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The past year was another active one for international commercial disputes, with significant although not revolutionary developments in U.S. arbitration law, and considerable growth in investor-State disputes under investment treaties.

I. U.S. Arbitration Law Developments

A. Arbitrator Competence

In 2003, the U.S. Supreme Court decided three cases involving the question: how are jurisdiction-like functions allocated between courts and arbitrators? In each case the issue presented was one familiar to international arbitration: not only "who decides what," but also "who decides who decides." In the United States, this question may arise when courts are asked either to stay or to compel arbitration,[1] or during judicial review of an award.[2]

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1. 9 U.S.C. § 4 provides that courts may compel arbitration "upon being satisfied that the making of the agreement for arbitration . . . is not in issue."

2. 9 U.S.C. § 10 permits vacatur of an award "where the arbitrators exceeded their powers." For determining arbitral jurisdiction at the award stage, *see* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). In international cases, the New York Convention article V provides that courts need not recognize an award if the arbitration agreement "is not valid" (art. V(1)(a)), or if the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration" (art. V(1)(c)).

Analysis usually implicates the twin doctrines of separability (the validity of the arbitration clause is determined independently from that of the main agreement) and *compétence-compétence* (arbitrators have jurisdiction to determine their own jurisdiction, at least as a preliminary matter).[3] In each of the three cases, the Court held the arbitrator had power to determine issues related to his or her competence to hear the claim. While the cases involved U.S. domestic arbitrations, the Court's statements about arbitrator jurisdiction should be equally applicable to international arbitration.

1. *What the Three Cases Say*

a. Howsam

In *Howsam v. Dean Witter Reynolds, Inc.*,[4] an investor in limited partnerships commenced arbitration against her broker for misrepresenting an investment's quality. The brokerage firm responded with suit in federal court seeking an injunction against the arbitration because the investment advice was more than six years old and thus barred by the National Association of Securities Dealers (NASD) eligibility rule,[5] which functions as a statute of limitations for arbitration, but is imposed by the NASD rather than state law. However, unlike a statute of limitations, which restricts a party's right to bring a claim, the eligibility rule arguably limits an arbitrator's jurisdiction to hear the case.

Resolving a split among the circuits over who (judge or arbitrator) decides on eligibility requirements, the *Howsam* Court held time limits were for the arbitrator to determine. Justice Breyer's unanimous opinion acknowledged that judges would normally decide gateway jurisdictional matters unless the parties clearly provided otherwise. The Court, however, presumed the parties intended the arbitrators to construe the NASD rules because they were supposed to possess special familiarity and expertise in interpreting them.[6]

b. Pacificare

In *Pacificare Health Systems, Inc. v. Book*,[7] a group of doctors filed a nationwide class action against several health maintenance organizations alleging conspiracy to refuse reimbursement for services under certain health plans. After agreeing to arbitrate disputes with the health plans, the doctors then changed their minds, arguing they would be denied their

3. *See generally* Alan Scott Rau, *The Arbitrability Question Itself*, 10 Am. Rev. Int'l Arb. 287 (1999); William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?* 12 Arb. Int'l 137 (1996), *reprinted in* 11 Int'l Arb. Rep. 28 (Oct. 1996); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int'l Arb. 133 (1997), *reprinted in* Arb. & Dispute L.J. 19 (Mar. 2000); William W. Park, *Jurisdictional Issues in Financial Arbitration*, *in* Festschrift für Otto Sandrock zum 70. Geburtstag 745 (Klaus Peter Berger ed., 2000); Adam Samuel, Jurisdictional Problems in International Commercial Arbitration (1989), Chapters III–V.

4. 537 U.S. 79 (2002).

5. NASD Code of Arbitration Section 10304 (formerly Rule 15) states that no dispute "shall be eligible for submission [to arbitration] . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute." *Id.* at 82.

6. The Court also noted § 10324 of the NASD Rules (formerly Rule 35) gave arbitrators power to "interpret and determine the applicability of all provisions under the [NASD] Code." *Howsam*, 537 U.S. at 86. Justice Thomas's concurrence rested solely on the basis that, under New York law applicable to the contract in question, time bars under the NASD Rules are for arbitrators to decide. *But see* Diamond Sys. Inc. v. 55 Liberty Owners Corp., N.Y.L.J., July 24, 2003, at 1, col. 4 (N.Y. Sup. Ct.) (arbitration commenced beyond six year statute of limitations stayed because timeliness of claims to be arbitrated, including those governed by the FAA, is to be resolved by the courts, not the arbitrator).

7. 538 U.S. 401 (2003), *rev'g* In re Humana Inc. Managed Care Litig., 285 F.3d 971 (11th Cir. 2002).

ability to prosecute claims under RICO, the Racketeer Influenced and Corrupt Organizations Act[8], which allows for treble damages. Some of the arbitration agreements explicitly prohibited punitive damages awards.[9] The physicians prevailed in both the District Court and the Eleventh Circuit.[10]

In a relatively brief opinion by Justice Scalia, a unanimous U.S. Supreme Court[11] reversed the lower courts and upheld the health care organizations' right to compel arbitration. The Court found the scope of the contractual prohibition on punitive damages was a matter of contract interpretation, and hence an issue for the arbitrator. The Court reasoned it was ambiguous whether the contracts' reference to punitive damages included RICO treble damages since some authority suggested treble damages had both a compensatory and punitive character.[12]

Consequently, the Court said it would be speculative to determine whether an arbitrator would interpret the punitive damage prohibitions so as to cast doubt on the permissibility of treble damages. The Court labeled as abstract the question of "whether it is for courts or arbitrators to decide enforceability in the first instance."[13] Because it would be "mere speculation" to presume that arbitrators might deny themselves the power to grant punitive damages, the Court would not "take upon [itself] the authority to decide the antecedent question of how the ambiguity [concerning punitive damages] is to be resolved."[14] In short, the Court gave the arbitrators *de facto* power to determine jurisdiction by interpreting the meaning of punitive damages in the agreement to arbitrate.[15] If the arbitrators held treble damages were not punitive in the context of the physicians' claims, then these damages would be within their jurisdiction.

8. 18 U.S.C. §§ 1961–68. While some readers might be puzzled that a health care provider was influenced by racketeers, those familiar with RICO know it has been commonplace to include racketeering counts in ordinary business litigation. Section 1962 makes it unlawful to invest income derived from a pattern of racketeering in any business engaged in interstate or international commerce. Section 1961 defines racketeering to include not only acts and threats of murder, kidnapping, arson, robbery and bribery, but also acts indictable under other sections of federal criminal law. Frequently RICO civil claims are based on an alleged conspiracy to commit mail and wire fraud under 18 U.S.C. §§ 1341, 1342. Section 1964 provides that persons injured by violations of RICO shall recover treble damages plus attorney's fees. *See generally* Norman Abrams, *A New Proposal for Limiting Private RICO*, 37 UCLA L. Rev. 1 (1989).

9. The various arbitration clauses provided "punitive damages shall not be awarded [in arbitration]," "arbitrators . . . shall have no authority to award any punitive or exemplary damages" and "arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages." *Pacificare*, 538 U.S. at 405.

10. The Court of Appeals based much of its analysis on *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), which held, where limitations on remedies contained in an arbitration clause prevented a plaintiff from obtaining meaningful relief for a statutory claim, the arbitration clause would be unenforceable with respect to that claim.

11. Justice Thomas took no part in the case.

12. Referring to statutory remedies such as those at issue in RICO claims, Justice Scalia described treble damages as lying "on different points along the spectrum between purely compensatory and strictly punitive awards." *Pacificare*, 538 U.S. at 406 (quoting Cook County v. United States ex rel. Chandler, 538 U.S. 119 (2003)).

13. *Id.* at 407.

14. *Id.* at 406–07.

15. Other courts have also held the validity of remedy restriction provisions in arbitration agreements is a question for the arbitrator. *See, e.g.*, Hawkins v. Aid Ass'n. for Lutherans, 338 F.3d 801, 807 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1146 (2004); Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., 334 F.3d 721, 725–26 (8th Cir. 2003). *But see* Anders v. Hometown Mortgage Serv., Inc., 346 F.3d 1024 (11th Cir. 2003) (holding courts may consider objections to remedy restriction provisions in deciding arbitrability of a claim).

c. Bazzle

The Court took a similar approach in *Green Tree Financial Corp. v. Bazzle*,[16] which began when two groups of borrowers filed separate suits in South Carolina state courts seeking class certification of claims against the lender pursuant to loan agreements containing arbitration clauses. In the first case, the court certified the class and compelled class arbitration. In the other, the case proceeded to arbitration before the same arbitrator, who then certified a second class. After the arbitrator awarded the two classes $10.9 million and $9.2 million, respectively, plus attorneys' fees, South Carolina's Supreme Court consolidated the lender's appeals and ruled the relevant loan contracts permitted class actions in arbitration. The U.S. Supreme Court granted certiorari to determine whether the state court holding conformed to the Federal Arbitration Act (FAA). The decision split 4–1-3–1. Four Justices concluded the permissibility of class action arbitration was a matter of contract interpretation for arbitrators, not courts. Justice Breyer's plurality opinion said the question presented was "what kind of arbitration proceeding the parties [had] agreed to?"[17] Justice Stevens concurred in the judgment, although he would have preferred to affirm the South Carolina decision ordering arbitration to proceed as a class action. Three dissenting Justices found any imposition of class-wide arbitration contravened the parties' contract, while another found the FAA should not apply in state courts.[18]

It is possible that litigants might agree to give an arbitrator broad power to determine whether an arbitration clause includes the possibility of a class action, as suggested by Justice Breyer's opinion. Such a conclusion, however, is not obvious from the language of the relevant contracts, each of which was accepted by an individual borrower and provided for selection of an arbitrator for all disputes arising from the singular contract. In commercial arbitration, the normal presumption has always been that parties agree to arbitrate with particular claimants or respondents, not with the whole world. Prior to *Bazzle*, it had been held that the FAA does not authorize forced joinder of different arbitrations arising out of related claims[19] except as agreed by the parties,[20] when conducted pursuant to a statute that explicitly provides for joinder,[21] or under certain other defined circumstances permitting joinder of non-signatories.[22]

16. 123 S. Ct. 2402, 2403, 2407–09 (2003).

17. *Id.* at 2407.

18. Chief Justice Rehnquist's dissent (joined by Justices O'Connor and Kennedy) argued any imposition of class-wide arbitration contravened the parties' contract. Justice Thomas dissented on the ground that the Federal Arbitration Act should not apply in state courts. Justice Stevens concurred in the judgment but dissented from its reasoning. *Id.* at 2409.

19. *See* Gov't of United Kingdom of Great Britian v. Boeing Co., 998 F.2d 68 (2d Cir. 1993) (denying consolidation of arbitrations with Boeing and Textron, Inc. relating to contract with the British Ministry of Defense to develop an electronic fuel system).

