Investment Treaty News: 2006 – A Year in Review

By Luke Eric Peterson

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1. Introduction

In a recent survey of *Investment Treaty News* (*ITN*) readers, a number of respondents expressed the desire for a publication that synthesized the dozens and dozens of news stories appearing in the newsletter, offering an overview of key trends and notable developments. The publication you are reading was inspired by these demands, and seeks to pull back the lens from our week-to-week coverage. The *Year in Review* highlights notable 2006 developments related to international investment agreements (IIAs),[1] as adjudged by their wider implications for public policy-making. At the same time, the publication makes no attempt to offer a comprehensive account of every investment treaty negotiation, arbitration or interpretive issue to arise in 2006.

The task of undertaking any overview of the international regime that governs foreign direct investment (FDI) is complicated by the fact that there is no single international body charged with making FDI rules, much less with hearing and resolving investor-state disputes. In global governance terms, there is no analogue to the World Trade Organization (WTO). Investment treaties proliferate widely at the bilateral and regional level; at the same time as the inevitable legal disputes over compliance with IIAs are heard under a multitude of different procedural rules, and by an evolving cast of arbitrators convened for purposes of a single case.

Questions as seemingly basic as "how many IIA disputes went to arbitration in 2006?" have no ready answer. Indeed, a significant part of this *Year in Review* exercise has consisted of a series of interviews with selected arbitration practitioners, institutions and governments. These interviews have helped to provide a better sense of the number of investment treaty arbitrations initiated in 2006 (see Sections 2 and 3) even if the *total* universe of these cases remains unmeasurable due to the lack of openness that surrounds some forms of arbitration.

While many new cases were initiated in 2006, a much larger cohort of IIA arbitrations were launched in earlier years; some of these cases were resolved in 2006, and certain key lessons and developments are highlighted in Section 4 of this publication. While foreign investors don't always win their international lawsuits against governments, at the end of the day, all IIA cases are about investor protection—and how far IIAs oblige governments to go in protecting foreign investments. For this reason, governments, policymakers and the interested public ought to pay attention to developments in the evolving field of international investment law.

2. How many treaty-based investor-state arbitrations were launched in 2006?

Arbitrations under investment treaties may proceed along various tracks.[2] A large proportion of treaties offer investors the possibility of arbitration pursuant to the rules of the World Bank's arbitration venue, the

1 There are a multitude of different legal instruments that may provide legal guarantees to foreign investors, and that may give rise to arbitration of investment disputes. These include: investor-state contracts (power-purchase or resource-exploitation agreements); bilateral or regional treaties; and national investment laws. This review focuses upon IIAs, defined as investment treaties or the investment provisions of broader trade/economic agreements. At the end of 2005, UNCTAD has put the number of bilateral investment treaties alone at 2,495. (See: UNCTAD, Developments in International Investment Agreements 2005, *IIA Monitor* No.2, 2006, available online at: http://www.unctad.org/en/docs/webiteiia20067_en.pdf)

2 For purposes of this study, treaty-based investment arbitrations are defined as those where the investor has invoked a consent-to-arbitration clause contained in an investment treaty or trade agreement. As such, the study does not examine that category of investment arbitrations that arise solely out of contractual arbitration clauses or clauses contained in national investment laws. While these other types of arbitrations might occasionally involve substantive legal arguments which invoke investment treaty obligations as part of the applicable law of the arbitration—and there are suggestive signs that such a practice may be more widespread that realized—this study excludes such cases because of its singular focus on those cases where the *basis for arbitration* is found in a treaty.

International Centre for Settlement of Investment Disputes (ICSID). However, treaties may offer other methods of arbitration. *Ad hoc* rules, such as those drafted by the UN Commission on International Trade Law (UNCITRAL), are typically used for arbitrating private commercial disputes between two business entities; however, they are often offered as a dispute settlement avenue in investment treaties. Less common, but also available in some treaties, are the rules of certain commercial arbitration centres such as the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce (SCC).

While those claims arbitrated at the ICSID facility are listed on a publicly-accessible registry, arbitrations that use other procedural rules need not be publicly disclosed.[3] The upshot of this multiplicity of options is that disputes between foreign investors and governments are not easily tracked.

Casual observers might infer that the most visible venue, ICSID, handles the bulk of investment treaty arbitrations because that institution maintains a publicly-available Web site listing a long succession of investor-state arbitrations (treaty-based and otherwise) taking place at the Centre. Indeed, in a December 2006 report, the UN Conference on Trade and Development indicated that at least 25 treaty-based arbitrations were known to have been initiated in 2006, with the large majority (18) of them taking place at the ICSID facility.

However, a large number of interviews conducted by this author with practitioners and arbitral institutions reveal a different picture.[4] In particular, a much larger number of treaty-based arbitrations are seen to have been launched outside of ICSID in 2006.[5] As can be seen from Figure 1, the actual number of treaty-based arbitrations launched at ICSID in 2006 was 15, while at least 21 treaty-based investment arbitrations were launched in that same time-span outside of ICSID. A full list of the cases, and any identifying information that could be gleaned, can be found in the Appendix to this report.[6]

The findings in Figure 1 are notable, in that they reveal that the ICSID facility—the most visible and well-known forum for investment disputes—handled less than half of the treaty-based investment arbitrations launched in 2006. What's more, some further number of cases could have been launched without being detected by the series of interviews conducted for this publication. Certainly, it is possible that the proportion of cases taking place *outside* of ICSID is even more pronounced.

It should be stressed that it tends to be more difficult to monitor the progress of cases proceeding *outside* of ICSID—even where the existence of these arbitrations has been discovered. When cases are arbitrated at ICSID, events such as jurisdictional decisions, challenges to arbitrators and final awards may be publicly noted on the ICSID Web site. For non-ICSID cases, these milestones are not publicized as a matter of course, and information about such cases enters the public domain (if at all) in an unpredictable fashion.

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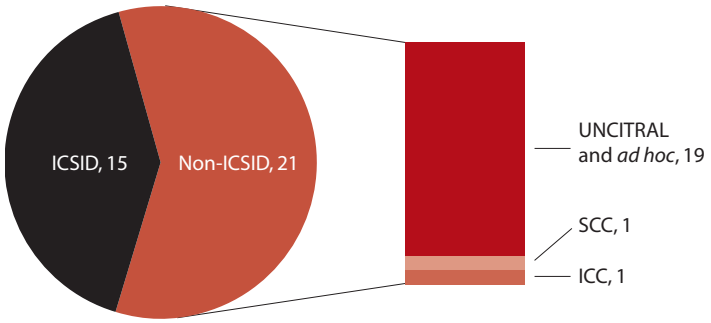
3 Under *ad hoc* or UNCITRAL rules, there is no central institution that registers—and thus tallies—such cases. Commercial arbitration venues such as the SCC or ICC will keep such a registry; however, detailed information from that registry is not a matter of public record. The latter bodies may provide statistical information on the number of treaty-based claims—and perhaps some indication of the parties' geographic origin—however, details such as the actual names of the parties are not disclosed to the public.

4 The methodology used for this review is a purely journalistic one. The Editor of *Investment Treaty News* contacted by telephone or e-mail more than 150 individuals known to be active in international investment arbitrations in an effort to obtain information about investment treaty arbitrations in which they or their colleagues had become involved in 2006. Key arbitration venues were also contacted for statistics on the number of treaty-based arbitrations which they handled. The ICSID, The Permanent Court of Arbitration, Stockholm Arbitration Institute, the ICC International Court of Arbitration, the Singapore International Arbitration Centre and the London Court of International Arbitration provided such figures.

5 Dates have been assigned to arbitrations according to the date upon which the request for arbitration was sent in UNCITRAL/*ad hoc* cases, or when the relevant institution registered the case in ICSID/SCC/ICC cases.

6 Should further information come to light in future, the author will endeavour to update the Appendix. Similarly, efforts will be made in future to correct any erroneous information that may have been provided (e.g., where a case is described by a source as having been initiated in 2006, but turns out, upon further scrutiny, to have been initiated in a different year).

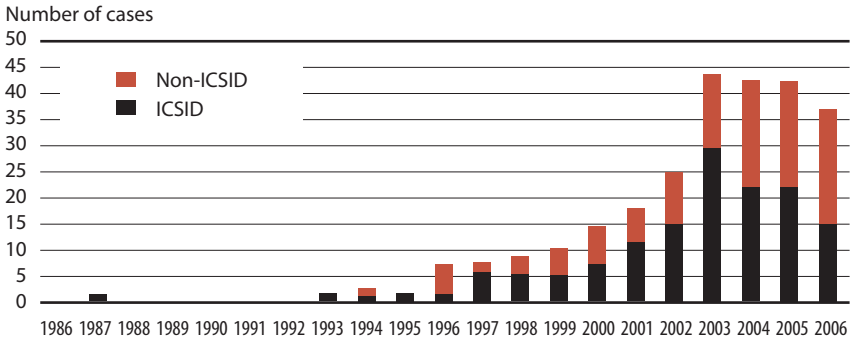
Figure 1: 2006 known treaty cases by rules of arbitration



In terms of year-on-year trends, the number of cases known to have been initiated in 2006 is less than the annual number of known cases documented in any of the three immediately preceding years. Figure 2 builds upon a figure originally published by UNCTAD at the end of 2005 and which offered a picture of the known IIA arbitrations as of November 2005.[7] One clear trend that can be noted is that the annual number of investment treaty cases at ICSID has declined since its 2003 peak.

