

9 Investor-State Disputes and Investment Treaty Arbitration

1) Introduction

The encouragement of investment, particularly investment into developing countries, is clearly a desirable objective. Investment treaties are designed to achieve two separate but related purposes, one for the benefit of a State and the other for the benefit of an investor. First, there is a need to attract inward investment into a 'host' State. Second, there is a need to protect the investment of the investor in the host State, in particular against uncompensated expropriation by that State.

Those two objectives – the promotion and the protection of investments – have been successfully achieved through the medium of bilateral investment treaties (BITs). BITs have tended to be made between developed capital-exporting countries and developing capital-importing countries, but there is also an increasing trend towards BITs between developing countries.

The first BIT was entered into over 40 years ago between Germany and Pakistan (in 1959). The number of such treaties now exceeds 2,000, and BITs are seen as instruments both for encouraging foreign investment and for protecting the interests of foreign investors.

*"The first BITs were made in the period 1959-1969. Much of the inspiration for these and the later treaties came from the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1967 OECD Draft Convention on the Protection of Foreign Property...."*³⁴

The resolution of disputes between investors and States was seen to require special machinery. This need was supplied the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, commonly referred to as the ICSID Convention or the Washington Convention. The Convention created an organisation whose purpose is to deal with investment treaty disputes – the International Centre for Settlement of Investment Disputes (the ICSID Centre) in Washington.

An understanding of investor-State disputes – and investment treaty arbitration – requires a consideration of two matters: BITs and the ICSID Convention. These are considered in sections 2 and 3 of this chapter. Section 4 sets out some of the problems that have arisen in investor-State arbitrations.

The ICSID Arbitration Rules are dealt with in Chapter 14, which also looks at the ICSID Centre. The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (which may be used as an alternative to the ICSID Arbitration Rules) are

34 Antonio Parra, 'Applicable Substantive Law in ICSID Arbitrations', *ICSID News* 2000, 17(2). The paper delivered by Mr Parra, Deputy Secretary-General of ICSID, at the 17th ICSID/AAA/ICC Colloquium in Washington DC in November 2000 can be found on the ICSID website.

dealt with in Chapter 18, which looks at international commercial arbitral institutions and other international bodies.

Because ICSID – both the Convention and the Centre – are dealt with in some detail, only comparatively brief reference can be made in the Manual to two other investment dispute resolution processes: Chapter 11 of the North American Free Trade Association (NAFTA) and Article 26 of the Energy Charter Treaty (ECT) (see sections 6 and 7 of this chapter).

The NAFTA is concerned with trade generally and the ECT with energy disputes specifically. Both are, needless to say, of considerable international importance, and further information about them can be found on their websites.³⁵

2) Bilateral Investment Treaties: the Japan-Vietnam Agreement

Perhaps the simplest way to see how BITs work is to look at the details of one such treaty. A comparatively current example is the agreement made between Japan and the Socialist Republic of Vietnam, entered into in November 2003.³⁶

The agreement between Japan and Vietnam contains the type of provisions that are likely to be found in many BITS:

- i) provisions to encourage investment;
- ii) fair and equitable treatment provisions and provisions relating to expropriation and compensation;
- iii) provisions relating to the free transfer of capital, profits and so on;
- iv) investor-State dispute resolution provisions that provide for attempts at amicable settlement, followed if necessary by either ICSID arbitration or arbitration under the UNCITRAL Arbitration Rules.

The Agreement states that Japan and Vietnam wish to promote investment “*in order to strengthen the economic relationship between the two countries*”, intending to “*further create favourable conditions for greater investment by investors of one country in the Area of the other country*”. It contains 23 Articles.

Introductory matters

Article 1 sets out a series of definitions, including “*investments*”. That term covers “*every kind of asset owned or controlled... by any investor*”, including enterprises, shares, bonds, debentures, loans, rights under contracts, claims to money, intellectual property rights and concessions (“*including those for exploration and exploitation of natural resources*”), and tangible and intangible, movable and immovable property.

35 www.nafta-sec-alena.org/DefaultSite/index.html and www.encharter.org/index.jsp.

36 The Japan-Vietnam Investment Agreement can be found on the UNCTAD website: www.unctad.org/sections/dite/ia/docs/bits/japan_vietnam.pdf.

Article 2 requires each Contracting Party to accord “*no less favourable treatment*” to investors of the other Contracting Party than it accords to its own investors. Article 3 requires no less favourable treatment for investment in relation to access to the courts and tribunals of the host State.

Requirements are not to be imposed, as a condition of investment activity, in connection with matters such as the appointment of managers, etc, of any particular nationality, or in relation to the location of an investor’s headquarters in the host country (Article 4). However, Article 5 permits each Contracting Party to maintain “*exceptional measures*” in relation to the matters set out in Annex 1. For example, in relation to Japan, these are matters relating to fisheries, the space industry and the electricity and gas industries. For Vietnam, the matters covered include oil and gas exploration, precious mineral mining and the exploitation of timber.

Article 6 permits the maintenance of the “*exceptional measures*” listed in Annex 11 that existed at the date of the Agreement. For Japan, these include the mining and oil industries. For Vietnam, they cover legal, accounting, insurance and banking services.

Article 7 requires each Contracting Party to publish “*its laws, regulations, administrative provisions and administrative rulings and judicial decisions of general application as well as international agreements*” that pertain to or affect investment activities. “*Sympathetic consideration*” is to be given by each Contracting Party to applications for entry and residence of natural persons of the nationality of the other Contracting Party (Article 8).

Fair and equitable treatment / no expropriation clause

Article 9 sets out essential provisions relating to fair and equitable treatment:

“Each Contracting Party shall accord to investments in its Area of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.”

Article 9 (2) (3) and (4) contain the “*no expropriation without fair compensation*” provisions. Article 9 (2) states that neither Contracting Party shall “*expropriate or nationalize investments in its Area of investors of the other Contracting Party or take any measure tantamount to expropriation or nationalization... except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) upon payment of prompt, adequate and effective compensation; and (d) in accordance with due process of law*”.

Article 9 (3) provides that compensation shall be equivalent to the “*fair market value of the expropriated investments immediately before the expropriation occurred. The fair market value shall not reflect any change in value because the expropriation had become publicly known earlier. The compensation shall be paid without delay and shall carry an appropriate interest, taking into account the length of time until the time of payment. It shall be effectively realizable and freely transferable and shall be freely convertible into the currency of the Contracting Party of the investors concerned, and into freely usable currencies as defined in the Articles of Agreement of the International Monetary Fund, at the market exchange rate prevailing on the date of expropriation.*”

Article 9 (4) states that, without prejudice to Article 14 (dealing with investment dispute resolution), the investor affected is to have the right of access to the courts of justice or administrative tribunals or agencies of the Contracting Party making the expropriation “for a prompt review of the investors’ case, and the amount of the compensation”.

Article 10 contains provisions dealing with compensation for losses suffered to investment activities due to armed conflict, civil disturbances and similar events. Article 11 deals with subrogation and insurance.

