

HEINONLINE

Citation: 41 Int'l Law. 291 2007



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Thu May 7 16:57:13 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0020-7810](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0020-7810)

International Courts and Tribunals

LEE M. CAPLAN, NANCY A. COMBS, CARL MAGNUS NESSER,
UCHEORA O. ONWUAMAEGBU AND CESARE P.R. ROMANO*

This article summarizes significant developments in 2006 concerning international courts and tribunals, particularly events relating to the International Court of Justice, the Permanent Court of Arbitration, the Iran-U.S. Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and arbitral tribunals constituted under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. This article covers the period of activity from December 1, 2005, to November 30, 2006.

I. International Court of Justice¹

The International Court of Justice (ICJ or Court) is the principal judicial organ of the United Nations (U.N.). The ICJ's jurisdiction is two-fold: to deliver judgments in contentious cases submitted to it by sovereign states, and to issue nonbinding advisory opinions at the request of certain U.N. organs and agencies.²

This section reports briefly on the contentious cases decided by the Court, new cases before the Court, the Court's general list of pending cases, and the composition of the Court.

* The authors are leaders of the International Courts Committee of the ABA's International Law Section. Nancy A. Combs and Ucheora O. Onwuamaegbu co-chair the Committee. Nancy A. Combs is an Associate Professor at the William & Mary Marshall-Wythe School of Law. Mr. Ucheora O. Onwuamaegbu is Senior Counsel at the International Centre for Settlement of Investment Disputes, Washington, D.C. Lee M. Caplan, Carl Magnus Nesser, and Cesare P.R. Romano are the Committee's co-vice chairs. Mr. Caplan is an Attorney-Adviser in the Office of the Legal Adviser, U.S. Department of State. Carl Magnus Nesser serves as First Secretary at the Permanent Mission of Sweden to the United Nations. Cesare P.R. Romano is an Associate Professor at Loyola Law School Los Angeles, and Assistant Director of the Project on International Courts and Tribunals (PICT). The views expressed in this article are those of the authors and do not necessarily represent the views of any government body or international organization associated with them.

1. All International Court of Justice decisions, pleadings, and other related documents cited in this section are available online at <http://www.icj-cij.org>.

2. U.N. Charter arts. 92, 96; Statute of the International Court of Justice art. 36, <http://www.icj-cij.org/iccjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>.

A. CONTENTIOUS CASES

1. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*

On December 19, 2005, the Court rendered its judgment in the above case.³ The Democratic Republic of the Congo (DRC) had alleged that Uganda violated, *inter alia*, the principle of non-use of force in international relations and the principle of nonintervention by engaging in military activities against the DRC on the latter's territory by occupying Ituri, a region in the north-east of the DRC, on its border with Uganda, and by extending support to irregular forces operating in DRC territory. The Court agreed.⁴

The Court held that Uganda violated its obligations under international human rights law and international humanitarian law, *inter alia*, since its armed forces committed acts of killing, torture, and other forms of inhumane treatment of the Congolese civilian population. Moreover, the Court ruled that Uganda violated obligations owed to the DRC under international law through the looting, plundering, and exploiting by the Ugandan armed forces of Congolese natural resources and by its failure to prevent such acts in the Ituri District.⁵ The ICJ therefore held that Uganda was obligated to make reparation to the DRC for the injury caused, and that the amount of damages due to the DRC was to be determined by the Court, failing agreement by the parties.⁶

After determining that Uganda had failed to comply with the Order of the Court of provisional measures of July 1, 2000,⁷ the Court turned to the first counterclaim advanced by Uganda, which alleged that it had been the victim of military operations and other destabilizing activities by DRC/Zaire-based groups supported or tolerated by successive DRC governments.⁸ The Court found that this counterclaim was admissible, but dismissed it on the merits for several reasons. First, there was no conclusive evidence of DRC/Zaire support for anti-Ugandan rebels in the period before and after the Ugandan attack on the DRC, on August 2, 1998. Second, any military action, including support for rebels, taken by the DRC after the attack by Uganda would be justified as self-defense under Article 51 of the U.N. Charter.⁹

Uganda's second counterclaim related to attacks on Ugandan diplomatic premises and personnel in Kinshasa, as well as on Ugandan nationals for which the DRC was alleged to be responsible. The Court found this counterclaim inadmissible in part, but ruled in Uganda's favor on the rest. In particular, the Court determined that there was sufficient evidence to prove the existence of attacks by the DRC on the Ugandan Embassy and the maltreatment of Ugandan diplomats by the DRC on diplomatic premises and at Ndjili

3. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment of Dec. 19, 2005), ¶¶ 28-165, available at http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_20051219.pdf.

4. *Id.*

5. *Id.* ¶¶ 205-21.

6. *Id.* ¶¶ 259-60.

7. *Request for the Indication of Provisional Measures (Democratic Republic of the Congo v. Uganda)* (Order of July 1, 2000), available at http://www.icj-cij.org/icjwww/idocket/ico/ico_orders/ico_iorder_20060701.htm.

8. *Id.* ¶ 264.

9. *Id.* ¶ 305.

Airport.¹⁰ In committing these acts, the DRC violated Articles 22 and 29 of the Vienna Convention on Diplomatic Relations.¹¹ The DRC was also held responsible for breaches of international law on diplomatic relations through the removal of property and archives from the Ugandan Embassy.¹² With respect to the admissible part of the second counterclaim, the Court found that the DRC was liable to make reparation to Uganda for damages done. Failing an agreement by the parties on the amount, the Court reserved the subsequent procedure in the case for settling that issue.¹³

2. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*

In its judgment of February 3, 2006,¹⁴ the Court found that it lacked jurisdiction to entertain an application, filed on May 28, 2002,¹⁵ in which the DRC alleged that the Republic of Rwanda engaged in acts of armed aggression on DRC territory and in “massive, serious and flagrant violations of human rights and of international humanitarian law.”¹⁶

The DRC invoked eleven grounds for the exercise of jurisdiction by the Court, all of which the Court rejected. The Court’s reasoning is summarized below:

- The 1984 Convention against Torture was not a valid basis for jurisdiction, since Rwanda is not a party to that treaty.¹⁷
- The Convention on Privileges and Immunities was not a valid basis for jurisdiction, since it was not invoked by the DRC in the relevant phase of the proceedings.¹⁸
- Jurisdiction could not be based on *forum prorogatum* (conclusive acceptance of jurisdiction; e.g., by appearance in the proceedings) because Rwanda had repeatedly objected to the Court’s jurisdiction, and the purpose of its participation in the proceeding was to challenge that jurisdiction.¹⁹
- Rwanda’s request that the Court remove the case from its docket because of a “manifest lack of jurisdiction” could not be interpreted as an admission of the Court’s jurisdiction because, when considering requests for the indication of provisional measures, the Court usually does not take a definitive position on its jurisdiction, but rather reserves the right to examine the issue fully at a later stage.²⁰

10. *Id.* ¶ 334.

11. *Id.* ¶ 340.

12. *Id.* ¶¶ 342-43.

13. *Id.* ¶ 344.

14. *Armed Activities on the Territory of the Congo (Jurisdiction of the Court and Admissibility of the Application) (Democratic Republic of the Congo v. Rwanda)* (Judgment of Feb. 3, 2006), available at http://www.icj-cij.org/iccjwww/idocket/icrw/ijudgment/icrw_ijudgment_20060203.pdf.

15. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* (Application of Democratic Republic of Congo, May 28, 2002), available at http://www.icj-cij.org/iccjwww/cdoocket/ccrw_application_20020528_requete.PDF.

16. *Id.* at Judgment, ¶ 1.

17. *Id.* at Application of DRC, ¶ 16.

18. *Id.* ¶ 17.

19. *Id.* ¶ 22.

20. *Id.* ¶¶ 22, 25.

- Article IX of the Genocide Convention, which provides that Contracting Parties shall submit disputes regarding the interpretation, application, or fulfillment of the Convention to the ICJ, was not a valid basis for jurisdiction, since Rwanda had made a reservation thereto.²¹
- Article 22 of the Convention on Racial Discrimination was not a basis for jurisdiction, because Rwanda had made a reservation against it.²²
- Article 29, Paragraph 1, of the Convention on Discrimination Against Women was also not a valid basis for jurisdiction because the DRC had not met certain treaty prerequisites, including, *inter alia*, the commencement of negotiations and arbitration.²³
- Article 75 of the WHO Constitution, which provides that disputes regarding the interpretation or application of the Constitution may be referred to the ICJ if negotiations before the World Health Assembly fail, was not a basis for jurisdiction because the dispute did not concern the WHO Constitution, and none of the other preconditions for referral to the Court had been met.²⁴
- Article XIV, Paragraph 2, of the UNESCO Constitution was not a basis for jurisdiction because the dispute was not related to the interpretation of the UNESCO Constitution and other preconditions had not been met.²⁵
- Article 14, Paragraph 1, of the Montreal Convention was not a basis for jurisdiction because the prerequisites concerning recourse to arbitration (similar to those in the Convention on the Discrimination Against Women) had not been met.²⁶
- Article 66 of the Vienna Convention on the Law of Treaties was not a basis for jurisdiction because that provision was not applicable to the Conventions on Genocide and Racial Discrimination, as these agreements had been concluded before the entry into force of the Vienna Convention; nor was the article declaratory of customary international law; nor had the parties agreed to apply it between themselves.²⁷

21. *Id.* ¶ 70. The Court did not agree with the DRC that the reservation had been withdrawn (neither the Rwandan law on withdrawal of reservations to multilateral treaties nor the statements of the Justice Minister at the U.N. Commission on Human Rights did suffice; notification of Contracting States was required) or was invalid (peremptory norms, *ius cogens*, would not automatically confer jurisdiction upon the ICJ; the basic principle for its jurisdiction is consent by the states concerned).

