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I. Introduction

The year 2006 was a busy and interesting one for international arbitration. The first section of this report focuses on U.S. federal court developments in the arena of domestic arbitration (where such developments may be relevant to international arbitration), as well as several cases involving international arbitrations. In 2006, the federal courts, including the United States Supreme Court, continued to reaffirm the strong federal policy favoring arbitration, while increasingly showing impatience with spurious challenges to arbitration awards. In addition, the federal courts continued to wrestle with their gatekeeper function, in which they are charged with determining whether a particular dispute is subject to arbitration. Developments also occurred in the areas of arbitrator challenges and class arbitration.

Next, the focus shifts to developments in the investor-state arena. In 2006, there were a significant number of jurisdictional and merits decisions in cases decided under bilateral investment treaties (BIT), as well as one significant decision in a case decided under the North American Free Trade Agreement (NAFTA). Although BIT arbitration remains a relatively recent phenomenon, BIT arbitration may be showing some signs of maturation as BIT tribunals are able to build on an accumulating body of experience in interpreting the existing BITs. For example, some of the issues that were hot topics two or three years ago, such as the meaning of fork in the road clauses, seemed to be less controversial in 2006. Nevertheless, new topics, such as the implications of most-favored-nations clauses, attracted considerable attention in 2006.

Finally, we report on some significant institutional changes relating to arbitration, including rule changes by various bodies, modifications to the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the entry into force of the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA).

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II. Arbitration Developments in U.S. Courts

A. Interpretation and Enforcement of Arbitration Clauses

1. *Reaffirmation of Severability Principle and Arbitrators' Exclusive Authority to Determine Validity of Contracts*

In its only arbitration decision of 2006, the U.S. Supreme Court in *Buckeye Check Cashing v. Cardegna*,[1] reaffirmed the severability principle, the principle that the arbitration clause is severable from the rest of the contract in which it is found, and stressed that arbitral tribunals have the exclusive authority to determine the validity of agreements containing arbitration clauses. In *Buckeye*, plaintiffs brought a putative class action in Florida state court alleging that Buckeye's check-cashing business charged usurious interest rates and thereby violated state law. Buckeye moved to compel arbitration based on the arbitration provision in the plaintiffs' agreements with Buckeye. The trial court held that it was the role of the court, rather than the arbitrator, to decide whether the contract was illegal and void *ab initio*. The Florida Supreme Court ultimately agreed.

The U.S. Supreme Court reversed. It held that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."[2] Relying on its landmark decisions in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[3] and *Southland Corp. v. Keating*,[4] the Court noted, first, that under *Prima Paint* the arbitration clause was severable from the rest of the contract, regardless of state severability law. Second, except where the arbitration clause itself is being challenged, the validity of the contract as a whole is for the arbitrator to decide. Third, these basic propositions apply equally in state and federal court, based on the broad commerce clause power that Congress exercised in enacting the Federal Arbitration Act (FAA).

According to the Court, this ruling "permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void," while the opposite approach would allow "a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly reasonable."[5] Hence, the federal policy favoring arbitration can only be honored by granting arbitrators the exclusive authority to determine contract validity.

2. *Courts as Arbitration Gatekeepers*

While the Supreme Court has consistently articulated and decided cases in light of the federal policy favoring arbitration, it has in the past also noted the role of the courts in acting as gatekeepers of the arbitral process.[6] The policy favoring arbitration does not go so far as to permit courts to compel arbitration when the parties have not agreed to arbitrate. In 2006, courts continued to wrestle with factually complex cases in which it was

1. Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 1209 (2006).
2. *Id.* at 1210.
3. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 411 (1967).
4. Southland Corp. v. Keating, 465 U.S. 1, 11-14 (1984).
5. *Buckeye*, 126 S. Ct. at 1210.
6. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002) (holding that despite the general federal policy favoring arbitration agreements, there is a small category of circumstances where parties would have expected a court to decide this "gateway" question of arbitrability).

not entirely clear whether the parties had agreed to arbitrate their dispute. As the cases discussed immediately below demonstrate, the nature and extent of the required relationship between an arbitration clause and a given dispute remains elusive and will undoubtedly continue to be an area of controversy in the future.

For example, in *Wachovia Bank N.A. v. Schmidt*,[7] the Fourth Circuit Court of Appeals denied a petition to compel arbitration by a bank accused of fraudulently inducing an investor's participation in a tax shelter. The bank acted as the investor's financial advisor and also loaned him funds to use in connection with the transaction. The promissory note used for the loan included an arbitration clause providing that either party could compel arbitration with respect to "any claim or controversy arising out of, or relating to" the note or other documents executed in connection with the loan.

But the Fourth Circuit saw the lending and advising relationships as distinct from one another, and noted that the investor's claims "derive[d] exclusively from the adviser-advisee relationship."[8] The court reasoned that the note did not bear a significant relationship to the claims and, thus, the note's arbitration clause was not implicated in the dispute. Similarly, although the court held that the warrant that the investor purchased as part of the transaction also included an arbitration agreement, the warrant was only tangentially related to the investor's claims against the bank.

Hence, in *Wachovia*, the Fourth Circuit determined that despite two broadly worded arbitration clauses in documents connected to the underlying transaction in dispute, the dispute was not arbitrable. In 2006, the Third, Fifth, and Eighth Circuit Courts of Appeals similarly found that arbitration clauses that are connected to, but not at the heart of the dispute, were an inadequate basis to compel arbitration.[9]

In contrast, the Tenth Circuit Court of Appeals compelled arbitration in a case where the claims arguably arose under a contract containing an arbitration clause, despite the fact the claims might also have arisen under a subsequent contract without an arbitration clause. In *Image Software, Inc. v. Reynolds & Reynolds Co.*,[10] a computer software developer granted a perpetual license to a distributor, and the parties agreed in that licensing agreement to arbitrate any disputes. Two years later, the parties entered into a maintenance agreement that did not include an arbitration agreement (and which did not entirely supplant the earlier licensing agreement). At the time of the later maintenance agreement, the distributor also obtained a newer version of the software.

7. Wachovia Bank, Nat'l Ass'n v. Schmidt, 445 F.3d 762 (4th Cir. 2006).

8. *Id.* at 768.

9. U.S. Small Bus. Admin. v. Chimicles, 447 F.3d 207 (3d Cir. 2006) (holding a receiver's claims against an investment fund subscription agreement not subject to the arbitration clause of the fund's partnership agreement); Suburban Leisure Ctr., Inc. v. AMF Bowling Prod., Inc., 468 F.3d 523 (8th Cir. 2006) (holding claims based on earlier oral agreement not subject to the arbitration clause of a later written agreement containing merger and integration clauses); Tittle v. Enron Corp., 463 F.3d 410 (5th Cir. 2006) (holding that a dispute among insureds about division of insurance policy proceeds is not subject to the arbitration clause in the insurance contract that required arbitration of claims between insureds and insurer). *Cf.* Lipton-U. City, LLC v. Shurgard Storage Crts., Inc., 454 F.3d 934, 935 n.1 (8th Cir. 2006) (holding that a clause providing that if a purchase option was exercised the parties would arbitrate "additional terms . . . not contemplated by" the contract did not require the arbitration of a price term that had been contemplated by the contract but rescinded by the court on the basis that there had been no meeting of the minds).

10. Image Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044 (10th Cir. 2006).

When a copyright and trade secrets dispute arose, the distributor moved to compel arbitration under the licensing agreement. The developer objected, asserting that because the newer software (purchased at the time of the maintenance agreement) was at issue, the arbitration clause in the licensing agreement did not apply. Siding with the distributor, the Tenth Circuit held that the dispute was subject to arbitration, since there was some basis to conclude that the updated software was governed by the original licensing agreement, not the later maintenance agreement.

Similarly, the Ninth Circuit Court of Appeals compelled arbitration against a tax shelter sponsor under an arbitration clause contained in a brokerage agreement. In *Reddam v. KPMG LLP*,[11] the plaintiffs had adopted a program intended to minimize tax liabilities. When the program did not work out as plaintiffs had anticipated, they sued the program's developer, but not the securities broker that plaintiffs were referred to for transactions related to the program. The contract between the plaintiffs and the broker included an agreement to arbitrate disputes and indicated that arbitration would be governed by the rules of the National Association of Securities Dealers (NASD). When the developer asserted that the dispute was arbitrable, the NASD refused to exercise jurisdiction over a dispute where no named party was associated with the NASD. The Ninth Circuit held that the arbitration agreement's language referencing the NASD rules was not integral to the arbitration agreement. The district court had erred in concluding that the agreement had become unenforceable and was directed to exercise jurisdiction over the dispute for the purpose of appointing a substitute arbitrator.[12]

Notably, the conflict among the federal courts with respect to arbitrability does not arise in cases involving clauses that are so defective or internally inconsistent that they simply do not work. *Marks 3-Zet-Ernst Marks GmbH & Co. KG v. Presstek, Inc.*[13] is a good example of that kind of case. In *Marks*, the Court of Appeals for the First Circuit confronted an arbitration clause that provided for "arbitration in the Hague under the International Arbitration rules." The problem, of course, is that while there are plenty of international arbitration rules provided by various institutions including the American Arbitration Association (AAA), the London Court of International Arbitration, the International Chamber of Commerce, and others, there is no such thing as "the International Arbitration rules" in general.

Marks first sought arbitration in the Permanent Court of Arbitration (PCA) in the Hague. The PCA refused to hear the claim, reasoning that it was not clear that the parties intended to invoke the UNCITRAL arbitration rules, the sole rules under which the PCA would hear disputes. Marks then sued in U.S. federal court to compel the PCA to conduct arbitration under the AAA international rules. Although not disagreeing that the AAA rules may have been intended, the district court rejected Marks' claim primarily because the PCA had already stated that it was competent to resolve only those cases brought under the UNCITRAL rules, and thus, Marks was asking for relief—PCA arbitration under AAA rules—that did not exist. The court of appeals affirmed, ruling that Marks'

11. Reddam v. KPMG LLP, 457 F.3d 1054 (9th Cir. 2006).

12. *See also* ING Fin. Partners v. Johansen, 446 F.3d 777, 778 (8th Cir. 2006) (holding that a broker's employment agreement providing for arbitration of "any dispute . . . in accordance with the rules of the National Association of Security Dealers" was broad enough to permit arbitration of sex discrimination claims despite fact that NASD rules themselves did not extend to such claims).

13. Marks 3 Zet-Ernst GmBh & Co. KG v. Presstek, Inc., 455 F.3d 7 (1st Cir. 2006).

insistence on a nonexistent remedy constituted a waiver of its right to obtain a ruling on any other theory that might have resulted in arbitration before an entity other than the PCA.

3. *Attempts to Arbitrate Against or by Non-Signatories*

Problems of third-party enforcement continue to appear in a variety of contexts, with the issue of equitable estoppel and related doctrines continuing to provide fertile grounds for motions to compel arbitration against non-signatories to arbitration agreements. For example, in *Nitro Distributing, Inc. v. Alticor, Inc.*,[14] the Amway Corporation sought to compel arbitration against non-signatories when it was sued by businesses that were operated by its distributors, but that had not signed the arbitration agreements in effect between the distributors and Amway. Amway sought to compel arbitration on two grounds: first, that the businesses should be estopped from rejecting arbitration, as they had benefited from Amway's contracts with its distributors (contracts that included an arbitration clause); and second, that the distributors and the plaintiff businesses constituted a community of interest and therefore were equally governed by the arbitration clause. The Eighth Circuit rejected Amway's estoppel arguments because the businesses benefited only indirectly from the contract containing the arbitration clauses. The court also rejected the community of interest theory, holding that the theory applies only where a non-signatory attempts to bind a signatory to an arbitration agreement, not the reverse. As the court observed, "[a]rbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so."[15]

The Fourth Circuit decision in *American Bankers Insurance Group v. Long* illustrates the reverse case, that is, the circumstances under which a non-signatory may successfully assert estoppel to compel a signatory to arbitrate claims against the non-signatory.[16] Plaintiffs in *Long* claimed to have been sold an allegedly fraudulent promissory note as part of an automobile insurance scheme structured by ABIG, the underwriter. The promissory note was incorporated by reference into an agreement between plaintiffs and the insurer, which contained an arbitration clause. ABIG, as the underwriter, had not signed the agreement. When plaintiffs brought suit, the court of appeals agreed with ABIG that plaintiffs should be equitably estopped from denying that they were bound by the arbitration clause. Plaintiffs' claims relied on the terms of the note because their claims were based on ABIG's alleged breach of a duty assigned to it in the note. Plaintiffs could not seek both to enforce the agreement's duties and to deny its arbitration clause.

4. *Court Alteration of Arbitration Clauses in the Face of Limitations on Arbitration Due to Statutory Rights, Public Policy, and Related Grounds*

One of the few reasons why courts may deny an otherwise applicable arbitration clause is that the clause is illegal or somehow conflicts with public policy. In the past, courts have refused to enforce arbitration clauses in circumstances where, for example, individual

14. Nitro Distrib., Inc. v. Alticor, Inc., 453 F.3d 995 (8th Cir. 2006).
15. *Id.* at 999 (quoting Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995)).
16. Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006).

employees would likely be unable to afford the costs of arbitration and hence would be deprived of any forum in which to assert claims.[17]

In 2006, the First Circuit took up this issue when considering contracts of adhesion between a cable service provider and its subscribers. In *Kristian v. Comcast Corp.*,[18] the subscribers sued the provider, Comcast, alleging that they were paying inflated prices as the result of anticompetitive practices that would violate state and federal antitrust laws. Although the contracts at issue contained arbitration clauses, the clauses provided for limited discovery, shortened the statute of limitations, prevented recovery of treble damages and attorney's fees, and prohibited class mechanisms, all in conflict with the plaintiffs' statutory rights. The plaintiffs contended that their arbitration agreements with Comcast should be invalidated because of this conflict.

Looking to recent Supreme Court precedent, notably *Howsam v. Dean Witter Reynolds, Inc.*,[19] the First Circuit determined that it could consider the effect of the challenged provisions on plaintiffs' rights. It concluded that the bar on recovery of treble damages and attorney's fees conflicted with the clear statutory language of federal antitrust law. The bar on class arbitration, while not in direct conflict with antitrust law, was at odds with the Federal Rules of Civil Procedure and foreclosed what was the only realistic method for plaintiffs to advance their claims without facing prohibitive litigation costs.

