INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

REJOINDER

SUBMITTED BY

THE UNITED STATES OF AMERICA

May 17, 2021

ANNEXES

VOLUME VII

Annexes 386 through 402

ANNEX 386

In the arbitration under the UNCITRAL Arbitration Rules
and the Dominican Republic-Central America-United States Free Trade Agreement

between

SPENCE INTERNATIONAL INVESTMENTS, et al
Claimants,
and

THE REPUBLIC OF COSTA RICA
Respondent.

ICSID Secretariat File No. UNCT/13/2

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NON-DISPUTING PARTY SUBMISSION OF THE REPUBLIC OF EL SALVADOR

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April 17, 2015

Annex 386

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1. The Republic of El Salvador ("El Salvador") makes this submission pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement (the "Treaty" or "CAFTA-DR"), regarding the interpretation of Articles 10.5 (Minimum Standard of Treatment), 10.7 (Expropriation and Compensation), 10.18 (Conditions and Limitations on Consent of Each Party), and 10.1 (Scope and Coverage).

2. El Salvador does not express a position regarding how the interpretations included in this submission apply to the facts of this case. In addition, no inference should be made from the absence of comments regarding any question not specifically addressed in this submission.

I. ARTICLE 10.5 (MINIMUM STANDARD OF TREATMENT)

A. The source of customary international law is State practice

3. CAFTA-DR Article 10.5 is titled "minimum standard of treatment." The first paragraph of Article 10.5 provides that each CAFTA-DR Party "shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

4. The second paragraph explains that the concept of "fair and equitable treatment" does not require treatment beyond the minimum standard of treatment to aliens in accordance to customary international law.

5. Finally, Article 10.5 must be interpreted in accordance with Annex 10-B, which explains the CAFTA-DR Parties' understanding that customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation."

6. The CAFTA-DR Parties thus made it clear that customary international law must be proven through evidence of (1) general and consistent practice of States (2) that they follow from

a sense of legal obligation.[1] Therefore, while decisions of arbitral tribunals that discuss State practice might be useful as evidence of the State practice they discuss, arbitral decisions can never substitute for State practice as the *source* of customary international law.

B. The burden to prove the existence of a norm of customary international law resides with the party alleging its existence, normally the claimant

7. The general and consistent practice of States crystallizes as a norm in customary international law through the passage of time until it can be recognized as such. The party that alleges the existence of a norm of customary international law (normally the claimant) has the burden to prove the existence of State practice followed from a sense of legal obligation that has given rise to the alleged norm.[2]

C. The minimum standard of treatment does not include the protection of investors' expectations, legitimate or otherwise

8. Because the focus of an inquiry regarding the minimum standard of treatment must be the conduct of the State, it is incorrect to make reference to the expectations of an investor to decide if the State has complied with the minimum standard of treatment. The minimum standard of treatment must be an objective concept to evaluate the treatment a State accords to an investor, not a concept that can vary depending on the investor's subjective understanding about the treatment it expects to receive. This is so even when those expectations might be based on what has been offered to the investor. Considering the investor's legitimate expectations would have the effect of eliminating States' regulatory capacity, something the States Parties never agreed to

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[1] The second requirement is also known by the Latin phrase "*opinio juris*" (*opinio juris sive necessitates*).

[2] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on the Merits and Objections to Jurisdiction of Respondent United States of America, Dec. 14, 2012, paras. 352, 354, *available at* http://www.state.gov/documents/organization/203097.pdf.

do in the Treaty. Therefore, State conduct is the only relevant factor in any inquiry regarding the minimum standard of treatment.

9. El Salvador is not alone in this interpretation. In fact, the majority of CAFTA-DR Parties have previously declared that the minimum standard of treatment does not include the protection of investors' expectations. In a previous CAFTA-DR arbitration between Teco Holdings and the Republic of Guatemala, four CAFTA-DR non-disputing Parties (El Salvador, the Dominican Republic, Honduras, and the United States of America) filed written submissions interpreting that the minimum standard of treatment under customary international law, as referred to in CAFTA-DR Article 10.5, does not include the protection of investors' expectations, legitimate or otherwise.[3]

10. Three non-disputing Parties in the *Teco v. Guatemala* arbitration also made oral submissions. During its oral submission, the United States incorporated by reference its interpretation regarding investors' expectations expressed in a NAFTA proceeding also interpreting the content of the minimum standard of treatment under customary international law.[4] In that NAFTA arbitration, *Grand River v. United States*, the United States clearly stated that "States are not obligated to protect a foreign investor's expectations—legitimate or otherwise—under the minimum standard of treatment."[5]

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[3] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submissions of El Salvador, Oct. 5, 2012, paras. 13-14 (attached to this Submission as **Annex A**); the Dominican Republic, Oct. 5, 2012, para. 10 (**Annex B**); Honduras, Nov. 15, 2012, paras. 9-10 (**Annex C**); and the United States of America, Nov. 23, 2012, para. 6 (**Annex D**). The non-disputing Party submissions are also available at http://portaldace.mineco.gob.gt/casos-guatemala .

[4] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Oral Submission of the United States of America, Hearing Transcript, Vol. 5, Mar. 4, 2013, at 822-824 (**Annex E**).

[5] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Counter-Memorial of Respondent United States of America, Dec. 22, 2008, at 96-100, *available at* http://www.state.gov/documents/organization/114065.pdf. *See also, Glamis Gold, Ltd. v. United States of America*, Counter-Memorial of Respondent

11. In addition to the four non-disputing Parties, Guatemala declared in its written submissions in *Teco v. Guatemala* the same interpretation that "the doctrine of legitimate expectations does not apply in the context of the international minimum standard."[6] Therefore, at least five of the seven CAFTA-DR Parties have declared in the previous CAFTA-DR arbitrations that there is no role for investors' expectations in an analysis of whether a State has complied with its international obligations under CAFTA-DR Article 10.5.

12. Finally, El Salvador would like to clarify an apparent misunderstanding regarding what the tribunal in the *TECO v. Guatemala* arbitration decided regarding this issue. The Claimants in the present arbitration seem to indicate that the tribunal in *TECO v. Guatemala* rejected Guatemala's interpretation that there is no role for investors' expectations in an analysis regarding compliance with the minimum standard of treatment.[7] El Salvador notes that the passage of the award quoted by the Claimants in this arbitration does not correspond to the tribunal's analysis; it is a summary of the claimant's arguments in that case.[8] In reality, the tribunal in the *TECO v. Guatemala* arbitration agreed with Guatemala that there is no role for legitimate expectations in an analysis under the minimum standard of treatment, and cited the non-disputing Party

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United States of America, Sept. 19, 2006, at 233-234, *available at* http://www.state.gov/documents/organization/73686.pdf.

[6] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Rejoinder of the Republic of Guatemala, Sept. 24, 2012, paras. 172, 182, *available at* http://portaldace.mineco.gob.gt/sites/default/files/unidades/DefensaComercial/Casos/Controversias/Inversionista%20-%20Estado/Arbitraje%2010-23%20%28Teco%29/Memorial%20de%20D%C3%BAplica/Memorial%20de%20D%C3%BAplica/Ingles/Rejoinder%20ENG.pdf.

[7] *Spence International Investments, LLC, et al. v. Costa Rica*, Claimants' Rejoinder on Jurisdiction, Feb. 4, 2015, para. 117 and n.85, *available at* http://www.comex.go.cr/tratados/vigentes/cafta/Casos/150204%20Claimants%20Rejoinder%20on%20Jurisdiction.pdf.

[8] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, Dec. 19, 2013, para. 267, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4012_En&caseId=C1280.

submissions of El Salvador, the Dominican Republic, and Honduras to support this determination.[9]

D. Only extreme levels of State conduct fall below the minimum standard of treatment

13. Due to the origin of the minimum standard of treatment in customary international law as an absolute floor to the treatment States may provide, only State actions of an extreme nature can violate the minimum standard of treatment. Like other CAFTA-DR Parties, El Salvador understands that the conduct of a State must rise to the level of manifest arbitrariness, utter lack of due process, blatant unfairness, evident discrimination, or egregious denial of justice, to become a breach of CAFTA-DR Article 10.5.[10]

14. Conversely, conduct that is merely arbitrary has not been established to constitute a breach of the minimum standard of treatment based on evidence of general and consistent State practice followed from a sense of legal obligation, as required by CAFTA-DR Article 10.5.[11]

15. In addition, as the United States expressed in its non-disputing Party submission in the *Teco* case, "[d]etermining a breach of the minimum standard of treatment 'must be made in the

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[9] *TECO v. Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, Dec. 19, 2013, para. 621 and n.513 ("It is clear, in the eyes of the Arbitral Tribunal, that any investor has the expectation that the relevant applicable legal framework will not be disregarded or applied in an arbitrary manner. However, that kind of expectation is irrelevant to the assessment of whether a State should be held liable for the arbitrary conduct of one of its organs. What matters is whether the State's conduct has objectively been arbitrary, not what the investor expected years before the facts.").

[10] *See, e.g., TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submissions of the Dominican Republic, Oct. 5, 2012, paras. 6-9 (Annex B); Honduras, Nov. 15, 2012, para. 9 (Annex C); and the United States of America, Nov. 23, 2012, para. 6 (Annex D).

[11] *See, e.g., Glamis Gold, Ltd. v. United States of America,* Counter-Memorial of Respondent United States of America, Sept. 19, 2006, at 227-230, *available at* http://www.state.gov/documents/organization/73686.pdf.

light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.'"[12]

E. A claimant has the burden to prove that the concept of "fair and equitable treatment" may be applied in contexts other than denial of justice

16. Article 10.5, second paragraph, specifically mentions that the concept of "fair and equitable treatment" as part of the minimum standard of treatment "includes the obligation to not deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

17. The United States noted in its non-disputing Party submission in the *TECO v. Guatemala* case that "the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law *in specific contexts*."[13]

18. In *Apotex v. United States of America*, the United States explained that the applicability of the minimum standard of treatment under customary international law has only been established in a few areas. The United States explained in further detail:

> Sufficiently broad State practice and *opinio juris* thus far have coincided to establish minimum standards of State conduct in only a few areas, such as the requirements to provide compensation for *expropriation*; to provide *full protection and security* (or a minimum level of internal security and law); and to refrain from *denials of justice*. In the absence of an international law rule governing State conduct in a particular area, a State is free to conduct its affairs as it deems appropriate.[14]

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[12] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submission of the United States of America, Nov. 23, 2012, para. 7 (internal citation omitted) (Annex D).

[13] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submission of the United States of America (November 23, 2012), para. 3 (emphasis added) (Annex D).

[14] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on the Merits and Objections to Jurisdiction of Respondent United States of America, Dec. 14, 2012, para. 353 (emphasis added, internal citations omitted), *available at* http://www.state.gov/documents/organization/203097.pdf.

19. CAFTA-DR includes *expropriation* in Article 10.7 and deals with *full protection and security* in Article 10.5.2(b). This makes *denial of justice* the only established area of application recognized in Article 10.5.2(a) for the concept of "fair and equitable treatment" as part of the minimum standard of treatment.

20. A party alleging the applicability of the minimum standard of treatment beyond the area of denial of justice has the burden to prove the existence of the norm it alleges. As mentioned before, the proof must be based on the general and consistent State practice that States follow from a sense of a legal obligation.

21. In the absence of evidence of general and consistent State practice that they follow from a sense of a legal obligation, as required by CAFTA-DR Article 10.5 and Annex 10-B, it is not possible to establish the existence of additional obligations as part of the concept of "fair and equitable treatment" included in the minimum standard of treatment. Therefore, unless a party (normally the claimant) proves otherwise with evidence of the general and consistent practice of States that they follow from a sense of legal obligation, the concept of "fair and equitable treatment" used in CAFTA-DR as part of the minimum standard of treatment, has only been established as applicable in the area of denial of justice.

II. ARTICLE 10.7 (EXPROPRIATION AND COMPENSATION)

22. Article 10.7.1 protects investments covered by CAFTA-DR from direct and indirect expropriation, except (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2-4 of Article 10.7; and (d) in accordance with due process of law and Article 10.5.

23. The CAFTA-DR Parties made it clear that Article 10.7 must be interpreted in accordance with Annex 10-C. In Annex 10-C, the CAFTA-DR Parties "confirm[ed] their shared

understanding" that, "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

24. Therefore, a claimant would have the burden to rebut the strong presumption created in CAFTA-DR that a State's nondiscriminatory regulatory measures designed to protect the environment do not constitute an indirect expropriation.

III. ARTICLE 10.18 (CONDITIONS AND LIMITATIONS ON CONSENT OF EACH PARTY)

25. Article 10.18.1 provides that "no claim may be submitted to arbitration . . . if more than three years have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of a breach under CAFTA-DR Article 10.16.1 . . . and knowledge that the claimant . . . has incurred loss or damage."

26. CAFTA-DR does not require the investor to act immediately. Article 10.15 encourages the parties to a dispute to "seek to resolve [it] through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation." In addition, Article 10.16.3 mandates a minimum period of six months between the date of the events giving rise to a claim and the date when an investor may submit the claim to arbitration.[15]

27. According to Article 10.18.1, a claim becomes time-barred three years from the date when the claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of loss or damage as a result of that breach. This three-year time limit includes the time that the parties to the dispute may be engaged in direct consultation or negotiation, as well as in conciliation or mediation procedures.

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[15] This is the minimum waiting time, provided that the claimant has also filed the required Notice of Intent within those six months and at least 90 days earlier, in accordance with CAFTA-DR Article 10.16.2.

28. This leaves a window of 2½ years (after the mandatory minimum of six months counted from the events that give rise to the claim) for an investor to initiate arbitration under CAFTA-DR Article 10.16.

A. Knowledge of the existence of a measure alleged to breach CAFTA-DR and resulting harm is sufficient to trigger the three-year statute of limitations

29. Article 10.18.1 refers to knowledge of a "breach alleged under [CAFTA] Article 10.16.1" and knowledge of resulting harm as the triggering event for the three-year statute of limitations to begin to run. However, it is not necessary for the investor to know that there has been a breach of a certain provision of CAFTA-DR Section A, of an investment authorization, or of an investment agreement, in the legal sense. It is sufficient if the investor is aware, or should be aware, of the existence of a measure that harms it and that is later alleged to constitute the breach under CAFTA-DR Article 10.16.1.

B. It is not necessary to know the exact amount of loss or damage, only that loss or damage has been suffered as a result of the measure

30. While knowledge of loss or damage is required, it is not necessary to have knowledge of the precise amount of the loss or damage.[16] The only requirement in Article 10.18.1 is knowledge that there has been some loss or damage as a result of the offending measure.

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[16] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, para. 77 ("A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time."), *available at* http://www.state.gov/documents/organization/69499.pdf.

C. It is irrelevant whether an alleged breach is characterized as an act having a continuing character

31. Because the requirement refers to "the date on which the claimant first acquired, or should have first acquired, knowledge of a breach", it is irrelevant whether the measure is characterized as an act having a continuing character. El Salvador agrees with the United States' submission regarding the same language in NAFTA:

> An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular "date." Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.[17]

IV. ARTICLE 10.1 (SCOPE AND COVERAGE)

32. CAFTA-DR Article 10.1.3 provides that:

> For greater certainty, this Chapter [Ten] does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

33. This clause tracks the language of the non-retroactivity principle as stated in Article 28 of the Vienna Convention on the Law of Treaties and affirms that this principle applies to all of the provisions on investment in CAFTA-DR Chapter Ten, including Section B: Investor-State Dispute Settlement. The consent of CAFTA-DR Parties to arbitration in Article 10.17 is thus limited *ratione temporis* by the language of Article 10.1.3. Each Party's consent does not extend to arbitration with respect to measures adopted or any act or fact that took place before CAFTA-DR entered into force for that Party.

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[17] *Merrill & Ring Forestry, L.P. v. Canada*, UNCITRAL, Submission of the United States of America, July 14, 2008, para. 5 (emphasis in original), *available at* http://www.state.gov/documents/organization/128851.pdf.

34. El Salvador thus interprets that a dispute that existed before CAFTA-DR entered into force, and that remains unresolved after CAFTA-DR entered into force, cannot give rise to a claim for a breach of the substantive provisions of CAFTA-DR.[18]

René Salazar 2012

RENÉ ALBERTO SALAZAR

DIRECTOR OF TRADE POLICY

MINISTERIO DE ECONOMIA
República de El Salvador en la América Central
SAN SALVADOR

[18] *See Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Non-disputing Party Submission of El Salvador, Mar. 19, 2010 (**Annex F**).

ANNEX 387

TRANSLATION

International Center for Settlement of Investment Disputes

In the Arbitration Proceeding Between:

TECO Guatemala Holdings LLC, Claimant

and

Republic of Guatemala, Respondent

ICSID Case No. ARB/10/23

Brief of Non-Disputing Party, the Republic of Honduras

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1. The Republic of Honduras makes this submission, which concerns the interpretation of Article 10.5 the Dominican Republic – Central America – United States Free Trade Agreement ("Agreement"), pursuant to Article 10.20.2 of the Agreement.
2. Honduras is not opining on the merits of this dispute, and the fact that this submission does not address the fact that this is a legal issue that has arisen during the proceeding must not be considered as an indication that Honduras either agrees or disagrees with the positions adopted by the disputing parties.
3. In current international investment arbitration practice, the term "fair and equitable treatment" covers two very different concepts. The first concept has to do with the minimum standard of treatment under customary international law and is very limited in scope. The second concept is used in many investment protection agreements, but

without reference to the minimum standard of treatment under customary international law, and is therefore much broader in scope than the first.

4. Under Article 31.1 of the Vienna Convention on the Law of Treaties, treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms.
5. Article 10.5 establishes that each State Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. It is important to note from the outset that the title and purpose of Article 10.5 is “Minimum Standard of Treatment,” not “Fair and Equitable Treatment.” “Fair and equitable treatment” is merely mentioned as a subordinate concept that is included under the broader category of “minimum standard of treatment.” The second paragraph of Article 10.5 clearly establishes that this concept of “fair and equitable treatment” cannot go beyond the minimum standard of treatment to be afforded to aliens under customary international law.
6. Therefore, the terms of Article 10.5 of the Agreement clearly reflect the intention of the States Parties to adopt the most restrictive possible interpretation of “fair and equitable treatment” as a part of the minimum standard of treatment under customary international law.
7. Annex 10-B of the Agreement makes it clear that in referring to “customary international law” in Article 10.5, the States Parties understood that customary international law “results from a general and consistent practice of States that they follow from a sense of legal obligation.”
8. In order to ascertain the current state of customary international law, it is necessary to look to the practice of States rather than rely on arbitral tribunal decisions that have not

reviewed the minimum standard of treatment. As far back as the era of the Permanent Court of Justice, it has been established that the party alleging the existence of a norm of customary international law has the burden of proving the existence of a general and consistent practice of States—a practice that States follow from a sense of legal obligation--that has given rise to the alleged norm.

9. Owing to the origins of “minimum standard of treatment” in customary international law, as the absolute lowest threshold that supplements the obligation of States to afford aliens at least the same standard of treatment that States afford their own nationals, only actions by a State that are shocking, egregious, [and] outrageous can breach the minimum standard of treatment, which includes fair and equitable treatment as a concept included in the minimum standard.

10. The Republic of Honduras considers the following to be valid specific examples of conduct that can violate the minimum standard of conduct: a serious denial of justice; manifest arbitrariness; blatant unfairness; a complete lack of due process; evident discrimination; or a manifest lack of reasons for a particular decision[1]. Since the focus must be on the State’s conduct, however, the Republic of Honduras does not believe that it is valid or necessary to refer to investors’ expectations in order decide whether or not the minimum standard of treatment has been violated.

[Stamp: Ministry of Industry and Commerce] [Initialed]

José Adonis Lavaire
Minister of Industry and Commerce

[1] Glamis Gold Ltd., v. United States of America, Award of June 8, 2009, paragraphs 616 and 627. Available at https://www.italaw.com/documents/Glamis_Award_001.pdf

Annex 387

CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

EN EL ARBITRAJE ENTRE

TECO Guatemala Holdings, LLC
Demandante

y

LA REPUBLICA DE GUATEMALA
Demandado

Caso CIADI NO. ARB/10/23

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ESCRITO DE PARTE NO-CONTENDIENTE DE LA REPUBLICA DE HONDURAS

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1. La República de Honduras presenta esta comunicación de conformidad con el Artículo 10.20.2 del Tratado de Libre Comercio entre la República Dominicana, Centroamérica y los Estados Unidos (el "Tratado"), sobre la interpretación del Artículo 10.5 del Tratado.

2. Honduras no se pronuncia sobre los hechos de está disputa, y el hecho que está es una cuestión jurídica que haya surgido durante el procedimiento no se aborde esta comunicación no deberá considerarse como que Honduras esta de acuerdo o en desacuerdo con la posición adoptadas por las partes contendientes.

3. En el arbitraje internacional de inversiones actual se manejan dos conceptos muy distintos bajo el nombre de "trato justo y equitativo." El primer concepto de "trato justo y equitativo" se hace con referencia al nivel mínimo de trato bajo el derecho internacional

consuetudinario, y es un concepto muy limitado. El segundo concepto de "trato justo y equitativo" ha sido utilizado en muchos tratados de protección de inversiones, pero sin relacionarlo al nivel mínimo de trato bajo el derecho internacional consuetudinario, y por lo tanto es un concepto más amplio que el primero.

4. De conformidad con el Artículo 31.1 de la Convención de Viena sobre el Derecho de los Tratados, los tratados deben interpretarse de buena fe, de conformidad con el significado corriente de sus términos.

5. El Artículo 10.5 establece que cada Estado Parte "otorgará a las inversiones cubiertas un trato acorde con el derecho internacional consuetudinario, incluido el trato justo y equitativo, así como la protección y seguridad plenas." Es importante comenzar con la observación que el título y objeto del Artículo 10.5 es el "Nivel Mínimo de Trato," no el "trato justo y equitativo." El "trato justo y equitativo" solamente se menciona con el rango de un "concepto" que está incluido en el "Nivel Mínimo de Trato." El segundo párrafo del Artículo 10.5 establece claramente que este concepto de "trato justo y equitativo" no puede ir más allá del nivel mínimo de trato a los extranjeros según el derecho internacional consuetudinario.

6. Por lo tanto, los términos del Artículo 10.5 del Tratado reflejan claramente la intención de los Estados Parte de adoptar el concepto más restrictivo posible de "trato justo y equitativo" como parte del nivel mínimo de trato conforme al derecho internacional consuetudinario.

7. El Anexo 10-B del Tratado deja claro que al referirse al derecho internacional consuetudinario en el Artículo 10.5, los Estados Parte entendieron que el derecho internacional consuetudinario es el que "resulta de una práctica general y consistente de los Estados, seguida por ellos en el sentido de una obligación legal."

8. Para determinar cuál es el estado actual del derecho internacional consuetudinario es necesario referirse a la práctica de los Estados, no a decisiones de tribunales arbitrales que no han examinado el nivel mínimo de trato. Desde los tiempos de la Corte Permanente de Justicia ha quedado establecido que la parte que alega la existencia de una norma de derecho internacional consuetudinario corre con la carga de la prueba para demostrar que existe una práctica general y consistente de los Estados seguida por un sentimiento de obligación legal que ha generado la norma alegada.

9. Debido al origen del "Nivel Mínimo de Trato" en el derecho internacional consuetudinario, como un "piso" absoluto que complementa la obligación de los Estados de otorgar a los extranjeros al menos el mismo nivel de trato que los Estados otorgan a sus propios nacionales, solamente acciones de carácter chocante, excesivo, ultrajante, de parte de un Estado, pueden violar el nivel mínimo de trato, incluyendo el trato justo y equitativo como un concepto incluido en el nivel mínimo de trato.

10. La República de Honduras considera válidos los siguientes ejemplos específicos de conducta que puede violar el nivel mínimo de trato: una grave denegación de justicia, una arbitrariedad manifiesta, una injusticia flagrante, una completa falta de debido proceso, una discriminación manifiesta, o la ausencia manifiesta de las razones para una decisión.[1] Sin embargo, debido a que el enfoque debe ser en la conducta del Estado, la República de Honduras no considera válido ni necesario hacer referencia a las expectativas de los inversionistas para decidir si se ha violado el nivel mínimo de trato.

José Adonis Lavaire
Secretario de Estado en los Despachos de
Industria y Comercio

[1] *Glamis Gold, Ltd. c. United States of America*, Laudo del 8 de junio de 2009, párrafos 616, 627, *disponible en* http://italaw.com/documents/Glamis_Award_001.pdf.

ANNEX 388

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICA TRADE AGREEMENT

ELI LILLY AND COMPANY

v.

GOVERNMENT OF CANADA

(Case No. UNCT/14/2)

SUBMISSION OF MEXICO PURSUANT TO NAFTA ARTICLE 1128

1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA.

2. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties. Mexico has previously addressed the interpretation of provisions of NAFTA Chapter Eleven in its submissions in other disputes, and Mexico reaffirms those prior submissions.

3. Mexico has taken no position on the facts of this dispute.

Article 1116 and 1117 – Limitation period

4. Mexico concurs with Canada's submissions on the three-year time limit prescribed by Articles 1116(2) and 1117(2), as stated in paragraphs 66 to 80 of the Rejoinder.

5. The NAFTA Parties made their consent to arbitration conditional upon compliance with the procedural requirements established in NAFTA Chapter Eleven, including Article 1116(2) and 1117(2). Mexico agrees, and has previously stated, that a Chapter Eleven arbitral tribunal's jurisdiction *rationae temporis* is reliant on a claimant's compliance with the requirement to submit its claims to arbitration within three years of the date that it first acquired, or ought to have first acquired, knowledge of the alleged breach and knowledge that the investor (or investment, as the case may be) has incurred loss or damage.

6. NAFTA tribunals, such as *Grand River v. the United States* and *Feldman v. Mexico* have recognized that there is a "clear and rigid limitation defense – not subject to any suspension, prolongation or other qualification"[1] introduced by Articles 1116(2) and 1117(2).

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1 *Grand River Enterprise Six Nations Ltd c. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, at para. 29.

7. It follows that neither a continuing course of conduct nor the occurrence of subsequent acts or omissions can renew or interrupt the three-year limitation period once it has commenced to run.

8. Additionally, as Canada has stated at paragraph 75 of its Rejoinder, given that the NAFTA Parties have repeatedly concurred the view that the three-year limitation period cannot be extended by an allegation that the alleged violation has continued, their "clear and consistent position ... on this issue constitutes a 'subsequent agreement between the parties regarding the interpretation of the treaty' and/or 'subsequent practice' which 'shall be taken into account' when interpreting NAFTA.

Article 1105 – Minimum Standard of Treatment

9. Article 1105(1) reads *"[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."*

10. In accordance with the NAFTA Free Trade Commission, *"Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party"*.[2] This statement expressly confirms that the applicable standard in Article 1105(1) is the customary international law minimum standard of treatment, and tribunals established under Chapter 11 should apply it in accordance with Article 1131(2).[3]

11. As Mexico stated in *Loewen v. The United States of America*, *"[c]ustomary international law results from the accretion and broadening of State practice until it assumes widespread acceptance."*[4] Thus, two requirements must be met to establish the existence of an obligation under the customary international law: State practice and *opinio juris*.[5] Mexico has consistently maintained that position, in common with both of the other Parties, in subsequent submissions under Article 1128.[6]

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2 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001) (FTC Note of Interpretation). The FTC Note of Interpretation also clarified that "The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens", and that "A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

3 Article 1131(2): An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

4 *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America* (ICSID Case No. ARB(AF)/98/3), Second Article 1128 Submission of the United Mexican States, 9 November 2001 at page 2.

5 As explained by the United States in its Second Submission in *Mesa v. Government of Canada* (PCA Case No. 2012-17), this two-element approach has been widely supported by the literature, State practice and decisions of international courts like the International Court of Justice. Second Article 1128 Submission of the United States, 12 June 2015 at paras. 9 - 10.

6 See, for example, Mexico's Article 1128 submission in *Mercer International Inc. v. Government of Canada* dated May 8, 2015 at para.19, Mexico's second Article 1128 submission in *Mesa Power LLC v. Government of Canada* dated June 12, 2015 at para 9; and Mexico's Article 1128 submission in *Windstream Energy LLC v.*

12. Mexico agrees with the United States that currently "... *customary international law has crystallized a minimum standard of treatment in only a few areas. One such area which is expressly addressed in Article 1105(1), concerns the obligation to provide "fair and equitable treatment'. This includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings, such as when a State's judiciary administers justice to aliens in a 'notoriously unjust' or 'egregious' manner "which offends a sense of judicial property"*' [footnotes omitted].[7]

13. It has been recognized that a State is responsible for the conduct of its legislative, executive and judicial organs, either at the central or sub-central level of government.[8] However, in the particular case of judicial acts of a State, Mexico has expressed that even when those acts can rise to international responsibility, there are "... *fundamental distinctions that international law has made and continues to make between acts of the judiciary and the acts of other organs of the State. International tribunals defer to the acts of municipal courts not only because the courts are recognized as being expert in matters of a State's domestic law, but also because of the judiciary's role in the organization of the State*".[9]

14. Thus, because of the particular role of the adjudicative power within the organization of states, Mexico agrees with Canada that, with respect to judicial acts, denial of justice is the only rule of customary international law clearly identified and established so far as part of the minimum standard of treatment of aliens, as explained in paragraphs 231- 245 of the Counter-Memorial of Canada.[10] Thus, if a claimant asserts a breach of Article 1105(1) based on a different concept, that party has the burden of identifying the relevant obligation under the customary international law based on State practice and *opinio juris.*[11] However, it should be noted that decisions of international tribunals do not constitute State practice that can assist to identify a rule of customary

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Government of Canada dated January 12, 2016 at paras 6 and 7. Mexico's Article 1128 submissions in Mercer, Mesa and Windstream are not available on the web and are thus attached hereto for ease of reference.

7 *Mesa v. Government of Canada,* Second Article 1128 Submission of the United States, 12 June 2015 at para. 12.

8 Article 4.1, Articles on Responsibility of States for International Wrongful Acts (2001).

9 *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America* (ICSID Case No. ARB(AF)/98/3), Second Article 1128 Submission of the United Mexican States, 9 November 2001, at page 5.

10 *Eli Lilly and Company v. Government of Canada,* Counter-Memorial of Canada, 27 January 2015.