22. *Id.* ¶ 79. Since many of the DRC arguments were the same as its argument with respect to the Genocide Convention, the Court referred to its reasoning regarding the Genocide Convention, but also addressed the following points. The DRC argued that the reservation had lapsed or fallen into desuetude since it was in conflict with the undertaking set out in the Rwandan Basic Law to withdraw all reservations to human rights treaties. The Court disagreed, stating that the Convention itself requires notification of the withdrawal of a reservation to the U.N. Secretary-General. Since this had not been done, the reservation was still in force. With regard to the DRC's claim that the reservation was invalid by being incompatible with the object and purpose of the Convention, the Court disagreed. A reservation is incompatible if at least two-thirds of States parties object to it, but that was not the case; not even the DRC, the Court remarked, had objected to Rwanda's reservation.

23. *Id.* ¶ 93.

24. *Id.* ¶ 101.

25. *Id.* ¶ 109.

26. *Id.* ¶ 119.

27. *Id.* ¶ 125. The DRC argued specifically that the Rwandan reservations to the compromissory clauses in the Genocide Convention and other agreements constituted violations of peremptory norms and thus were null and void and thus the Court had jurisdiction under Article 66. The Court found that its jurisdiction is

Having found that it could not accept any of the bases of jurisdiction put forward by the DRC and that it therefore did not have to rule on the admissibility of the case, the Court nevertheless stressed that States are required to fulfill their obligations under international law and are responsible for their violations thereof, even when they have not accepted the jurisdiction of the ICJ.²⁸

3. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*

On July 13, 2006, the Court decided, by a vote of fourteen to one, to refuse the request by Argentina for provisional measures.²⁹ Argentina filed the initial application on May 4, 2006,³⁰ alleging violations by Uruguay of a 1975 bilateral treaty (1975 Treaty) regulating the use of the River Uruguay, the joint Uruguay-Argentina border, because Uruguay had unilaterally authorized the construction of two paper mills on the river—which Argentina claimed threatened the environment of the river and its environs—in disregard of the notification and consultation process stipulated by the 1975 Treaty.

At the same time, Argentina submitted a request for the indication of provisional measures under which Uruguay would be compelled (1) to suspend—pending the final decision by the Court—the construction authorization for the mills and (2) to cooperate with Argentina on, *inter alia*, environmental aspects of the use of the river.³¹ The Court rejected the first part of the request. It ruled that it was unconvinced of the impossibility of remedying any violations of the Treaty at the merits stage of the proceedings and that neither the decision to authorize the construction nor the construction itself constituted in themselves imminent threats of irreparable damage.³² The Court also found that it had not been proved that pollution from the mills would result in irreparable damage and that, at any rate, the danger was not imminent since the mills were not operational.³³ The Court rejected the second part of the request by reminding the parties of their duty to cooperate and by accepting Uruguay's intention to comply in full with the 1975 Treaty.³⁴

B. NEW CASES

Djibouti instituted proceedings against France in an Application dated January 9, 2006.³⁵ France consented to the jurisdiction of the Court, pursuant to Article 38, Para-

based on the consent of the parties; the fact that rights and obligations *erga omnes* or *ius cogens* are at issue is no exception to this principle.

28. *Id.* ¶ 127.

29. *Pulp Mills on the River Uruguay, Provisional Measures, (Argentina v. Uruguay)* (Order of July 13, 2006), available at http://www.icj-cij.org/icjwww/idocket/iau/iau_orders/iau_order_provisional_measures_20060713.pdf. The Court held that “the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.” *Id.* ¶ 87.

30. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Application Instituting Proceedings of May 4, 2006), available at http://www.icj-cij.org/cijwww/cdoocket/cau/cau_requete/cau_requette_20060504.pdf.

31. *Id.* at Order, ¶ 1.

32. *Id.* ¶¶ 73-76.

33. *Id.* ¶ 77.

34. *Id.* ¶ 84.

35. *Certain Questions of Mutual Assistance in Criminal Matters (Republic of Djibouti v. France)* (Application of Republic of Djibouti of Jan. 9, 2006), available at http://www.icj-cij.org/cijwww/cdoocket/cdjf/cdjf_application/cdjf_requete.pdf.

graph 5, of the Rules of Court, on August 9, 2006.³⁶ The case concerns alleged refusal by the French authorities to execute an international letter rogatory regarding the transmission to Djibouti of the record relating to a homicide investigation, a refusal that, according to Djibouti, constitutes a violation of the Treaty of Friendship and Co-Operation (1977) and the Convention on Mutual Assistance in Criminal Matters between France and Djibouti (1986).³⁷

On May 4, 2006, Argentina filed in the Registry of the Court an application instituting proceedings against Uruguay concerning alleged violations by Uruguay of obligations under the Statute of the River Uruguay.³⁸

*A third case was brought by Dominica against Switzerland on April 26, 2006, in a dispute concerning alleged violations of the Vienna Convention on Diplomatic Relations and other rules and instruments of international law in relation to a diplomatic envoy of Dominica to the United Nations in Geneva.*³⁹ *The case was removed by the Court from its List on June 9, at the request of Dominica.*⁴⁰

C. GENERAL LIST

As of November 30, 2006, the General List of pending contentious ICJ cases was composed as follows:

- (1) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*;
- (2) *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*;
- (3) *Abmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*;
- (4) *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*;
- (5) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*;
- (6) *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*;
- (7) *Territorial and Maritime Dispute (Nicaragua v. Colombia)*;
- (8) *Certain Criminal Proceedings in France (Republic of the Congo v. France)*;
- (9) *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*;
- (10) *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*;

36. Press Release, International Court of Justice, The French Republic Consents to the Jurisdiction of the ICJ to Entertain an Application Filed against France by the Republic of Djibouti (Aug. 10, 2006), available at http://www.icj-cij.org/iccjwww/ipresscom/ipress2006/ipresscom_2006-32_djf_20060810.htm.

37. Djibouti further asserts that, in summoning certain internationally protected nationals of Djibouti, including the Head of State, in connection with a criminal complaint, France has violated its obligation to prevent attacks on the person, freedom, or dignity of persons enjoying such protection.

38. See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, available at <http://www.icj-cij.org/iccjwww/idocket/iau/iauframe.htm>.

39. *Case Concerning the Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations (Commonwealth of Dominica v. Switzerland)* (Application of Commonwealth of Dominica of Apr. 26, 2006), available at http://www.icj-cij.org/iccjwww/idocket/idos/idos_application/idos_application_20060426.pdf.

40. *Id.* at Order of June 9, 2006, available at http://www.icj-cij.org/iccjwww/idocket/idos/idos_order/idos_order_20060609.pdf.

- (11) *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*;
- (12) *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*;
- (13) *Certain Questions of Mutual Assistance in Criminal Matters (Republic of Djibouti v. France)*.

D. COMPOSITION OF THE COURT

As of November 30, 2006, the membership of the Court was comprised as follows: Rosalyn Higgins (United Kingdom), President; Awn Shawkat Al-Khasawneh (Jordan), Vice-President; Judge Raymond Ranjeva (Madagascar); Judge Shi Jiuyong (China); Judge Abdul G. Koroma (Sierra Leone); Judge Gonzalo Parra-Aranguren (Venezuela); Judge Thomas Buergenthal (United States of America); Judge Hisashi Owada (Japan); Judge Bruno Simma (Germany); Judge Peter Tomka (Slovakia); Judge Ronny Abraham (France); Judge Kenneth Keith (New Zealand); Judge Bernardo Sepúlveda Amor (Mexico); Judge Mohamed Bennouna (Morocco); and Judge Leonid Skotnikov (Russian Federation).

II. The Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) is the oldest of the existing dispute settlement bodies. It was established by the 1899 Hague Convention on the Pacific Settlement of International Disputes,⁴¹ subsequently revised in 1907⁴² to facilitate immediate settlement of international disputes, which the parties have agreed to refer to it. Besides arbitration, the Hague Treaties of 1899 and 1907 provide for the constitution of an International Commission of Inquiry to facilitate the solution of disputes by elucidating facts through an impartial and conscientious investigation.

The point has been well made that the name "Permanent Court of Arbitration" is not a wholly accurate description of the machinery set up by the Hague conventions. Indeed the PCA is neither a court nor permanent. It is, rather, an institutional framework open to parties to a dispute to avail themselves of at their choice. It provides them with all legal, administrative, and secretarial services necessary to have an effective settlement of the dispute, including providing an updated list of leading scholars and practitioners to be appointed as arbitrators or conciliators; acting as a channel of communication between the parties, holding and disbursing deposits for costs; ensuring safe custody of documents; arranging for efficient secretarial, language, and communications services; and providing a courtroom and office space.