20. As between the same parties, article 4(6) of the ICC International Court of Arbitration's Rules permits the court to join claims until the signing of the Terms of Reference. Thereafter, addition of any new claim must be authorized by the arbitral tribunal. Compare article 22(h) of the Arbitration Rules of the London Court of International Arbitration, which permits the arbitral tribunal to allow third persons to be joined in an arbitration provided they consent in writing.

21. For example, Mass. Gen. Laws, ch. 251, § 2A, calls for consolidation as provided in Mass. R. Civ. P. 42, which permits joinder of actions "involving a common question of law or fact." *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988) held a federal court sitting in Massachusetts may order consolidation pursuant to state statute. *See also* Cal. Civ. Proc. Code § 1281.3 (allowing consolidation of separate arbitration proceedings involving disputes arising from "the same transactions or series of related transactions" and "common issue or issues of law or fact").

22. *See infra* Section I.B.

2. *What the Three Cases Mean*

The theme running through these cases is that for each question whose arbitrability was at issue, the arbitrators had authority to determine the limits of their power. The cases suggest the Court will narrowly define the issues to be resolved by courts. Such judicial restraint in interfering with arbitral procedure is generally considered good for arbitration. However, the results in some instances may permit arbitrators to bootstrap themselves into a job and presume their own conclusions.

If an arbitrator joins unrelated parties in a way not permitted by the arbitration clause, has the nature of the contracted-for dispute resolution process been impermissibly altered? If a case is eligible for arbitration no longer than six years following broker misbehavior, can one speak of an "arbitrator" for a claim filed in the seventh year? If parties expressly provide that an arbitrator may award only compensation for actual loss, can an arbitrator grant extra-contractual relief my making a recital that treble damages are not really treble?

The heart of the jurisdictional dilemma is that language, while often open to multiple interpretations, is not infinitely plastic. Some contract terms with jurisdictional import may fall within the spectrum of matters the parties intended the arbitrator to interpret. Others, however, do not. What remains in flux is how courts should draw this line.

B. Proper Parties

The law concerning the extent to which non-signatories to a contract containing an arbitration clause can become parties to an arbitration continued to develop in 2003. The Fifth Circuit emphasized that arbitration agreements may apply to nonsignatories only "in rare circumstances," and declined to compel the government of Turkmenistan to arbitrate even though the party seeking to compel arbitration had made the arbitration agreement with a government-owned entity.[23] The plaintiff entered into a joint venture agreement with a production association formed and owned by the government of Turkmenistan. The government itself was not a signatory to the agreement, but parties were designated in the agreement as "Foreign Party" and "Turkmenian Party."[24] The plaintiff initiated an arbitration proceeding when the government ordered it to suspend further work in Turkmenistan and prohibited it from making imports to and exports from the country. The government argued it was not a proper party to the arbitration because it did not sign the joint venture agreement. The Fifth Circuit agreed, noting the government did not sign the agreement and was not defined as a party therein. The court also held that while principles of contract and agency law may bind a nonsignatory to an arbitration agreement, the evidence here did not support an agency determination.

In contrast, a New York District Court permitted one non-signatory to enforce an arbitration award against another non-signatory. In *Data-Stream AS/RS Technologies, L.L.C. v. China International Marine Containers, Ltd.*,[25] the respondent sought to vacate an award, arguing it was not the proper party because the underlying breach of contract dispute was solely between its wholly-owned subsidiary and the petitioner. The court rejected this argument, finding the respondent's participation in the arbitration as the parent corporation and as a legitimate party waived its right to claim it should not be a party to the arbitration. The court also found the petitioner was an assignee of the corporation that entered into a

23. Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347 (5th Cir. 2003).
24. *Id.* at 351–52.
25. No. 02 Civ. 6530, 2003 WL 22519456 (S.D.N.Y. Nov. 6, 2003).

contract with the respondent and had standing to pursue confirmation of the award. Despite not being captioned as a party, the petitioner was an active and real party in interest. As assignee, it initiated the arbitration on the assignor's behalf, and the respondent treated it as the real party in interest in the arbitration.

While several Circuits have held that under certain circumstances a non-signatory may be estopped from opposing arbitration and thus compelled to arbitrate, in *DSMC, Inc. v. Convera Corp.*,[26] the D.C. Circuit held alleged estoppel would not support an interlocutory appeal under section 16(a)(1)(B) of the FAA. The court held section 16, which allows for interlocutory appeals from orders refusing a stay of any action pending arbitration or denying a petition to order arbitration, should be narrowly construed. Thus, section 16 was not a basis for the court to reach the question of whether the non-signatory should be estopped from resisting arbitration.

C. Agreements to Vary the Scope of Judicial Review

The courts also addressed whether parties may, by contract, alter traditional standards of judicial review of arbitration awards. In *Lapine Technology Corp. v. Kyocera Corp.*,[27] the Ninth Circuit had held parties can contract for heightened judicial review. In 2003, the Ninth Circuit decided *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*,[28] and reversed its *Lapine* holding. Seeking to preserve arbitration as a speedy, informal, and cost-efficient alternative to litigation, the court held parties cannot "dictate a broad standard of review when Congress has specifically prescribed a narrower standard" in the FAA.[29] The court also concluded that the invalid standard of review provision could be severed from the otherwise valid dispute resolution provision in the contract. The Ninth Circuit now concurs with the Tenth Circuit and differs from the Third, Fourth, and Fifth Circuits in disallowing contractual expansion of the scope of judicial review.[30]

The Eighth Circuit continued to "express skepticism as to whether parties can contract for heightened judicial review of arbitration awards" without resolving the issue because the parties had not "clearly and unmistakably" agreed to *de novo* review of the arbitration award.[31] The court relied on a number of Seventh Circuit decisions suggesting parties cannot contract to alter judicial review—decisions one district court cited to prohibit expansion of the scope of review.[32]

In *Hoeft v. MVL Group Inc.*,[33] the Second Circuit rejected agreements where parties contracted for a *narrower* scope of judicial review than otherwise afforded by law. The court also declined to adopt a middle ground approach allowing parties to eliminate the manifest disregard of the law grounds for review while preserving statutory grounds. Noting that

26. 349 F.3d 679 (D.C. Cir. 2003).
27. 130 F.3d 884 (9th Cir. 1997).
28. Kyocera Corp. v. Prudential-Bache Trade Servs., 341 F.3d 987 (9th Cir. 2003).
29. *Id.* at 994, 1000.
30. *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 937 (10th Cir. 2001); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 WL 452245, at *15-*17 (4th Cir. Aug. 11, 1997); Gateway Tech., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 997 (5th Cir. 1995).
31. Schoch v. InfoUSA, Inc., 341 F.3d 785, 788-89 (8th Cir. 2003).
32. Bargenquast v. Nakano Foods, Inc., 243 F. Supp. 2d 772, 776 (N.D. Ill. 2002) (citing Eljer Mfr., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1253 (7th Cir. 1994); Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991)).
33. 343 F.3d 57, 63-66 (2d Cir. 2003).

courts are not "rubber stamps" and "judicial standards of review, like judicial precedents, are not the property of private litigants," the court bristled at the notion that parties seeking to enforce arbitration awards through the federal courts could divest the courts' statutory and common-law authority to review arbitration awards.[34] The *Hoeft* decision diverges from the Third Circuit's suggestion that parties can narrow the grounds for statutory review.[35]

D. Manifest Disregard of the Law

Courts have attempted to define the outer bounds of arbitral power, with several 2003 decisions considering the judge-made rule that arbitral awards can be set aside not only for the reasons specified in the FAA but also for manifest disregard of the law. In *Duferco International Steel Trading v. T. Klaveness Shipping*,[36] the Second Circuit delineated three relevant inquiries in determining whether an arbitrator manifestly disregarded the law: (1) whether the allegedly ignored law was clear and plainly applicable to the matter before the arbitrator; (2) whether the law was in fact improperly applied, leading to an erroneous outcome; and (3) whether the arbitrator was fully aware of the law and its applicability, but intentionally disregarded it. Summarizing prior Second Circuit decisions, the court held the arbitrator's knowledge and intent should be inferred only if the arbitrator made an error so obvious it would be instantly perceived as such by the average person qualified to serve as an arbitrator. The challenged arbitration award arose from a dispute over who should be liable for a third party's damages and extra costs. Although the award "only arguably conform[ed] to legal standards," and was confusing because of seemingly contradictory rationale, the court identified a plausible reading that fit within the law and concluded the arbitrators did not intentionally defy the law.[37]

Consistent with this high standard for proving manifest disregard, the Second Circuit held there was no manifest disregard where the asserted law or its application to the facts was not clear. In *GMS Group, LLC v. Benderson*,[38] the court refused to vacate an award ordering payment of damages for giving faulty investment advice. The court found an award resting on application of an unclear rule of law to a complex factual situation does not evince manifest disregard, and found the NASD rules on investment advice did not clearly constitute law. The court also rejected the appellant's claim that an arbitration award implicating federal statutory rights should be scrutinized more rigorously than under the current manifest disregard standard.

For similar reasons, the Second Circuit reversed the District Court's invalidation of an award in *Hoeft*.[39] The party challenging the award asserted the arbitrator manifestly disregarded Generally Accepted Accounting Principles (GAAP). The court found no proof for this claim, and found GAAP insufficiently well-defined or explicit to constitute law. Notably, the District Court ordered the deposition of the arbitrator, who was then asked about the reasoning behind his award, a practice the Court of Appeals properly criticized.

The Fifth Circuit's exposition of the manifest disregard doctrine in recent decisions declining to overturn arbitral awards echoes the Second Circuit. Manifest disregard exists

34. *Id.*

35. *Roadway Package Sys., Inc.*, 257 F.3d at 293 ("Parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own.").

36. 333 F.3d 383, 389–90 (2d Cir. 2003).

37. *Id.* at 391–93.

38. GMS Group, LLC v. Benderson, 326 F.3d 75 (2d Cir. 2003).

39. Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003).

only if the arbitrator's error was "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator," and if "the arbitrator appreciated the existence of a clearly governing principle but ignored it."[40] The Seventh Circuit recently limited grounds for reversal further, finding manifest disregard "only when the arbitrator[] . . . orders the parties to violate the law."[41]

The general reluctance of courts to vacate awards for manifest disregard does not mean the doctrine is without force. In *Hardy v. Walsh Manning Securities, LLC*,[42] the Second Circuit found an arbitral award in manifest disregard because it appeared to be based on an unsupportable application of the *respondeat superior* doctrine. The award's confusing rationale distinguished it from the award in *Duferco International Steel Trading* because here the court could not discern any alternative reading of the award resolving the apparent error in applying *respondeat superior*.[43] Meanwhile, one might question *Hardy's* fidelity to the third *Duferco* element because it was not evident in *Hardy* that the arbitrators intentionally disregarded the law rather than merely getting it wrong. Perhaps recognizing this problem, the Second Circuit did not vacate the award, but instead directed the District Court to remand the dispute to the arbitral tribunal for further clarification of the award.