Although investment treaty arbitrations may involve important matters of public interest, it will be more difficult to ascertain the public interests at stake in non-ICSID cases; to track the progress of such cases; and, of course, to determine exactly how many such cases are taking place outside of the ICSID system. While the ICSID facility does garner criticism for transparency deficiencies (including the fact that arbitration hearings are routinely closed to the public) it bears emphasis that other arbitration methods used to resolve IIA disputes tend to be even less open to public scrutiny.

Figure 2: Known investment treaty arbitrations



7 UNCTAD, "Latest Developments in Investor-State Dispute Settlement," *IIA Monitor*, No.4, 2005, at pg. 2, available online at: http://www.unctad.org/en/docs//webiteiit20052_en.pdf; The researcher for the 2005 UNCTAD survey was also Luke Eric Peterson, who conducted the research for the present *Year in Review* publication. It is important to note that no effort has been made here to update the UNCTAD figures on IIA arbitrations from earlier years, notwithstanding the fact that occasional arbitrations initiated in earlier years may come to light over time. As such, the number of cases documented in the 2005 UNCTAD study as of November 2005, are taken as a given and used as a baseline for comparison in Figure 2. It may be that a comprehensive effort to update the UNCTAD figures for earlier years might generate additional cases, as arbitrations which were once confidential sometimes come to public light for one reason or another with the passage of time.

3. Matters brought to arbitration in 2006 range widely

Of the 37 arbitrations known to have been filed in 2006, details of many of them—including, in some cases, the very names of the parties—are not a matter of public record. Notwithstanding this limitation, it is clear that certain cases initiated in 2006 have the potential to touch upon matters of wider public interest, either because of the subject matter or the sheer financial implications for the parties involved. This section profiles some of the more notable arbitrations to arise in 2006.

3.1 Government policies designed to promote domestic cultural objectives

An IIA arbitration initiated in 2006 against the Ukraine may see arbitrators coming to grips with the regulation of broadcasting. A U.S. citizen, Joseph Charles Lemire, accuses regulators in the Ukraine of various failures and omissions, leading to the dilution of Mr. Lemire's position in the Ukrainian radio broadcasting sector.[8] Ultimately, Mr. Lemire alleges that the Ukraine has failed to live up to the "fair and equitable treatment" standard contained in the U.S.-Ukraine investment treaty. Among the Ukrainian measures which Mr. Lemire objects to are requirements for Ukrainian radio stations to play a minimum of 50 per cent local music. While some IIAs have been drafted so as to ensure the right of governments to impose domestic-content rules on foreign-owned broadcasting enterprises—for example requirements to play local music, cultural programming or news content—other IIAs fail to address this subject at all.

3.2 Compulsory acquisition and redistribution of agricultural lands

Perennially contentious issues such as land reform have been at the centre of some recent investment treaty disputes. In 2006, a U.K. group filed a claim against the Government of Venezuela after that country targeted an extensive U.K.-owned land-holding for compulsory acquisition.[9] The Venezuelan Government has been reviewing agricultural land-holdings and designating those deemed "unproductive" for redistribution to landless Venezuelans. For its part, the U.K.-based Vestey Group contested a local administrative finding that several of its land-holdings were "unproductive" and without legal title. The U.K. firm moved to sue the Venezuelan Government under the U.K.-Venezuela investment treaty, alleging that its properties were being subject to seizure and land invasions contrary to treaty guarantees. The claim was promptly settled in 2006, after Vestey agreed to donate certain land-holdings to the state, while the firm would be compensated for another property acquired by the state.

Elsewhere, the Government of Zimbabwe is being sued under the Netherlands-Zimbabwe investment treaty, following the alleged expropriation of agricultural holdings owned by 14 Dutch nationals in Zimbabwe.[10] The claimants allege that they endured intimidation and occasionally violent land invasions, culminating in outright expropriation; they accuse Zimbabwean police of failing to provide the "protection and security" owed under the relevant investment treaty. They also claim that they are owed full, market-value compensation for their losses. While the Zimbabwe claim has been brought by a group of individual Dutch nationals, more often investment treaty claims are brought by corporate entities.

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8 "U.S. investor invokes BIT to sue Ukraine over broadcasting quotas and licensing," by Luke Eric Peterson, *Investment Treaty News*, October 13, 2006, available online at: http://www.iisd.org/pdf/2006/itn_oct13_2006.pdf

9 "U.K. farm group settles BIT claim over Venezuelan land seizures and invasions," by Luke Eric Peterson, *Investment Treaty News*, April 1, 2006, available online at: http://www.iisd.org/pdf/2006/itn_april11_2006.pdf

10 "Dispossessed Dutch Farmers continue to pursue arbitration over Zimbabwe losses," by Luke Eric Peterson, *Investment Treaty News*, May 9, 2007, available online at: http://www.iisd.org/pdf/2007/itn_may9_2007.pdf

3.3 Intellectual property rights

In 2006, two Dutch-based members of the Royal Dutch-Shell corporate family filed a claim against Nicaragua, alleging expropriation of the firm's intellectual property, including brands and trademarks used in Nicaragua.[11] The investment treaty claim was filed in response to an embargo ordered by a Nicaraguan court, as part of an effort by Nicaraguan citizens to enforce a judgment rendered against another Shell subsidiary. In the latter 2002 judgment, a Nicaraguan court had found against the U.S.-based Shell Oil Company along with several other defendants, awarding US$489 million in compensation to past victims of the agro-chemical pesticide DBCP. However, when Nicaraguan courts subsequently moved against the intellectual property of two Dutch incorporated Shell subsidiaries, these companies responded by filing an investment treaty suit. The Dutch firms insisted that they were not the firm named in the Nicaraguan lawsuit, and that the embargo of their property was unlawful. When the embargo was later reversed by a higher Nicaraguan court, the two Dutch claimants withdrew their investment treaty arbitration.

This claim served as a reminder of the potentially broad definition of covered "investments" under IIAs, which often provide express protection for patents, trademarks and other forms of intellectual property. Analysts have cautioned that the broader policy implications of this protection for intellectual property rights—particularly in areas such as pharmaceutical patents—has not been fully explored to date.[12]

3.4 Privatization disputes

At other times, foreign investors may mount arbitrations arguing that states have failed to live up to alleged privatization commitments. In 2006, Poland was sued by a German sugar firm, Nordzucker, under the Germany-Poland treaty for failure to follow through on an alleged commitment to sell the German firm two additional Polish sugar producers.[13] When the sugar producers were sold off to a state-owned firm instead, Nordzucker mounted an arbitration claim against Poland.

Meanwhile, the Government of Azerbaijan saw two claims filed against it in the latter part of 2006, in relation to foreign investments in the oil and electricity sectors.[14] The disputes trace their roots to the 2005 ousting of Economic Development Minister Farhad Aliyev, after government officials charged him with plotting a political coup. Subsequently, businesses with strong ties to Mr. Aliyev came under scrutiny from the Azeri government, as authorities alleged that privatizations overseen by Mr. Aliyev were marred by a lack of transparency and signs of favouritism. Azpetrol, a company owned by Aliyev's brother saw its interests in an oil company stripped amidst charges of tax evasion.[15] Meanwhile, an electricity concession held by Barmek was cancelled, and the company's managers were charged with embezzlement, "abuse of office" and the illegal sale of electricity.[16]

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11 "Shell launches claim against Nicaragua over seizure of intellectual property," by Damon Vis-Dunbar, *Investment Treaty News*, October 13, 2006, available online at: http://www.iisd.org/pdf/2006/itn_oct13_2006.pdf

12 Carlos Correa, "Bilateral Investment Agreements: Agents of New Global Standards for the protection of intellectual property rights?," 2004, available online at: http://www.grain.org/rights/tripsplus.cfm?id=59

13 "Poland embroiled in new arbitration over privatization reversal," by Luke Eric Peterson, *Investment Treaty News*, June 13, 2007, available online at: http://www.iisd.org/pdf/2007/itn_june13_2007.pdf

14 Azpetrol International Holdings B.V., Azpetrol Group B.V., and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan (ICSID Case No. ARB/06/15) and Barmek Holding A.S. v. Republic of Azerbaijan (ICSID Case No. ARB/06/16).

15 "Azerbaijan case raises fears for oil supplies," Isabel Gorst, *Financial Times*, May 15, 2007.