The court nevertheless did not bar arbitration. Instead, it found that although these limitations on the nature of relief available in arbitration were unenforceable, such limitations could be severed based on the arbitration agreement's savings clause. The court accordingly held that the arbitration could proceed, so long as it proceeded on a class basis and with plaintiffs having the right to seek treble damages and attorney's fees.

Kristian joins other recent cases in imposing arbitration with different procedural and substantive contours than is actually set forth in the arbitration clause or clauses at issue. To date these cases have arisen in domestic cases, in cases involving contracts of adhesion, and in circumstances where the costs of arbitrating would be prohibitive.[20] It remains to be seen if this reasoning extends into international arbitration, with the risks of imposing rules and practices on foreign parties and arbitrators—particularly regarding class actions—with which they have no or limited familiarity because those rules and practices are unknown in their home countries.

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17. *See, e.g.*, Ferguson v. Countrywide Credit Indus., 298 F.3d 778 (9th Cir. 2002) (one-sided arbitration agreement that required employee to share costs was unenforceable); Shankle v. B-G Maintenance Mgmt. of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999) (arbitration agreement requiring employee to pay portion of arbitrator's fees was unenforceable).

18. Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).

19. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002). The First Circuit also looked to Pacificare Health Systems, Inc. v. Book, 538 U.S. 401 (2003), and Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), to inform its application of *Howsam*.

20. *See, e.g.*, Cole v. Burns Int'l Sec. Servs., 323 U.S. App. D.C. 133 (D.C. Cir. 1997) (interpreting arbitration agreement to require employer to pay arbitration fees); DeOrnellas v. Aspen Square Mgmt., Inc., 295 F. Supp. 2d 753 (D. Mich. 2003) (enforcing arbitration agreement but severing provisions that limited remedies, shared costs, and allowed employer to pick the location of the hearing).

5. *Bankruptcy*

Bankruptcy proceedings present another opportunity for collision between arbitration clauses and public policy considerations. Among other things, the U.S. Bankruptcy Code consolidates all creditor claims, provides an alternative set of procedures to address claims, and gives debtors and courts power to repudiate certain not fully performed contracts.

Nevertheless, in 2006, two courts of appeals held that bankruptcy courts are limited in their ability to override arbitration agreements. In *Mintze v. American Financial Services, Inc.*,[21] a lender sought to compel arbitration based on a clause in the loan agreement, where a Chapter 13 debtor sought to enforce an earlier rescission of that loan agreement. The Third Circuit held that, under the standard set out in *Shearson/American Express, Inc. v. McMahon*,[22] where an otherwise applicable arbitration clause exists, a bankruptcy court lacks the authority and discretion to refuse its enforcement, unless congressional intent to preclude waiver of judicial remedies for the statutory rights at issue were shown. Here, there was no evidence of such congressional intent, and furthermore, there was no conflict between arbitration of the dispute and the Bankruptcy Code, as the debtor's statutory claims arose from consumer protection laws and not from the Bankruptcy Code.

In a similar case, the Second Circuit held that a bankruptcy court does not have the discretion to override an arbitration agreement unless it finds a serious conflict between the relevant provisions of the Bankruptcy Code and the FAA, or that arbitration of the claim would necessarily jeopardize the objectives of the U.S. Bankruptcy Code.[23] The court found no such conflict where a creditor sought to stay a Chapter 7 debtor's proceeding against it and compel arbitration. The debtor's bankruptcy case had been fully administered and her debts discharged, so she no longer required the protection of the Bankruptcy Code's automatic stay provision. Furthermore, arbitration was a competent forum for the interpretation and enforcement of Section 362(h) of the Bankruptcy Code, on which her claim was based.

B. Arbitrator Challenges

Perhaps the biggest news in 2006 for U.S. courts considering arbitrator challenges was the Fifth Circuit decision in *Positive Software Solutions v. New Century Mortgage* and its subsequent grant of rehearing en banc.[24] After an arbitrator's ruling in favor of New Century, the losing party discovered that the arbitrator and his former law firm had previously, in an unrelated matter, been co-counsel with one of the law firms representing New Century. The partner representing New Century in the arbitration was also personally involved in the earlier matter. New Century claimed that the partner's personal involvement in the earlier matter had ended before the arbitrator's involvement began, and that the two individuals had never met. But their names did appear together on some pleadings, and court opinions listed each as co-counsel at an even later date. The arbitrator had not disclosed these facts, nor offered any explanation for the nondisclosure.

21. Mintze v. Am. Gen. Fin. Servs., 434 F.3d 222, 226-27 (3d Cir. 2006).

22. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220 (1987).

23. MBNA Am. Bank v. Hill, 436 F.3d 104 (2d Cir. 2006).

24. Positive Software Solutions v. New Century Mortgage Corp., 436 F.3d 495 (5th Cir. 2006), *reh'g en banc granted*, 449 F.3d 616.

Upon discovering these facts, Positive Software moved to have the award vacated for evident partiality under the FAA.[25] The meaning of the evident partiality standard is disputed,[26] and the Fifth Circuit had not previously addressed it directly. Both parties in *Positive Software* looked to the U.S. Supreme Court's holding in *Commonwealth Coatings Corp. v. Continental Casualty. Co.*, which set out the "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias," thereby implying that evidence of actual bias was not necessary for vacatur.[27] The majority in *Commonwealth Coatings* had stated that it

> ha[d] no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge. . . . [W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.[28]

New Century pointed to Justice White's concurring opinion in *Commonwealth Coatings*, which set forth a narrower test for when disclosure is required. Justice White asserted that arbitrators should not to be held to the same high standards as Article III judges.[29] He rephrased the court's holding as requiring that an arbitrator disclose when he or she "has a *substantial* interest in a firm which has done *more than trivial* business with a party."[30] Based on Justice White's opinion, other courts of appeals, notably the Second Circuit, have endorsed the view that something more than an appearance of bias is needed to disqualify an arbitrator.[31]

A Fifth Circuit three-judge panel rejected this interpretation and held that an arbitrator "displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality. The evident partiality is demonstrated from the nondisclosure, regardless of whether actual bias is established."[32] Acknowledging that this disclosure rule was demanding, the court reasoned that requiring disclosure as a condition to enforceability would minimize the role of courts in evaluating potential conflicts, minimize the discretion of arbitrators, and underscore the importance of adherence to the disclosure rules of the AAA. The AAA Code of Ethics for Arbitrators in Commercial Disputes provides in pertinent part that "[p]ersons who are requested to serve as arbitrators should, before accepting, disclose: . . . (2) Any existing or past financial, business,

25. 9 U.S.C.A. § 10 (2006).

26. *See, e.g.*, Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994) (adopting "reasonable impression of partiality" standard for nondisclosure cases); Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1201 (11th Cir. 1982) (adopting "reasonable impression of partiality" standard); Morelite Constr. Corp. v. New York City District Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984) (holding that more than mere "appearance of bias" is needed to vacate arbitration award); Peoples Security Life Ins. Co. v. Monumental Life Ins., 991 F.2d 141, 146 (4th Cir. 1993) (holding "a mere appearance of bias is insufficient to demonstrate evident partiality").

27. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).

28. *Id.* at 148.

29. *Id.* at 150.

30. *Id.* at 151-52 (emphasis added).

31. *Morelite*, 748 F.2d 79.

32. *Positive Software Solutions*, 436 F.3d at 502.

professional, family or social relationships which are likely to affect impartiality or which might reasonably create any appearance of partiality or bias."[33] This decision puts the Fifth Circuit in line with the Ninth Circuit, which endorsed a similar standard in *Schmitz v. Zilveti*.[34]

But the panel decision stands in contrast to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, which specifically provide that an arbitrator need not disclose that he and counsel for one of the parties have previously served together as co-counsel.[35] In addition, New Century raised concerns that such a lenient standard for vacating arbitral awards will disqualify too many attorneys from acting as arbitrators. The court attempted to deflect this criticism by pointing out that what is required is not disqualification but rather disclosure. That argument is somewhat unsatisfying. If the underlying relationship is not indicative of bias such that it could be the basis for disqualification, why should an arbitrator be penalized for failure to disclose it? It remains to be seen whether the court will change its approach in its en banc decision.

Positive Software was relied on heavily in the motion to vacate filed by claimants in another arbitrator disclosure case, *Sturm v. Citigroup, Inc.*[36] After losing an arbitration in which Sturm claimed over $900 million in damages arising out of Citigroup's brokerage services and its relationship to the WorldCom fraud, Sturm moved to vacate the award because one of the arbitrators had not disclosed a number of indirect connections to the parties or the fact that he had allegedly played a role in a securities fraud committed by a previous employer.[37] The case was dismissed after the parties settled out of court, and the terms of the settlement have not been disclosed.

Although the standard for evident partiality may be uncertain, some relationships are almost certainly too tenuous to support a motion to vacate an arbitration award—even if those relationships are not disclosed. For instance, in another challenge involving Citigroup, the court was asked to vacate an award in favor of Citigroup because the tribunal

33. *Id.* at 502-03.

34. Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994).

35. COUNCIL OF THE INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL BAR ASSOCIATION GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION § 4.4.2 (May 22, 2004), *available at* http://www.ibanet.org/images/downloads/guidelines%20text.pdf.

36. Civ. No. 1:06-cv-00290-PSF-MJW (D. Colo. 2006).

37. Sturm's allegations were as follows:

> 1. After his appointment as an arbitrator in this case, Arbitrator Drennen and his employer received a lucrative underwriting engagement to take public a company represented by Rogers & Hardin LLP, a law firm heavily involved in the coordinated defense of WorldCom research fraud cases for Respondents. 2. That an investor had brought a securities fraud lawsuit against Drennen. 3. That Arbitrator Drennen had been employed by Jones & Keller PC, which had regularly represented defendants in securities arbitration matters and had represented Respondent Citigroup, Inc. 4. The true nature and extent of Arbitrator Drennen's relationship with Harrison Douglas, Inc., a securities broker-dealer. 5. That Arbitrator Drennen's law partner had been involved in a dispute in which the SEC alleged a stock valuation method he created was fraudulent.

Movant/Arbitration Claimants' Motion to Vacate Arbitration Award, at 4. Sturm later amended their motion to include the allegation that "Arbitrator Drennen Failed to Disclose that his Conduct was an Issue in an Arbitration Against Cohig & Associates, Inc., a broker-dealer, in which the Arbitration Panel Found Cohig Liable for Securities Fraud and Awarded Punitive Damages." Movant/Arbitration Claimants' Amended Motion to Vacate Arbitration Award, at 3.

chairman sat on a country club's board of directors along with a manager of two Citigroup offices.[38] The arbitrator had not disclosed that the country club was also one of his legal clients, supposedly creating an incentive to favor Citigroup in order to retain the board's approval of his legal representation of the club. The district court refused to vacate the award based on purely "remote, uncertain, or speculative" evidence.[39]

It remains the case that courts will not infer partiality merely from the absence of evidence to support the award,[40] or vacate awards where there has been a trivial departure from the parties' agreed-upon arbitrator qualifications.[41]

C. Enforcement and Annulment of Awards

1. *Apparent Growing Impatience with Manifest Disregard Challenges to Arbitral Awards*

A unique aspect of U.S. arbitration law is the persistence of the court-crafted manifest disregard of law basis on which to vacate awards, in addition to the grounds expressly set out in the New York Convention and the FAA. Although the manifest disregard doctrine has attracted considerable attention and commentary over the years[42] and is sometimes a last-ditch attempt by a losing party to annul or delay enforcement of an award, courts have actually annulled on that basis only rarely.[43]

Recognizing this background, the Eleventh Circuit served notice that it would be increasingly intolerant of spurious manifest disregard arguments. *B. L. Harbert International LLC v. Hercules Steel Co.*, involved a garden-variety construction scheduling dispute, an award, and a motion to annul on manifest disregard grounds. The Eleventh Circuit saw no merit in this strategy. In affirming the district court's refusal to annul, the court of appeals identified only one reported case in the history of the circuit that had found manifest disregard of the law. Moreover, the court found that the present set of facts did not come within shouting distance[44] of that earlier decision.

38. Thomason v. Citigroup Global Mkts., No. 2:05-CV-00883 PGC, 2006 U.S. Dist. LEXIS 3168 (D. Utah 2006).

39. *See also* Weber v. Merrill Lynch Pierce Fenner & Smith, Inc., 455 F. Supp. 2d 545, 550 (N.D. Tex. 2006) (arbitrator disclosed membership in same country club as two potential witnesses, which relationship did not satisfy "onerous burden" of actual bias).

40. Wise v. Wachovia Secs. LLC, 450 F.3d 265 (7th Cir. 2006) (arbitrators' granting summary judgment without explanation did not demonstrate corruption, partiality, or exceeding of powers).

41. Bulko v. Morgan Stanley DW Inc., 450 F.3d 622, 626 (5th Cir. 2006) (award by attorney on inactive status not vacated despite NASD arbitration clause requiring arbitrator to be "an attorney . . . or other professional" who had devoted a certain percentage of time to securities-related work).

42. *See, e.g.*, Hans Smit, *The Time is Ripe for the U.S. Supreme Court to Bury the Misconceived Doctrine of Manifest Disregard of the Law*, 16 Am. Rev. Int'l Arb. 21 (2005); Noah Rubins, *"Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 Am. Rev. Int'l Arb. 363 (2001); Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 Ind. L. Rev. 241 (1993).

43. Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003) ("[O]btaining judicial relief for arbitrators' manifest disregard of the law is rare. . . . [S]ince 1960 we have vacated some part of all of an arbitral award for manifest disregard in . . . four out of at least 48 cases where we applied the standard.").

44. *See* B.L. Harbert Int'l LLC v. Hercules Steel Co., 441 F.3d 905, 911 (11th Cir. 2006).

