DISPUTES

International Commercial Dispute Resolution

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I. Developments in Investor-State Arbitration

A. Awards on the Merits—Summary of Outcomes

Relatively robust activity characterized the investor-state docket in 2005. Between December 2004 and November 2005, five awards on the merits were issued in Investor-State treaty-based arbitrations: *Petrobart Ltd. v. Republic of Kyrgyz*,[1] *Methanex Corp. v. United States*,[2] *Eureko B.V. v. Poland*,[3] *Noble Ventures, Inc. v. Romania*,[4] and *CMS Gas Transmission Co. v. Argentina*.[5]

Petrobart Ltd. v. Republic of Kyrgyz concerned a contract for the supply of condensate gas between Petrobart Limited, a company registered in Gibraltar, and Kyrgyzgasmunaizat (KGM), a state joint stock company wholly-owned by the government of the Republic of

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1. Petrobart Ltd. v. Kyrgyz Republic, Arbitral Award Case No. 126/2003, Stockholm Chamber of Commerce Arbitration Inst. (Mar. 29, 2005), *available at* www.iisd.org/pdf/2005/investsd_petrobart_kyrgyz.pdf. The award was rendered under the Energy Charter Treaty and the arbitration proceedings were governed by the rules of the Stockholm Arbitration Institute. The tribunal was composed of former Justice Hans Denelaus, Professor Ove Bring, and Mr. Jeroen Smets.

2. *See* Methanex Corp. v. United States, Final Award, NAFTA Trib. (Aug. 8, 2005), *available at* http://www.state.gov/documents/organization/51052.pdf. The tribunal was composed of Mr. J. William F. Rowley, QC; Professor W. Michael Reisman; and V.V. Veeder, QC.

3. Eureko B.V. v. Republic of Poland, Partial Award (Aug. 19, 2005), *available at* http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf. The tribunal was composed of Mr. L. Yves Fortier, CC, QC; Judge Stephen M. Schwebel; and Professor Jerzy Rajski.

4. Noble Ventures, Inc. v. Republic of Romania, ICSID (W. Bank) Case No. ARB/01/11 (2005), *available at* http://ita.law.uvic.ca/documents/Noble.pdf. The tribunal was composed of Professor Karl-Heinz Böckstiegel; Sir Jeremy KCMG, QC; and Professor Pierre-Marie Dupuy.

5. CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8 (2005), *available at* http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf.

Kyrgyz. After KGM failed to pay certain invoices, Petrobart obtained a favorable ruling from the local arbitration court. Execution of the award was stayed for three months, at the request of Governmental authorities[6] who, at a later stage, pursued a stabilization program that rendered KGM insolvent by transferring its assets to other entities controlled by the state. Petrobart claimed that the Kyrgyz authorities' interference in the court's proceedings, the stripping of KGM's assets, and other measures taken by the Republic of Kyrgyz, breached the Energy Charter Treaty of 1998.[7] Agreeing with the investor, the tribunal awarded it US $1,130,859 (with interest), but declined to award compensation for lost profits. The Republic of Kyrgyz has challenged the award before the Swedish courts.

Methanex Corp. v. United States arose from a change in California law that precluded sales of gasoline containing the additive MTBE by the end of 2002. The measure was ostensibly motivated by health and safety concerns. Methanex, a Canadian corporation, produces an ingredient used to make MTBE. It brought a claim alleging that the ban on MTBE violated NAFTA[8] Chapter Eleven. It sought US $970 million in compensation. In August of 2005, the Tribunal dismissed all of its claims.

Eureko B.V. v. Poland related to privatization of a state-owned insurance company and the government's alleged failure to make a public offering that would have allowed Eureko B.V. to take control of the company. In a partial award on liability, the Tribunal decided (with one dissenting opinion)[9] that Poland had breached BIT obligations.

Noble Ventures, Inc. v. Romania, brought under the U.S.–Romania BIT,[10] concerned a privatization agreement between a U.S. investor, Noble Ventures, Inc. (Noble), and the Romanian Government, regarding a state-owned steel mill, CSR, and related assets. Noble claimed that Romania misrepresented CSR's assets, failed to perform in good faith certain contractual obligations, failed to provide full protection and security during a period of labor unrest,[11] and initiated insolvency proceedings to deprive Noble of the effective use of its investment. The Tribunal found no treaty breaches and dismissed all of Noble's claims.

CMS Gas Transmission Co. v. Argentina was the first decision on the merits in the many claims arising out of Argentina's emergency measures following the financial crisis that began in late 2001. CMS held a minority interest in Transportadora de Gas del Norte (TGN), which was granted a license to transport gas for thirty-five years. TGN's license, as well as laws, regulations, and the memorandum offering shares in TGN, said its tariffs were to be calculated in U.S. dollars, converted to pesos at the time of billing and tariffs would be adjusted every six months in accordance with U.S. inflation. CMS claimed at the ICSID that Argentina's unilateral amendment of the form of the tariffs breached Argen-

6. The Tribunal made a specific reference to a Vice Prime Minister letter, asking the Court's Chairman to "assist in granting a deferral of the enforcement." *See Petrobart Ltd.*, Arbitral Award Case No. 126/2003, at 75.