Intentional disregard of clearly applicable law may have been somewhat more evident in *Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*.[44] The court found the arbitration panel's award of attorneys' fees evidenced manifest disregard because the panel acknowledged a Minnesota Supreme Court decision effectively barring the statutory fraud claim on which recovery of fees rested, but ignored that decision by awarding the fees anyway. Unlike *Hardy*, this award was not remanded to the arbitral tribunal for further clarification.

District Courts in the Second Circuit followed *McDaniel v. Bear Stearns & Co.*,[45] expanding the manifest disregard doctrine to allow an award to be overturned for "manifest disregard of the evidence."[46] In *Tripi v. Prudential Securities, Inc.*,[47] the court remanded an award to the arbitrators. Given the overwhelming evidence of liability, the arbitration panel's award limiting without explanation an investor's recovery against a securities brokerage to just three percent of his losses was bizarre and shocking. In *Coutee v. Barington Capital Group, L.P.*,[48] however, the Ninth Circuit stated that while in some circumstances an arbitrator's failure to recognize undisputed, legally dispositive facts may properly be deemed a manifest disregard of the law, there is no independent "manifest disregard of the facts" ground for vacating an arbitration award. The extent to which courts will thus undertake

40. *See* Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395–96 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 281 (2003) (finding arbitration panel's refusal to compel discovery of certain evidence not manifestly contrary to law); Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 363 (5th Cir. 2003) (finding no error in arbitrator's determination of the discount rate in calculating damages for award in contract dispute).

41. Butler Mfg. Co. v. United Steelworkers of America, 336 F.3d 629, 636 (7th Cir. 2003).

42. 341 F.3d 126 (2d Cir. 2003).

43. *Id.* at 132.

44. 319 F.3d 1060, 1069 (8th Cir. 2003).

45. 196 F. Supp. 2d 343 (S.D.N.Y. 2002).

46. *See, e.g.*, Ono Pharm. Co. v. Cortech, Inc., No. 03 Civ. 5840, 2003 WL 22481379, at *2 (S.D.N.Y. Nov. 3, 2003); Broome & Wellington v. Levcor Int'l, Inc., No. 02 Civ. 6566, 2003 WL 21032008, at *3 (S.D.N.Y. May 7, 2003).

47. 303 F. Supp. 2d 349, (S.D.N.Y. 2003).

48. 336 F.3d 1128, 1133–34 (9th Cir. 2003).

a more traditional appellate function of arbitral awards, reviewing not merely the law but also the facts, remains to be seen.

E. Award Set Aside in Foreign Country

Echoing the well-known decision in *Chromalloy Aeroservices v. Arab Republic*,[49] in *Four Seasons Hotel and Resorts v. Consorcio Barr*,[50] a Florida court held, after arbitration in Miami, that a ruling by Venezuelan courts invalidating the arbitration agreements at issue under Venezuelan law did not bar enforcement of the award under the New York Convention. The court found the Venezuelan courts were not a "competent authority" to nullify the award, within the meaning of the Convention, because the arbitration agreements granted either party the right to seek enforcement, not nullification, of an award in a Venezuelan court. Although the arbitration involved Venezuelan substantive law and U.S. procedural law, the competent authority was the District Court in the arbitration forum of Miami. The court also noted the parties freely participated in the arbitration in the United States and had already debated the arbitrability of the dispute to the arbitral tribunal.

F. Waiver of Right to Arbitrate

Courts have long held a party may waive its right to arbitrate a dispute by taking steps to litigate. In *O.J. Distributing, Inc. v. Hornell Brewing Co.*,[51] the Sixth Circuit held a party who largely sits on its right to insist on arbitration waives the right. A supplier spent fifteen months denying the existence of a distribution agreement, to the distributor's prejudice. After months of communications and negotiations, and after the supplier defaulted in the distributor's court action, the supplier attempted to enforce the agreement's mandatory arbitration provision. The court found the supplier waived its right to arbitrate.

Colón v. R.K. Grace & Co.[52] also highlights the importance of timely insisting on the right to arbitrate. The First Circuit stated that although the FAA does not explicitly require an aggrieved party to take an immediate interlocutory appeal from a denial of a motion to compel arbitration, failure to do so may foreclose, by estoppel, that party's right to demand arbitration—a rule favored by three other circuits (Second, Fifth, and Eighth).[53] Estoppel, however, is not automatic and depends on a showing of prejudice. Prejudice was not shown where the trial was essentially completed before the District Court denied the motion to compel the arbitration.

Conversely, a party can preserve its objection to arbitral jurisdiction by consistently maintaining that objection.[54] The Third Circuit held a party opposing enforcement of a foreign arbitration award under the New York Convention for alleged invalidity of the arbitration clause is entitled to present evidence of such invalidity to the trial court, which must independently determine the agreement's validity. The court found a party who objects to

49. 939 F. Supp. 907 (D.D.C. 1996).

50. 267 F. Supp. 2d 1335, 1346–47 (S.D. Fla. 2003).

51. 340 F.3d 345, 357–59 (6th Cir. 2003).

52. No. 03-1206, 2003 WL 23191003 (1st Cir. Dec. 22, 2003).

53. *Id.* at *4 n.2 (citing Cargill Ferrous Int'l v. Sea Phoenix MV, 325 F.3d 695, 700 (5th Cir. 2003); John Morrell & Co. v. United Food & Commercial Workers Int'l Union, 37 F.3d 1302, 1303 n.3 (8th Cir. 1994); Cotton v. Slone, 4 F.3d 176, 180 (2d Cir. 1993)).

54. China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003).

jurisdiction alleging forgery of the underlying agreement does not waive its objection by participating in the arbitration. Although the party participated, it did so primarily to argue jurisdiction, to which it consistently objected.

G. Support for International Arbitration by Changes in Ethics Rules

It has long been the practice in international arbitrations for all arbitrators on a three-member tribunal, including the two party-appointed arbitrators, to be impartial and independent. This, however, was not traditionally the case in U.S. domestic arbitrations, where the two party-appointed arbitrators often functioned as advocates for the party who nominated them. The *Code of Ethics for Arbitrators in Commercial Disputes*, originally promulgated by the American Arbitration Association and the American Bar Association in 1977, sanctioned that practice by permitting party-appointed arbitrators to be "predisposed toward the party who appointed them," with the third arbitrator serving as the neutral.[55] The Code's non-neutrality presumption changed when a revised Code became effective on March 1, 2004. The revision establishes a presumption of neutrality for all arbitrators, including party-appointed ones, unless the parties' explicit agreement, agreed rules, or applicable laws provide otherwise. Canon II requires party-appointed arbitrators to make pre-appointment disclosures of any interest or relationship which might reasonably affect impartiality or lack of independence in the eyes of any party. The revision still maintains a set of alternative provisions for those opting-out of the neutrality presumption. Nevertheless, the revision's neutrality presumption is a meaningful step towards harmonizing international and domestic arbitration practice in the United States.

In a welcome retreat, a Florida Bar commission on the multijurisdictional practice of law recently published proposed bar rules that would exempt international arbitrations from new restrictions on the practice of law in Florida by out-of-state attorneys. The commission was prompted to act by the Florida Supreme Court's decision in *Florida Bar v. Rapoport*,[56] in which an out-of-state lawyer regularly representing clients in Florida securities arbitrations was found guilty of the unlicensed practice of law. In March 2003, the commission proposed amending the Florida bar rules to permit temporary practice by out-of-state attorneys in a variety of circumstances, including arbitrations. The proposed rules, however: (1) had no comparable provision permitting attorneys from foreign countries to practice in Florida; (2) limited out-of-state attorneys to three arbitrations per year; (3) required out-of-state attorneys to obtain leave to appear in arbitrations by filing a verified statement indicating confidential information about previous arbitrations handled in Florida; and (4) required a $250 filing fee per appearance.

The proposed rule changes generated a storm of controversy. Critics contended that they would deter parties from conducting international arbitrations in Florida and would threaten Miami's chances of becoming the headquarters of the 34-nation Free Trade Area of the Americas. Faced with these potential negative ramifications, the Florida Bar commission revised its proposal, expressly exempting international arbitrations from the new restrictions. The proposed rules, as revised, define international arbitration broadly, covering any arbitration where one party is a nonresident of the United States, or where the

55. American Arbitration Association, *The Code of Ethics for Arbitartors in Commercial Disputes*, Canon VII(A)(1) (1999), *available at* http://www.abanet.org/ftp/pub/dispute/arbdoc.txt (last visited May 10, 2004).

56. 845 So. 2d 874 (Fla. 2003).

contract in dispute involves property, an investment, or an entity outside of the United States, or requires performance or enforcement outside of the United States, or bears some other relation to one or more foreign countries.

The Florida experience follows a similar attempt in California to impose new regulations on domestic arbitrations that, unwittingly, would also have applied to international arbitrations in the state. As of July 1, 2002, California law requires neutral arbitrators in domestic arbitrations to disclose matters that might call their impartiality into question.[57] Disclosures are required on a myriad of subjects, including personal and professional relationships between the arbitrator and the parties or their lawyers; the arbitrator's prior cases involving a party, lawyer or law firm involved in the current arbitration; any financial or professional relationship between the arbitrator and a dispute resolution provider organization, if one is being used; and the arbitrator's membership in any organization practicing invidious discrimination based on race, sex, religion, national origin, or sexual orientation.[58]

California law now also requires neutral arbitrators to comply with a set of ethics standards promulgated by the state's Judicial Council.[59] These standards govern various subject areas, such as when an arbitrator must disqualify him or herself; duties and limitations on future professional relationships or employment with parties or their lawyers; ex-parte communications between arbitrators and parties or their lawyers; confidentiality; compensation; and the arbitrator's marketing of his or her services. These requirements have attracted heavy criticism. Some see them as unduly burdensome and in conflict with other laws regulating arbitrations. At least one federal court found application of these requirements to the New York Stock Exchange and other self-regulatory organizations preempted by the Exchange Act and the Federal Arbitration Act.[60]

Despite initial uncertainty, international commercial arbitrations have been explicitly exempted from these requirements in both the California Code of Civil Procedure and in the promulgated standards themselves.[61] Under California law, international commercial arbitrations are broadly defined as arbitrations where the parties have their places of business in different states, or where the place of arbitration is in a different state than where the parties have their places of business, or where some significant aspect of the subject matter of the arbitration is in a different state or more than one state.[62] Arbitrators participating in these types of arbitrations are not required to comply with the new ethics standards and disclosure regulations.