The court also reflected on the laudatory goals of the FAA, which would be defeated "if we permit parties who lose in arbitration to freely relitigate their cases in court."[45] The Court accordingly concluded with a warning to parties considering future challenges to arbitration awards:

> Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions. . . . The warning this opinion provides is that in order to further the purposes of the FAA and to protect arbitration as a remedy we are ready, willing, and able to consider imposing sanctions in appropriate cases.[46]

2. *Other Grounds for Vacating Awards*

In 2006, there were a number of cases in which disappointed parties sought annulment of awards. Among these cases was the closely watched *Gulf Petro Trading Co. v. Nigerian National Petroleum Corp.*, a case involving an international arbitration. In that case, the losing party in an arbitration in Switzerland under Swiss rules sought, unsuccessfully, to challenge the award in both the Swiss and U.S. courts. After the first challenge in Switzerland was denied, the Northern District Court of Texas rebuffed the second challenge because the New York Convention permits annulment only by the court at the place of the arbitration, Switzerland.[47] Undeterred, the losing party most recently brought yet another suit, this time in the Eastern District of Texas, claiming corruption and bribery of the arbitral tribunal and naming the arbitrators as co-defendants.[48] The case gained notoriety in the international arbitration community because the tribunal members are highly esteemed.

Fortunately, the Texas court dismissed this most recent manifestation of the challenge. The court noted that, although plaintiffs claimed to be seeking substantial damages (in addition to a declaration that the award should be vacated), to afford monetary relief would in effect require vacating the award. The court reiterated that "[u]nder the Convention, [the] court [could not] vacate an arbitral award that was not made in the United States and did not in any way involve the laws of the United States."[49] To second-guess the outcome of the Swiss arbitration "would invite similar treatment by foreign courts of arbitration awards rendered in" the United States and would "disrupt the reliability of international arbitration established under the Convention over four decades."[50]

This was a welcome result. The liberality of U.S. court pleading rules, and the absence of fee shifting in U.S. courts, raised the prospect that such personal claims against arbitrators could form a new means of collaterally attacking arbitral awards, and in the process

45. *See id.* at 907.

46. *See id.* at 913-14.

47. Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 288 F. Supp. 2d 783 (N.D. Tex. 2003), *aff'd*, 115 Fed. Appx. 201 (5th Cir. 2004).

48. Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., Civ. No. 1:05CV619, 2006 U.S. Dist LEXIS 86493 (E.D. Tex. Mar. 15, 2006).

49. *Id.* at 7.

50. *Id.* at 7-8 (quoting the earlier opinion of the United States District Court for the Northern District of Texas, *Gulf Petro Trading Co.*, 288 F. Supp. 2d at 793).

have a chilling effect on international arbitration in the United States. The district court's robust decision should make such a situation less likely. The decision is now on appeal to the United States Court of Appeals for the Fifth Circuit.

3. *Enforcement Issues*

The year 2006 also produced some interesting cases involving enforcement of awards. In *Admart AG v. Birch Foundation, Inc.*,[51] the Third Circuit considered the extent to which a court, in an effort to implement the arbitrator's intent, may alter an award long after the award was made and in the face of changed circumstances. *Admart* involved a Swiss award made in 1994 that contained specific provisions regarding payment for a piece of art. In 2003, a U.S. district court confirmed the award but altered some of the payment terms, saying it was "reluctant to simply rubber-stamp the Award as written, given the passage of time and the conduct of the parties," and wished to "bring th[e] dispute to final closure."[52]

On appeal, the court of appeals found that, although the district court judgment confirming the award was consistent with the award's substance, and although the passage of time from the rendition of the award until the date of the district court's confirmation order "understandably necessitated some deviation from the original terms," the order should have "adhere[d] as closely to the text of the Award as feasible." The appeals court accordingly took its own approach to varying the award, eliminating some provisions the district court had imposed and restoring terms it had eliminated. In principle, however, the Third Circuit endorsed the notion that courts can adjust awards on account of changed circumstances.

In another case, *Telcordia Tech Inc. v. Telkom SA Ltd.*, the Third Circuit made clear that dismissal of an enforcement case under Article VI of the New York Convention,[53] because of a pending annulment challenge at the arbitral seat, necessarily was without prejudice and permitted a party to recommence the enforcement suit later if it successfully defended the award.[54] The *Telcordia* case was complicated by the fact that the District Court for the District of Columbia had dismissed an earlier enforcement action, and the D.C. Circuit had affirmed on Article VI grounds.[55] The New Jersey district court treated the D.C. Circuit Court's judgment as preclusive, and dismissed the subsequent enforcement action it was considering with prejudice.

The Third Circuit reversed, explaining that the lower court had misconstrued the D.C. Circuit's decision, which was not a decision on the merits, but rather a determination that the proceeding should be adjourned pursuant to Article VI pending the outcome of the arbitration proceeding. The D.C. court's dismissal was without prejudice, and the Third Circuit ruled that the District Court for the District of New Jersey should not have enabled the losing party in the arbitration "to be able to piggyback a dismissal without

51. Admart AG v. Birch Foundation, 457 F.3d 302 (3d Cir. 2006).

52. Admart AG. v. Birch Foundation, Civ. No. 95-410-SLR, 2004 U.S. Dist LEXIS 2428 (D. Del. 2004).

53. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, *implemented by* 9 U.S.C. §§ 201 *et seq.*

54. Telcordia Tech Inc. v. Telkom SA Ltd., 458 F.3d 172 (3rd Cir. 2006).

55. Telcordia Techs., Inc. v. Telkom SA, Ltd., 2003 U.S. Dist. LEXIS 23726 (D.D.C. 2003, *aff'd*, 2004 U.S. App. LEXIS 7081 (D.C. Cir., Apr. 9, 2004).

prejudice into a dismissal with prejudice."[56] This was "anathema to the 'wait-and-see' raison d'etre of Article VI."[57]

4. *Removal to Federal Court of New York Convention Cases*

The removal provision of the legislation implementing the New York Convention was discussed extensively in two Fifth Circuit cases, *Acosta v. Master Maintenance & Construction, Inc.*[58] and *Certain Underwriters at Lloyd's, London v. Warrantech Corp.*[59] The court reaffirmed its support for removal of cases that have a valid connection to the New York Convention, but clarified that remand orders are reviewable only in a narrow set of circumstances.

In *Acosta*, the Fifth Circuit expanded its already broad reading of 9 U.S.C. § 205, which allows for the removal to federal court of actions that relate to arbitration agreements or awards falling under the New York Convention. Plaintiffs asserted injuries from mustard gas exposure and sued a facility owner and its insurers. The insurers removed based on arbitration clauses in the insurance policies. The Fifth Circuit allowed removal, holding that

> [c]ommon sense dictates the conclusion that policy provisions relating to coverage of the insured's torts are, almost by definition, related to claims that are based on the disputed assertion of coverage of the insured's torts . . . . Stated as a rule, a clause determining the forum for resolution of specific types of disputes relates to a lawsuit that seeks the resolution of such disputes.[60]

In *Warrantech*, the appellate court considered its jurisdiction to review a district court's remand order after a case is removed under 9 U.S.C. § 205. In the Fifth Circuit, for a remand order to be reviewable on appeal, the district court must clearly and affirmatively state a policy-based, non-statutory ground for remand. The district court had stated that it was remanding because all arbitration issues had been resolved and, as a result, the federal arbitration statutes offered "no reason from a policy standpoint" for the court to retain jurisdiction.[61] The appellate court determined that this language was insufficient to "clear the high bar of the clear-statement requirement," and therefore, the remand order was not reviewable.

III. Investor-State Disputes

The year 2006 was another busy year for investment treaty disputes. The year included published decisions in over thirty arbitrations. While the tribunal decisions in 2006 were arguably less immediately controversial than certain well-known awards in the past few years, many of the 2006 decisions will also be studied and cited in the years to come. For example, tribunals continued to explore the meaning of most-favored nations clauses,

56. *Telecordia Tech*, 458 F.3d at 179.
57. *Id.*
58. Acosta v. Master Maint. & Constr. Inc., 452 F.3d 373 (5th Cir. 2006).
59. Certain Underwriters at Lloyd's, London v. Warrentech Corp., 461 F.3d 568 (5th Cir. 2006).
60. *Acosta*, 452 F.3d at 379.
61. *Certain Underwriters*, 461 F.3d at 574.

tended to reinforce a growing consensus among arbitrators about the content of the fair and equitable standard, and provided guidance on damages calculations. This section reports on some of the topics covered in investment treaty cases this year, starting with jurisdiction and admissibility, turning then to merits decisions, and concluding with damages.

A. Jurisdiction and Admissibility

1. *Investor Standing*

Although few aspects of a treaty case could be more fundamental than the definition of an investor, the question of who qualifies as an investor under the various treaty provisions has been a perennial topic of discussion.

a. Defining an Investor

In the past, respondents have contended that, where a corporate investor of qualifying nationality is owned or controlled by nationals of another State, the investor should not be considered to have qualifying nationality. But tribunals have consistently held that where a BIT requires incorporation in the contracting State as the sole requirement for qualifying as an investor, a tribunal must not examine additional conditions, such as ownership and control.[62] The recent decisions in *Saluka Investments v. Czech Republic* and *ADC v. Hungary* interpret the relevant BITs in the same manner.[63] In both cases the respondents contended that the qualifying nationals were mere shell companies, with the real parties in interest being corporate parents with nationalities that did not have BIT protection. Both tribunals rejected this argument, holding that incorporation in the qualifying country sufficed to establish nationality for jurisdiction under the relevant BITs. Observing that the investors in that case were "legal person[s] constituted or incorporated in compliance with the law" of Cyprus as the Cyprus-Hungary BIT specified,[64] the *ADC* tribunal pointed out that the inquiry must stop with the incorporation and "considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant."[65]

In contrast to that textually accurate if somewhat formalistic approach, where a treaty provides that jurisdiction may be established by ownership or control, tribunals have tended to put aside formalism and treat the question of control pragmatically. For example, the tribunal in *International Thunderbird Gaming Corporation v. Mexico* followed that approach in construing NAFTA Article 1117, which permits an investor to bring a claim on behalf of an enterprise of another Contracting Party that is a juridical person, provided that the investor "owns or controls directly or indirectly" that enterprise.[66] The claimant

62. *See, e.g.*, Aguas del Tunari, S.A. v. Bolivia, Decision on Jurisdiction, ICSID Case No. ARB/02/3 (Oct. 21, 2005) [hereinafter Tunari]; Tokios Tokelés v. Ukraine, Decision on Jurisdiction, ICSID Case No. ARB/02/18 (Apr. 29, 2004); *see also* Autopista Concesionada de Venezuela, C.A. v. Venezuela, Decision on Jurisdiction, ICSID Case No. ARB/00/5 (Sept. 27, 2001). All awards discussed in this section are available at www.investmentclaims.com.

63. Saluka Invs. BV v. Czech Republic, Partial Award, UNCITRAL (Mar. 17, 2006) [hereinafter Saluka]; ADC Affiliate Ltd. v. Hungary, Award, ICSID Case No. ARB/03/16 (Oct. 2, 2006) [hereinafter ADC].

64. ADC, *supra* note 63, ¶ 357.

65. *Id.*

66. Int'l Thunderbird Gaming v. Mexico, UNCITRAL Award, (Jan. 26, 2006) [hereinafter Thunderbird].

in *Thunderbird* partially owned three Mexican entities and did not command a majority of their shares. The tribunal nevertheless rejected Mexico's challenge,[67] holding that effective or de facto control was sufficient, provided it was established beyond any reasonable doubt.[68] The tribunal considered that even a minority owner may have the power to effectively decide and implement the key decisions of the business activity of the enterprise, or it may achieve de facto control by "the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation."[69] The *Thunderbird* tribunal thus espoused a flexible, fact dependent test for establishing control.

b. Change of Ownership

A number of cases dating back at least to *FEDAX N.V. v. Venezuela*[70] and running through *Loewen Group v. United States*[71] have involved circumstances where ownership of the investor or the investment has changed before potential BIT claims could be asserted or conclusively resolved.

The tribunal in *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. People's Democratic Republic of Algeria* held that where a company that was a party to a government contract validly merged into another company of the same nationality, the surviving company had standing to assert claims and commence arbitration arising out of the contract.[72] Tribunals reached similar results in three cases involving claimants who had sold their remaining assets in the host State after having instituted arbitration proceedings. In *El Paso Energy International Co. v. Argentina*, *National Grid PLC v. Argentina*, and *EnCana Corp. v. Ecuador*, the tribunals rejected the respondents' objections and held that there was "no rule of continuous ownership of the investment."[73] The tribunal in *EnCana* observed that the cause of action was complete at the date of the treaty breach causing loss or damage.[74] According to the *El Paso* decision, the purpose of BITs would be defeated if continuous ownership were required, because BITs addressed issues of "confiscation, expropriation and nationalization of foreign investments. Once the taking has occurred, there is nothing left except the possibility of using the ICSID/BIT mechanism."[75] As a result, "the claim continue[s] to

67. *Id.* ¶ 105.

68. *Id.* ¶ 106.

69. *Id.* ¶108.

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

71. The Loewen Group, Inc. v. United States, Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to the Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3 (Jan. 5, 2001).

72. L.E.S.I. S.p.A v. Algeria, Decision on Jurisdiction, ICSID Case No. ARB/05/3 (July 12, 2006) [hereinafter L.E.S.I.].

73. El Paso Energy Int'l Co. Ltd. v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/03/15, ¶ 135 (Apr. 27, 2006) [hereinafter El Paso]; National Grid PLC v. Argentina, Decision on Jurisdiction, UNCITRAL, ¶ 118 (June 20, 2006) [hereinafter National Grid]; *see, e.g.*, Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, Decision on Jurisdiction, ICSID Case No. ARB/97/4, ¶ 31 (May 24, 1999); The Vivendi II tribunal also observed, "it is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted." *See* Compañía de Aguas del Aconquija, S.A. v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/97/3, ¶¶ 60-61 (Nov. 14, 2005).