7. *See* Energy Charter Treaty, European Energy Charter Conference, Dec. 20, 1993, *available at* http://www.encharter.org. The Energy Charter Treaty was signed in Lisbon on December 17, 1994, and entered into force in April 1998, following completion of the thirtieth ratification.

8. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

9. *See Eureko B.V.*, Partial Award.

10. Romania Bilateral Investment Treaty, U.S.-Rom., May 23, 1992, S. TREATY Doc. No. 102-37 (1994), *available at* http://www.bilaterals.org/IMG/html/US-ROM_BIT_1994_.html (treaty between the Government of the United States of America and the Government of Romania concerning the Reciprocal Encouragement and Protection of Investment of 28 May 1992).

11. *Noble Ventures, Inc.*, ICSID Case No. ARB/01/11, ¶ 15.

tina's obligations under the Argentina-U.S. BIT. The ICSID Tribunal awarded CMS US$133 million plus interest in damages.

B. Fair And Equitable Treatment

To varying degrees and without full unity, the awards under consideration address the content of the "fair and equitable treatment" obligation prevalent among BITS. Though not accounting for all recent cases, two reasoning trends can be identified. The first is an approach that focuses on the investor's expectations when making the investment.[12] The award in *Eureko B.V.*, for example, endorses the expectation-based approach by citing, with approval, *Tecmed v. Mexico*[13] an award that elaborated upon the importance of an investor's expectations.[14]

The second approach, associated in particular with the NAFTA cases, equates fair and equitable treatment with customary international law's minimum standard, as dictated by an interpretation issued by the NAFTA Free Trade Commission (FTC) in 2001.[15] While legitimate expectations are relevant to this second approach, liability seems to depend on the investor demonstrating a relatively high degree of arbitrariness or unreasonableness.[16]

In relation to fair and equitable treatment, *Methanex* is noteworthy in at least two aspects. First, it endorses the binding character of the controversial interpretation of 1105 NAFTA issued by the FTC in 2001.[17] Second, the Tribunal posited that discrimination between nationals and aliens contravenes customary international law only by way of exception. Accordingly, that the claimant had received treatment different from that of a national

12. *See* Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2 (2003), *available at* http://www.investmentclaims.com/decisions/Tecnicas-Mexico-Award-29May2003-Eng.pdf; *see also* MTD Equity Sdn. Bhd v. Republic of Chile, ICSID (W. Bank) Case No. ARB/01/7 (2004), *available at* http://www.investmentclaims.com/decisions/MTD-Chile-Award-25May2004.pdf; *see also* Occidental Exploration & Prod. Co. v. Republic of Ecuador, LCIA Case no. UN3467 (2004), *available at* http://www.investmentclaims.com/decisions/Occidental-Ecuador-FinalAward-1Jul 2004.pdf; *see also* CMS Gas Transmission, ICSID (W. Bank) Case No. ARB/01/8.

13. *See Tecmed*, ICSID (W. Bank) Case No. ARB (AF)/00/2.

14. More recently, subsequent to the period covered by this report, the separate opinion in *Thunderbird v. Mexico* provided a rich exploration of the role of investor expectations in relation to fair and equitable treatment. *See* Thunderbird v. Mexico, NAFTA Ch 11, Award of January 26, 2006 (Sep. Op. of Thomas Waelde), *available at* http://www.naftaclaims.com.

15. *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.

16. *See* Waste Mgmt. v. United Mexican States, ICSID (W. Bank) Case No. ARB (AF)/00/3, 43 I.L.M. 967, (2004), *available at* http://www.investmentclaims.com/decisions/WasteMgmt-Mexico-2-FinalAward-30Apr2004.pdf. The tribunal did a thorough review of the existing international case law on this topic,

> the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and [candor] in any administrative process.

For a similar approach, but in a case under an investment treaty, *see* Genin v. Republic of Estonia, ICSID (W. Bank) Case No. ARB/99/2 (2001), *available at* http://www.investmentclaims.com/decisions/Genin-Estonia-Award-25Jun2001.pdf.

17. *See Methanex*, Final Award, NAFTA Trib., at part IV, chap. C, p. 9, ¶ 20.

would not constitute a breach of the minimum standard unless claimant established that a specific customary rule required equal treatment under the circumstances.[18] The tribunal regarded the claimant's authority to be insufficient for that purpose.