Free transfer of capital, etc

Article 12 deals with a matter of considerable importance to the investor: the freedom to transfer monies out of the host State. Each Contracting Party is to ensure that all payments relating to investments in its Area of an investor of the other Contracting Party:

“may be freely transferred into and out of its Area without delay. Such transfers shall include, in particular, though not exclusively:

- (a) the initial capital and additional amounts to maintain or increase investments;*
- (b) profits, interest, capital gains, dividends, royalties and fees....”*

Various other types of payments are listed in Article 12 (1)

Neither of the Contracting Parties is to prevent transfers being made without delay and in freely convertible currencies at the market rate of exchange existing as at the date of the transfer. However, transfers may be delayed or prevented in circumstances involving bankruptcy, insolvency, criminal offences or in order to comply with orders or judgments made in adjudicatory proceedings (Article 12 (2) and (3)).

Dispute resolution provisions: ICSID and UNCITRAL

Articles 13 and 14 contain the dispute resolution provisions. Article 13 (1) states that each Contracting Party shall accord “*sympathetic consideration*” to representations made by the other Contracting Party in relation to any matter affecting the operation of the Agreement.

Any dispute between the Contracting Parties as to the interpretation or application of the Agreement that cannot be satisfactorily dealt with by “*diplomacy*” is to be referred to an arbitration board. This board is to be composed of three arbitrators. One is to be appointed by each of the Contracting Parties within a period of 30 days from the date of receipt of a note requesting arbitration. The third arbitrator is to be appointed as President by the other two arbitrators within a further period of 30 days. He or she is not to be a national of either Contracting Party. In the event that the party-appointed arbitrators cannot agree on the appointment of a third arbitrator, the Contracting Parties must ask the President of the ICJ to make the appointment.

The arbitration board is to reach its decision within a reasonable time. The decision may be by a majority vote and is final and binding (Article 13 (2) and (4)). Article 13 (5) deals with the cost of the arbitral proceedings.

Article 14 (1) defines an “*investment dispute*” as a dispute between a Contracting Party and an investor of the other Contracting Party “*that has incurred loss or damage by reason of, or arising out of, an alleged breach of any rights conferred by this Agreement with respect to investments of investors of that other Contracting Party*”.

Article 14 (2) requires that, as far as possible, an investment dispute is to be settled amicably through consultation. However, if there is no settlement within three months from the date on which the investor requested the consultation, the dispute – at the request of the investor concerned – is to be submitted to either:

- “(1) *conciliation or arbitration in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington, March 18, 1965... or conciliation or arbitration under the Additional Facility Rules of the International Centre of Settlement of Investment Disputes...; or*
- (2) *arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law, adopted by the United Nations Commission on International Trade Law on April 28, 1976.*”

These provisions, providing for either ICSID arbitration or arbitration under the UNCITRAL Rules, are common in BITs.

The arbitration decision shall be final and binding and is to be executed in accordance with the applicable laws and regulations in force in the country in whose Area such execution is sought (Article 14 (5)).

Article 14 (6) states that a dispute is not to be submitted to arbitration where an investor of either Contracting Party is seeking “*judicial or administrative settlement in the Area of the other Contracting Party or arbitral decision in accordance with any applicable previously agreed dispute-settlement procedures, concerning an investment dispute, or in the event that a final judicial settlement on such dispute has been made...*”

Article 14 (7) deals with “*legal persons*” for the purposes of investment disputes. Finally, Article 14 (8) provides that the provisions of Article 14 are not to be construed so as to prevent an investor from seeking judicial or administrative settlement in the Area of the Contracting Party that is a party to such a dispute.

Protective measures

Articles 15 and 16 deal with the right of the Contracting States to take measures for their protection in time of war, armed conflict or other emergencies, and to adopt measures dealing with “*serious balance-of-payments and external financial difficulties*.” Article 17 states that the Contracting Parties may adopt measures in relation to financial services, including measures for the protection of investors.

Intellectual property

Intellectual property rights are dealt with in Article 18: “*nothing in this Agreement shall be construed so as to derogate from the rights and obligations under multilateral*

agreements in respect of protection of intellectual property rights, to which the Contracting Parties are parties”.

Other provisions

Article 19 deals with taxation.

Article 20 provides for the setting up of a Joint Committee whose function is to discuss and review the operation of the Agreement, to discuss and review any exceptional measures relating to Articles 5 and 6, to discuss other investment-related matters and where necessary to make appropriate recommendations to the Contracting Parties *“for the more effective functioning or the attainment of the objectives of this Agreement”*. The Committee is to be composed of representatives of the Contracting Parties. It is entitled to determine its own rules of procedure for the purposes of carrying out its functions. It is also entitled to establish sub-committees and to delegate specific tasks to them. Unless the Contracting Parties decide otherwise, the Committee is to meet once a year *“and otherwise at the request of either Contracting Party”*.

Article 21 deals with environmental matters. The Contracting Parties recognise that it is *“inappropriate to encourage investment by investors of the other Contracting Party by relaxing environmental measures. To this effect, each Contracting Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion in its Area of investment by investors of the other Contracting Party.”*

Article 22 (1) requires each Contracting Party to take reasonable measures to ensure the observance of the agreement by *“local governments in its Area”*. Article 22 (2) deals with the situation where investors in a third country own or control an *“investor”*. Article 22 (3) provides that preferential treatment need not be extended in relation to membership of free trade areas, customs unions, or international agreements for economic integration or similar international agreements.

The final article, Article 23, deals with the entry into force, duration and termination of the Agreement. The Agreement is to remain in effect for a period of 10 years following its entry into force, and it is to continue until terminated by one Contracting Party giving one year's advance notice in writing to the other Contracting party *“at the end of the initial 10-year period or at any time thereafter”*.

Article 23 (3) states that, in respect of investments acquired prior to the date of termination of the Agreement, the provisions of the Agreement are to continue in effect for a period of 10 years from its date of termination. However, the Agreement is not to apply to claims arising out of events that occurred prior to its entry into force.

The Agreement was made in Japanese, Vietnamese and English. In the event of disputes concerning interpretation, the English text is to prevail.

3) The ICSID Convention

i) Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States – commonly known as the ICSID Convention or the Washington Convention – was mentioned earlier in the Manual as one of the conventions that are of particular relevance in the context of international trade and investment.³⁷

The Convention was formulated by the Executive Directors of the World Bank and was submitted by them to member States of the Bank in March 1965 for their consideration and with a view to signature and ratification. The Convention entered into force on 14 October 1966.

The Convention established the International Centre for Settlement of Investment Disputes, based in Washington DC (considered in more detail in Chapter 14). The ICSID Centre is a public international organisation that provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The objective of the Centre in making such facilities available is to “*promote an atmosphere of mutual confidence between States and foreign investors conducive to increasing the flow of private international investment*”.

The Centre does not itself take part in the conciliation or arbitration process. That task is undertaken by conciliators and arbitrators appointed either by the parties or as provided for in the ICSID Convention. The Centre assists the parties in the commencement and the conduct of the conciliation or arbitration proceedings, performing various administrative functions in connection with those proceedings.

Conciliation and arbitration under the ICSID Convention is voluntary:

“No Contracting State or national of such a State is obliged to resort to such conciliation or arbitration without having consented to do so. However, once the parties have consented, they are bound to carry out the undertaking and, in the case of arbitration, to abide by the award. Moreover, all Contracting States, whether or not parties to the dispute, are required to recognise awards rendered pursuant to the Convention as binding and to enforce the pecuniary obligations imposed thereby. Such awards are not subject to any appeal or to any other remedy except those which, like the remedy of annulment, are provided for in the Convention itself.”