H. Ratification of the New York Convention

Following Brazil's lead, in 2003, two new countries, Nicaragua and Qatar, became Members of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

57. *See* Cal. Civ. Proc. Code § 1281.9 (West 2004); Cal. Rules of Court Code, Appx Div. VI, Standard 7 (Deering 2004).

58. *See id.*

59. *See* Cal. Civ. Proc. Code § 1281.85 (West 2004); Cal. Rules of Court Code, Appx Div. VI, Standards 4–15 (Deering 2004).

60. Mayo v. Dean Witter Reynolds, Inc., 258 F.Supp.2d 1097 (N.D. Cal. 2003).

61. *See* Cal. Civ. Proc. Code § 1297.17; Cal. Rules of Court Code, Appx, Div. VI, Standard 3(b)(2)(A) (Deering 2004).

62. *See* Cal. Civ. Proc. Code § 1297.13 (West 2004).

commonly known as the New York Convention. Nicaragua, the only major Latin American holdout to the Convention, ratified it on September 24, 2003, and it went into full force and effect there on December 23, 2003. Nicaragua also ratified the Inter-American Convention on International Commercial Arbitration, commonly known as the Panama Convention, on July 15, 2003, although it had been a signatory since the Panama Convention's inception in 1975.

Qatar's ratification of the Convention, which became effective on March 30, 2003, is significant in that now most Persian Gulf countries have ratified. Qatar, like many countries, ratified the Convention in part to promote foreign investment in its economy.

II. Investor-State Arbitration

There were significant developments in 2003 affecting investor-State arbitration. The International Center for the Settlement of Investment Disputes (ICSID) recorded an astounding thirty new cases. Eighteen were filed against the Republic of Argentina because of emergency economic measures it took at the beginning of this decade. Tribunals under the Washington (or ICSID) Convention or the Additional Facility rendered at least eleven awards,[63] and six decisions on jurisdiction. Eight are now publicly available.[64] A count of ICSID filings likely under-represents the number of new investor-State disputes because such proceedings can advance without detection if administered by other institutions or on an *ad hoc* basis under other rules, such as those of the United Nations Commission for International Trade Law (UNCITRAL).

At least two new claims were initiated under chapter eleven of the North American Free Trade Agreement (NAFTA); one against the United States,[65] the other against Mexico.[66] Concurrently, a number of chapter eleven cases advanced, resulting in two awards involving the United States[67] and numerous determinations on procedural matters. NAFTA parties continued to use their article 1128 prerogative to offer views on proper interpretations of NAFTA,[68] and at least two of the respondent States prosecuted set aside actions against award recipients, albeit unsuccessfully.[69] Chapter eleven tribunals continued to address jurisdictional and procedural matters, such as how to implement rulings permitting *amicus* briefs.[70] The literature addressing investor-State disputes enlarged in 2003, adding to an

63. The cases may be found on ICSID's website, http://www.wbg.org/icsid/cases/cases.htm (last visited May 10, 2004).

64. *See supra* note 61.

65. Tembec, Inc. v. United States (UNCITRAL Rules), Notice of Arbitration and Statement of Claim, *available at* http://www.state.gov/documents/organization/27805.pdf.

66. Corn Prod. Int'l v. Mexico, Notice of Intent to Submit Claim, *available at* http://www.naftalaw.org (last visited May 10, 2004).

67. Loewen v. United States, Final Award, June 26, 2003, Case No. ARB(AF)/98/3, *available at* http://naftalaw.org; ADF Group, Inc. v. United States, Final Award,. ARB (AF)/00/1, ICSID (World Bank, Jan. 9, 2003), *available at* http://www.naftalaw.org (last visited May 10, 2004).

68. Article 1128 states: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." North American Free Trade Agreement, Dec. 17, 1992, art. 1128, 32 I.L.M. 605 [hereinafter NAFTA].

69. Both brought in Canadian courts, these were: Mexico's petition in reaction to the final award in *Karpa v. Mexico*, in Mexico v. Karpa [2003] O.J. No. 5070, 2003 ON.C. LEXIS 4442, *available at* http://www.naftalaw.org (last visited May 10, 2004); and Canada's action following the damages award in *S.D. Myers v. Canada*, in Canada (Attorney General) v. S.D. Myers, Inc., [2004] F.C. 38 (Can.).

70. *See* Methanex v. United States (NAFTA Chapter 11 Panel, Jan. 15, 2001) (decision on "Amici Curiae" intervention), *available at* http://www.naftalaw.org; U.P.S. v. Canada (NAFTA Chapter 11 Panel, Oct. 17, 2001)

already remarkable list of writings addressing NAFTA chapter eleven[71] and investment arbitration in general.[72]

A. Jurisdictional and Admissibility Issues

A majority of investment dispute decisions published in 2003 addressed jurisdiction and admissibility issues. As in earlier years, the two jurisdictional issues most often addressed were the scope of the term "investment", and tribunal competency when faced with contractual references to other fora. But the year 2003 also brought some interesting new developments; for instance, arbitral tribunals addressed whether breaches of contract could be brought before an international arbitral tribunal established under a Bilateral Investment Treaty (BIT).

1. *Claim Relating to an Investment*

Arbitral tribunals usually construe the term "foreign investment" broadly, whether interpreting instruments that do not define the term (like the Washington Convention) or ones that do (like chapter eleven and numerous BITs). The award in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*[73] typifies this jurisprudence. Morocco argued the

(decision on Amicus Curiae intervention), ¶ 17, *available at* http://www.naftalaw.org (last visited May 10, 2004).

71. For a non-exhaustive chapter eleven bibliography compiled by this Committee, *see NAFTA Chapter Eleven–A Selective Bibliography*, 3 Int'l Arb. News 5 (Winter 2002/2003). Among the articles recently published are Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 Yale J. Int'l L. 365 (2003); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. Rev. 30 (2003); Charles H. Brower, II, *Structure, Legitimacy and NAFTA's Investment Chapter*, 36 Vand. J. Transnat'l L. 37 (2003); Charles H. Brower, II, *NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights*, 36 Vand. J. Transnat'l L. 1533 (2003); Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 Vand. J. Transnat'l L. 1381 (2003); Sanford E. Gaines, *Protecting Investors, Protecting the Environment—The Unexpected Story of NAFTA Chapter 11*, Greening NAFTA 173 (2003) (David L. Markell & John H. Knox eds.); David A. Grantz, *International Decision: Pope & Talbot, Inc. v. Canada*, 97 Am. J. Int'l L. 923, 937–50 (2003); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Measures "Relating to" Foreign Investors Under NAFTA Dispute Resolution*, 97 Am. J. Int'l L. 440 (2003); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: NAFTA Decision on Continuous Nationality and Local Remedies*, 97 Am. J. Int'l L. 700 (2003); Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate through the Eyes of a Property Theorist*, 33 Envtl. L. 851 (2003); Eduardo Siqueiros T., *NAFTA Chapter 11 Arbitration: Recent Developments*, 17 News & Notes Institute Transnat'l Arb. 1 (Winter 2003), *available at* http://www.cailaw.org/ita/publications.html; Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 Hous. J. Int'l L. 301 (2003); Madeline Stone, *Note: NAFTA Article 1110: Environmental Friend of Foe?*, 15 Geo. Int'l Envtl. L. Rev. 763 (2003); Todd Weiler, *Foreign Investment Law and the United States: You Can't Tell the Players without a Score Card*, 37 Int'l Law. 279 (2003) [hereinafter Weiler, *Foreign Investment Law*]; Todd Weiler, *NAFTA Chapter 11 Jurisprudence: Coming Along Nicely*, 9 Sw. J. L. & Trade Am. 245 (2003); NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (Todd J. Weiler, ed., 2004).

72. *See, e.g.*, Hans Bagner, *Swedish Appeals Court "Strikes Delicate Balance" In Czech Republic v. CME*, 18 Mealey's Int'l Arb. Rep. NewsBrief 19 (June 2003); Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 Ohio St. J. Disp. Resol. 5 (2003); Lawrence W. Newman & David Zaslowsky, *Dispute Resolution Opportunites for Foreign Investors*, 231 N.Y.L.J., Jan. 30, 2004, at 3, col. 1; David Williams, *International Commercial Arbitration and Globalization— Review and Recourse Against Awards Rendered Under Investment Treaties*, 4 J. World Invest. 251 (Apr. 2003).

73. ICSID (W. Bank) ARB/00/4 (July 21, 2001), 42 I.L.M. 609 (2003).

tribunal lacked jurisdiction because a highway construction contract was not an investment under Moroccan law. Though the BIT limited covered investments to those made "in accordance with laws and regulations of [Morocco]," the tribunal declined to let the domestic characterization control. The BIT defined investments broadly as rights of an economic nature, like those under the construction contract, and the BIT's reference to the laws and regulations of Morocco was better understood as referring to the investment's validity, not its classification.

To determine whether the construction contract was also a foreign investment under the Washington Convention, the *Salini* tribunal adopted certain criteria developed in academic writings, such as the existence of contributions, a certain duration in the performance of the contract, participation in the risks of the transaction, and contribution to the economic development of the host State. Examined in light of those factors, the disputed contract fell under the Convention.

The tribunal in *Methanex Corp. v. United States* found a jurisdictional limit in whether the challenged state measure related to the investment directly enough to trigger NAFTA protections.[74] The claimant marketed methanol, an ingredient in the gas additive MTBE, the sale of which California then banned. The United States largely succeeded in arguing California's MTBE ban was so remote from the investment in methanol production that it did not "relate to" an investment within the meaning of NAFTA article 1101.[75] In its Partial Award of August 2002,[76] the tribunal found a claim relying merely on a regulation's negative tertiary effects was not within its jurisdiction, because NAFTA's architects could not have intended a construction that placed no practical limit on the class of enterprises that might bring claims. The tribunal nevertheless acknowledged that the portion of the claim alleging a purposeful targeting of methanol producers might satisfy chapter eleven's "relating to" requirement. The tribunal authorized fresh pleadings, to be accompanied by evidentiary support, without prejudice to the possibility that the claim would again fail to invoke chapter eleven jurisdiction. Further pleadings ultimately followed.[77]

Some treaties exempt a category of investments from treaty protection. Article 1108(7) of NAFTA excludes procurement by a Party from chapter eleven's reach. In *ADF v. United States*,[78] a NAFTA tribunal addressed whether procurement by Virginia fell under that exception. ADF, a Canadian steel processor, alleged it was shut out of a federally-assisted Virginia highway project by American regulations, executed by the state, requiring steel for the project be processed domestically. ADF asserted violations of chapter eleven's guar-

74. Methanex Corp. v. United States (Dec. 2, 1999) (notice of arb.), *available at* http://www.naftalaw.org (last visited May 10, 2004).

75. *See generally* NAFTA, *supra* note 68, art. 1101.