Noble Ventures assessed the fair and equitable treatment provision in the governing BIT as a matter of treaty construction. Based on the ordering of the clauses, the tribunal observed that fair and equitable treatment might be viewed as a general duty composed of specific obligations including: the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures, and the obligation to observe contractual obligations towards investors.[19] The more specific guarantees had not been violated. Though the tribunal reasoned that, in theory, the lesser-included undertakings need not be breached for there to have occurred an actionable lapse in fair and equitable treatment, the facts did not establish such a breach in the case at hand,[20] in part because the state was responding to dramatic economic conditions.[21]

The role of dramatic economic conditions was also considered by the *CMS Gas Transmission Co. v. Argentina* Tribunal. While it found that none of Argentina's arguments amounted to a complete defense of its actions, the Tribunal accepted that Argentina's economic situation influenced the standard of treatment it could be expected to provide to foreign investors. The Tribunal said "the Claimant cannot ask to be entirely beyond the reach of the abnormal conditions prompted by the crisis, as this would be unrealistic."[22]

After expressing its willingness to adjust the standard of treatment to accommodate Argentina's changed circumstances, the *CMS Gas* Tribunal found that Argentina had still failed to meet the standard of fair and equitable treatment. The license and legal framework provided for both systematic and ad-hoc review of the tariffs to accommodate changing costs and returns. As a result, the Tribunal found that Argentina's unilateral adjustment of the nature of the tariffs, without using the mechanisms provided in the license and relevant laws, breached both the fair and equitable treatment standard and the umbrella clause of the BIT. The Tribunal drew from the treaty's objectives to conclude that "a stable legal and business environment is an essential element" of the fair and equitable treatment standard.[23]

The award in *Petrobart Ltd. v. Republic of Kyrgyz* is distinctive. The Tribunal reasoned that despite the prevalence of fair and equitable treatment provisions within BITs, international law had developed no specific definition of that doctrine. Accordingly, the obli-

18. *Id.* ¶ 25. The tribunal wrote:

> Customary international law has . . . has decided that some differentiations are discriminatory. But the International Court of Justice has held that "[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party"

Id. ¶ 26.

19. *See Noble Ventures, Inc.*, ICSID Case No. ARB/01/11, ¶ 182.

20. *Id.*

21. The Tribunal explicitly affirmed that its conclusion "is reinforced by the consideration that the Respondent is not to be blamed for having violated any obligations under international law in connection with the indisputable dramatic economic situation at the time." *Id.* It is interesting to contrast this approach with the one adopted in *CMS Gas Transmission Co. v. Argentina* where the tribunal considered that the dramatic situation in Argentina was relevant for purposes of assessing the damages but not as a matter of liability under the standard under consideration.

22. *CMS Gas Transmission*, ICSID (W. Bank) Case No. ARB/01/8, ¶ 244.

23. *Id.* ¶ 274.

gation could be understood through standard rules of treaty interpretation that relied on ordinary meaning. Against this standard, the acts and omissions of the host state, various forms of interference with the investment, had fallen short.

C. Umbrella Clauses[24]

Two recurrent questions are among those that characterize the emerging jurisprudence concerning umbrella clauses: can an umbrella clause transform a contract breach into a treaty breach;[25] and if it can, must the breach be of a particular character or magnitude to engage the host state's responsibility? Two recent awards are among the available precedent on these questions. *Eureko B.V.* and *Noble* involved similarly worded umbrella clauses[26] Consistently with *SGS v. Philippines*[27] and thus somewhat at odds with *SGS v. Pakistan*,[28] both tribunals opined that such clauses encompassed at least certain contractual breaches by the host state; and their umbrella clause analyses the awards appear to not distinguish among types of contract breach.[29]

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24. *See generally* Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 Arb. Int'l 411 (2004); Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims*, in International Investment law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 325 (Todd Weiler ed. 2005) [hereinafter International Investment Law].

25. *See* SGS Société Générale de Surveillance S.A.v. Pakistan, ICSID Case No. ARB/01/13 (2003), *available at* http://ita.law.uvic.ca/documents/SGSvPakistan-decision_000.pdf (where the tribunal adopted a negative view); *contra* SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6 (2004), *available at* http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf (where the tribunal reached the opposite conclusion).

26. *See* Romania Bilateral Investment Treaty, *supra* note 10, at art. II.2(c) ("Each Party shall observe any obligation it may have entered into with regard to investments."); *see also* Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Pol., art. 3(5), *available at* http://145.69.44.61/beleid/home_ond/buithandmissie/ibo/ibopolen.pdf.

27. ICSID Case No. ARB/ 02 / 6, 19 Mealey's Int'l Arb. Rep. C1 (Feb. 2004). For the *SGS v Pakistan* tribunal, it was essential, however, that the party relying on the clause demonstrates that the treaty parties shared an intention to catch such breaches. In the case there at hand, that intention had not been demonstrated. *See* Gaillard, *supra* note 24, at 339-40. Some tribunals, though regarding the umbrella clause as embracing contract breaches, may decline to exercise jurisdiction where the contract has a forum selection clause that names a domestic court.