In addition to the conciliation and arbitration facilities set out in the ICSID Convention, the ICSID Centre has provided an Additional Facility that allows it to administer certain proceedings between States and nationals of other States that fall outside the scope of the Convention itself, i.e., where one of the parties is not a Contracting State or a national of such a State.

As of January 2006, 155 States had signed the Convention and 143 have ratified it.

37 Detailed information about the Convention can be found in Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001.

ii) The Convention

The Convention is divided into 10 Chapters.

The Centre

Chapter I is concerned with the Centre. Article 1 states that the Centre *"is hereby established"* and that its purpose is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States *"... in accordance with the provisions of this Convention"*. Article 2 provides that the seat of the Centre is to be the principal office of the International Bank for Reconstruction and Development. The Centre is to have an Administrative Council and a Secretariat and is to maintain a Panel of Conciliators and a Panel of Arbitrators.

Articles 4 to 11 of the Convention deal with the Administrative Council and the Secretariat. Articles 12 to 16 are concerned with the Panels. Each Contracting State may designate four persons to the Panel of Conciliators and the Panel of Arbitrators. Persons designated to serve on the Panels *"... shall be persons of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."*

The Chairman of the Administrative Council, when designating persons to serve on the Panels, is to pay due regard to *"the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity"*.

Articles 17 to 24 deal with the financing, status, immunities and privileges of the Centre, the Chairman, the members of the Administrative Council and persons acting as conciliators and arbitrators. They are to enjoy immunity from legal process in relation to acts performed by them in the exercise of their functions.

Jurisdiction of the Centre

Chapter II deals with the jurisdiction of the Centre. This is to extend to *"any legal dispute arising directly out of an investment, between a Contracting State... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, nobody may withdraw its consent unilaterally"* (Article 25).

Article 26 provides that the consent of the parties to arbitration under the Convention shall, unless otherwise stated, be deemed to be consent to such arbitration to the exclusion of any other remedy. However, a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition to its consent to arbitration under the Convention.

Conciliation

Chapter III (Articles 28 to 35) deals with Conciliation.

A Contracting State (or a national of a Contracting State) that wishes to institute conciliation proceedings is to send a written request to the Secretary-General of the Centre, who is to send copy of that request to the other party. The request is to contain information relating to the issues in dispute, the identity of the parties and their consent to the conciliation process. The Secretary-General is to register the request *“unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre”* (Article 28).

A Conciliation Commission is to be constituted as soon as possible after the registration of the request. This may consist of either a sole conciliator or any uneven number of conciliators. The Commission is to be the judge of its own competence, and any objection by a party to the dispute to the effect that the dispute is not within the jurisdiction of the Centre is to be considered by the Commission, *“which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute”*.

The conciliation proceedings are to be conducted in accordance with the provisions of Articles 32 to 35, and in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. Any question of procedure not covered by either the Convention or the Conciliation Rules is to be decided by the Commission.

The Commission is to clarify the issues in dispute between the parties and is to endeavour to bring about agreement between them on mutually acceptable terms. For that purpose it may at any stage of the proceedings and from time to time *“recommend terms of settlement to the parties”*. The parties are to cooperate in good faith with the Commission in order to enable it *“to carry out its functions, and shall give the most serious consideration to its recommendations”*. If the parties reach agreement, the Commission is to draw up a report *“noting the issues in dispute, and recording that the parties have reached agreement”*. However, if at any stage of the proceedings the Commission considers that there is no likelihood of agreement being reached between the parties, it is to close the proceedings and draw up a report recording the failure of the parties to reach agreement. The Commission is also to close the proceedings if one party fails to participate in them (Article 34).

The conciliation process is confidential. Unless the parties agree otherwise, neither of them is entitled to rely on – in other proceedings – any views expressed or statements or offers of settlement made by the other party in the conciliation proceedings (Article 35).

Arbitration

Chapter IV (Articles 36 to 55) deals with Arbitration.

Article 36 provides for a Request for Arbitration. As in the case of Conciliation, a written request is to be addressed to the Secretary-General, who is to send a copy to the other party. The request is to contain information relating to the issues in dispute, the identity

of the parties and their consent to arbitration. The Secretary-General is to register the request, unless he or she finds that the dispute is outside the jurisdiction of the Centre.

Articles 37 to 40 deal with the appointment of the Arbitral Tribunal. Again, as in the case of Conciliation, the Tribunal is to be constituted as soon as possible after registration of the request. It is to consist of either a sole arbitrator or any uneven number of arbitrators. Where the parties do not agree on the number of arbitrators, or the method of their appointment, the Tribunal is to consist of three arbitrators: one appointed by each party and the third, who is to be its President, to be appointed by agreement between the parties (Article 38).

Articles 41 to 47 deal with the powers and functions of the Tribunal. It is to be the judge of its own competence, and any objection by one of the parties in relation to the jurisdiction of the Centre is to be considered by the Tribunal, which may either deal with the challenge as a preliminary question or may join it to the merits of the dispute (Article 41).

Article 42 provides that the Tribunal is to decide the dispute *“in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting Party to the dispute (including its rules on the conflict of laws), and such rules of international law as may be applicable.”* The Tribunal may not bring in a finding of *non liquet*³⁸ on the ground of silence or “obscurity of the law”. Provided the parties agree, the Tribunal is entitled to decide a dispute *ex aequo et bono*.³⁹

Unless the parties agree otherwise, the Tribunal may, if it considers it necessary, call on the parties to produce documents or other evidence and may in addition visit the scene connected with the dispute and *“conduct such enquiries there as it may deem appropriate”* (Article 43).

The arbitration proceedings are to be conducted in accordance with the provisions of Articles 41 to 47 of the Convention (unless the parties agree otherwise) and also in accordance with the ICSID Arbitration Rules in effect on the date on which the parties consented to arbitration. Any procedural question not covered either by the relevant provisions of the Convention or by the Arbitration Rules (or any rules agreed by the parties) is to be decided by the Tribunal (Article 44).

Failure by a party to appear or to present its case is not deemed an admission of the other party’s assertions. However, where a party fails to do so, the other party may request that the Tribunal deal with the questions submitted to it and render an award. Before rendering such an award the Tribunal shall notify – and grant a period of grace to – the party failing to appear or to present its case *“unless it is satisfied that that party does not intend to do so”* (Article 45).

38 *Non liquet* refers to a situation where, for want of legal rules, a court is unable (or unwilling) to give a decision based on law.

39 According to what is just and good.

Article 46 gives power to the Tribunal to determine any incidental or additional claims or counterclaims that arise directly out of the subject matter of the dispute. Unless the parties agree otherwise, the Tribunal may recommend any provisional measures needed to preserve the respective rights of either of the parties (Article 47).

The Arbitration Award

The Award is dealt with in Articles 48 to 55. Article 48 deals with the basic requirements of an award made under the ICSID Convention:

- i) the Tribunal may decide questions by a majority vote;
- ii) the award is to be in writing and is to be signed by the members of the Tribunal who voted for it;
- iii) the award is to deal with every question submitted to the Tribunal and is to give the reasons on which the award is based;
- iv) any member of the Tribunal is entitled to attach his/her individual opinion to the award, whether or not he or she dissents from the majority – similarly, any member of the Tribunal may attach a statement of dissent;
- v) the Centre is not to publish the award without the consent of the parties.