76. Methanex Corp. v. United States (Aug. 7, 2002) (preliminary award of jurisdiction), ¶¶ 138–39, 147, 159, *available at* http://www.naftalaw.org (last visited May 10, 2004).

77. Methanex submitted new pleadings in January of 2003. The United States then sought a bifurcated approach isolating for preliminary treatment the article 1101 jurisdictional question (whether California intended to address remote suppliers like Methanex). In June 2003, the tribunal elected to join the jurisdictional issue to the merits. The tribunal noted the general rule favoring early treatment of jurisdictional issues expressed in the UNCITRAL Rules, but found the default guidance supplanted in the instant case by the intimate connection between the jurisdictional question and the merits. *See* Methanex v. United States, (NAFTA Chapter 11 Panel, June 2, 2003) (Order dismissing Respondent's motion for additional jurisdictional hearing), *at* http://www.naftalaw.org (last visited May 10, 2004).

78. ICSID (W. Bank) ARB(AF)/00/1 (Jan. 9, 2003), *available at* http://www.naftalaw.org (last visited May 10, 2004).

antees of national and most favored nation treatment and non-compliance with its restrictions on performance requirements. The tenability of ADF's claim depended largely on whether procurement by Virginia constituted procurement by a NAFTA Party. The tribunal ruled it did, relying on ordinary meaning and use of the term elsewhere in NAFTA. Because NAFTA did not reach Virginia's policies, the claim was dismissed.

2. *BIT Claim or State Law Claim*

a. Overlap of Contractual and BIT Dispute Settlement Clauses

Does a contract or concession clause referring disputes brought by the foreign investor exclusively to a domestic forum deprive a BIT tribunal of jurisdiction to hear treaty-based claims arising out of that same contractual relationship? The *ad hoc* committee in the *Vivendi* annulment proceedings addressed this question in 2002, but it recurred in 2003.[79]

The *Vivendi* committee distinguished contract claims from BIT claims. It held "where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract,"[80] but where

> the . . . basis of the claim . . . is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state . . . cannot operate as a bar to the application of the treaty standard.[81]

In *SGS v. Pakistan*,[82] the parties' contract included a clause requiring arbitration in Pakistan under Pakistani law. Pakistan initiated arbitration proceedings, arguing the Pakistani tribunal should have exclusive jurisdiction since SGS's claims were based on the contract. Relying on language in the Switzerland-Pakistan BIT invoked by the investor in the *Vivendi* annulment decision, the tribunal held it had exclusive jurisdiction over BIT-based theories of recovery but lacked jurisdiction over claims alleging only breach of contractual obligations.

The same principle was applied where the underlying contract provided for recourse to domestic courts. In *CMS v. Argentina*,[83] Argentina objected to the tribunal's jurisdiction because the project company's license referred all disputes to domestic courts, thus renouncing any other jurisdiction. The tribunal rejected this argument, finding such contract clauses do not affect jurisdiction under a BIT "as the functions of these various instruments are different."[84]

Similarly, in *Azurix v. Argentina*,[85] each of the contract documents required the concessionaire to submit to the courts of La Plata and expressly waived "any other forum or

79. Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID (W. Bank) ARB/97/3 (July 3, 2002), 41 I.L.M. 1135 (decision by the ad hoc annulment committee).

80. *Id.* ¶ 98.

81. *Id.* ¶ 101.

82. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID (W. Bank) ARB/01/13 (Aug. 6, 2003) (decision on jurisdiction), *available at* http://www.worldbank.org/icsid/cases/cases.htm (last visited May 10, 2004).

83. CMS Gas Transmission Company v. Argentine Republic, ICSID (W. Bank) ARB/01/8 (July 17, 2003), 42 I.L.M. 788 (decision on jurisdiction).

84. *Id.* ¶ 76.

85. Azurix Corp. v. Argentine Republic, ICSID (W. Bank) ARB/01/12 (Dec. 9, 2003) (decision on jurisdiction), ¶ 26.

jurisdiction that may correspond due to any reason." Argentina claimed the waiver language precluded claims under the dispute mechanisms contained in the Argentina-U.S. BIT. The tribunal, however, found the waiver language made little difference as it related only to contract disputes. Relying on *Vivendi* and *Lanco v. Argentina*, it reasoned the BIT claim embodied a dispute different from the contract actions to which the waiver referred. In that respect, the waiver language had added little to the exclusive forum clause often found in concessions "since the acceptance of the exclusivity of a forum implies by definition the renunciation of any other fora whether or not explicitly stated in the clause."[86] The case left open whether an investor and a State can contract around international law obligations agreed between States in a Treaty.

b. Jurisdiction of BIT Tribunals to Hear Contract Claims

One rationale for confining contract claims to contractually agreed domestic fora is that contractual obligations, including those of the host state, are ordinarily defined by municipal law, a system not coextensive with that of governing treaties. To quote the International Court of Justice, "[c]ompliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision."[87] State parties may in theory agree to transform breaches of contract into international law claims so that any breach of contract could be brought before a BIT tribunal. But whether the State parties intended to so elevate contract claims will depend on the wording of each individual BIT.

In BIT practice, two types of clauses may authorize contract claims before a BIT tribunal. First, the BIT's jurisdiction clause might expressly entrust to the tribunal any claims concerning the investment, including claims arising out of a contract. Second, the BIT's substantive obligations may be defined to include state compliance with contractual undertakings towards covered investors. The latter clause has become known as an umbrella clause, because it provides the cover of international arbitration under a BIT to all contractual obligations irrespective of whether the parties agreed to settle their contractual disputes in a different forum. During the period under review, both types of clauses figured prominently in jurisdictional contests. The tribunals in *Salini v. Morocco* and *SGS v. Pakistan* considered whether a broadly formulated jurisdictional clause may cover contract claims. The two tribunals, however, came to different conclusions, although the jurisdictional clauses under the two BITs were similar.

In *Salini v. Morocco*,[88] the jurisdictional clause of the Italy-Morocco BIT included "[a]ll disputes or differences, including disputes related to the amount of compensation due in the event of expropriation, nationalization, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party."[89] The tribunal noted the provision referred to all investment disputes and was hence too broad to exclude a contract claim. The tribunal, however, observed an important limitation: the scope of that clause was lim-

86. *Id.* ¶¶ 75–85.

87. *See* Elettronica Sicula S.p.A. (ELSI), (U.S. v. Italy), 28 I.L.M. 1111 (1989), ¶ 73.

88. Salini Construttori S.p.A. & Italistrade S.p.A. v. Kingdom of Morocco, ICSID (W. Bank) ARB/00/4 (2003), 42 I.L.M. 609 (decision on jurisdiction).

89. *Salini*, 42 I.L.M. 609 at 623–24.

ited to the investor and the host State, and thus did not cover distinct legal entities, even if they were governmental. Only if the State itself breached the contract could a claim be brought before the BIT tribunal, a ruling apparently intended to exclude breaches by state instrumentalities.

In *SGS v. Pakistan*,[90] the jurisdictional clause of the Switzerland-Pakistan BIT covered "disputes with respect to investments," which the tribunal found could include disputes arising out of a contract. The tribunal held, however, that the phrase was "descriptive of the *factual subject matter* of the disputes," but did "not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims."[91] The tribunal also found "no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties."[92] The issue will likely arise in a number of future investment disputes, and it remains to be seen which of the two views will prevail.

The tribunal in *SGS v. Pakistan* also considered an umbrella clause. SGS argued article 11 of the Switzerland-Pakistan BIT, in which Pakistan guaranteed to observe its commitments with respect to foreign investments, constituted an umbrella clause in which the Contracting Parties transformed contract breaches into BIT breaches. The tribunal, however, held SGS failed to provide clear and convincing evidence that the drafters of article 11 meant to give it such a broad scope, particularly because (1) it was an accepted principle that, under general international law, a violation of a contract between a State and an investor did not, by itself, constitute a violation of international law, and (2) such an interpretation would have far-reaching consequences: it would render the substantive BIT provisions superfluous, nullify any freely negotiated arbitration clause, and benefit ultimately only the investor. The tribunal added, however, that States may agree to treat breaches of State contracts with certain investors as BIT breaches provided they do so expressly or their intention to do so can clearly be established.

c. Fork-in-the-Road Clauses

Many BITs leave the investor with the choice of pursuing its claim before a domestic court or an arbitration tribunal under the BIT. The tribunals in *CMS Gas Transmission Co. v. Argentina* and *Azurix Corp. v. Argentina* considered whether the fork-in-the-road provision of article VII(3)(a) of the U.S.-Argentina BIT were triggered by the local company's resort to domestic fora.[93] Both confirmed what is rapidly becoming established arbitral jurisprudence: the clause is triggered only where the parties and cause of action are identical. Since the causes of action for the contract and BIT claims differed, recourse to local courts for breach of contract as opposed to breach of the BIT did not prevent submission of the BIT claims to arbitration. The tribunals also distinguished the investor from the local company; the latter's use of local courts did not trigger the fork-in-the-road provision because they were different entities.

90. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID (W. Bank) ARB/01/13 (Aug. 6, 2003) (decision on jurisdiction), *available at* http://www.worldbank.org/icsid/cases/cases.htm (last visited May 10, 2004).

91. *Id.* ¶ 161.

92. *Id.*

93. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) ARB/01/8 (July 17, 2003), 42 I.L.M. 788, 800 (decision on jurisdiction); Azurix Corp. v. Argentine Republic, ICSID (W. Bank) ARB/01/12 (Dec. 9, 2003), ¶¶ 86–92 (decision on jurisdiction).

d. Waiver, Forks, and Exhaustion

By leaving the foreign investor the choice between domestic court proceedings and international arbitration, the fork-in-the-road clause is based on an assumption that no exhaustion of local remedies is required.[94] Indeed, offering the foreign investor an alternative to domestic recourse for breaches of the host States' international legal obligations is one major innovation of investment treaties. Yet in *Loewen Group, Inc. v. United States*,[95] the tribunal effectively imposed an exhaustion requirement. The final award dismissing the claim on standing grounds contained lengthy dicta concluding the claim would have also failed, among other reasons, because Loewen, without satisfactory explanation, had not sought U.S. Supreme Court review of the state court proceedings giving rise to the claim. The *Loewen* tribunal reasoned that because exhaustion was a customary international law requirement, it applied unless article 1121 (requiring an investor's waiver of certain domestic proceedings before arbitrating) or another provision had supplanted the doctrine. The tribunal acknowledged the tension between an exhaustion requirement and article 1121, but—at least regarding alleged *judicial* violations of international law—declined to displace the exhaustion principle based merely on what it saw as the unclear implications of the waiver provision. The tribunal explained:

> It would be strange indeed if sub silentio the international rule were to be swept away [] [a]nd . . . a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than . . . review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties.[96]

Elsewhere, the *Loewen* tribunal, in a much discussed passage, returned to the theme of self-restraint and deference to domestic systems:

> [W]e find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself.[97]

There is little debate that, as a matter of principle, international arbitral tribunals should not become courts of appeal on matters of domestic law. If, however, the *Loewen* tribunal intended this settled precept to explain its views on exhaustion, its explanation seems unsatisfactory in light of chapter eleven's architecture and the unanswered question left in the award's wake.