28. ICSID Case No. ARB/ 01/13, 18 ICSID Rev. 307 (2003); 42 I.L.M. 1290 (2003). For the *SGS v Pakistan tribunal*, it was controlling that the party relying on the clause had not demonstrated that the treaty parties shared an intention to catch such breaches. The tribunal did not question that states may through treaty agree that breaches of state contracts with investors are also treaty breaches. *See* Gaillard, *supra* note 24, at 339-40. Some tribunals, though regarding the umbrella clause as embracing contract breaches, may decline to exercise jurisdiction where the contract in question has a forum selection clause that names a domestic court. *See id.* at 242-343.

29. In *Eureko B.V. v. Poland* such an inference can be drawn from the citations of authors supporting the position that mere contractual breaches can imply a breach of an umbrella clause and from the assertion by the tribunal that Poland's breach of its contractual arrangements does not qualify as a breach of the fair and equitable standard or the expropriation provision, but it may imply a transgression of the umbrella clause. *See Eureko B.V.*, Partial Award, ¶¶ 250-51. A strong dissent lamented the majority's failure to examine the law governing the contract in question, and raised other issues. *See Eureko B.V.*, Partial Award (Dissenting Opinion of Mr. Jerzy Rajski).

In *Noble Ventures, Inc. v. Romania*, the Tribunal refrained from expressing a definitive conclusion as to the type of breaches and obligations that might create liability under an umbrella clause, given that such a distinction would not affect its ultimate conclusions on liability. But it decided to proceed on the basis that a breach of contract constituted a breach of a BIT. *See Noble Ventures, Inc.*, ICSID (W. Bank) Case No. ARB/01/11, ¶ 61.

D. EXPROPRIATION

Although succinct on the subject, the award in *Petrobart Ltd. v. Republic of Kyrgyz* found a lack of indirect expropriation based upon reasoning out of step with prevailing doctrine.[30] The Tribunal noted that the measures did not appear to be directed specifically to the claimant, or have the aim of transferring economic value from Petrobart to the Kyrgyz Republic. Neither predicate, however, is insisted upon by most commentators and tribunals.[31]

Controversial doctrine was also set forth in the *Methanex* award, when it observed that as a matter of general international law:

> a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which effects, inter alios, a foreign investor or investment is not deemed expropriatory unless specific commitments have been given by the regulating government to the then putative foreign investors contemplating investment that the government would refrain from such regulation.[32]

Critics of the *Methanex Corp.* expropriation *obiter* consider it unduly restrictive. The tribunal relied for authority upon an award issued in an Oversees Private Investment Corporation insurance arbitration and upon portions of the Waste Management II[33] award devoted to the international minimum standard, as distinct from analysis directed to NAFTA's expropriation provision. The Tribunal's pre-investment promise scenario is a good example of indirect taking arising from regulation. The tribunal's apparent view that the fact pattern mentioned exhausts those in which a taking can be found when non-discriminatory regulation is involved[34] seems to oversimplify the far from cohesive authority addressing regulatory takings.[35]

Though the NAFTA text involved in *Methanex* differs from the latest Model BITs published by the U.S. and Canada, the *Methanex* expropriation dictum is concordant with those texts. In particular, both models contains language suggesting that general measures designed to protect legitimate public welfare objectives are only rarely compensable; they also enumerate factors that bear on the existence of an indirect taking.[36] In combination,

30. It is clear that there was no formal expropriation of Petrobart's investment. Nor does it appear that the measures taken by the Kyrgyz Government and state authorities, although they had negative effects for Petrobart, were directed specifically against Petrobart's investment or had the aim of transferring economic values from Petrobart to the Kyrgyz Republic. Petrobart's claims against KGM remained and gave rise to demands in KGM's bankruptcy. The Arbitral Tribunal considers that the measures taken by the Kyrgyz Republic, while disregarding Petrobart's legitimate interests as an investor, did not attain the level of *de facto* expropriation. The Arbitral Tribunal therefore concludes that the Republic's action does not fall within [a]rticle 13(1) of the Treaty. *Petrobart Ltd.*, Arbitral Award Case No. 126/2003, at 77.

31. *See generally* George Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J INT'L LAW 585 (1994).

32. *Methanex*, Final Award, NAFTA Trib., at part IV, chap. D, p. 4, ¶ 7.

33. *Id.* ¶¶ 7-8 (citing *Waste Management*, 43 I.L.M. 967, ¶ 11).

34. *Id.* ¶¶ 7, 10.

35. *See generally* Jack J. Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, *in* INTERNATIONAL INVESTMENT LAW, *supra* note 24.