11 In *Cargill Inc. v. The United Mexican States* (ICSID Case No. ARB (AF)/05/2), the tribunal stated in para. 273: "The Parties disagree, however, as to how that customary standard has in fact, if at all, evolved since that time. The burden of establishing any new elements of this custom is Claimant. The Tribunal acknowledges that the proof of chance in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal proof of such evolution, in such an instance, should hold Claimant fails to establish the particular standard asserted."

international law,[12] particularly arbitral decisions that interpret autonomous stand-alone fair and equitable treatment.[13]

15. With respect to "legitimate expectations" of investors, Mexico concurs with Canada's submissions in paragraphs 275 – 278, and 280-283 of its Counter- Memorial, particularly with respect the following statements:

- "...[t]he mere failure to meet an investor's legitimate expectations does not constitute a breach Article 1105(1)... [T]he unjustified repudiation of specific representations made to the investor in order to induce an investor can be a factor in assessing whether the minimum standard of treatment has been breached...";[14]

- "... states may amend or modify their regulations to achieve legitimate welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector";[15] and

- "...the theory of legitimate expectations has not been proven to be a rule of customary international law..." and "... the requirement that an investor's legitimate expectations must be based on specific promises or representations to the investor is by no means a "narrow standard" – it is *the* standard".[16]

16. As Canada describes in its Counter-Memorial, NAFTA tribunals have reached the same conclusions in general.[17]

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12 See also, *Mesa v. Government of Canada*, Second Article 1128 Submission of the United States, 12 June 2015, at para. 14; *Eli Lilly and Company v. Government of Canada*, Counter-Memorial of Canada, 27 January 2015, at para. 271; and *Mercer International Inc. v. Government of Canada*, Submission of Mexico pursuant 1128 of NAFTA, 8 May 2015, at para. 18.

13 In *Glamis Gold v. the United States* the tribunal stated: "Looking, for instance, to Claimant's reliance on *Tecmed v. Mexico* for various of its arguments, the Tribunal finds that Claimant has not proven that this award, based on a BIT between Spain and Mexico, defines anything other than an autonomous standard and thus an award from which this Tribunal will not find guidance. Article 4(1) of the Spain- Mexico BIT involved in the *Tecmed* proceeding provides that each contracting party guarantees just and equitable treatment conforming with "International Law" to the investments of investors of the other contracting party in its territory. Article 4(2) proceeds to explain that this treatment will not be less favorable than that granted in similar circumstances by each contracting party to the investments in its territory by an investor of a third State. Several interpretations of the requirement espoused in Article 4(2) are indeed possible, but the *Tecmed* tribunal itself states that it 'understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from an autonomous interpretation ....' Thus, this Tribunal finds that the language or analysis of the *Tecmed* award is not relevant to the Tribunal's consideration." (Award, 8 June 2009, at para. 610)

14 *Eli Lilly and Company v. Government of Canada*, Counter-Memorial of Canada, 27 January 2015, at para. 275.

15 Id. at para. 278.

16 Id. at para. 280.

17 See also, *Dumberry, Patrick; The Protection of Investor's Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105; Journal of International Arbitration 31, No. 1 (2014). "The position adopted by NAFTA tribunals regarding the interpretation of the concept of legitimate expectations*

Article 1110 – Expropriation and Compensation.

17. Article 1110(1) of NAFTA reads as follows: "*1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.*"

18. A claim of expropriation under Article 1110(1), first requires the claimant (in its capacity as an investor of a Party) to establish that it has an "investment" (as defined in Article 1139 "Definitions") in the territory of the host Party. An investment can only be based on vested legal rights under the legal system of the host Party. Pending legal rights and contingent legal rights cannot constitute an "investment" under NAFTA Article 1139 (Definitions), or for the purposes of Article 1101 (Scope and Coverage) or Article 1110 (Expropriation and Compensation). Rather, there must be valid and subsisting property rights that fall within one or more of the categories listed in Article 1139.

19. When legal rights are declared a nullity, or void *ab initio*, by a court of competent jurisdiction, there cannot be a claim of expropriation. Mexico agrees with Canada that in such case, as a matter of domestic law, the alleged investment never existed for the purposes of Article 1110. In such circumstances a disputing investor would have to establish a claim of "denial of justice" under Article 1105 in order to succeed.

20. *Azinian v. the United Mexican States*, illustrates this point. The Ayuntamiento of Naucalpan de Juárez in the State of Mexico issued an administrative resolution nullifying a municipal waste collection concession on grounds that misrepresentations inducing the granting of the concession rendered it void *ab initio*, notwithstanding that it had been partly performed by

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clearly contrasts with the much more liberal approach that has been taken by non-NAFTA tribunals. Thus, only one award supports the view that the concept constitutes a stand-alone element of the FET standard under Article 1105. The majority of NAFTA tribunals have held, on the contrary, that the host state's failure to respect an investor's legitimate expectations does not constitute a breach of the FET standard, but is rather a 'factor' to be taken into account when assessing whether or not other well-established elements of the standard have been breached. Another notable unique feature of NAFTA case law is the fact that tribunals have repeatedly narrowly qualified the concept of legitimate expectations. Tribunals have thus required that an investor's expectations be objective and be based on 'definitive, unambiguous and repeated' specific 'commitments' (or 'assurances') made by the host state to have 'purposely and specifically induced the investment' by the investor. Another illustration of this trend is the fact that NAFTA tribunals have also concluded that legitimate expectations cannot simply be based on the host state's existing domestic legislation on foreign investments at the time when the investor makes its investment. The Glamis award thus emphasized the threshold requirement of a quasi-contractual relationship between the investor and the host state. Finally, unlike non-NAFTA tribunals (including CMS, Enron: Teemed: and many others), no NAFTA tribunal has ever read into the FET standard an obligation for the host state to maintain a stable legal and business environment. These efforts of clarification by NAFTA tribunals have significantly reduced the scope of application of the concept of legitimate expectations. It is no surprise that to date, no NAFTA tribunal has come to the conclusion that a host state stood in violation of an investor's legitimate expectations under Article 1105." [emphasis added]] the Claimants.[18] The Ayuntamiento's resolution of nullity was upheld on three levels of appeal the Mexican courts, and the Azinian Tribunal made the following finding:

> The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.
>
> But the Claimants have raised no complaints against the Mexican courts; they do not allege a denial of justice. Without exception, they have directed their many complaints against the Ayuntamiento of Naucalpan. The Arbitral Tribunal finds that this circumstance is fatal to the claim, and makes it unnecessary to consider issues relating to performance of the Concession Contract. <u>For if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated</u>.[19] [Emphasis added]

21. As explained by the Azinian Tribunal, in such circumstances a claimant could only complain of "denial of justice":

> A denial of justice could be pleaded if relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case.
>
> There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrong-doing been pleaded, but the Arbitral tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.[20]

Application of Article 1110(7)

22. Article 1110(7) does not invite an arbitral tribunal constituted under Section B of Chapter Eleven to determine whether the host Party has complied with Chapter Seventeen when revoking or limiting intellectual property rights owned by an investor of another Party.

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18 See. *Robert Azinian et al v. the United Mexican States*, at paras. 9 – 17.

19 *Robert Azinian et al v. the United Mexican States*, Award, November 1 1999, at paras. 99 – 100.

20 Id. at paras. 102 – 103.

23. The NAFTA is very clear where Chapter Eleven tribunals are vested with authority to consider and apply other provisions of the NAFTA:

- Articles 1116 and 1117 *expressly* provide that an investor of Party may submit a claim that another Party has breached an obligation under (a)... Article 1503(2) (State Enterprises) or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A [of Chapter Eleven].

- Article 1401(2), (the Scope and Coverage provision in Chapter Fourteen, the Financial Services Chapter) *expressly* provides that "Articles 1109 through 1111, 1113, 1114 and 1211 are hereby incorporated into and made a part of this Chapter. Articles 1115 through 1138 are hereby incorporated into and made a part of this Chapter solely for breaches by a Party of Articles 1109 through 1111, 1113 and 1114, as incorporated into this Chapter".

24. All other dispute settlement under the NAFTA is restricted to Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

25. Chapter Twenty would apply to a dispute between two or more NAFTA Parties concerning a Party's alleged nonconformity with a requirement of Chapter Seventeen.[21]

26. It will be observed that Chapter Seventeen contains a lengthy, complicated and highly technical description of the Parties' various obligations pertaining to various forms of intellectual property rights.

27. It will also be observed that Chapter Twenty provides for establishment panels of five properly qualified individuals (Article 2010 "Qualification of Panelists"), direct participation by the third (non-disputing) NAFTA Party (Article 2013 "Third Party Participation"), the engagement of experts (Article 2014 "Role of Experts"), the establishment of a scientific review board (Article 2015 "Scientific Review Boards) and a short time frame for rendering panel reports (Article 2016 "Initial Report", and Article 2017 "Final Report").

28. The remedy under Chapter Twenty is based on panel's determinations and recommendations (if any) for the respondent Party to bring itself into compliance with the panel's interpretation of the NAFTA provision at issue[22] and that a respondent Party's failure to implement the panel's determinations and recommendations can provide grounds for the complaining Party to seek suspension of benefits.

29. Importantly, a Party cannot be compelled to implement a Chapter Twenty panel's finding, nor can it be compelled to pay financial compensation to the complaining Party or any person or

[21] NAFTA Article 2004 (Recourse to Dispute Settlement Procedures) and Article 2018(2) (Implementation of Final Report).

[22] NAFTA Article 2016(2)(b) (Initial Report).

entity affected by the impugned measure.[23] It also expressly provides that "no Party may provide a right of action under domestic law on the ground that a measure of another Party is inconsistent with this Agreement".[24]

30. Mexico submits that if the NAFTA Parties had intended that a Party should be liable to compensate an investor of another Party for an alleged non-compliance with an obligation under Chapter Seventeen, they would have so provided expressly.

31. Mexico further submits that the most a Chapter Eleven arbitral tribunal can do in considering the application of Article 1110(7) is to determine whether or not it is plainly obvious or clear on its face that measure allegedly amounting to termination or limitation of the intellectual property rights at issue is inconsistent with Chapter Seventeen. If not, that would be the end of the inquiry. If there appeared to be a genuine dispute as to whether the impugned measure conforms with the requirements of Chapter Seventeen, in the absence of a finding of nonconformity by a Chapter Twenty dispute settlement panel, the exception stipulated by Article 1110(7) would apply.

Respectfully submitted,

Leticia Ramírez Aguilar
Deputy General Counsel

18 March 2016

[23] NAFTA Article 2018 (Implementation of Final Report) and Article 2019 (Non implementation – Suspension of Benefits).

[24] NAFTA Article 2021 (Private Rights).

ANNEX 389

COMPREHENSIVE AND PROGRESSIVE AGREEMENT

FOR

TRANS-PACIFIC PARTNERSHIP

PREAMBLE

The Parties to this Agreement, resolving to :

REAFFIRM the matters embodied in the preamble to the Trans-Pacific Partnership Agreement, done at Auckland on 4 February 2016 (hereinafter referred to as "the TPP");

REALISE expeditiously the benefits of the TPP through this Agreement and their strategic and economic significance;

CONTRIBUTE to maintaining open markets, increasing world trade, and creating new economic opportunities for people of all incomes and economic backgrounds;

PROMOTE further regional economic integration and cooperation between them;

ENHANCE opportunities for the acceleration of regional trade liberalisation and investment;

REAFFIRM the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest; and

negotiated restructuring means the restructuring or rescheduling of a debt instrument that has been effected through (a) a modification or amendment of that debt instrument, as provided for under its terms, or (b) a comprehensive debt exchange or other similar process in which the holders of no less than 75 per cent of the aggregate principal amount of the outstanding debt under that debt instrument have consented to the debt exchange or other process;

New York Convention means the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958;

non-disputing Party means a Party that is not a party to an investment dispute;

protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law, including classified government information;

respondent means the Party that is a party to an investment dispute;

Secretary-General means the Secretary-General of ICSID; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.

Article 9.2: Scope

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:

   (a) investors of another Party;

   (b) covered investments; and

   (c) with respect to Article 9.10 (Performance Requirements) and Article 9.16 (Investment and Environmental, Health and other Regulatory Objectives), all investments in the territory of that Party.

2. A Party's obligations under this Chapter shall apply to measures adopted or maintained by:

   (a) the central, regional or local governments or authorities of that Party; and

(b) any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party.[13]

3. For greater certainty, this Chapter shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement for that Party.

Article 9.3: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement of a Party that a service supplier of another Party post a bond or other form of financial security as a condition for the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter shall apply to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that the bond or financial security is a covered investment.

3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 11 (Financial Services).

Article 9.4: National Treatment[14]

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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[13] For greater certainty, governmental authority is delegated under the Party's law, including through a legislative grant or a government order, directive or other action transferring or authorising the exercise of governmental authority.

[14] For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

3. For greater certainty, the treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

Article 9.5: Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).

Article 9.6: Minimum Standard of Treatment[15]

1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

[15] Article 9.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 9-A (Customary International Law).

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

Article 9.7: Treatment in Case of Armed Conflict or Civil Strife

1. Notwithstanding Article 9.12.6(b) (Non-Conforming Measures), each Party shall accord to investors of another Party and to covered investments non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

2. Notwithstanding paragraph 1, if an investor of a Party, in a situation referred to in paragraph 1, suffers a loss in the territory of another Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation or both, as appropriate, for that loss.

3. Paragraph 1 shall not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 9.4 (National Treatment) but for Article 9.12.6(b) (Non-Conforming Measures).

Article 9.8: Expropriation and Compensation[16]

1. No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:

(a) for a public purpose;[17, 18]

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and

(d) in accordance with due process of law.

2. Compensation shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realisable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

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[16] Article 9.8 (Expropriation and Compensation) shall be interpreted in accordance with Annex 9-B (Expropriation) and is subject to Annex 9-C (Expropriation Relating to Land).

[17] For greater certainty, for the purposes of this Article, the term “public purpose” refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as “public necessity”, “public interest” or “public use”.

[18] For the avoidance of doubt: (i) if Brunei Darussalam is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the *Land Code* (Cap. 40) and the *Land Acquisition Act* (Cap. 41), as of the date of entry into force of the Agreement for it; and (ii) if Malaysia is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the *Land Acquisitions Act 1960*, *Land Acquisition Ordinance 1950* of the State of Sabah and the *Land Code 1958* of the State of Sarawak, as of the date of entry into force of the Agreement for it.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid, converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with Chapter 18 (Intellectual Property) and the TRIPS Agreement.[19]

6. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant,

(a) in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or

(b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant,

standing alone, does not constitute an expropriation.

Article 9.9: Transfers[20]

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital;[21]

(b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees and other fees;

[19] For greater certainty, the Parties recognise that, for the purposes of this Article, the term "revocation" of intellectual property rights includes the cancellation or nullification of those rights, and the term "limitation" of intellectual property rights includes exceptions to those rights.

[20] For greater certainty, this Article is subject to Annex 9-E (Transfers).

[21] For greater certainty, contributions to capital include the initial contribution.

ANNEX 390

International Investment Agreements Navigator

Select country

Bilateral Investment Treaties (BITs)

Total: 2897
Total in force: 2343

Treaties with Investment Provisions (TIPs)

Total: 417
Total in force: 324

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Short title:

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018)

Parties

1. Australia (/international-investment-agreements/countries/11/australia)
2. Brunei Darussalam (/international-investment-agreements/countries/29/brunei-darussalam)
3. Canada (/international-investment-agreements/countries/35/canada)
4. Chile (/international-investment-agreements/countries/41/chile)
5. Japan (/international-investment-agreements/countries/105/japan)
6. Malaysia (/international-investment-agreements/countries/127/malaysia)
7. Mexico (/international-investment-agreements/countries/136/mexico)
8. Peru (/international-investment-agreements/countries/165/peru)
9. New Zealand (/international-investment-agreements/countries/150/new-zealand)
10. Singapore (/international-investment-agreements/countries/190/singapore)
11. Viet Nam (/international-investment-agreements/countries/229/viet-nam)

Treaty type

Treaties with Investment Provisions

Annex 390

Status

In force

Date of signature

08/03/2018

Date of entry into force

30/12/2018

Treaty full text

en (/international-investment-agreements/treaty-files/5672/download)

Treaty investment chapter text

en (/international-investment-agreements/treaty-files/5673/download)

IIA content

Not mapped

Additional notes

Australia, Canada, Japan, Mexico, New Zealand, Singapore and Viet Nam have ratified the agreement triggering its entry into force from 30 December 2018. More information on the status of the agreement for the 11 signatories is available at **New Zealand's depository page for the CPTPP** (https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/cptpp/).

Relationships with other agreements

Replacing

Australia - Mexico BIT (2005) (/international-investment-agreements/treaties/treaties-with-investment-provisions/213/australia---mexico-bit-2005-)

Replacing

Australia - Viet Nam BIT (1991) (/international-investment-agreements/treaties/treaties-with-investment-provisions/224/australia---viet-nam-bit-1991-)

Coexists with

AANZFTA (/international-investment-agreements/treaties/treaties-with-investment-provisions/3268/aanzfta)

Annex 390

Coexists with

Australia-New Zealand Investment Protocol (/international-investment-agreements/treaties/treaties-with-investment-provisions/3288/australia-new-zealand-investment-protocol)

Coexists with

Japan - Viet Nam BIT (2003) (/international-investment-agreements/treaties/treaties-with-investment-provisions/2164/japan---viet-nam-bit-2003-)

Coexists with

Japan-Viet Nam EPA (/international-investment-agreements/treaties/treaties-with-investment-provisions/3250/japan-viet-nam-epa)

Coexists with

Australia-Singapore FTA (/international-investment-agreements/treaties/treaties-with-investment-provisions/3317/australia-singapore-fta)

Coexists with

Japan-Mexico EPA (/international-investment-agreements/treaties/treaties-with-investment-provisions/3356/japan-mexico-epa)

Coexists with

ASEAN Comprehensive Investment Agreement (2009) (/international-investment-agreements/treaties/treaties-with-investment-provisions/3273/asean-comprehensive-investment-agreement-2009-)

About +

Terminology +

Annex 390

ANNEX 391

Formal Request to Commence UK Accession Negotiations to CPTPP

On Monday 1st February, we submitted our notification of intent letter to begin the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) accession process.

From:
Department for International Trade
Published:
1 February 2021

Dear Minister O'Connor,

As the Minister of Trade in New Zealand, the depositary nation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and with reference to Article 5: 'Accession' of the CPTPP treaty text, I am writing to you on behalf of the United Kingdom to formally request the commencement of negotiations on UK accession to CPTPP.

Accession to CPTPP is a priority for the UK government and a key part of our trade negotiations programme as a newly independent trading nation. CPTPP is one of the most important free trade areas in the world and UK accession could see CPTPP's proportion of global GDP rise to 16%. UK membership would also be the first step in expanding this influential and modern trade network of 11 dynamic economies beyond the Indo-Pacific region and Americas.

The UK shares the CPTPP's commitment to free trade and welcomes the high standards of this ambitious agreement. The UK will comply fully with the process set out in the commission decision of January 2019 on the Accession Process of the CPTPP. I believe UK membership would send a powerful signal about the importance placed on free trade by this dynamic group of countries at this critical time in our history.

In line with the accession process you have set out for aspirant economies, over the last two years, the UK has actively engaged with all 11 Signatories at both ministerial and official level to discuss UK accession to CPTPP. I am delighted that all CPTPP members have welcomed our interest in accession.

CPTPP membership will complement and reinforce new and enhanced bilateral trade agreements we have already signed or are negotiating now – with Australia, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore and Vietnam. We believe our strong bilateral trade relationships with CPTPP members, including with Brunei and Malaysia, provide an effective springboard to our CPTPP accession.

We would now like to formalise our request to commence accession negotiations. I hope you will consider our request favourably and we stand ready to engage with you in order to establish a Working Group and to agree a timetable to negotiate the UK's accession. The UK will publish its outline approach, scoping analysis, and response to our public consultation before we begin negotiations. I look forward to working with you and the CPTPP members.

Best wishes,

THE RT HON ELIZABETH TRUSS MP

Secretary of State for International Trade
& President of the Board of Trade

ANNEX 392

IN THE MATTER OF AN INTERNATIONAL ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

B E T W E E N :

METHANEX CORPORATION

Claimant/Investor

and

UNITED STATES OF AMERICA

Respondent/NAFTA Party

FINAL AWARD OF THE TRIBUNAL ON JURISDICTION AND MERITS

THE TRIBUNAL:

J. William F. Rowley
Professor W. Michael Reisman
V.V. Veeder (President)

PART IV - CHAPTER C
ARTICLE 1105 NAFTA

(1) INTRODUCTION

1. As noted in the previous Chapter, at the outset of the Tribunal's discussion of NAFTA Article 1102, an affirmative finding of a malign intent under NAFTA Article 1101 might satisfy the requirements of a showing of the requisite "relation" under NAFTA Article 1105. But a failure to find a malign intent under Article 1101 might yet be repaired by an affirmative finding that an investor had not been accorded treatment in accordance with international law. Hence in fairness to Methanex, the Tribunal, as part of the joinder of jurisdictional questions and the merits, will now turn to the material adduced with respect to the claims under Article 1105 to determine whether a possible finding of a violation under Article 1105 could fulfil the requirements of Article 1101.

(2) METHANEX'S CASE REGARDING ARTICLE 1105 NAFTA

2. Methanex submits that the US measures were intended to discriminate against foreign investors and their investments and that intentional discrimination is, by definition, inequitable. Thus it is claimed that the USA's breach of Article 1102 NAFTA establishes a breach of Article 1105 as well.

3. Methanex's pleaded claim under Article 1105 was commendably succinct. It was developed in three paragraphs in the Second Amended Statement of Claim and consisted of a single assertion: "the California measures were intended to discriminate against foreign investors and their investments, and intentional

discrimination is, by definition, unfair and inequitable"[1]. Methanex went on to state, "[T]his is a straightforward case of raw economic protectionism. On such facts, the United States' breach of Article 1102 'establishes a breach of Article 1105 as well'"[2]. Methanex's Reply devoted only four paragraphs to its Article 1105 claim - two of which argued against the validity of the FTC's interpretation of Article 1105[3] and two of which restated its contention that "intentional discrimination violates even the minimum standard of treatment required by Article 1105"[4].

4. Both in its written and oral submissions, Methanex contended that the FTC's interpretation of 31st July 2001 is a purported amendment, as opposed to a valid interpretation, of Article 1105; and it is therefore not binding on this Tribunal under Article 1131(2) NAFTA. In oral argument, Methanex assailed the FTC's interpretation as invalid substantively because Article 1131 requires the Tribunal "to take into account all of international law"[5]; and invalid procedurally because [t]hat's too distinct and too important a deletion from the Treaty to be anything other than an amendment"[6].

5. Accordingly, Methanex contends that the Tribunal should disregard the interpretation on the basis that it is nothing more than an attempt by the USA retroactively to suppress a legitimate claim. Methanex relies on the legal opinion of the late Sir Robert Jennings in support of its contentions at the jurisdictional phase

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[1] Second Am. Claim, para. 313; see id., para. 314 (referencing the NAFTA award in *S.D. Myers*).

[2] Id., para. 315.

[3] Reply, paras. 203-204; see generally Free Trade Commission Clarifications Related to NAFTA Chapter 11, 31st July 2001.

[4] Id., para. 205; see id., para. 206.

[5] Transcript Day 8, p. 1854 (lines 6-7).

[6] Id. at p. 1855 (lines 16-18).

of this case:

"It would be wrong to discuss these three-Party 'interpretations' of what have become key words in this arbitration, without protesting the impropriety of the three governments making such an intervention well into the process of the arbitration, not only after the benefit of seeing the written pleadings of the parties but also virtually prompted by them[7]."

Methanex contends that, in any event, the interpretation should have no material impact on the proceedings as it cannot alter the substance of NAFTA's investment protections.

6. In response, the USA argued that the FTC's interpretation is binding on this Tribunal and, by its terms, precludes the contention that a breach of Article 1102 also breaches Article 1105 (or, as the case may be, another article in Chapter Eleven, such as Article 1110)[8]. Even ignoring the FTC's interpretation, the USA argues, nationality-based discrimination was cabined exclusively under Article 1102[9]. Further, according to the USA, Methanex has not demonstrated the existence of a rule of customary international law that prohibits a state from differentiating between nationals and aliens[10].

7. At the main hearing in June 2004, Methanex placed considerable weight on the description of the general standard emerging for Article 1105(1) set out in the award in the *Waste Management v. Mexico* arbitration:

"*98. The search here is for the Article 1105 standard of review, and it is not*

[7] Expert Op. of Robert Jennings, 6th September 2001 (Methanex's Submission in Response to the NAFTA Free Trade Commission Interpretation, 18th September 2001, Exh. 1).

[8] Am. Defense at Part IV A.

[9] See id., para. 365.

[10] See, e.g., id., paras. 366-370.

necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

99. Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case[11]."

8. According to Methanex, California's actions in banning MTBE and methanol and precipitously introducing ethanol were arbitrary, grossly unfair, unjust and idiosyncratic in the sense that there was a pandering to a domestic US industry, i.e. the domestic ethanol industry. These actions were discriminatory because they discriminated against foreign-owned investments such as the investments of Methanex. In addition, Methanex argues that there was a complete lack of transparency because the critical event was not the public hearings held in California, but rather the meeting between Mr Davis and ADM in Decatur, Illinois. Methanex claims that the promotion of ethanol in California was driven by the political debt that Governor Davis felt he owed to ADM in return for its political contributions, which was not in any way apparent in the administrative process[12]. Methanex submits that, whenever a political official implicitly favours one competitor in return for political contributions and shuts another competitor out of

[11] *Waste Mgmt. Inc. v. Mexico*, Arb (AF)/00/3, paras. 98-99 (ICSID 2004); e.g., Transcript Day 8, pp. 1939, 1944 (Mr Dugan for Methanex); Transcript Day 9, pp. 2151-2153 (Ms Guymon for the USA).

[12] Transcript Day 8, pp. 1944-1945.

the market, that action is arbitrary, grossly unfair, unjust, and idiosyncratic as the decision is not made on the merits[13].

(3) THE TRIBUNAL'S DECISION REGARDING ARTICLE 1105 NAFTA

9. Article 1105 NAFTA provides:

> *"1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*
>
> *2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.*
>
> *3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b)."*

Article 1108(7)(b), to which Article 1105(3) refers, provides: "(b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance". Article 1131(2) provides: "2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section".

10. As recited earlier in this Award, the FTC issued on 31st July 2001 an interpretation of Article 1105(1), as follows:

> *"B. Minimum Standard of Treatment in Accordance with*

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[13] Id. at pp. 1940-1942.

International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

The purport of this FTC interpretation has been discussed in a number of NAFTA arbitral awards[14], some of which are relevant to this case.

11. The tribunal in *Mondev*, for example, emphasised that the application of the customary international law standard does not per se permit resort to other treaties of the NAFTA Parties or, indeed, other provisions within NAFTA[15]. The *ADF* tribunal emphasised that recourse to customary international law "must be disciplined by being based on State practice and judicial or arbitral case law or other sources of customary or general international law"[16]. The *Loewen* tribunal observed, by way of obiter dictum: "Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is

[14] See, e.g., *Metalclad Corp. v. Mexico*, 5 ICSID Reports 209 (Second Am. Claim App., 3 LA tab 85); *S. D. Myers v. Canada,* Partial Award 40 ILM 1408 (Second Am. Claim App., 4 LA tab 97); *Mondev Int'l Ltd. v. United States*, 6 ICSID Reports 181, 42 ILM 85 (Am. Defense App., 4 LA tab 61); *The Loewen Group, Inc. v. United States*, 42 ILM 811 (Am. Defense App., 4 LA tab 58); *ADF Group Inc. v. United States*, 6 ICSID Reports 470, (Am. Defense App., 1 LA tab 2).

[15] *Mondev Int'l Ltd.*, paras. 120-121.

[16] *ADF Group Inc.*, para. 184.

enough, even if one applies the [FTC] Interpretation according to its terms”[17].

12. Most recently, as more fully cited above from Methanex’s argument, the NAFTA tribunal in *Waste Management* attempted the difficult task of synthesising the post-interpretation jurisprudence of Article 1105, as: “[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in any administrative process.”

13. Methanex marshals a number of arguments, which are considered below. Ultimately, however, the Tribunal decides that Methanex’s claim under Article 1105 fails for a number of reasons.

14. First, even assuming that Methanex had established discrimination under Article 1102, (which the Tribunal has found it did not) and ignoring, for the moment, the FTC’s interpretation - the plain and natural meaning of the text of Article 1105 does not support the contention that the “minimum standard of treatment” precludes governmental differentiations as between nationals and aliens. Article 1105(1) does not mention discrimination; and Article 1105(2), which does mention it, makes clear that discrimination is not included in the previous paragraph. By prohibiting discrimination between nationals and aliens with respect to measures relating to losses suffered by investments owing to armed conflict or civil strife, the second paragraph imports that the preceding paragraph did not prohibit - in all other

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[17] *The Loewen Group, Inc.*, para. 132.

circumstances - differentiations between nationals and aliens that might otherwise be deemed legally discriminatory: inclusio unius est exclusio alterius. The textual meaning is reinforced by Article 1105(3), which makes clear that the exception in paragraph 2 is, indeed, an exception.

15. Elsewhere, when the NAFTA Parties wished to incorporate a norm of non-discrimination, they did so - as one finds in Article 1110(1)(b) which requires that a lawful expropriation must, among other requirements be effected “on a non-discriminatory basis”. But Article 1110(1)(c) makes clear that the NAFTA Parties did not intend to include discrimination in Article 1105(1). Article 1110(1)(c) establishes that another requirement for a lawful expropriation is that it be effected “in accordance with due process of law and Article 1105(1)”. If Article 1105(1) had already included a non-discrimination requirement, there would be no need to insert that requirement in Article 1110(1)(b), for it would already have been included in the incorporation of Article 1105(1)’s due process requirement.

16. This is not an instance of textual ambiguity or lacuna which invites a tribunal even to contemplate making law. When the NAFTA Parties did not incorporate a non-discrimination requirement in a provision in which they might have done so, it would be wrong for a tribunal to pretend that they had. Thus, even if Methanex had succeeded in establishing that it had suffered a discrimination for its claim under Article 1102, it would not be admissible for it, as a matter of textual interpretation, to establish a claim under Article 1105.