To outline these concerns, first, the tribunal's construction of chapter eleven leads to superfluous treaty text because it is not clear what would be left to waive under article 1121

94. Last year's survey noted the apparent consensus among tribunals that exhaustion of local remedies was not a prerequisite to bringing an admissible claim under chapter eleven. *See* William W. Park, et al., *International Commercial Dispute Resolution*, 37 INT'L LAW. 445, 455 (2003); Coe, *supra* note 71, at 1418–25.

95. Loewen Group, Inc. v. United States, ICSID (W. Bank) ARB(AF)198/3 (June 26, 2003), ¶¶ 2, 142–164, 207–217.

96. *Id.* ¶ 162.

97. *Id.* ¶ 242.

if exhaustion was invariably a requirement. At the bringing of the claim the investor, per the *Loewen* dictum, would have fully pursued proceedings in domestic fora regarding the alleged chapter eleven breach. Treaties are ordinarily not interpreted so as to render functionless non-duplicative clauses. Interestingly, article 1121 is styled "Conditions Precedent to Submission of a Claim," which suggests the importance of the waiver procedure and indicates the place where an exhaustion requirement might have been found had one been originally intended.[98] Second, for claims against Mexico, exhaustion creates special challenges for claimants in light of the fork-in-the-road proviso conditioning Mexico's undertaking to arbitrate. Specifically, annex 1120.1 states a claimant may not assert a breach of chapter eleven in both the courts of Mexico and in chapter eleven arbitration. The proviso seems not to be merely a prohibition of parallel proceedings, but carries elective consequences. Though the proviso does not fully negate any supposed exhaustion requirement, it would make its fulfillment more perilous given the need to carefully tailor requests for relief to avoid reliance on NAFTA. Regardless, Mexico's caveat under the annex (like the Parties' crafting of the waiver requirement) demonstrates a concern for the details of claim admissibility that one might have expected to result in an express exhaustion requirement if exhaustion was intended. Third, an exhaustion requirement also comes into tension with chapter eleven's three year time bar, which has no express tolling provisions.[99] If the claim can arise through low level acts and omissions (the implication of NAFTA's scope provisions), but the claim cannot be brought before plausible appeals are exhausted, the three year period will often expire before the claim is admissible.

Importantly, the *Loewen* tribunal did not suggest the exhaustion predicate was applicable to all chapter eleven claims, declining instead to speculate on the impact article 1121 might have in other settings. If the exhaustion requirement is to be justified as a substantive requirement specific to denial of justice cases, the tribunal could have done more to establish that such an element inheres in denial of justice theory. Indeed, a random examination of other denial of justice cases does not support the notion that a ripe denial of justice claim *ex hypothesi* implies exhaustion.[100] Similarly, both accepted rules of state responsibility and NAFTA itself seem not to preclude low level judicial actions from engaging a NAFTA state's responsibility.[101]

Regardless, the reemergence of a generally applicable exhaustion requirement certainly would be troubling news for investors seeking to vindicate international law rights under a treaty. Prominent investor-State cases resulting in recovery for the investor have involved acts by State agents or instrumentalities who are not the highest domestic authority within that State, and in circumstances where either court or administrative review of those acts was at least notionally available to the investor or an associated entity. Exhaustion requirements in those cases, which might have required the investor to spend a considerable

98. *See generally* NAFTA, *supra* note 68, art. 1121.

99. *Id.* arts. 1116–17.

100. The *Mondev* tribunal, in discussing the denial of justice claim before it, regarded an investor's arbitral remedy as an alternative to domestic court proceedings, stating: "[u]nder NAFTA, parties have *the option* to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal." Mondev v. United States, ICSID (W. Bank) ARB (AF)/99/2 (Oct. 11, 2002), ¶ 126 (emphasis added).

101. The government acts to which chapter eleven is addressed include "any law, regulation, procedure, requirement or practice," a definition broad enough to cover some low level judicial errors. NAFTA, *supra* note 68, art. 201.

amount of money and time battling in domestic courts or administrative proceedings, might have effectively extinguished the claims.

e. Res judicata

The fork-in-the-road jurisprudence borrows heavily from traditional criteria developed primarily in the *res judicata* context for determining the identity between one proceeding and another. In *CME v. Czech Republic*,[102] the tribunal considered whether a previous arbitration award for a claim under the U.S.-Czech Republic BIT should preclude a claim under the Netherlands-Czech Republic BIT. The tribunal examined the two actions' parties, subject matter and causes of action, and found the triple-identity *res judicata* test was not satisfied. First, each arbitration was brought by a different party (but both against the Czech Republic). Second, the facts in the arbitrations were not found to be identical. Third, the arbitrations were based on BITs granting comparable, but not identical, protections. Triple-identity test aside, this was not the best case for State invocation of *res judicata*; the tribunal made clear that *res judicata* should not attach because the Czech Republic "expressly and repeatedly refused any coordination" of the arbitrations and "expressly and impliedly waived any *lis pendens* or *res judicata* defense."[103]

3. *Investor standing*

a. Indirect ownership

How much ownership or control must a foreign investor have over a local company to bring a claim before the arbitral tribunal? NAFTA article 1117 allows an investor to bring a claim "on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly."[104] In the *Loewen* case, Ray Loewen failed to prove he met the requirements of article 1117.[105] The tribunal let Loewen participate in the proceedings to investigate his stock ownership. Ultimately, his claim failed for lack of proof, the tribunal finding Loewen offered no evidence to demonstrate his interest.

The *SD Myers* case provides a broad interpretation of article 1117, holding that, in order to indirectly control the local project company (Myers Canada), it was not necessary to hold any shares in that company.[106] The Canadian entity at the center of that dispute was in fact owned not by SDMI (the U.S affiliate, a privately held Ohio corporation), but by SDMI's major shareholders; thus the investment vehicle was not a subsidiary of SDMI. Canada argued indirect control assumed share ownership, so managerial power centralized in SDMI's CEO did not alone suffice. The tribunal found SDMI had a claim with respect

102. CME Czech Republic B.V. (Netherlands) v. Czech Republic, (UNCITRAL arbitral tribunal, March 14, 2003).

103. *Id.* ¶¶ 426, 431 (emphasis added).

104. NAFTA, *supra* note 68, art. 1117.

105. Loewen Group, Inc. v. United States, ICSID (W. Bank) ARB(AF)198/3 (June 26, 2003), ¶ 239. *Loewen* arose out of a suit brought by an American plaintiff in a Mississippi court against a Canadian corporation and its U.S. subsidiary. Plaintiff alleged breach of contract, unfair competition and fraud. Per the tribunal's findings, plaintiff's trial strategy seemed designed to inspire jury prejudice against defendant's national origin. The trial court failed to properly intervene or mitigate the tactic's effects on the jury, which awarded plaintiff $500 million ($400 million as punitive damages). The Mississippi Supreme Court declined to relax the 125 per cent bonding requirement for appeals under Mississippi law. In January 1996, Loewen settled, agreeing to pay $175 million. Loewen did not seek U.S. Supreme Court review. Two Chapter 11 claims eventually followed. They advanced, among other bases of recovery, denial of justice (subsumed within article 1105's minimum standard).

106. Canada (Attorney General) v. S.D. Myers, Inc., [2004] Fed. Ct. 38 (reasons for order) (Can.).

to Myers Canada, despite not owning any of its shares.[107] The final word was given by a Canadian court, Canada having sought to set aside the award.[108] In finding the tribunal's construction of "investment" and "investor" did not warrant setting aside, the court noted control was not defined, in contrast to the approach taken in the Canada-U.S. Free Trade Agreement, which suggested purposeful flexibility. As fact-finders, the arbitrators were entitled to conclude, as they did, that SDMI's CEO directed the activities of the Canadian enterprise and closely orchestrated its relations with SDMI.

In BIT cases, the question of indirect control will depend, in the first place, on the specific language of the BIT. The U.S.-Argentina BIT, for instance, allows an investor who is a national of one Party to bring a claim against the other Contracting Party if it owns or controls directly or indirectly an investment in the territory of the other Contracting Party, which may consist, *inter alia*, of "shares of stocks or other interests in a company or interests in the assets thereof."[109] The language seems clear. A U.S. company, for instance, is entitled to assert a BIT claim against Argentina if it holds even a few shares, or any other interest, in an Argentine company. Argentina, in both *CMS* and *Azurix*, nevertheless argued a U.S. company would lack *jus standi* to bring a claim against Argentina. It relied on the venerable holding in *Barcelona Traction* that shareholders in a local project company lack the *jus standi* to file an indirect claim predicated on damage to the company itself. Consistent with holdings by other tribunals, arbitrators of both tribunals rejected that argument based on the wording of article 25 of the Washington Convention and Article I of the U.S.-Argentina BIT,[110] and in the case of the *CMS* tribunal, also on current international law that no longer followed the *Barcelona Traction* holding.[111] The *CMS* tribunal ruled that such standing also extends to non-controlling minority shareholders in the local entity, a view that comports with the awards in *Lanco* and *Vivendi*.

b. Nationality

Though the final award in *Loewen* contains wide-ranging merits-related dicta, the corporate claims were dismissed on jurisdictional grounds. In the process, the tribunal examined the continuous nationality principle and its relevance to chapter eleven claims. During the arbitration, the Canadian corporate claimant was reborn an American corporation, pursuant to a reorganization plan. The United States argued the claim had become one by a U.S. national against the United States, thus removing it from the tribunal's competency despite initial diversity.[112] The tribunal agreed, holding nationality must remain diverse throughout the arbitration under the continuous nationality rule established by international precedent.

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107. S.D. Myers, Inc v. Canada, (UNICITRAL arbitral tribunal, Nov 13, 2000) (dissenting opinion of Prof. Bryan P. Schwartz), ¶ 38.

108. Canada (Attorney General) v. S.D. Myers, Inc., [2004] Fed. Ct. 38 (reasons for order) (Can.).

109. Bilateral Investment Treaty, Nov. 14, 1991, U.S.-Arg., art. I.1(a), S. Treaty Doc. No. 103-2, 103d Cong., 1st sess. 1994.

110. CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) ARB/01/8 (July 17, 2003), 42 I.L.M. 788, (decision on jurisdiction), ¶¶ 43 *et seq*; Azurix Corp. v. Argentine Republic, ICSID (W. Bank) ARB/01/12, (Dec. 9, 2003) (decision on jurisdiction), ¶¶ 72–74.