In recent years there has been a sharp increase in accessions to the Conventions of 1899 and 1907. There are currently 106 States that are parties to one or both of the Conventions.⁴³ Each Member State may designate up to four arbitrators, known as "Members of

41. For the text of the Convention of July 29, 1899, see I TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 230-46 (C.I. Bevans ed., 1968).

42. For the text of the Convention of Oct. 18, 1907, see *id.* at 577-606.

43. See Permanent Court of Arbitration, <http://www.pca-cpa.org/ENGLISH/CSAI/> (last visited Feb. 11, 2007).

the Court," from among whom the members of each ad hoc arbitral tribunal might be chosen.⁴⁴

Under its rules of procedure, which are based upon the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), the PCA administers arbitration, conciliation, and fact finding in disputes involving various combinations of states, private parties, and intergovernmental organizations.⁴⁵ The forum is available not only to States, or for disputes involving at least one State, but also international commercial arbitration.

A. ARBITRAL AWARDS

During 2006, two arbitral tribunals, working under the auspices of the PCA rendered their awards, one partial and one final.

1. *Saluka Investments B.V. (The Netherlands) v. Czech Republic*

On July 18, 2001, Saluka Investments B.V. (Saluka), a legal person constituted under the law of The Netherlands, initiated arbitration proceedings against the Czech Republic claiming violation of a bilateral investment treaty between the two countries.⁴⁶ On March 17, 2006, the arbitral tribunal issued a partial award in the case brought by Saluka Investments B.V. (The Netherlands) against the Czech Republic.⁴⁷ The members of the arbitral tribunal were Arthur Watts (Chairman), L. Yves Fortier, and Peter Behrens. The PCA served as Registry. The arbitration was conducted pursuant to the UNCITRAL Rules and the registry services were performed by the Permanent Court of Arbitration.

This arbitration arose out of events following the reorganization and privatization of the Czech banking sector as it had formerly existed under the centralized banking system of the Communist period. One of the first major Czech banks privatized after the fall of communism was IP Banka (IPB). In 1998, the State's shares of IPB were sold to a company within the Nomura Group.⁴⁸ The Nomura Group is a major Japanese merchant banking and financial services group of companies, which typically operates through subsidiaries set up in various countries. The Nomura Company, which bought the shares in IPB, then transferred them to one of its subsidiaries, Saluka.⁴⁹

Although teetering on bankruptcy, IPB was still the third-largest bank in the Czech Republic when the Czech government placed it under forced administration in June 2000.

44. Moreover, according to Article 4.1 of the Statute of the International Court of Justice, the members of the PCA appointed from each State party constitute "national groups" that are entitled to nominate candidates for election, by the General Assembly and the Security Council of the U.N., to the International Court of Justice.

45. The PCA Rules of Procedure are available at <http://www.pca-cpa.org/ENGLISH/BD/>.

46. The Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, Neth.-Czech & Slov. Fed. Rep., Apr. 29, 1991, OJ 1992 L 115, available at http://www.unctad.org/sections/dite/ia/docs/bits/czech_netherlands.pdf.

47. The Matter of an Arbitration under the UNCITRAL Arbitration Rules 1976 (Saluka Invs. B.V. (The Netherlands) v. the Czech Republic) (Partial Award of Mar. 17, 2006), available at <http://www.pca-cpa.org/ENGLISH/RPC/#Saluka>.

48. *Id.* ¶ 1.

49. *Id.*

due to a combination of relatively liberal credit policies and inadequate creditors' rights.⁵⁰ Subsequently, the government decided to sell IPB to Československá obchodní banka (CSOB) for the symbolic price of one crown.⁵¹ This action prompted Saluka, which then held a 46.16 percent stake in IPB, to initiate arbitration proceedings.⁵² Saluka claimed, in particular, a violation of Article 5 (deprivation of investment) and Article 3 (fair and equitable treatment) of the bilateral investment treaty between The Netherlands and the Czech Republic.⁵³

At the outset, the Czech Republic filed a counterclaim against Saluka, arguing that Nomura did not buy IPB shares to invest in IPB's banking operations, but that instead its true purpose was to facilitate its acquisition of Czech breweries in which IPB held a controlling shareholding; that Nomura did not disclose that true purpose to the Czech authorities at the time of its purchase of IPB shares; that Nomura had thus not acted in good faith and had violated the principle of non-abuse of rights, and was therefore not a *bona fide* investor; and therefore Saluka, to whom Nomura had transferred its IPB shareholding, was precluded from having recourse to arbitration under the Treaty.⁵⁴ On May 7, 2004, the Tribunal handed down its *Decision on Jurisdiction over the Czech Republic's Counterclaim*. It decided that it was without jurisdiction to hear and determine the counterclaim.⁵⁵

The Czech Republic objected to the Tribunal's jurisdiction over Saluka's claims, arguing that Saluka failed to meet the definition of an investor under the BIT, because it was merely an agent for the parent corporation Nomura, which, not being a Dutch corporation, could not benefit from the BIT. The Tribunal addressed the question of jurisdiction while considering the merits and rejected the Czech Republic's objections.⁵⁶

On the merits, the Tribunal concluded that the Czech Republic, by adopting measures of forced administration, did not violate Article 5 of the BIT, as the measure was "valid and permissible as within its regulatory powers, notwithstanding that the measure had the effect of eviscerating Saluka's investment."⁵⁷ However, the Tribunal did find that the Czech Republic had violated Article 3 of the BIT, guaranteeing fair and equitable treatment. In reaching its decision, the Tribunal determined that the Czech Republic, "without undermining its legitimate right to take measures for the protection of the public interest . . . assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations."⁵⁸ In the mid-1990s, all of the four major banks in the Czech Republic, of which IPB was one, were facing problems of bad debt stemming from loan policies regarding nonperforming loans.⁵⁹ While the other banks received assistance from the state, IPB did not.⁶⁰ The

50. *Id.* ¶¶ 39, 136.

51. *Id.* ¶ 143.

52. *Id.* ¶¶ 1, 46, 72.

53. *Id.* ¶ 26.

54. *Id.* at Decision on Jurisdiction over the Czech Republic's Counterclaim of May 7, 2004, ¶ 17, available at <http://www.pca-cpa.org/ENGLISH/RPC/#Saluka>.

55. *Id.*

56. *Id.* at Partial Award, ¶¶ 243-44.

57. *Id.* ¶ 276.

58. *Id.* ¶ 309.

59. *Id.* ¶ 36.

60. *Id.* ¶¶ 324-26.

Tribunal found that there was no reasonable justification for the differential treatment.⁶¹ Furthermore, the Tribunal found that the Respondent violated its obligations to “fair and equitable treatment” by frustrating IPB’s and the shareholders’ good faith efforts to resolve the bank’s crisis.⁶² In that respect the Tribunal also concluded that this conduct constituted a violation of the Respondent’s “no-impairment” obligation under Article 3.1 of the BIT.⁶³

The Tribunal reserved the questions of redress for the breach, as well as the question of costs, for a later point; hence, the award is only partial.

2. *Barbados/Trinidad & Tobago*

On April 11, 2006, an Arbitral Tribunal constituted pursuant to Article 286 and Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)⁶⁴ (a so-called Annex VII Arbitral Tribunal) rendered the final award in an arbitration between Barbados and Trinidad & Tobago.⁶⁵ The case involved the delimitation of the maritime boundary between Barbados and Trinidad & Tobago. Proceedings were started unilaterally by Barbados on February 16, 2004. The members of the Tribunal were: Stephen M. Schwebel (President), Ian Brownlie, Vaughan Lowe, Francisco Orrego Vicuña, and Arthur Watts. The PCA acted as registry, and the hearings were held in London. The Tribunal’s decision represents the first time an Annex VII Arbitral Tribunal has decided a case on the merits.⁶⁶

As arbitration was initiated unilaterally, Trinidad & Tobago raised a jurisdictional objection at the outset claiming that there was no properly called dispute and that diplomatic means had not yet been exhausted.⁶⁷ These objections were quickly disposed of by the arbitral tribunal.⁶⁸

On the merits, both parties claimed more than what they would have obtained if the equidistance criterion was strictly employed. Notably, Barbados made a claim based on historical fishing routes for an area around the Island of Tobago, within the sea area claimed by Trinidad & Tobago as its Exclusive Economic Zone.⁶⁹ Trinidad & Tobago

61. *Id.* ¶ 498.

62. *Id.* ¶ 407.

63. *Id.* ¶ 499.

64. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.

65. In the Matter of an Arbitration between Barbados and the Republic of Trinidad & Tobago (Award of Apr. 11, 2006), available at <http://www.pca-cpa.org/ENGLISH/RPC/> [hereinafter *Trinidad & Tobago Award*].

66. None of the other Annex VII arbitral tribunals have, to date, decided a case on the merits. The one convened to decide the Southern Bluefin Tuna dispute dismissed the case for lack of jurisdiction. Southern Bluefin Tuna (New Zealand v. Japan, Australia v. Japan), Jurisdiction and Admissibility, Award of the Arbitral Tribunal, 39 I.L.M. 1359 (2000). The MOX dispute arbitral tribunal has suspended proceedings pending a decision of the European Court of Justice (*see infra*, discussion in section II.B.2), and the arbitral tribunal to adjudicate the boundary between Suriname and Guyana (*see infra*, discussion in section II.B.1) has not yet rendered its award.