74. EnCana Corporation v. Ecuador, Award, UNCITRAL, ¶ 131 (Feb. 3, 2006) [hereinafter EnCana].

75. El Paso, *supra* note 73 ¶ 135.

exist, *i.e.* the right to demand compensation for the injury suffered at the hands of the State remains," except if it "can be shown that [the claim] was sold with the investment."[76]

2. *Qualifying Investment*

a. Claims Arising out of Investments

Whether a putative investor owns an investment subject to BIT protection is another issue that may arise. The precise definition of an investment in any given circumstance depends on the precise wording of the relevant treaty or law. But the cases have offered some general guidance with respect to treaty interpretation. For example, in *Jan de Nul N.V. Dredging International N.V. v. Egypt*,[77] the tribunal followed a test that had previously been established in *Salini v. Morocco*, according to which the following criteria are indicative of an investment for purposes of the ICSID Convention: (i) a contribution; (ii) a certain duration over which the project is implemented; (iii) a sharing of operational risks; and (iv) a contribution to the host State's development.[78] The tribunals in *LESI v. Algeria* and *Saluka Investments v. Czech Republic*, however, held that it was unnecessary to establish the fourth element, because it would be difficult to determine whether an investment contributed to the economic development of the host State.[79] Hence the *Saluka* tribunal rejected the Czech Republic's argument that "a short-term holding of shares [in a bank] with a view to making a large profit from the sale of major assets" controlled by that bank could not qualify as an investment.[80]

The Argentina cases provided a lens through which to view the requirement in Article 25(1) of the Washington Convention that a dispute arises "directly out of an investment." In those cases, Argentina has argued that its adoption of general economic measures was not specifically directed against an investor and hence did not satisfy the nexus the Washington Convention requires. As in past years, Argentina's argument was rejected in 2006 by all arbitration tribunals that considered it, on the grounds that Article 25(1) required "a connection of a sufficient degree of directness between a *dispute* submitted to ICSID and a claimant's *investment*."[81] As a result, "the adverb 'directly' is not related to the link between the measure and the investment but to that between the dispute and the investment,"[82] and the term "specific" cannot be considered "as a synonym of 'directly.'"[83] The UNCITRAL tribunal in *National Grid v. Argentina* came to a similar conclusion when

76. *Id.*

77. Jan de Nul N.V. v. Egypt, Decision on Jurisdiction, ICSID Case No. ARB/04/13 (June 16, 2006) [hereinafter Jan de Nul].

78. Salini Construttori S.p.A. v. Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/4 (July 23, 2001).

79. L.E.S.I., *supra* note 72, ¶¶ 72, 73; Saluka, *supra* note 63, ¶ 210.

80. Saluka, *supra* note 63, ¶ 209.

81. Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/03/17, ¶ 29 (May 16, 2006) (emphasis in original) [hereinafter Suez ICSID I]; Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/03/19 (Aug. 3, 2006) [hereinafter Suez ICSID II]; AWG Group Ltd. v. Argentina, Decision on Jurisdiction, UNCITRAL , ¶ 29 (Aug. 3, 2006) [hereinafter Suez UNCITRAL].

82. El Paso, *supra* note 73, ¶ 97; *see also* Metalpar S.A. y Buen Aire, S.A. v. Argentina, ICSID Case No. ARB/03/5, ¶¶ 90-98 (Apr. 27, 2006) [hereinafter Metalpar] (holding that, for a dispute to arise directly out of an investment, there must exist an immediate cause and effect relation between the acts of the host State and the effects of such acts on the protected investments).

examining Article 8 of the Argentina-U.K. BIT that required the existence of a "dispute with regard to an investment." The tribunal concluded that there "has to be a connection between the [m]easures and the investment," but that "connection does not need to be exclusive."[84]

b. Investment Made in Conformity with the Law

A developing area of BIT jurisprudence concerns the obligation found in many BITs that an investment must be made in conformity with the law or words to similar effect. Recent decisions suggest that tribunals may take a dualistic approach to this requirement; they will not dismiss claims because investors have failed in some minor or technical respect to comply with local law, but will dismiss claims where investors have engaged in some kind of fraudulent or criminal activity with respect to the investment.

The tribunal in *Metalpar S.A. y Buen Aire S.A. v. Argentina* held that the failure of one of the claimants to register its investment in Argentina in accordance with Argentine legal requirements before filing its claim did not affect its capacity as an investor under the Argentina-Chile BIT.[85] Similarly, in *L.E.S.I. v. Algeria*, the tribunal rejected Algeria's objection that the contract for the construction of a dam system did not formally meet the requirements for an investment under Algerian law. The tribunal explained that the terms of an international treaty could not be interpreted in view of the domestic legislation of one of the parties.[86]

In contrast, in *Inceysa Vallisoletana S.L. v. El Salvador*, an ICSID tribunal held that an investment procured by fraud was not "in conformity with the law."[87] The tribunal upheld El Salvador's jurisdictional objection, finding that Inceysa had presented false and misleading information in bidding for a concession contract in violation of law and the principle of good faith.[88] The tribunal observed that international public policy required that El Salvador's consent to ICSID jurisdiction under the BIT should not extend to investments that were not made in accordance with law, and ordered the claimants to bear the entire cost of the arbitration.[89] Similarly, in *World Duty Free Company Ltd. v. Kenya*, an ICSID tribunal constituted under an investment agreement between the parties dismissed the claim on the grounds that Kenya's former president had solicited and obtained a $2 million dollar bribe from claimant to procure the investment.[90] The tribunal concluded that the claimant was not legally entitled to maintain any of its pleaded claims in the proceedings as a matter of *ordre public international* and public policy under English and Kenyan laws, which applied under the investment agreement.[91]

83. Cont'l Cas. Co. v. Argentina, ICSID Case No. ARB/03/9, ¶ 71 (Feb. 22, 2006); *see also* Total, S.A. v. Argentina, ICSID Case No. ARB/04/01, ¶ 65 (Aug. 25, 2006).

84. National Grid, *supra* note 73, ¶ 139.

85. Metalpar, *supra* note 82, ¶¶ 72-85.

86. L.E.S.I., *supra* note 72, ¶ 83(iii).

87. Inceysa Vallisoletana S.L. v. El Salvador, ICSID Case No. ARB/03/26 (Aug. 2, 2006).

88. *Id.* ¶¶101-27.

89. *Id.* ¶ 252.

90. World Duty Free Co. Ltd. v. Kenya, ICSID Case No. ARB/00/7 (Oct. 4, 2006) [hereinafter World Duty Free].

91. *Id.* ¶ 188.

3. *Dispute with a Contracting State*

In the *Jan de Nul v. Egypt* and *L.E.S.I. v. Algeria* arbitrations, respondents argued that there was no "dispute with a Contracting Party"—and hence the tribunals lacked jurisdiction—because the entity with which the claimants had contracted had independent legal personality and its acts could not be attributed to the State. The tribunals in both cases observed that it was "not for the [t]ribunal at the jurisdictional stage to examine whether the case is in effect brought against the State and involves the latter's responsibility."[92] Instead, it was "sufficient that the case was brought against the State."[93] But "[a]n exception is made in the event that if it is manifest that the entity involved has no link whatsoever with the State."[94] In both cases, the tribunals concluded that, on the basis of the material submitted by the claimants, the responsibility of the host State could not be excluded.[95]

4. *Umbrella Clauses*

The jurisprudence is split on whether umbrella clauses transform all breaches of contract into treaty breaches or whether umbrella clauses merely protect contract breaches that amount to a violation of the other standards of protection under the BIT. Advocates of a narrow reading of umbrella clauses now can rely on two additional decisions.

The tribunals in *El Paso v. Argentina* and *B.P. v. Argentina* cases examined the relatively broadly worded umbrella clause in the Argentina-United States BIT according to which "[e]ach Party shall observe any obligation it may have entered into with regard to investments."[96] Both tribunals appear to have been troubled by recent decisions in *SGS v. Philippines*, *Eureko v. Poland*, and *Noble Ventures v. Romania*, holding that, by force of the umbrella clause, the breach of a contract was assimilated to a breach of the BIT.[97] They consequently concluded that umbrella clauses "cannot entertain purely contractual claims, which do not amount to a violation of the standards of protection of the BIT."[98] According to both tribunals, "an umbrella clause cannot transform any contract claims into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims."[99] If that were permitted, "the division between the national legal order and the international legal order is completely blurred."[100]

92. Jan de Nul, *supra* note 77, ¶ 85; L.E.S.I. *supra* note 72, ¶ 78.
93. L.E.S.I., *supra* note 72, ¶ 78.
94. Jan de Nul, *supra* note 77 ¶ 85, L.E.S.I., *supra* note 72, ¶ 78.
95. *Id.*
96. According to the *El Paso* tribunal, "[t]he broadest [umbrella] clauses read like that contained in the relevant clause of Article II(2)(c) in the U.S.-Argentina BIT." *El Paso, supra* note 73, ¶ 70; Pan Am. Energy LLC v. Argentina, Decision on Preliminary Objections, ICSID Case No. ARB/03/13, ¶ 99 (July 27, 2006) [hereinafter Pan Am].
97. SGS v. Philippines, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (Jan. 29, 2004); Eureko B.V. v. Poland, Partial Award, Ad Hoc Arbitral Tribunal (Aug. 19, 2005); Noble Ventures, Inc. v. Romania, Award, ICSID Case No. ARB/01/11 (Oct. 12, 2005).
98. El Paso, *supra*, note 73, ¶ 85; Pan Am, *supra*, note 96, ¶ 115.
99. El Paso, *supra*, note 73, ¶ 82; Pan Am, *supra*, note 96, ¶ 110.
100. El Paso, *supra*, note 73, ¶ 77.

The *El Paso* and *BP* cases instead distinguished "the State as a merchant from the State as a sovereign."[101] They assumed that investors require protection only from the State acting as a sovereign, not from the State acting as a merchant.[102] They sought textual support for their view in Article VII(1) of the BIT, which confers arbitral jurisdiction to decide disputes regarding "an investment agreement between [a] Party and [a] national or company." In the tribunals' view, that provision "includes among the investment disputes under the Treaty all disputes resulting from a violation of a commitment given by the *State as a sovereign State*."[103] The tribunals reached that conclusion although Article VII(1) of the BIT does not define investment agreements as solely referring to agreements concluded by the State as a sovereign, whatever meaning one ascribes to that term.

That conclusion differs from the holding of some earlier tribunals, and from dicta in *LESI v. Algeria*, where the tribunal stated that umbrella clauses "have the effect of transforming the violations of contractual obligations of the State [into] violations of that clause of the BIT."[104] The last word has plainly not been spoken on this topic.

5. *Most-Favored-Nation Clauses*

Another much-discussed issue that has divided tribunals is whether the most-favored-nation clause (MFN clause) in various BITs can be used to import elements of a more favorable dispute settlement mechanism contained in a second BIT that the respondent State concluded with a third State. In 2006, the controversy intensified.

In *Suez v. Argentina*,[105] *AWG v. Argentina*,[106] and *National Grid v. Argentina*,[107] tribunals permitted investors to use MFN clauses to avoid BIT provisions requiring resort to local courts before commencing arbitration. The MFN clause in the Argentina-Spain BIT at issue in *Suez* expressly provided that it applied to "all matters subject to this Agreement."[108] The tribunals concluded that dispute settlement was "certainly a 'matter' governed by the Argentina-Spain BIT" and was, in effect, "as important as other matters governed by the BIT" and "an integral part of the investment protection regime" Argentina and Spain agreed upon.[109] The tribunals cited *Maffezini v. Spain* and other cases.[110] While the MFN clause in the Argentina-U.K. BIT at issue in *National Grid* and *AWG* did not specifically provide that it applied "to all matters governed by this Agreement," the tribunals in those cases observed that "dispute resolution is not included among the exceptions to the application of the clause." Applying the doctrine of *expressio unius est exclusio*

101. *Id.* ¶¶ 79, 81; Pan Am, *supra* note 96, ¶¶ 108-09.
102. El Paso, *supra* note 73, ¶¶ 79-80; Pan Am, *supra* note 96, ¶ 108.
103. El Paso, *supra* note 73, ¶ 81 (emphasis added); Pan Am, *supra* note 96, ¶ 109.
104. L.E.S.I., *supra* note 72, ¶ 84.
105. Suez v. Argentina refers to the Suez ICSID I, Suez ICSID II, and Suez UNCITRAL arbitrations.
106. Suez, Sociedad General de Aguas de Barcelona, S.A., Vivendi Universal, S.A v. The Argentine Republic, ICSID Case No. ARB/03/19 and AWG Group Ltd. v. The Argentine Republic.
107. *See* National Grid, *supra* note 73.
108. Argentina-Spain Bilateral Treaty art. IV; Suez ICSID I, *supra* note 81, ¶ 53; Suez UNCITRAL, *supra* note 81, ¶ 53.
109. Suez UNCITRAL, *supra* note 81, ¶¶ 55, 59.
110. Suez ICSID I, *supra* note 81, ¶ 61; Suez UNCITRAL, *supra* note 81, ¶ 53; Siemens A.G. v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/02/8 ¶ 102 (Aug. 2, 2004); MTD Equity Sdn. Bhd. v. Chile, Award, ICSID Case No. ARB/01/7 (May 25, 2004) [hereinafter MTD].

alterius, the tribunals concluded that, by not being expressly excluded from the application of the clause, dispute resolution was among the matters covered by the clause.[111]

These tribunals sought to distinguish *Plama Consortium Ltd. v. Bulgaria*, in which an ICSID tribunal concluded it had no jurisdiction over claims arising out of the Bulgaria-Cyprus BIT. That BIT did not provide for ICSID jurisdiction, but did contain an MFN clause that the investor said permitted it to borrow ICSID dispute settlement clauses from other treaties ratified by the host State.[112] The more recent tribunals observed that the claimant in *Plama* attempted to replace the Bulgaria-Cyprus BIT dispute settlement mechanism "in toto," and considered that this "radical effect" could be distinguished from the "much more limited one caused here, which merely consists in waiving a preliminary step" in accessing ICSID.[113] If dispute settlement options are indeed part of the treatment guaranteed to investors by BITs generally and MFN clauses specifically, it is not entirely clear why MFN clauses should provide qualifying investors with equal treatment for preliminary matters only, nor why the MFN clauses should permit borrowing another treaty's dispute settlement provisions in part but not in their entirety as a complete and integrated package. Yet that is one possible implication of these recent cases.