36. *See* 2004 Model BIT, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, *available at* www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf. According to annex

these guides are intended to bring structure and discipline to claims of regulatory taking. The extent to which they codify custom is subject to debate however.[37]

Eureko B.V. is distinctive in that the Tribunal concluded that a failure to make a public offering in breach of a promise to do so may be tantamount to a deprivation of an asset thus requiring compensation.[38] By contrast, drawing on factual parallels to the ELSI case,[39] the *Noble Ventures* tribunal declined to find certain judicial measures expropriatory, in part because the investor's enterprise was insolvent.[40]

The *CMS Gas* Tribunal also rejected an expropriation claim. The Tribunal found that Argentina had not substantially deprived CMS of the enjoyment of its investment because CMS still owned and controlled the company.[41] The Tribunal's decision on this point, however, does not fully address the argument that a contract right may be expropriated without the entire business being expropriated. CMS argued that Argentina's measures expropriated its right to a tariff in U.S. dollars, adjusted for inflation which was another type of investment protected by the BIT.[42] The Tribunal did not rule on this issue at all.

II. Jurisdictional Requirements in Investor-State Arbitration

Arbitration tribunals established under investment treaties, like all international tribunals, have jurisdiction limited to a specific subject matter (jurisdiction *res materiae*), to specific persons or entities (jurisdiction *res personae*), and to specific timing of events (jurisdiction *res temporis*). Jurisdictional objections are raised in the majority of treaty-based arbitrations. Consistent with this tendency, 2005 witnessed a number of important decisions on all three dimensions of jurisdiction.

B of the U.S. Model BIT 2004 (transferring the jurisprudence of the U.S. Supreme Court on national constitutional law to customary international law), the ordinary meaning of indirect expropriation is:

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
  (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
  (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
  (iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

37. *See generally* Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003); David Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States—Chile Free Trade Agreement*, 19 AM. U. INT'L L.R. 679 (2004); Barton Legum *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID Rev. 344 (2004); Jack J. Coe Jr., *The State of Investor-State Arbitration–Some Reflections on Professor Brower's Search for Sensible Principles*, 20 AM. U. INT'L L. REV. 931 (2005).

38. *See Eureko B.V.*, Partial Award, ¶¶ 238-43.

39. *Case Concerning Elettronica Sicula S.p.A.* (U.S. v. Italy) 1989 I.C.J. 15 (July 20).

40. *See Noble Ventures, Inc.*, ICSID (W. Bank) Case No. ARB/01/11, ¶¶ 211-16.

41. *CMS Gas Transmission*, ICSID (W. Bank) Case No. ARB/01/8, ¶ 263.

42. *Id.* ¶ 256.

A. Subject-Matter Jurisdiction

As noted above, in August of 2005 the *Methanex* tribunal issued its final award,[43] dismissing the investor's claims and awarding costs to the United States. Both the structure of the final award and the theories of recovery ultimately sponsored by the claimant, however, were prefigured by a pivotal jurisdictional ruling issued by the tribunal in August 2002.[44] Based on the phrasing of NAFTA Article 1101 it reasoned that jurisdiction under Chapter Eleven existed only when the measure complained of "related to" the investment or the investor. The result is a legal proximity test. Because Methanex's product was an ingredient in MTBE, and not MTBE itself, it faced a remoteness problem under the tribunal's construction of Article 1101. Methanex's claim would be well-founded only if the complained of measures were shown to directly target or contemplate the investor or its enterprise. Merely demonstrating a negative effect on the investment would not suffice where that effect was simply a consequence of regulation directed to an end-user of the investor's product.[45]

In its reformulated claim Methanex asserted that the measure complained of was an attempt by California's governor to reward claimant's competitors (makers of ethanol) for their political support.[46] The tribunal remained unconvinced.[47] Claimant's theory of the case depended on inferences the tribunal deemed unwarranted given the more plausible and legitimate public health reasons for the regulation in question.[48]

In 2005, the surfeit of claims arising from Argentina's economic crisis of 2000 and associated emergency measures continued to produce jurisdictional rulings. In *Camuzzi International S.A. v. Argentina (Camuzzi I)*,[49] *Sempra Energy International v. Argentina*,[50] and *AES Corp. v. Argentina*,[51] the Tribunals took jurisdiction despite forum clauses in the contracts designating Argentine courts. *AES* and *Gas Natural SDG*, examined ICSID's Article 25 jurisdictional conditions—a "legal" dispute that arises directly out of an investment,[52] conditions found to be present despite the generalized nature of the economic emergency.

43. *Methanex*, Final Award, NAFTA Trib.

44. Methanex Corp. v. United States, Partial Award, NAFTA Trib. (Aug. 7, 2002), *available at.* http://www.state.gov/documents/organization/12613.pdf.

45. *Id.* ¶ 50.

46. *Methanex*, Final Award, NAFTA Trib., ¶¶ 30-38.