67. Southern Bluefin Tuna (New Zealand v. Japan, Australia v. Japan), Jurisdiction and Admissibility, Award of the Arbitral Tribunal, 39 I.L.M. 1359 (2000), ¶ 74.

68. *Id.* ¶¶ 188-218.

69. *Id.* ¶ 125.

claimed a large area north of the hypothetical equidistance line⁷⁰ based on a treaty concluded with Venezuela in 1990.⁷¹

The Award established a single maritime boundary between Barbados and Trinidad & Tobago that differed from the boundaries claimed by each, and that for the most part follows the equidistance line between the two.⁷² In addition, the Tribunal decided that the parties are under a duty to agree upon the measures necessary to coordinate and ensure the conservation and development of flying fish stocks, and to negotiate in good faith and conclude an agreement that will accord “fisherfolk of Barbados” access to fisheries within the Exclusive Economic Zone of Trinidad & Tobago.⁷³ The Arbitral Tribunal ultimately bent northward the equidistance line at its eastern extremity in the Atlantic to take into account the shape of the coasts of Trinidad & Tobago that abut upon the area of overlapping claims (an area of about 300 square miles).⁷⁴

B. PENDING CASES

1. *Guyana/Suriname*

On February 24, 2004, Guyana unilaterally started arbitration proceedings under Annex VII of the UNCLOS concerning the delimitation of the maritime boundary with Suriname.⁷⁵ The members of the Tribunal are: Dolliver Nelson (President); Thomas Franck; Hans Smit; Ivan Shearer; and Kamal Hossain. The PCA is acting as registry in this case. By agreement of the two governments, both the written and oral proceedings in this arbitration are to be confidential. It is, however, expected that the Award of the Tribunal will be made public after it has been rendered.

2. *Ireland v. United Kingdom (MOX Plant Case)*

Proceedings in *Ireland v. United Kingdom*, involving another Law of the Sea Convention Annex VII Tribunal, are also currently pending.⁷⁶ The PCA is acting as Registry. The Tribunal is composed as follows: Thomas A. Mensah (President); James Crawford; Maître L. Yves Fortier; Prof. Gerhard Hafner; and Arthur Watts. In 2001, Ireland initiated proceedings unilaterally under the dispute settlement procedure of the Law of the Sea Convention. It alleges that the United Kingdom has violated basic obligations of the convention with regard to the protection of the marine environment, including the obli-

70. *Id.* ¶¶ 162-65.

71. Treaty between the Republic of Trinidad & Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas, Trin. & Tobago-Venez., Apr. 18, 1990, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA—MARITIME BOUNDARY AGREEMENTS (1985-1991) 25-29 (1992).

72. Trinidad & Tobago Award, *supra* note 65, ¶ 381.

73. *Id.* ¶ 385.

74. *Id.* ¶¶ 369-373.

75. Permanent Court of Arbitration, <http://www.pca-cpa.org/ENGLISH/RPC/#Guyana/Surinam> (last visited Feb. 11, 2007).

76. Permanent Court of Arbitration, [http://www.pca-cpa.org/ENGLISH/RPC/#Ireland%20v.%20United%20Kingdom%20\(MOX%20Plant%20Case\)](http://www.pca-cpa.org/ENGLISH/RPC/#Ireland%20v.%20United%20Kingdom%20(MOX%20Plant%20Case)).

gation to carry out an assessment of environmental impacts, by building and commissioning the so-called MOX plant, a nuclear waste recycling facility.⁷⁷

Pending the constitution of an arbitral tribunal, on November 15, 2001, Ireland requested provisional measures from International Tribunal for the Law of the Sea (ITLOS).⁷⁸ The ITLOS determined that the arbitral tribunal had *prima facie* jurisdiction, and prescribed provisional measures on December 3, 2001.⁷⁹

However, both Ireland and the United Kingdom are Members of the European Communities. As such, they are bound by Article 292 of the Treaty Establishing the European Community (EC Treaty),⁸⁰ and the identically worded Article 193 of the Treaty Establishing the European Community and the European Atomic Energy (EA Treaty),⁸¹ whereby EC "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."

In 2003, the European Commission announced that it was examining legal action against Ireland before the European Court of Justice (ECJ).⁸² In response, the LOS Convention Annex VII Arbitral Tribunal suspended proceedings.⁸³ It did so "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States."⁸⁴

The European Commission instituted proceedings against Ireland in the ECJ on June 10, 2004. The Commission alleged that Ireland had breached Article 292 of the EC Treaty and Article 193 of the EA Treaty because by submitting the dispute to the LOS Convention Annex VII Arbitral Tribunal, it failed to respect the ECJ's exclusive jurisdiction on the interpretation and application of Community law. Second, the Commission claimed that Ireland violated Article 10 of the EC Treaty and Article 192 of the EA Treaty because by not consulting with the Commission before initiating arbitral proceedings, Ireland had hindered the achievement of the Community's tasks and jeopardized the attainment of the objectives of the Community treaties. On May 30, 2006, the ECJ issued its ruling.⁸⁵ The Court upheld all complaints.

The European Court's ruling shifts the focus of the dispute back to the Arbitral Tribunal. As this article was being prepared at the end of November 2006, the parties were

77. Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland v. United Kingdom), Order No. 3, June 24, 2003, 42 I.L.M. 1187 (2003).

78. The MOX Plant Case (Ireland v. U.K.), Order, Dec. 3, 2001, 41 I.L.M. 405, ¶ 89 (2002).

79. *Id.*

80. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C340) 3.

81. Treaty Establishing the European Atomic Energy Community, Feb. 7, 1992, available at <http://eurolex.europa/en/treaties/dat/12006A/12006A.html> (as amended by the Treaty of Nice, 26 Feb. 26, 2001, OJ 2001 C80/1).

82. Dispute Concerning the MOX Plant, *supra* note 77, ¶ 21.

83. *Id.* See Press Release, Permanent Court of Arbitration, MOX Plant Arbitral Tribunal Issues Order No. 4 Further Suspending Proceedings on Jurisdiction and Merits (Nov. 14, 2003), available at <http://www.pca-cpa.org/ENGLISH/RPC/MOX/MOX%20Press%20Release%2014%20Nov.pdf>.

84. Dispute Concerning the MOX Plant, *supra* note 77, ¶ 28.

85. Comm'n of the European Communities v. Ireland, Case C-459/03, Grand Chamber Judgment, 2 *OJ C* 165 (2006).

holding consultations about how to proceed in light of the ECJ ruling. No date for a final award had yet been fixed.

III. Iran-United States Claims Tribunal

The Iran-United States Claims Tribunal (the Tribunal) was established in 1981 pursuant to the Algiers Declarations⁸⁶ as part of the resolution of the Iranian hostage crisis. The Tribunal adjudicates disputes between Iran and the United States and their respective nationals. It hears two categories of claims: private claims, which are claims brought by a national of one country against the other country, and inter-governmental claims, which are claims brought by one country against the other, alleging either a breach of contract or a violation of the Algiers Declarations.⁸⁷ After twenty-five years in operation, the Tribunal has decided virtually all of the private claims, disposing of nearly 4,000 cases, and awarding more than \$2.5 billion to the United States and U.S. nationals, and more than \$900 million to Iran and Iranian nationals. Its docket now consists primarily of large inter-governmental claims.⁸⁸

During 2005 and 2006, the Tribunal has had before it an exceptionally large case—Case No. B61—involving Iran's claim for compensation for losses arising out of an alleged U.S. obligation to transfer, to Iran, Iranian military properties that are being held by U.S. nationals. In September 2005, the Tribunal held a two-week hearing that addressed, among other things, questions concerning the United States' liability for its failure to transfer the military equipment, Iran's ownership of the properties at issue, and general valuation questions. In May 2006, the Tribunal began hearings to address the specific properties. The May hearings concerned claims relating to IBEX, a 1970's program of the Iranian Air Force designed to modernize and expand its electronic intelligence gathering system. Hearings are continuing through the Fall and Winter of 2006 and the early Spring of 2007 to address claims involving Iran Aircraft Industries, the Iran Helicopter Supply and Renewal Company, and the Imperial Iranian Air Force, among others.

In December 2005, the United States lodged a challenge against the Tribunal's three Iranian arbitrators. The challenge was made pursuant to Article 10 of the Tribunal rules, which authorizes challenges to arbitrators when "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."⁸⁹ The basis for the challenge was a statement by one of the Iranian arbitrators, Mr. Noori, that "an increase in the Iranian arbitrators' remuneration would not affect their personal situations that much as they remit a portion of their remuneration to Iran."⁹⁰ The United States consequently

86. The term "Algiers Declarations" refers to: (1) The Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 224 [hereinafter General Declaration] and (2) The Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 20 I.L.M. 230 [hereinafter Claims Settlement Declaration].

87. Claims Settlement Declaration, *supra* note 86, art. II.

88. Many documents relating to the Iran-U.S. Claims Tribunal are not in the public domain, and much information about the Tribunal is not generally available from public sources. Accordingly, much of the information in this section is based upon the firsthand knowledge of the author.