Article 49 provides that the Secretary-General is to dispatch certified copies of the award to the parties. The award is deemed to have been rendered on the date on which the certified copies were dispatched. That Article also contains provisions enabling the Tribunal to decide any question that it had omitted to decide in the award, and to rectify any clerical, arithmetical or similar errors.

Articles 50 and 51 deal with interpretation and revision of the award. The parties may apply to the Secretary-General requesting an interpretation of the award in the event of a dispute as to the meaning or scope of the award. If possible, the request is to be submitted to the Tribunal that rendered the award. If for any reason that is not possible, a new Tribunal is to be constituted. The Tribunal may stay enforcement of the award pending its decision on interpretation.

An application requesting a revision of the award is to be made in writing to the Secretary-General. Such an application may be made on the ground of discovery of some fact *“of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant’s ignorance of that fact was not due to negligence”*. The application is to be made within 90 days of discovery of the fact in question, and in any event within three years of the date on which the award was rendered. If possible, the request for revision is to be submitted to the Tribunal that rendered the award, failing which a new Tribunal is to be constituted. If the Tribunal considers it necessary, enforcement of the award may be stayed pending decision.

Annulment of the arbitration award

Article 52 contains important and significant provisions relating to the annulment of an ICSID award.

Either party may request an annulment of the award. Such application is to be made in writing to the Secretary-General on one or more of the following grounds set out in Article 52 (1):

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure;
- (e) that the award has failed to state the reasons on which it is based.

The annulment application is to be made within 120 days after the date on which the award was rendered, except in circumstances where the annulment is requested on the ground of corruption. In that case the application is to be made within 120 days after discovery of the corruption, and in any event within three years after the date on which the award was rendered.

An ad hoc Committee of three persons is to be appointed from the Panel of Arbitrators. No member of the Committee is to have been a member of the Tribunal that rendered the award. The Committee is to have authority to annul the award or any part of that award on any of the grounds set out in Article 52 (1). The Committee may stay enforcement of the award pending its decision. If the Committee annuls the award, either party may request that the dispute be submitted to a new Tribunal (Article 52 (6)).

Recognition and enforcement of ICSID arbitration awards

Articles 53 to 55 deal with the recognition and enforcement of the award. It is of considerable importance to note that an ICSID award is self-enforcing. Unlike an award made by an international commercial arbitration tribunal in a pure commercial dispute – whose enforcement relies on the provisions of the New York Convention – an ICSID award is enforceable pursuant to the provisions contained within the ICSID Convention itself.

Article 53 provides that the award is binding on the parties and is not to be subject to any appeal or to any other remedy save as provided for in the Convention.

Article 54 (1) states that each Contracting State is to recognise an award rendered pursuant to the Convention *“as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgement of the courts of a constituent state.”*

A party seeking recognition or enforcement of the award is to furnish to a competent court (or other authority designated for the purpose) a copy of the award certified by the Secretary-General. Execution of the award is governed by the laws concerning execution of judgements in force in the State in whose territories the execution is sought (Article 54 (3)). Article 55 states that nothing in Article 54 is to be construed as derogating from the law in force in any Contracting State relating to immunity of that State (or of any foreign State) from execution.

Other chapters of the Convention

Chapter V contains provisions in Articles 56, 57 and 58 relating to the replacement and disqualification of conciliators and arbitrators, Chapter VI deals with the cost of proceedings and Chapter VII deals with the place of proceedings.

Chapter VIII in Article 64 deals with disputes between Contracting States concerning the interpretation or application of the Convention. If such a dispute is not settled by negotiation, it is to be referred to the ICJ on the application of any party to the dispute, unless the States concerned have agreed on another method of settlement. Chapters IX and X contain provisions on amendment and the final provisions.

4) Some Problems Arising in Investor-State Disputes

There are a number of problems that have arisen in investor-State disputes that, taken together, are peculiar to such disputes. First, there are jurisdiction issues. Second, there is the problem of different decisions being reached by different international tribunals on similar facts / similar issues.

i) Jurisdiction issues

There are a group of issues that can be broadly classified as issues relating to the jurisdiction of a Tribunal appointed under the provisions of a BIT:

- 'umbrella' / *pacta sunt servanda* clauses;
- causes of action;
- forum selection clauses;
- 'fork in the road' provisions.

Specifically, does such a Tribunal have jurisdiction to deal only with claims under the treaty ('treaty claims', to which international law will apply), or may that Tribunal also deal with claims under an investment contract ('contract claims', to which the local law of the relevant State will apply)?

'Umbrella' / *pacta sunt servanda* clauses

There are circumstances in which a Tribunal may have jurisdiction to deal also with contractual claims. One example is where the treaty contains a so-called 'umbrella' clause – also referred to as a *pacta sunt servanda* clause or a 'sanctity of contract' clause.

Professor Christoph Schreuer describes an umbrella clause as “a provision in a treaty for the protection of investments under which the State parties undertake to observe any obligations they may have entered into with respect to investments. In other words, contractual obligations are put under the treaty’s protective umbrella. It is widely accepted that under the regime of an umbrella clause violations of the contract become treaty violations.”

Later he says that the object and purpose of an umbrella clause is to “*add extra protection to the investor. It dispenses with the often difficult proof that there has been an indirect expropriation or a violation of the fair and equitable standard under the treaty.*”⁴⁰

The consequence of an umbrella / *pacta sunt servanda* clause in a BIT may therefore be to convert a breach of an investment contract into a treaty breach. Take, for example, the umbrella clause in Article X (2) of the BIT in the *SGS v Philippines* case (discussed below):

“*Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.*”

And compare that provision with the umbrella clause in the *SGS v Pakistan* case (again mentioned below). Clause 11 of the Swiss-Pakistan BIT provided that: “*Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.*”

It will be recalled that Article 26 of the Vienna Convention on the Law of Treaties (referred to in Chapter 6 of the Manual) provides that “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*”

Antonio Parra of ICSID was quoted earlier as saying that much of the inspiration for the first BITs made in the period 1959-1969 – and for later treaties – came from the 1959 Abs-Shawcross Draft Convention on Investments Abroad (and the 1967 OECD Draft Convention on the Protection of Foreign Property). Sir Hartley Shawcross had been a British Attorney-General and Dr Herman Abs was the Chairman of Deutsche Bank. Article II of their Draft Convention provided that: “*Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.*”

Whether an umbrella clause in an investment treaty achieves its objective of elevating a breach of an investment agreement into an international breach may be open to argument. The *SGS* cases discussed later were concerned with that problem. A more recent decision than the *SGS* cases is the Partial Award in *Eureko B.V. v Poland* of 19 August 2005 at paras. 244-260.⁴¹

Causes of action and forum selection clauses

The issue of jurisdiction is also concerned with causes of action: does the claim or cause of action arise under the treaty or under the investment contract?

The jurisdiction question may also involve consideration of a forum selection clause in a contract that confers exclusive jurisdiction on the courts of a specific State. For example, the forum selection clause in the *SGS v Philippines* case provided in Article 12 of the Comprehensive Import Supervision Scheme (CISS) Agreement that contractual disputes be submitted to specific courts in the Philippines and be decided in accordance with that country’s laws.