17. This textual analysis places the FTC’s interpretation in perspective. The interpretation, it will be recalled, stated in relevant part that: “3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)”. In clarifying that, for purposes of the present case, a determination of

discrimination under Article 1102 would not establish a breach of Article

1105(1), the FTC simply confirmed the text.

18. In this respect, the rather severe words of the late Sir Robert Jennings, in his September 2001 legal opinion for Methanex - referring to the "impropriety" of the FTC Interpretation under the circumstances of the case[18] - lack a predicate in this case. For, as far as Methanex's textual claim under Article 1105(1) was concerned, the interpretation changed nothing. Moreover, as a factual matter, the Tribunal cannot now assume that the three NAFTA Parties had Methanex's claim specifically in mind; the USA has observed that every NAFTA claimant in cases pending in 2001 has argued that the FTC interpretation was specifically targeted against it[19].

19. If there were rules of customary international law prohibiting differentiations by a government between foreign investors or their investments and national investors or their investments, a matter to which the Tribunal will turn in a moment, Sir Robert's opinion might be more understandable; but in oral submissions at the main hearing Methanex cited only one case, which had been delivered a month earlier and whose purport is, on examination, not helpful to its argument.

20. But even if Methanex's assertions of the existence of a customary rule were correct, the FTC interpretation would be entirely legal and binding on a tribunal seised with a Chapter 11 case. The purport of Article 1131(2) is clear beyond peradventure (and any investor contemplating an investment in reliance on NAFTA must be deemed to be aware of it). Even assuming that the FTC interpretation was a far-reaching substantive change (which the Tribunal believes not to be so with respect to the

[18] Expert Op. of Robert Jennings, 6th September 2001.

[19] Rejoinder, para. 186.

issue relating to this case), Methanex cites no authority for its argument that far-reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the parties.

21. Article 39 of the Vienna Convention on the Law of Treaties says simply that "[a] treaty may be amended by agreement between the parties". No particular mode of amendment is required and many treaties provide for their amendment by agreement without requiring a re-ratification. Nor is a provision on the order of Article 1131 inconsistent with rules of international interpretation. Article 31(3)(a) of the Vienna Convention provides that:

> *"3. There shall be taken into account, together with the context:*
>
> > *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.*"

22. Nor is Article 1131(2) improper under general principles of law or international constitutional principles. If a legislature, having enacted a statute, feels that the courts implementing it have misconstrued the legislature's intention, it is perfectly proper for the legislature to clarify its intention. In a democratic and representative system in which legislation expresses the will of the people, legislative clarification in this sort of case would appear to be obligatory. The Tribunal sees no reason why the same analysis should not apply to international law.

23. From the time of the *Alabama* award[20], it has been accepted that States may agree to

arbitrate by specifying the principles and rules of law they wish the tribunal to

[20] The Washington Treaty of 8 May 1871 between the United Kingdom and the USA included agreement on three rules applicable to the United Kingdom as a neutral during the Civil War, which ensured that the United Kingdom would be held liable by the Geneva tribunal, even though these rules imposed higher duties than those previously accepted under international law (subject only to quantum and jurisdiction over the so-called "Indirect Claims"). See Tom Bingham, *The Alabama Claims Arbitration*, 54 ICLQ 1 (2005).

apply. This is frequently referred to as arbitration on an agreed basis[21]. When the parties wish to arbitrate on an agreed basis, a tribunal is then bound by law and honour to respect and give effect to the parties's selection of the rules of law to be applied.

24. Nevertheless, the Tribunal agrees with the implication of Methanex's submission with respect to the obligations of an international tribunal - that as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or jus cogens and not to give effect to parties' choices of law that are inconsistent with such principles. Yet even assuming that the USA errs in its argument for an approach to minimum standards that does not prohibit discrimination, this is not a situation in which there is a violation of a jus cogens rule. Critically, the FTC interpretation does not exclude non-discrimination from NAFTA Chapter 11, an initiative which would, arguably, violate a jus cogens and thus be void under Article 53 of the Vienna Convention on the Law of Treaties. All the FTC's interpretation of Article 1105 does, in this regard, is to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination.

25. As to the question of whether a rule of customary international law prohibits a State, in the absence of a treaty obligation, from differentiating in its treatment of nationals and aliens, international law is clear. In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens. As the previous discussion shows, no conventional rule binding on the NAFTA Parties is to the contrary with respect to the issues raised in this case. Indeed, the

text of NAFTA indicates that the States parties explicitly excluded a rule of non-

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[21] See generally W. Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971).

discrimination from Article 1105.

26. Customary international law has established exceptions to this broad rule and has decided that some differentiations are discriminatory. But the International Court of Justice has held that "[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party"[22]. In his oral submissions at the main hearing, Counsel for Methanex cited only one case. That award, *Waste Management*, in the relevant part of the excerpt quoted above, states that "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is . . . discriminatory and exposes the claimant to sectional or racial prejudice . . ."[23]. The tribunal, presumably deriving this part of its synthesis from *Loewen*, opined that the conduct must have been "discriminatory *and* expose[d] the claimant to sectional or racial prejudice"[24]. The Tribunal need not comment on the accuracy of the cumulative requirement in this part of the *Waste Management* synthesis, since Methanex failed, as explained in Part III of this Award, to establish that California and the California ban on MTBE was discriminatory or in any way exposed it to "sectional or racial prejudice". Methanex offered no other authority for its assertion.

27. For all the above reasons, the Tribunal decides that Methanex's claim under Article 1105 NAFTA fails. The Tribunal also decides that Methanex's case under Article 1101 is not assisted by its arguments under Article 1105.

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[22] *Rights of Asylum (Colombia v. Peru)*, 1950 ICJ Rep. 266, 276 (US Reply Mem. on Jurisdiction, Admissibility, and the Proposed Amendment App., 1 LA tab 11).

[23] *Waste Mgmt. Inc.*, para. 98.

[24] Id. (emphasis added).

ANNEX 393

1 Fletcher Cyc. Corp. § 41

Fletcher Cyclopedia of the Law of Corporations September 2020 Update

Chapter 2. THE CORPORATE ENTITY OR PERSONALITY

II. Disregard of the Corporate Entity; Piercing the Corporate Veil and Alter Ego Liability

§ 41. Theory and factors warranting piercing the corporate veil

West's Key Number Digest

West's Key Number Digest, Corporations and Business Organizations 1030 to 1032
West's Key Number Digest, Corporations and Business Organizations 1036 to 1040
West's Key Number Digest, Corporations and Business Organizations 1043
West's Key Number Digest, Corporations and Business Organizations 1044
West's Key Number Digest, Corporations and Business Organizations 1049
West's Key Number Digest, Corporations and Business Organizations 1051 to 1056
West's Key Number Digest, Corporations and Business Organizations 1058 to 1065
West's Key Number Digest, Corporations and Business Organizations 1067 to 1077
West's Key Number Digest, Corporations and Business Organizations 1078(1) to 1078(6)

There are essentially two major views of the nature of a corporation. A corporation may be regarded as a privilege granted by the state and treated as an "artificial entity" to be operated by its members.[1] According to this view, it is viewed as a privilege that carries with it the responsibility to operate in accordance with the public interest. Thus, the corporate veil should be pierced if there is an abuse of the corporate form.

Alternatively, a corporation may be viewed as a mere contractual arrangement between individuals.[2] As such, the state should not interfere with the corporate form any more than it would a private contract. Accordingly, the corporate veil should be pierced only when it appears that something in the original "contract" has gone amiss.[2.50]

Regardless of the theory of the nature of a corporation, it is indisputable that there are some circumstances under which the corporate entity will be disregarded and liability imposed upon its members.[3] The tests and factors that the courts consider to determine whether to disregard the corporate form differ from state to state.[4] However, some of the most common factors include fraud, illegality, contravention of contract, public wrong, inequity,[5] and whether the corporation was formed to defeat public convenience.[6] Organizing a corporation for the purpose of avoiding personal liability, however, does not alone justify piercing the corporate veil.[7] Indeed, a corporation may be formed for the sole purpose of avoiding personal liability.[8] Thus, as a general rule, it is often said that the corporation will be viewed as a legal entity unless it is used to defeat public convenience or perpetrate or protect crime or fraud;[9] when those situations occur, the courts will more carefully scrutinize the corporation and may regard it merely as an association of persons and extend liability to them.[10] In some jurisdictions, evidence of fraud alone may be sufficient to pierce the corporate veil.[11] Regardless of the basis for piercing the corporate veil, a determination should be made with regard to the totality of the facts and circumstances of each case.[12]

While the factors that will justify piercing the corporate veil vary from jurisdiction to jurisdiction, a number of courts will disregard the existence of a corporate entity when the plaintiff shows: (1) control, not merely majority or complete stock control, but complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control was used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or to commit a dishonest and unjust act in contravention of the plaintiff's legal rights;[13] and (3) that the aforesaid control and breach of duty proximately caused the injury or unjust loss.[14]

Factors that many states consider include: (1) whether the shareholder sought to be charged owns all or most of the stock of the corporation; (2) whether the shareholder has subscribed to all of the capital stock of the corporation or otherwise caused its incorporation; (3) inadequate capitalization; (4) whether the shareholder uses the property of the corporation as the shareholder's own; (5) whether the directors or executives of the corporation act independently in the interest of the corporation or simply take their orders from the shareholder in the latter's interest; and (6) whether the formal legal requirements of the corporation are observed.[15] In addition to factors such as the foregoing, some jurisdictions require that there be an element of injustice or fundamental unfairness.[16]

Factors to consider in determining if there is a unity of ownership and interest may include: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere façade for the operation of the dominant stockholders.[16.30]

It is not always necessary to prove illegality in order to establish excessive control of the corporation by shareholders so as to warrant the imposition of personal liability on the shareholders for the corporation's debts.[17] Because there is no single factor that alone justifies piercing the corporate veil, a careful review of the entire relationship between various corporate entities and their directors and officers may reveal that such an equitable action is warranted.[18]

Wholly owned subsidiaries sometimes present a situation ripe for piercing the corporate veil under the alter ego theory.[19] Additionally, where a corporate entity is operated by a partnership and there is such an intermingling of the affairs of the two businesses that they are mere instrumentalities of each other, the veil may be pierced.[20] In other words, if an inter-entity affiliation is devised for or is being used to accomplish an improper or unlawful purpose, equity has the authority to tear down technical legal barriers and reach beyond them to impose liability or grant proper relief.[21]

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Footnotes

1	For a substantive discussion of this doctrine, see §§ 25 et seq. See also Presser, Piercing the Corporate Veil, § 1:2.
2	See Presser, Piercing the Corporate Veil, § 1:2.
2.50	Tower Investors, LLC v. 111 E. Chestnut Consultants, Inc., 371 Ill. App. 3d 1019, 1033 (2007) (quoting treatise); Willow Electrical Supply Company, Inc. v. Miracle Investment Group, Inc, 2020 IL App (1st) 181329-U.

3 **U.S.**

Dole Food Co. v. Patrickson, 538 U.S. 468, 123 S. Ct. 1655, 155 L. Ed. 2d 643, 188 A.L.R. Fed. 661 (2003), citing this treatise; Sky Cable, LLC v. DIRECTV, Inc., 886 F.3d 375 (4th Cir. 2018), quoting this treatise; In re Cambridge Biotech Corp., 186 F.3d 1356, 44 Fed. R. Serv. 3d 595 (Fed. Cir. 1999); Fidelity & Deposit Co. of Maryland v. Commercial Cas. Consultants, Inc., 976 F.2d 272 (5th Cir. 1992); Itel Containers Intern. Corp. v. Atlanttrafik Exp. Service Ltd., 909 F.2d 698 (2d Cir. 1990) (applying New York law); Bodenhamer Bldg. Corp. v. Architectural Research Corp., 873 F.2d 109, 13 Fed. R. Serv. 3d 1144 (6th Cir. 1989); U.S. v. Sutton, 795 F.2d 1040, 21 Fed. R. Evid. Serv. 30 (Temp. Emer. Ct. App. 1986); Contractors, Laborers, Teamsters & Engineers Health and Welfare Plan v. Hroch, 757 F.2d 184 (8th Cir. 1985); Pepsi-Cola Metropolitan Bottling Co., Inc. v. Checkers, Inc., 754 F.2d 10 (1st Cir. 1985); Jaloy Mfg. Co., Inc. v. U.S. Fidelity & Guar. Co., 736 F.2d 1131 (6th Cir. 1984) (applying Michigan law); J-R Grain Co. v. FAC, Inc., 627 F.2d 129 (8th Cir. 1980) (applying Nebraska law); DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976) (piercing corporate veil and imposing individual liability on president of debtor corporation); Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc., 524 F.2d 162 (10th Cir. 1975) (applying Oklahoma law); Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975); U.S. v. Finnigan, 504 F.2d 1355 (8th Cir. 1974); Capital Tel. Co., Inc. v. F.C.C., 498 F.2d 734 (D.C. Cir. 1974); Rainbo Gold Mines v. Magnus, 371 F.2d 519 (10th Cir. 1966), citing this treatise; Mayo v. Pioneer Bank & Trust Co., 274 F.2d 320 (5th Cir. 1960), citing this treatise; Fitzgerald v. Central Bank & Trust Co., 257 F.2d 118 (10th Cir. 1958); Simmons Co. v. Crew, 84 F.2d 82, 91 (C.C.A. 4th Cir. 1936); Majestic Co. v. Orpheum Circuit, 21 F.2d 720 (C.C.A. 8th Cir. 1927); Antonic Rigging and Erecting of Missouri, Inc. v. Foundry East Ltd. Partnership, 773 F. Supp. 420 (S.D. Ga. 1991) (applying Georgia law); CNC Service Center, Inc. v. CNC Service Center, Inc., 753 F. Supp. 1427 (N.D. Ill. 1991) (applying Wisconsin law); Central States, Southeast and Southwest Areas Pension Fund v. Sloan, 714 F. Supp. 943 (N.D. Ill. 1989), judgment aff'd, 902 F.2d 593 (7th Cir. 1990) (intent to avoid labor obligations linchpin of alter ego doctrine); Thermothrift Industries, Inc. v. Mono-Therm Insulation Systems, Inc., 450 F. Supp. 398 (W.D. Ky. 1978) (applying Kentucky law); Miller & Miller Auctioneers, Inc. v. Mersch, 442 F. Supp. 570, 23 U.C.C. Rep. Serv. 626 (W.D. Okla. 1977) (quoting this treatise); Woodland Nursing Home Corp. v. Weinberger, 411 F. Supp. 501 (S.D. N.Y. 1976), citing this treatise; Consumers Time Credit, Inc. v. Remark Corp., 227 F. Supp. 263, 8 Fed. R. Serv. 2d 64.5, Case 1 (E.D. Pa. 1964)

U.S.

"Growing tendency" is to look beyond the corporate form to the purpose of it, and to the officers who are identified with it for that purpose. J.J. McCaskill Co. v. U.S., 216 U.S. 504, 515, 30 S. Ct. 386, 54 L. Ed. 590 (1910)

Ala.

Chenault v. Jamison, 578 So. 2d 1059 (Ala. 1991); Thorne v. C & S Sales Group, 577 So. 2d 1264 (Ala. 1991); Messick v. Moring, 514 So. 2d 892 (Ala. 1987); First Nat. Bank v. Winchester, 119 Ala. 168, 24 So. 351 (1898)

Ala.

Separate legal existence will not be recognized when the corporation is organized and controlled such that it is merely an instrumentality of another corporation, or when it is the alter ego of the person owning and controlling it. Environmental Waste Control, Inc. v. Browning-Ferris Industries, Inc., 711 So. 2d 912 (Ala. 1997)

Alaska

Pyramid Printing Co. v. Alaska State Com'n for Human Rights, 153 P.3d 994 (Alaska 2007)

Ariz.

Employer's Liability Assur. Corp. v. Lunt, 82 Ariz. 320, 313 P.2d 393 (1957); Mosher v. Lee, 32 Ariz. 560, 261 P. 35 (1927); Phoenix Safety Inv. Co. v. James, 28 Ariz. 514, 237 P. 958 (1925)

Ark.

Anderson v. Stewart, 366 Ark. 203, 234 S.W.3d 295 (2006); National Bank of Commerce (of El Dorado) v. HCA Health Services of Midwest, Inc., 304 Ark. 55, 800 S.W.2d 694 (1990) (burden is on plaintiff to show corporate form abused to injury of third person); Winchel v. Craig, 55 Ark. App. 373, 934 S.W.2d 946 (1996) (citing this treatise)

Cal.

Midwest Air Filters Pacific v. Finn, 201 Cal. 587, 258 P. 382 (1927); Wenban Estate v. Hewlett, 193 Cal. 675, 227 P. 723 (1924); Lyons v. Stevenson, 65 Cal. App. 3d 595, 135 Cal. Rptr. 457 (1st Dist. 1977)

Colo.

Micciche v. Billings, 727 P.2d 367 (Colo. 1986); Industrial Commission v. Lavach, 165 Colo. 433, 439 P.2d 359 (1968)

Conn.

Hoffman Wall Paper Co. v. City of Hartford, 114 Conn. 531, 159 A. 346 (1932); Woodbridge v. Pratt & Whitney Co., 69 Conn. 304, 37 A. 688 (1897)

Del.

Opdyke v. Kent Liquor Mart, Inc., 40 Del. Ch. 316, 181 A.2d 579 (1962); Terry Apartments Associates v. Associated-East Mtg. Co., 373 A.2d 585 (Del. Ch. 1977), citing this treatise; Pauley Petroleum, Inc. v. Continental Oil Co., 43 Del. Ch. 366, 231 A.2d 450 (1967), judgment aff'd, 43 Del. Ch. 516, 239 A.2d 629 (1968), citing this treatise; Equitable Trust Co. v. Gallagher, 34 Del. Ch. 76, 99 A.2d 490 (1953), adhered to, 34 Del. Ch. 249, 102 A.2d 538 (1954)

Del.

Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076 (D. Del. 1990), aff'd, 932 F.2d 959 (3d Cir. 1991)

D.C.

Camacho v. 1440 Rhode Island Ave. Corp., 620 A.2d 242 (D.C. 1993)

Fla.

Roberts' Fish Farm v. Spencer, 153 So. 2d 718 (Fla. 1963); Hester v. Tucker, 465 So. 2d 1261 (Fla. 2d DCA 1985)

Ga.

The concept of piercing the corporate veil is applied in Georgia to remedy injustices which arise where a party has overextended its privileges in the use of a corporate entity in order to defeat justice, to perpetrate fraud, or evade statutory contractual or tort responsibility. Antonic Rigging and Erecting of Missouri, Inc. v. Foundry East Ltd. Partnership, 773 F. Supp. 420 (S.D. Ga. 1991)

Hickman v. Hyzer, 261 Ga. 38, 401 S.E.2d 738 (1991); Deubler v. Hart, 139 Ga. 773, 78 S.E. 176 (1913)

Haw.

Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Haw. 224, 982 P.2d 853 (1999)

Idaho

VFP VC v. Dakota Co., 141 Idaho 326, 109 P.3d 714 (2005); Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc., 95 Idaho 599, 514 P.2d 594 (1973), citing this treatise

Ill.

Steiner Elec. Co. v. Maniscalco, 51 N.E.3d 45 (Il. App. 2016). For an expanded analysis of this case see 34 No. 5 Fletcher Corp Law Adviser NL 4; Donovan v. Purtell, 216 Ill. 629, 75 N.E. 334 (1905). Loy v. Booth, 16 Ill. App. 3d 1077, 307 N.E.2d 414 (2d Dist. 1974); People ex rel. Troxell v. Baylor, 15 Ill. App. 3d 815, 305 N.E.2d 15 (4th Dist. 1973)

Ind.

DeWeese v. Pribyla, 114 N.E.3d 501 (Ind. App 2018); Clarke Auto Co. v. Fyffe, 124 Ind. App. 222, 116 N.E.2d 532 (1954)

Iowa

DeCook v. Environmental Sec. Corp., Inc., 258 N.W.2d 721, 100 A.L.R.3d 1094 (Iowa 1977), citing this treatise

Kan.

Kilpatrick Bros., Inc. v. Poynter, 205 Kan. 787, 473 P.2d 33 (1970); Amoco Chemicals Corp. v. Bach, 222 Kan. 589, 567 P.2d 1337 (1977), citing this treatise; Kvassay v. Murray, 15 Kan. App. 2d 426, 808 P.2d 896, 14 U.C.C. Rep. Serv. 2d 1093 (1991)

Ky.

Dare To Be Great, Inc. v. Com. ex rel. Hancock, 511 S.W.2d 224 (Ky. 1974)

Ky.

Thermothrift Industries, Inc. v. Mono-Therm Insulation Systems, Inc., 450 F. Supp. 398 (W.D. Ky. 1978)

La.

Hamilton v. AAI Ventures, L.L.C., 768 So. 2d 298 (La. Ct. App. 1st Cir. 2000); West Bldg. Materials, Inc. v. Daley, 476 So. 2d 554 (La. Ct. App. 3d Cir. 1985); Dunham v. Anderson-Dunham, Inc., 466 So. 2d 1317 (La. Ct. App. 1st Cir. 1985), writ denied, 472 So. 2d 29 (La. 1985); Kingsman Enterprises, Inc. v. Bakerfield Elec. Co., Inc., 339 So. 2d 1280 (La. Ct. App. 1st Cir. 1976); Camp v. Gibbs, 331 So. 2d 517 (La. Ct. App. 2d Cir. 1976)

Me.

State v. Weinschenk, 2005 ME 28, 868 A.2d 200 (Me. 2005)

Md.

Maryland Unemployment Compensation Board v. Albrecht, 183 Md. 87, 36 A.2d 666 (1944)

Mass.

My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 233 N.E.2d 748 (1968)

Mich.

Gallagher v. Persha, 315 Mich. App. 647, 891 N.W.2d 505 (2016); Industrial Steel Stamping, Inc. v. Erie State Bank, 167 Mich. App. 687, 423 N.W.2d 317 (1988)

Mich.

Jaloy Mfg. Co., Inc. v. U.S. Fidelity & Guar. Co., 736 F.2d 1131 (6th Cir. 1984)

Minn.

Congdon v. Congdon, 160 Minn. 343, 200 N.W. 76 (1924); Almac, Inc. v. JRH Development, Inc., 391 N.W.2d 919 (Minn. Ct. App. 1986)

Mo.

66, Inc. v. Crestwood Commons Redevelopment Corp., 998 S.W.2d 32 (Mo. 1999); Real Estate Investors Four, Inc. v. American Design Group Inc., 46 S.W.3d 51 (Mo. Ct. App. E.D. 2001); Community Federal Sav. and Loan Ass'n v. Boyer, 710 S.W.2d 332 (Mo. Ct. App. E.D. 1986); Standard Leasing Corp. v. Missouri Rock Co., Inc., 693 S.W.2d 232, 41 U.C.C. Rep. Serv. 1280 (Mo. Ct. App. W.D. 1985); Pasta House Co. v. Miller, 691 S.W.2d 460 (Mo. Ct. App. E.D. 1985)

Neb.

In re Estate of Price, 223 Neb. 12, 388 N.W.2d 72 (1986); ServiceMaster Industries Inc. v. J.R.L. Enterprises, Inc., 223 Neb. 39, 388 N.W.2d 83 (1986); J.L. Brock Builders, Inc. v. Dahlbeck, 223 Neb. 493, 391 N.W.2d 110 (1986); Ehlers v. Bankers' Fire Ins. Co., 108 Neb. 756, 189 N.W. 159 (1922); Ridenour v. Kuker, 185 Neb. 321, 175 N.W.2d 287 (1970); Graham Graphics, Inc. v. Baer Marketing Intern., Inc., 10 Neb. App. 382, 631 N.W.2d 550 (2001)

Neb.

J-R Grain Co. v. FAC, Inc., 627 F.2d 129 (8th Cir. 1980)

Nev.

Nevada Tax Commission v. Hicks, 73 Nev. 115, 310 P.2d 852 (1957). I.C. Deal v. 999 Lakeshore Ass'n, 94 Nev. 301, 579 P.2d 775 (1978)

N.H.

Peter R. Previte, Inc. v. McAllister Florist, Inc., 113 N.H. 579, 311 A.2d 121 (1973), citing this treatise

N.J.

Dorn v. Transport of New Jersey, 200 N.J. Super. 159, 491 A.2d 1 (App. Div. 1984)

N.M.

State Trust & Savings Bank v. Hermosa Land & Cattle Co., 1925-NMSC-037, 30 N.M. 566, 240 P. 469 (1925); Morrissey v. Krystopowicz, 365 P.3d 20 (N.M. App. 2015) (abuse of corporate form). For an expanded analysis of this case see 33 No. 10 Fletcher Corp Law Adviser NL 10

N.Y.

People v. North River Sugar Refining Co., 121 N.Y. 582, 24 N.E. 834 (1890); People by Koppell v. Empyre Inground Pools Inc., 227 A.D.2d 731, 642 N.Y.S.2d 344 (3d Dep't 1996); Rothermel v. Ermiger, 161 A.D.2d 1016, 557 N.Y.S.2d 587 (3d Dep't 1990); Glassman v. Glassman, 19 A.D.2d 801, 243 N.Y.S.2d 194 (1st Dep't 1963) (corporate structure to be ignored where used for fraudulent purpose)

N.Y.

Itel Containers Intern. Corp. v. Atlanttrafik Exp. Service Ltd., 909 F.2d 698 (2d Cir. 1990)

N.C.

Glenn v. Wagner, 313 N.C. 450, 329 S.E.2d 326 (1985); Waff Bros, Inc. v. Bank of North Carolina, N.A., 289 N.C. 198, 221 S.E.2d 273 (1976), citing this treatise; Henderson v. Security Mortg. & Finance Co., 273 N.C. 253, 160 S.E.2d 39 (1968); Copley Triangle Associates v. Apparel America, Inc., 96 N.C. App. 263, 385 S.E.2d 201 (1989)

Ohio

Damascus Mfg. Co. v. Union Trust Co., 119 Ohio St. 439, 6 Ohio L. Abs. 710, 164 N.E. 530 (1928); Springfield v. Palco Invest. Co., Inc., 2013-Ohio-2348, 992 N.E.2d 1194 (Ohio Ct. App. 2d Dist. Clark County 2013); Saeks v. Saeks, 24 Ohio App. 3d 67, 493 N.E.2d 280 (2d Dist. Montgomery County 1985)

Okla.

Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc., 524 F.2d 162 (10th Cir. 1975)

Or.

Creditors Protective Ass'n v. Balcom, 248 Or. 38, 432 P.2d 319 (1967); Epton v. Moskee Inv. Co., 180 Or. 86, 174 P.2d 418 (1946); Security Sav. & Trust Co. v. Portland Flour Mills Co., 124 Or. 276, 261 P. 432 (1927); Sneed v. Santiam River Timber Co., 122 Or. 652, 260 P. 237 (1927)

Pa.

College Watercolor Group, Inc. v. William H. Newbauer, Inc., 468 Pa. 103, 360 A.2d 200, 92 A.L.R.3d 126 (1976); Gagnon v. Speback, 389 Pa. 17, 131 A.2d 619 (1957); Lomas v. Kravitz, 130 A.3d 107 (Pa. Super. 2015) (undercapitalization, failure to adhere to corporate formalities, intermingling of funds, and fraud)

Pa.

Consumers Time Credit, Inc. v. Remark Corp., 227 F. Supp. 263, 8 Fed. R. Serv. 2d 64.5, Case 1 (E.D. Pa. 1964)

R.I.

Vennerbeck & Clase Co. v. Juergens Jewelry Co., 53 R.I. 135, 164 A. 509 (1933)

S.C.

Multimedia Pub. of South Carolina, Inc. v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993) (employing two-pronged test for piercing veil); Peoples Federal Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992) (corporate form disregarded to assist third party); C.T. Lowndes & Co. v. Suburban Gas & Appliance Co., Inc., 307 S.C. 394, 415 S.E.2d 404 (Ct. App. 1991)

S.D.

Glanzer v. St. Joseph Indian School, 438 N.W.2d 204 (S.D. 1989)

Tenn.

Electric Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp., 691 S.W.2d 522 (Tenn. 1985); Widdicombe v. McGuire, 221 Tenn. 601, 429 S.W.2d 815 (1968); Fidelity Trust Co. v. Service Laundry Co., 160 Tenn. 57, 22 S.W.2d 6 (1929); Oceanics Schools, Inc. v. Barbour, 112 S.W.3d 135 (Tenn. Ct. App. 2003); Newman v. Bartee, 787 S.W.2d 929 (Tenn. Ct. App. 1990), citing this treatise

Tex.

Mancorp, Inc. v. Culpepper, 802 S.W.2d 226 (Tex. 1990); Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986); First Nat. Bank v. Gamble, 134 Tex. 112, 132 S.W.2d 100, 125 A.L.R. 265 (Comm'n App. 1939); Tryco Enterprises, Inc. v. Robinson, 390 S.W.3d 497 (Tex. App. Houston 1st Dist. 2012), review dismissed, (Apr. 5, 2013)

Utah

Colman v. Colman, 743 P.2d 782 (Utah Ct. App. 1987) (holding modified by, Jones & Trevor Marketing, Inc. v. Lowry, 2012 UT 39, 284 P.3d 630 (Utah 2012))

Va.

Lewis Trucking Corp. v. Com., 207 Va. 23, 147 S.E.2d 747 (1966)

Wash.

Kueckelhan v. Federal Old Line Ins. Co. (Mut.), 69 Wash. 2d 392, 418 P.2d 443 (1966); Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 524 P.2d 1355 (Div. 1 1974), citing this treatise

W. Va.

Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)

Wis.

Stebane Nash Co. v. Campbellsport Mut. Ins. Co., 27 Wis. 2d 112, 133 N.W.2d 737, 16 A.L.R.3d 760 (1965); Jonas v. State, 19 Wis. 2d 638, 121 N.W.2d 235, 95 A.L.R.2d 880 (1963); R. B. General Trucking, Inc. v.

Auto Parts & Service, Inc., 3 Wis. 2d 91, 87 N.W.2d 863 (1958); Spearing v. Bayfield County, 133 Wis. 2d 165, 394 N.W.2d 761 (Ct. App. 1986) (piercing corporate veil inapplicable absent fraud or equity claim), citing this treatise

Wis.

CNC Service Center, Inc. v. CNC Service Center, Inc., 753 F. Supp. 1427 (N.D. Ill. 1991)

For a historical and analytical overview of the piercing doctrine, see Presser, Piercing the Corporate Veil §§ 1:1 et seq.