16 "Turkish businessman slips into coma at trial in Azeri capital," BBC Monitoring, May 1, 2007; "Turkish power firm says it was driven out of Azerbaijan," *Turkish Daily News*, July 6, 2006.

3.5 Tax disputes

In some IIA claims launched in 2006, allegations and counter-allegations of political intrigue, corruption and abuse of power have given rise to investment treaty arbitrations. The Dutch-registered firm, Rompetrol, accused Romania of pursuing a long-running "sham" investigation for tax evasion and other financial improprieties, leading to a depressed share price for Rompetrol. In 2006, Rompetrol made good on a threat to sue Romania under the Netherlands-Romania investment treaty.[17] For their part, Romanian authorities accused Rompetrol executives of various legal and regulatory breaches.

3.6 Summary

Investment treaty arbitrations initiated in 2006 touch upon subject-matters which may be of wider public interest. From allegations of tax evasion on the part of foreign investors to allegations of politically-motivated abuses by host governments, IIA disputes often feature allegations and counter-allegations of wrongdoing. More than this, however, the government actions which are in the cross-hairs may have been motivated—at least in the government's view—by compelling interests such as demands for economic redistribution, reversal of unfavourable business deals arranged by earlier governments or policy goals such as the encouragement of local cultural or media productions. Yet, it remains for arbitrators to balance those interests against any investment treaty obligations which those governments may have undertaken. Of course, the extent to which that balancing and resolution takes place in public or in private, is a separate matter—one which is touched upon in Section 4.8.1 below.

4. Notable outcomes in IIA arbitrations during 2006

At the same time as *new* disputes have been brought to arbitration under IIAs, a number of *ongoing* disputes have been resolved through arbitration. Reviewing ITN's reporting for 2006, as well as arbitration rulings publicized through other channels, various notable developments can be identified.[18] The following sections highlight some of the most noteworthy, and offer some analysis of their wider significance.

4.1 Treaty-shopping for a more favourable "home country"

Given that there is no single multilateral investment agreement governing global FDI flows, investors rely on the patchwork of regional and bilateral agreements available. Where no agreement is in place between the home country of an investor and the intended host state—or where an available agreement is deemed to be less favourable from an investor's perspective—there may be opportunities for investors to "shop" for a home country of convenience. The practice of treaty-shopping got a boost in 2006, thanks to several rulings that affirmed the ability of foreign investors to incorporate in countries other than their primary place of business, and to take advantage of treaty networks negotiated by other governments.

Hungary was held in October 2006 to have expropriated the investment of a pair of Cypriot-based firms earlier contracted to construct a new terminal at Budapest Airport.[19] Notably, the tribunal rejected Hungary's jurisdictional argument that the Cyprus companies were mere shell corporations used by

17 "Investors in Romanian oil firm warn Romania of potential arbitration," *Invest-SD News Bulletin*, by Luke Eric Peterson, September 15, 2005, available online at: http://www.iisd.org/pdf/2005/investment_investsd_sept15_2005.pdf

18 Arbitrations discussed in this section may have been reported on by *ITN*, or may have come to light on other publicly-available Web sites which house investment treaty awards and rulings.

19 " Cyprus-based companies recoup $75 Mil in BIT arbitration over Hungary airport," by Luke Eric Peterson, *Investment Treaty News*, Nov.2, 2006, available online at: http://www.iisd.org/pdf/2006/itn_nov2_2006.pdf

Canadian business interests for tax reasons and, as such, not "genuine" Cypriot investors entitled to the protections of the Cyprus-Hungary treaty. In dismissing this argument, the tribunal observed that the relevant treaty was couched broadly enough so that any legal entity duly incorporated in Cyprus—regardless of the nationality of the ultimate owners—could qualify as a Cypriot investor and enjoy the protections of Cyprus's investment treaty with Hungary.

In another dispute, a Dutch-incorporated arm of the Japanese bank Nomura partially prevailed in an arbitration with the Czech Republic in March 2006. Saluka Investments had sued the Czech Republic alleging that it suffered less favourable treatment than other financial institutions when its Czech bank was placed in forced administration and ownership transferred to a competing financial institution.[20] The Dutch firm successfully convinced the tribunal that it had been discriminated against contrary to the requirement for the Czech Republic to provide fair and equitable treatment. The tribunal noted that Saluka ought to have received state subsidies comparable to those provided to other competitors. However, the tribunal rejected Saluka's argument that it had suffered an expropriation.

Notably, the Czech Republic had objected that Saluka was a mere shell company of London-based Nomura Europe. The arbitral tribunal allowed that it had "some sympathy for the argument that a company which has no real connection with a State Party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that state, should not be entitled to invoke the provisions of that treaty." "Such a possibility," the tribunal went on to note, "lends itself to abuses of the arbitral procedure, and to practices of 'treaty shopping' which can share many of the disadvantages of the widely-criticized practice of 'forum shopping'." Nonetheless, the tribunal held that it was duty-bound to respect the capacious wording of the Netherlands-Czech Republic treaty which permitted any Dutch-incorporated entity to qualify as a protected "investor."

These two rulings handed down in 2006 remind that many investment treaties have been drafted expansively, and can be used by nationals of third countries without needing to demonstrate that corporate control—or even significant business activity—takes place in the putative *home* state. Although arbitrators may express varying degrees of discomfort with "treaty-shopping" or the use of "home-states-of-convenience," they point to the fact that many treaties define "investors" or "nationals" generously so as to encompass any legal entity incorporated in the home state. In fact, the majority in another prominent investment dispute, Aguas del Tunari v. Bolivia, has ruled in a 2005 jurisdictional decision that bilateral treaties actually "serve in many cases more broadly as portals" for investments originating from a wide range of other countries; in the Aguas del Tunari case, the U.S. construction conglomerate Bechtel Enterprises was able to structure its investments into Bolivia so as to make use of a Dutch investment treaty with Bolivia.[21]

Such developments will hardly discomfit those governments wishing to extend bilateral treaty protections to all comers; moreover, foreign investors appear to take the view that such "treaty-shopping" is rational in the absence of a single overarching multilateral agreement on investment which would protect all foreign investors regardless of their nationality. However, the ease with which foreign investors may shop for a more suitable nationality and treaty protections might trouble those governments seeking to limit treaty protections to those investors who can demonstrate more significant commercial ties to the other country that has entered into a treaty with the host state.

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20 "Saluka investments claims partial victory against Czech Republic," by Damon Vis-Dunbar and Luke Eric Peterson, *Investment Treaty News*, March 29, 2006, available online at: http://www.iisd.org/pdf/2006/itn_mar29_2006.pdf

21 "Tribunal split in Bechtel-Bolivia case over corporate nationality of investor," by Luke Eric Peterson, *Investment Treaty News*, December 20, 2005, available online at: http://www.iisd.org/pdf/2005/itn_dec20_2005.pdf

Indeed, in some investment treaties, governments expressly provide that treaty protection may be denied to a company that is controlled by nationals of some third party, if that third party does not maintain "normal economic relations" with the host state.[22] Such language might hobble, for example, Iranian or North Korean investors looking to use a holding company in some other country to enable them to enjoy treaty protection for onward investments made into the United States. Meanwhile, another exclusion used by certain governments to limit treaty-shopping is to provide for denial of treaty benefits to a company if it does not carry on "substantial business activities" in its putative home state.

4.2 Treaty exclusions play a factor in several rulings

A handful of cases in 2006 hinged, in part, on the fact that the relevant investment agreements contained provisions which limited the reach of key treaty obligations or an investor's access to arbitration. Thus, for example, a ruling in the Encana v. Ecuador arbitration laid emphasis upon Article XII of the Canada-Ecuador treaty which sharply restricted the applicability of the treaty in disputes over taxation measures.[23] In February 2006, a majority of a three-member tribunal rejected Encana's $80 million claim, holding that the denial of Value-Added Taxes (VAT) refunds did not breach the Canada-Ecuador investment treaty. By virtue of the narrow treaty language, the Canadian investor was obliged to pursue its tax grievance in the local Ecuadorian courts.

In another case, Fireman's Fund v. Mexico, the limited applicability of the NAFTA Chapter 11 obligations in disputes related to *financial services* ensured that an arbitration tribunal lacked jurisdiction to explore whether Mexico had denied the U.S.-based insurance company certain forms of treatment contained in NAFTA Chapter 11.[24] The investor had argued that it suffered discriminatory and other forms of mistreatment during the Mexican financial crisis of the 1990s. While the tribunal agreed that Mexico had suffered discrimination, it lacked jurisdiction to arbitrate any claim that non-discrimination obligations in NAFTA had been violated. The tribunal could only entertain a claim that expropriation had taken place—something which could not be borne out on the facts of the particular dispute.