89. Iran-United States Claims Tribunal, Rules of Procedure, art. 10(1) (May 3, 1983).

90. Decision on the Challenge launched by the United States against Judges Assadollah Noori, Koorosh H. Ameli, and Mohsen Aghahosseini at 1, Apr. 19, 2006.

alleged that these payments constituted “party-mandated arbitrator kickbacks” that gave rise to justifiable doubts about the Iranian arbitrators’ impartiality or independence.⁹¹

The Tribunal’s Appointing Authority, W.E. Haak, rejected the challenge. The Appointing Authority first found that the challenge was untimely because, in his view, the United States had actual knowledge since 1984 that Iranian arbitrators had paid some of their salaries to Iran.⁹² In addition, the Appointing Authority concluded that even if the challenge had been timely, the United States had failed to prove that the payments were anything other than legally made contributions required by Iranian tax law.⁹³

IV. The Eritrea-Ethiopia Claims Commission

War erupted between Eritrea and Ethiopia in 1998 following disputes over the countries’ common border. After two years of fighting, which resulted in many thousands of casualties and considerable physical damage, Eritrea and Ethiopia entered into the Peace Agreement of December 12, 2000,⁹⁴ which ended the war and established two Commissions: (1) a Boundary Commission charged with determining for the parties a common boundary that they would be obliged to accept,⁹⁵ and (2) a Claims Commission charged with resolving the claims of each party against the other for any acts arising out of the war that injured that party, including injury to its nationals, and that were in violation of international law.⁹⁶ The Eritrea-Ethiopia Claims Commission (the Commission) has five members: Belgian professor and arbitrator Hans van Houtte serves as President, while four American lawyers serve as party-appointed members. In particular, Eritrea appointed John Crook and Lucy Reed, while Ethiopia appointed George Aldrich and James Paul.⁹⁷

Thus far, the Commission has issued four sets of awards, the last of which it issued in December 2005. Most notable of the Commission’s holdings in these recent awards was its conclusion that Eritrea carried out a series of unlawful armed attacks against Ethiopia that violated Article 2, Paragraph 4, of the Charter of the United Nations, which prohibits the threat or use of force against the territorial integrity or political independence of any State.⁹⁸ In so concluding, the Commission rejected Eritrea’s claim that its actions were lawful measures of self-defense pursuant to Article 51 of the United Nations Charter.⁹⁹ The December 2005 awards also addressed the parties’ claims relating to military actions on the Western and Eastern Fronts, diplomatic claims, economic claims, claims involving the ports, and claims involving displaced civilians, pensions, and aerial bombardment.

91. *Id.* at 5.

92. *Id.* at 4-5.

93. *Id.* at 5.

94. Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Peace Agreement), Eth.-Eri., Dec. 12, 2000, 40 I.L.M. 260, available at <http://www.pca-cpa.org/ENGLISHRPC/EEBC/E-E%20greement.html>.

95. *Id.* at art. 4(2).

96. *Id.* at art. 5(1).

97. Permanent Court of Arbitration, <http://www.pca-cpa.org/ENGLISH/RPC/#Eritrea-Ethiopia%20Claims%20Commission>.

98. Partial Award between the Federal Democratic Republic of Ethiopia and the State of Eritrea, *Jus Ad Bellum*; Ethiopia’s Claims 1-8, ¶ 16, (Dec. 19, 2005), <http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ET%20JAB.pdf>.

99. *Id.* ¶ 9.

In its December 2005 partial award, the Commission adjudicated Eritrea's claims relating to Ethiopia's conduct of warfare on the Western front, its aerial bombardment at various places in Eritrea, and its alleged displacement of Eritrean civilians.¹⁰⁰ With respect to warfare on the Western front, Eritrea alleged that Ethiopia had abused civilians and engaged in widespread looting and destruction of property.¹⁰¹ The Commission determined that Eritrea had not presented sufficient evidence to prove a pattern of frequent or pervasive abuse of civilians, with the exception of Eritrea's rape claim. The Commission determined, however, that "Ethiopia failed to impose effective measures on its troops, as required by international humanitarian law, to prevent rape."¹⁰² With respect to property loss, the Commission also found an "abundance of clear and convincing evidence of violations."¹⁰³ The Commission found, for instance, that Ethiopia permitted the looting and burning of Tenesey, Alighidirdid, Tabaldia, Gergef, Barentu, and Gulaj, among other locations.¹⁰⁴

The Commission rejected Eritrea's claim that Ethiopia's aerial attacks were indiscriminate or disproportionate.¹⁰⁵ The Commission likewise rejected Eritrea's claim that Ethiopia's bombing of the Hirgigo Power Station violated international law because it was not a military objective. Relying on the testimony of an Eritrean officer who declared the power plant was going to be a huge asset to Massawa, the Commission held the Hirgigo Power Station to be a military objective.¹⁰⁶ As for Ethiopia's attempt to bomb the Harsile Water Reservoir, the Commission determined that Ethiopia's action violated Article 54 of Protocol I to the 1949 Geneva Conventions, which prohibits attacks on drinking water installations.¹⁰⁷

Finally, Eritrea sought relief for the injuries and losses caused by the internal displacement of its civilians as a result of shelling, aerial bombardment, explosions, and other conditions that necessitated their evacuation. The Commission divided Eritrea's claims into so-called indirect displacement—displacement of civilians caused by their fear of alleged Ethiopian violations of international law—and direct displacement—displacement resulting from Ethiopia's orders to civilians to displace. The Commission determined that the flight of civilians due to their own fear does not give rise to liability under international law.¹⁰⁸ As for direct displacement, the Commission found that the evidence submitted by Eritrea was not convincing except for that pertaining to the Awgaro village. There, Eritrea's evidence consistently indicated that Ethiopian soldiers forced civilians out of their homes based solely on their ethnicity.¹⁰⁹ As a consequence, the Commission found Ethiopia's actions to constitute a presumptive violation of Article 49 of the Geneva

100. Partial Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25, 26 (Dec. 19, 2005), <http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ER%20FRONT%20CLAIMS.pdf>.

101. *Id.* ¶ 25.

102. *Id.* ¶ 83.

103. *Id.* ¶ 29.

104. *Id.* §§ IX(A)(2)(a)-(j).

105. *Id.* ¶ 97.

106. *Id.* ¶¶ 118-21.

107. *Id.* ¶ 105.

108. *Id.* ¶ 135.

109. *Id.* ¶¶ 138-39.

Convention IV, which restricts the right of an occupying power to force residents from their homes.¹¹⁰

In its Pensions Claim, Eritrea contended that Ethiopia breached certain bilateral agreements that obligated Ethiopia to reimburse Eritrea for pension payments that Eritrea made to former Ethiopia State employees, military personnel, and employees of nationalized state enterprises who currently live in Eritrea. After reviewing historical precedent, the Commission observed that “[a]t an earlier time, writers viewed war as canceling all treaty relationships between the belligerents except treaties specifically designed for war,”¹¹¹ but that modern writers “generally maintain that [States] parties should be presumed to intend that such treaties be at least suspended during the hostilities.”¹¹² Finding that principle applicable in this case, the Commission held that the 1998-2000 war between Ethiopia and Eritrea resulted in, at the least, the suspension of pension-related treaty obligations during the course of the conflict.¹¹³

Eritrea’s Claim Number 24 related to the loss of property in Ethiopia by nonresidents. The Commission held, among other things, that the evidence “establishes a systematic confiscation of trucks [and buses] for which no compensation was provided.”¹¹⁴ Although the Commission determined that the confiscation itself was not a violation of international law because the confiscation was for a “legitimate public purpose,”¹¹⁵ Ethiopia did violate international law when it failed to pay compensation to the owners of the vehicles because “[w]here aliens’ property is taken for State purposes in wartime, the obligation to provide full compensation continues to operate” even if the compensation cannot be made until after the war ends.¹¹⁶

In its Claim Number 7, Ethiopia sought compensation for a wide range of economic damage that Ethiopia suffered, pointing in particular to Eritrea’s unlawful use of force and its breach of five bilateral agreements regulating trade and commercial relations between the parties. After dismissing some claims for lack of proof, the Commission held, consistent with its determination in Eritrea’s Pension Claim, that the bilateral agreements were not in effect during the war.¹¹⁷ For the remainder of its economic claims, Ethiopia maintained that Eritrea should pay for the economic damages caused by the war since Eritrea began the war with its unlawful use of force. Although the Commission has found that Eritrea is liable under this theory, it determined that questions regarding the scope of damages will be considered in a later, damages phase.¹¹⁸

110. *Id.* ¶¶ 140-41.

111. Final Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Pensions, Eritrea’s Claims 15, 19 & 23, ¶ 28 (Dec. 19, 2005), <http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ER%20PENSIONS.pdf>.

112. *Id.* ¶ 30.

113. *Id.* ¶ 32.

114. Partial Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Loss of Property in Ethiopia Owned by Non-Residents; Eritrea’s Claim 24, ¶ 22 (Dec. 19, 2005), <http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ER%20CLAIM%2024.pdf>.

115. *Id.* ¶ 23.

116. *Id.* ¶ 24.