4 **U.S.**

U.S. v. Scherping, 187 F.3d 796 (8th Cir. 1999) (applying Minnesota law); In re Cambridge Biotech Corp., 186 F.3d 1356, 44 Fed. R. Serv. 3d 595 (Fed. Cir. 1999); Longhi v. Animal & Plant Health Inspection Service, 165 F.3d 1057, 1999 FED App. 0027P (6th Cir. 1999) (state law controls issue of piercing the corporate veil); Soviet Pan Am Travel Effort v. Travel Committee, Inc., 756 F. Supp. 126 (S.D. N.Y. 1991)

U.S.

Corporate form is disregarded only if considerations of fairness or public necessity warrant. InterGen N.V. v. Grina, 344 F.3d 134 (1st Cir. 2003)

U.S.

The law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders. Kalb, Voorhis & Co. v. American Financial Corp., 8 F.3d 130 (2d Cir. 1993)

Minn.

U.S. v. Scherping, 187 F.3d 796 (8th Cir. 1999)

Mo.

66, Inc. v. Crestwood Commons Redevelopment Corp., 998 S.W.2d 32 (Mo. 1999)

For analyses of the law of individual states on this issue, see Presser, Piercing the Corporate Veil, §§ 2:1 et seq.

5 **U.S.**

U.S. v. Scherping, 187 F.3d 796 (8th Cir. 1999) (applying Minnesota law); In re Cambridge Biotech Corp., 186 F.3d 1356, 44 Fed. R. Serv. 3d 595 (Fed. Cir. 1999); Freeman v. Complex Computing Co., Inc., 119 F.3d 1044 (2d Cir. 1997) (applying New York law); Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc., 30 F.3d 627, 30 Fed. R. Serv. 3d 184 (5th Cir. 1994) (applying Texas law); Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994) (applying Illinois law); Fidelity & Deposit Co. of Maryland v. Commercial Cas. Consultants, Inc., 976 F.2d 272 (5th Cir. 1992); Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991) (applying Minnesota law); Bodenhamer Bldg. Corp. v. Architectural Research Corp., 873 F.2d 109, 13 Fed. R. Serv. 3d 1144 (6th Cir. 1989); Trustees of Bldg. Service 32B-J Pension, Health and Annuity Funds v. Hudson Service Corp., 871 F. Supp. 631 (S.D. N.Y. 1994) (New York law); Pulte Home Corp., Inc. v. Ply Gem Industries, Inc., 804 F. Supp. 1471 (M.D. Fla. 1992) (applying Michigan law); Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076 (D. Del. 1990) (applying Delaware law), aff'd, 932 F.2d 959 (3d Cir. 1991)

Ala.

Johnston v. Green Mountain, Inc., 623 So. 2d 1116 (Ala. 1993)

Ark.

Anderson v. Stewart, 366 Ark. 203, 234 S.W.3d 295 (2006); Winchel v. Craig, 55 Ark. App. 373, 934 S.W.2d 946 (1996), citing this treatise

Conn.

SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 585 A.2d 666 (1991) (separate corporation)

Del.

Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076 (D. Del. 1990), aff'd, 932 F.2d 959 (3d Cir. 1991)

Fla.

Munder v. Circle One Condominium, Inc., 596 So. 2d 144 (Fla. 4th DCA 1992) (failing to maintain and pay for insurance not enough to pierce corporate veil); Harrell v. Accurate Orthotics & Prosthetics, Inc., 529 So. 2d 358 (Fla. 2d DCA 1988)

Ga.

Hickman v. Hyzer, 261 Ga. 38, 401 S.E.2d 738 (1991)

Ill.

Roiser v. Cascade Mountain, Inc., 367 Ill. App. 3d 559, 305 Ill. Dec. 352, 855 N.E.2d 243 (1st Dist. 2006); Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 160 Ill. Dec. 634, 577 N.E.2d 1205 (1st Dist. 1991)

Ill.

Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994)

Ind.

DeWeese v. Pribyla, 114 N.E.3d 501 (Ind. App 2018)

Kan.

Kvassay v. Murray, 15 Kan. App. 2d 426, 808 P.2d 896, 14 U.C.C. Rep. Serv. 2d 1093 (1991)

La.

Hamilton v. AAI Ventures, L.L.C., 768 So. 2d 298 (La. Ct. App. 1st Cir. 2000)

Mich.

Pulte Home Corp., Inc. v. Ply Gem Industries, Inc., 804 F. Supp. 1471 (M.D. Fla. 1992)

Minn.

U.S. v. Scherping, 187 F.3d 796 (8th Cir. 1999); Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991) (veil pierced)

Mo.

Real Estate Investors Four, Inc. v. American Design Group Inc., 46 S.W.3d 51 (Mo. Ct. App. E.D. 2001)

Neb.

Wolf v. Walt, 247 Neb. 858, 530 N.W.2d 890 (1995)

N.J.

AYR Composition, Inc. v. Rosenberg, 261 N.J. Super. 495, 619 A.2d 592 (App. Div. 1993) (fraud present)

N.Y.

Morris v. New York State Dept. of Taxation and Finance, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993), citing this treatise; Godwin Realty Associates v. CATV Enterprises, Inc., 275 A.D.2d 269, 712 N.Y.S.2d 39 (1st Dep't 2000) (fraud present); Morris v. New York State Dept. of Taxation and Finance, 183 A.D.2d 5, 588 N.Y.S.2d 927 (3d Dep't 1992), judgment rev'd, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993); Rothermel v. Ermiger, 161 A.D.2d 1016, 557 N.Y.S.2d 587 (3d Dep't 1990)

N.Y.

Freeman v. Complex Computing Co., Inc., 119 F.3d 1044 (2d Cir. 1997); Trustees of Bldg. Service 32B-J Pension, Health and Annuity Funds v. Hudson Service Corp., 871 F. Supp. 631 (S.D. N.Y. 1994) (veil can be pierced either by alter ego or fraud)

N.C.

Fischer Inv. Capital, Inc. v. Catawba Development Corp., 200 N.C. App. 644, 689 S.E.2d 143 (2009)

Ohio

Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc., 67 Ohio St. 3d 274, 1993-Ohio-119, 617 N.E.2d 1075 (1993) (holding modified by, Dombroski v. WellPoint, Inc., 119 Ohio St. 3d 506, 2008-Ohio-4827, 895 N.E.2d 538 (2008))

Pa.

First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 600 A.2d 601 (1991) (no basis for piercing corporate veil); Superior Stores Co. v. Pennsylvania Dept. of Health, Special Supplemental Food Program for Women, Infants and Children, 151 Pa. Commw. 102, 616 A.2d 166 (1992); Longenecker v. Com., 142 Pa. Commw. 130, 596 A.2d 1261 (1991)

Tex.

SSP Partners v. Gladstrong Investments (USA) Corp., 275 S.W.3d 444 (Tex. 2008); Mancorp, Inc. v. Culpepper, 802 S.W.2d 226 (Tex. 1990); Kern v. Gleason, 840 S.W.2d 730 (Tex. App. Amarillo 1992)

Tex.

Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc., 30 F.3d 627, 30 Fed. R. Serv. 3d 184 (5th Cir. 1994)

Va.

Greenberg v. Com. ex rel. Atty. Gen. of Virginia, 255 Va. 594, 499 S.E.2d 266 (1998); Sloan v. Thornton, 249 Va. 492, 457 S.E.2d 60 (1995)

Wash.

U.S. Tobacco Sales and Marketing Co., Inc. v. State, Dept. of Revenue, 96 Wash. App. 932, 982 P.2d 652 (Div. 2 1999)

For a full discussion of fraud as justifying piercing corporate veil, see § 41.32; illegality as justifying piercing corporate veil, see § 41.34.

See Establishing Elements for Disregarding Corporate Entity and Piercing Entity's Veil, 114 Am. Jur. Proof of Facts 3d 403.

6 **U.S.**

Longhi v. Animal & Plant Health Inspection Service, 165 F.3d 1057, 1999 FED App. 0027P (6th Cir. 1999) (applying Michigan law) (corporate veil may not be pierced absent misuse to accomplish fraud or other wrongful purpose); Local 144 Hotel, Hosp., Nursing Home and Allied Services Union, SEIU, AFL-CIO v. C.N.H. Management Associates, Inc., 752 F. Supp. 1195 (S.D. N.Y. 1990)

Mich.

Green v. Ziegelman, 282 Mich. App. 292, 767 N.W.2d 660 (2009)

Mich.

Longhi v. Animal & Plant Health Inspection Service, 165 F.3d 1057, 1999 FED App. 0027P (6th Cir. 1999) (corporate veil may not be pierced absent misuse to accomplish fraud or other wrongful purpose)

Mont

The term "public convenience" refers to something fitting or suited to the public need. Drilcon, Inc. v. Roil Energy Corp., Inc., 230 Mont. 166, 749 P.2d 1058 (1988)

Va.

Greenberg v. Com. ex rel. Atty. Gen. of Virginia, 255 Va. 594, 499 S.E.2d 266 (1998)

See Establishing Elements for Disregarding Corporate Entity and Piercing Entity's Veil, 114 Am. Jur. Proof of Facts 3d 403.

7 **Ala.**

The use of the corporate form to shield shareholders from personal liability is not a fraudulent purpose that warrants piercing the corporate veil. Gilbert v. James Russell Motors, Inc., 812 So. 2d 1269 (Ala. Civ. App. 2001)

Colo.

Leonard v. McMorris, 63 P.3d 323 (Colo. 2003), citing this treatise

N.D.

Axtmann v. Chillemi, 2007 ND 179, 740 N.W.2d 838 (N.D. 2007)

Tex.

SSP Partners v. Gladstrong Investments (USA) Corp., 275 S.W.3d 444 (Tex. 2008)

Incorporating for purpose of insulation from personal liability, see § 14.

8 **Conn.**

Commissioner of Environmental Protection v. State Five Indus. Park, Inc., 304 Conn. 128, 37 A.3d 724 (2012)

La.

New Orleans Jazz and Heritage Foundation, Inc. v. Kirksey, 40 So. 3d 394 (La. Ct. App. 4th Cir. 2010), writ denied, 45 So. 3d 1100 (La. 2010)

N.Y.

Miranco Contracting, Inc. v. Perel, 57 A.D.3d 956, 871 N.Y.S.2d 310 (2d Dep't 2008)

9 **U.S.**

In re Cambridge Biotech Corp., 186 F.3d 1356, 44 Fed. R. Serv. 3d 595 (Fed. Cir. 1999); Longhi v. Animal & Plant Health Inspection Service, 165 F.3d 1057, 1999 FED App. 0027P (6th Cir. 1999) (applying Michigan law) (corporate veil may not be pierced absent misuse to accomplish fraud or other wrongful purpose); Freeman v. Complex Computing Co., Inc., 119 F.3d 1044 (2d Cir. 1997) (applying New York law); Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994) (applying Illinois law); Radaszewski by Radaszewski v. Telecom Corp., 981 F.2d 305 (8th Cir. 1992); Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764 (9th Cir. 1992); Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991) (applying Minnesota law); Gunther v. Capital One, N.A., 703 F. Supp. 2d 264 (E.D. N.Y. 2010) (applying Virginia law), citing this treatise; Pulte Home Corp., Inc. v. Ply Gem Industries, Inc., 804 F. Supp. 1471 (M.D. Fla. 1992) (applying Michigan law)

U.S.

No fraud had been perpetrated, nor was there a paramount equity sufficient to enable the court to ignore the separate corporate status of the corporation. Federal Sav. and Loan Ins. Corp. v. Quality Inns, Inc., 674 F. Supp. 522 (D. Md. 1987), judgment aff'd in part, vacated in part, 876 F.2d 353 (4th Cir. 1989)

Ala.

Simmons v. Clark Equipment Credit Corp., 554 So. 2d 398 (Ala. 1989); Deupree v. Ruffino, 505 So. 2d 1218 (Ala. 1987)

Colo.

McCallum Family L.L.C. v. Winger, 221 P.3d 69 (Colo. App. 2009), citing this treatise; Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC, 37 P.3d 485 (Colo. App. 2001)

Conn.

SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 585 A.2d 666 (1991)

Fla.

Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114 (Fla. 1984); Munder v. Circle One Condominium, Inc., 596 So. 2d 144 (Fla. 4th DCA 1992) (failing to maintain and pay for insurance not enough to pierce corporate veil)

Ga.

Hickman v. Hyzer, 261 Ga. 38, 401 S.E.2d 738 (1991); Christopher v. Sinyard, 313 Ga. App. 866, 723 S.E.2d 78 (2012)

Ga.

There is no evidence that the corporation was a sham, or that it was used to justify wrong, protect fraud, defend crime, or any other reason which in equity and good conscience would justify disregard of the corporate separate entity. Brunswick Mfg. Co., Inc. v. Sizemore, 183 Ga. App. 482, 359 S.E.2d 180 (1987)

Haw.

Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Haw. 224, 982 P.2d 853 (1999)

Ill.

Melko v. Dionisio, 219 Ill. App. 3d 1048, 162 Ill. Dec. 623, 580 N.E.2d 586 (2d Dist. 1991); Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 160 Ill. Dec. 634, 577 N.E.2d 1205 (1st Dist. 1991)

Ill.

Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994)

La.

Hamilton v. AAI Ventures, L.L.C., 768 So. 2d 298 (La. Ct. App. 1st Cir. 2000)

Me.

State v. Weinschenk, 2005 ME 28, 868 A.2d 200 (Me. 2005)

Mich.

Longhi v. Animal & Plant Health Inspection Service, 165 F.3d 1057, 1999 FED App. 0027P (6th Cir. 1999) (corporate veil may not be pierced absent misuse to accomplish fraud or other wrongful purpose); Pulte Home Corp., Inc. v. Ply Gem Industries, Inc., 804 F. Supp. 1471 (M.D. Fla. 1992) (deception by defendant and reliance by plaintiff)

Minn.

Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991) (veil pierced)

Miss.

Penn Nat. Gaming, Inc. v. Ratliff, 954 So. 2d 427 (Miss. 2007)

Neb.

Wolf v. Walt, 247 Neb. 858, 530 N.W.2d 890 (1995)

N.H.

LaMontagne Builders, Inc. v. Bowman Brook Purchase Group, 150 N.H. 270, 837 A.2d 301 (2003)

N.M.

Scott v. AZL Resources, Inc., 1988-NMSC-028, 107 N.M. 118, 753 P.2d 897 (1988)

N.Y.

WESTLAW © 2021 Thomson Reuters. No claim to original U.S. Government Works.

Ventresca Realty Corp. v. Houlihan, 28 A.D.3d 537, 813 N.Y.S.2d 196 (2d Dep't 2006); Godwin Realty Associates v. CATV Enterprises, Inc., 275 A.D.2d 269, 712 N.Y.S.2d 39 (1st Dep't 2000) (fraud present); Morris v. New York State Dept. of Taxation and Finance, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993), citing this treatise

N.Y.

Freeman v. Complex Computing Co., Inc., 119 F.3d 1044 (2d Cir. 1997)

N.D.

Axtmann v. Chillemi, 2007 ND 179, 740 N.W.2d 838 (N.D. 2007)

Ohio

Society Natl. Bank v. Security Fed. S. & L., 71 Ohio St. 3d 321, 1994-Ohio-152, 643 N.E.2d 1090, 25 U.C.C. Rep. Serv. 2d 812 (1994); Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc., 67 Ohio St. 3d 274, 1993-Ohio-119, 617 N.E.2d 1075 (1993) (holding modified by, Dombroski v. WellPoint, Inc., 119 Ohio St. 3d 506, 2008-Ohio-4827, 895 N.E.2d 538 (2008)); Snapp v. Castlebrook Builders, Inc., 7 N.E.3d 574 (Ohio App. 2014)

Pa.

Rinck v. Rinck, 363 Pa. Super. 593, 526 A.2d 1221 (1987)

S.C.

Oskin v. Johnson, 400 S.C. 390, 735 S.E.2d 459 (2012); Multimedia Pub. of South Carolina, Inc. v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993); Hunting v. Elders, 359 S.C. 217, 597 S.E.2d 803 (Ct. App. 2004)

Tenn.

H.G. Hill Realty Co., L.L.C. v. Re/Max Carriage House, Inc., 428 S.W.3d 23 (Tenn. Ct. App. 2013), appeal denied, (Nov. 14, 2013)

Tex.

Mancorp, Inc. v. Culpepper, 802 S.W.2d 226 (Tex. 1990); Kern v. Gleason, 840 S.W.2d 730 (Tex. App. Amarillo 1992)

Tex.

There was no evidence to show that the corporation was used to perpetrate a fraud, avoid the effect of the statute, evade an existing obligation, protect a crime, achieve or perpetrate a monopoly, or justify a wrong. Mitchell v. Rancho Viejo, Inc., 736 S.W.2d 757 (Tex. App. Corpus Christi 1987), writ refused n.r.e., (Oct. 21, 1987)

Vt.

Jack C. Keir, Inc. v. Robinson & Keir Partnership, 151 Vt. 358, 560 A.2d 957 (1989)

Va.

Greenberg v. Com. ex rel. Atty. Gen. of Virginia, 255 Va. 594, 499 S.E.2d 266 (1998); Sloan v. Thornton, 249 Va. 492, 457 S.E.2d 60 (1995)

Va.

Gunther v. Capital One, N.A., 703 F. Supp. 2d 264 (E.D. N.Y. 2010), citing this treatise

10 **U.S.**

Burnet v. Commonwealth Improvement Co., 287 U.S. 415, 53 S. Ct. 198, 77 L. Ed. 399 (1932); Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764 (9th Cir. 1992); Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991) (applying Minnesota law); Bodenhamer Bldg. Corp. v. Architectural Research Corp., 873 F.2d 109, 13 Fed. R. Serv. 3d 1144 (6th Cir. 1989); Cancun Adventure Tours, Inc. v. Underwater Designer Co., 862 F.2d 1044, 8 U.C.C. Rep. Serv. 2d 1035 (4th Cir. 1988); Secon Service System, Inc. v. St. Joseph Bank and Trust Co., 855 F.2d 406 (7th Cir. 1988) (applying Indiana law); Electronic Switching Industries, Inc. v. Faradyne Electronics Corp., 833 F.2d 418 (2d Cir. 1987); Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co., Inc., 826 F.2d 725, 8 Fed. R. Serv. 3d 1001 (7th Cir. 1987) (applying Illinois law); U.S. v. Van Diviner, 822 F.2d 960 (10th Cir. 1987); Joyce v. Super Fresh Food Markets, Inc., 815 F.2d 943 (3d Cir. 1987); Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S. A., 312 F.2d 299 (2d Cir. 1963); Allied Corp. v. Frola, 701 F. Supp. 1084 (D.N.J. 1988); Hoffman v. Optima Systems, Inc., 683 F. Supp. 865 (D. Mass. 1988) (applying Massachusetts law); Federal Deposit Ins. Corp. v. Martinez Almodovar, 671 F. Supp. 851 (D.P.R. 1987), citing this treatise; Porter v. Beloit Corp., 667 F. Supp. 367 (S.D. Miss. 1987) (applying Mississippi law); Banegas v. United Brands Co., 663 F. Supp. 198 (D.S.C. 1986); Quad/Graphics, Inc. v. Fass, 548 F. Supp. 966 (E.D. Wis. 1982), judgment aff'd, 724 F.2d 1230, 14 Fed. R. Evid. Serv. 737 (7th Cir. 1983) (veil pierced where corporate accounts intermingled and owner withdrew corporate assets for personal use); Thermothrift Industries, Inc. v. Mono-Therm Insulation Systems, Inc., 450 F. Supp. 398 (W.D. Ky. 1978) (applying Kentucky law); Miller & Miller Auctioneers, Inc. v. Mersch, 442 F. Supp. 570, 23 U.C.C. Rep. Serv. 626 (W.D. Okla. 1977), citing this treatise; Honolulu Lumber Co. v. American Factors, Limited, 265 F. Supp. 578 (D. Haw. 1966) (piercing corporate veil of plaintiff in antitrust action, in denying petition to proceeding on appeal in forma pauperis)

Ala.

Chenault v. Jamison, 578 So. 2d 1059 (Ala. 1991); Simmons v. Clark Equipment Credit Corp., 554 So. 2d 398 (Ala. 1989); Messick v. Moring, 514 So. 2d 892 (Ala. 1987); Fossum v. Poston, 464 So. 2d 116 (Ala. Civ. App. 1985); Forester & Jerue, Inc. v. Daniels, 409 So. 2d 830 (Ala. 1982); Tri-State Bldg. Corp. v. Moore-Handley, Inc., 333 So. 2d 840 (Ala. Civ. App. 1976)

Ala.

Piercing the corporate veil is not a power that is exercised lightly; the concept that a corporation is a legal entity existing separately from its shareholders is well settled. First Health, Inc. v. Blanton, 585 So. 2d 1331 (Ala. 1991)

Alaska

Klondike Industries Corp. v. Gibson, 741 P.2d 1161 (Alaska 1987)

Ariz.

Standage v. Standage, 147 Ariz. 473, 711 P.2d 612 (Ct. App. Div. 1 1985)

Ark.

Julian James Stores, Inc. v. Bennett, 250 Ark. 279, 465 S.W.2d 94 (1971); Arkla Chemical Corp. v. Palmer, 250 Ark. 405, 465 S.W.2d 335 (1971)

Cal.

Lyons v. Stevenson, 65 Cal. App. 3d 595, 135 Cal. Rptr. 457 (1st Dist. 1977); Sheard v. Superior Court, 40 Cal. App. 3d 207, 114 Cal. Rptr. 743 (1st Dist. 1974)

Colo.

Micciche v. Billings, 727 P.2d 367 (Colo. 1986); Contractors Heating & Supply Co. v. Scherb, 163 Colo. 584, 432 P.2d 237 (1967); Fink v. Montgomery Elevator Co. of Colo., 161 Colo. 342, 421 P.2d 735 (1966); McCallum Family L.L.C. v. Winger, 221 P.3d 69 (Colo. App. 2009), citing this treatise

Conn.

SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 585 A.2d 666 (1991); DeMartino v. Monroe Little League, Inc., 192 Conn. 271, 471 A.2d 638 (1984)

Del.

Pauley Petroleum Inc. v. Continental Oil Co., 43 Del. Ch. 516, 239 A.2d 629 (1968), citing this treatise

Fla.

Munder v. Circle One Condominium, Inc., 596 So. 2d 144 (Fla. 4th DCA 1992) (failing to maintain and pay for insurance not enough to pierce corporate veil); Gershuny v. Martin McFall Messenger Anethesia Professional Ass'n, 539 So. 2d 1131 (Fla. 1989); Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114 (Fla. 1984); State ex rel. Continental Distilling Sales Co. v. Vocelle, 158 Fla. 100, 27 So. 2d 728 (1946)

Ga.

Hickman v. Hyzer, 261 Ga. 38, 401 S.E.2d 738 (1991); Farmers Warehouse of Pelham, Inc. v. Collins, 220 Ga. 141, 137 S.E.2d 619 (1964); Midtown Properties, Inc. v. George F. Richardson, Inc., 139 Ga. App. 182, 228 S.E.2d 303 (1976); Christopher v. Sinyard, 313 Ga. App. 866, 723 S.E.2d 78 (2012)

Idaho

Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc., 95 Idaho 599, 514 P.2d 594 (1973) (dealings of husband and wife sole stockholders were of such informality that recognition of entity would be inequitable)

Idaho

Common requirements for piercing the corporate veil include include: (1) such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) treating it as a corporate entity would produce an inequitable result. Chick v. Tomlinson, 96 Idaho 483, 531 P.2d 573 (1975), citing this treatise

Ill.

Melko v. Dionisio, 219 Ill. App. 3d 1048, 162 Ill. Dec. 623, 580 N.E.2d 586 (2d Dist. 1991); Geittmann v. Geittmann, 126 Ill. App. 3d 470, 81 Ill. Dec. 597, 467 N.E.2d 297 (5th Dist. 1984) (exception where distinct entity rule poses obstacle to protection or enforcement of private or public rights); Berlinger's, Inc. v. Beef's Finest, Inc., 57 Ill. App. 3d 319, 14 Ill. Dec. 764, 372 N.E.2d 1043 (1st Dist. 1978); Loy v. Booth, 16 Ill. App. 3d 1077, 307 N.E.2d 414 (2d Dist. 1974); Chicago-Crawford Currency Exchange, Inc. v. Thillens, Inc., 48 Ill. App. 2d 366, 199 N.E.2d 295 (1st Dist. 1964)

Ill.

Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co., Inc., 826 F.2d 725, 8 Fed. R. Serv. 3d 1001 (7th Cir. 1987)

Ind.

Stacey-Rand, Inc. v. J.J. Holman, Inc., 527 N.E.2d 726 (Ind. Ct. App. 1988); Lambert v. Farmers Bank, Frankfort, Ind., 519 N.E.2d 745 (Ind. Ct. App. 1988) (corporation alter ego of debtor and corporate assets as subject to execution and satisfaction of personal liabilities); State v. McKinney, 508 N.E.2d 1319 (Ind. Ct. App. 1987); Burger Man, Inc. v. Jordan Paper Products, Inc., 170 Ind. App. 295, 352 N.E.2d 821 (1976)

Ind.

Secon Service System, Inc. v. St. Joseph Bank and Trust Co., 855 F.2d 406 (7th Cir. 1988)

Iowa

C. Mac Chambers Co., Inc. v. Iowa Tae Kwon Do Academy, Inc., 412 N.W.2d 593 (Iowa 1987); Northwestern Nat. Bank of Sioux City v. Metro Center, Inc., 303 N.W.2d 395 (Iowa 1981) (improper piercing of corporate veil); In DeCook v. Environmental Sec. Corp., Inc., 258 N.W.2d 721, 100 A.L.R.3d 1094 (Iowa 1977); Newberry v. Barth, Inc., 252 N.W.2d 711 (Iowa 1977)

Kan.

Kilpatrick Bros., Inc. v. Poynter, 205 Kan. 787, 473 P.2d 33 (1970); Kvassay v. Murray, 15 Kan. App. 2d 426, 808 P.2d 896, 14 U.C.C. Rep. Serv. 2d 1093 (1991)

Ky.

Thermothrift Industries, Inc. v. Mono-Therm Insulation Systems, Inc., 450 F. Supp. 398 (W.D. Ky. 1978)

La.

Casson v. Hartford Fire Ins. Co., 548 So. 2d 66 (La. Ct. App. 3d Cir. 1989); Byles Welding and Tractor Co., Inc. v. Butts Sales and Service, Inc., 541 So. 2d 992 (La. Ct. App. 3d Cir. 1989), writ denied, 546 So. 2d 1224 (La. 1989); Quaglino Tobacco & Candy Co., Inc. v. Barr, 519 So. 2d 200 (La. Ct. App. 4th Cir. 1987); Sparks v. Progressive American Ins. Co., 517 So. 2d 1036 (La. Ct. App. 3d Cir. 1987), writ denied, 519 So. 2d 106 (La. 1987)

La.

Because the corporate concept is beneficial, the limited liability attendant to corporate ownership should be disregarded only in exceptional circumstances. Lopez v. TDI Services, Inc., 631 So. 2d 679 (La. Ct. App. 3d Cir. 1994), writ denied, 637 So. 2d 501 (La. 1994)

Me.

Brennan v. Saco Const., Inc., 381 A.2d 656 (Me. 1978); Maine Aviation Corp. v. Johnson, 160 Me. 1, 196 A.2d 748 (1964); Bonnar-Vawter, Inc. v. Johnson, 157 Me. 380, 173 A.2d 141 (1961)

Mass.

My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 233 N.E.2d 748 (1968)

Mass.

Hoffman v. Optima Systems, Inc., 683 F. Supp. 865 (D. Mass. 1988)

Minn.

Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991)

Almac, Inc. v. JRH Development, Inc., 391 N.W.2d 919 (Minn. Ct. App. 1986); Groves v. Dakota Printing Services, Inc., 371 N.W.2d 59 (Minn. Ct. App. 1985)

Miss.

Wood v. Gulf States Capital Corp., 217 So. 2d 257 (Miss. 1968) (veil not pierced where no fraud and organized according to law)

Miss.

Porter v. Beloit Corp., 667 F. Supp. 367 (S.D. Miss. 1987)

Mo.

Haynes v. Edgerson, 240 S.W.3d 189 (Mo. Ct. App. W.D. 2007); Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 737 S.W.2d 206, 74 A.L.R.4th 141 (Mo. Ct. App. E.D. 1987); Krajcovic v. Krajcovic, 693 S.W.2d 884 (Mo. Ct. App. E.D. 1985); Fairbanks v. Chambers, 665 S.W.2d 33 (Mo. Ct. App. W.D. 1984); Smith v. City of Lee's Summit, 450 S.W.2d 485 (Mo. Ct. App. 1970); National Plumbing Supply Co. v. Torretti, 237 Mo. App. 570, 175 S.W.2d 947 (1943)

Mont

Drilcon, Inc. v. Roil Energy Corp., Inc., 230 Mont. 166, 749 P.2d 1058 (1988); E.C.A. Environmental Management Services, Inc. v. Toenyes, 208 Mont. 336, 679 P.2d 213 (1984)

Neb.

Wolf v. Walt, 247 Neb. 858, 530 N.W.2d 890 (1995); Southern Lumber & Coal Co. v. M.P. Olson Real Estate and Const. Co., Inc., 229 Neb. 249, 426 N.W.2d 504 (1988); J.L. Brock Builders, Inc. v. Dahlbeck, 223 Neb. 493, 391 N.W.2d 110 (1986); In re Estate of Price, 223 Neb. 12, 388 N.W.2d 72 (1986); ServiceMaster Industries Inc. v. J.R.L. Enterprises, Inc., 223 Neb. 39, 388 N.W.2d 83 (1986); Scribner Grain & Lumber Co. v. Wortman, 204 Neb. 92, 281 N.W.2d 394 (1979) (principal stockholder and managing officer as personally liable for debts of corporation)

N.J.

Meredith v. Meredith, 133 N.J. Eq. 196, 31 A.2d 216 (Ch. 1943); Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972)

N.M.

Scott v. AZL Resources, Inc., 1988-NMSC-028, 107 N.M. 118, 753 P.2d 897 (1988); Levy v. Disharoon, 1988-NMSC-009, 106 N.M. 699, 749 P.2d 84 (1988)

N.Y.