40 ‘Overlapping Contract & Treaty Claims - the Vivendi I Case’ in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May, 2005, pp 299 and 301.

41 <http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf>.

'Fork in the road' provisions

Jurisdiction issues may also arise in relation to 'fork in the road' provisions. These are provisions in BITs that give the investor the choice of commencing a claim in the domestic courts of the host State or of bringing a claim before an international tribunal.

An example of a 'fork in the road' clause is contained in the BIT in the *SGS v Philippines* case. That provision states that, if a dispute is not resolved by consultations between the parties pursuant to Article VIII (1) of the treaty, the investor may submit the dispute "either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration", and in the latter case, at the investor's option, to ICSID or UNCITRAL arbitration.

ii) Different decisions by different tribunals

Similar facts and similar issues in investor-State disputes have given rise to different decisions by different tribunals. This raises the question of the extent to which the problems created by such conflicting decisions could be dealt with by way of consolidation or similar measures – such as similar fact disputes being dealt with by the same tribunal.

In addition, to what extent could the problem of different / conflicting decisions being reached by different tribunals faced with similar facts / similar issues be resolved by an appellate system being introduced into investor-State arbitrations? The ICSID system has its annulment provisions, but is something more than that needed?

5) An Example: *SGS v Philippines*

These problems, in particular the 'umbrella' clause and 'fork in the road' difficulties, are illustrated by the decisions in two ICSID cases that involved the same Claimant: Société Générale de Surveillance S.A. The cases – *SGS v Pakistan* and *SGS v Philippines* – may both be found on the ICSID website.⁴²

The extent of the problem can be seen by considering the later decision, namely that of the ICSID Tribunal in the *SGS v Philippines* case.

Background

The background to the case is set out in paragraphs 1-4 of the Tribunal's Decision. The first paragraph states that:

"1. On 26 April 2002, the International Centre for Settlement of Investment Disputes (ICSID) received from Société Générale de Surveillance S.A. (SGS) a request for arbitration dated 24 April 2002 against the Republic of the Philippines (hereafter the Philippines or the Respondent, as the context requires). SGS is a large Swiss corporation providing verification, testing, monitoring and certification services in respect of various products, to the private sector as well as to governments and international institutions. On 23 August 1991, SGS concluded an agreement with the Philippines regarding the provision of comprehensive import supervision

⁴² www.worldbank.org/icsid.

services (the CISS Agreement), under which SGS would provide specialized services to assist in improving the customs clearance and control processes of the Philippines. A dispute having arisen between the parties concerning alleged breaches of the CISS Agreement, SGS invoked in the request for arbitration the provisions of a bilateral Agreement of 1997 between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments (the BIT).

Paragraphs 2-4 deal with the registering of the request for arbitration on 6 June 2002 by the ISCID Secretary-General and the agreement on 24 June 2002 that the Tribunal should consist of three arbitrators, one appointed by the Claimant and the second by the Respondent. The President of the Tribunal would be appointed by agreement between the two parties or, failing agreement within 30 days of the appointment of the second arbitrator, by the ISCID Secretary-General.

The contract

The relevant provisions of the contract – the CISS Agreement – are set out in paragraphs 19-25 of the Decision:

“19. ... SGS accepted to carry out, on an exclusive basis, pre-shipment inspection in any country of export to the Philippines. Inspections would cover quality, quantity and price comparisons. Article 5 required SGS to maintain a liaison office in the Philippines. Under Article 16, SGS also agreed to provide the Philippines with the assistance set out in Schedule II. This assistance was to be provided free of cost; on the other hand it was stated to be a ‘special condition’ which ‘shall govern the other services to be conducted by SGS’. The assistance to be provided included:

- training courses to be conducted by SGS for various Philippines agencies, in particular the BOC [Bureau of Customs];*
- the provision to the BOC of customs equipment and the maintenance of that equipment;*
- the provision of customs consultants to carry out feasibility studies and evaluation of the BOC’s computerisation needs;*
- the provision of a customs specialist to investigate the practicability of an ‘open’ bonded warehouse system for the BOC;*
- the provision of a customs intelligence / investigative consultant for a stipulated period to conduct an in-depth review of the coordination between various Philippines intelligence units, the provision of computer hardware and software to support the coordination process, and thereafter to provide technical support; and*
- setting up a BOC library, stocked with the most comprehensive trade publications from the twenty leading exporting countries to the Philippines, as well as other price data and basic customs texts on administration and procedure.*

“20. In exchange for the performance of SGS’s obligations, according to Article 6 and Schedule I, the Philippines agreed to pay SGS, in Swiss francs, a fee amounting

to 0.6% of the FOB [Free on Board] value declared on the exporter's final settlement invoice covering each shipment inspected. A minimum of USD225 (convertible into Swiss francs at the prevailing exchange rate) per shipment or part shipment would be applicable where the rate of 0.6% would produce a smaller amount. For inspections of shipments invoiced at less than USD2,500 the minimum fee was USD150.

"21. Under Articles 7 and 10.1.4, the Philippines had to maintain a letter of credit in the amount of CHF7,500,000 against which SGS could present for payment invoices for fees due under the CISS Agreement.

"22. Article 12 of the CISS Agreement provided that:

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

Thus contractual disputes were required to be submitted to specified courts in the Philippines to be decided in accordance with Philippines law.

"23. Under the terms of the First Addendum, executed on 14 December 1994, in consideration of the extension of the CISS Agreement for a period of three years from 15 March 1995, SGS agreed to carry out the 'Exit Program' as set out in Schedule A of the Addendum. The Exit Program consisted of a number of 'projects' to be undertaken jointly by the BOC and SGS in addition to the regular pre-shipment inspection programme. The objectives of these projects were stated to be:

(i) *to set in place on or before 16 March 1998 or at the end of the CISS Agreement between the Philippines and SGS the various systems that would enable the Philippines to value imported goods, identify high risk shipments that would be subjected to careful verification, conduct examinations on such shipments following the same procedure and level of scrutiny as SGS, and maintain a data bank of various files / control tables needed for the proper determination of dutiable values;*

(ii) *to identify leakages in customs revenue generation and set in place systems to plug such leaks, manage and monitor their occurrence; and*

(iii) *to extend to BOC information on the latest available hardware, systems and technology utilized by other customs and port administrations in facilitating trade and preventing smuggling and other frauds on customs.*

"24. The Second Addendum to the CISS Agreement, executed on 29 January 1998, extended the duration of the CISS Agreement to the end of 1999; it also made certain changes to the terms of the CISS Agreement intended to enhance the efficiency of pre-shipment inspection operations and to provide relevant electronic infrastructure.

"25. The provisions of Article 12 of the CISS Agreement concerning governing law and the settlement of disputes continued to apply to the Agreement as amended by the First and Second Addenda, as well as to the further extension of the Agreement to 31 March 2000."