117. Partial Award between the Federal Democratic Republic of Ethiopia and the State of Eritrea, Economic Loss Throughout Ethiopia, Ethiopia’s Claim 7, ¶ 18, (Dec. 19, 2005), <http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ET%20CLAIM%207.pdf>.

118. *Id.* § V(2).

In Ethiopia's ports claim, Ethiopia contended that Eritrea effected a taking of Ethiopian cargo that was bound to or from Ethiopia and that was stranded in Eritrea ports when the hostilities commenced. The Commission held that the evidence was not consistent with the claim that there was a taking of Ethiopian cargo because the evidence showed that the Eritrean port of Assab remained open to movements of Ethiopian cargo for a number of days after the hostilities began.¹¹⁹ The Commission went on to hold that the record also did not establish other violations of international law involving stranded property. Although movements of cargo did eventually cease, by this time, it was clear that the Parties were engaged in an international armed conflict. The right of a Party to an international armed conflict to terminate commerce and trade with another party to the same conflict is "clearly established, and is evidenced by extensive State practice during the twentieth century." Thus, Eritrea had the right to terminate Ethiopia's access to the port of Assab and the movement of Ethiopian cargo from Assab to Ethiopia, notwithstanding any prior peacetime agreements regarding access to Eritrean ports.¹²⁰ The Commission went on to observe that a belligerent may regulate or freeze the private property of another belligerent with a view to returning the property once the hostilities have ended.¹²¹ According to the Commission, the evidence did not indicate that Eritrea acted in an unreasonable or unlawful fashion in its treatment of the property in question. During the Commission's hearing, Eritrea had stated its willingness to return Ethiopia's stranded property and to provide an accounting to Ethiopia for funds it had received for property it had sold, and to transfer the balances to Ethiopia, less certain administrative costs. The Commission determined that these offers "appear to be broadly in line with [Eritrea's] belligerent obligations in relation to the property."¹²²

Both Ethiopia and Eritrea alleged that the other State had violated the Vienna Convention on Diplomatic Relations (VCDR).¹²³ In both of these claims, the Commission held that the parties did not have the right to derogate from their fundamental obligations under the VCDR.¹²⁴ The Commission concluded that, although each party had the right to unilaterally sever diplomatic relations, since neither did so, they could not successfully maintain that the exigencies of war allowed them to derogate from the treaty.

Turning first to Eritrea diplomatic claims, it was uncontested that after the armed conflict began, Ethiopia ordered Eritrea's Ambassador to reduce diplomatic staff to three people. Ethiopia then declared all but those three to be *persona non grata* and ordered them to leave the country within forty-eight hours. Later, Ethiopia deemed the Ambassador himself *persona non grata*. The Commission determined that a receiving State may, without any reason, declare a member of a sending State's diplomatic mission to be *persona*

119. Final Award between the Federal Democratic Republic of Ethiopia and the State of Eritrea, Ports; Ethiopia's Claim 6, ¶ 19 (Dec. 19, 2005).

120. *Id.* ¶ 20.

121. *Id.* ¶ 25.

122. *Id.* ¶¶ 31-32.

123. Partial Award between the Federal Democratic Republic of Ethiopia and the State of Eritrea, Diplomatic Claim, Ethiopia's Claim 8, (Dec. 19, 2005), <http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ET%20DIP%20AWARD.pdf>. [hereinafter Ethiopia's Diplomatic Claim]; Partial Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Diplomatic Claim, Eritrea's Claim 20, (Dec. 19, 2005), <http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ER%20DIP%20AWARD.pdf> [hereinafter Eritrea's Diplomatic Claim].

124. Ethiopia's Diplomatic Claim, *supra* note 123, ¶ 24; Eritrea's Diplomatic Claim, *supra* note 123, ¶ 20.

non grata.¹²⁵ Further, although the Commission received considerable evidence that Ethiopia detained and abused an Eritrean guard, it determined that Eritrea did not show that such treatment interfered with the essential functioning of its mission, as Eritrea had maintained.¹²⁶

The Commission did find, however, that Ethiopia violated the VCDR by physically searching diplomats and their luggage at the airport before they departed.¹²⁷ The Commission also determined that Eritrea presented clear and convincing evidence that the Ethiopian security guards ransacked, searched and seized the Eritrean Embassy residence without Eritrea's consent, in violation of Article 22 of the VCDR.¹²⁸ Finally, Eritrea argued that Ethiopia violated its obligations as host to the Organization of African Unity (OAU) and the United Nations Economic Commission for Africa (UNECA) by peremptorily rejecting Eritrea's Ambassador, and then his nominated replacement, as Eritrea's accredited representative to those organizations.¹²⁹ After examining the OAU Privileges and Immunities Convention, the OAU Headquarters Agreement, and the UNECA Headquarters Agreement, the Commission determined that Ethiopia had no legal obligation to provide Eritrea absolute discretion to designate particular individuals to serve as representatives to OAU and UNECA. The Commission further concluded that even if there was a cognizable international law basis for Eritrea's claim, Eritrea failed to prove that Ethiopia interfered with its full participation in OAU and UNECA.¹³⁰

In Ethiopia's Diplomatic claim, it argued, among other things, that Eritrea violated the VCDR in its treatment of Ethiopia's *Charge d'Affaires*. The Commission found that Eritrea violated Article 29 of the VCDR by arresting and briefly detaining the Charge, but determined that its brief questioning of the Charge did not violate Articles 26 or 31.¹³¹

V. Arbitral Tribunals Constituted under the ICSID Convention

A. INTRODUCTION

The International Centre for Settlement of Investment Disputes (ICSID) is one of the five constituent institutions of the World Bank Group. It was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention), which came into force on October 14, 1966.¹³² The Bank's main consideration in creating a non-lending institution like ICSID was the belief that an institution specially designed to facilitate the settlement of investment disputes between gov-

125. Eritrea's Diplomatic Claim, *supra* note 123, ¶¶ 30-31.

126. *Id.* ¶ 59.

127. *Id.* ¶¶ 35-36.

128. *Id.* ¶ 46.

129. *Id.* ¶ 59.

130. *Id.* ¶¶ 61-62.

131. Ethiopia's Diplomatic Claim, *supra* note 123, ¶¶ 33-34.

132. ICSID Convention, Regulations & Rules, *available at* <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> [hereinafter ICSID Regulations & Rules].

ernments and foreign investors could help to promote increased flows of international investment.¹³³

Pursuant to the Convention, ICSID provides facilities for the resolution, by conciliation and arbitration, of disputes between its Member States and investors from other Member States. The Convention requires each Member State of ICSID, whether or not a party to the dispute at issue, to recognize and enforce the award of an ICSID Tribunal.¹³⁴

In addition to proceedings under the Convention, since 1978 the ICSID Secretariat has, by a set of Additional Facility Rules, been authorized to administer other types of proceedings between States and foreign nationals that fall outside the scope of the Convention.¹³⁵ These include: conciliation and arbitration proceedings where either the State party or the home State of the foreign national is not a member of ICSID; cases where the dispute is not an investment dispute, provided it is distinguishable from an ordinary commercial transaction; and fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry "to examine and report on facts."¹³⁶

Below is a review of the key developments in ICSID during the period from December 1, 2005, to November 30, 2006, both institutionally and with regard to the cases administered by the Centre.

One key development is that ICSID's membership grew to 143, with the ratification of the Convention by Syria in January 2006.¹³⁷ Member States of the World Bank that are yet to ratify the ICSID Convention include Canada, India, Iraq, Mexico, South Africa, Qatar, Russia, and Thailand.¹³⁸

Another important institutional development at the Centre in 2006 was the election by the ICSID Administrative Council on September 20, 2006, of Ms. Ana Palacio as the Centre's new Secretary-General. Ms. Palacio, a Spanish national, was a member of the Spanish Parliament, from 2004 until taking up her new World Bank duties in 2006, having previously served as Foreign Minister of Spain under Prime Minister José María Aznar from 2002 to 2004.

Also key among the developments at the Centre in 2006 was the amendment of ICSID's Rules of Procedure for Arbitration Proceedings (Arbitration Rules) and ICSID's Administrative and Financial Regulations. Pursuant to Article 44 of the ICSID Convention, unless otherwise agreed by the parties, an ICSID arbitration proceeding is conducted in accordance with the Centre's Arbitration Rules in effect on the date on which the parties consented to arbitration. In their application, the Arbitration Rules are supplemented by certain provisions of the Administrative and Financial Regulations. On April 10, 2006, Member States of the ICSID, by mail vote, approved amendments to the Centre's Rules

133. International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965), ¶ 9, available at <http://www.worldbank.org/icsid/basicdoc/partB.htm>.

134. ICSID Rules & Regulations, *supra* note 132, art. 54.

135. ICSID Additional Facility Rules, available at <http://www.worldbank.org/icsid/facility/facility.htm>.

136. *Id.* art. 2 (Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID).

137. A full list of the Member countries of ICSID (as of Dec. 15, 2006) is available at the Centre's website, <http://www.worldbank.org/icsid/constate/c-states-en.htm>.