Morris v. New York State Dept. of Taxation and Finance, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993), citing this treatise; Rothermel v. Ermiger, 161 A.D.2d 1016, 557 N.Y.S.2d 587 (3d Dep't 1990); Port Chester Elec. Const. Co. v. Atlas, 40 N.Y.2d 652, 389 N.Y.S.2d 327, 357 N.E.2d 983 (1976); International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285, 79 N.E.2d 249 (1948); Bartle v. Finkelstein, 19 A.D.2d 256, 241 N.Y.S.2d 655 (4th Dep't 1963)

N.C.

Henderson v. Security Mortg. & Finance Co., 273 N.C. 253, 160 S.E.2d 39 (1968)

N.C.

Evidence was insufficient to support disregard of the corporate entity where nothing in the record showed a sale was commercially unreasonable, or that there was usurpation of corporate opportunity or any overreaching on the president's part. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985)

N.D.

Axtmann v. Chillemi, 2007 ND 179, 740 N.W.2d 838 (N.D. 2007); Family Center Drug Store, Inc. v. North Dakota State Bd. of Pharmacy, 181 N.W.2d 738 (N.D. 1970); Schriock v. Schriock, 128 N.W.2d 852 (N.D. 1964)

Ohio

Society Natl. Bank v. Security Fed. S. & L., 71 Ohio St. 3d 321, 1994-Ohio-152, 643 N.E.2d 1090, 25 U.C.C. Rep. Serv. 2d 812 (1994); Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc., 67 Ohio St. 3d 274, 1993-Ohio-119, 617 N.E.2d 1075 (1993) (holding modified by, Dombroski v. WellPoint, Inc., 119 Ohio St. 3d 506, 2008-Ohio-4827, 895 N.E.2d 538 (2008))

Okla.

Gulf Oil Corp. v. State, 1961 OK 71, 360 P.2d 933 (Okla. 1961); Mid-Continent Life Ins. Co. v. Goforth, 1943 OK 244, 193 Okla. 314, 143 P.2d 154 (1943)

Or.

West Bearing & Parts, Inc. v. Peet, 253 Or. 639, 456 P.2d 993 (1969)

Pa.

First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 600 A.2d 601 (1991); Ashley v. Ashley, 482 Pa. 228, 393 A.2d 637, 25 U.C.C. Rep. Serv. 843 (1978); Sams v. Redevelopment Authority of City of New Kensington, 431 Pa. 240, 244 A.2d 779 (1968)

R.I.

R & B Elec. Co., Inc. v. Amco Const. Co., Inc., 471 A.2d 1351 (R.I. 1984)

S.C.

Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984), citing this treatise

S.D.

Ethan Dairy Products v. Austin, 448 N.W.2d 226, 10 U.C.C. Rep. Serv. 2d 1253 (S.D. 1989); Mobridge Community Industries, Inc. v. Toure, Ltd., 273 N.W.2d 128 (S.D. 1978)

Tenn.

Widdicombe v. McGuire, 221 Tenn. 601, 429 S.W.2d 815 (1968); H.G. Hill Realty Co., L.L.C. v. Re/Max Carriage House, Inc., 428 S.W.3d 23 (Tenn. Ct. App. 2013), appeal denied, (Nov. 14, 2013); Neese v. Fireman's Fund Ins. Co., 53 Tenn. App. 710, 386 S.W.2d 918 (1964)

Tex.

LaChalet Intern., Inc. v. Nowik, 787 S.W.2d 101 (Tex. App. Dallas 1990); Lucas v. Texas Industries, Inc., 696 S.W.2d 372 (Tex. 1984); Pace Corp. v. Jackson, 155 Tex. 179, 284 S.W.2d 340 (1955) (corporate entity not disregarded where no fraud, avoidance of personal liability, or evasion of any applicable statute)

Utah

Transamerica Cash Reserve, Inc. v. Dixie Power and Water, Inc., 789 P.2d 24 (Utah 1990); Municipal Bldg. Authority of Iron County v. Lowder, 711 P.2d 273 (Utah 1985); Grover v. Garn, 23 Utah 2d 441, 464 P.2d 598 (1970) (corporate veil improperly pierced absent showing of fraud or injustice); Canada Dry Bottling Co. of Utah v. Board of Review, Indus. Commission of Utah, Dept. of Employment Sec., 118 Utah 619, 223 P.2d 586, 22 A.L.R.2d 664 (1950)

Vt.

Except in cases where recognition of corporate status would result in fraud or injustice, courts will generally refuse to pierce the corporate veil. Jack C. Keir, Inc. v. Robinson & Keir Partnership, 151 Vt. 358, 560 A.2d 957 (1989)

Va.

Greenberg v. Com. ex rel. Atty. Gen. of Virginia, 255 Va. 594, 499 S.E.2d 266 (1998); Sloan v. Thornton, 249 Va. 492, 457 S.E.2d 60 (1995); Cheatle v. Rudd's Swimming Pool Supply Co., Inc., 234 Va. 207, 360 S.E.2d 828 (1987)

Wash.

Kueckelhan v. Federal Old Line Ins. Co. (Mut.), 69 Wash. 2d 392, 418 P.2d 443 (1966); Washington Sav-Mor Oil Co. v. Tax Commission, 58 Wash. 2d 518, 364 P.2d 440 (1961)

W. Va.

Laya v. Erin Homes, Inc., 177 W. Va. 343, 352 S.E.2d 93 (1986)

Wis.

Posyniak v. School Sisters of St. Francis of St. Joseph's Convent, 180 Wis. 2d 619, 511 N.W.2d 300 (Ct. App. 1993); Security Bank v. Klicker, 142 Wis. 2d 289, 418 N.W.2d 27 (Ct. App. 1987)

Wyo.

Miles v. CEC Homes, Inc., 753 P.2d 1021 (Wyo. 1988) Langdon v. Lutheran Broth., 625 P.2d 209 (Wyo. 1981), citing this treatise; Peters Grazing Ass'n v. Legerski, 544 P.2d 449 (Wyo. 1975); State ex rel. Christensen v. Nugget Coal Co., 60 Wyo. 51, 144 P.2d 944 (1944)

11 **U.S.**

Fidelity & Deposit Co. of Maryland v. Commercial Cas. Consultants, Inc., 976 F.2d 272 (5th Cir. 1992); Towe Antique Ford Foundation v. I.R.S., Dept. of Treasury, U.S., 791 F. Supp. 1450 (D. Mont. 1992), judgment aff'd, 999 F.2d 1387 (9th Cir. 1993) (applying Montana law); Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076 (D. Del. 1990), aff'd, 932 F.2d 959 (3d Cir. 1991) (applying Delaware law)

Del.

Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076 (D. Del. 1990), aff'd, 932 F.2d 959 (3d Cir. 1991)

Fla.

Munder v. Circle One Condominium, Inc., 596 So. 2d 144 (Fla. 4th DCA 1992)

Ill.

Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 160 Ill. Dec. 634, 577 N.E.2d 1205 (1st Dist. 1991)

Mont

Drilcon, Inc. v. Roil Energy Corp., Inc., 230 Mont. 166, 749 P.2d 1058 (1988)

Mont

Towe Antique Ford Foundation v. I.R.S., Dept. of Treasury, U.S., 791 F. Supp. 1450 (D. Mont. 1992), judgment aff'd, 999 F.2d 1387 (9th Cir. 1993)

N.J.

AYR Composition, Inc. v. Rosenberg, 261 N.J. Super. 495, 619 A.2d 592 (App. Div. 1993)

N.Y.

Godwin Realty Associates v. CATV Enterprises, Inc., 275 A.D.2d 269, 712 N.Y.S.2d 39 (1st Dep't 2000) (veil pierced)

Wash.

U.S. Tobacco Sales and Marketing Co., Inc. v. State, Dept. of Revenue, 96 Wash. App. 932, 982 P.2d 652 (Div. 2 1999)

For a full discussion of fraud as justifying piercing corporate veil, see § 41.32.

12 **Kan.**

Mr. Cinnamon of Kansas, Inc. v. Hall, 41 Kan. App. 2d 457, 202 P.3d 734 (2009)

La.

Louisiana Lift & Equipment, Inc. v. Eizel, 770 So. 2d 859 (La. Ct. App. 2d Cir. 2000); Kemper v. Don Coleman, Jr., Builder, Inc., 746 So. 2d 11 (La. Ct. App. 2d Cir. 1999), writ denied, 752 So. 2d 861 (La. 2000) and writ denied, 752 So. 2d 861 (La. 2000)

Tenn.

H.G. Hill Realty Co., L.L.C. v. Re/Max Carriage House, Inc., 428 S.W.3d 23 (Tenn. Ct. App. 2013), appeal denied, (Nov. 14, 2013)

13 **U.S.**

Trustees of the Graphic Communications Intern. Union Upper Midwest Local 1M Health and Welfare Plan v. Bjorkedal, 516 F.3d 719 (8th Cir. 2008) (applying Minnesota law); Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd., 475 F.3d 783, 2007 FED App. 0048P (6th Cir. 2007) (applying Michigan law); Taylor Steel, Inc. v. Keeton, 417 F.3d 598, 2005 FED App. 0330P (6th Cir. 2005) (applying Ohio law); Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 60 Fed. R. Serv. 3d 1065 (9th Cir. 2005) (applying Oregon law); Holley v. Crank, 386 F.3d 1248 (9th Cir. 2004), opinion amended and superseded, 400 F.3d 667 (9th Cir. 2005), quoting this treatise; U.S. v. Scherping, 187 F.3d 796 (8th Cir. 1999) (applying Minnesota law); Gardemal v. Westin Hotel Co., 186 F.3d 588 (5th Cir. 1999); Heating & Air Specialists, Inc. v. Jones, 180 F.3d 923, 38 U.C.C. Rep. Serv. 2d 1110 (8th Cir. 1999); Carter-Jones Lumber Co. v. Dixie Distributing Co., 166 F.3d 840, 1999 FED App. 0038P (6th Cir. 1999) (applying Ohio law) (individual liability for CERCLA violation); Huard v. Shreveport Pirates, Inc., 147 F.3d 406 (5th Cir. 1998) (applying Louisiana law); Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 37 U.C.C. Rep. Serv. 2d 244 (11th Cir. 1998) (applying Florida law); Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994) (applying Illinois law); Miles v. Kohli & Kaliher Associates, Ltd., 917 F.2d 235, 14 U.C.C. Rep. Serv. 2d 135 (6th Cir. 1990) (simply filing for bankruptcy insufficient to satisfy requirement of fraud); Manville Sales Corp. v. Paramount Systems, Inc., 917 F.2d 544 (Fed. Cir. 1990), citing this treatise; Shades Ridge Holding Co., Inc. v. U.S., 880 F.2d 342 (11th Cir. 1989), opinion amended and superseded, 888 F.2d 725 (11th Cir. 1989), as amended on denial of reh'g, (Sept. 29, 1989) (corporation alter ego of taxpayer who transferred property to it to avoid tax liability); Firstmark Capital Corp. v. Hempel Financial Corp., 859 F.2d 92 (9th Cir. 1988) (applying California law); Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co., Inc., 826 F.2d 725, 8 Fed. R. Serv. 3d 1001 (7th Cir. 1987); Flynt Distributing Co., Inc. v. Harvey, 734 F.2d 1389 (9th Cir. 1984); Sicilia Di R. Biebow & Co. v. Cox, 732 F.2d 417 (5th Cir. 1984); U.S. v. Standard Beauty Supply Stores, Inc., 561 F.2d 774 (9th Cir. 1977) (applying California law); Zubik v. Zubik, 384 F.2d 267 (3d Cir. 1967); World Class Const. Management Group v. Baylor, 962 F. Supp. 2d 296 (D.D.C. 2013) (applying District of Columbia law), citing this treatise; Papatheodorou v. Clark, 781 F. Supp. 2d 582 (N.D. Ohio 2011) (applying Ohio law); Tredit Tire & Wheel Co., Inc. v. Regency Conversions, LLC, 636 F. Supp. 2d 598 (E.D. Mich. 2009) (applying Michigan law); McWilliams Ballard, Inc. v. Broadway Management Co., Inc., 636 F. Supp. 2d 1 (D.D.C. 2009) (applying Distirct of Columbia law); In re Western States Wholesale Natural Gas Litigation, 605 F. Supp. 2d 1118 (D. Nev. 2009) (applying Wisconsin law);

McConkey v. McGhan Medical Corp., 144 F. Supp. 2d 958 (E.D. Tenn. 2000) (applying Tennessee law); Baker v. Dataphase, Inc., 781 F. Supp. 724 (D. Utah 1992) (applying Utah law) (officers receiving higher compensation when corporation unable to pay other employees standing alone not conclusive proof of fraud); Walk-In Medical Centers, Inc. v. Breuer Capital Corp., 778 F. Supp. 1116 (D. Colo. 1991) (applying Colorado law); Factofrance Heller v. I.P.M. Precision Machinery Co., 627 F. Supp. 1412, 42 U.C.C. Rep. Serv. 1829 (N.D. Ill. 1986); Armada Supply, Inc. v. S/T Agios Nikolas, 613 F. Supp. 1459 (S.D. N.Y. 1985); Oriental Commercial and Shipping Co., Ltd. v. Rosseel, N.V., 609 F. Supp. 75 (S.D. N.Y. 1985); Vespe Contracting Co. v. Anvan Corp., 433 F. Supp. 1226 (E.D. Pa. 1977); Spinoza, Inc. v. U.S., 375 F. Supp. 439 (S.D. Tex. 1974)

Ala.

Heisz v. Galt Industries, Inc., 93 So. 3d 918 (Ala. 2012)

Alaska

Elliott v. Brown, 569 P.2d 1323 (Alaska 1977)

Ariz.

Butler v. American Asphalt & Contracting Co., 25 Ariz. App. 26, 540 P.2d 757 (Div. 1 1975); Gardner v. Royal Development Co., 11 Ariz. App. 447, 465 P.2d 386 (Div. 1 1970); Ferrarell v. Robinson, 11 Ariz. App. 473, 465 P.2d 610 (Div. 1 1970)

Cal.

Webber v. Inland Empire Investments, 74 Cal. App. 4th 884, 88 Cal. Rptr. 2d 594 (4th Dist. 1999) (the two requirements for applying the alter ego doctrine are that (1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice); Cooperman v. Unemployment Ins. Appeals Bd., 49 Cal. App. 3d 1, 122 Cal. Rptr. 127 (2d Dist. 1975); Roman Catholic Archbishop v. Superior Court, 15 Cal. App. 3d 405, 93 Cal. Rptr. 338 (1st Dist. 1971) (alter ego doctrine inapplicable); O'Donnell v. Weintraub, 260 Cal. App. 2d 352, 67 Cal. Rptr. 274 (2d Dist. 1968)

Cal.

Firstmark Capital Corp. v. Hempel Financial Corp., 859 F.2d 92 (9th Cir. 1988); U.S. v. Standard Beauty Supply Stores, Inc., 561 F.2d 774 (9th Cir. 1977)

Colo.

Fink v. Montgomery Elevator Co. of Colo., 161 Colo. 342, 421 P.2d 735 (1966), quoting this treatise; Martin v. Freeman, 2012 COA 21, 272 P.3d 1182 (Colo. App. 2012) (quoting this treatise); Harding v. Lucero, 721 P.2d 695 (Colo. App. 1986), quoting this treatise; Reader v. Dertina and Associates Marketing, Inc., 693 P.2d 398 (Colo. App. 1984); Rosebud Corp. v. Boggio, 39 Colo. App. 84, 561 P.2d 367 (App. 1977), quoting this treatise

Colo.

Walk-In Medical Centers, Inc. v. Breuer Capital Corp., 778 F. Supp. 1116 (D. Colo. 1991)

Conn.

Naples v. Keystone Bldg. and Development Corp., 295 Conn. 214, 990 A.2d 326 (2010); SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 585 A.2d 666 (1991) (separate corporation); Mountview Plaza Associates, Inc. v. World Wide Pet Supply, Inc., 76 Conn. App. 627, 820 A.2d 1105 (2003)

Del.

Even in absence of fraud, there are cases which permit a direct action against the patent company where it has completely ignored the separate identity of its wholly owned subsidiary. Walsh v. Hotel Corp. of America, 231 A.2d 458 (Del. 1967)

D.C.

Simon v. Circle Associates, Inc., 753 A.2d 1006 (D.C. 2000)

D.C.

World Class Const. Management Group v. Baylor, 962 F. Supp. 2d 296 (D.D.C. 2013), citing this treatise; McWilliams Ballard, Inc. v. Broadway Management Co., Inc., 636 F. Supp. 2d 1 (D.D.C. 2009)

Fla.

Munder v. Circle One Condominium, Inc., 596 So. 2d 144 (Fla. 4th DCA 1992) (failing to maintain and pay for insurance not enough to pierce corporate veil); Charter Air Center, Inc. v. Miller, 348 So. 2d 614 (Fla. 2d

DCA 1977); American Mortg. & Safe Deposit Co. v. Rubin, 168 So. 2d 777 (Fla. 3d DCA 1964); Sirmons v. Arnold Lumber Co., 167 So. 2d 588 (Fla. 2d DCA 1964)

Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 37 U.C.C. Rep. Serv. 2d 244 (11th Cir. 1998) (improper conduct requirement)

Ga.

Hickman v. Hyzer, 261 Ga. 38, 401 S.E.2d 738 (1991); Farmers Warehouse of Pelham, Inc. v. Collins, 220 Ga. 141, 137 S.E.2d 619 (1964); Graham v. Palmtop Properties, Inc., 284 Ga. App. 730, 645 S.E.2d 343 (2007); Trans-American Communications, Inc. v. Nolle, 134 Ga. App. 457, 214 S.E.2d 717 (1975), citing this treatise

Idaho

Jolley v. Idaho Securities, Inc., 90 Idaho 373, 414 P.2d 879 (1966); Metz v. Hawkins, 64 Idaho 386, 133 P.2d 721 (1943)

Ill.

Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 160 Ill. Dec. 634, 577 N.E.2d 1205 (1st Dist. 1991); Edwards v. Chicago & N. W. Ry. Co., 79 Ill. App. 2d 48, 223 N.E.2d 163 (4th Dist. 1967)

Ill.

Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994)

Ind.

Stacey-Rand, Inc. v. J.J. Holman, Inc., 527 N.E.2d 726 (Ind. Ct. App. 1988); Lambert v. Farmers Bank, Frankfort, Ind., 519 N.E.2d 745 (Ind. Ct. App. 1988)

Kan.

Kvassay v. Murray, 15 Kan. App. 2d 426, 808 P.2d 896, 14 U.C.C. Rep. Serv. 2d 1093 (1991); Kilpatrick Bros., Inc. v. Poynter, 205 Kan. 787, 473 P.2d 33 (1970)

Ky.

Tavadia v. Mitchell, 564 S.W.3d 322 (Ky. App. 2018)

La.

Hamilton v. AAI Ventures, L.L.C., 768 So. 2d 298 (La. Ct. App. 1st Cir. 2000); Middleton v. Parish of Jefferson, 707 So. 2d 454 (La. Ct. App. 5th Cir. 1998), writ denied, 716 So. 2d 896 (La. 1998); Coury v. Coury Moss, Inc., 510 So. 2d 1316 (La. Ct. App. 3d Cir. 1987); Smith v. Moore, 347 So. 2d 316 (La. Ct. App. 4th Cir. 1977); Matassa v. Temple, 346 So. 2d 803 (La. Ct. App. 1st Cir. 1977), writ denied, 349 So. 2d 332 (La. 1977); Sampay v. Davis, 342 So. 2d 1186 (La. Ct. App. 1st Cir. 1977); Texas Industries, Inc. v. Dupuy & Dupuy Developers, Inc., 227 So. 2d 265 (La. Ct. App. 2d Cir. 1969)

La.

Huard v. Shreveport Pirates, Inc., 147 F.3d 406 (5th Cir. 1998)

Md.

Hildreth v. Tidewater Equipment Co., Inc, 378 Md. 724, 838 A.2d 1204 (2003), citing this treatise

Mass.

Scott v. NG U.S. 1, Inc., 450 Mass. 760, 881 N.E.2d 1125 (2008), citing this treatise

Mich.

Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd., 475 F.3d 783, 2007 FED App. 0048P (6th Cir. 2007); Tredit Tire & Wheel Co., Inc. v. Regency Conversions, LLC, 636 F. Supp. 2d 598 (E.D. Mich. 2009)

Minn.

Trustees of the Graphic Communications Intern. Union Upper Midwest Local 1M Health and Welfare Plan v. Bjorkedal, 516 F.3d 719, 43 Employee Benefits Cas. (BNA) 2129 (8th Cir. 2008) (piercing not warranted); U.S. v. Scherping, 187 F.3d 796 (8th Cir. 1999)

Mo.

APAC-Missouri, Inc. v. Boyer, 420 S.W.3d 651 (Mo. Ct. App. S.D. 2013), reh'g and/or transfer denied, (Nov. 21, 2013); Zubres Radiology v. Providers Ins. Consultants, 276 S.W.3d 335 (Mo. Ct. App. W.D. 2009); Comninellis v. Comninellis, 99 S.W.3d 502 (Mo. Ct. App. W.D. 2003); Real Estate Investors Four, Inc. v. American Design Group Inc., 46 S.W.3d 51 (Mo. Ct. App. E.D. 2001); Smith v. City of Lee's Summit, 450 S.W.2d 485 (Mo. Ct. App. 1970)

Mont

Drilcon, Inc. v. Roil Energy Corp., Inc., 230 Mont. 166, 749 P.2d 1058 (1988) (either actual or constructive fraud as sufficient to pierce corporate veil in given case)

Nev.

Polaris Indus. Corp. v. Kaplan, 103 Nev. 598, 747 P.2d 884 (1987); Carson Meadows Inc. v. Pease, 91 Nev. 187, 533 P.2d 458 (1975); North Arlington Medical Bldg., Inc. v. Sanchez Const. Co., 86 Nev. 515, 471 P.2d 240 (1970)

Nev.

Nevada courts apply the following test for piercing the corporate veil based on a finding of alter ego: (1) the corporation must be influenced and governed by the person asserted to be its alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice. Lorenz v. Beltio, Ltd., 114 Nev. 795, 963 P.2d 488 (1998)

N.H.

Gautschi v. Auto Body Discount Center, Inc., 139 N.H. 457, 660 A.2d 1076 (1995)

N.M.

Morrissey v. Krystopowicz, 365 P.3d 20 (N.M. App. 2015). For an expanded analysis of this case see 33 No. 10 Fletcher Corp Law Adviser NL 10

N.Y.

Cortlandt St. Recovery Corp. v. Bonderman, 96 N.E.3d 191 (N.Y. 2018); Cobalt Partners, L.P. v. GSC Capital Corp., 97 A.D.3d 35, 944 N.Y.S.2d 30 (1st Dep't 2012); In re Estate of Moak, 92 A.D.3d 1040, 938 N.Y.S.2d 648 (3d Dep't 2012); Peery v. United Capital Corp., 84 A.D.3d 1201, 924 N.Y.S.2d 470 (2d Dep't 2011); Old Republic Nat. Title Ins. Co. v. Moskowitz, 297 A.D.2d 724, 747 N.Y.S.2d 556 (2d Dep't 2002); Guptill Holding Corp. v. State, 33 A.D.2d 362, 307 N.Y.S.2d 970 (3d Dep't 1970), order aff'd, 31 N.Y.2d 897, 340 N.Y.S.2d 638, 292 N.E.2d 782 (1972)

N.C.

Fischer Inv. Capital, Inc. v. Catawba Development Corp., 200 N.C. App. 644, 689 S.E.2d 143 (2009); East Market Street Square, Inc. v. Tycorp Pizza IV, Inc., 175 N.C. App. 628, 625 S.E.2d 191 (2006); Becker v. Graber Builders, Inc., 149 N.C. App. 787, 561 S.E.2d 905 (2002)

N.D.

Red River Wings, Inc. v. Hoot, Inc., 2008 ND 117, 751 N.W.2d 206 (N.D. 2008)

Ohio

Minno v. Pro-Fab, Inc., 121 Ohio St. 3d 464, 2009-Ohio-1247, 905 N.E.2d 613 (2009); Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc., 67 Ohio St. 3d 274, 1993-Ohio-119, 617 N.E.2d 1075 (1993) (holding modified by, Dombroski v. WellPoint, Inc., 119 Ohio St. 3d 506, 2008-Ohio-4827, 895 N.E.2d 538 (2008)); Springfield v. Palco Invest. Co., Inc., 2013-Ohio-2348, 992 N.E.2d 1194 (Ohio Ct. App. 2d Dist. Clark County 2013); Swayne v. Beebles Invests., Inc., 176 Ohio App. 3d 293, 2008-Ohio-1839, 891 N.E.2d 1216 (10th Dist. Franklin County 2008); Charvat v. Farmers Ins. Columbus, Inc., 178 Ohio App. 3d 118, 2008-Ohio-4353, 897 N.E.2d 167 (10th Dist. Franklin County 2008); Starner v. Guardian Industries, 143 Ohio App. 3d 461, 758 N.E.2d 270 (10th Dist. Franklin County 2001); Longo Constr., Inc. v. ASAP Tech. Serv., Inc., 140 Ohio App. 3d 665, 748 N.E.2d 1164 (8th Dist. Cuyahoga County 2000)

Ohio

Taylor Steel, Inc. v. Keeton, 417 F.3d 598, 2005 FED App. 0330P (6th Cir. 2005); Carter-Jones Lumber Co. v. Dixie Distributing Co., 166 F.3d 840, 1999 FED App. 0038P (6th Cir. 1999) (individual liability for CERCLA violation); Papatheodorou v. Clark, 781 F. Supp. 2d 582 (N.D. Ohio 2011)

Okla.

Mainord v. Sharp, 1977 OK CIV APP 29, 569 P.2d 546 (Ct. App. Div. 1 1977)

Or.

State ex rel. Neidig v. Superior Nat. Ins. Co., 343 Or. 434, 173 P.3d 123 (2007), citing this treatise

Or.

Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 60 Fed. R. Serv. 3d 1065 (9th Cir. 2005)

R.I.

McFarland v. Brier, 769 A.2d 605 (R.I. 2001)

S.C.

Oskin v. Johnson, 400 S.C. 390, 735 S.E.2d 459 (2012); Drury Development Corp. v. Foundation Ins. Co., 380 S.C. 97, 668 S.E.2d 798 (2008)

S.D.

Glanzer v. St. Joseph Indian School, 438 N.W.2d 204 (S.D. 1989)

Tenn.

Bracken v. Earl, 40 S.W.3d 499 (Tenn. Ct. App. 2000); Anderson v. Durbin, 740 S.W.2d 417 (Tenn. Ct. App. 1987)

Tenn.

McConkey v. McGhan Medical Corp., 144 F. Supp. 2d 958 (E.D. Tenn. 2000)

Tex.

Tryco Enterprises, Inc. v. Robinson, 390 S.W.3d 497 (Tex. App. Houston 1st Dist. 2012), review dismissed, (Apr. 5, 2013); Zisblatt v. Zisblatt, 693 S.W.2d 944 (Tex. App. Fort Worth 1985), dismissed, (Feb. 19, 1986); Duke v. Duke, 605 S.W.2d 408 (Tex. Civ. App. El Paso 1980), dismissed, (Jan. 21, 1981); Humphrey v. Humphrey, 593 S.W.2d 824 (Tex. Civ. App. Houston 14th Dist. 1980), dismissed, (Apr. 16, 1980); Paine v. Carter, 469 S.W.2d 822 (Tex. Civ. App. Houston 14th Dist. 1971), writ refused n.r.e., (Nov. 17, 1971); George v. Houston Boxing Club, Inc., 423 S.W.2d 128 (Tex. Civ. App. Houston 14th Dist. 1967), writ refused n.r.e., (Apr. 17, 1968); Williams v. Freeport Sulphur Co., 40 S.W.2d 817 (Tex. Civ. App. Galveston 1930)

Utah

Municipal Bldg. Authority of Iron County v. Lowder, 711 P.2d 273 (Utah 1985); Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028 (Utah 1979); Centurian Corp. v. Fiberchem, Inc., 562 P.2d 1252 (Utah 1977), citing this treatise; Grover v. Garn, 23 Utah 2d 441, 464 P.2d 598 (1970)

Vt.

Jack C. Keir, Inc. v. Robinson & Keir Partnership, 151 Vt. 358, 560 A.2d 957 (1989) (no fraud found)

Wis.

Posyniak v. School Sisters of St. Francis of St. Joseph's Convent, 180 Wis. 2d 619, 511 N.W.2d 300 (Ct. App. 1993)

Wis.

In re Western States Wholesale Natural Gas Litigation, 605 F. Supp. 2d 1118 (D. Nev. 2009)

See Establishing Elements for Disregarding Corporate Entity and Piercing Entity's Veil, 114 Am. Jur. Proof of Facts 3d 403.

For a full discussion of fraud as justifying piercing the corporate veil, see § 41.32.

14 **U.S.**

Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd., 475 F.3d 783, 2007 FED App. 0048P (6th Cir. 2007) (applying Michigan law); Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994) (applying Illinois law); Radaszewski by Radaszewski v. Telecom Corp., 981 F.2d 305 (8th Cir. 1992); Bodenhamer Bldg. Corp. v. Architectural Research Corp., 873 F.2d 109, 13 Fed. R. Serv. 3d 1144 (6th Cir. 1989); Papatheodorou v. Clark, 781 F. Supp. 2d 582 (N.D. Ohio 2011) (applying Ohio law); In re Western States Wholesale Natural Gas Litigation, 605 F. Supp. 2d 1118 (D. Nev. 2009) (applying Wisconsin law); McConkey v. McGhan Medical Corp., 144 F. Supp. 2d 958 (E.D. Tenn. 2000) (applying Tennessee law)

Ala.

Heisz v. Galt Industries, Inc., 93 So. 3d 918 (Ala. 2012); Messick v. Moring, 514 So. 2d 892 (Ala. 1987) (discussing similar tests)

Conn.

Naples v. Keystone Bldg. and Development Corp., 295 Conn. 214, 990 A.2d 326 (2010)

Ga.

NEC Technologies, Inc. v. Nelson, 267 Ga. 390, 478 S.E.2d 769, 31 U.C.C. Rep. Serv. 2d 992 (1996) (importer not alter ego of manufacturer of products it sells)

Ill.

Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994)

Md.

Hildreth v. Tidewater Equipment Co., Inc, 378 Md. 724, 838 A.2d 1204 (2003), citing this treatise

Mich.

Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd., 475 F.3d 783, 2007 FED App. 0048P (6th Cir. 2007)

Mo.