Meanwhile in another pair of IIA cases resolved in 2006, the Telenor v. Hungary arbitration and the Berschader v. Russia arbitration, the relevant treaties sharply circumscribed the range of treaty obligations which could be enforced through investor-state treaty arbitration.[25] In each case, the tribunals lacked jurisdiction to review a broad set of alleged breaches of the relevant treaties. (To date, however, the latter arbitral ruling has not been published.)

It should be recalled, of course, that investment treaties differ widely and the same dispute might be arbitrable under the terms of one treaty concluded by a given country, while excluded from the scope of another. Indeed, the aforementioned claim brought by Canadian energy firm Encana against Ecuador was very similar to another arbitration launched by U.S.-based Occidental against the South American Government. Given the different treatment of tax matters in the Canada-Ecuador and U.S.-Ecuador bilateral investment treaties, the presiding tribunals in the Encana and Occidental cases reached very different rulings; with Encana losing its claim, and Occidental prevailing in its own challenge.

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22 See for example Article 12 of the U.S.-Azerbaijan bilateral investment treaty.

23 "ANALYSIS: Ecuador and its Tax Arbitrations with Occidental and Encana," by Luke Eric Peterson, *Investment Treaty News*, March 14, 2006, available online at: http://www.iisd.org/pdf/2006/itn_mar14_2006.pdf

24 "Mexico prevails in NAFTA Ch 11 arbitration over financial services," by Luke Eric Peterson, *Investment Treaty News*, July 26, 2006, available online at: http://www.iisd.org/pdf/2006/itn_july26_2006.pdf

25 "Russia prevails in Stockholm arbitration with Belgian construction firm owners," by Luke Eric Peterson, *Investment Treaty News*, August 23, 2006, available online at: http://www.iisd.org/pdf/2006/itn_aug23_2006.pdf; "Hungary prevails in ICSID arbitration with Norwegian telecoms firm," by Luke Eric Peterson, *Investment Treaty News*, September 20, 2006, available online at: http://www.iisd.org/pdf/2006/itn_sep20_2006.pdf

In light of the significant differences that may occur across different treaties signed by a single host government, foreign investors may be especially attentive to opportunities for treaty-shopping (a practice described in the previous section). At the same time, governments might be caught unaware by a claim under a treaty other than the one that is operative between the foreign investor's *known* home country and the host territory.

4.3 Tribunals confronted with allegations of corruption or illegality in select cases

Allegations of corruption or illegality on the part of investors and/or host states factored in several IIA arbitration rulings in 2006, offering some guidance as to how future tribunals might handle such allegations.

First, the Republic of Trinidad & Tobago emerged victorious in an arbitration with a U.S.-based oil company; however the final award was not made public.[26] From information gleaned by *ITN*, FW Oil apparently failed to convince a tribunal that it had an "investment" as defined in the U.S.-T&T bilateral investment treaty. FW Oil had brought a claim against Trinidad in 2003, alleging that the Government reneged upon a contract for rehabilitation and exploration of oil and gas fields. The Government denied that it ever had a contract with the U.S. firm. Trinidadian Press reports suggest that the U.S. firm had accused Government officials of demanding bribes; however, these allegations were reportedly withdrawn during a late stage of the arbitral proceedings. Regrettably, the arbitral ruling remains unpublished, thus inhibiting a fuller understanding of how—and to what extent—these allegations were examined by the tribunal.

The FW Oil case was not the only IIA arbitration decided in 2006 where allegations of corruption swirled. In another arbitration resolved in 2006, a dissenting arbitrator suggested that the hint of corruption which dogged the investor and its dealings in Mexico might have had some influence on the outcome of the case. While it had been established that the Canadian-held gambling company had paid a $300,000 success fee to a local law firm in order to secure a government licence, the dissenting arbitrator expressed a concern that insinuations of corruption—without a concomitant effort to prove those allegations—might have "colored the tribunal's award" in favour of Mexico.[27] The majority of the tribunal had rejected a claim by the investor that the regulation and closure of its gaming facilities in Mexico led to breaches of NAFTA's Chapter 11.

While allegations or insinuations of corruption swirled around certain arbitrations, such allegations came to a head in other cases resolved in 2006. The Republic of El Salvador prevailed in an ICSID arbitration in 2006, thanks in large part to the tribunal's finding that the claimant's investments had been fraudulently made.[28] Inceysa Vallisoletana S.L. had accused the Government of breaching a contract which entitled the Spanish company to operate motor vehicle inspection facilities in El Salvador and to conduct physical inspections and emissions-control testing. The Spanish firm mounted a BIT arbitration, accusing El Salvador of breaching the Spain-El Salvador treaty. However, the tribunal found that the company had misrepresented its experience, and submitted forged documents to the Government in support of its earlier contract-bid. Ultimately, the tribunal ruled that the dispute was not arbitrable under the El Salvador-Spain treaty, because that agreement provided for arbitration only where investments had been made in accordance with the law.

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26 "U.S. oil firm loses BIT claim against Trinidad & Tobago," by Luke Eric Peterson, *Investment Treaty News*, March 29, 2006, available online at: http://www.iisd.org/pdf/2006/itn_mar29_2006.pdf

27 See paragraph 111 of Separate Opinion of Arbitrator Thomas Walde in International Thunderbird Gaming Corporation v. The United Mexican States, January 26, 2006, available online at: http://www.investmentclaims.com/decisions/Thunderbird-Mexico-Dissent.pdf

28 "Tribunal declines jurisdiction over fraudulently made investment in El Salvador," by Luke Eric Peterson, *Investment Treaty News*, December 19, 2006, available online at: http://www.iisd.org/pdf/2006/itn_dec19_2006.pdf

Notably, in 2006 an ICSID tribunal arbitrated another dispute—this one not arising under an investment treaty—which saw a claim dismissed on the basis that it had been brought forward based on a contract that had been illegally procured by means of a bribe paid to the President of Kenya.[29] The tribunal in the World Duty Free v. Kenya case noted that bribery was contrary to "international public policy of most, if not all states," leading to a conclusion that claims premised on such contracts could not be upheld in arbitration.

4.4 Multitude of Argentina arbitrations give rise to contradictions

Argentina continues to face a bevy of investment treaty arbitrations, the overwhelming majority of which relate to that country's financial crisis. Although Argentina has faced dozens of IIA arbitrations, no additional cases were formally initiated against the country in 2006; at the same time, a handful of existing claims were suspended,[30] withdrawn[31] or decided on the merits. In the waning months of 2006, tens of thousands of foreigners claiming to hold defaulted Argentine debt signalled their intention to join the queue of foreign investors pursuing international lawsuits against Argentina. These claimants assert that Argentina's default on billions in debt—and subsequent offer of a reported 34 cents on the dollar—violates investment protections contained in treaties signed by Argentina.[32] While announced in 2006, the claim was not formally taken up by the ICSID arbitration facility until 2007.[33]

Several ongoing cases against Argentina saw final arbitral awards on the merits in 2006. In July of 2006, the U.S.-based water services company Azurix prevailed in a dispute with Argentina which predated the Argentine financial crisis. Azurix successfully convinced a tribunal that it had suffered various instances of unreasonable and politically-motivated interference at the hands of local regulators, leading to a breach of the "fair and equitable treatment" obligation in the U.S.-Argentina investment treaty. However, the tribunal held that Azurix had wildly overbid for the 30 year water concession with the intention of agitating for subsequent tariff renegotiations so that those front-end costs could be recouped. Ultimately, the tribunal awarded Azurix $165 Million in compensation for its sunk capital investments and only a small portion of the initial concession-fee (US$438 million) paid by Azurix.[34]

The Azurix ruling was not the only decision to be rendered in a case involving Argentina in 2006; in October, Argentina was found liable for breaches of the U.S.-Argentina investment treaty in a different arbitral claim filed by the U.S. natural gas company LG&E.[35] The LG&E dispute arose out of Argentina's response to its financial crisis, and the impact of those actions upon the U.S. company's investments in several Argentine natural gas distribution companies. LG&E complained that public utility prices were subjected to a freeze, and that, contrary to contractual promises, the prices that would be charged to customers were based on the (now devalued Argentine Peso) rather than the stronger U.S. dollar.

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29 World Duty Free Company Ltd. v. Republic of Kenya ICSID Case No. ARB/00/7, Award of October 4, 2006.

30 Four cases at ICSID were formally suspended for unknown lengths of time in 2006: Telefónica S.A. v. Argentine Republic (Case No. ARB/03/20), Enersis S.A. and others v. Argentine Republic (Case No. ARB/03/21), Unisys Corporation v. Argentine Republic (Case No. ARB/03/27), and SAUR International v. Argentine Republic (Case No. ARB/04/4).

31 Two cases at ICSID were formally terminated in 2006: France Telecom S.A. v. Argentine Republic (Case No. ARB/04/18) and RGA Reinsurance Company v. Argentine Republic (Case No. ARB/04/20).