111. *CMS Gas Transmission Co.*, ICSID (W. Bank) ARB/01/8, ¶¶ 43 *et seq*.

112. *See* Weiler, *Foreign Investment Law*, *supra* note 71, at 302–303; Loewen Group, Inc. v. United States, ICSID (W. Bank) ARB(AF)198/3 (June 26, 2003), ¶¶ 220–26.

The doctrine, according to the tribunal, required the qualifying nationality to persist from the time the claim arose through the date of its resolution. The tribunal could apply the rule because it had not been supplanted by NAFTA (which only speaks to nationality when the claim arises).[113] The tribunal distinguished the *Mondev* award,[114] in which another chapter eleven tribunal ruled the loss of an investment by foreclosure would not preclude the investor's claim.

B. Arbitral Procedure

1. *Amici*

Chapter eleven tribunals have considered recently the extent to which non-disputants may participate in proceedings. Though intervention (or other ways of adding a disputant) has been rightly precluded, the *UPS* and *Methanex* cases confirmed the permissibility of written *amicus* briefs. Operating under the UNCITRAL Rules, both tribunals were influenced by emerging pro-transparency policies, the public character of substantive issues often raised in investor-state arbitration, and the absence of any firm prohibition in either the UNCITRAL Rules or NAFTA. Though these rulings were handled as preliminary matters, they contemplated that, if permitted, such *amicus* filings would relate to the merits.[115] With that stage nearing in both proceedings the manner and content of such submissions arose again in 2003.

As well as treating the reserved issue whether such briefs would ever be called for,[116] the two tribunals confronted a number of related details. Among the questions raised in *Methanex* was whether the *amici* could address questions of both fact and law.[117] The tribunals agreed *amici* should be limited to questions of law. The United States disagreed, maintaining the *amici* might contribute equally to the tribunal's work by offering a perspective on factual matters. The tribunal announced its intention to invite *amicus* submissions to occur in January 2004, contemporaneously with the non-disputant Parties' article 1128 submissions. The tribunal deferred further questions about the role of *amici* until closer to the time.

2. *Use of the IBA Rules*

The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules)[118] enjoyed continued utility in investor-State arbitra-

113. *Loewen*, ICSID (W. Bank) ARB(AF)198/3 ¶ 237; *see* NAFTA, *supra* note 68, art. 1131(1). The relevant nationality was that of the enterprise as reorganized and not the Canadian assignee of the arbitral claim, an entity created to maintain the claim's nationality. (The claim assigned to it was its sole asset). For a critical review of the award, *see* Barry Appleton, *Loewen: A First Look at a Controversial Case*, 17 News & Notes Inst. Transnat'l Arb. 1 (Autumn 2003), *available at* http://www.cailaw.org/ita/publications.html.

114. Mondev v. United States, ICSID (W. Bank) ARB (AF)/99/2 (Oct. 11, 2002), ¶ 227, *available at* http://www.naftalaw.org (last visited May 10, 2004). Mondev is discussed in more detail in this Committee's Newsletter. *See Denial of Justice and NAFTA Chapter Eleven–The Mondev Award*, 3 Int'l Arb. News 2 (Winter 2002/2003).

115. *See, e.g.*, UPS v. Canada, (NAFTA Chapter 11 Panel, Oct. 17, 2001) (decision on petitions for intervention), ¶ 73.

116. In April 2003, the *UPS* parties were ordered to supply to the *amici* copies of all pleadings and the *amici* were invited to submit their views on the submitted written briefs. U.P.S. v. Canada, (NAFTA Chapter 11 Panel, April 4, 2003) (procedural directions for amicus submissions), at 2.

117. Response of Respondent to Request to Limit *Amicus Curiae* Submissions, (Methanex v. United States) (April 28, 2003), at 1.

118. *See generally* Michael Buhler & Carroll Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration: Novel or Tested Standards?*, 17 J. Int'l Arb. 3 (2000); Jack J.

tion. Certain chapter eleven tribunals incorporated that text into procedural orders, referring the parties there for detailed guidance on a range of evidentiary and discovery-related issues. In *Methanex*, the disputants were instructed to observe articles 4 and 5 of the IBA Rules in handling witness statements and expert reports, with the tribunal noting it might order the experts to meet and confer per article 5. In *GAMI Investments*,[119] the tribunal considered the IBA Rules "with respect to any issue not governed by the UNCITRAL Rules, section B of chapter XI of the NAFTA or this Procedural Order," and noted specific provisions as likely to be influential.[120]

C. Merits Issues

1. *Standard of Treatment*

The tribunal in *Tecmed v. Mexico*[121] found a Mexican regulatory authority's refusal to renew Tecmed's authorization to operate its landfill constitued, *inter alia*, a breach of the obligation to provide fair and equitable treatment under article 4(1) of the Mexico-Spain BIT. The award includes the most comprehensive definition so far of that obligation. The tribunal observed that under article 4(1), the Contracting Parties were obliged "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[122] The tribunal enumerated certain investor expectations protected by the clause. First:

> [T]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.[123]

Second, "the foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."[124] Third, "the investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."[125] The tribunal found: "[F]ailure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded

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Coe, Jr., *The Serviceable Texts of International Commercial Arbitration: An Embarrassment of Riches*, 10 Willamette J. Int'l L. & Disp. Resol. 143, 155–57 (2002).

119. GAMI Inv., Inc. v. Mexico, (NAFTA Chapter 11 Panel, Jan. 31, 2003) (Procedural Order No. 1).

120. *Id.* ¶ 15.

121. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID (W. Bank) ARB(AF)/00/2 (May 29, 2003), *available at* http://www.worldbank.org/icsid/cases/awards.htm#award24.

122. *Id.* ¶ 154.

123. *Id.*

124. *Id.*

125. *Id.*

by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle."[126]

2. *Denial of Justice*

The *Loewen* tribunal discussed the standard applicable to denial of justice cases under NAFTA article 1105. With seeming approval it recited the test enunciated in the *Mondev* award.[127] Under that formulation, to violate the customary law underlying article 1105, a decision must be "clearly improper and discreditable" when viewed in light of all the facts and "generally accepted standards of the administration of justice."[128] Regarding prejudice suffered by the claimants, the tribunal noted that while it was not empowered to rectify mere breaches of municipal law, "[i]nternational law . . . [attaches] special importance to discriminatory violations of municipal law."[129] The award ultimately concluded the treatment given the investor, tested against these norms, violated article 1105. The award did so in the firmest of terms.[130]

3. *Measuring Damages*

The tribunals in *CME v. Czech Republic, First Eagle v. Bank for International Settlements* and *Tecmed v. Mexico* awarded compensation for the taking of the investors' respective assets. In assessing the compensation due, all three tribunals agreed that market value was best defined "as the fair value of the transaction on an arms' length basis, where both parties to the transaction have knowledge of the applicable circumstances."[131]

The tribunal in *CME v. Czech Republic*[132] derived the fair market value of the expropriated TV station from an offer made by media conglomerate SBS to CME's parent company in contemplation of a proposed merger. While that merger had not been consummated, the tribunal found the SBS offer, made only six months before the taking, constituted "an objective view of the fair market value of [the expropriated company] CNTS in February/March 1999 by a third party purchaser on the basis of arms-length negotiations."[133] The tribunal determined the value of CNTS to be $400 million (U.S.). The tribunal found the value of the investment remained unaffected by events occurring after the offer but before completion of the taking.[134]

126. *Id.*

127. Mondev v. United States, ICSID (W. Bank) ARB (AF)/99/2, (Oct. 11, 2002), *available at* http://www.naftalaw.org (last visited May 10, 2004).

128. Loewen Group, Inc. v. United States, ICSID (W. Bank) ARB(AF)198/3 (June 26, 2003), ¶ 133 (quoting *Mondev*, ICSID (W. Bank) ARB (AF)/99/2).

129. *Id.* ¶¶ 134–135 (citing, *inter alia*, *Harvard Draft Convention on the Responsibility of States for Damage Done in their Territory to the Persons or Property of Foreigners*, 23 Am. J. Int'l L. 133, 174 (Supp.1929)).

130. The tribunal wrote, for example: "By any standard of measurement, the trial . . . was disgrace. By any standard of review, the tactics of [plaintiff's]lawyers, . . . were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due." *Loewen*, ICSID (W. Bank) ARB(AF)198/3, ¶ 119.

131. *See Técnicas*, ICSID (W. Bank) ARB(AF)/00/2, ¶ 191.

132. CME Czech Republic B.V. (Netherlands) v. Czech Republic, (UNCITRAL arbitral tribunal, March 14, 2003).

133. *Id.* ¶ 514.

134. *Id.* ¶ 534. From that amount, the tribunal deducted $72 million to account for damage done by the claimant's partner Dr. Zelezny to the value of the claimant's Czech Republic investment. As the tribunal had held in its Partial Award on liability, it was the collusion of Dr. Zelezny with the Czech Media Council that led in the first place to the BIT breaches by the Czech Republic.

Although not strictly-speaking an investment treaty case, the award in *First Eagle v. Bank for International Settlements*,[135] effectively $500 million (U.S.) against an international organization, contained reasoning that may be apt to evaluating damages in investment treaty cases. The *First Eagle* tribunal valued expropriated shares traded on the Zurich and Paris stock exchange at almost a quarter of their proportionate part of the Bank's Net Asset Value (NAV).[136] The tribunal observed it had to value the shares based on the Bank's constituent instruments, which constituted *lex specialis* under general international law, even if that law permitted reliance on trading value. The Bank's statutes provided for equality of property rights in ongoing profits of the business and its assets on liquidation. Accordingly, the tribunal held the shares should be valued per their proportionate share of the Bank's NAV, which corresponded with the Bank's historic record of valuing the shares. The tribunal further rejected any discounts to the NAV for lack of voting rights, reduced marketability, and restrictions arising from the double veto, all of which it deemed "inapposite in an NAV analysis in an entity whose constituent instruments establish the equality of the right of all shares to the assets of the company."[137] The tribunal, however, applied a 30 percent discount to the NAV because of the Bank's record in applying such a discount in pricing shares issued to new central banks. The discount was based on what the tribunal described as a hypothetical liquidation value, which was set forth in an internal 1969 memorandum and which assumed a substantial diminution in the value of the Bank's assets.

In *Tecmed S.A. v. Mexico*, the tribunal also looked to determine fair market value by reference to actual pricing made prior to the arbitration.[138] For the value of the expropriated landfill, it started with the price Tecmed paid two years before the expropriation. It then took account of other factors, like additional investments made, the contribution of management and client development, an increase in the landfill's operation (and other good will), and lost profits.