John Knox Village v. Fortis Const. Co., LLC, 449 S.W.3d 68 (Mo. App 2014); APAC-Missouri, Inc. v. Boyer, 420 S.W.3d 651 (Mo. Ct. App. S.D. 2013), reh'g and/or transfer denied, (Nov. 21, 2013); Zubres Radiology v. Providers Ins. Consultants, 276 S.W.3d 335 (Mo. Ct. App. W.D. 2009); Real Estate Investors Four, Inc. v. American Design Group Inc., 46 S.W.3d 51 (Mo. Ct. App. E.D. 2001); Dwyer v. ING Inv. Co., Inc., 889 S.W.2d 902 (Mo. Ct. App. E.D. 1994) (corporation being operated for personal benefit of sole shareholder and partnership); Grote Meat Co. v. Goldenberg, 735 S.W.2d 379 (Mo. Ct. App. E.D. 1987)

N.M.

Scott v. AZL Resources, Inc., 1988-NMSC-028, 107 N.M. 118, 753 P.2d 897 (1988); Morrissey v. Krystopowicz, 365 P.3d 20 (N.M. App. 2015). For an expanded analysis of this case see 33 No. 10 Fletcher Corp Law Adviser NL 10

N.Y.

Cortlandt St. Recovery Corp. v. Bonderman, 96 N.E.3d 191 (N.Y. 2018); AZTE, Inc. v. Auto Collection, Inc., 124 A.D.3d 81, 12 N.Y.S.3d 212 (2015); Cobalt Partners, L.P. v. GSC Capital Corp., 97 A.D.3d 35, 944 N.Y.S.2d 30 (1st Dep't 2012); In re Estate of Moak, 92 A.D.3d 1040, 938 N.Y.S.2d 648 (3d Dep't 2012); Dana v. Shopping Time Corp., 76 A.D.3d 992, 908 N.Y.S.2d 114 (2d Dep't 2010)

N.Y.

Factors which determine whether corporate veil should be withdrawn under instrumentality rule in New York are (1) domination and control over corporation by individuals which is so complete that corporation has no separate mind, will, or existence of its own; (2) use of domination and control to commit fraud or wrong or any other dishonest or unjust act; and (3) injury or unjust loss resulting to plaintiff from said control and wrong. Brunswick Corp. v. Waxman, 459 F. Supp. 1222 (E.D. N.Y. 1978), judgment aff'd, 599 F.2d 34 (2d Cir. 1979)

N.C.

State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 362 N.C. 431, 666 S.E.2d 107 (2008); Fischer Inv. Capital, Inc. v. Catawba Development Corp., 200 N.C. App. 644, 689 S.E.2d 143 (2009); East Market Street Square, Inc. v. Tycorp Pizza IV, Inc., 175 N.C. App. 628, 625 S.E.2d 191 (2006); Becker v. Graber Builders, Inc., 149 N.C. App. 787, 561 S.E.2d 905 (2002)

Ohio

Minno v. Pro-Fab, Inc., 121 Ohio St. 3d 464, 2009-Ohio-1247, 905 N.E.2d 613 (2009); Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc., 67 Ohio St. 3d 274, 1993-Ohio-119, 617 N.E.2d 1075 (1993) (holding modified by, Dombroski v. WellPoint, Inc., 119 Ohio St. 3d 506, 2008-Ohio-4827, 895 N.E.2d 538 (2008)); Snapp v. Castlebrook Builders, Inc., 7 N.E.3d 574 (Ohio App. 2014); Springfield v. Palco Invest. Co., Inc., 2013-Ohio-2348, 992 N.E.2d 1194 (Ohio Ct. App. 2d Dist. Clark County 2013); Swayne v. Beebles Invests., Inc., 176 Ohio App. 3d 293, 2008-Ohio-1839, 891 N.E.2d 1216 (10th Dist. Franklin County 2008); Starner v. Guardian Industries, 143 Ohio App. 3d 461, 758 N.E.2d 270 (10th Dist. Franklin County 2001); Longo Constr., Inc. v. ASAP Tech. Serv., Inc., 140 Ohio App. 3d 665, 748 N.E.2d 1164 (8th Dist. Cuyahoga County 2000); Link v. Leadworks Corp., 79 Ohio App. 3d 735, 607 N.E.2d 1140 (8th Dist. Cuyahoga County 1992)

Ohio

Papatheodorou v. Clark, 781 F. Supp. 2d 582 (N.D. Ohio 2011)

S.C.

Colleton County Taxpayers Ass'n v. School Dist. of Colleton County, 371 S.C. 224, 638 S.E.2d 685, 215 Ed. Law Rep. 489 (2006)

Tenn.

McConkey v. McGhan Medical Corp., 144 F. Supp. 2d 958 (E.D. Tenn. 2000)

Wis.

In re Western States Wholesale Natural Gas Litigation, 605 F. Supp. 2d 1118 (D. Nev. 2009)

See Establishing Elements for Disregarding Corporate Entity and Piercing Entity's Veil, 114 Am. Jur. Proof of Facts 3d 403.

15 **U.S.**

Wachovia Securities, LLC v. Banco Panamericano, Inc., 674 F.3d 743 (7th Cir. 2012) (applying Illinois law); Zimmerman v. Puccio, 613 F.3d 60 (1st Cir. 2010) (applying Massachusetts law), citing this treatise; Trustees of the Graphic Communications Intern. Union Upper Midwest Local 1M Health and Welfare Plan v. Bjorkedal, 516 F.3d 719 (8th Cir. 2008) (applying Minnesota law); Commodity Futures Trading Com'n v. Topworth Intern., Ltd., 205 F.3d 1107 (9th Cir. 1999), as amended, (Mar. 23, 2000) (extreme undercapitalization); U.S. v. Scherping, 187 F.3d 796 (8th Cir. 1999) (applying Minnesota law); Gardemal v. Westin Hotel Co., 186 F.3d 588 (5th Cir. 1999); Heating & Air Specialists, Inc. v. Jones, 180 F.3d 923, 38 U.C.C. Rep. Serv. 2d 1110 (8th Cir. 1999); Ost-West-Handel Bruno Bischoff GmbH v. Project Asia Line, Inc., 160 F.3d 170 (4th Cir. 1998) (in admiralty context); Huard v. Shreveport Pirates, Inc., 147 F.3d 406 (5th Cir. 1998) (applying Louisiana law); Radaszewski by Radaszewski v. Telecom Corp., 981 F.2d 305 (8th Cir. 1992); U.S. v. Fidelity Capital Corp., 920 F.2d 827 (11th Cir. 1991) (applying Georgia law); McWilliams Ballard, Inc. v. Broadway Management Co., Inc., 636 F. Supp. 2d 1 (D.D.C. 2009) (applying District of Columbia law); Cuiksa v. Hallmark Hall of Fame Productions, Inc., 252 F. Supp. 2d 1166 (D. Kan. 2003) (applying Kansas law); McConkey v. McGhan Medical Corp., 144 F. Supp. 2d 958 (E.D. Tenn. 2000) (applying Tennessee law); U.S. v. ACB Sales & Service, Inc., 590 F. Supp. 561 (D. Ariz. 1984)

Alaska

L.D.G., Inc. v. Brown, 211 P.3d 1110 (Alaska 2009); Nerox Power Systems, Inc. v. M-B Contracting Co., Inc., 54 P.3d 791 (Alaska 2002); Uchitel Co. v. Telephone Co., 646 P.2d 229, 33 U.C.C. Rep. Serv. 1678 (Alaska 1982)

Colo.

Where the sole shareholder incorporated the business, used company money for personal purchases and failed to hold directors' meetings there was a sound basis for the conclusion that the sole shareholder used the corporate entity principally as an instrumentality for the transaction of his own affairs. Reader v. Dertina and Associates Marketing, Inc., 693 P.2d 398 (Colo. App. 1984)

Conn.

Naples v. Keystone Bldg. and Development Corp., 295 Conn. 214, 990 A.2d 326 (2010)

D.C.

Estate of Raleigh v. Mitchell, 947 A.2d 464 (D.C. 2008), citing this treatise

D.C.

McWilliams Ballard, Inc. v. Broadway Management Co., Inc., 636 F. Supp. 2d 1 (D.D.C. 2009)

Ga.

U.S. v. Fidelity Capital Corp., 920 F.2d 827 (11th Cir. 1991)

Ill.

Fiumetto v. Garrett Enterprises, Inc., 321 Ill. App. 3d 946, 255 Ill. Dec. 510, 749 N.E.2d 992 (2d Dist. 2001)

Ill.

Wachovia Securities, LLC v. Banco Panamericano, Inc., 674 F.3d 743 (7th Cir. 2012)

Ind.

Cantrell v. Putnam County Sheriff's Dep't, 894 N.E.2d 1081 (Ind. Ct. App. 2008); Community Care Centers, Inc. v. Hamilton, 774 N.E.2d 559 (Ind. Ct. App. 2002); Price v. Aronson, 629 N.E.2d 268 (Ind. Ct. App. 1994), decision approved, 644 N.E.2d 864 (Ind. 1994)

Iowa

Cemen Tech, Inc. v. Three D Industries, L.L.C., 753 N.W.2d 1 (Iowa 2008)

Kan.

Cuiksa v. Hallmark Hall of Fame Productions, Inc., 252 F. Supp. 2d 1166 (D. Kan. 2003); Kvassay v. Murray, 15 Kan. App. 2d 426, 808 P.2d 896, 14 U.C.C. Rep. Serv. 2d 1093 (1991)

La.

Crutcher-Tufts Resources, Inc. v. Tufts, 992 So. 2d 1091 (La. Ct. App. 4th Cir. 2008), writ denied, 998 So. 2d 105 (La. 2009); Town of Haynesville, Inc. v. Entergy Corp., 956 So. 2d 192 (La. Ct. App. 2d Cir. 2007), writ denied, 964 So. 2d 334 (La. 2007); Amoco Production Co. v. Texaco, Inc., 838 So. 2d 821 (La. Ct. App. 3d Cir. 2003), writ denied, 845 So. 2d 1096 (La. 2003) and writ denied, 845 So. 2d 1096 (La. 2003); Hamilton v. AAI Ventures, L.L.C., 768 So. 2d 298 (La. Ct. App. 1st Cir. 2000)

La.

Huard v. Shreveport Pirates, Inc., 147 F.3d 406 (5th Cir. 1998)

Md.

Turner v. Turner, 147 Md. App. 350, 809 A.2d 18 (2002)

Minn.

Hoyt Properties, Inc. v. Production Resource Group, L.L.C., 736 N.W.2d 313 (Minn. 2007)

Mass.

Zimmerman v. Puccio, 613 F.3d 60 (1st Cir. 2010), citing this treatise

Minn.

Trustees of the Graphic Communications Intern. Union Upper Midwest Local 1M Health and Welfare Plan v. Bjorkedal, 516 F.3d 719, 43 Employee Benefits Cas. (BNA) 2129 (8th Cir. 2008) (piercing not warranted); U.S. v. Scherping, 187 F.3d 796 (8th Cir. 1999)

Mo.

Grote Meat Co. v. Goldenberg, 735 S.W.2d 379 (Mo. Ct. App. E.D. 1987) (corporation totally undercapitalized)

Nev.

Polaris Indus. Corp. v. Kaplan, 103 Nev. 598, 747 P.2d 884 (1987)

Nev.

Factors concerning the alter ego theory include, but are not limited to, commingling of funds, undercapitalization, unauthorized diversion of funds, treatment of corporate assets as the individual's own, and failure to observe corporate formalities; no single factor is dispositive. Lorenz v. Beltio, Ltd., 114 Nev. 795, 963 P.2d 488 (1998) (finding alter ego and piercing the corporate veil)

N.Y.

Peery v. United Capital Corp., 84 A.D.3d 1201, 924 N.Y.S.2d 470 (2d Dep't 2011)

N.D.

Taszarek v. Lakeview Excavating, Inc., 883 N.W.2d 880 (N.D. 2016), citing this treatise. For an expanded analysis of this case see 34 No. 10 Fletcher Corp Law Adviser NL 4

Pa.

Superior Stores Co. v. Pennsylvania Dept. of Health, Special Supplemental Food Program for Women, Infants and Children, 151 Pa. Commw. 102, 616 A.2d 166 (1992) (corporation independent entity even if controlled and owned by one person)

S.C.

Mid-South Mgt. Co. Inc. v. Sherwood Development Corp., 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007)

Tenn.

McConkey v. McGhan Medical Corp., 144 F. Supp. 2d 958 (E.D. Tenn. 2000)

Tex.

Tryco Enterprises, Inc. v. Robinson, 390 S.W.3d 497 (Tex. App. Houston 1st Dist. 2012), review dismissed, (Apr. 5, 2013); Howell v. Hilton Hotels Corp., 84 S.W.3d 708 (Tex. App. Houston 1st Dist. 2002) (observance of formalities no longer factor for consideration in Texas alter ego cases); Fontenot Petro-Chem & Marine Services, Inc. v. LaBono, 993 S.W.2d 455 (Tex. App. Corpus Christi 1999); Aztec Management and Inv. Co., Inc. v. McKenzie, 709 S.W.2d 237 (Tex. App. Corpus Christi 1986)

See Establishing Elements for Disregarding Corporate Entity and Piercing Entity's Veil, 114 Am. Jur. Proof of Facts 3d 403.

16 **U.S.**

Damon v. Groteboer, 937 F. Supp. 2d 1048 (D. Minn. 2013) (applying Minnesota law)

Minn.

Damon v. Groteboer, 937 F. Supp. 2d 1048 (D. Minn. 2013)

N.D.

Taszarek v. Lakeview Excavating, Inc., 883 N.W.2d 880 (N.D. 2016), citing this treatise. For an expanded analysis of this case see 34 No. 10 Fletcher Corp Law Adviser NL 4

16.30 **Ill.**

Steiner Elec. Co. v. Maniscalco, 51 N.E.3d 45 (Il. App. 2016). For an expanded analysis of this case see 34 No. 5 Fletcher Corp Law Adviser NL 4; Gajda v. Steel Solutions Firm, Inc., 395 Ill. Dec. 796, 39 N.E.3d 263 (Ill. App. 2015)

N.D.

Taszarek v. Lakeview Excavating, Inc., 883 N.W.2d 880 (N.D. 2016), citing this treatise. For an expanded analysis of this case see 34 No. 10 Fletcher Corp Law Adviser NL 4

17 **Ala.**

Messick v. Moring, 514 So. 2d 892 (Ala. 1987)

Or.

State ex rel. Neidig v. Superior Nat. Ins. Co., 343 Or. 434, 173 P.3d 123 (2007), citing this treatise

18 **U.S.**

Dole Food Co. v. Patrickson, 538 U.S. 468, 123 S. Ct. 1655, 155 L. Ed. 2d 643, 188 A.L.R. Fed. 661 (2003), citing this treatise; Wachovia Securities, LLC v. Banco Panamericano, Inc., 674 F.3d 743 (7th Cir. 2012) (applying Illinois law); Heating & Air Specialists, Inc. v. Jones, 180 F.3d 923, 38 U.C.C. Rep. Serv. 2d 1110 (8th Cir. 1999); Ost-West-Handel Bruno Bischoff GmbH v. Project Asia Line, Inc., 160 F.3d 170 (4th Cir. 1998) (in admiralty context)

Idaho

Lunneborg v. My Fun Life, 163 Idaho 856, 421 P.3d 187 (2018), quoting this treatise. For an expanded analysis of this case see 36 No. 8 Fletcher Corp Law Adviser NL 3

Ill.

Hills of Palos Condominium Ass'n, Inc. v. I-Del, Inc., 255 Ill. App. 3d 448, 193 Ill. Dec. 760, 626 N.E.2d 1311 (1st Dist. 1993); In re Rehabilitation of Centaur Ins. Co., 238 Ill. App. 3d 292, 179 Ill. Dec. 459, 606 N.E.2d 291 (1st Dist. 1992), judgment aff'd, 158 Ill. 2d 166, 198 Ill. Dec. 404, 632 N.E.2d 1015 (1994) (parent and wholly owned subsidiary as distinct entities absent fraud)

Ill.

Wachovia Securities, LLC v. Banco Panamericano, Inc., 674 F.3d 743 (7th Cir. 2012)

Ind.

Stacey-Rand, Inc. v. J.J. Holman, Inc., 527 N.E.2d 726 (Ind. Ct. App. 1988)

N.C.

Fischer Inv. Capital, Inc. v. Catawba Development Corp., 200 N.C. App. 644, 689 S.E.2d 143 (2009)

Ohio

Longo Constr., Inc. v. ASAP Tech. Serv., Inc., 140 Ohio App. 3d 665, 748 N.E.2d 1164 (8th Dist. Cuyahoga County 2000)

Or.

State ex rel. Neidig v. Superior Nat. Ins. Co., 343 Or. 434, 173 P.3d 123 (2007), citing this treatise

R.I.

McFarland v. Brier, 769 A.2d 605 (R.I. 2001)

S.C.

Drury Development Corp. v. Foundation Ins. Co., 380 S.C. 97, 668 S.E.2d 798 (2008)

Tex.

Mancorp, Inc. v. Culpepper, 802 S.W.2d 226 (Tex. 1990) (court looking at all dealings of corporation and sole shareholder to determine alter ego status); Stauffacher v. Lone Star Mud, Inc., 54 S.W.3d 810 (Tex. App. Texarkana 2001); Fontenot Petro-Chem & Marine Services, Inc. v. LaBono, 993 S.W.2d 455 (Tex. App. Corpus Christi 1999)

Utah

Jones & Trevor Marketing, Inc. v. Lowry, 2012 UT 39, 284 P.3d 630 (Utah 2012), citing this treatise

Determinative factors generally, see § 41.3; detailed analysis of specific factors, see §§ 41.31 et seq.

19 Piercing the corporate veils of parent, subsidiary and affiliated corporations, see § 43.

20 Piercing the corporate veil of partnerships, see § 41.80.

21 **U.S.**

N.L.R.B. v. G & T Terminal Packaging Co., Inc., 246 F.3d 103 (2d Cir. 2001); Heating & Air Specialists, Inc. v. Jones, 180 F.3d 923, 38 U.C.C. Rep. Serv. 2d 1110 (8th Cir. 1999); Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991) (applying Minnesota law); Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076 (D. Del. 1990), aff'd, 932 F.2d 959 (3d Cir. 1991) (applying Delaware law)

Del.

Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076 (D. Del. 1990), aff'd, 932 F.2d 959 (3d Cir. 1991)

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Ind.

AGS Capital Corp., Inc. v. Product Action Intern., LLC, 884 N.E.2d 294 (Ind. Ct. App. 2008) (where prima facie showing of misuse of corporate form for fraud or to promote injustice was made, sister corporation was subject to a preliminary injunction)

Minn.

Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991) (veil pierced)

Mo.

State v. Garrette, 699 S.W.2d 468 (Mo. Ct. App. S.D. 1985)

N.M.

Scott v. AZL Resources, Inc., 1988-NMSC-028, 107 N.M. 118, 753 P.2d 897 (1988)

Purpose of piercing corporate veil, see § 41.20; equitable basis of remedy, see § 41.25.

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ANNEX 394

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of the Arbitration between

TSA SPECTRUM DE ARGENTINA S.A.
Claimant

v.

ARGENTINE REPUBLIC
Respondent

ICSID Case No. ARB/05/5

AWARD

Members of the Tribunal:

Judge Hans Danelius, President
Professor Georges Abi-Saab, Arbitrator
Mr. Grant D. Aldonas, Arbitrator

Secretary of the Tribunal: Ms. Natalí Sequeira

Representing the Claimant:	***Representing the Respondent:***
Mr. R. Doak Bishop, Mr. Craig S. Miles Mr. Roberto Aguirre Luzi Ms. Silvia Marchili Mr. Ben Love *King & Spalding L.L.P.* 1100 Louisiana St., Suite 4000, Houston, Texas 77002, USA	Mr. Osvaldo César Guglielmino *Procurador del Tesoro de la Nación Argentina* Procuración del Tesoro de la Nación Posadas 1641 (1121), Buenos Aires Argentina

Date of Dispatch to the Parties: December 19, 2008

TABLE OF CONTENTS

Indonesia[37], *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*[38], *Tokios Tokelés v. Ukraine*[39]). In a recent case – *Rompetrol Group N.V. v. Romania*[40] – the fact that there was a Romanian majority shareholding in a Dutch company was not considered an obstacle to bringing proceedings against Romania under the rules of the ICSID Convention and the Dutch-Romanian bilateral investment treaty.

132. Alternatively, even if the Tribunal (i) decides to analyse the nationality of all of the companies that directly or indirectly own TSA's shares, and (ii) interprets the terms "foreign control" on the date before the dispute arose as meaning "effective foreign control" or as requiring the last controlling company in the ownership chain to be foreign, TSA would still fulfil the "foreign control" requirement.

B. THE ARBITRAL TRIBUNAL'S FINDINGS

133. The Arbitral Tribunal will start its examination on this point by analyzing Article 25(2)(b) of the ICSID Convention and then proceed to a consideration of its application in the circumstances of the present case and taking into account the contents of the BIT between Argentina and the Netherlands.

I. Article 25(2)(b) of the ICSID Convention

134. Article 25 of the ICSID Convention defines the ambit of ICSID's jurisdiction. In other words, it defines the extent, hence also the objective limits, of this jurisdiction (including the jurisdiction of tribunals established therein) which cannot be extended or derogated from even by agreement of the Parties.

135. In respect of Article 25(2)(b) of the ICSID Convention, which is the provision of particular interest in the present case, Aron Broches has stated as follows:

> "The purpose of that provision, as well as of Article 25(1), is to indicate

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[37] ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para. 14.
[38] ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 335, 337, 342, 343 and 357.
[39] See supra note 34, at paras 22, 36 and 46.
[40] ICSID Case No. ARB/06/3, Decision on Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, paras. 81-85, 93 and 110.

the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto." [41]

136. The objective character of these limits has been noted by several ICSID Tribunals (*Vacuum Salt Products Ltd v. Republic of Ghana*[42], and *Rompetrol Group N.V. v. Romania*: "reflects objective 'outer limits' beyond which party consent would be ineffective"[43]).

137. ICSID and the Convention establishing it have for sole purpose and function, as their very title indicates, "the settlement of investment disputes between States and nationals of other States".

138. Article 25(2)(b) defines the juridical persons that can have access to ICSID as "nationals of another Contracting State", classifying them in two categories :

(i) "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration", and

(ii) "any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention".

139. The second clause of Article 25(2)(b) introduces a significant exception to one of the major premises of the Convention (which also reflects a general principle of international law), *i.e.* that it deals exclusively with disputes between parties of diverse nationalities, to the exclusion of those between a State and its own national investors. The *ratio legis* of this exception is the wording "because of foreign control". Foreign control is thus the objective factor on which turns the applicability of this provision. It justifies the extension

[41] Broches, Academy of International Law, *Recueil des cours*, vol. 136 [1973 II].
[42] See supra note 31, at paras. 36-38.
[43] See supra note 40, at para. 80.

of the ambit of ICSID, but sets the objective limits of the exception at the same time. As was stated in *Vacuum Salt Products Ltd v. Republic of Ghana*, "[t]he reference in Article 25(2)(b) to 'foreign control' necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist".

140. A significant difference between the two clauses of Article 25(2)(b) is that the first uses a formal legal criterion, that of nationality, whilst the second uses a material or objective criterion, that of "foreign control" in order to pierce the corporate veil and reach for the reality behind the cover of nationality.

141. Once the Parties have agreed to the use of the latter criterion for juridical persons having the nationality of the host State, they are bound by this criterion as a condition for ICSID jurisdiction and cannot extend that jurisdiction by other agreements.

142. In this respect, Professor Schreuer, after surveying the case-law, states:

> "These cases, especially Vacuum Salt, make it abundantly clear that foreign control at the time of consent is an objective requirement which must be examined by the tribunal in order to establish jurisdiction". [44]

143. The question as to whether, or to what extent, the corporate veil should be pierced or lifted in the application of Article 25(2)(b) of the ICSID Convention presents itself in a different light and can lead to different solutions, depending on whether the case falls under the first or the second clause of this provision.

144. The first clause of Article 25(2)(b) mentions only the "nationality" of a Contracting State other than the State party to the dispute. In other words, it uses as a criterion the formal legal concept of nationality, which for legal persons is determined by one of the two generally accepted criteria of the place of incorporation or the seat (*siège social*) of the corporation. There is no reference here to "control", whether foreign or other, nor any mention of "piercing" or looking beyond this nationality.

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[44] Schreuer, *The ICSID Convention: A Commentary*, p. 312, para. 548.

145. This text may be interpreted in a strict constructionist manner to mean that a tribunal has to go always by the formal nationality. On the other hand, such a strict literal interpretation may appear to go against common sense in some circumstances, especially when the formal nationality covers a corporate entity controlled directly or indirectly by persons of the same nationality as the host State.

146. In the two cases of *Tokios Tokelés v. Ukraine* and *Rompetrol Group N.V. v. Romania*, the Tribunals adopted the strict constructionist interpretation in spite of the control of the foreign companies by nationals of the host States. However, this interpretation has not been generally accepted and was also criticised by the dissenting President of the *Tokios Tokelés* Tribunal.

147. The situation is different, however, when it comes to the second clause of Article 25(2)(b) of the Convention. Here, the text itself allows the parties to agree to lift the corporate veil, but only "because of foreign control", which justifies, but at the same time conditions, this exception. Although the text refers to juridical persons holding the nationality of the host State that the parties have agreed should be treated as nationals of another contracting State "because of foreign control", the existence and materiality of this foreign control have to be objectively proven in order for them to establish ICSID jurisdiction by their agreement. It would not be consistent with the text, if the tribunal, when establishing whether there is foreign control, would be directed to pierce the veil of the corporate entity national of the host State and to stop short at the second corporate layer it meets, rather than pursuing its objective identification of foreign control up to its real source, using the same criterion with which it started.

148. However, in cases falling within the second clause of Article 25(2)(b), ICSID tribunals have not been constant in dealing with this issue of whether or not to pierce the second corporate layer after the one bearing the nationality of the host State, in identifying foreign control. In *AMCO and others v. Republic of Indonesia, Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* and *Aguas del Tunari v. Republic of Bolivia*, the Tribunals refused to lift the veil beyond the first layer or rung of the

corporate ladder (bearing the nationality of the host State). On the other hand, the Tribunals in *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*[45] and, most recently, *African Holding Company of America and Société Africaine de Construction au Congo S.A.R.L. v. Republic of Congo*[46] did not hesitate to pierce the successive corporate layers in identifying foreign control and the nationality of those holding it.

149. It is to be noted that in all these cases what was at issue was not the objective existence of foreign control, which was not contested by the host State, but the nationality of this foreign control.

150. In only one other case, *Vacuum Salt Products Ltd v. Republic of Ghana*, was the question of the existence and reality of "foreign control" raised, *i.e.* the question whether the company, formally national of the host State, was indeed under "foreign control" or whether it remained, directly or indirectly, in the hands of nationals of the host State and thus fell outside the objective bounds of ICSID's jurisdiction under Article 25(2)(b).

151. Indeed, in that case, the Claimant deduced from a jurisdictional clause referring to ICSID in the contract that the parties – *Vacuum Salt Products Ltd.*, which was incorporated under Ghanaian law, and the Government of Ghana – had agreed to treat the Company "as a foreign national", *i.e.* that they had recognised the existence of "foreign control" under the second clause of Article 25(2)(b). The Tribunal considered that such an agreement only "raises a rebuttable presumption that the 'foreign control' criterion of the second clause of Article 25(2)(b) has been satisfied on the date of consent"[47]. Thereupon, the Tribunal proceeded to a thorough examination of the facts of the case, to reach the conclusion that the presumption was rebutted, *i.e.* that the criterion of foreign control was not satisfied, and dismissed the case for lack of jurisdiction.

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[45] ICSID Case No. ARB/82/1, Decision on Jurisdiction, 19 July 1984.
[46] ICSID Case No. ARB/05/21, Award, 29 July 2008.
[47] See supra note 31, at para. 38.

152. Writers and commentators are also divided on the issue of piercing the corporate veil under Article 25(2)(b) in general. But a majority appear to favour piercing the veil and going for the real control and nationality of controllers[48].

153. The reasons for piercing of the corporate veil up to the real source of control is *a fortiori* more compelling under the second clause of Article 25(2)(b) when ultimate control is alleged to be in the hands of nationals of the host State, whose formal nationality is also that of the Claimant corporation. Thus, Professor Schreuer concludes his analysis with the following rhetorical question: "Is it sufficient for nationals of non-Contracting States or even of the host State to set up a company of convenience in a Contracting State to create the semblance of appropriate foreign control?" And his answer is that "the better approach would appear to be a realistic look at the true controller thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State"[49].

154. This is also why in the one case under the second clause of Article 25(2)(b) where national control was alleged (*Vacuum Salt Products Ltd. v. Republic of Ghana*), the Tribunal found the presumption of jurisdiction rebutted and declined jurisdiction. And in no other such case up to date has an ICSID Tribunal, after setting aside the nationality of the host State, stopped short at the second corporate layer or rung, refusing to pursue control to its real source.

II. The Circumstances of the Case

155. TSA bases "foreign control" mainly on the interpretation of Article 1(b)(iii) of the BIT between the Netherlands and Argentina, and its Protocol which provides under B:

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[48] *E.g.* G.R. Delaune, "How to Draft an ICSID Arbitration Clause" (*ICSID Rev -FILJ* vol. 7 (1992)), p. 168 at 178; A. Broches, "Denying ICSID's Jurisdiction : The ICSID Award in Vacuum Salt Products Ltd", *Journal of International Arbitration*, vol. 13 (1996), p. 21 (Broches also presided the SOABI Tribunal); M. Hirsch, *The Arbitration Mechanism of the ICSID* (1993), p. 104; Ch. Schreuer, "Access to ICSID Disputes Settlement for Locally Incorporated Companies", *in* Friedleweiss, Deuters & de Waart (eds.) *International Economic Law with a Human Face* (1998), p. 497; Ch. Schreuer, *The ICSID Convention : A Commentary,* (*Commentary*, *op.cit.*, pp. 317-318, paras. 562-563); M. Burgstaller, "Nationality of Corporate Investors and International Claims against the Investor's own State", *Journal of World Investment and Trade*, vol. 7, no 2 (Dec. 2006), p. 857.

[49] Schreuer, *Commentary*, *op.cit.*, p. 318 [para. 563].