32 See "Italian holders of Argentine bonds mount $3.6 billion claim at ICSID," by Luke Eric Peterson, *Investment Treaty News*, September 20, 2006, available online at: http://www.iisd.org/pdf/2006/itn_sep20_2006.pdf

33 Indeed, in 2007, a second claim by a different group of self-described Argentine debt-holders saw their claim registered at the ICSID facility, see: "Second group of Argentine bondholder sue Argentina at ICSID," *Investment Treaty News*, April 27, 2007, available online at: http://www.iisd.org/pdf/2007/itn_april27_2007.pdf

34 The reasoning of the Azurix tribunal generated further discussion in the legal community for reaching an interpretation of a particular treaty provision—the so-called umbrella clause—that seemed at odds with an interpretation adopted by an earlier tribunal. (See Section 4.6 for further discussion.)

35 "Tribunal holds Argentina liable for BIT breaches, but accepts necessity plea in part," by Luke Eric Peterson, *Investment Treaty News*, October 5, 2006, available online at: http://www.iisd.org/pdf/2006/itn_oct5_2006.pdf

Argentina scored a partial victory in its dispute with LG&E when it convinced the presiding tribunal that the country's actions were driven by "necessity" for at least part of the period under scrutiny. Thus, Argentina was exempted from liability for treaty breaches for the period from December 1, 2001 to April 26, 2003—the period during which the country acted out of a state of necessity. However, actions taken outside of that timespan were found to have violated obligations owed to LG&E under the U.S.-Argentina investment treaty, and the tribunal ruled that it would quantify those losses at a later stage of the proceeding.

Strikingly, Argentina's defence of necessity had been *rejected* by another ICSID tribunal hearing a separate case at ICSID (CMS v. Argentina), leading Argentine Government officials to decry the "great contradiction" inherent in these two competing arbitration rulings, and to raise more basic criticisms of the suitability of one-off arbitration as a method for resolving multiple investment treaty disputes with multiple foreign investors who have filed arbitration claims against Argentina.

More puzzling, despite reaching different readings on a key issue, the tribunals in CMS v. Argentina and LG&E v. Argentina contained a common member: former International Court of Justice Judge Francisco Rezek. Judge Rezek did not elaborate in the 2006 ruling issued in the LG&E case as to why he endorsed the necessity defence in that case, but not in the 2005 ruling in the CMS case.

Although tribunals have differed—as they did in the CMS and LG&E cases—as to whether Argentina is entitled to a defence of "necessity" in the arbitrations which have been initiated following that country's financial crisis, it should be underscored that *all* tribunals thus far concur that such a defence would not entitle Argentina to freeze public utility prices indefinitely. Even in the LG&E case—where a necessity defence was recognized by arbitrators—that defence absolved Argentina for liability only for a span of 16 months when the financial crisis and its fallout were at their peak.

4.5 Tribunals continue to differ on distinction between regulation and expropriation

One of the longest-running controversies in relation to investment treaty disputes has been the positioning of the dividing line between legitimate non-compensable government regulation and forms of indirect expropriation for which compensation must be paid. In policy terms, it remains unclear what test will be used to determine the latitude governments enjoy under international law to regulate foreign investments for legitimate public interest reasons, where those regulations impose some cost on the foreign investors.

Earlier IIA disputes have seen a divergence of views as to how expropriation should be defined, leading to wider political debate as well as efforts by some governments to refine treaty language so as to provide greater certainty on this question. In one early NAFTA case—often invoked by investor-claimants—the tribunal focused upon the effects or impact of the government measures on the foreign investment, in determining whether an expropriation had occurred.[36] By contrast, in a more recent NAFTA case, Methanex v. USA, a tribunal placed more weight on the purpose of the government measures in question, ruling that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[37]

36 See Metalclad Corporation v. United Mexican States, Award of August 30, 2000, available online at: http://www.investmentclaims.com/decisions/Metalclad-Mexico-Award-30Aug2000-Eng.pdf

37 "Tribunal rejects Methanex's compensation claim in key environmental arbitration," by Luke Eric Peterson, *Investment Treaty News*, August 22, 2005, available online at: http://www.iisd.org/pdf/2005/investment_investsd_aug22_2005.pdf

In 2006, several rulings touched upon this topic. An arbitral tribunal in the Azurix v. Argentina case held that Argentina had *not* expropriated Azurix's water services investments, and offered its own view as to how expropriation ought to be defined.[38] The tribunal acknowledged the divergence of approaches to defining expropriation, and cast its own lot with a different approach—one taken by an earlier ICSID tribunal in the case of Tecmed v. Mexico. In the Tecmed case, the tribunal weighed the legitimacy of the government aim being pursued; the degree of impact borne by the foreign investor; and whether the means chosen were proportionate to the policy aim being pursued. By taking this path, the tribunal in the Azurix case expressly took issue with interpretive approaches which hinge largely upon the *purpose or intent* of the government measures under review.[39]

Meanwhile, in another case resolved in 2006, a different tribunal adopted a very different approach to the definition of expropriation; an approach that appeared to lay critical emphasis upon the purpose of the government measures being challenged by the foreign investor. In Saluka v. Czech Republic, the tribunal nodded to the earlier-mentioned Methanex ruling, and held that a state has not committed an expropriation "when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."[40]

Cases resolved in 2006 did little to lay to rest the debate in legal and academic circles as to the proper approach to distinguishing acts of expropriation (for which compensation must be paid) from those government regulations which do not amount to expropriation. Indeed, this persisting divergence of views was acknowledged in another late 2006 ICSID ruling, where an *ad hoc* annulment committee noted that there are "various positions" as to whether the effects of a measure are the sole and unique criterion for defining expropriation, or whether the purpose of those measures is also germane.[41] It would appear that governments and investors could use greater certainty as to how indirect expropriation will be defined.

Notwithstanding this continuing disagreement as to the appropriate legal test of expropriation, anecdotal evidence suggests that many expropriation claims—whatever the test used—are failing on their merits. For example, even in the above-mentioned Azurix v. Argentina case the investor was unable to demonstrate that the degree of interference suffered, in practice, rose to the level of an expropriation.

4.6 Arbitrators differ as to reading of ambiguous "umbrella clauses"

Debate persisted in 2006 as to the proper interpretation of so-called "observance of undertakings" or "umbrella" clauses. These clauses which are found in some, but not all investment treaties, are drafted in a variety of ways, but tend not to define the "undertakings" covered. On the most investor-friendly interpretation, such provisions serve to internationalize a wide range of legislative, contractual and other commitments made by a host state to an investor. On this view, a breach of any such undertaking could amount to a breach of the overarching investment treaty, and would provide foreign investors with the ability to sue under the investment treaty, rather than in local courts. Perhaps not surprisingly, most governments confronted with arbitral claims have objected to broad readings of these rather ambiguous provisions.

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38 "Argentina liable for breaches of U.S.-Argentina BIT in dispute with U.S. water firm," by Luke Eric Peterson, *Investment Treaty News*, July 19, 2006, available online at: http://www.iisd.org/pdf/2006/itn_july19_2006.pdf

39 Azurix Corp v. Argentine Republic, Award of July 14, 2006, ICSID Case No. ARB/01/12; See the tribunal's criticism of the approach in Myers at paragraphs 310–311.

40 "Analysis: tribunal distinguishes regulation from expropriation in latest Czech case," by Luke Eric Peterson, *Investment Treaty News*, March 29, 2006, available online at: http://www.iisd.org/pdf/2006/itn_mar29_2006.pdf

41 Patrick Mitchell v. Democratic Republic of Congo, Decision on the Application for Annulment of the Award, ICSID Case No. ARB/9/7, Nov.1, 2006, at Paragraph 54.

Several arbitral tribunals were asked to interpret such provisions in 2006, and the resulting rulings have only served to underscore the divergent—and even contradictory—readings given by different tribunals to such treaty provisions. A pair of jurisdictional rulings rendered in two arbitrations against Argentina rejected an expansive reading of a so-called umbrella clause contained in the U.S.-Argentine bilateral investment treaty.[42] The presiding arbitrators in these two cases held that the clause in question—which stipulates that "(e)ach Party shall observe any obligation it may have entered into with regard to investments"—was not designed to permit investors to sue for breach of treaty whenever a contract commitment was breached. Indeed, one of these tribunals, hearing the BP-Pan American v. Argentina case, warned that it would be "quite destructive of the distinction between the national legal orders and the international legal order" to construe any breach of a contract or a domestic law as a breach of an international treaty. At the same time, other tribunals have taken a much more expansive reading of such clauses; with some tribunals holding that a much-disputed clause in the U.S.-Argentina treaty is in fact an umbrella clause which elevates contractual breaches to the plane of international law.[43]

Adding to the confusion surrounding these treaty provisions is a lack of clarity as to whether foreign investors must themselves be signatories to any contracts or licences whose alleged breach is claimed to raise a further treaty breach—or whether a treaty claim might also be premised on the breach of contracts and licenses which had been signed not by the foreign investor themselves, but by a subsidiary of the foreign investor.