Where fair market value is determinable based on a reliable arms-length transaction, other valuation methodologies, like discounted cash flow (DCF) method, may not be necessary. The *Tecmed* tribunal rejected DCF methodology, finding the project's infant stage provided too few objective data for a reliable DCF analysis—future cash flow projection would have required speculation about as yet unmade investment decisions and commitments.[139] In *CME v. Czech Republic*, however, the TV station had been functioning profitably for several years, and substantial effort had been devoted by management, SBS in the context of the merger offer, and independent analysts to develop forecasts of future profits. Moreover, both the claimant and respondent presented DCF analyses, which the tribunal could use to confirm the value of the expropriated company. The tribunal observed the DCF calculations were dependent "on disputed assumptions" not on "hard facts or plausible arguments" and thus contained "a rather high element of uncertainty

135. Reineccius v. Bank for Int'l Settlements, (Perm. Ct. Arb. Nov. 22, 2002) (partial award), *available at* http://www.pca-cpa.org/ENGLISH/RPC/BIS/EPA.pdf.

136. *Id.* ¶ 161.

137. *Id.* ¶ 199.

138. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID (W. Bank) ARB(AF)/00/2 (May 29, 2003), ¶¶ 193–195, *available at* http://www.worldbank.org/icsid/cases/awards.htm#award24.

139. *Id.* ¶ 186 (citing Metalclad Corporation v. United Mexican States, ARB (AF)/97/1, 16 MEALEY'S INT'L ARB. REP., at A-1 *et seq.*, A-14/A-15, 119–122 (2000); Phelps Dodge Corp. v. Islamic Republic of Iran, 10 IRAN-U.S. CLAIMS TRIBUNAL REP., p. 121 *et seq.* (1986), 30 IRAN-U.S. CLAIMS TRIBUNAL REP, pp. 132–33 (1989); Wena Hotels v. Arab Republic of Egypt, ARB/98/4 (December 8, 2000), ¶¶ 122–125, 41 I.L.M. 896, 918–19 (2002)).

and speculation."[140] Consequently, they should be used primarily to confirm "the Tribunal's findings in assessment of the SBS offer," which it regarded as more reliable.[141]

Awards to date indicate widespread acceptance that an award of damages should also include interest, but there is not a single widely accepted rate or method for calculating interest. The purpose of an award of interest is restitution. But tribunals have taken different approaches to reach this goal, both in the nominal interest rate, and in whether interest should be calculated on a simple or compound basis. The *First Eagle* and *CME* tribunals both opined "[i]nternational law does not prescribe a specific rate of interest,"[142] and accordingly looked to the domestic statutory rate most warranting application. In *First Eagle*, the Swiss five percent simple interest statutory rate was selected after the tribunal applied a "closest connection" choice of law analysis. Swiss law had the closest contacts because the Bank had its seat and operational center in Basle, had made dividend payments in Swiss francs, is obliged to pay interest in Swiss francs, and had dealt with the excluded private shareholders in Switzerland. In *CME v. Czech Republic*, the tribunal applied the Czech statutory rate for judgments.[143] The tribunal did not award compound interest because Czech law provides for simple interest, which afforded sufficient compensation given the generous Czech interest statute. In *Tecmed v. Mexico*, the tribunal awarded six percent compounded annually, holding "compound interest has been accepted in a number of awards," in particular in expropriation cases.[144] The six percent rate was not disputed by the parties.

D. Annulment Proceedings

1. *Internal Mechanisms*

The *Loewen* case illustrates that certain perceived defects in an award may, at a party's request, be subject to corrective actions by the rendering tribunal, although ordinarily the tribunal may not be asked to re-adjudicate matters already decided. The types of reprocessing that may be requested are governed by the *lex arbitri* and applicable rules, and typically relate to clerical errors, overlooked claims, or textual ambiguity. In *Loewen*, disputants on both sides requested supplemental awards relying on article fifty-eight of the Additional Facility Rules. The United States returned to the tribunal for a clarification about Mr. Loewen's individual claim under article 1116 (as distinct from the Loewen corporate claims or Mr. Loewen's article 1117 claim).[145] Mr. Loewen's petition for a supplemental award also referenced his article 1116 claim, but argued the tribunal "completely overlooked" it when deciding the corporate claims.[146] Mr. Loewen urged the tri-

140. CME Czech Republic B.V. (Netherlands) v. Czech Republic, (UNCITRAL arbitral tribunal, March 14, 2003), ¶¶ 595, 604.

141. *Id.*

142. *Reineccius*, ¶¶ 91, 94, *available at* http://www.pca-cpa.org; *CME Czech Republic B.V. (Netherlands)*, ¶ 636 (noting neither international law nor the BIT gave the applicable interest rate).

143. *CME Czech Republic B.V. (Netherlands)*, ¶¶ 636–640.

144. *Técnicas*, ICSID (W. Bank) ARB(AF)/00/2, ¶¶ 196–97, *available at* http://www.worldbank.org/icsid/cases/awards.htm#award24.

145. Request for Supplementary Decision (Loewen Group, Inc. v. U.S.), ICSID (W. Bank) ARB(AF)198/3 (Aug. 11, 2003), *available at* http://www.state.gov/documents/organization/23325.pdf. (last visited May 10, 2004).

146. Article 58 Submissions as to Raymond L. Loewen's Article 1116 Claim (Loewen Group, Inc. v. U.S.), ICSID (W. Bank) ARB(AF)198/3, (Sep. 19, 2003), *available at* http://www.state.gov/s/l/c3755.htm (last visited May 10, 2004).

bunal to "return to the merits and decide the merits of his claim in accordance with all the submissions."[147]

2. *Set Aside Actions*

During 2003, Canadian courts again decided set aside actions brought by a NAFTA party. In *Mexico v. Karpa*, Mexico sought such relief.[148] In December 2002, the arbitration tribunal, sitting in Ottawa, Canada, issued an award finding Mexico failed to give national treatment to a U.S. investor in connection with certain tax rebates. Mexico was ordered to pay approximately seventeen million pesos, but it eventually pursued a set aside action in the Ontario courts. The grounds relied upon, supplemented by theories offered after Canada intervention, included: the tribunal impermissibly drew negative inferences, thus preventing Mexico from presenting its case; the tribunal violated a non-disclosure prerogative conferred on Mexico by NAFTA, thus diverging from the disputants' agreed procedure; and, the award violated Ontario public policy by ordering compensation for rebates to which the investor was not entitled under domestic law.

In November 2003, the Ontario Superior Court declined to set aside the award. Applying the governing Model Law-based statute, the court rejected Mexico's theories of annulment. The court's approach to Mexico's petition reflected a strong provincial policy favoring arbitration, the unquestioned expertise of the tribunal members, the limited nature of the applicable set aside grounds (which replicate Model Law article thirty-four), and the deference to which arbitrators are ordinarily entitled. The negative inference Mexico complained of arose because Mexico failed to adduce certain evidence in the face of the claimant's *prima facie* discrimination case. Mexico had attributed its failure to adduce evidence to restrictions based in domestic privacy law. The tribunal disagreed, concluding Mexico was not prevented, under Mexican law, from offering evidence. The Ottawa court, though confirming that it was precluded from review on the merits, concurred with the tribunal's assessment of the Mexican privacy law. Neither the impingements on Ontario's public policy alleged by Mexico, nor the tribunal's evidentiary rulings, nor its finding and quantification of liability provided grounds to set aside the award.

The proceeding is noteworthy in at least two respects. First, the Ontario court evinced a more deferential attitude to a two-arbitrator award with a robust dissent than the British Columbia court did to a unanimous award in *Metalclad*.[149] This more rigid self-restraint comports with the Model Law, with Canadian arbitral jurisprudence,[150] and with the freshly issued set aside judgment in *S.D. Myers*.[151] Second, Canada intervened in the proceeding, as in *Metalclad*, thus demonstrating multiple views will typically be before the trial judge in set aside actions, at least in Canadian courts. Successful claimants should anticipate a dual

147. *Id.*

148. Mexico v. Karpa, [2003] O.J. No. 5070, 2003 ON.C. LEXIS 4442 (Can.).

149. *See generally* Todd J. Weiler, *Metalclad v. Mexico—A Play in Three Parts*, 2 J. WORLD INVEST. 685 (2001).

150. *See* Quintette Coal, Ltd. v. Nippon Steel Corp., [1990] S.C.R. 2 (Can.); Automatic Sys., Inc. v. Bracknell Corp. [1994] 18 O.R. (3d) 257 (Can).

151. The set aside action in *S.D. Myers* quickly generated a judgment once the parties were heard in December 2003. Canada (Attorney General) v. S.D. Myers, Inc., [2004] Fed. Ct. 38 (reasons for order) (Can.). The Canadian federal court declined to set aside the tribunal's award. It was influenced by the tribunal's expertise, the deference owed to the arbitrators under Canadian law, and Canada's failure to timely raise the jurisdictional issues before the tribunal. For reasons broadly similar to those given in *Karpa*, Canada's public policy argument also failed.

attack: the intervening non-disputant NAFTA Parties' views are usually allied with those of the disputant Party.

In Sweden, the Czech Republic sought annulment of the Partial Award of September 13, 2001, issued in the arbitration proceedings initiated by CME against the Czech Republic.[152] The Czech Republic alleged, *inter alia,* (i) the majority of the arbitration tribunal excluded the Czech appointed arbitrator, Dr. Hándl, (ii) the tribunal failed to apply Czech law, and (iii) the tribunal lacked jurisdiction, because the award rendered in the arbitration proceedings between Lauder and the Czech Republic was *res judicata.* The Stockholm Court of Appeals unanimously rejected all of those allegations, confirming the validity of the Partial Award.[153] One interesting feature of the Swedish court proceeding was the extent to which it addressed the nature of arbitral deliberations, in connection with which the court admitted into evidence the documentary records of the deliberations including drafts of the award, and took the testimony of each arbitrator. Swedish procedural law provided no method like a U.S. style motion to dismiss, or for summary judgment that might have avoided such an intrusion into the deliberative process.

Examining the allegation that the dissenting arbitrator had been excluded from the deliberations, the Swedish Court of Appeals noted the Swedish Arbitration Act contains no formal requirements as to the manner in which the arbitrators' deliberations shall be conducted. Deliberation procedures are not proscribed in detail, "to allow for the possibility to smoothly and expeditiously adapt the various stages in the proceedings to the circumstances of the particular case."[154] The lack of encumbering detail, in the words of the court, "promotes the public interest of promptness and flexibility in arbitration proceedings."[155] The Swedish court concluded the dissenting arbitrator participated in the deliberations, received all essential communications between the arbitrators, and had reasonable deadlines to express his views. It thus rejected the Czech Republic's allegations about arbitrator exclusion as "unproven and close to groundless,"[156] strong language for a Swedish court and a welcome conclusion for international arbitration generally.

152. Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919 (Swedish Court of Appeals 2003).
153. *Id.* at 971.
154. *Id.* at 961.
155. *Id.*
156. *Id.* at 963.