The BIT and the ICSID Convention

The relevant provisions of the BIT – the 1997 Swiss-Philippines Bilateral Agreement – are set out in paragraphs 26-34 of the Decision. The Tribunal also referred to provisions of the ICSID Convention:

“26. *The Tribunal’s jurisdiction, if it exists, must arise by virtue of the ICSID Convention associated with the BIT. It was not disputed by the parties that at the jurisdictional stage the Tribunal may deal with all issues of law that are necessary in order to determine its jurisdiction. It is not enough that the Claimant raises an issue under one or more provisions of the BIT which the Respondent disputes. To adapt the words of the International Court in the Oil Platforms case, the Tribunal ‘must ascertain whether the violations of the [BIT] pleaded by [SGS] do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction ratione materiae⁴³ to entertain’ pursuant to Article VIII (2) of the BIT.*

“27. *With regard to the ICSID Convention, the relevant provisions are Article 25(1) and 26.*

“28. *Article 25(1) sets out the criteria to be met in order for ICSID to have jurisdiction over a dispute. It provides that:*

‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.’

This has to be read in conjunction with Article 42(1) of the Convention, which provides that:

‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’

“29. *It is clear from the general language of Article 25(1) that ICSID jurisdiction may extend to disputes which are purely contractual in character. For example a dispute arising out of an investment contract between a State or constituent subdivision or agency could be covered, and this could be the case even though the dispute exclusively concerns issues arising under the proper law of the contract. There is no distinction drawn in Article 25, or in Article 42(1), between purely contractual and other disputes (e.g. claims for breach of treaty).*

“30. *In accordance with Article 25, ICSID jurisdiction is based on the written consent of the parties to the dispute. This raises the question of the relation between consent given for the purposes of the ICSID Convention and any dispute resolution provisions specifically included in investment contracts. In this regard, Article 26 of the ICSID Convention provides that:*

'Consent of the Parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'

"31. In the present case, the Claimant relies upon the consent to ICSID arbitration given by the Philippines in the BIT, combined with its own written consent contained in the Request for Arbitration. It is well established that the combination of these forms of consent can constitute 'consent in writing' within the meaning of Article 25(1), provided that the dispute falls within the scope of the BIT.

"32. Article II of the BIT provides that:

'The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement.'

"33. It is not disputed that SGS is potentially an investor of the other Contracting Party under the BIT: no issue of SGS's nationality or effective control is raised. Furthermore it is not denied by the Respondent that the services provided by SGS, itself or through its wholly owned Swiss affiliates, and the resulting rights to payment are capable of constituting an investment. Under Article I (2) of the BIT, the term 'investments' is defined to include 'every kind of asset' including '(c) claims to money or to any performance having an economic value'. But the Respondent denies that SGS made any investment in the territory of the Philippines, on the basis that all or substantially all the services for which SGS now claims payment were performed abroad, and were indeed stipulated to have been so performed in the CISS Agreement.

"34. As to the basis of claim and Respondent's consent to jurisdiction, SGS relies on the following provisions of the BIT:

"ARTICLE IV: PROTECTION, TREATMENT

- 1. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investments.*
- 2. Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.*

"ARTICLE VI: DISPOSSESSION, COMPENSATION

Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization, or any other measures having the

same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation shall include interest, from the date of dispossession until payment, shall be settled in a freely convertible currency and paid without delay to the person entitled thereto without regard to its residence or domicile.

"ARTICLE VIII: SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

1. *For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article IX of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.*
2. *If these consultations do not result in a solution within six months from the date of request for consultations, the investor may submit the dispute either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration. In the latter event the investor has the choice between*
 - (a) the International Center for the Settlement of Investment Disputes (I.C.S.I.D.) instituted by the Convention on the settlement of investment disputes between states and nationals of other States, opened for signature at Washington, on 18 March 1965;*
 - (b) an ad hoc arbitral tribunal which unless otherwise agreed upon by the parties to the dispute shall be established under the arbitration rules of the United Nations Commission on International Trade Law....*

"ARTICLE X: OTHER COMMITMENTS

1. *If the provisions in the legislation of either Contracting Party or rules of international law entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that they are more favourable prevail over this Agreement.*
2. *Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."*

The umbrella clause

We move now to the first of the problems concerning investor-State disputes that were raised earlier: the 'umbrella' clause. The Tribunal dealt in paragraphs 113-129 of their Decision with the problems concerning the umbrella clause – Article X (2) of the BIT, quoted above:

"113. On the footing that it had made an investment in the territory of the Philippines, the principal jurisdictional submission of SGS is that, having failed to pay for services due under the CISS Agreement, the Philippines is in breach of Article X (2) of the BIT, and that the Tribunal's jurisdiction is attracted by Article VIII (2) in respect of such breaches. The Philippines for its part denies that Article X (2) has such an effect, relying *inter alia* on the decision of the SGS v Pakistan Tribunal on the equivalent BIT provision in that case.

"114. One must begin with the actual text of Article X. It is headed 'Other Commitments'. Article X (1) is a kind of 'without prejudice' clause, providing that legislative provisions or international law rules more favourable to an investor shall to that extent 'prevail over this Agreement'. It deals with the relation between commitments under the BIT and distinct commitments under host State law or under other rules of international law. It does not appear to impose any additional obligation on the host State in the framework of the BIT.

"115. Article X (2) is different. It reads:

'Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.'

This is not expressed as a without prejudice clause, unlike Article X (1). It uses the mandatory term 'shall', in the same way as substantive Articles III-VI. The term 'any obligation' is capable of applying to obligations arising under national law, e.g. those arising from a contract; indeed, it would normally be under its own law that a host State would assume obligations 'with regard to specific investments in its territory by investors of the other Contracting Party'. Interpreting the actual text of Article X (2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT. Article X (2) was adopted within the framework of the BIT, and has to be construed as intended to be effective within that framework.

"116. The object and purpose of the BIT supports an effective interpretation of Article X (2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other'. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.

"117. Moreover it will often be the case that a host State assumes obligations with regard to specific investments at the time of entry, including investments entered into on the basis of contracts with separate entities. Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State. But if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X (2).

"118. *The Respondent argued that, if Article X (2) does have substantive effect, it should be interpreted as being limited to obligations under other international law instruments. But such a limitation could readily have been expressed. The argument accepted that Article X (2) may have operative effect, but read into that provision words of limitation which are simply not there.*

"119. *This provisional conclusion – that Article X (2) means what it says – is however contradicted by the decision of the Tribunal in SGS v Pakistan, the only ICSID case which has so far directly ruled on the question. It should be noted that the 'umbrella clause' in the Swiss-Pakistan BIT was formulated in different and rather vaguer terms than Article X (2) of the Swiss-Philippines BIT. Article 11 of the Swiss-Pakistan BIT provides that:*

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

Apart from the phrase 'shall constantly guarantee' (what could an inconstant guarantee amount to?), the phrase 'the commitments it has entered into with respect to the investments' is likewise less clear and categorical than the phrase 'any obligation it has assumed with regard to specific investments in its territory' in Article X (2) of the Swiss-Philippines BIT.