The tribunal in the Azurix v. Argentina case adopted the narrower view, holding that Azurix could *not* mount a claim for alleged breaches of the supposed umbrella clause in the U.S.-Argentina treaty, because Azurix was not itself party to any of the contracts which it alleged Argentina to have breached. (Rather, other corporate subsidiaries had concluded those contracts with the Argentine province of Buenos Aires). Notably, however, in the earlier CMS v. Argentina ruling, the tribunal had allowed the foreign investor to claim for breaches of the so-called umbrella clause, notwithstanding the fact that the contracts alleged to have been breached had not been entered into by CMS, but rather by other corporate entities. More striking, one individual sat on the two tribunals, in the CMS and Azurix arbitrations, which reached these seemingly contradictory readings.[44]

In another case resolved in 2006, LG&E v. Argentina, a tribunal held that the umbrella clause of the U.S.-Argentina BIT was breached by Argentina. However, this violation did not hinge on the breach of *contractual* undertakings; thus, there was no need for the tribunal to determine whether a foreign investor (who might not have been a party to the particular contracts at issue) could pursue a claim for breach of the treaty's so-called umbrella clause. Rather, in the LG&E case, the tribunal held that Argentina had breached specific undertakings in the country's Gas Law, other implementing regulations, and in an international publicity campaign which accompanied Argentina's privatization of its public utilities.[45] Breach of these obligations triggered a breach of LG&E's rights under the U.S.-Argentina treaty's so-called umbrella clause.

One arbitration lawyer, speaking to *Investment Treaty News* in 2006, conceded that interpretation of this particular treaty clause differs widely from case to case, and that arbitrators appear to bring differing

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42 "Analysis: tribunal stirs up storm with 'umbrella' clause ruling," by Luke Eric Peterson, *Investment Treaty News*, June 15, 2006, available online at: http://www.iisd.org/pdf/2006/itn_june15_2006.pdf; "Existence of 'umbrella' clause denied in U.S.-Argentina BIT dispute," by Luke Eric Peterson, *Investment Treaty News*, August 10, 2006, available online at: http://www.iisd.org/pdf/2006/itn_aug10_2006.pdf

43 See for example the ruling in CMS v. Argentina, *op.cit*.

44 The CMS tribunal consisted of Francisco Orrego Vicuna, Marc Lalonde and Francisco Rezek; the Azurix tribunal consisted of Andres Rigo Sureda, Marc Lalonde and Daniel Martins. The umbrella clause ruling in the CMS award would later be annulled by an ICSID annulment committee, see: "Umbrella clause annulled in CMS-Argentina case, remainder upheld," by Luke Eric Peterson, *Investment Treaty News*, September 28, 2007, available online at: http://www.iisd.org/pdf/2007/itn_sep28_2007.pdf

45 See paragraph 175 of LG&E, *et al.* v. Argentine Republic, Decision on Liability, October 3, 2006.

philosophical positions to the task of interpreting these provisions.[46] Depending upon who is called upon to resolve a given case, interpretations given to investment treaty obligations may vary widely. In the absence of clearer treaty drafting, a uniform approach to interpreting so-called umbrella or "observance of undertakings" clauses may remain elusive.

4.7 Civil society groups continue to take an interest in IIA disputes

Reflecting the wide range of public policy issues which can be implicated in IIA disputes, a cross-section of civil society groups and interested third parties are monitoring this field increasingly closely. Occasionally, such groups seek to become active participants, by applying for *amicus curiae* (friend of the court) status in investment treaty arbitrations.

In 2000, lawyers for the IISD, along with other non-governmental organizations, sought *amicus curiae* status in a major arbitration between the Canadian-based Methanex corporation and the United States Government, in an effort to address certain of the dispute's implications for public health and the environment.[47] In 2001, the arbitral tribunal hearing that dispute signalled that it had the authority to accept a written legal brief from *amicus curiae*, and that it was "minded" to do so in that particular case. In the years since the intervention in the Methanex case, various other third-parties have sought to have their views taken into account by tribunals hearing IIA disputes, including business lobbyists, trade unions and sustainable development or human rights NGOs.[48]

In 2006, a handful of groups sought leave to intervene in an ongoing arbitration between a Canadian mining company, Glamis Gold Ltd., and the United States Government. The arbitration arose out of a claim by Glamis following the introduction of a regulatory requirement for back-filling of mining sites near Native American sacred sites. A pair of environmental groups, Sierra Club and Earthworks, submitted legal arguments that argued for the necessity of such measures in light of the potential environmental problems associated with open-pit mining.[49] The groups also argued that the back-filling requirements do not violate the terms of the North American Free Trade Agreement, and should not mandate financial compensation for affected foreign mining companies such as Glamis. Conversely, the National Mining Association submitted a brief in the Glamis v. USA case that argues that the contested mining regulations are tantamount to expropriation, and that the NAFTA requires that compensation be paid to Glamis Gold.[50] Meanwhile, members of a Native American tribe affected by the proposed Glamis mining operation have filed arguments attesting to the spiritual importance of the Glamis mining site, and arguing that the U.S. Government has positive obligations under international law to respect and protect indigenous peoples' spiritual sites.[51]

The Glamis v. USA arbitration has yet to be resolved by arbitrators, and the impact (if any) of these third-party submissions remains to be seen. Glamis and the U.S. Government exchanged written legal briefs in late 2006 and early 2007, and oral hearings on the merits of the dispute were held in August and September of 2007.

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46 "Existence of 'umbrella clause' denied by tribunal in U.S.-Argentina BIT dispute," by Luke Eric Peterson, *Investment Treaty News*, August 10, 2006, available online at: http://www.iisd.org/pdf/2006/itn_aug10_2006.pdf

47 For background, see: http://www.iisd.org/investment/methanex_background.asp

48 See "Business group, union and NGO weigh in on UPS arbitration against Canada," *Investment Treaty News*, November 21, 2005, available online at: http://www.iisd.org/pdf/2005/investment_investsd_nov21_2005.pdf

49 A copy of the joint submission by the two environmental groups is available online at: http://www.state.gov/documents/organization/74832.pdf

50 A copy of the National Mining Association submission is available online at: http://www.state.gov/documents/organization/75179.pdf

51 Copies of two separate submissions by the Quechan Nation are available online at: http://www.state.gov/documents/organization/75016.pdf and http://www.state.gov/documents/organization/52531.pdf

Apart from the flurry of *amicus curiae* submissions in the Glamis case in 2006, third parties also sought to intervene in other ongoing IIA disputes. For instance, five non-governmental organizations, including the International Institute for Sustainable Development (IISD), petitioned the tribunal for *amicus curiae* status in the arbitration between the U.K.-based water services company Biwater Gauff Ltd. and the Government of Tanzania. The *Biwater v. Tanzania* arbitration arose after the Tanzanian Government cancelled a water and sewage concession, accusing Biwater's Tanzanian subsidiary of failing to live up to the terms of the deal. Biwater turned to arbitration, alleging that Tanzania had breached the terms of the U.K.-Tanzania bilateral investment treaty.

The two parties to the *Biwater v. Tanzania* arbitration differed sharply as to whether the hearings ought to be opened to the public, and whether documents and legal pleadings should be released. Biwater objected to Tanzania's release of various documents related to the ongoing case, and expressed fears that third parties and the media would exert undue pressure on the U.K. firm to withdraw its arbitration claim against Tanzania. In response to these concerns, the tribunal issued an Order in September 2006 which imposed additional restrictions on the release of documents related to the proceeding. The tribunal acknowledged that the public interest in the dispute meant that the parties and the tribunal should confer regularly in relation to certain categories of documents which might be released by mutual agreement.[52] Following this Order, the group of would-be *amicus curiae* filed their petition to the tribunal in November 2006, seeking leave to intervene in the case, as well as a loosening of the confidentiality surrounding the proceedings.[53] In early 2007, the tribunal gave leave to the NGOs to submit an *amicus* brief; however, no changes or modifications were made to the confidentiality order at that time.

Meanwhile, in the closing days of 2006, another set of would-be amicus curiae filed for leave to submit a brief in an ongoing IIA arbitration between Argentina and a set of European water-services companies.[54] In early 2007, the tribunal gave its blessing to this bid—citing the public interest in the arbitration, its potential to touch upon human rights law issues, and the potential lessons for other water services investments in developing countries.

4.8 Process issues

4.8.1 Revisions to procedural rules

There is no single international court or tribunal charged with resolving IIA disputes; every case is heard before a different group of arbitrators. Depending upon the procedural rules which are offered in a given investment treaty, resulting arbitrations may or may not be initiated with public disclosure. Under the ICSID rules, arbitrations must be disclosed on a public register, which is published online. Conversely, the dockets of commercial arbitration venues such as the Stockholm Arbitration Institute and the ICC International Court of Arbitration are not publicly accessible. Meanwhile, arbitrations under *ad hoc* auspices, including the popular UNCITRAL rules, are not recorded on a docket (public or private). Because no central institution tracks the initiation of investment treaty cases arbitrated under *ad hoc* rules, the total number of such cases remains unknown.