> "B. With reference to Article 1, paragraph b) (iii) the Contracting Party in the territory of which the investments are undertaken may require proof of the control invoked by the investors of the other Contracting Party. The following facts, inter alia, shall be accepted as evidence of the control:
>
> i. being an affiliate of a legal person of the other Contracting Party;
>
> ii. having a direct or indirect participation in the capital of a company higher than 49% or the direct or indirect possession of the necessary votes to obtain a predominant position in assemblies or company organs."

156. However, the provisions of the BIT cannot provide ICSID jurisdiction unless the conditions of Article 25(2)(b) of the ICSID Convention are satisfied. In this sense, the *Vacuum Salt Products Ltd v. Republic of Ghana* Tribunal stated:

> "(...) the parties' agreement to treat Claimant as a foreign national 'because of foreign control' does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to 'foreign control' necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so."[50]

157. What is decisive is therefore whether the circumstances are such that TSA, although it is an Argentinian juridical person, can base jurisdiction on the second clause of Article 25(2)(b) of the ICSID Convention.

158. TSA argues in this respect that the shares of TSA are wholly held by TSI, which is incorporated under the law of the Netherlands and is domiciled there. It thus satisfies the criterion of the Protocol and also Article 25(2)(b) of the Convention since the parties have agreed in the BIT that TSA, because of TSI's incorporation in the Netherlands and its 100% participation in TSA's capital, should be treated as a national of the Netherlands.

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[50] See supra note 31, at para. 36.

159. The Argentine Republic argues that TSA does not fulfil the conditions in Article 25(2)(b) of the ICSID Convention for being treated as a national of the Netherlands, since it appears from the information provided by TSA that at all possible critical dates (the request of arbitration, the consent to jurisdiction, the origin of the dispute), TSI was controlled by an Argentinian national, Mr. Jorge Justo Neuss, who held, directly or indirectly, a majority of its shares, starting with 51%, increasing over time to near totality. Therefore, TSA was not under foreign control and cannot be "treated as a national of another Contracting State". The case must therefore be dismissed for lack of jurisdiction.

160. The Tribunal has found above that in the application of the second part of Article 25(2)(b) it is necessary to pierce the corporate veil and establish whether or not the domestic company was objectively under foreign control. It also appears from the text of Article 25(2)(b) that the relevant date is the date on which the parties consented to submit the dispute to arbitration. In a letter of 10 December 2004 to the President of the Argentine Republic, TSA consented to ICSID arbitration on the basis of the BIT which means that on that date both parties had consented to arbitration.

161. TSA has submitted a chart showing that at the time of the notice of the dispute, on 16 December 2004, thus close to the date of consent, TSA, via other companies, was wholly owned by TH Operations International NV (THOP) and that the owner of THOP's shares was Mr. Jorge Justo Neuss, a German-Argentinian citizen. TSA contends, however, that Mr. Jean-Nicolas d'Ancezune, a French citizen, has rights to 75% of THOP's shares through a "fiduciary encumbrance" agreed to by Mr. Neuss, who continues all the same to hold the shares on his behalf. In spite of questions put to TSA (and to Mr. d'Ancezune during his witness statement) about the arrangements made with Mr. d'Ancezune and the nature of the "fiduciary encumbrance", only scant information – and no corroborating evidence – was provided. TSA's contention in this regard thus remains vague and unproven, and there is no evidence that TSA was, at the time of consent, under the real control of Mr. d'Ancezune who, moreover, is not a Dutch but a French citizen.

162. The only conclusion that can be drawn from the information and evidence available to the Tribunal is thus that the ultimate owner of TSA on and around the date of consent was the Argentinian citizen Mr. Jorge Justo Neuss. It therefore follows that, whatever

interpretation is given to the BIT between Argentina and the Netherlands, including the Protocol to the BIT, TSA cannot be treated, for the purposes of Article 25(2)(b) of the ICSID Convention, as a national of the Netherlands because of absence of "foreign control" and that the Arbitral Tribunal therefore lacks jurisdiction to examine TSA's claims.

VIII. FOURTH ISSUE OF JURISDICTION

A. THE PARTIES' ARGUMENTS

1. The Argentine Republic

163. The Arbitral Tribunal's competence is outlined by Article 25(1) of the ICSID Convention in which the term "investment" is not defined. The BIT is the instrument in which the parties gave their consent and determined what kind of investment could be submitted to the ICSID jurisdiction. Article 1(a) of the BIT requires that an asset, in order to be protected, must have been invested in accordance with the laws and regulations of the relevant Contracting Party. An investment made in violation of such laws and regulations shall not be considered an investment for the purposes of the BIT.

164. An investment made by illegal means such as corruption cannot be considered to have been made in accordance with the laws and regulations of the host state. TSA is being investigated in Argentina for corruption in regard to the awarding of the Concession Contract in June 1997. A criminal accusation was filed on 16 July 2001 by the Anticorruption Office. There was a partial acquittal but it was annulled by the Court of Appeals on 15 November 2005. On 26 February 2008, several public officials as well as Mr. Jorge Justo Neuss and Mr. Jean Nicolas d'Ancezune were charged with criminal offences in connection with the awarding of the Concession to TSA.

165. There have been extensive press reports on corruption in connection with the Concession, and a certain Mr. Lionel Queudot has made accusations against TSA. It is possible to note the existence of bribery and/or corruption involving company officials and Argentine public officers. Argentina considers the existence of events proven which confirm the

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Chapter 10: Parties to International Arbitration Agreements

[Chapter 10] (1)

P 1405 An issue which arises recurrently in connection with the enforcement of international arbitration agreements is the identity of the parties to such agreements: what entities are bound by, and what entities may invoke, an international arbitration agreement? This P 1406 Chapter addresses these issues.

The Chapter first discusses the basic principle that international arbitration agreements are, as consensual instruments, binding only on the parties to such agreements. Second, the Chapter examines the various legal doctrines that have been used to give effect to arbitration agreements as to entities that did not execute such agreements ("non-signatories"), including theories of agency, alter ego status (or veil piercing), "group of companies," estoppel, guarantor relations, third party beneficiary rights, succession, assignment, assumption and miscellaneous other doctrinal bases. Third, the Chapter examines the choice-of-law rules governing the foregoing issues. Fourth, the Chapter discusses the allocation of competence, between national courts and arbitral tribunals, to decide disputes regarding the identity of the parties to an international arbitration agreement. Finally, the Chapter addresses the subjects of arbitration in corporate contexts and "class arbitrations."

§ 10.01 INTRODUCTION

As discussed above, international commercial arbitration is fundamentally consensual in nature. (2) As a consequence, the effects of an arbitration agreement extend only to the agreement's parties, and not to others. (3) Presumptively, and in most instances, the parties to an arbitration agreement will be its formal signatories.

Nonetheless, as detailed below, there are a number of legal bases by which non-signatories may be held to be parties to – and consequently both bound and benefitted by – an arbitration agreement. The extent to which non-signatories may be bound by an arbitration agreement is among the most delicate and complex issues in international commercial arbitration. (4)

[A] International Arbitration Agreements Are Binding On "Parties" and Not Others

The principle that the rights and obligations of an arbitration agreement apply only to the agreement's parties is a straightforward application of the doctrine of privity of P 1407 contract, recognized in both civil and common law jurisdictions. (5) In some legal systems, the identity of the parties to an arbitration agreement is referred to as a question of the "subjective" scope of the arbitration agreement or jurisdiction *"rationae personae."* (6) In other legal regimes, the identity of the parties to the arbitration agreement is characterized as a question of formation or existence of the agreement to arbitrate. (7)

Whatever terminology is employed, the principle that only the parties to an international arbitration agreement are either bound or benefitted by that agreement is fundamental to international arbitration. That principle is uniformly reflected in international arbitration conventions, national arbitration legislation, judicial decisions and arbitral awards.

All leading international arbitration conventions adopt the non-controversial principle that an agreement to arbitrate binds only the parties to such agreement. Article II(1) of the New York Convention impliedly recognizes the subjective limits on the binding nature of arbitration agreements, providing that Contracting States "shall recognize an agreement in writing under which *the parties* undertake to submit [their disputes] to arbitration." (8) Other international conventions, including the European Convention, are similar. (9) Each of these instruments rests on the principle that an arbitration agreement is a contract between, and binding on, the "parties" to that agreement, and not on other P 1408 persons. Equally, each of these instruments requires recognition of arbitration agreements insofar as their "parties," and not other entities, are concerned. (10)

National law also recognizes the limited subjective scope of arbitration agreements. Article 7(1) of the UNCITRAL Model Law defines an arbitration agreement as "an agreement by *the parties* to submit to arbitration all or certain disputes which have arisen or which may arise *between them*." (11) Other national arbitration legislation is similar. (12)

Even in the absence of statutory provisions to this effect, settled law in all developed jurisdictions provides that it is the parties to an international arbitration agreement – and not other persons – that are bound by the agreement. (13) In the words of one U.S. judicial decision, "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (14) Similarly, a recent English decision concludes:

readily accessible to a counter-party. (95)

In principle, as with other choice-of-law issues in the context of arbitration agreements, (96) a validation principle should apply to the effects of an agency relationship on a non-signatory party's status under an arbitration agreement. If either the law governing the underlying arbitration agreement or the law governing the agency relationship would subject the principal (or the agent) to the arbitration agreement, then the non-signatory should be bound (and benefitted) by that agreement. This is consistent with the likely intentions of the parties and serves more general interests in efficiency and fairness, by centralizing disputes in a single forum. (97)

[B] Apparent or Ostensible Authority

Closely related to agency as a basis for concluding that an entity is party to an arbitration agreement is ostensible or apparent authority. (98) This is referred to as the "principle of appearance" or "*mandat apparent*" in some jurisdictions. (99)

P 1425 Under the apparent authority theory, a party may be bound by another entity's acts purportedly entered into on its behalf, even where those acts were unauthorized, if the putative principal created the appearance of authorization through words or conduct, leading a counter-party reasonably to believe that authorization actually existed. (100) In particular, this theory of apparent authority can bind the "apparent" principal to a contract (including an arbitration agreement) entered into putatively on its behalf by the "apparent" agent. (101) In the words of one U.S. decision: An "agent enjoys implied authority to enter into a transaction when verbal or other acts by a principal reasonably
P 1426 give the appearance of authority to the agent." (102) Or, from a civil law perspective, "[w]hat French law calls '*la théorie du mandat apparent*' (the principle of apparent authority) is generally accepted in international arbitration." (103)

This doctrine rests in part on principles of contract law and good faith, aimed at objectively identifying the parties to a contract, but also on notions akin to estoppel and abuse of right, which operate independently from principles of consent. (104) As explained by one authority:

> "Ostensible authority, on the other hand, derives not from any consensual arrangement between the principal and the agent, but is founded on a representation made by the principal to the third party which is intended to convey, and does convey, to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal." (105)

As with agency, the apparent authority doctrine raises choice-of-law issues. Possibly applicable national laws include the law governing the arbitration agreement, (106) the law of the state where the putative principal's or putative agent's conduct occurred, or the law of the state where the counter-party apprehends the putative principal's conduct or statements. (107)

There are few principled grounds for choosing among the options presented by existing
P 1427 choice-of-law rules, providing the basis for a substantial argument that a specialized rule of international law governing apparent authority should apply to international arbitration agreements. (108) Such a rule would not upset private expectations (for example, reflected in choice-of-law agreements), given that apparent authority does not rest on principles of consent. A rule of substantive international law, governing apparent authority, would also be consistent with the better-reasoned approach, discussed below, to the choice of law governing estoppel in the context of international arbitration agreements. (109)

[C] Implied Consent

As discussed above, it is not only by formal execution of an agreement, as a specifically identified contractual party, that an entity can become a party to that agreement. Under most developed legal systems, an entity may become a party to a contract, including an arbitration agreement, impliedly – typically, either by conduct or non-explicit declarations, as well as by express agreement or formal execution of an agreement. (110)

In general, ordinary principles of contract law apply to issues of implied consent (as to other issues) with respect to arbitration agreements. (111) As discussed above, authorities in some jurisdictions impose requirements for express consent to arbitration agreements, but these decisions are dated and contrary to Article II and the New York Convention. (112)

The fundamental question in the context of implied consent is whether the parties' objective intention was that a particular entity be a party to the arbitration agreement. Although the non-signatory's intent is often most controversial, the intention of other parties to be bound by the agreement to arbitrate with the non-signatory is also necessary. (113) That is, even if a non-signatory intended to be bound by the arbitration agreement, one must also determine whether the signatory (and other) parties to the
P 1428 agreement accepted it as such: for commercial or other reasons, signatories to an arbitration agreement may wish to extend their obligations to arbitrate only to those entities that have signed the agreement, and not to others.

Questions of implied consent arise in numerous factual settings. Some arbitral tribunals have held that negotiation and/or performance of some or all of the obligations of a contract, even when unsigned by a counter-party, can bind a party to that agreement, including its arbitration provision. (114) As one award reasoned, the "scope of an arbitration clause may be extended to non-signatory companies with separate legal [existence] only if they played an active role in the negotiations leading to the clause, or if they are directly implicated in the agreement." (115)

Other tribunals have held that a company's awareness of a contract (including an arbitration clause) between other parties, and its confirmation of one aspect of the underlying contract, does not necessarily make the company a party to the arbitration clause. (116) In general, arbitral awards have also held that merely incidental involvement in contractual performance is insufficient to constitute consent to the underlying contract, or its arbitration clause. (117)

National courts have adopted similar approaches to issues of implied consent to an international arbitration agreement. Where a party conducts itself as if it were a party to a commercial contract, by playing a substantial role in negotiations and/or performance of the contract, it may be held to have impliedly consented to be bound by the contract.
P 1429 (118) In the words of the Swiss Federal Tribunal, "a third party who interferes in the execution of the contract containing the arbitration agreement is deemed to have accepted it, by way of conclusive acts." (119) Again, however, merely incidental involvement in negotiations or performance is consistently held to be insufficient to constitute implied consent to be bound by the contract, or its arbitration clause. (120)

Implied consent to be bound by the arbitration clause in one contract can also be inferred from a party's conclusion of a related agreement. (121) This type of analysis has
P 1430 close parallels to the incorporation of arbitration agreements by reference, which is discussed above, (122) and which some courts have referred to as a basis for binding a non-signatory to an arbitration agreement. (123)

As with other non-signatory issues, it is essential to consider questions of implied consent to an arbitration agreement in the context of the separability presumption. As discussed above, it is a party's implied consent to arbitrate – not to deliver or purchase goods – that is decisive. (124)

Nonetheless, in most instances, a party's consent to the underlying contract will carry with it consent to the associated arbitration clause, just as a party's formal execution of the underlying contract carries with it consent to the arbitration agreement; there are circumstances where this will not be the case, but these are exceptional. (125) Again, negotiation or involvement in performance of only isolated aspects of a contract is less likely to constitute consent to the arbitration clause than broad involvement in many or central aspects of the contractual relationship.

There are also instances in which a party's conduct after a dispute arises evidences its implied consent to an arbitration clause. A classic example of such consent is where a non-signatory party affirmatively invokes an arbitration clause or fails to object when another party invokes the clause against it (126) (with this factual scenario often also being considered under principles of estoppel (127)). It remains essential, however, that all the relevant parties agree to a non-signatory's inclusion as a party to the arbitration agreement. (128)

P 1431 As with other non-signatory doctrines, questions of implied consent raise choice-of-law issues. Questions of implied consent should be governed by the law applicable to the arbitration agreement, as is the case with other questions of interpretation and formation. (129) Given the contractual character of the implied consent doctrine, this approach is in keeping with private expectations. (130)

U.S. courts are divided with regard to the choice of law governing implied consent. Some courts have applied principles of federal common law, (131) while other courts have applied state (or foreign) law, particularly when the parties' agreement contains a choice-of-law provision. (132) A few U.S. courts have concluded that, when a non-signatory objects to being subjected to an arbitration clause, the existence of consent on its part is governed by federal common law, while the question of consent by a non-signatory who seeks to invoke an arbitration clause is governed by any choice-of-law agreement associated with the clause. (133)

[D] Alter Ego and Veil-Piercing (134)

P 1432 Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an "alter ego" of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from "the fundamental principle...that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities." (135)

The alter ego doctrine is referred to in German as "*Durchgriff*," (136) in French as "*levée du voile social*," (137) in Spanish as "*levantamiento del velo societario*" (138) and in many English language contexts as "piercing" or "lifting" the "corporate veil." (139) As discussed below, whatever the terminology, the veil-piercing doctrine has broadly similar elements in most jurisdictions, at least in the context of international arbitration agreements.

The International Court of Justice explained the veil-piercing doctrine in *Barcelona Traction* as follows:

> "the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations." (140)

Definitions of "alter ego" vary materially in different legal systems, and are applied in a number of different contexts. Nonetheless, the essential theory of the "alter ego" doctrine in most jurisdictions is that one party so strongly dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms, and to treat them as a single entity. In the context of
P 1433 arbitration agreements, demonstrating an "alter ego" relationship ● under most developed legal systems requires convincing evidence that one entity dominated the day-to-day actions of another and/or that it exercised this power to work fraud or other injustice or inequity on a third party or to evade statutory or other legal obligations.

The "alter ego" doctrine differs from principles of agency or implied consent, in that the parties' intentions are not decisive; rather, the doctrine rests on overriding considerations of equity and fairness, which mandate disregarding an entity's separate legal identity in specified circumstances. (141) In the words of one arbitral award, "[e]quity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment." (142) Or, as a U.S. judicial decision reasoned: "The concept of 'piercing the corporate veil' is equitable in nature and courts will pierce the corporate veil 'to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability.'" (143)

Many national courts have been circumspect in applying the alter ego doctrine. (144) In England, an alter ego relationship may be found where the corporate structure is used to evade mandatory legal obligations or the enforcement of existing and legitimate third
P 1434 party rights. (145) This standard generally requires fraud or other misconduct ● calculated to avoid or conceal liability through the use of company structure. (146) In a frequently-cited decision, an English court declared:

> "English law insists on recognition of the distinct legal personality of companies unless the relevant contract or legislation requires or permits a broad interpretation to be given to references to members of a group of companies or the legal personality is a mere façade or sham or unlawful device." (147)

The court emphasized that it is legitimate to structure a corporate group so as to allocate risk between members of the group and limit the liability of particular companies:

> "we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant which is the member of a corporate group merely because the corporate structure has been used to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law." (148)

Likewise, Swiss courts (149) and tribunals applying Swiss law (150) only disregard the corporate form in exceptional circumstances, amounting to fraud or an abuse of right. In the words of a leading Swiss commentator:

P 1435
> ● "Swiss law…is resolutely committed to the legal independence of the company in relation to its sole shareholder or of the subsidiary in relation to the parent company. It will only be disregarded in exceptional circumstances, where the fact of resorting to such a subsidiary to escape one's obligations would amount to fraud or to a patent abuse of right." (151)

German courts are also cautious in applying veil-piercing (*Durchgriff*) theories, (152) requiring fraud or other misconduct. (153) Indeed, some German authorities question (wrongly) whether the veil-piercing theory, which is traditionally used for purposes of substantive liability, may ever be used to bind non-signatories to arbitration agreements. (154)

While also relying on a potentially expansive "group of companies" theory (discussed below), (155) French courts appear willing, often without clearly distinguishing the doctrines, (156) to disregard corporate identities in cases amounting to fraud. (157) Courts in Canada, (158) Ireland, (159) the Netherlands, (160) Korea, (161) Hong Kong (162) and China (163) are also prepared to pierce the corporate veil, at least in some circumstances.

P 1436 ● U.S. courts have often been more willing than many other authorities to apply an alter ego analysis to subject a non-signatory to an arbitration agreement. (164) According to one U.S. decision:

> "To apply the alter ego doctrine to justify the disregard of a corporate entity, the court must determine that there is such unity of interest and ownership that separate personalities of the corporations no longer exist, and that failure to disregard the corporate form would result in fraud or injustice." (165)

Even in U.S. courts, the standard for establishing alter ego status is ordinarily difficult to satisfy. The starting point is a strong presumption that a parent corporation and its affiliates are legally separate and distinct entities. (166) In the memorable words of one early authority:

> P 1437 "Normally, the corporation is an insulator from liability on claims of creditors....Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." (167)

Many U.S. courts have also held that piercing the corporate veil is an exceptional action, in both international and other contexts, requiring persuasive evidence to overcome the separate corporate identities of the parties. (168) The existence of overlapping boards of directors and management, 100% share ownership and common corporate logos or trademarks are not sufficient to establish (or even particularly probative of) alter ego status. (169) Similarly, undercapitalization of a company is not sufficient, independently, to justify piercing the corporate veil. (170)

Most U.S. courts have held that overcoming the presumption of separateness requires showing: (a) the domination of a corporate affiliate, including disregard of corporate formalities, such that it has no separate identity or existence, (171) and (b) fraudulent or P 1438 collusive misuse of that control, or equivalent misconduct, to the injury of other parties. (172) In cases of complete domination or control of one company's day-to-day activities by another company, this may in some circumstances be independently sufficient to pierce the corporate veil. (173)

U.S. judicial decisions have generally conducted fairly extensive factual inquiries in deciding claims of domination or control. (174) Different U.S. authorities have identified a variety of factors that are relevant to an inquiry into control for purposes of alter ego status. (175) For example, in a recent U.S. decision arising from the attempted recognition of an international arbitral award, the court identified fifteen "private law" factors, which it described as always "concerned with reality and not form":

> "(1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; P 1439 (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of the subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities...(13) whether the directors of the 'subsidiary' act in the primary and independent interest of the 'parent'; (14) whether others pay or guarantee debts of the dominated corporation; and (15) whether the alleged dominator deals with the dominated corporations at arm's length." (176)

Assessing these various factors, the court held that a foreign state-owned entity was not financially independent from the foreign state that owned it (Turkmenistan), and that the foreign state's intentional "bleeding [of] a subsidiary to thwart creditors is a classic ground for piercing the corporate veil." (177) The court also noted that "[u]ndercapitalization is often critical in alter ego analysis." (178)

As noted above, many U.S. courts have held that there must be a showing of fraud or other wrongful or inequitable conduct in order to bind a non-signatory to an arbitration agreement. (179) As explained by one U.S. court: "While complete domination of the corporation is the key to piercing the corporate veil,...such domination, standing alone, is not enough; some showing of *a wrongful or unjust act toward plaintiff is required*." (180) Other courts have expressed the same view, (181) although a considerable body of P 1440 authority holds that, in some circumstances, sufficiently extensive day-to-day control or domination is sufficient to pierce the corporate veil. (182)

Typically, alter ego status can only be established with respect to an entity or person which owns shares (directly or indirectly), or holds a corporate position, in a company. Nonetheless, in unusual cases, other sorts of control relationships or corporate affiliations have been regarded as sufficient to establish alter ego status. (183)

International arbitral tribunals have also generally been circumspect in applying alter ego theories. Most awards have required persuasive evidence of overlapping ownership, management and (often) involvement in negotiation and performance of the contract, as well as (occasionally) affirmative statements that the affiliated company is involved in the transactions in question. (184) Use of a common logo, brand, or trademark is generally not a decisive factor in alter ego analysis, (185) nor is the mere fact of overlapping management or supervisory boards or shared employees. (186) On the other P 1441 hand, fraudulent or similarly abusive misconduct, (187) undercapitalization of a corporate body, (188) deliberate tortious actions, (189) or siphoning off of assets (resulting in undercapitalization) (190) are strong indicators of an alter ego relationship.

Some awards have also relied on the existence of reasonable, good faith mistake or confusion as to the identity or character of a counter-party. (191) As one tribunal explained, in the context of an effort to subject a controlling shareholder to the arbitration agreement:

> "arbitration is essentially based upon the principle of consent. So too, any extension of the scope of application of the arbitration clause must have a voluntary basis. Of course, such an intention can be merely implicit, otherwise any discussion of extension would have no meaning....[T]he fact that two companies belong to the same group, or that a shareholder has a dominant position, are never sufficient, in and of themselves, to legally justify lifting the
> P 1442 ● corporate veil.... *One would entertain this exception where confusion is fostered by the group or by the majority shareholder*....An arbitrating body must be very circumspect in matters of extending the effect of a clause to a director or manager who has acted strictly in an official capacity. Any such extension presupposes that the artificial person has been no more than the business implement of the natural person, so that one can ascribe to the natural person the contracts and undertakings signed by the artificial person." (192)

Other awards have emphasized the importance of principles of good faith in conducting an alter ego analysis. (193) This approach parallels that of most national courts (summarized above) (194) and the expectations of parties engaged in international commercial transactions, being to give effect to corporate forms, save in exceptional cases.

As with other non-signatory theories, the critical question in the alter ego context is whether one party's relationship with another justifies treating it as a party to the agreement to arbitrate (not the underlying contract). (195) There may, for example, be instances where one party's domination of another party's participation in a particular transaction (or in an arbitration) results in it being bound by the associated agreement to arbitrate, notwithstanding the absence of any such control or alter ego relationship more generally. More frequently, however, an alter ego relationship will exist with regard to a particular commercial contract or relationship, which will also be applied with regard to the associated arbitration agreement. (196)

Finally, as with other bases for binding non-signatories to arbitration agreements, questions of alter ego status and veil piercing raise choice-of-law questions. Various authorities have applied the law of the state of incorporation of a company, (197) or the law governing the arbitration agreement, (198) or the law governing the underlying contract, (199) to the question whether the company's corporate veil may be pierced. The
P 1443 ● weight of authority rejects these analyses, (200) instead applying either international principles (201) or general principles of law. (202)

Thus, a leading U.S. Supreme Court decision held that the question whether to pierce the veil of a Cuban state-owned company was governed by principles of international law (rather than Cuban law). (203) The Court reasoned:

> P 1444 ● "To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." (204)

Accordingly, the Court applied veil-piercing principles "common to both international law and federal common law" (205) (reflecting an approach bearing some similarities to the "cumulative" choice-of-law analyses adopted in a number of contemporary arbitral awards): (206)

> "Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded. Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice." (207)

This authority is persuasive, and applies more broadly to veil-piercing issues arising in determining whether either state or non-state entities are parties to an international arbitration. As with the doctrines of apparent authority and estoppel, (208) it is artificial to select the law of any particular national jurisdiction to define those circumstances in which basic principles of fairness and good faith in international business dealings require disregarding a corporate identity conferred by national law and subjecting a party to an international arbitration agreement. Rather, uniform international principles better achieve the purposes of the veil piercing doctrine, without materially interfering with the parties' expectations. (209)

[E] "Group of Companies" Doctrine (210)

P 1445 ● Another significant, but controversial, basis for binding non-signatories to an arbitration agreement is the "group of companies" doctrine. Under this principle, non-

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140 S.Ct. 1637
Supreme Court of the United States.

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., fka Converteam SAS, Petitioner
v.
OUTOKUMPU STAINLESS USA, LLC, et al.

No. 18-1048
|
Argued January 21, 2020
|
Decided June 1, 2020

Synopsis

Background: Buyer of cold rolling mills for steel plant brought action in state court against supplier that provided motors for mills to seller of mills. Supplier removed action to federal court. The United States District Court for the Southern District of Alabama, No. 1:16-cv-00378-KD-C, Kristi K. DuBose, J., 2016 WL 7422675, adopted report and recommendation of William E. Cassady, United States Magistrate Judge, 2016 WL 7423406, and denied buyer's motion to remand, and subsequently granted supplier's motion to compel arbitration and dismiss action, 2017 WL 401951. Buyer appealed. The Eleventh Circuit Court of Appeals, Beth Bloom, District Judge, sitting by designation, 902 F.3d 1316, reversed the order compelling arbitration. Certiorari was granted.

The Supreme Court, Justice Thomas, held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories, abrogating *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996.

Reversed and remanded.

Justice Sotomayor filed a concurring opinion.

See also 2017 WL 480716.

***1640** *Syllabus*[*]

ThyssenKrupp Stainless USA, LLC, entered into three contracts with F.L. Industries, Inc., for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Each contract contained a clause requiring arbitration of any contract dispute. F.L. Industries then entered into a subcontractor agreement with petitioner (GE Energy) for the provision of nine motors to power the cold rolling mills. After the motors for the cold rolling mills allegedly failed, Outokumpu Stainless USA, LLC (which acquired ownership of the plant), and its insurers sued GE Energy in Alabama state court. GE Energy removed the case to federal court under 9 U.S.C. § 205. It then moved to dismiss and compel arbitration, relying on the arbitration clauses in the F.L. Industries and ThyssenKrupp contracts. The District Court granted the motion, concluding that both Outokumpu and GE Energy were parties to the agreement. The Eleventh Circuit reversed. It concluded that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) allows enforcement of an arbitration agreement only by the parties that actually signed the agreement and that GE Energy was a nonsignatory. It also held that allowing GE Energy to rely on state-law equitable estoppel doctrines to enforce the arbitration agreement would conflict with the Convention's signatory requirement.

Held: The New York Convention does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. Pp. 1643 – 1648.

(a) Chapter 1 of the Federal Arbitration Act (FAA) does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 129 S.Ct. 1896, 173 L.Ed.2d 832. The " 'traditional principles' of state law" that apply under Chapter 1 include doctrines, like equitable estoppel, authorizing contract enforcement by a nonsignatory. *Id.*, at 631–632, 129 S.Ct. 1896.

The New York Convention is a multilateral treaty addressing international arbitration. One Article of the Convention addresses arbitration agreements—Article II—and one provision of Article II addresses the enforcement of those agreements—Article II(3). Article II(3) provides that courts of a contracting state "shall ... refer the parties to arbitration" when the parties to an

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action entered into a written agreement to arbitrate and one of the parties requests such a referral.

Chapter 2 of the FAA grants federal courts jurisdiction over actions governed by the Convention. As relevant here, Chapter 2 provides that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention." 9 U.S.C. § 208. Pp. 1643 – 1645.

(b) The application of familiar tools of treaty interpretation establishes that the state-law equitable estoppel doctrines permitted under Chapter 1 do not "conflict with ... the Convention." § 208. Pp. 1644 – 1648.

(1) The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. The Convention is simply silent on the issue of nonsignatory enforcement. This silence is dispositive because nothing in the Convention's text could be read to conflict with the application of domestic equitable estoppel doctrines. Article II(3)—the only provision in the Convention addressing the enforcement of arbitration agreements—contains no exclusionary language; it does not state that arbitration agreements shall be enforced *only* in the identified circumstances. Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of such language. This interpretation is especially appropriate because Article II contemplates using domestic doctrines to fill gaps in the Convention. Pp. 1644 – 1645.