"120. *Nonetheless it is relevant to consider the reasons given by the Tribunal in SGS v Pakistan for giving a highly restrictive interpretation to the 'umbrella clause', in the context of the more specific language of Article X (2), the provision the present Tribunal has to apply. Essentially there were four such reasons.*

"121. *The first reason was textual. As the Tribunal noted, Article 11 could cover a wide range of commitments including legislative commitments; it went on to say that the interpretation favoured by SGS was 'susceptible of almost indefinite expansion'. It is true that Article X (2) of the Swiss-Philippines BIT likewise is not limited to contractual obligations. But it is limited to 'obligations... assumed with regard to specific investments'. For Article X (2) to be applicable, the host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment – not as a matter of the application of some legal obligation of a general character. This is very far from elevating to the international level all 'the municipal legislative or administrative or other unilateral measures of a Contracting Party'.*

"122. *Secondly, the Tribunal applied general principles of international law to generate a presumption against the broad interpretation of Article 11. The principle relied on was that 'a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law'. This principle is well established. It was affirmed by the ad hoc Committee in the Vivendi case, cited by the Tribunal. But the Franco-Argentine BIT considered in the Vivendi case did not contain any equivalent to Article 11 of the Swiss-Pakistan BIT, and the ad hoc Committee therefore did not need to consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law. Certainly it might do so, as the International Law Commission observed in its commentary to Article 3 of the ILC Articles on Responsibility of*

States for Internationally Wrongful Acts. The question is essentially one of interpretation, and does not seem to be determined by any presumption.

“123. Thirdly, the Tribunal was concerned that the effect of a broad interpretation would be, *inter alia*, to override dispute settlement clauses negotiated in particular contracts. The present Tribunal agrees with this concern, but – as will be seen – it does not accept that this follows from the broad interpretation of Article X (2).

“124. Fourthly and subsidiarily, the Tribunal in *SGS v Pakistan* found support for its conclusion in the fact that Article 11 is located at the end of the BIT, after the basic jurisdictional clauses, whereas if it had been intended to impose substantive international obligations it would more naturally have appeared earlier. This factor is entitled to some weight, and it is the case that where it appears (as it does in only a minority of BITs) the ‘umbrella’ clause is usually located earlier in the text. But the Tribunal does not regard the location of the provision as decisive, having regard to the other considerations recited above. In particular, it is difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location.

“125. Not only are the reasons given by the Tribunal in *SGS v Pakistan* unconvincing: the Tribunal failed to give any clear meaning to the ‘umbrella clause’. It treated Article 11 as signalling...

‘an implied affirmative commitment to enact implementing rules and regulations necessary or appropriate to give effect to a contractual or statutory undertaking in favor of investors of another Contracting Party that would otherwise be a dead letter. Secondly, we do not preclude the possibility that under exceptional circumstances, a violation of certain provisions of a State contract with an investor of another State might constitute violation of a treaty provision... enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party.’

But Article 11, if it has any effect at all, confers jurisdiction on an international tribunal, and needs to do so with adequate certainty. Jurisdiction is not conferred by way of ‘an implied affirmative commitment’ or through the characterisation of circumstances as ‘exceptional’.

“126. Moreover the *SGS v Pakistan* Tribunal appears to have thought that the broad interpretation which it rejected would involve a full-scale internationalisation of domestic contracts – in effect, that it would convert investment contracts into treaties by way of what the Tribunal termed ‘instant transubstantiation’. But this is not what Article X (2) of the Swiss-Philippines Treaty says. It does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X (2) addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained. It is a conceivable function of a provision such as Article X (2) of the Swiss-Philippines BIT to

provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments – in effect, to help secure the rule of law in relation to investment protection. In the Tribunal's view, this is the proper interpretation of Article X (2).

"127. To summarize, for present purposes Article X (2) includes commitments or obligations arising under contracts entered into by the host State. The basic obligation on the State in this case is the obligation to pay what is due under the contract, which is an obligation assumed with regard to the specific investment (the performance of services under the CISS Agreement). But this obligation does not mean that the determination of how much money the Philippines is obliged to pay becomes a treaty matter. The extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract.

"128. To summarize the Tribunal's conclusions on this point, Article X (2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement. In the absence of other factors it could be decided by a tribunal constituted pursuant to Article VIII (2). The proper law of the CISS Agreement is the law of the Philippines, which in any event this Tribunal is directed to apply by Article 42(1) of the ICSID Convention. On the other hand, if some other court or tribunal has exclusive jurisdiction over the Agreement, the position may be different.

"129. Before turning to that question, however, it is appropriate to ask whether the present Tribunal could exercise jurisdiction over contractual disputes concerning an investment by virtue of Article VIII (2) of the BIT, irrespective of any breach of the substantive provisions of the BIT. This issue was debated before the Tribunal and is potentially relevant, for example, in the context of the application of the BIT to claims arising before its entry into force."

'Fork in the road'

In paragraphs 130-135 the Tribunal then went on to deal with another problem highlighted in this chapter, namely 'fork in the road' provisions. The relevant provisions of the BIT are set out in Article VIII (2). The Tribunal stated:

"130. Article VIII of the BIT provides for settlement of 'disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party'. If a dispute is not resolved by consultations between the parties pursuant to Article VIII (1), the investor may submit the dispute 'either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration', and in the latter case, at the investor's option, to ICSID or UNCITRAL arbitration.

"131. Prima facie, Article VIII is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State. The term 'disputes with respect to investments' ('différents relatifs à des divertissements'

in the French text) is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a 'dispute with respect to investments' so too would a dispute arising from an investment contract such as the CISS Agreement.

"132. This prima facie conclusion is supported by a number of further considerations, both within the BIT itself and extrinsic to it:

- (a) Each of the forums contemplated by Article VIII (2) (the national courts of the host State, ICSID panels and ad hoc tribunals established under the UNCITRAL Rules) has the competence to apply the law of the host State, including its law of contract. Indeed, if the BIT has not been implemented internally, the national courts may only be competent to apply their own law.*
- (b) The general term 'disputes with respect to investments' may be contrasted with the more specific term '[d]isputes... regarding the interpretation or application of the provisions of this Agreement' in Article IX. If the States Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT, they would have said so expressly, using this or similar language.*
- (c) As noted already, the purpose of the BIT is to promote and protect foreign investments. Allowing investors a choice of forum for resolution of investment disputes of whatever character is consistent with this aim. By contrast drawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty. It may be necessary to draw such distinctions in some cases, but it should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum.*
- (d) By definition, investments are characteristically entered into by means of contracts or other agreements with the host State and the local investment partner (or if these are different entities, with both of them). The specific link between investments and contracts is acknowledged by the line of cases dealing with pre-contractual claims. ICSID tribunals have been very reluctant to acknowledge that an investment has actually been made until the contract has been signed or at least approved and acted on. Thus the phrase 'disputes with respect to investments' naturally includes contractual disputes; the same is true of the phrase 'legal dispute arising directly out of an investment' in Article 25(1) of the ICSID Convention.*
- (e) In other investment protection agreements, when investor-State arbitration is intended to be limited to claims brought for breach of international standards (as distinct from contractual or other claims under national law), this is stated expressly. A well-known example is Chapter 11 of the North American Free Trade Agreement (NAFTA), under which investors may only bring claims for breaches of specified provisions of Chapter 11 itself.*

*"133. However, a different view of the matter was apparently taken by the ICSID Tribunal in *SGS v Pakistan*, and it is necessary to consider the reasons given for their conclusion. The equivalent provision of the BIT in that case, Article 9, used the phrase 'disputes with respect to investments': this is the same as*

Article VIII of the Swiss-Philippines BIT. The relevant passage of the decision reads as follows:

'161. We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI [pre-shipment inspection] Agreement, can both be described as "disputes with respect to investments," the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the factual subject matter of the disputes, does not relate to the legal basis of the claims, or the cause of action asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent. Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting ex hypothesi exclusively on contract. Both Claimant and Respondent have already submitted their respective claims sounding solely on the PSI Agreement to the PSI Agreement arbitrator. We recognize that the Claimant did so in a qualified manner and questioned the jurisdiction of the PSI Agreement arbitrator, albeit on grounds which do not appear to relate to the issue we here address. We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause so far as concerns the Claimant's contract claims which do not also amount to BIT claims, and it is a clause that this Tribunal should respect. We are not suggesting that the parties cannot, by special agreement, lodge in this Tribunal jurisdiction to pass upon and decide claims sounding solely in the contract. Obviously the parties can. But we do not believe that they have done so in this case. And should the parties opt to do that, our jurisdiction over such contract claims will rest on the special agreement, not on the BIT.