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52 "ICSID tribunal issues ruling on confidentiality in Tanzanian water concession dispute," by Luke Eric Peterson, *Investment Treaty News*, October 19, 2006, available online at: http://www.iisd.org/pdf/2006/itn_oct19_2006.pdf

53 Subsequently, in 2007, the tribunal paved the way for the applicants to make a written intervention, while declining, for the time being their request to release certain documents or open the hearings to the public. See "Tribunal to submit NGO submission in Biwater-Tanzania water arbitration," by Damon Vis-Dunbar, *Investment Treaty News*, March 2, 2007, available online at: http://www.iisd.org/pdf/2007/itn_mar2_2007.pdf

54 "NGOs to submit arguments in Suez/Vivendi/Aguas Barcelona dispute with Argentina," by Luke Eric Peterson, *Investment Treaty News*, March 2, 2007, available online at: http://www.iisd.org/pdf/2007/itn_mar2_2007.pdf

As discussed in Section 2, a series of interviews with practitioners conducted by *Investment Treaty News* revealed evidence of at least 18 investment treaty arbitrations initiated in 2006 and proceeding according to the UNCITRAL rules of arbitration. Detailed information about many of these cases—in some instances even the precise names of the parties—is not a matter of public record. Nevertheless, the mere fact that so many UNCITRAL arbitrations have been documented in 2006 gives greater currency to the ongoing debate as to whether the UNCITRAL arbitration rules ought to be revised so as to bring greater transparency to investment treaty disputes arbitrated under those auspices.

In 2006, the UNCITRAL announced plans to revise its signature arbitration rules, leading to a series of intergovernmental meetings to examine various potential revisions. Two civil society groups, the International Institute for Sustainable Development and the Center for International Environmental Law (CIEL), have argued for a separate version of the UNCITRAL procedural rules which would apply in investor-state arbitrations, in order to bring more transparency and accountability to the resolution of disputes which can have wide public policy implications.[55] Among the changes sought by IISD and CIEL is one which would mandate the disclosure of every new case brought to arbitration pursuant to an investment treaty under the UNCITRAL procedural rules. The revision process is expected to run through 2007 and into 2008—with important decisions possibly on the table at a meeting in New York City in February of 2008.

The move to revise the UNCITRAL rules comes on the heels of modest changes made to the ICSID arbitration rules in 2006.[56] The ICSID Secretariat initiated this process by publishing a discussion paper in 2004 setting forth various proposed changes to the ICSID rules; among these proposals was an appeals facility which would ensure uniform interpretation of common investment treaty provisions, as well as the right for tribunals to open arbitral hearings to the public. However, following informal consultations with member-governments and the interested public, the ICSID Secretariat withdrew the appeals facility proposal, and moderated its ambitions with respect to public arbitral hearings. When the proposals were finally submitted to a vote of ICSID member-governments in 2006, the revisions did not remove the current veto that either party to an arbitration enjoys when it comes to a move by an arbitration tribunal to open the hearings to the public. As such, while the existence of ICSID arbitrations is disclosed on a publicly accessible docket, the proceedings typically run their course behind closed doors.

4.8.2 Debate roils as to what constitute arbitrator conflicts or lack of independence

At the same time as there has been debate as to whether the procedural rules used for investment treaty arbitration should permit greater levels of transparency, other aspects of the arbitration process have come under closer scrutiny. In particular, the independence and impartiality of those arbitrators selected to hear investment treaty disputes remains a perennial subject of discussion at conferences and in actual arbitration cases.[57] In 2006 a series of rulings by tribunals, courts and arbitration supervision institutions added to this conversation. Many of these rulings arose out of situations where a party to an arbitration objected to the fact that one or more of the arbitrators moonlighted as counsel to investors in other arbitrations, or had some sort of professional collaboration with law firms that represent investors in such arbitrations.

In late 2006, a Belgian court rejected a bid by the Government of Poland to disqualify an arbitrator in a major arbitration with the Dutch insurance company Eureko.[58] The arbitration arose following a move by

55 See IISD/CIEL, "Revising the UNCITRAL arbitration rules to address state arbitrations," February 2007, available online at: http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf

56 "ICSID member-governments ok watered-down changes to arbitration process," by Damon Vis-Dunbar and Luke Eric Peterson, *Investment Treaty News*, March 29, 2006, available online at: http://www.iisd.org/pdf/2006/itn_mar29_2006.pdf

57 See also: "Analysis: Arbitrator challenges raising tough questions as to who resolves BIT cases," by Luke Eric Peterson, *Investment Treaty News*, January 17, 2007, available online at: http://www.iisd.org/pdf/2007/itn_jan17_2007.pdf

a newly-elected Polish Government to reverse a controversial privatization of a major Polish insurance firm. In the ensuing arbitration, Poland had challenged Judge Stephen Schwebel—who had been appointed to the tribunal by Eureko—primarily because of his close working relationship with the law firm Sidley Austin which was suing Poland in another (unrelated) investment treaty arbitration. For his part, Judge Schwebel had insisted that he was not involved in the other arbitration claim being handled by Sidley Austin, and a Belgian Court held that no evidence to the contrary had emerged. The Court also held that Judge Schwebel's personal law practice—quartered in the same building as Sidley Austin—provided insufficient reason to question his ability to serve as an impartial arbitrator in the Eureko v. Poland dispute. The Polish Government has persisted with its challenge, lodging an appeal with the Belgian courts, and tabling what it characterizes as evidence of the close working relationship of Judge Schwebel and Sidley Austin on a number of other investment treaty arbitrations, including Fireman's Fund v. Mexico and Vivendi v. Argentina. The Government insists that it continues to have "legitimate doubts"—the operative standard under Belgian law—as to the arbitrator's impartiality. To date, no further ruling on the challenge has been forthcoming from the Belgian courts; however, a hearing was held in October 2007 before a higher court.

Not all challenges to arbitrators are a matter of public record—some appear to be handled quietly, and when arbitration institutions (as opposed to courts of law) are called upon to pass judgment on a particular challenge, they may not always provide reasons for the decisions taken. Nonetheless, in 2006, *ITN* brought to light some information about other arbitrator challenges in investment treaty arbitrations, including in relation to a handful of cases against the Argentine Republic. An effort by Argentina to challenge one individual serving on three different arbitral tribunals came to its conclusion in January 2006 when Argentina's bid was squelched.[59] Argentina had questioned whether the individual in question, Dr. Andres Rigo Sureda, had the requisite independence given that he was presiding over arbitrations where the claimant's lead counsel was an individual who was elsewhere sitting in a quasi-judicial capacity in a case which was being argued by Dr. Andres Rigo Sureda's (then) law firm. Argentina had expressed concerns that Dr. Rigo might not be fully independent to act as arbitrator in a case where a negative outcome for the claimants would impact negatively upon an individual lawyer who was elsewhere sitting in judgment of an arbitration claim brought by Dr. Rigo's (then) law firm. Ultimately, however, Argentina proved unsuccessful in its challenge to Dr. Rigo, with two different arbitral institutions dismissing the bid—albeit without offering reasons for so doing.

Elsewhere, Argentina mounted a challenge to an arbitrator in another ongoing arbitration, alleging that it had doubts as to the impartiality of that individual, Mr. Fernando de Trazegnies Granda, because he had provided a legal opinion to another multinational corporation embroiled in an international arbitration with the Government of Peru—a legal opinion which Argentina was unable to scrutinize because of the confidentiality surrounding the Peruvian arbitration.[60] Although the individual in question rejected Argentina's questioning of his impartiality, he elected to resign from the tribunal in question.

Challenges to arbitrators may be handled by a multitude of different bodies or persons (e.g., other tribunal members, arbitral supervising institutions, or even the local courts of the place of arbitration). Nevertheless, the challenges discussed above share some commonality, insofar as they raise questions about the extent to which arbitrators may marry their part-time role as arbitrator in a given case with other activities, including service as expert-witness or counsel on behalf of other parties, or collaboration with law firms that act in such cases.

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58 "Challenge to arbitrator Schwebel rejected by Belgian Court, Poland seeks appeal," by Luke Eric Peterson, *Investment Treaty News*, January 17, 2007, available online at: http://www.iisd.org/pdf/2007/itn_jan17_2007.pdf

59 "ICC nixes Argentina's bid to disqualify arbitrator in financial crisis case," by Luke Eric Peterson, *Investment Treaty News*, January 12, 2006, available online at: http://www.iisd.org/pdf/2006/itn_jan12_2006.pdf

60 "Argentina persists with challenges to arbitrators in BITs cases," by Luke Eric Peterson, *Investment Treaty News*, July 19, 2006, available online at: http://www.iisd.org/pdf/2006/itn_july19_2006.pdf

In the absence of a permanent court or tribunal that hears all IIA disputes, it seems likely that further challenges will arise as parties disagree over the extent to which arbitrator duties may overlap with advocacy or expert testimony on behalf of clients in other IIA arbitrations.