47. In light of the tribunal's interpretation of article 1101's "relating to" phraseology, the claimant had to demonstrate that it or its investment was targeted and thus not too remotely associated with the regulation in question; the claimant thus was not entitled to fashion in the normal way claims for sub-standard treatment under article 1105, or discriminatory treatment under articles 1102 and 1103, which theories would not ordinarily depend on governmental animus or intent to harm.

48. *Methanex*, Final Award, NAFTA Trib., at part III, ch. B, ¶¶ 1-60. "[T]here is ample evidence . . . that leaking [underground storage tanks] and water contamination were perceived as a serious and urgent problem by the California Government, as well as by the California public at large." *Id.* ¶ 9.

49. Camuzzi Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/03/2 (2005), *available at* http://www.investmentclaims.com/decisions/Camuzzi-Argentina-Jurisdiction-11May2005.pdf.

50. Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16 (2005), *available at* http://www.investmentclaims.com/decisions/Sempra-Argentina-Jurisdiction-11May2005.pdf.

51. AES Corp. v Argentine Republic, ICSID Case No. ARB/02/17, ¶¶ 95-99 (2005), *available at* http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_000.pdf.

52. *Id.* ¶ 47; Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, ¶ 22 (2005), *available at* http://www.investmentclaims.com/decisions/Gas%20Natural%20SDG%20-%20Jurisdiction.pdf; *AES Corp.*, ICSID Case No. ARB/02/17, ¶ 56; *Gas Natural SDG*, ICSID Case No. ARB/03/10, ¶ 21.

Not all tribunals accepted jurisdiction however. Two tribunals rejected arguments that claimants could broaden the tribunals' jurisdiction through Most Favored Nation (MFN) clauses. In *Plama Consortium Ltd. v. Bulgaria*,[53] the Tribunal rejected the claimant's argument that it could use the Cyprus-Bulgaria BIT's MFN clause to add ICSID to the investor's arbitration options, even though other Bulgarian BITs, unlike the one at hand, afforded investors an ICSID arbitration alternative.

A similar kind of MFN borrowing was attempted by the claimant in *Impregilo v. Pakistan*.[54] Its claims were largely based on the Pakistan water authority's failure to perform its contractual obligations. There is no obligation observance or umbrella clause in the Italy-Pakistan BIT that might oblige Pakistan to observe its contractual obligations. Based on the Italy-Pakistan BIT's MFN clause, *Impregilo* invoked an obligations observance clause in another BIT to which Pakistan is a party. Relying on a narrow reading of the BIT with Italy, the tribunal rejected Impreglio's MFN theory because the Pakistan water authority was not a "Contracting Party" to the BIT containing the MFN provision.[55]

The *Impregilo* Tribunal did, however, accept jurisdiction to hear other claims including that Pakistan breached fair and equitable treatment and expropriation undertakings. Pakistan was, in the process, largely unsuccessful in convincing the tribunal that the claims in question were merely alleged contract breaches adorned as treaty violations.[56] Impregilo had pointed to an exercise of sovereign authority in Pakistan's impugned acts sufficient to establish the Tribunal's jurisdiction.[57]

In *Plama Consortium* the host state unsuccessfully argued that Plama had no investment, as required by both the investment treaty and the ICSID Convention. The putative investment was nevertheless ruled sufficient even though there was ongoing litigation in Bulgaria over whether Plama owned the shares in question and even though Bulgaria alleged that because of investor misrepresentations its share purchase was null and void. In retaining jurisdiction, the Tribunal noted the treaty's wide definition of "investment," which included "any right conferred by law or contract," a definition "[t]hat . . . would be satisfied by a contractual or property right even if it were defeasible."[58] Furthermore, because Plama claimed it was the true owner of the shares, it would be premature to accept Bulgaria's characterization at the jurisdictional phase,[59] particularly given the belatedness of Bulgaria's objection.[60] Finally, the Tribunal found that the dispute settlement provisions in the treaty were autonomous "so even if the parties' [share purchase] agreement . . . is arguably invalid . . . the agreement to arbitrate remains effective."[61]

B. Personal Jurisdiction

Claimants against Argentina also satisfied personal jurisdiction requirements in several cases. In *Camuzzi I* and *Sempra Energy International v. Argentina*, the tribunals upheld the

53. Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (2005), *available at* http://www.investmentclaims.com/decisions/Plama-Bulgaria-Jurisdiction-8Feb2005.pdf.

54. Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3 (2005), *available at* http://www.investmentclaims.com/decisions/Impregilo-Pakistan-Jurisdiction-22Apr2005.pdf.

55. *Id.* ¶ 223.

56. *Id.* ¶¶ 268, 282.

57. *Id.* ¶¶ 264-66.

58. *Plama*, ICSID (W. Bank) Case No. ARB/03/24, ¶ 128.

59. *Id.*

60. *Id.* ¶ 129.