138. *Id.*

and Regulations.¹³⁹ The amendments had been proposed by the Secretariat and were the culmination of a series of consultations with governments, arbitration experts, and business and civil interest groups, which included a discussion paper issued by the Secretariat on October 22, 2004,¹⁴⁰ and a Working Paper of May 12, 2005.¹⁴¹ The amendments concern ICSID Arbitration Rules 6, 32, 37, 39, 41, and 48 and the corresponding provisions of the ICSID Arbitration (Additional Facility) Rules, where applicable, as well as the ICSID Administrative and Financial Regulation 14.

Rule 6: Disclosure requirements of arbitrators. Before the 2006 amendments, arbitrators were only required under Rule 6, at the outset of the proceedings, to sign declarations affirming that they know of no reason why they should not serve as arbitrators in the case, that they will judge fairly between the parties according to the applicable law, and that they will accept no unauthorized instruction or compensation. They were also required to append to the declarations statements of any past or present professional, business or other relationships with the parties. The 2006 amendment extends the scope of the statement to be appended to the declaration to include “any other circumstance that might cause [the arbitrator’s] reliability for independent judgment to be questioned by a party.” The amendment also specifies that the obligation is a “continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during [the] proceeding.” Corresponding changes were made to Article 13(2) of the ICSID Arbitration (Additional Facility) Rules.

Rule 32: Attendance of Hearings by Third Parties. Under the old Rule 32, aside from the parties and their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, the Tribunal could only allow third parties to attend a hearing with the consent of the parties. Under the amended Rule 32, “[u]nless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons . . . to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.” The amendments also require the Tribunal in such cases to prescribe procedures to protect proprietary and privileged information. Even with the 2006 amendment, the Tribunal would be unable to allow a third party to attend or observe a proceeding if a party objects. Corresponding changes were made to Article 39(2) of the ICSID Arbitration (Additional Facility) Rules.

Rule 37: Submissions to the Tribunal by Third Parties. Prior to the 2006 amendments, there was no provision in the ICSID Arbitration Rules dealing with the power of an ICSID Tribunal to receive or consider submissions of third parties. However, in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), the Tribunal in its May 19, 2005, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, recognized that an ICSID tribunal may indeed receive such submissions.

Under the changes introduced to Rule 37 in the 2006 amendments,

139. Press Release, ICSID, Amendments to the ICSID Rules and Regulations (Apr. 5, 2006), available at <http://www.worldbank.org/icsid/highlights/03-04-06.htm>.

140. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper (Oct. 22, 2004), <http://www.worldbank.org/icsid/highlights/improve-arb.pdf>.

141. ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper (May 12, 2005), <http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf>.

[a]fter consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute . . . to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal is also required to ensure that such third-party submission “does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.” Corresponding changes were made to Article 41 of the ICSID Arbitration (Additional Facility) Rules.

Rule 39: Provisional Measures. Under Arbitration Rule 39, the parties in an ICSID arbitration proceeding can seek provisional measures from a judicial or other authority only if they had so stipulated in the instrument recording their consent. In the absence of such consent, therefore, such relief is only available from the tribunal. With the introduction of a new Rule 39(5), parties are allowed to request provisional measures immediately after the institution of the proceeding. The Secretary-General, in such cases, would “fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.” No similar changes were required to be made to the Additional Facility Rules provisional measures applications in such proceedings could at any time be made in the local court system.

Rule 41: Preliminary Objection that “a Claim is Manifestly without legal Merit.” The old Rule 41 was only concerned with jurisdictional objections, and it was mandatory for a tribunal to suspend the proceeding on the merits on the raising of such an objection. The 2006 amendments allow the parties, “no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal,” to file an objection that a claim is manifestly without legal merit. Hence, a tribunal may at an early stage of the proceeding now be asked on an expedited basis to dismiss all or part of a claim on the merits. With this amendment, it became necessary also to make it discretionary, and not mandatory, for the tribunal to suspend the proceeding on the merits of the case when a preliminary objection is raised. Corresponding changes were made to Article 45 of the ICSID Arbitration (Additional Facility) Rules.

Rule 48: Publication of Excerpts. Article 48(5) of the ICSID Convention and the first sentence of Arbitration Rule 48(4) preclude the Centre from publishing an award without the consent of the parties. Under old Rule 48, however, the Centre may publish excerpts from the legal holdings of the award. The 2006 amendments make it mandatory for such excerpts to be published, and promptly. Similar changes were introduced to the corresponding provisions in Article 53(3) of the ICSID Arbitration (Additional Facility) Rules.

Administrative and Financial Regulation 14: Fees of Arbitrators. Although Article 60(2) of the ICSID Convention allows the parties and tribunals to agree to depart from the standard daily fees of arbitrators prescribed by the Secretary-General, under ICSID Administrative and Financial Regulation 14, an amendment was introduced to make it clear that

requests by tribunals for increases in the applicable rate will only be made through the Centre.

B. CASES BEFORE THE CENTRE

There were seventeen cases registered by ICSID between January and November 2006. Ten of them were against Eastern European countries, while four were against Latin American countries. Two were against African countries and the remaining two were against countries in Asia. The subject matters of the cases were varied and included projects in oil refinery, mining, hotel operations, cement production and distribution, electricity generation and transmission, rail road enterprise, etc. The majority of the cases were commenced under arbitration provisions in bilateral investment treaties.

At the end of this review period, there were 105 pending arbitration cases at the Centre, ninety-seven of which were submitted under the Convention, and eight submitted under the ICSID Additional Facility Rules.¹⁴² There were also pending at the time, five Annulment proceedings, one Resubmission proceeding, and one Rectification proceeding. Numerous orders and decisions were issued by the various tribunals in the pending cases, including the order on confidentiality in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), which addressed some of the recent amendments to the ICSID Rules; and the decision on liability in *LG&E Energy v. Argentine Republic* (ICSID Case No. Arb/02/1), which contained a departure from similar cases at the Centre involving Argentina.

In *LG&E Energy v. Argentine Republic* (ICSID Case No. Arb/02/1),¹⁴³ the Tribunal was composed of Tatiana B. de Maekelt, of Venezuela, as president, and Judge Francisco Rezek, of Brazil and Professor Albert Jan van den Berg of the Netherlands, as arbitrators. The case is one of the ICSID cases concerning Argentina's 2001 emergency measures (in particular, the January 6, 2002, Emergency Law), which modified the regulatory environment under which the Claimants invested in three natural gas distribution enterprises in Argentina. These measures included the suspension of previously agreed tariff adjustment mechanisms and the freeze on bank withdrawals and prohibition of capital transfers. In its Decision on Liability of October 3, 2006, the Tribunal, although finding breaches of certain obligations under the Argentina/USA BIT, concluded that "between 1 December 2001 and 26 April 2003, Argentina was in a state of necessity, for which reason it shall be exempted from the payment of compensation for damages incurred during that period" in the present case.¹⁴⁴ No such exemption had been found in any of the other cases brought to the Centre with regard to the Convertibility Law.

In *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), the Tribunal issued its Procedural Order No. 3, on issues of confidentiality of the proceeding, on September 29, 2006. In the Order, which was the first to address aspects

142. Up-to-date information on cases pending at the Centre is available at <http://www.worldbank.org/icsid/cases/pending.htm>.

143. Decisions in this case are available at <http://www.worldbank.org/icsid/cases/awards.htm#awardARB0415>.

144. *LG&E Energy v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, Oct. 3, 2006, ¶ 267, available at http://www.worldbank.org/icsid/cases/pdf/ARB021_LGE-Decision-on-Liability-en.pdf.

of the April 10, 2006, amendments to the Rules, the Tribunal concluded that the parties may engage in general discussion about the case in public, provided that any such public discussion is "not used as an instrument to antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order."¹⁴⁵ Specifically, the Tribunal directed that for the duration of the proceedings, and in the absence of any agreement between the parties, the parties should refrain from disclosing to third parties the minutes or record of any hearings; any of the documents produced in the proceedings by the opposing party; any of the pleadings or memorials (and any attached witness statements or expert reports); and any correspondence between the parties and/or the Tribunal exchanged in respect of the proceedings.¹⁴⁶

Among the Annulment proceedings registered in 2006 is *CMS Gas Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8), which was filed by Argentina to annul the award of the arbitral tribunal rendered in May 2005.¹⁴⁷ The Award was the first one to be issued by any of the Tribunals dealing with the cases resulting from Argentina's 2001 emergency measures. On September 1, 2006, the Annulment Committee, comprised of Gilbert Guillaume of France, James Crawford of Australia, and Nabil Elaraby of Egypt, issued a Decision, pursuant to ICSID Arbitration Rule 54, granting the application of the Argentine Republic for a continued stay of enforcement of the Award, which had been opposed by the Claimant.¹⁴⁸

C. CONCLUDED CASES

Fourteen cases were concluded during the review period ending on November 15, 2006. Nine were concluded with an award of the tribunal, while in four cases, the proceedings were concluded after settlement was agreed to by the parties. One conciliation case was concluded with a report of the Conciliation Committee after the parties failed to reach settlement, and that dispute has since been submitted to arbitration. Where the consent of both parties has been provided, the relevant awards have been published on the website of the Centre. The cases concluded in 2006 are as follows:¹⁴⁹

World Duty Free Co. v. Republic of Kenya (Case No. ARB/00/7).¹⁵⁰ The dispute in this case, which was registered by the Centre in July 2000, concerned a duty-free concession contract. The Tribunal consisted of Gilbert Guillaume of France, as president, Andrew Rogers of Australia, and V.V. Veeder of the United Kingdom, who was appointed on the resignation of James Crawford of Australia, as co-arbitrators. In its Award rendered on

145. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) (Procedural Order No. 3 of Sept. 29, 2006), at 43, available at http://www.worldbank.org/icsid/cases/arb0522_procedural_order3.pdf.