At the same time, the tribunal in *Telenor Mobile Communications A.S. v. Hungary*, may have gone even further than *Plama* in restricting use of an MFN clause. The tribunal cited *Plama* when it refused to use the Norway-Hungary BIT's MFN clause to assert jurisdiction over claims other than expropriation.[114] The *Telenor* tribunal read the provision "investments shall be accorded treatment no less favorable than that accorded to investments made by investors of any third State" to refer only to substantive rights, and not to procedural rights.[115] While the tribunal worried about "treaty-shopping by the investor," that is arguably the very purpose of MFN clauses in that they ensure investors or investments the best treatment the host State has made available to any investor or investment. The tribunal also reviewed the BITs signed by Norway and Hungary and concluded that the parties to the Norway-Hungary BIT had made "a deliberate choice to limit arbitration" to claims of expropriation and "have eschewed the wide form of dispute resolution clause adopted in many of their other BITs."[116] In the tribunal's view, "to invoke the MFN clause to embrace the method of dispute resolution is to subvert the intention of the parties to the basic treaty."[117]

These recent decisions confirm that questions about the interpretation of MFN clauses to include dispute settlement provisions are still far from being settled and are likely to remain an issue that will be fiercely litigated by parties in BIT disputes.

111. Suez UNCITRAL, *supra* note 81, ¶ 58; National Grid, *supra* note 73, ¶ 82 (citing 8 ENCYCLOPEDIA OF PUB. INT'L LAW 411, 415 (R. Bernhardt ed.,1985) ("By its nature, the unconditional clause, unless otherwise agreed, attracts all favors extended on whatever grounds by the granting State to the third State")). *See also* Gas Natural SDG, S.A. v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/03/10 (June 17, 2005).

112. Plama Consortium Ltd. v. Bulgaria, Decision on Jurisdiction, ICSID Case No. ARB/03/24 (Feb. 8, 2005).

113. Suez ICSID I, *supra* note 81, ¶ 63; Suez UNCITRAL, *supra* note 81, ¶ 65.

114. Telenor Mobile Communic'n A.S. v. Hungary, Decision on Jurisdiction, ICSID Case No. ARB/04/15 (Sept. 13, 2005).

115. *Id.* ¶ 92.

116. *Id.* ¶ 97.

117. *Id.* ¶ 95.

6. *Timeliness of Claims*

The year 2006 also featured a number of decisions about whether claims were too early or too late. In *Jan de Nul v. Egypt* the tribunal considered a BIT that applied to investments made before its entry into force, but provided that it was not "applicable to disputes having arisen prior to its entry into force."[118] As the claimants had previously prosecuted a case through the Egyptian courts concerning the same project to widen the Suez Canal, the parties disagreed on whether the dispute before the ICSID Tribunal had arisen before or after May 23, 2002, the BIT's effective date. The *Jan de Nul* tribunal held that the 2002 BIT sought to exclude earlier disputes that "could be deemed 'treaty disputes' under treaty standards." The dispute before the Egyptian courts was not such a treaty dispute, as it related to questions of contract interpretation and Egyptian law, which differed from the treaty-based dispute before the ICSID tribunal.[119] The fact that the bulk of the claims concerned BIT violations in connection with the very facts that founded the claim before the Egyptian court did "not change the situation." What mattered was that "the domestic dispute antedated the international dispute and ultimately led towards it."[120]

In *Grand River Enterprises Six Nations, Ltd. v. United States*, the tribunal considered a jurisdictional objection under Articles 1116(2) and 1117(2) of NAFTA, which provide that "an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." The claimants in that case sought redress for the Master Settlement Agreement (which settled the litigation cases brought by more than forty U.S. state attorneys against U.S. tobacco producers) and the escrow laws subsequently adopted, as well as related measures and enforcement actions.[121]

In interpreting the term "should have first acquired knowledge," the tribunal invoked the concept of constructive knowledge and observed that constructive knowledge "is imputed to a person if by exercise of reasonable care or diligence, the person would have known that fact."[122] The tribunal emphasized that investors who intend to make an investment in a foreign jurisdiction "ought to have made reasonable inquiries about significant legal requirements potentially impacting their activities."[123] Investment treaties are not "substitutes for prudence and diligent inquiry in international investors' conduct of their affairs."[124] The tribunal concluded that the claimants should have known prior to the relevant date (March 12, 2001) of the Master Settlement Agreement, the escrow statute and related measures and enforcement actions taken prior to that date, and of loss and damages they incurred as a result in relation to off-reservation sales. As a result, the claims with respect to those matters were barred under Articles 1116(2) and 1117(2) of

118. Belgo-Luxembourg Economic Union and Egypt Bilateral Investment Treaty art. 12, 2002.

119. Jan de Nul, *supra* note 77, ¶ 117.

120. *Id.*; *cf.* Lucchetti, S.A. v. Peru, Award, ICSID Case No. ARB/03/4, ¶ 50 (Feb. 7, 2005) (finding no new dispute when "the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute").

121. Grand River Enter. Six Nations, Ltd. v. United States, Decision on Objections to Jurisdiction, NAFTA/UNCITRAL (July 20, 2006).

122. *Id.* ¶ 59.

123. *Id.* ¶ 66.

124. *Id.* ¶ 67.

NAFTA, except for the claims that related to sales made on Native American reservations.[125]

While in the foregoing cases the respondents contended that the claims were too late, in *Western NIS Enterprise Fund v. Ukraine*, the respondent claimed they were too early because the investor had not given Ukraine proper notice of the claim.[126] The tribunal observed that "proper notice is an important element of the State's consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations." But the tribunal clarified that failure to give proper notice "in and of itself [did not] affect the [t]ribunal's jurisdiction." The tribunal thus granted the claimant "an opportunity to remedy the deficient notice" by furnishing the tribunal with evidence that it had given proper notice to Ukraine.[127] The tribunal then decided to strictly observe the waiting period, holding that the court would suspend proceedings for six months from the date of any proper notice furnished to the tribunal "unless both sides agree to reactivate the proceedings earlier."[128]

7. *Taxation Measures*

Several BITs exclude taxation measures from the scope of the BIT, but they often provide for exceptions when the tax measures amount to violations of certain BIT protections. The Canada-Ecuador BIT, for instance, excludes any taxation measures from the scope of the BIT, except when such a taxation measure amounts to an expropriation of an investment under Article VIII of that BIT.[129] In the *EnCana v. Ecuador* arbitration, the tribunal agreed with Ecuador that EnCana's claims concerning Value Added Tax (VAT) refunds were "inextricably associated with a 'taxation measure.'"[130] Under the tribunal's analysis, it was irrelevant for jurisdictional purposes whether a taxation measure was "arguably in breach of commonly accepted substantive standards for such measures," had been applied in an idiosyncratic or discriminatory manner, or was "based on a wrong factual premis[e]."[131] The tribunal thus decided it had no jurisdiction over EnCana's VAT refund claim.

The Argentina-U.S. BIT also excludes tax measures from the scope of the BIT, but accords broader exceptions than the Canada-Ecuador BIT. The treaty carves out from its exclusion not only expropriations but also "transfers pursuant to Article V" and "the observance and enforcement of terms of an investment agreement or authorization." In the *BP v. Argentina* cases, the claimants did not dispute that Argentina's export withholdings qualified as tax measures pursuant to the Argentina-U.S. BIT. But they argued that their claims were claims of expropriation and breaches of investment agreements and were thus under the tribunal's jurisdiction. The *BP* tribunal agreed that the claimants had demonstrated "*prima facie* that the imposition of export withholdings . . . could possibly amount

125. *Id.* ¶ 83.

126. Western NIS Enter. Fund v. Ukraine, ICSID Case No. ARB/04/2 (Mar. 16, 2006).

127. *Id.*

128. *Id.*

129. Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments art. 7, Can.-Ecuador, Apr. 29, 1996.

130. EnCana, *supra* note 74, ¶¶ 133, 135.

131. *Id.* ¶¶ 146-47.

to the expropriation of specific legal and contractual rights"[132] and that the claimants' "[h]ydrocarbon [c]oncession and [c]ontracts could be 'investment agreements' within the meaning . . . of the BIT."[133] The tribunal therefore concluded that it had jurisdiction over Argentina's export withholdings, but only insofar as those withholdings were linked to expropriation, transfers, and the observance and enforcement of investment agreements and authorizations.[134]

8. *Exception to Jurisdiction under Article 1901(3) of NAFTA.*

Article 1901(3) of NAFTA requires that, with the exception of NAFTA's entry-into-force provision, "no provision of any other Chapter in this Agreement shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law." In the consolidated cases of *Canfor Corp. v. United States*, and *Terminal Forest Products Ltd. v. United States*, the claimants submitted claims with respect to U.S. antidumping and countervailing duty law.[135] The tribunal decided that, by virtue of Article 1901(3), it had no jurisdiction to decide the claims to the extent that they concerned U.S. antidumping and countervailing duty law. As a result, the tribunal also lacked jurisdiction over the claims in so far as they concerned the conduct of commerce, the U.S. International Trade Commission, and other government entities and officials before, during, and after the preliminary and final determinations in relation to such antidumping and countervailing duty law.[136] But the tribunal held that the so-called Byrd Amendment was not antidumping or countervailing duty law within the meaning of that term under Article 1901(3), and therefore, the tribunal had jurisdiction to decide the claims to the extent that they concerned the Byrd Amendment.[137]

B. Procedure

1. *Amicus Curiae and Nonparty Participation*

In *Suez, Sociedad General de Aguas de Barcelona S.A v. Argentina*, an Argentine NGO and several individual petitioners sought to attend the hearings, submit *amicus curiae* briefs, and have access to the documents produced in the case.[138] *In line with a prior decision by the tribunal in Aguas del Tunari S.A. v. Republic of Bolivia,*[139] the *Suez* tribunal observed that, pursuant to then ICSID Arbitration Rule 32(2), only the parties, their agents, counsel and

132. BP Am. Prod. Co. v. Argentina, Decision on Preliminary Objections, ICSID Case No. ARB/04/8, ¶ 136 (July 27, 2006) [hereinafter BP Am. Prod.].
133. *Id.* ¶ 138.
134. *Id.* ¶ 139.
135. Canfor Corp. v. United States, Decision on Preliminary Question, NAFTA/UNCITRAL (June 6, 2006).
136. *Id.* ¶¶ 347-50.
137. *Id.* ¶¶ 274-278, 347-50. The Byrd Amendment is codified in 19 U.S.C. § 1675 and was in the process of being repealed at the time the decision was rendered. It provided that any duties assessed pursuant to a countervailing or antidumping duty order shall be distributed on an annual basis to the affected domestic producers. *See id.* ¶ 345.
138. Suez Sociedad General de Aguas de Barcelona, S.A. v. Argentina, Order in Response to a Petition for Participation as Amicus Curaie, ICSID Case No. ARB/03/17, ¶ 29 (Mar. 17, 2006) [hereinafter Suez Amicus Petition].
139. Tunari, *supra* note 62, ¶¶ 15-18.

advocates, witnesses and experts, and the tribunal's officers could participate *at the hearings, unless the parties agreed otherwise.*[140] The tribunal nevertheless held that ICSID tribunals had the power to admit amicus curiae submissions, but noted that the standards for doing so had not been met in the present case. It therefore dismissed the petition without prejudice, but *granted the petitioners the opportunity "to apply for leave to make amicus curiae* submission if and when the Petitioners provide the [t]ribunal with convincing information and reasons that they qualify as *amicus curiae*."[141] The tribunal said that it would even reconsider the amici's request for access to documents.[142] These standards may change as a result of recent amendments to the ICSID Rules, which are described below in Section IV.

2. *Consolidation of Proceedings*

Absent a specific agreement to the contrary, the consolidation of two or more ICSID proceedings requires the consent of all the parties involved. In the *BP v. Argentina* cases, all parties consented to consolidate two separately filed arbitration proceedings. On May 23, 2003, Pan American Energy LLC and BP Argentina Exploration Company, two Delaware companies, initiated arbitration proceedings against the Republic of Argentina, alleging that Argentina's economic emergency measures violated the protections for claimants' investments under the U.S.-Argentina BIT.[143] Seven months later, on December 17, 2003, BP America Production Company, a Delaware company that owns and controls BP Argentina Exploration Company, and three Argentine subsidiaries of Pan American Energy LLC (Pan American Sur SRL, Pan American Fueguina SRL, and Pan American Continental SRL) also initiated ICSID proceedings alleging breaches of the U.S.-Argentina BIT.[144] In March 2004, Argentina and the claimants in both proceedings agreed that the cases should be consolidated and heard by the same tribunal.[145] As a result, the tribunal constituted in the first filed arbitration heard the consolidated cases and rendered a single decision on jurisdiction on July 27, 2006.

On April 17, 2003, ICSID received several requests regarding water concessions in Argentina: a case instituted by *Aguas Provinciales de Santa Fe, S.A., Suez Sociedad General de Aguas Barcelona S.A.* and *Interagua Servicios Integrales del Agua, S.A.*;[146] a second case instituted by *Aguas Cordobesas, S.A., Suez* and *Sociedad General de Aguas de Barcelona, S.A.*;[147] and a third case instituted by *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A., Vivendi Universal, S.A. and AWG.*[148] The parties to those cases agreed that

140. Suez Amicus Petition, *supra* note 138, ¶¶ 6-7.
141. *Id.* ¶ 38.
142. *Id.*
143. *See* Pan Am, *supra* note 96.
144. *See* BP Am. Prod., *supra* note 132.
145. *Id.* ¶ 4.
146. Suez ICSID I, *supra* note 81.
147. Suez and Sociedad General de Aguas de Barcelona, S.A. v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/03/18 (May 16, 2006).
148. Suez UNCITRAL, *supra* note 81. Pursuant to the terms of Article 8(3) of the Argentina-UK BIT, AWG was required to submit its dispute to arbitration under the ad hoc UNCITRAL Rules. Argentina did not accept AWG's offer to extend ICSID jurisdiction to the claims of AWG, but agreed to allow the case to be administered by ICSID. On April 14, 2006, the tribunal discontinued the proceedings with respect to Aguas Argentinas, S.A.

one single tribunal would hear all cases, but they did not agree to formally consolidate them. The parties also agreed on a staggered schedule of written and oral submissions.[149] The tribunal rendered decisions on jurisdiction in the first and the third case with largely identical holdings on May 16, 2006, and on August 3, 2006. The second case is currently suspended.