61. *Id.* ¶ 130.

investors' ability to claim for indirect damages suffered directly by an Argentine company in which they held shares. The *Plama* tribunal also resisted Bulgaria's theory that the claims were caught by its notice under the Energy Charter Treaty purporting to exclude certain classes of disputes from investor-state arbitration.[62] Reacting to the timing of the notice the Tribunal ruled that such a notice could have prospective effect only, and thus did not encompass the claims in question. Otherwise Bulgaria would be allowed "[to be the] judge in its own cause."[63]

In *Impregilo v. Pakistan*, the Tribunal addressed the standing of a joint venture and the parties to the joint venture. The Tribunal upheld the claimant's right to claim indirect damages suffered by the joint venture, though claimant had no right to claim on behalf of the other parties to the venture or the joint venture itself.[64]

C. Temporal Jurisdiction

Argentina's admissibility and objections *ratione temporis* were also unsuccessful in the main. In both *Camuzzi II*[65] and *Gas Natural*,[66] the claimants applied MFN clauses to overcome a species of exhaustion requirement that would delay arbitral proceedings eighteen months. The claimants successfully invoked certain of the respondent's other treaties to side-step the eighteen month resort to domestic courts.[67] Similarly, in *AES*, the tribunal rejected Argentina's argument that the claim was not ripe because ongoing negotiations rendered the final amount of damages unknown.[68] The treaty contained no exhaustion of local negotiations requirement, only one requiring that the investor wait six months before filing the claim.[69] With regard to damages, the Tribunal opined that the claimant did not have to prove it suffered a loss from the state's measures until the merits stage.[70]

Claimants against other states were not as successful in establishing temporal jurisdiction. The *Luchetti v. Peru* Tribunal found it lacked jurisdiction based on a BIT clause limiting claims to disputes beginning after the treaty came into force.[71] In response to the Respondent's jurisdictional challenge, the Claimants accepted that there was a dispute before the treaty came into force, but argued that its claim arose out of separate acts giving rise to a new dispute arising after the BIT came into force. In determining whether the second dispute was a new dispute, the Tribunal asked if "the facts or considerations that gave rise

62. *See* Energy Charter Treaty, *supra* note 7. Article 17 states that

> [e]ach Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized . . . .

Id. at art. 17.

63. *Plama*, ICSID (W. Bank) Case No. ARB/03/24, ¶ 149.

64. *Impregilo*, ICSID (W. Bank) Case No. ARB/03/3, ¶¶ 136-66.

65. *Camuzzi*, ICSID (W. Bank) Case No. ARB/03/2.

66. *Gas Natural SDG*, ICSID Case No. ARB/03/10.

67. *Camuzzi*, ICSID (W. Bank) Case No. ARB/03/2, ¶ 28; *Gas Natural SDG*, ICSID Case No. ARB/03/10, ¶¶ 29-30.

68. *AES Corp.*, ICSID (W. Bank) Case No. ARB/02/17, ¶¶ 68-73.

69. *Id.* ¶¶ 68-71.

70. *Id.* ¶¶ 72-73.

71. Empresas Lucchetti, S.A. and Luccetti Peru, S.A. v. Republic of Peru, ICSID (W. Bank) Case No. ARB/03/4 (2005), *available at* http://www.investmentclaims.com/decisions/Luchetti-Peru-Award-7Feb2005.pdf.

to the earlier dispute continued to be central to the later dispute,"[72] or if the disputes had the same "origin or source."[73] The Tribunal found that the earlier facts were central to the later dispute and that the disputes did have the same origin because the reasons for the later revocation were directly related to the considerations that gave rise to the initial dispute.[74]

The *Impregilo v. Pakistan* Tribunal also considered an investor's ability to base a claim on events occurring before the treaty came into force. Unlike the Chile-Peru BIT considered in *Lucchetti v. Peru*, the Italy-Pakistan BIT before the *Impregilo* Tribunal did not contain an express prohibition on claims arising from disputes occurring before the treaty came into force. Qualifying the customary rule that a state cannot breach a treaty through acts occurring before the treaty comes into force, the tribunal accepted that it had would have temporal jurisdiction over pre-treaty acts that continued past that effective date of the treaty. The principle, nevertheless, could not be the basis of jurisdiction in the case at hand, because no such continuation in the complained of acts had been established.[75]

III. New York Courts May Issue Provisional Remedies in Aid of International Arbitration

On October 4, 2005, New York Governor George Pataki signed bill number 4837, amending New York Civil Practice Law and Rules (CPLR) section 7502(c), to enable New York courts to issue provisional remedies in connection with international arbitrations. The amendment brings New York law into conformity with the laws of other states, the laws of other countries, and the rules of several international and national arbitration organizations, and enhances New York's ability to promote itself as an ideal forum for the resolution of international arbitrations. Since 1985, CPLR section 7502(c) has empowered New York courts to entertain applications either for orders of attachment or preliminary injunctions in connection "[with] an arbitrable controversy."[76] Specifically, CPLR section 7502(c) empowers courts to grant such applications where the ultimate award "may be rendered ineffectual without such provisional relief."[77] Until recently, however, New York courts interpreted this rule to apply only to domestic arbitrations (i.e., disputes located in New York and that do not involve foreign persons as parties). The New York courts concluded that the New York Convention's purpose of minimizing uncertainty regarding enforcing arbitration agreements would be undermined by permitting attachment and judicial proceedings and subjecting foreign business entities to unfamiliar foreign laws.[78]

72. *Id.* ¶ 50.