146. *Id.* at 43-44.

147. *CMS Gas Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8) (Award of May 12, 2005), available at http://www.worldbank.org/icsid/cases/CMS_Award.pdf.

148. *Id.* at Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, Sept. 1, 2006, available at http://www.worldbank.org/icsid/cases/arb0108_Decision_en.pdf.

149. Up-to-date information on concluded cases is available on the ICSID website at <http://www.worldbank.org/icsid/cases/conclude.htm>.

150. *World Duty Free Co. v. Republic of Kenya* (Case No. ARB/00/7) (Award), available at <http://www.transnational-dispute-management.com>.

October 4, 2006, the Tribunal concluded that the contract on the basis of which the proceeding was commenced had been successfully voided by the Respondent when it discovered that the contract had been procured by the payment of a bribe.

F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago (Case No. ARB/01/14). This case, which involved an oil and gas development project, was registered by the Centre in November 2001. The Tribunal was composed of Fali S. Nariman of India, as president, and Franklin Berman and Michael Mustill, both of the United Kingdom, as co-arbitrators. An award was rendered on March 3, 2006.

Fireman's Fund Insurance Co. v. United Mexican States (Case No. ARB(AF)/02/1). This case, which was brought under ICSID's Additional Facility Rules, concerned debt instruments. It was registered by the Centre in January 2002, and the Tribunal was composed of Albert Jan van den Berg of the Netherlands (appointed following the resignation of Francisco Carrillo Gamboa of Mexico), as president, and Andreas Lowenfeld of the United States and Alberto Guillermo Saavedra Olavarrieta of Mexico as co-arbitrators. The Tribunal's Award was rendered on July 17, 2006.

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan (Case No. ARB/02/13).¹⁵¹ This case, which involved a dam construction project in Jordan, was brought to ICSID on the basis of the Italy/Jordan BIT and was registered in November 2002. The Tribunal comprised of Gilbert Guillaume of France as President, Bernardo Cremades of Spain and Ian Sinclair of the United Kingdom, who was appointed following the resignation of Eric Schwartz of the United States, as co-arbitrators. On November 29, 2004, the Tribunal issued a Decision in which it upheld jurisdiction over part of the dispute, the remainder being dismissed in the Award rendered on January 31, 2006.

ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary (Case No. ARB/03/16).¹⁵² This case, which involved an airport construction and management project, was registered by the Centre in July 2003. The Tribunal was composed of Neil Kaplan of the United Kingdom, who was appointed following the resignation of Allan Philip of Denmark, as president, Charles N. Brower of the United States, and Albert Jan van den Berg of the Netherlands, as co-arbitrators. In its Award rendered on October 2, 2006, the Tribunal found that Hungary had illegally expropriated the Claimants' investment, and breached both the fair and equitable treatment and full security and protection obligations under the Cyprus/Hungary BIT. In determining the amount of compensation for the expropriation, the Tribunal applied the standard established in the *Chorzów Factory* case to "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." In addition, however, the Tribunal acknowledged that the case was peculiar among decided cases concerning the expropriation by States of foreign-owned property, due to the very considerable increase in the value of the investment since the date of expropriation in this case. For this reason, the Tribunal decided that the date of valuation of the loss should be the date of the Award and not the date of expropriation, "since this is what

151. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, Decision on Jurisdiction, 20 ICSID Rev.—FILJ 148 (2005); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, Decision on Jurisdiction (Award of Jan. 31, 2006), available at http://www.worldbank.org/icsid/cases/SalinivJordanAward_IncludingAnnex.pdf.

152. *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary* (Award of Oct. 2, 2006), available at http://www.worldbank.org/icsid/cases/pdf/ARB0316_ADCvHungary_AwardOctober2_2006.pdf.

is necessary to put the Claimants in the same position as if the expropriation had not been committed." The Tribunal awarded the Claimants approximately US\$76.2 million (US\$55,426,973 plus US\$20,773,027) together with interest.

Western NIS Enterprise Fund v. Ukraine (Case No. ARB/04/2). This case, which involved a dispute over a sunflower oil joint venture project in Ukraine was registered by the Centre in January 2004. The Tribunal was composed of Rodrigo Oreamuno of Costa Rica as president, Jan Paulsson of France and Michael Pryles of Australia as co-arbitrators. The parties settled their dispute, and on June 1, 2006, the Tribunal issued an Order taking note of the discontinuance at the request of the parties.

Alstom Power Italia S.p.A. and Alstom S.p.A. v. Republic of Mongolia (Case No. ARB/04/10). This case involved a thermal energy power station project in Mongolia and was registered by the Centre in March 2004. The Tribunal comprised of Marc Lalonde of Canada, as president, Jan Paulsson of France and Anthony Mason of Australia, as co-arbitrators. A settlement was agreed by the parties and, at their request, an Order taking note of the discontinuance of the proceeding was issued by the Tribunal on March 13, 2006.

Telenor Mobile Communications AS v. Republic of Hungary (Case No. ARB/04/15). This case, which involved a telecommunications concession, was registered by the Centre in August 2004. The Tribunal was composed of Royston Goode of the United Kingdom, as president, and Nicholas W. Allard of the United States and Arthur W. Mariott, of the United Kingdom, as co-arbitrators. The Award of the Tribunal was rendered on September 13, 2006.

France Telecom S.A. v. Argentine Republic (Case No. ARB/04/18). This case, which involved a telecommunications concession in Argentina, was among the cases resulting from the country's 2001 emergency measures, registered by the Centre against Argentina in 2004. Before a Tribunal was constituted, a settlement was agreed by the parties and, at their request an Order taking note of the discontinuance of the proceeding was issued by the Acting Secretary General of the Centre on March 30, 2006.

RGA Reinsurance Company v. Argentine Republic (Case No. ARB/04/20). This case, another of the ones registered against Argentina in 2004, involved financial reinsurance services. The Tribunal was composed of Fali S. Nariman of India, as president, and Piero Bernardini of Italy and Georges Abi-Saab of Egypt, as co-arbitrators. Settlement was agreed by the parties and, at their request, an Order taking note of the discontinuance of the proceeding was issued by the Tribunal, pursuant to ICSID Arbitration Rule 43(1) on September 14, 2006.

Togo Electricité v. Republic of Togo (Case No. CONC/05/1). This case, which was the fifth conciliation case ever before ICSID, was registered in May 2005. It concerned an electricity concession project in Togo. The Conciliation Commission was composed of Antonio Maria Ribeiro de Sampaio Caramelo of Portugal, as president, and Bernard Hanotiau of Belgium and Pierre B. Meunier of Canada, as members. On April 6, 2006, the Conciliation Commission issued a Report pursuant to Conciliation Rule 33 of the Centre. Togo Electricité has since instituted ICSID arbitration proceedings against the Government, (Case No. ARB/06/7), which was registered by the Centre on April 10, 2006.

Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt (Case No. ARB/02/9).¹⁵³ This case involved a cotton processing and trading enterprise and was registered by the Centre in August 2002. The Tribunal was composed of Robert Briner of Switzerland as president, and L. Yves Fortier of Canada and Laurent Aynès of France, as co-arbitrators. The Tribunal's Award was rendered on October 27, 2006.

Patrick Mitchell v. Democratic Republic of the Congo (Case No. ARB/99/7). This case, which involved investment in a law firm, was originally registered by the Centre in 1999. The Tribunal consisted of Andreas Bucher of Switzerland, as president, and Yawoyi Agboyibo of Togo, and Marc Lalonde of Canada (appointed following the passing away of Mr. Willard Z. Estey, also of Canada), as co-arbitrators. The Award of the Tribunal was rendered on February 9, 2004, with a Dissenting Opinion of one of the arbitrators and in July 2004, the Centre registered a request for annulment of the proceeding. The Annulment Committee was comprised of Antonias C. Dimolista of Greece as president, and Robert S.M. Dossou of Benin Republic and Andrea Giardina of Italy, as members, and its Decision was issued on November 1, 2006.

Noble Ventures, Inc. v. Romania (Case No. ARB/01/11). This case involved a stock purchase agreement and was registered by the Centre in October 2001. The Tribunal was comprised of Karl Heinz Böcksteigel of Germany, as president, and Jeremy Lever of the United Kingdom and Pierre-Marie Dupuy of France, as co-arbitrators. Its Award was rendered on October 12, 2005, and on October 26, 2005, the Centre registered a request for rectification of the Award. The Tribunal's Decision on the Request for Rectification of the Award was issued on May 19, 2006.

153. *Champion Trading Co. & Ameritrade Int'l, Inc. v. Arab Republic of Egypt* (Decision on Jurisdiction of Oct. 21, 2003), 19 ICSID Rev.—FILJ 275 (2004).