5. Conclusion

While the World Bank's ICSID is the most well-known forum for resolving investment treaty claims, it appears from the interviews with practitioners conducted for this *Year in Review* that a *greater* proportion of these cases were actually initiated outside of ICSID in 2006—either at commercial arbitration venues like the ICC or SCC, or more often under *ad hoc* rules of procedure, such as those of the UNCITRAL.

What's more, it should be stressed that not all cases proceeding under *ad hoc* or UNCITRAL rules will come to light on the basis of a journalistic inquiry such as the one used here. For reasons of time, limited resources and the simple fact that anyone in any jurisdiction might bring an *ad hoc* arbitration claim against a state, it is highly improbable that every *ad hoc* arbitration claim mounted in 2006 has been detected by a limited survey such as the one employed here.[61]

Nonetheless, having found evidence of a sizable number of cases proceeding outside of the ICSID, a key implication should be noted. The actual resolution of these non-ICSID cases—and the interpretation of the underlying international treaties—may be shrouded in greater confidentiality than is seen in the ICSID context.

In this light, it should be recalled that a major revision process was underway, at the time of this writing, with respect to the UNCITRAL rules of arbitration. One of the issues being debated by UNCITRAL member-governments is whether the UNCITRAL rules ought to be adapted so that they require the public disclosure of any investment treaty arbitrations launched pursuant to those rules, as well as public access to the arbitral hearings and documents. This review undertaken by *Investment Treaty News* for 2006—revealing as it does extensive use of the UNCITRAL rules—suggests that the UNCITRAL discussion is far from a theoretical debate. On the contrary, the UNCITRAL discussion may have major consequences for future efforts by policy-makers, journalists and academics to track and analyze the evolution of investment treaty law, and the fundamental legal, policy and financial implications flowing from such international agreements.

Of course, even where arbitration rulings are a matter of public record, review of those arbitrations resolved in 2006 suggests that a number of key interpretive questions related to investment treaties remain unresolved or contested. Different arbitrators sometimes take differing positions from case to case; indeed, on rare occasion, the *same* arbitrators appear to endorse differing positions from one case to the next. Policy-makers seeking to understand the concrete implications of international investment agreements would be advised to continue to "watch this space" as many question-marks continue to swirl around the more than 2,500 international investment agreements that have been concluded to date.

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61 Given greater time and resources it would be fruitful to survey *all* governments which have concluded bilateral investment treaties or free trade agreements, inquiring as to whether they will disclose information about the arbitrations they face. Such an exercise might have to target multiple departments in any given government, as there is not always a coordinating agency or department in some governments. For example, when *Investment Treaty News* has contacted the Polish Treasury Department seeking information about investment treaty arbitrations pending against Poland, the Department has stressed that other departments might be representing the Polish Government in such lawsuits. Indeed, the Polish Finance Ministry is known to have represented Poland in at least one such arbitration; the Finance Ministry, however, has offered little information about that case. (See: "Polish Finance Ministry not talking about BIT arbitration at ICC," *Investment Treaty News*, January 31, 2006, available online at: http://www.iisd.org/pdf/2006/itn_jan31_2006.pdf).

Appendix: Investment treaty arbitrations known to have been initiated in 2006

Parties	Rules	Instrument	Other Notes
Non-ICSID			
Mr. R. J. Binder v. Czech Republic	*Ad hoc*	Germany-Czech Republic Bilateral Investment Treaty (BIT)	
Oxus Gold v. Kyrgyzstan	UNCITRAL; (LCIA administered)	U.K.-Kyrgyzstan BIT	LCIA Secretariat discloses that they registered three treaty-based arbitrations in 2006; one of these claims is known to be the Oxus v. Kyrgyzstan case which is a matter of public record
Parties unknown	UNCITRAL; (LCIA administered)	Unknown Treaty	LCIA Secretariat discloses that they registered three treaty-based arbitrations in 2006
Parties unknown	UNCITRAL; (LCIA administered)	Unknown Treaty	LCIA Secretariat discloses that they registered three treaty-based arbitrations in 2006.
Canadian investor v. Eastern-European/former USSR government	UNCITRAL	Canada BIT with Eastern European/Former USSR host state	
Finnish company v. Eastern European/former USSR government	UNCITRAL	Finland BIT with Eastern European/Former USSR host state	
Cementownia "Nowa Huta" SA v. Republic of Turkey	UNCITRAL; PCA administered	Poland-Turkey BIT	
Polska Energetyka Holdings SA v. Republic of Turkey	UNCITRAL; PCA administered	Poland-Turkey BIT	
Nordzucker v. Poland	UNCITRAL	Germany-Poland BIT	
Chevron v Republic of Ecuador	UNCITRAL; PCA administered	U.S.-Ecuador BIT	
German company v. a European Union government	UNCITRAL	German BIT with European Union host state	Case registered April 2006 (Withdrawn July 2006); (Information supplied by Stockholm Chamber which provided some services in relation to this matter)
Scandinavian investor v. Caribbean government	UNCITRAL	BIT between Scandinavian home state and Caribbean host state	
U.K. company v. SE Asian government	UNCITRAL	U.K. BIT with SE Asian host state	
West European company v. Latin American government	UNCITRAL	BIT between Western European home state and South American host state	
U.S. company v. Sub-Saharan African government	UNCITRAL	U.S. BIT with Sub-Saharan African host state	
Vivendi v. Poland	UNCITRAL; PCA administered	Poland-France BIT	
Merrill & Ring v. Canada	UNCITRAL	North American Free Trade Agreement	
GL Farms v. Canada	UNCITRAL	North American Free Trade Agreement	

Parties	Rules	Instrument	Other Notes
Parties not public	UNCITRAL; PCA administered	BIT	PCA does not release information about cases without consent of the parties, however unless otherwise indicated other cases on this list are not PCA-administered—as confirmed by sources—thus ensuring that the PCA case cited here is not double-counted in this survey.
Private person and a private company v. a former Soviet Republic	Stockholm Chamber of Commerce	BIT between investors' home state and former Soviet Republic	
Investor from Eastern Europe v. Eastern European Government	International Chamber of Commerce	BIT between Eastern European home state and Eastern European host state	ICC Secretariat reports this information and adds that one of the two countries is an EU member. Although the ICC Secretariat would not disclose further details, this case is believed to be the claim brought by the Russian enclave Kaliningrad against the Republic of Lithuania, which has elsewhere been reported by *Investment Treaty News* on September 7, 2007.
ICSID Cases			
Spyridon Roussalis v. Romania (Case No. ARB/06/1)	ICSID	Greece-Romania BIT	All information about ICSID cases has been obtained from ICSID Secretariat lawyers.
Quimica e Industrial del Borax Ltda. and others v. Republic of Bolivia (Case No. ARB/06/2)	ICSID	Bolivia-Chile BIT	
The Rompetrol Group N.V. v. Romania (Case No. ARB/06/3)	ICSID	Netherlands-Romania BIT	
Vestey Group Ltd. v. Bolivarian Republic of Venezuela (Case No. ARB/06/4)	ICSID	U.K.-Venezuela BIT	
Phoenix Action Ltd. v. Czech Republic (Case No. ARB/06/5)	ICSID	Israel-Czech Rep BIT	
Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic (Case No. ARB(AF)/06/1)	ICSID	U.S.-Kyrgyz BIT and Kyrgyz investment law	
Libananco Holdings Co.) Limited v. Republic of Turkey (Case No. ARB/06/8)	ICSID	Energy Charter Treaty (ECT)	
Branimir Mensik v. Slovak Republic (Case No. ARB/06/9)	ICSID	Switzerland- Slovakia BIT	
Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (Case No. ARB/06/11)	ICSID	U.S.-Ecuador BIT	

Parties	Rules	Instrument	Other Notes
Shell Brands International AG and Shell Nicaragua S.A. v. Republic of Nicaragua (Case No. ARB/06/14)	ICSID	Netherlands-Nicaragua BIT	
Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan (Case No. ARB/06/15)	ICSID	Energy Charter Treaty (ECT)	
Barmek Holding A.S. v. Republic of Azerbaijan (Case No. ARB/06/16)	ICSID	ECT and Turkey-Azerbaijan BIT	
Tècnicas Reunidas, S.A. and Eurocontrol, S.A. v. Republic of Ecuador (Case No. ARB/06/17)	ICSID	Ecuador-Spain BIT	
Cementownia "Nowa Huta" S.A. v. Republic of Turkey (Case No. ARB(AF)/06/2)	ICSID	Energy Charter Treaty (ECT)	
Joseph C. Lemire v. Ukraine (Case No. ARB/06/18)	ICSID	U.S.-Ukraine BIT	

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