3. *Provisional Measures*

In conformity with existing jurisprudence, the ICSID tribunal in Biwater Gauff Ltd. v. United Republic of Tanzania held that provisional measures under Article 47 of the ICSID Rules may be used not only to protect a party's substantive rights, but also to safeguard a party's procedural rights with respect to the production of evidence. Biwater Gauff had requested such provisional measures as, among others, (1) to preserve certain items of evidence and (2) to obtain from Tanzania a compilation of an inventory of documents.[150] The tribunal granted the request.[151] The tribunal also ordered the parties to keep certain documents confidential. But "the tribunal refused to ban public discussion of the proceedings by the parties as long as such discussion was not used as an instrument to antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult."[152]

4. *Stay of Enforcement*

In the latest of a series of stay-of-enforcement decisions, the ad hoc Annulment Committee in *CMS v. Argentina* granted a stay of enforcement without security, because Argentina's Attorney General sought to enforce the pecuniary obligations imposed by the tribunal's award in the event that annulment was not granted.[153] The tribunal observed that, "[a]s a general matter a respondent State seeking annulment should be entitled to a stay provided it gives reasonable assurances that the award, if not annulled, will be complied with."[154] The tribunal then examined whether such assurance should take the form of a bank guarantee. Five previous ad hoc committees stayed enforcement on condition of a guarantee,[155] whereas three previous ad hoc committees declined to make the stay con-

149. *Id.*

150. Biwater Gauff (Tanzania) Ltd. v. Tanzania, Procedural Order No. 1, ICSID Case No. ARB/05/22, ¶ 82 (Mar. 31, 2006).

151. *Id.* ¶ 88.

152. *Id.*

153. CMS Gas Transmission Co. v. Argentina, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ICSID Case No. ARB/01/8 (Sept. 1, 2006) [hereinafter CMS Stay of Enforcement].

154. *Id.* ¶ 38.

155. Amco Asia Corp. v. Indonesia, Decision of the Ad Hoc Committee Setting Aside the Award Rendered on the Merits in the Arbitration Between Amco Asia Corp. and Indonesia, ICSID Case No. ARB/81/1, 25 ILM 1439 (May 16, 1986); Amco Asia Corp. v. Indonesia, Interim Order No. 1 Concerning the Stay of Enforcement of the Award of March 2, 1991, ICSID Case No. ARB/81/1, 9 ICSID Rep. 59 (2006); Wena Hotels Ltd. v. Egypt, Decision on Application for Annulment, ICSID Case No. ARB/98/4, 41 ILM 933 (Feb. 5, 2002); CDC Group plc v. Seychelles, Decision of the ad hoc Committee on the Application for Annulment of the Republic of the Seychelles, ICSID Case No. ARB/02/14 (June 29, 2005); Repsol YPF Ecuador, S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador), Procedural Order No. 1, ICSID Case No. ARB/01/10 (Dec. 22, 2005).

ditional on a guarantee.[156] The tribunal concluded that, in the present case, no bank guarantee was required, despite reports in the Argentine press that, in the event of a negative annulment decision, the constitutionality of ICSID awards would be examined before the Argentine Supreme Court or that Argentina would bring a case before the International Court of Justice under the Argentina-U.S. BIT.

But Argentina's Attorney General, Dr. Oswaldo Cesar Guglielmino, had provided "an undertaking to CMS . . . that, in accordance with its obligations under the ICSID Convention, it would recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and would enforce the pecuniary obligations imposed by that award within its territories, in the event that annulment was not granted."[157] Relying on the jurisprudence of the World Court in the *German Interests in Upper Silesia* case, and more recently, in the *Pulp Mills on the River Uruguay* case, the *CMS* tribunal held that, under international law, the attorney general, as its agent, had the authority to bind Argentina. Because of that binding commitment, CMS would not be prejudiced by the continued stay of enforcement even without security such as a bank guarantee.[158]

In the annulment proceedings of *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, the ad hoc committee granted a stay of enforcement subject to a bank guarantee "collectable in its entirety by Repsol in the event that Petroecuador's application was completely rejected."[159] When Petroecuador failed to deliver the guarantee within the time period established, the committee terminated the stay of enforcement of the arbitral award.[160]

C. Decisions on the Merits

The year 2006 also witnessed the publication of merits awards in seven arbitrations that will generate considerable discussion amongst practitioners and academics. They include *LG&E v. Argentina*,[161] *ADC v. Hungary*, *Azurix Corp. v. Argentina*,[162] *Saluka Investments v. Czech Republic*, *EnCana v. Ecuador*, *Salini v. Jordan*,[163] and *International Thunderbird Gaming v. Mexico*.

156. Maritime Int'l Nominees Establishment v. Guinea, Ad hoc Committee Decision of (Dec. 22, 1989), ICSID Case No. ARB/84/4, 5 ICSID Rev. FILJ 95 (1990); Mitchell v. Congo, Decision on the Stay of Enforcement of the Award, ICSID Case No. ARB/99/7 (Nov. 30, 2004); MTD Equity Sdn. Bhd. v. Chile, Decision on the Respondent's Request for a Continued Stay of Execution, ICSID Case No. ARB/01/7 (June 1, 2005) [hereinafter MTD Continued Stay].

157. CMS Stay of Enforcement, *supra* note 153, ¶ 28.

158. *Id.* ¶ 50.

159. Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador), Procedural Order No. 1 Concerning the Stay of Enforcement of the Award, ICSID Case No. ARB/01/10 (December 22, 2005).

160. *Id.*

161. LG&E Energy Corp. v. Argentina, Decision on Liability, ICSID Case No. ARB/02/1 (Oct. 3, 2006) [hereinafter LG&E].

162. Azurix Corp. v. Argentina, Award, ICSID Case No. ARB/01/12 (July 14, 2006) [hereinafter Azurix].

163. *See* Salini Construtorri S.p.A. v. Jordan, Final Award, ICSID Case No. ARB/02/13, (Jan. 31, 2006), *available at* http://www.investmentclaims.com/decisions/Salini-Jordan-Final-Award.pdf [hereinafter Salini] (providing both the decision of the tribunal and a dissent entitled, Declaration of Sir Ian Sinclair).

1. *Fair and Equitable Treatment*

Several tribunals during 2006 set forth interpretations of the fair and equitable treatment standard. As noted by the *Saluka* tribunal with respect to fair and equitable treatment, impairment, and nondiscrimination, "vague as they may be, [they] are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. Over the last few years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning."[164]

a. Legitimate Expectations

Some tribunals have looked to legitimate expectations as a fundamental element of decisions on breaches of fair and equitable treatment. As noted by the *LG&E* tribunal, "[i]n addition to the State's obligation to provide a stable legal and business environment, the fair and equitable treatment analysis involves consideration of the investor's expectations when making its investment in reliance on the protections to be granted by the host State."[165]

In the *Thunderbird* arbitration, the claimant argued that if an investor or investment reasonably relies on the representations of government officials and suffers damages because of such reliance, the responsibility of the State is engaged under international law. Although the tribunal confirmed the existence of the concept of legitimate expectations, it did not agree with the investor that the events in question had generated such an expectation.[166]

After taking into account the ordinary meaning, context, object, and purpose of the treaty, the *Saluka* tribunal concluded that "[t]he standard of 'fair and equitable treatment' [i]s therefore closely tied to the notion of legitimate expectations which is the dominant element of the standard."[167] In line with statements of the tribunal in *S.D. Myers v. Canada*, the *Saluka* tribunal underscored that the determination of a breach of the fair and equitable treatment obligation requires a balanced approach to the interests of the disputing parties by "a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."[168] It also emphasized the need for the "stability of the legal and business framework,"[169] and that a failure to provide such a "predictable and transparent" investment framework could constitute a breach of such expectations.[170]

In its award, the *LG&E* tribunal usefully summarized the features of the legitimate expectation element of fair and equitable treatment as follows:

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164. Saluka, *supra* note 63, ¶ 284.
165. LG&E, *supra* note 161, ¶ 127.
166. Thunderbird, *supra* note 66, ¶ 148.
167. Saluka, *supra* note 63, ¶¶ 302-03.
168. *Id.* ¶ 306.
169. Saluka, *supra* note 57, ¶ 303 (*citing* Occidental, Exploration and Production Company v. Ecuador, Final Award, LCIA Case No. UN3467, ¶¶ 80-92 (2004) [hereinafter Occidental].
170. Saluka, *supra* note 63, ¶ 348. Note that the Tribunal did not find a breach of legitimate expectations in that case. *See id.* ¶¶ 348-60, 500.

It can be said that the investor's fair expectations have the following characteristics: 1) they are based on the conditions offered by the host State at the time of the investment; 2) they may not be established unilaterally by one of the parties; 3) they must exist and be enforceable by law; and 4) in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity. However, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns.[171]

b. The Return of *Neer*?—Bad Faith and the Threshold Approach to Fair and Equitable Treatment

The *Thunderbird* tribunal addressed the question of the minimum standard of treatment under NAFTA Article 1105 with respect to the investor's claims concerning denial of justice and abuse of rights.[172] After confirming the applicability of the NAFTA Free Trade Commission's Notes of Interpretation from July 31, 2001,[173] the tribunal indicated its agreement with preceding NAFTA tribunals that "[t]he content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law."[174]

But the *Thunderbird* tribunal described the threshold for a breach of the minimum standard as being high, and that such acts must "amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[175] Although the tribunal did acknowledge that factually there were administrative irregularities by Mexican officials, it found that this conduct was not "grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment."[176] The *Thunderbird* award appears to have resurrected arguments made by the NAFTA State parties in earlier Chapter 11 arbitrations that Article 1105 is a minimal standard of customary law, requiring a high level of treatment as indicated in the now universally rejected *Neer* decision of 1926.[177] Similarly, reliance was placed on the *Genin v. Estonia* award, the subject of some critical comment this past year,[178] in which the emphasis was placed on the word minimum with respect to the treaty provisions at issue in that arbitration and the bad faith requirement of the *Neer* standard.[179]

In contrast, the *LG&E* tribunal considered that *Genin* had not adopted the *Neer* position that bad faith was required for a breach of the fair and equitable treatment standard.[180] Similarly, the *Saluka* and *Azurix* awards, rendered a few months after the *Thunderbird* award, rejected the relevance of *Neer* and *Genin* and looked to more recent cases and

171. LG&E, *supra* note 161, ¶ 130.
172. Thunderbird, *supra* note 66, ¶¶ 192-201.
173. *See* NAFTA Free Trade Comm'n, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/Nafta-interpr-en.asp.
174. Thunderbird, *supra* note 66, ¶ 194.
175. *Id.* ¶ 194.
176. *Id.* ¶ 200.
177. *See* United States (L.F. Neer) v. Mexico, 4 R.I.A.A. 60 (1926) (Gen. Claims Comm'n.).
178. Azurix, *supra* note 162, ¶ 372.
179. Genin v. Estonia, Award, ICSID Case No. ARB/99/2, ¶ 367 (June 25, 2001).
180. LG&E, *supra* note 161, ¶ 129.

academic commentaries.[181] Each of the *Saluka*, *Azurix*, and *LG&E* tribunals have effectively sided with claimants and endorsed the position that the customary international standard has evolved such that bad faith is not a requirement of the fair and equitable standard.

Those tribunals accordingly concluded that now there was no difference between the treaty standard of fair and equitable treatment and the standard required by customary international law. In the words of the *Saluka* tribunal, "[w]hatever the merits of this controversy between the parties may be, it appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real." The tribunal then added that, "[t]o the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied."[182]

2. *Non-Impairment*

Provisions such as Article 3(1) of the Netherlands-Czech Investment Treaty are typical of many BITs, providing that "each Contracting Party . . . shall not impair, by *unreasonable or discriminatory measures*, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors."[183]

Tribunals considering the meaning of such provisions have noted their close connection to the fair and equitable treatment obligation. In this vein, the *Saluka* tribunal opined that a breach of the non-impairment standard "does not therefore differ substantially from a violation of the 'fair and equitable treatment' standard."[184] It described the nondiscrimination standard as simply requiring "a rational justification of any differential treatment of a foreign investor"[185] and then applied this concept as part of its award, confirming a breach of the fair and equitable treatment standard, stating that "[i]n particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment."[186] This resonates with some earlier awards.[187]

The *LG&E* tribunal stated that "[i]n the context of investment treaties, and the obligation thereunder not to discriminate against foreign investors, a measure is considered dis-

181. Saluka, *supra* note 63, at nn.18, 34, 38, 41.

182. Saluka, *supra* note 63, ¶ 291. *See also* Azurix, *supra* note 162, ¶¶ 361-72; LG&E, *supra*, note 161, ¶ 127 (citing Occidental, *supra* note 169, ¶ 185; Tecnicas Mediambientales Tecmed, S.A. v. Mexico, Award, ICSID Case No. ARB(AF)/00/2, ¶¶ 154-55, (May 29, 2003) [hereinafter Tecmed]; CMS Gas Transmission Company v. Argentina, Award, ICSID Case No. ARB/01/8, ¶ 279 (May 12, 2005) [hereinafter CMS].

183. *See* Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Neth.-Czech Rep., Apr. 29, 1991, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/czech_netherlands.pdf (emphasis added).

184. Saluka, *supra* note 63, ¶ 461.

185. *Id.* ¶ 460.

186. *Id.* ¶ 307.

187. For example, *see* MTD, *supra* note 110, ¶¶ 109, 114; S.D. Myers, Inc. v. Canada, Partial Award, UNCITRAL, ¶¶ 162, 193 (Nov. 13, 2000); Lauder v. Czech Rep., Final Award, UNCITRAL, ¶ 291 (Sept. 3, 2001) [hereinafter Lauder]; Waste Management, Inc. v. Mexico, Award, ICSID Case No. ARB(AF)/00/3, ¶ 98 (Apr. 30, 2004).

criminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect."[188] The tribunal also pointed out that while the fair and equitable treatment clause overlapped with the non-impairment clause, they were not entirely coextensive. Hence, although the tribunal did not accept that the conduct of the government was arbitrary under the non-impairment clause, it made a particular point in noting that this did not imply the same result under the fair and equitable treatment clause.