'162. We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.'

"134. The present Tribunal agrees with the concern that the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself. On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements. But there are two different questions here: the interpretation of the general phrase 'disputes with respect to investments' in BITs, and the impact on the jurisdiction of BIT tribunals over contract claims (or, more precisely, the admissibility of those claims) when there is an exclusive jurisdiction clause in the contract. It is not plausible to suggest that general language in BITs dealing with all investment

disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements. As will be seen, it is possible for BIT tribunals to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions.

*"135. Interpreting the text of Article VIII in its context and in the light of its object and purpose, the Tribunal accordingly concludes that in principle (and apart from the exclusive jurisdiction clause in the CISS Agreement) it was open to SGS to refer the present dispute, as a contractual dispute, to ICSID arbitration under Article VIII (2) of the BIT."*⁴⁴

The two *SGS* cases illustrate the issues concerning 'umbrella' clauses and 'fork in the road' provisions. The apparently conflicting decisions in the two cases also raise the question whether an appellate system is now required for investor-State arbitrations.⁴⁵ A less radical solution may be the use of mechanisms to ensure that similar facts / similar issues cases are dealt with in such a way that conflicting decisions are less likely to arise: the use of joinder / consolidation (the Rules of the ICJ permit joinder of two or more cases), for example, or the listing of such cases before the same tribunal.

The ICSID Convention – and the Washington Centre created by the Convention – are of considerable importance in the field of investor-State disputes. The ICSID Arbitration Rules and the ICSID Additional Facility Rules are considered in the chapter dealing with the Centre in Part III of the Manual.

6) NAFTA – Chapter 11

The North American Free Trade Agreement (NAFTA) is a trilateral agreement between Canada, Mexico and the United States that is concerned with trade generally. Much of the NAFTA deals with State-to-State dispute settlement, but Chapter 11 is concerned with investment and investor-State arbitration and its provisions are similar to those that may be found in a BIT. Dispute procedures are administered by the NAFTA Secretariat, established under Article 2002 of the Agreement.

Dealing with Chapter 11, the Secretariat says that it "... establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal. A NAFTA investor who alleges that a host government has breached its investment obligations under Chapter 11 may, at its option, have recourse to one of the following arbitral mechanisms...."

Reference is then made to ICSID and UNCITRAL. The relevant provisions are set out in Article 1120:

"1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

⁴⁴ A report of the *SGS v Philippines* case may be found on the World Bank website.

⁴⁵ See Chapter 14. The ICSID Secretariat has issued a Discussion Paper that raises the possibility of the establishment of an appeal process.

- (a) *the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;*
 - (b) *the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or*
 - (c) *the UNCITRAL Arbitration Rules.*
2. *The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section."*

7) Energy Charter Treaty – Article 26

Whereas the NAFTA is concerned with trade generally, the Energy Charter Treaty (ECT) is concerned specifically with energy. In his Foreword to a publication on the ECT in September 2004,⁴⁶ the Secretary General of the Energy Charter Secretariat, Dr Ria Kemper, said that:

"The Energy Charter Treaty is a unique instrument for the promotion of international cooperation in the energy sector. Following its entry into force on 16 April 1998, the Treaty, together with the related documents contained in this booklet, provides an important legal basis for the creation of an open international energy market.

"The Charter process includes the countries of the enlarged European Union, Central and Eastern Europe, the Russian Federation, Central Asia and the Caucasus, as well as Japan, Australia and Mongolia. The Treaty remains open for accession by all countries committed to observance of its principles. It is very positive in this regard that States such as China, Iran, South Korea and the countries of ASEAN are taking a close interest in the Charter process, thus opening up the prospect of a further extension of its geographical scope."

Dr Kemper continued:

"The primary challenge facing the constituent members of the Energy Charter process in the coming years will be that of ensuring full implementation of the Treaty's commitments. This will entail increased focus on multilateral cooperation over transit, trade, investments, environmental protection and energy efficiency. By continuing to build on its existing work in these areas, the Charter process stands ready to play a key role in translating the aim of a truly open non-discriminatory energy market into reality."

The Secretariat explains that the provisions for resolving investment disputes are contained in Articles 26 and 27 of the ECT, and are *"based on the model of bilateral investment treaties. This is of particular importance for the energy sector, since disputes may often be very complex and involve huge amounts of money."*

Article 26 (2) provides that, if a dispute cannot be resolved amicably within three months, the investor party to the dispute may choose to submit it for resolution:

- "(a) to the courts or administrative tribunals of the Contracting Party party to the dispute; or*
- (b) in accordance with any applicable, previously agreed dispute settlement procedure; or*

(c) in accordance with the following paragraphs of this Article.”

In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), Article 26 (4) provides that:

“... the Investor shall further provide its consent in writing for the dispute to be submitted to:

- (a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the ‘ICSID Convention’), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or*
- (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the ‘Additional Facility Rules’), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;*
- (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as ‘UNCITRAL’); or*
- (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.”*

It will be noted that, compared with ICSID and the NAFTA, an additional dispute resolution process is brought in – arbitral proceedings under the Stockholm Arbitration Institute (see Chapter 18).

In February 2005 the *Financial Times* carried a report that a claim for some \$28 billion had been made by the parent group of Yukos against the Russian Government – perhaps one of the largest arbitration claims ever made. The report stated that: *“Menatep, the original investment vehicle of Mikhail Khodorkovsky, the former Yukos chief executive now defending fraud charges, has brought the action under the 1994 Energy Charter Treaty, the multilateral accord designed to enforce international law in energy investments to which Russia is a signatory.”*

The report stated that the Yukos parent had notified the Russian Government in November of its demand for a settlement *“and is now exercising its right under Article 26 of the Energy Charter Treaty to refer the dispute to international arbitration. It says the treaty entitles it to compensation if Russia breaches its obligations.”*⁴⁷

Further information on the NAFTA Secretariat and the Energy Charter Secretariat can be found on their websites.⁴⁸

47 Neil Buckley, ‘Menatep sues over Yukos sale’, *Financial Times*, 9 February 2005, www.news.ft.com.

48 www.nafta-sec-alena.org/; www.encharter.org/.

Part III: Supranational Dispute Resolution Bodies

"We may understand the materials upon which Greek philosophers were working if we look at an exhortation addressed by Demosthenes to an Athenian jury. Men ought to obey the law, he said, for four reasons: because laws were prescribed by God, because they were a tradition taught by wise men who knew the good old customs, because they were deductions from an eternal and immutable moral code, and because they were agreements of men with each other binding them because of a moral duty to keep their promises."

Roscoe Pound⁴⁹