73. *Id.* ¶ 53.

74. *Id.*

75. *Impregilo*, ICSID (W. Bank) Case No. ARB/03/3, ¶ 312.

76. *See* N.Y. C.L.P.R. § 7502(c) (McKinney 2005). Though entitled provisional remedies, CPLR section 7502(c) refers only to applications for orders of attachment or for a preliminary injunction. *See also* HSBC Bank USA v. Nat'l Equity Corp, 279 A.D.2d 251 (N.Y. App. Div. 2001) (holding that if the parties specifically agree that other forms of provisional relief may be sought, a court can grant such relief).

77. *See* N.Y. C.L.P.R. § 7502.

78. *See, e.g.*, Cooper v. Ateliers de la Motobecane, SA, 442 N.E.2d 1239, 1245-47 (N.Y. 1982). Although predating the enactment of section 7502(c), *Cooper's* reasoning has been relied upon in decisions that section 7502(c) only applies to domestic arbitrations. *See* Drexel Burnham Lambert Inc. v. Ruebsamen, 139 A.D.2d 323 (N.Y. App. Div. 1988). Notably, such an approach has not been adopted by other jurisdictions, including New York federal courts. *See* Borden, Inc. v. Meji Milk Prods. Co., 919 F.2d 822, 826 (2d Cir. 1990) ("[e]ntertaining an application for such a remedy, moreover, is not precluded by the Convention but rather is consistent with its provisions and its spirit").

Since the enactment of CPLR section 7502(c), experts have argued that this narrow interpretation did not further the interests of the New York Convention but instead led to hollow arbitral victories.[79] As a practical matter, many foreign jurisdictions (including other states such as California, Connecticut, and New Jersey) do provide these types of remedies. Therefore, it was argued that New York citizens involved in international business would be severely prejudiced because they are subject to these types of procedures in foreign jurisdictions, but are unable to invoke them within their own jurisdiction.[80] Moreover, the arbitral tribunal is not a legitimate substitute for court intervention because the tribunal is typically not empanelled during the period when provisional relief is most often necessary, and the tribunal often lacks sufficient power to craft suitable relief because, among other reasons, they have no authority over non-parties.

Accordingly, twenty years after its initial enactment, CPLR section 7502(c) was amended to permit courts to entertain applications for provisional remedies regardless of whether the arbitration is pending or about to be commenced "inside or outside the state, whether or not it is subject to the [New York Convention]."[81] The amendment further provides that any such relief will be voided where the arbitration is not commenced within thirty days, although the court is empowered to expand the thirty day time period for good cause. This latter rule also adds a penalty-type clause for failing to commence the proceeding within the set time frame by awarding costs, including attorney's fees, to the respondent.

The amendment did not alter the procedures or standards applicable to grants of relief. Parties are still required to file a special proceeding with the supreme court in the country where the arbitration is pending, and if an arbitration has not been commenced, then in the venue specified by the CPLR. Interestingly, neither the amendment itself nor the legislative reports accompanying the bill addresses and/or resolves the other open issue with respect to section 7502 (c). Specifically, New York courts have differed as to whether a party needs only to meet the "rendered inadequate" standard provided for in the law or whether they must also satisfy the other equitable considerations typically applied to this type of relief (i.e., (i) irreparable harm; (ii) likely success on the merits; and (iii) balance of equities in their favor) that have their source elsewhere in the CPLR.[82] Accordingly, this will remain an open question for those involved in either domestic or international arbitrations in New York.

79. S. 4837, Comm. On Civil Practices and Rules (N.Y. 2005), *available at* http://www.nysba.org/nysbainfo/committees/cplr/rpt05-06/S4837rpt.pdf.

80. JOINT REPORT OF THE INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE AND COMMITTEE ON ARBITRATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1-2 (2005), *available at* http://www.abcny.org/pdf/report/international_arb_rpt_on_equit_remedies.pdf (regarding amendment of N.Y. CPLR section 7502 (c) Permit Attachments and Preliminary Injunctions in Connection with National and International Arbitrations Joint Report).

81. *See* N.Y. C.P.L.R. § 7502(c).

82. *But see* Am. Home Assurance Co. v. Starr Technical Risks Agency, Inc., No. 600263/06, 2006 WL 304746, at *3 (N.Y. App. Div. Feb. 8, 2006).