3. *Full Protection and Security*

The question has arisen as to whether the standard of treatment known as full protection and security goes beyond physical protection and security by the military or police, for example. The tribunal in *Azurix* indicated strongly that full protection and security covers measures that go beyond mere physical security, including a more general obligation of due diligence.[189] But the *Saluka* tribunal took the more restrictive, and arguably more common view by holding that the full protection and security standard protects "the physical integrity of an investment against interference by use of force" and "applies essentially when the foreign investment has been affected by civil strife and physical violence."[190] Citing both the *Tecmed* and *Wena* awards, the *Saluka* tribunal indicated that the standard is not absolute and does not impose strict liability on the host State, but the host State is obliged to exercise due diligence.[191]

4. *National Treatment*

The claimant in *Thunderbird* alleged a violation of Mexico's national treatment obligation. Mexico had closed down the claimant's gaming facilities, while allegedly permitting the similar gaming facilities of competing domestic investors to remain open. The tribunal nevertheless found no breach of the national treatment obligation. The tribunal did not adopt Mexico's position that the standard "proscribes only demonstrable and significant indications of bias and prejudice on the basis on nationality."[192] Instead, it based its decision on the fact that the illicit domestic gaming facilities were operating outside of the knowledge and permission of Mexico.[193] In other words, the *Thunderbird* tribunal appears to have imputed the requirement into the national treatment test that the better treatment in question must be directly attributable to the actions (as opposed to inaction) of government officials.

5. *Expropriation—A New Bright Line?*

One could argue that the failed expropriation claims in the *EnCana*, *LG&E*, *Saluka*, and *Azurix* arbitrations demonstrate investor-state arbitral tribunals' wariness of indicating

188. LG&E, *supra* note 153, ¶ 146.

189. The close interrelationship between the fair and equitable treatment standard and the full protection and security standard is given as the main justification for this conclusion. *See* Azurix, *supra* note 162, ¶¶ 406-08 (citing Occidental, *supra* note 169, ¶ 187).

190. Saluka, *supra* note 63, ¶¶ 483-84.

191. *Id.* (citing Tecmed, *supra* note 182, ¶ 177; Wena Hotels Ltd. v. Egypt, Final Award ICSID Case No. ARB/98/4, ¶ 84 (Dec. 8, 2000)).

192. Thunderbird, *supra* note 66, ¶ 174.

193. *Id.* ¶ 180.

state responsibility under that traditional international law delict. It would appear that expropriation is out of fashion, if such a thing can occur in law. Of course, the results in these recent cases may largely be due to the fact that the measures at issue are not outright nationalizations or traditional direct expropriations with transfer of the property to government. Investments are often complex, and modern government regulation has become much more subtle with respect to investors and investments. Tribunals may simply not be prepared to label serious conduct that may otherwise be unfair and inequitable as being expropriatory in effect. Moreover, if the government measure does not result in (according to the often-cited phrase of the *Pope & Talbot* tribunal) a "substantial deprivation,"[194] effectively destroying the investment, tribunals may indeed be wary of granting such a claim.

The *LG&E* tribunal, largely relying on the *CMS*, *Tecmed*, and *Pope & Talbot* analyses of indirect expropriation, held that a claimant must be able to demonstrate that

> if the conduct relates to a regulatory measure, the expropriatory act was disproportionate to the need that the measure is addressing as an exercise of the State's police powers;[195]
>
> the economic impact of the measures have been "substantial"[196] such that the investor has lost control over its investment, and has been unable to direct the day-to-day operations of the investment;[197] and
>
> with respect to the duration of the measure, the effect of the alleged expropriatory action has been permanent.[198]

This sense of proportionality between the confiscatory measure and the legitimate need for it is intriguing. Most BITs do not contain any exception for the exercise of regulatory power. A possible interpretation could be, accordingly, that all takings, whether for a public purpose or not, would be compensable. This could be called a no-fault interpretation of such a provision. On the other end of the spectrum is the argument that all takings, even if based on discriminatory or arbitrary measures, could never be compensable because the police power is absolute.

With much the same result as the *LG&E* tribunal, the *Saluka* tribunal sailed a middle course. It held that the deprivation of Saluka's investment by the imposition of forced administration was justified on reasonable regulatory grounds, "notwithstanding that the measure had the effect of eviscerating Saluka's investment."[199] It reached that conclusion by importing the international law meaning of the term deprivation into the treaty.[200] The tribunal explained that "[it] is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a nondiscriminatory manner bona fide regulations that

194. *See* Pope & Talbot, Inc. v. Canada, Interim Award, UNCITRAL, ¶¶ 96-105 (Jan. 26, 2000) [hereinafter Pope & Talbot].
195. LG&E, *supra* note 161, ¶¶ 194-97.
196. *Id.* ¶¶ 190-91 (citing Pope & Talbot, *supra* note 194, ¶¶ 100-02).
197. *Id.* ¶ 199; *see also* Azurix, *supra* note 162, ¶ 322; EnCana, *supra* note 74, ¶ 174.
198. LG&E, *supra* note 161, ¶¶ 193, 200.
199. Saluka, *supra* note 63, ¶ 276.
200. *Id.* ¶ 254.

are aimed at the general welfare."[201] But the tribunal added, the significant caveat that international law "has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law."[202]

The majority in the *EnCana* arbitration dealt with the special issue of the indirect expropriation of a legal right—in this case the right to refunds of the VAT. The tribunal agreed with the *Occidental v. Argentina* tribunal that such a right could be expropriated and that such an expropriation had not occurred in the facts of the case.[203]

The *ADC* award is the one example in 2006 in which a tribunal was prepared to hold that a State party expropriated an investment without compensation.[204] As stated in the award, "[i]n the opinion of the [t]ribunal, this is the clearest possible case of expropriation."[205] Because of the unambiguous nature of the expropriation of the investment in *ADC*, the disputing parties were reduced to debating whether the deprivation was unlawful under the typical BIT terms[206]—a matter relevant to calculation of quantum (as discussed below). The tribunal held that the expropriation was unlawful on all counts. The expropriatory measures were not taken in the public interest nor under due process of law, were discriminatory, and compensation was not paid.

6. *Emergency Exception and Necessity*

When the *CME* and *Lauder*[207] tribunals arrived at different conclusions based on substantially the same fact pattern, a sizeable firestorm occurred in the ranks of the investment arbitration community.[208] The question of apparently contradictory decisions by arbitral panels has generated a great deal of discussion concerning the need for more consistency in investment arbitration, for example, by adopting some form of appellate mechanism.[209] The recent decision of the *LG&E* tribunal on the application of an emergency exception and the customary law principle of necessity promises to ignite another small brushfire in this continuing debate.

As in the *CMS* award,[210] the *LG&E* tribunal spent a considerable amount of its award addressing the application of the necessity defense and the related emergency excep-

201. *Id.* ¶ 255.

202. *Id.* ¶ 263.

203. *See* EnCana, *supra* note 74, ¶¶ 183, 197. Note that the *Occidental* tribunal also rejected the investor's claim of expropriation. *See* Occidental, *supra* note 169.

204. Professor James Crawford, counsel for the Claimant, referred to the facts of the claim as being the "plain hornbook law of expropriation." ADC, *supra* note 63, ¶ 303.

205. *Id.* ¶ 304.

206. *See* Agreement Between Cyprus and Hungary on the Mutual Promotion and Protection of Investments, art. 4, Cyprus-Hung., May 24, 1989 [hereinafter Cyprus-Hungary BIT].

207. *See* Lauder, *supra* note 187.

208. *See Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?*, *in* INVESTMENT TREATY LAW, (Ortino, Sheppard, Warner, eds., 2006), *available at* http://www.biicl.org.

209. *See* Ian Laird & Rebecca Askew, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System?*, 7 J. APP. PRAC. & PROCESS, 285 (2005).

210. CMS, *supra* note 182 ¶¶ 304-94.

tion.[211] But unlike the *CMS* tribunal, the *LG&E* tribunal factually determined that, under the provisions of the BIT and international law,[212] a state of necessity indeed existed during the economic crisis for a seventeen-month period from late 2001 to early 2003. As a result, the *LG&E* tribunal held that Argentina was exempt from responsibility during that period and that any liability for damages did not begin to accrue until after spring 2003. The full implications of this element of the *LG&E* merits award will have to wait for the damages decision of the tribunal.

Similar to the *CMS* tribunal, the *LG&E* tribunal did determine that Article XI of the BIT[213] was not a self-judging provision.[214] Also, both tribunals agreed that an economic crisis could be considered as relating to an "essential security interest."[215] But unlike the *CMS* tribunal,[216] the *LG&E* tribunal made a factual finding that the peso crisis, although not ultimately catastrophic, was sufficiently severe to come under the emergency exception.[217] The *LG&E* tribunal also disagreed with the *CMS* tribunal that there was sufficient evidence to hold that the Argentinean government had contributed to causing the crisis.[218]

D. Damages

Two tribunals granted substantial damages awards in 2006: *ADC v. Hungary* and *Azurix v. Argentina*.

1. *Unlawful Expropriation*

The question of whether the expropriation in *ADC* was lawful was the key issue because the relevant BIT did not provide a valuation standard for unlawful expropriation. The standard set forth in Article 4(1)(a) of the Cyprus-Hungary BIT refers to "just compensation" for a lawful expropriation under Article 4(1).[219]

211. LG&E, *supra* note 161, ¶¶ 201-65. Note also that the emergency exception was not an issue in the Azurix arbitration as the key events in that claim occurred prior to 2001. *See* Azurix, *supra* note 162, ¶ 57.

212. Article 25 of the International Law Commissions Articles on State Responsibility, titled Necessity, is considered to be a complete statement of the customary international law on the subject. *See* James Crawford, International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002).

213. *See* US-Argentina Bilateral Investment Treaty art. XI, U.S.-Arg., Nov. 14, 1991 ("This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.").

214. LG&E, *supra* note 161, ¶ 212.

215. *Id.* ¶ 251; CMS, *supra* note 182, ¶ 319.

216. Which concluded that the economic crisis was not sufficiently catastrophic to meet the standard. *See* CMS, *supra* note 182, ¶¶ 359-61.

217. LG&E, *supra* note 161, ¶ 238. Similarly, the *LG&E* tribunal (¶¶ 239-42) rejected the argument, accepted by the *CMS* tribunal, that there were alternative means for the Government to respond to the crisis. *See* CMS, *supra* note 182, ¶¶ 323-24.

218. LG&E, *supra* note 161, ¶¶ 256-57. Under Article 25(2)(b) if the ILC Articles on State Responsibility, necessity cannot be invoked if "the [s]tate has contributed to the situation of necessity." The *CMS* Tribunal decided that Argentina had contributed to the crisis and thus prevented the invocation of necessity. *See* CMS, *supra* note 182 ¶ 329.

219. Cyprus-Hungary BIT, *supra* note 206, art. 4 ("2. The amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation. 3. The amount of this

Hungary argued for the application of Hungarian law. But because the expropriation was unlawful, the tribunal held that the Article 4(2) standard, which only applied to a lawful expropriation, would not apply. Accordingly, the default was held to be the customary international law standard for unlawful expropriation.[220] The tribunal gave a lengthy dissertation[221] in support of the Permanent Court of International Justice (PCIJ) decision in the *Chorzów Factory* case as the statement of the customary international law standard for the assessment of damages resulting from an unlawful act. The key part of the decision of the PCIJ reads "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[222]

The most interesting element of the *ADC* award is that the tribunal set the date of valuation to be the date of award. Typically, the valuation date for expropriation claims is the date of the expropriation. But an issue arose in the arbitration because of the fact that the value of the investment significantly increased after the date of expropriation. The tribunal accepted the claimant's argument that, to fully meet the principle set out in *Chorzów Factory* (to put the claimants in the same position but for the unlawful expropriation), the date of the award and not the date of expropriation would be most appropriate.[223] In addition, the tribunal accepted the claimant's submissions that the discounted cash flow approach should be used to determine the fair market value of the unlawfully expropriated investment in that case.[224]

The *Azurix* tribunal was faced with considering damages for breaches of fair and equitable treatment, full protection and security, and impairment of the investment through arbitrariness. Although it rejected the expropriation claim, as the *CMS* tribunal did, the *Azurix* tribunal applied a methodology consistent with a fair market value approach used in determination of compensation for expropriation.[225] The tribunal indicated that the date for determining the valuation would be set in the following manner: "in assessing fair market value, a tribunal would establish that value in a hypothetical context where the State would not have resorted to such maneuvers but would have fully respected the provisions of the treaty and the contract concerned."[226] With respect to the award of interest, both the *ADC* and *Azurix* tribunals followed the increasing trend in investment arbitration to award compound interest.[227]

2. *Costs*

The practice in investor-state arbitrations with respect to the award of costs appears to have become somewhat inconsistent. In the past, decisions on costs in investor-state arbi-

compensation may be estimated according to the laws and regulations of the country where the expropriation is made.")

220. ADC, *supra* note 63, ¶¶ 480-83.

221. *Id.* ¶¶ 484-95.

222. *Id.* ¶ 489 (citing Germany v. Poland, 17 P.C.I.J. (ser. A) No. 3, at 47 (Chorzów Factory case)).

223. ADC, *supra* note 63, ¶¶ 497-500.

224. *Id.* ¶¶ 501-04.

225. Azurix, *supra* note 162, ¶¶ 420, 424 (citing CMS, *supra* note 182, ¶ 410).

226. *Id.* ¶ 417 (citing Compañía del Dessarollo de Santa Elena, S.A. v. Costa Rica, Award, ICSID Case No. ARB/96/1 (2000)).

227. *Id.* ¶ 440.

tration have for the most part resulted in parties bearing their own costs with respect to counsel fees and the arbitration expenses, except in the case of spurious claims or bad-faith litigation tactics. The practice of each party bearing its own costs was most recently followed in *Salini*, although Arbitrator Sinclair dissented on this point by suggesting that there should be some consideration of the loser pays principle.[228]

But following a new trend perhaps set in motion by the *Methanex v. U.S.* tribunal in 2005,[229] arbitral tribunals appear to now be more inclined to follow the so-called principle set out in Article 40 of the UNCITRAL Arbitration Rules and consider awarding costs in favor of the successful party. This is occurring even under ICSID arbitrations, such as the *ADC* and *Telenor* arbitrations, which are not subject to the UNCITRAL Arbitration Rules.[230] Another example is the *Thunderbird* arbitration, under the UNCITRAL Rules, in which the tribunal awarded three quarters of the counsel and arbitration costs against the unsuccessful claimant, although there was a lengthy and detailed dissent from co-arbitrator Professor Wälde.

Some tribunals have taken the opportunity in their award of costs to draw attention to the questionable conduct of one or both of the disputing parties. For example, in the *EnCana* award, where the claims of the investor were denied, the tribunal clearly wished to make a point when it held that the costs of the arbitration were to be paid by the successful respondent, while each party would bear its own costs with respect to counsel representation.[231] The *Azurix* tribunal awarded arbitration costs against the unsuccessful respondent, but indicated that counsel fees were to be borne equally by each disputing party.[232] In *ADC*, the tribunal particularly noted the poor conduct of Hungary prior to and during the arbitration as justification for a full counsel and arbitration cost award against it as the unsuccessful party.[233]

E. Annulment and Set Aside Actions

The year 2006 brought some developments in the protracted challenge of the *Occidental v. Ecuador* award of July 1, 2004. During the arbitration, Occidental argued that it was entitled to VAT refunds in excess of $75 million on goods and services purchased in connection with its exploration activities in Ecuador. In its award, the tribunal found that in failing to refund those amounts, Ecuador had breached several standards of protection set forth in the U.S.-Ecuador BIT, most notably, the fair and equitable treatment standard.

228. *See* Salini, *supra* note 163 ¶¶ 101-04; *see also* World Duty Free, *supra* note 90, ¶ 190 (parties ordered to bear costs equally despite "the general practice in transnational arbitration that the successful party under an award should recover its legal costs, i.e., its own costs and expenses reasonably incurred in those arbitration proceedings").

229. *See* Methanex v. United States, Award, UNCITRAL (2005). For other examples of costs following the event, *see* Telenor Mobile Communic'n A.S. v. Hungary, Award, ICSID Case No. ARB/04/15, ¶ 107 (Sep. 13, 2006); *see also* Inceysa Vallisoletana, S.L. v. El Salvador, Award, ICSID Case No. ARB/03/26 (Aug. 2, 2006), *available at* http://www.investmentclaims.com/decisions/El%20Salvador%20ICSID%20Award%20Description.pdf.

230. Under the ICSID Convention Article 61(2) and ICSID Arbitration Rule 28, wide discretion is in fact provided to tribunals regarding costs and no mention is made of a principle in favor of the successful party.

231. EnCana, *supra* note 74, ¶ 202

232. Azurix, *supra* note 162, ¶ 441.

233. ADC, *supra* note 63, ¶¶ 525-42.

Shortly after the award was entered, Ecuador appealed to the English courts (London was the seat of arbitration) on grounds that tax matters were not covered by the U.S.-Ecuador BIT, and therefore could not be adjudicated by an arbitral tribunal constituted under that BIT.

On September 9, 2005, the Queen's Bench Division dismissed Occidental's contentions that the dispute was not justiciable in English court because it involved relations between two foreign sovereigns. The court consequently allowed Ecuador's appeal to proceed.[234] In December 2005, Ecuador's appeal was heard by the Queen's Bench Division, which issued a decision on the matter on March 2, 2006. In its ruling, the Queen's Bench Division rejected Ecuador's request to set aside the award.[235] The Court found that, while the dispute between the parties might present some tax-related aspects, it was not a tax matter. Instead, it was a case on whether Ecuador had interfered with the regular performance of the parties' obligations under the exploration contract. As such, the dispute was covered by the U.S.-Ecuador BIT. Further, the Court stated that, as a result of the award, Ecuador had suffered no "substantial injustice."[236]

IV. Institutional Developments

A. AAA International Centre for Dispute Resolution

The International Centre for Dispute Resolution (ICDR), a division of the AAA, has amended its International Arbitration Rules (ICDR-IAR), effective May 1, 2006, to include a new rule providing for the appointment of an emergency arbitrator to take up requests for relief needed prior to the formation of the arbitration panel. The rule, Article 37, is included by default in standard arbitration rules.

The rule fills an important need. Previously, a party with a need for emergency relief prior to the formation of the entire arbitral tribunal had no choice but to pursue interim relief in the courts. But judicial relief may be unavailable, such as in United States jurisdictions that have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement.[237] In some cases, the inability to obtain emergency relief could be so serious as to render moot any eventual remedy the arbitrators offered. Moreover, seeking emergency interim relief from a court in an international case could frustrate the expectation of a neutral forum because the court with jurisdiction over the party to be restrained is likely to be in that party's home country.

Article 37 provides for the appointment of an emergency arbitrator within one business day of a request. The emergency procedure is automatically available where the parties have called for arbitration under the ICDR-IAR, unless the parties expressly opt-out.

234. *See* Occidental Exploration & Prod. Co. v. Ecuador, [2005] EWCA (Civ) 1116 (Eng.).

235. *See* Ecuador v. Occidental Exploration & Prod. Co., [2006] EWHC (Comm) 345 (Eng.).

236. *Id.* ¶ 121.

237. *See, e.g.*, McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974); Merrill Lynch, Pierce, Fenner & Smith v. McCollum, 666 S.W.2d 604 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), cert. denied, 469 U.S. 1127 (1985). New York state courts were under a similar limitation imposed by the New York Court of Appeals decision in Cooper v. Ateliers de la Motobecane, S.A., 442 N.E.2d 1239 (N.Y. 1982). But in 2005 the New York legislature amended New York's Civil Practice Law and Rules, allowing courts to provide interim relief in support of international arbitration. *See* N.Y. C.P.L.R. Section 7502(c) (McKinney 2005).

This favorably distinguishes it from other opt-in mechanisms for obtaining interim relief, which are seldom used. It requires notice of the application for the appointment of an emergency arbitrator be given to all parties an opportunity to be heard. Article 37 makes no provision for ex parte applications for emergency relief. The rule applies prospectively from May 1, 2006, based on the date of the parties' agreement to arbitrate.

B. UNCITRAL

The United Nations Commission of International Trade Law, at the thirty-ninth session of the Commission held in New York from June 19 to July 7, 2006, adopted two significant revisions to the UNCITRAL Model Law on International Commercial Arbitration (Model Law).[238]

First, the Commission expanded the Model Law's definition of agreements to arbitrate and provided States with two alternative texts. The first option requires that arbitration agreements "be in writing," but allows the requirement to be satisfied if the agreement's content is "recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."[239] The second option omits the writing requirement altogether and deems sufficient any agreement to arbitrate disputes arising from a defined legal relationship.[240] The Commission also issued a recommendation regarding the interpretation of the New York Convention that is consistent with this expanded notion of agreements to arbitrate.[241]

Second, the revised Model Law clarifies and expands arbitral tribunals' power to issue provisional measures. Under the revised Model Law, tribunals may grant interim measures unless the parties have agreed otherwise,[242] and may issue a preliminary order—a temporary form of interim relief—without notice to the non-requesting party if prior disclosure would risk frustrating the purpose of the order.[243] Preliminary orders expire after twenty days, and are binding on the parties but are not enforceable in court.[244]

C. ICSID Rules Amendments

On April 10, 2006, an amended version of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) entered into force.[245] While the amendments are

238. UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Ninth Session*, Supplement No. 17, A/61/17 (June 19-July 7, 2006), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/V06/558/15/PDF/V0655815.pdf?OpenElement.

239. *Id.* at Annex 1, art. 7, pp. 56-57.

240. *Id.*

241. *Id.* at Annex II: Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Done in New York, 10 June 1958, Adopted by the United Nations Commission of International Trade Law on 7 July 2006 at Its Thirty-Ninth Session.

242. *Id.* at Annex I, art. 17.

243. *Id.* at art. 17B(1)-(2).

244. *Id.* at art. 17C(4)-(5).

245. The amended Arbitration Rules apply only to claims brought under ICSID arbitration agreements entered on or after April 10, 2006. With respect to claims brought under Bilateral Investment Treaties, all BIT-based arbitration requests submitted on or after April 10, 2006 shall be dealt with under the amended Arbitration Rules, irrespective of the date when the BIT entered into force. ICSID, Rules of Procedure for

few in number, their impact is profound. This section discusses the most relevant changes brought about by the amendments.

1. *Expansion of Arbitrator Disclosure Requirements*

Upon their appointment, arbitrators in ICSID proceedings are required to disclose any "past and present" relationship with the parties, as well as "any other circumstance that might" raise questions about their independence.[246] Under the revised Arbitration Rules, the arbitrator's duty to disclose events which might raise questions about their independence continues throughout the proceeding, even if those events take place after their appointment. This revision brings the ICSID Arbitration Rules into line with the rules of other major international arbitration institutions.

2. *Facilitation of Interim Relief Measures*

The revised Arbitration Rules allow parties to seek interim relief before an arbitral tribunal is constituted. A party can seek provisional measures for the preservation of its rights "at any time after the institution of the proceeding,"[247] although requests will not be considered until after the tribunal is constituted.[248] Albeit a step forward, the new ICSID framework on interim relief still leaves a very serious deficiency in ICSID arbitration, especially given the length of time it often takes ICSID to constitute a tribunal.

3. *Preliminary Objections Allowed*

A respondent can now raise a preliminary objection "that a claim is manifestly without legal merit,"[249] similar to a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the U.S. Federal Rules of Civil Procedure. The tribunal is expected to rule on the objection "at its first session or promptly thereafter."

4. *Transparency and Third-Party Involvement Enhanced*

The Arbitration Rules introduced three innovations that seek to promote transparency in ICSID arbitration and facilitate the participation of third-parties, thereby emphasizing the public nature of ICSID proceedings and making them look less like traditional commercial arbitration.

First, ICSID arbitration hearings may now be public, unless either party objects and upon consultation with the Secretary General.[250] In the event that a hearing is public,

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Arbitration Proceedings (2006), http://www.worldbank.org/icsid/basicdoc/partF.htm [hereinafter Arbitration Rules].

246. *Id.* at Rule 6(2).

247. *Id.* at Rule 39(1).

248. *Id.* at Rule 39(5).

249. *Id.* at Rule 41(5).

250. *Id.* at Rule 32. Both in ICSID and UNCITRAL arbitrations, each party retains the power to veto public hearings. *See* UNCITRAL, UNCITRAL Arbitration Rules (1976), Rule 25(4), http://www.jus.uio.no/lm/un.arbitration.rules.1976/ (requiring that "hearings shall be held *in camera* unless the parties agree otherwise").

"the [t]ribunal shall . . . establish procedures for the protection of proprietary or privileged information."[251]

Second, the publication of excerpts from ICSID awards is now mandatory. Notwithstanding the general rule that awards cannot be published in full without the parties' consent, ICSID must "promptly include" excerpts of awards—limited to the tribunal's "legal reasoning"—in its publications.[252]

Third, the Arbitration Rules now provide some guidance for dealing with increasingly frequent requests for the submission of amicus briefs. The arbitral tribunal can admit amicus curiae submissions even if the parties object to them, though it must give the parties the opportunity to present their observations. In determining whether to allow an amicus curiae submission, the tribunal must consider, among other things, the extent to which the submission would address a matter within the scope of the dispute, whether it would assist the tribunal by offering knowledge or a perspective different from that of the disputing parties, and whether the party has a significant interest in the proceeding.[253]

With the enactment of the amended Arbitration Rules, ICSID arbitration has imported many court-litigation techniques and has become less party-centered. Yet, its popularity continues to grow. In 2006, ICSID was expected to register over twenty new claims, and a similar number of BITs containing consents to ICSID arbitration were expected to enter into force.[254]

D. CAFTA

An increasing number of multilateral investment treaties now incorporate consents to ICSID arbitration.[255] One of those treaties is the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA).[256] In 2006, CAFTA entered into force between the United States and El Salvador, Honduras, Nicaragua, and Guatemala. The Dominican Republic is expected to implement CAFTA before the end of 2006, and the final hold-out, Costa Rica, is expected to do so in early 2007.

The guarantees afforded by CAFTA to investors from one contracting State doing business in another contracting State are inspired by those laid out in the U.S. Model BIT, as well as in the U.S. free trade agreements with Chile and Singapore. They include national treatment and most-favored nation treatment, fair and equitable treatment protection under customary international law, nondiscriminatory treatment in case of armed conflict or civil strife, protection against expropriation and nationalization, entitlement to transfer investment-related capital freely and without delay into and out of the investment host State, release from performance requirements in order to maintain the investment in the investment host State, release from nationality requirements for senior management or

251. Arbitration Rules, *supra* note 245, at Rule 32. A similar provision has been introduced in Rule 39(2) of the AF Rules.

252. *Id.* at Rule 48(4).

253. *Id.* at Rule 37(2).

254. See cases registered by ICSID during 2006 at http://www.worldbank.org/icsid/cases/pending.htm.

255. *See* Christoph Schreuer, "Traveling the BIT Route: Of Waiting Periods, Umbrella Clauses, and Forks in the Road," 5 J. W. Inv. & Trade 231, 231-33 (2004).

256. *See* CAFTA art. 10.17.

boards of directors, and a requirement that the investment host State observe all obligations laid down in investment agreements the State may have entered into.

In case of a dispute between the investor and the investment host State, the investor must exhaust a consulting and negotiation period with the State. The investor then can institute international arbitration proceedings against the State, either before ICSID or under the UNCITRAL Arbitration Rules. Unless otherwise agreed to by the parties, the dispute shall be resolved by three arbitrators in accordance with CAFTA provisions and the "applicable rules of international law."[257] The domestic law of the respondent State can also apply, unless superseded (or prohibited) by CAFTA.

257. *Id.* at art. 1.22(1).