(2) This interpretation is confirmed by the Convention's negotiation and drafting history as well as " 'the postratification understanding' of signatory nations," *Medellín v. Texas*, 552 U.S. 491, 507, 128 S.Ct. 1346, 170 L.Ed.2d 190.

Cherry-picked generalizations from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text. Here, to the extent that the Convention's drafting history sheds any light on the treaty's meaning, it shows only that the drafters sought to impose baseline requirements on contracting states so that signatories would "not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520, n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270.

The postratification understanding of other contracting states—as evidenced by the "[d]ecisions of the courts of other Convention signatories," *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175, 119 S.Ct. 662, 142 L.Ed.2d 576, and the "postratification conduct" of contracting state governments, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227, 116 S.Ct. 629, 133 L.Ed.2d 596—may also serve as an aid to this Court's interpretation. Here, numerous sources indicate that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements. These sources, however, are from decades after the finalization of the New York Convention's text in 1958. This diminishes their value as evidence of the original understanding of the treaty's meaning.

Finally, because the Court's textual analysis and the Executive's interpretation of the Convention align here, there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference." Cf. *Edelman v. Lynchburg College*, 535 U.S. 106, 114–115, n. 8, 122 S.Ct. 1145, 152 L.Ed.2d 188. Pp. 1645 – 1648.

(c) The Court of Appeals may address on remand whether GE Energy can enforce the arbitration clauses under equitable estoppel principles and which body of law governs that determination. Pp. 1647 – 1648.

902 F.3d 1316, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Opinion

Justice THOMAS delivered the opinion of the Court.

***1642** The question in this case is whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. We hold that it does not.

I

In 2007, ThyssenKrupp Stainless USA, LLC, entered into three contracts with F.L. Industries, Inc., for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Each of the contracts contained an identical arbitration clause. The clause provided that "[a]ll disputes arising between both parties in connection with or in the performances of the Contract ... shall be submitted to arbitration for settlement." App. 171.

After executing these agreements, F.L. Industries, Inc., entered into a subcontractor agreement with petitioner GE Energy Power Conversion France SAS, Corp. (GE Energy), then known as Converteam SAS. Under that agreement, GE Energy agreed to design, manufacture, and supply motors for the cold rolling mills. Between 2011 and 2012, GE Energy delivered nine motors to the Alabama plant for installation. Soon thereafter, respondent Outokumpu Stainless USA, LLC, acquired ownership of the plant from ThyssenKrupp.

According to Outokumpu, GE Energy's motors failed by the summer of 2015, resulting in substantial damages. In 2016, Outokumpu and its insurers filed suit against GE Energy in Alabama state court. GE Energy removed the case to federal court under 9 U.S.C. § 205, which authorizes the removal of an action from state to federal court if the action "relates to an arbitration agreement ... falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards]." GE Energy then moved to dismiss and compel arbitration, relying on the arbitration clauses in the contracts between F.L. Industries, Inc., and ThyssenKrupp.

The District Court granted GE Energy's motion to dismiss and compel arbitration ***1643** with Outokumpu and Sompo Japan Insurance Company of America. *Outokumpu Stainless USA LLC v. Converteam SAS*, 2017 WL 401951 (SD Ala., Jan. 30, 2017).[1] The court held that GE Energy qualified as a party under the arbitration clauses because the contracts defined the terms "Seller" and "Parties" to include subcontractors. *Id.*, at *4. Because the court concluded that both Outokumpu and GE Energy were parties to the agreements, it declined to address GE Energy's argument that the agreement was enforceable under equitable estoppel. *Id.*, at *1, n. 1.

The Eleventh Circuit reversed the District Court's order compelling arbitration. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (2018). The court interpreted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) to include a "requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." *Id.*, at 1326 (emphasis in original). The court concluded that this requirement was not satisfied because "GE Energy is undeniably not a signatory to the Contracts." *Ibid.* It then held that GE Energy could not rely on state-law equitable estoppel doctrines to enforce the arbitration agreement as a nonsignatory because, in the court's view, equitable estoppel conflicts with the Convention's signatory requirement. *Id.*, at 1326–1327.

Given a conflict between the Courts of Appeals on this question,[2] we granted certiorari. 588 U.S. ——, 139 S.Ct. 2776, 204 L.Ed.2d 1156 (2019).

II

A

Chapter 1 of the Federal Arbitration Act (FAA) permits courts to apply state-law doctrines related to the enforcement of arbitration agreements. Section 2 of that chapter provides that an arbitration agreement in writing "shall be ... enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As we have explained, this provision requires federal courts to "place [arbitration] agreements ' "upon the same footing as other contracts." ' " *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S.Ct. 1248, 103

L.Ed.2d 488 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). But it does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009).

The "traditional principles of state law" that apply under Chapter 1 include doctrines that authorize the enforcement of a contract by a nonsignatory. *Id.*, at 631, 129 S.Ct. 1896 (internal quotation marks omitted). For example, we have recognized that arbitration agreements may be enforced by nonsignatories through " 'assumption, piercing the corporate veil, alter ego, incorporation by reference, ***1644** third-party beneficiary theories, waiver and estoppel.' " *Ibid.* (quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001)).

This case implicates domestic equitable estoppel doctrines. Generally, in the arbitration context, "equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." *Id.*, at 200 (2017). In *Arthur Andersen*, we recognized that Chapter 1 of the FAA permits a nonsignatory to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement. 556 U.S. at 631–632, 129 S.Ct. 1896.

B

The New York Convention is a multilateral treaty that addresses international arbitration. 21 U.S.T. 2517, T.I.A.S. No. 6997. It focuses almost entirely on arbitral awards. Article I(1) describes the Convention as applying only to "the recognition and enforcement of arbitral awards." *Id.,* at 2519. Articles III, IV, and V contain recognition and enforcement obligations related to arbitral awards for contracting states and for parties seeking the enforcement of arbitral awards. *Id.,* at 2519–2520. Article VI addresses when an award can be set aside or suspended. *Id.,* at 2520. And Article VII(1) states that the "Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." *Id.,* at 2520–2521.

Only one article of the Convention addresses arbitration agreements—Article II. That article contains only three provisions, each one sentence long. Article II(1) requires "[e]ach Contracting State [to] recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." *Id.,* at 2519. Article II(2) provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Ibid.* Finally, Article II(3) states that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Ibid.*

C

In 1970, the United States acceded to the New York Convention, and Congress enacted implementing legislation in Chapter 2 of the FAA. See 84 Stat. 692, 9 U.S.C. §§ 201–208. Chapter 2 grants federal courts jurisdiction over actions governed by the Convention, § 203; establishes venue for such actions, § 204; authorizes removal from state court, § 205; and empowers courts to compel arbitration, § 206. Chapter 2 also states that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention." § 208.

III

We must determine whether the equitable estoppel doctrines permitted under ***1645** Chapter 1 of the FAA, see *supra,* at 1643 – 1644, "conflict with ... the Convention." § 208. Applying familiar tools of treaty interpretation, we conclude that they do not conflict.

A

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008). The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. The Convention is simply silent on the issue of nonsignatory enforcement, and in general, "a matter not covered is to be treated as not covered"—a principle "so obvious that it seems absurd to recite it," A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012).

This silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines. Only one Article of the Convention addresses arbitration agreements—Article II—and only one provision of Article II addresses the enforcement of those agreements—Article II(3). The text of Article II(3) states that courts of a contracting state "shall ... refer the parties to arbitration" when the parties to an action entered into a written agreement to arbitrate and one of the parties requests referral to arbitration. The provision, however, does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances. That is, Article II(3) provides that arbitration agreements must be enforced in certain circumstances, but it does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements. Article II(3) contains no exclusionary language; it does not state that arbitration agreements shall be enforced *only* in the identified circumstances. Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of exclusionary language. Cf. *Marx v. General Revenue Corp.*, 568 U.S. 371, 380–384, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013).

This interpretation is especially appropriate in the context of Article II. Far from displacing domestic law, the provisions of Article II contemplate the use of domestic doctrines to fill gaps in the Convention. For example, Article II(1) refers to disputes "capable of settlement by arbitration," but it does not identify what disputes are arbitrable, leaving that matter to domestic law. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639, n. 21, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Similarly, Article II(3) states that it does not apply to agreements that are "null and void, inoperative or incapable of being performed," but it fails to define those terms. Again, the Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law.

In sum, the only provision of the Convention that addresses the enforcement of arbitration agreements is Article II(3). We do not read the nonexclusive language of that provision to set a ceiling that tacitly precludes the use of domestic law to enforce arbitration agreements. Thus, nothing in the text of the Convention "conflict[s] with" the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA. 9 U.S.C. § 208.

B

"Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as ***1646** 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellin*, 552 U.S. at 507, 128 S.Ct. 1346 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996)). These aids confirm our interpretation of the Convention's text.

1

Our precedents have looked to the "negotiating and drafting history" of a treaty as an aid in determining the shared understanding of the treaty. *Id.*, at 226, 116 S.Ct. 629. Invoking this interpretive aid, Outokumpu argues that the Convention's drafting history establishes a "rule of consent" that "displace[s] varying local laws." Brief for Respondents 27. We are unpersuaded. For one, nothing in the text of the Convention imposes a "rule of consent" that displaces domestic law—let alone a rule that allows some domestic-law doctrines and not others, as Outokumpu proposes. The only time the Convention uses the word "consent" is in Article X(3), which addresses ratification and accession procedures. Moreover, the statements relied on by Outokumpu do not address the specific question whether the Convention prohibits the application of domestic law that would allow nonsignatories to compel arbitration. Cherry-picked "generalization[s]" from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text. *Zicherman*, 516 U.S. at 227, 116 S.Ct. 629.

To the extent the drafting history sheds any light on the meaning of the Convention, it shows only that the drafters sought to impose baseline requirements on contracting states. As this Court has recognized, "[i]n their discussion of [Article II], the delegates to the Convention voiced frequent concern that courts of signatory countries ... should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk*, 417 U.S. at 520, n. 15, 94 S.Ct. 2449 (citing G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24–28 (1958)). Nothing in the drafting history suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances.

2

"[T]he postratification understanding" of other contracting states may also serve as an aid to our interpretation of a treaty's meaning. *Medellín*, 552 U.S. at 507, 128 S.Ct. 1346 (internal quotation marks omitted). To discern this understanding, we have looked to the "[d]ecisions of the courts of other Convention signatories," *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999), as well as the "postratification conduct" of the governments of contracting states, *Zicherman*, 516 U.S. at 227, 116 S.Ct. 629.

Here, the weight of authority from contracting states indicates that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements. The courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement. See 1 G. Born, International Commercial Arbitration § 10.02, pp. 1418–1484 (2d ed. 2014) (compiling cases). The United States identifies at least one contracting state with domestic legislation illustrating ***1647** a similar understanding. See Brief for United States as *Amicus Curiae* 28 (discussing Peru's national legislation). And GE Energy points to a recommendation issued by the United Nations Commission on International Trade Law that, although not directly addressing Article II(3), adopts a nonexclusive interpretation of Article II(1) and (2). Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ¶¶1, 2, U. N. Doc. A/61/17, annex II (July 7, 2006) (UN recommendation).

These sources, while generally pointing in one direction, are not without their faults. The court decisions, domestic legislation, and UN recommendation relied on by the parties occurred decades after the finalization of the New York Convention's text in 1958. This diminishes the value of these sources as evidence of the original shared understanding of the treaty's meaning. Moreover, unlike the actions and decisions of signatory nations, we have not previously relied on UN recommendations to discern the meaning of treaties. See also *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000–1001 (CA9 2017) (declining to give weight to the 2006 UN recommendation). But to the extent this evidence is given any weight, it confirms our interpretation of the Convention's text.

3

Finally, the parties dispute whether the Executive's interpretation of the New York Convention should affect our analysis. The United States claims that we should apply a " 'canon of deference' " and give " ' "great weight" ' " to an interpretation set forth by the Executive in an *amicus* brief submitted to the D C. Circuit in 2014. Brief for United States as *Amicus Curiae* 30 (quoting *Abbott v. Abbott*, 560 U.S. 1, 15, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010)); see also Brief for United States as *Amicus Curiae* in No. 13–7004 (CADC), pp. 7, 9. GE Energy echoes this request. Outokumpu, on the other hand, argues that the Executive's noncontemporaneous interpretation sheds no light on the meaning of the treaty, asserting that the Executive expressed the "opposite ... view at the time of the Convention's adoption." Brief for Respondents 33. Outokumpu asserts that this Court has repeatedly rejected executive interpretations that contradict the treaty's text or the political branches' previous understanding of a treaty. *Id.*, at 34–35 (citing, *e.g., Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 136, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989) (Brennan, J., concurring in judgment); *Perkins v. Elg*, 307 U.S. 325, 328, 337–349, 59 S.Ct. 884, 83 L.Ed. 1320 (1939)).

We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today. Our textual analysis aligns with the Executive's interpretation so there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference." Cf. *Edelman v. Lynchburg College*, 535 U.S. 106, 114–115, n. 8, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002) ("[T]here is no need to resolve deference issues when there is no need for deference").

IV

The Court of Appeals did not analyze whether Article II(3) of the New York Convention conflicts with equitable estoppel. Instead, the court held that Article II(1) and (2) include a "requirement that ***1648** the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." 902 F.3d at 1326. But those provisions address the recognition of arbitration agreements, not who is bound by a recognized agreement. Article II(1) simply requires contracting states to "recognize an agreement in writing," and Article II(2) defines the term "agreement in writing." Here, the three agreements at issue were both written and signed.[3] Only Article II(3) speaks to who may request referral under those agreements, and it does not prohibit the application of domestic law. See *supra,* at 1644 – 1645.

Because the Court of Appeals concluded that the Convention prohibits enforcement by nonsignatories, the court did not determine whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination. Those questions can be addressed on remand. We hold only that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.

* * *

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, concurring.

I agree with the Court that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 (New York Convention), does not categorically prohibit the application of domestic doctrines, such as equitable estoppel, that may permit nonsignatories to enforce arbitration agreements. I note, however, that the application of such domestic doctrines is subject to an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate.

This limitation is part and parcel of the Federal Arbitration Act (FAA) itself. It is a "basic precept," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), that "[a]rbitration under the [FAA] is a matter of consent, not coercion," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); see also, *e.g.*, *Lamps Plus, Inc. v. Varela*, 587 U.S. ——, ——, 139 S.Ct. 1407, 1416, 203 L.Ed.2d 636 (2019) ("Consent is essential under the FAA"); *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) ("[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent' "). "We have emphasized th[is] 'foundational FAA principle' many times," *Lamps Plus*, 587 U.S., at ——, 139 S.Ct., at 1415 (quoting *Stolt-Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758) (citing cases), and even the parties find common ground on the point, see Tr. of Oral Arg. 7, 49; Brief for Respondents 2.

Because this consent principle governs the FAA on the whole, it constrains any domestic doctrines under Chapter 1 of the FAA that might "appl[y]" to Convention proceedings (to the extent they do not "conflict with" the Convention). 9 U.S.C. § 208; cf. *ante*, at 1644 – 1645. Parties seeking to enforce arbitration agreements under Article II of the Convention thus may not rely on domestic nonsignatory doctrines that fail to reflect consent to arbitrate.

***1649** While the FAA's consent principle itself is crystalline, it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate. That is in no small part because some domestic nonsignatory doctrines vary from jurisdiction to jurisdiction. With equitable estoppel, for instance, one formulation of the doctrine may account for a party's consent to arbitrate while another does not. Cf. Brief for Respondents 45 (maintaining that courts have applied at least "three different versions" of GE Energy's equitable-estoppel theory, including one that allegedly "allows a non-party to force arbitration even of claims wholly unconnected to the agreement"). Lower courts

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must therefore determine, on a case-by-case basis, whether applying a domestic nonsignatory doctrine would violate the FAA's inherent consent restriction.*

Article II of the Convention leaves much to the contracting states to resolve on their own, and the FAA imposes few restrictions. Nevertheless, courts applying domestic nonsignatory doctrines to enforce arbitration agreements under the Convention must strictly adhere to "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758. Because the Court's opinion is consistent with this limitation, I join it in full.

All Citations

140 S.Ct. 1637, 207 L.Ed.2d 1, 20 Cal. Daily Op. Serv. 4741, 2020 Daily Journal D.A.R. 5215, 28 Fla. L. Weekly Fed. S 268

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The District Court later granted GE Energy's motion to compel arbitration with additional insurers. *Outokumpu Stainless USA LLC v. Converteam SAS*, 2017 WL 480716 (SD Ala., Feb. 3, 2017).

2 Compare 902 F.3d 1316, 1326 (CA11 2018), and *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1001–1002 (CA9 2017), with *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 375 (CA4 2012), and *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 48 (CA1 2008).

3 We do not address whether Article II(2) requires a signed agreement.

* In this case, however, I am skeptical that any domestic nonsignatory doctrines need come into play at all, because Outokumpu appears to have expressly agreed to arbitrate disputes under the relevant contract with subcontractors like GE Energy. The contract provided that disputes arising between the buyer and seller in connection with the contract were subject to arbitration. App. 171. It also specified that the seller in the contract "shall be understood" to include "[s]ub-contractors." Id., at 88–89. And it appended a list of potential subcontractors, one of which was GE Energy's predecessor, Converteam. Id., at 184–185.

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ANNEX 397

JUDGMENT OF THE COURT (Second Chamber)

14 March 2019 (*)(i)

(Reference for a preliminary ruling — Competition — Article 101 TFEU — Compensation for the damage caused by a cartel prohibited by that article — Determination of the undertakings liable to provide compensation — Succession of legal entities — Concept of 'undertaking' — Economic continuity test)

In Case C-724/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Supreme Court, Finland), made by decision of 19 December 2017, received at the Court on 22 December 2017, in the proceedings

Vantaan kaupunki

v

Skanska Industrial Solutions Oy,

NCC Industry Oy,

Asfaltmix Oy,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, acting as Judge of the Second Chamber, E. Levits, M. Berger and P.G. Xuereb, Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 16 January 2019,

after considering the observations submitted on behalf of:

– Vantaan kaupunki, by N. Mickelsson and O. Hyvönen, asianajajat,

– Skanska Industrial Solutions Oy, by A.P. Mentula and T. Väätäinen, asianajajat,

– NCC Industry Oy, by I. Aalto-Setälä, M. Kokko, M. von Schrowe and H. Koivuniemi, asianajajat,

– Asfaltmix Oy, by S. Hiltunen, A. Laine and M. Blomfelt, asianajajat,

– the Finnish Government, by J. Heliskoski and S. Hartikainen, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by C. Vollrath, H. Leupold, G. Meessen and M. Huttunen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2019,

gives the following

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Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU and the principle of effectiveness of EU law with regard to the rules in Finnish law applicable to actions for damages in respect of infringements of EU competition law.

2 The request has been made in proceedings between Vantaan kaupunki (City of Vantaa, Finland) and Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy concerning compensation for damage resulting from a cartel in the Finnish asphalt market.

Legal context

3 Pursuant to Paragraph 1 of Part 2 of the Vahingonkorvauslaki 412/1974 (Law 412/1974 on compensation) any person who deliberately or negligently causes damage to another is liable to pay compensation to the latter.

4 Under Paragraph 6(2) of that law, if the damage was caused by two or more persons, or if two or more persons are ordered to pay compensation for the same damage they are jointly and severally liable.

5 In accordance with Finnish Company law, every limited liability company is a separate legal person with its own property and its own liability.

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 Between 1994 and 2002 a cartel in the asphalt market was set up in Finland (‘the cartel in question’). That cartel, which agreed on dividing up contracts, prices and tendering for contracts, covered the whole of that Member State and was also liable to affect trade between Member States. The aforementioned cartel included, among others, Lemminkäinen Oyj, Sata-Asfaltti Oy, Interasfaltti Oy, Asfalttineliö Oy and Asfaltti-Tekra Oy.

7 On 22 March 2000, Asfaltti-Tekra, which changed its name to Skanska Asfaltti Oy from 1 November 2000, acquired all the shares in Sata-Asfaltti. On 23 January 2002, the latter was wound up due to a voluntary liquidation procedure in the course of which its business was transferred to Skanska Asfaltti on 13 December 2000. Skanska Asfaltti also took part in the cartel in question. On 9 August 2017, that company changed its name to Skanska Industrial Solutions (‘SIS’).

8 Interasfaltti was a 100% owned subsidiary of Oy Läntinen Teollisuuskatu 15. On 31 October 2000, NCC Finland Oy acquired the shares in Läntinen Teollisuuskatu 15. On 30 September 2002, Interasfaltti was merged with Läntinen Teollisuuskatu 15 which, on that occasion, changed its name to Interasfaltti. On 1 January 2003, NCC Finland was split into three new companies. One of them, NCC Roads Oy, received the ownership of all the shares in Interasfaltti. On 31 December 2003, Interasfaltti was wound up following a voluntary liquidation procedure, pursuant to which its commercial activities were transferred to NCC Roads with effect from 1 February 2003. On 1 May 2016, that company changed its name to NCC Industry (‘NCC’).

9 On 20 June 2000, Siilin Sora Oy, which changed its name to Rudus Asfaltti Oy, with effect from 17 October 2000, acquired all the shares in Asfalttineliö. On 23 January 2002, Asfalttineliö was wound up following a voluntary insolvency procedure, pursuant to which its commercial activities were transferred to Rudus Asfaltti from 16 February 2001. On 10 January 2014, that company changed its name to Asfaltmix.

10 On 31 March 2004, the Kilpailuvirasto (Competition Authority, Finland) proposed that fines should be imposed on seven companies. By judgment of 29 September 2009, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), in accordance with the economic continuity test recognised by the case-law of the Court of Justice, imposed fines, inter alia, on SIS for its own conduct and that of Sata-Asfaltti, on NCC for the conduct of Interasfalt, and on Asfaltmix for the conduct of Asfalttineliö.

11 On the basis of the judgment of the Korkein hallinto-oikeus (Supreme Administrative Court), the City of Vantaa, which had concluded agreements with Lemminkäinen for asphalt works for the years 1998 to 2001,

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brought an action for damages against, inter alia, SIS, NCC and Asfaltmix, on 2 December 2009, before the Käräjäoikeus (District Court, Finland), claiming that those three companies were jointly and severally liable for the additional costs which it had to pay for asphalt works due to overpricing resulting from the cartel in question. SIS, NCC and Asfaltmix claimed that they were not liable for the damage caused by the legally independent companies involved in the cartel in question, and argued that the claim for compensation should have been lodged in the liquidation proceedings of the latter companies.

12 The Käräjäoikeus (District Court) ordered SIS to pay damages on the basis of its own conduct and that of Sata-Asfaltti, NCC for the conduct of Interasfaltti and Asfaltmix for the conduct of Asfalttineliö. That court held that, in a situation such as that at issue in the main proceedings, it is practically impossible or unreasonably difficult for the party who has suffered damage as a result of an infringement of EU competition law to obtain compensation for the damage suffered as a result of that infringement under Finnish civil liability and company law. That court held that, in order to ensure the effectiveness of Article 101 TFEU, the economic continuity test must be applied to the determination of liability for damage in the same way as that for the imposition of fines.

13 On appeal, the Hovioikeus (Court of Appeal, Finland) held that the principle of effectiveness cannot call into question the fundamental characteristics of the Finnish rules on civil liability and that the economic continuity test applied in relation to the imposition of fines cannot be applied to actions for damages in the absence of detailed rules or more specific provisions. That court therefore dismissed the City of Vantaa’s claims in so far as they were directed against SIS, on account of Sata-Asfaltti’s conduct and NCC and Asfaltmix.

14 The City of Vantaa appealed to the Korkein oikeus (Supreme Court, Finland) against the judgment of the Hovioikeus (Court of Appeal).

15 The Korkein oikeus (Supreme Court) observes that Finnish law does not lay down rules on the attribution of liability for damage caused by an infringement of EU competition law in a situation such as that at issue in the main proceedings. The rules on civil liability in Finnish law are based on the principle that only the legal entity that caused the damage is liable. In the case of legal persons, it is possible to derogate from this basic rule by lifting the corporate veil. However, that approach is only possible if the operators concerned used the group structure, the relationship between the companies or the shareholder’s control in a reprehensible or artificial manner, resulting in the avoidance of legal liability.

16 The referring court observes that it is clear from the case-law of the Court that any person may claim compensation for damage resulting from an infringement of Article 101 TFEU if there is a causal link between that damage and the infringement and it is for the domestic legal order of each Member State to lay down the detailed rules for exercising that right.

17 However, it is not clear from that case-law whether persons who are required to provide compensation for such damage must be determined by direct application of Article 101 TFEU, or whether the detailed rules laid down by the domestic legal order of each Member State are applicable.

18 If the persons liable to provide compensation for damage resulting from an infringement of Article 101 TFEU are to be determined by direct application of that article, it is not clear to the referring court which persons may be held liable for the infringement of that article.

19 In that context, it is possible to establish the liability of the person infringing the competition rules or the liability of an ‘undertaking’, within the meaning of Article 101 TFEU. According to the case-law of the Court, when an undertaking consisting of several legal persons infringes the competition rules, it is for that undertaking to answer for the infringement, in accordance with the principle of personal liability. According to that case-law, liability for an infringement of Article 101 TFEU may be attributed to the entity which has continued the business of the entity responsible for the infringement in question, if the latter has ceased to exist.

20 According to the referring court, if the persons liable for the damage caused by an infringement of Article 101 TFEU are not to be determined by direct application of that article, that court must attribute liability

for the damage caused by the cartel in question in accordance with the rules of Finnish law and the principle of effectiveness of EU law.

21 In that regard, the referring court asks whether that principle requires that liability for an infringement of EU competition law is to be attributed to the company which has acquired the share capital and business of a company which has been wound up and which participated in the cartel. The question then arises as to whether the principle of effectiveness precludes a national rule, such as that described in paragraph 15 of the present judgment, and, if so, whether it can be held that the company which continued the business of the company participating in the cartel is to be held liable only if the former company knew or should have known, when it acquired the share capital of the latter company that the latter had committed such an infringement.

22 In those circumstances, the Korkein oikeus (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the determination of which parties are liable for the compensation of harm caused by conduct contrary to Article 101 TFEU to be done by applying that provision directly or on the basis of national provisions?

(2) If the entities liable are to be determined directly on the basis of Article 101 TFEU, are the entities which fall within the concept of “undertaking” mentioned in that article those liable for compensation? When determining the entities liable for compensation, are the same principles to be applied as the Court of Justice has applied to determining the entities liable in cases concerning fines, in accordance with which liability may be founded, in particular, on belonging to the same economic unit or on economic continuity?

(3) If the entities liable are to be determined on the basis of national provisions of a Member State, are national rules under which a company which, after acquiring the entire share capital of a company which took part in a cartel contrary to Article 101 TFEU, dissolved the company in question and continued its activity is not liable for compensation for the damage caused by the anticompetitive conduct of the company in question, even though obtaining compensation from the dissolved company is impossible in practice or unreasonably difficult, contrary to the EU law requirement of effectiveness? Does the requirement of effectiveness preclude an interpretation of a Member State’s domestic law making it a condition of compensation for damage that a transformation of the kind described has been implemented unlawfully or artificially in order to avoid liability for compensation for damage under competition law or otherwise fraudulently, or at least that the company knew or ought to have known of the competition infringement when implementing the transformation?’

Consideration of the questions referred

23 By its first and second questions, which it is appropriate to examine together, the national court asks essentially whether Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares of the companies which have participated in a cartel prohibited by that article were acquired by other companies, which dissolved the former companies and carried on their commercial activities, the acquiring companies may be held liable for the damage caused by that cartel.

24 In that regard, it should be noted that Article 101(1) and Article 102 TFEU produce direct legal effects in relations between individuals and directly create rights for individuals which national courts must protect (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 20 and the case-law cited).

25 It is settled case-law that the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in paragraph 1 of that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 21 and the case-law cited).

26 Any person is thus entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 22 and the case-law cited).

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27 It is true that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, provided that the principles of equivalence and effectiveness are observed (see, to that effect, judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 24 and the case-law cited).

28 However, as the Advocate General has pointed out in points 60 to 62 of his Opinion, the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law.

29 It is clear from the wording of Article 101(1) TFEU that the authors of the Treaties chose to use the concept of an 'undertaking' to designate the perpetrator of an infringement of the prohibition laid down in that provision (see, to that effect, judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 46).

30 Furthermore, it is settled case-law that EU competition law refers to the activities of undertakings (see, to that effect, judgments of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 38 and the case-law cited, and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 39 and the case-law cited).

31 Since the liability for damage caused by infringements of EU competition rules is personal in nature, the undertaking which infringes those rules must answer for the damage caused by the infringement.

32 It follows from the foregoing consideration that the entities which are required to compensate for the damage caused by a cartel or practice prohibited by Article 101 TFEU are the undertakings, within the meaning of that provision, which have participated in that cartel or that practice.

33 That interpretation is not called into question by the European Commission's argument put forward at the hearing that it is clear from Article 11(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1), according to which Member States are to ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law, that it is for the legal system of each Member State to determine, in accordance with the principles of equivalence and effectiveness, the entity which is to compensate for that damage.

34 That provision of Directive 2014/104, which, moreover, does not apply *ratione temporis* to the facts of the case in the main proceedings, does not apply to the definition of entities which are required to compensate for such damage, but to the attribution of liability between those entities and, thus, does not confer on the Member States the power to carry out that determination.

35 To the contrary, that provisions confirms, like Article 1 of Directive 2014/104, entitled 'Subject matter, scope and definitions', in paragraph 1, first sentence thereof, that those responsible for damage caused by an infringement of EU competition law are specifically the 'undertakings' which committed that infringement.

36 That being said, it must be recalled that the concept of an 'undertaking', within the meaning of Article 101 TFEU covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (judgment of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 38 and the case-law cited).

37 That concept, placed in that context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 48 and the case-law cited).

38 As regards the restructuring of an undertaking, such as that at issue in the main proceedings, in which the entity which committed the infringement of EU competition law has ceased to exist, it must be recalled that, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical (see, to that effect, judgments of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 42; of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 22; and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 40).

39 It is therefore not contrary to the principle of individual liability to impute liability for an infringement to a company which has taken over the company which committed the infringement where the latter has ceased to exist (judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 23 and the case-law cited).

40 Furthermore, the Court has stated that, for the effective implementation of the EU competition rules, it may be necessary to consider that the purchaser of the offending undertaking is liable for the infringement of those rules if that offending undertaking ceases to exist by reason of the fact that it has been taken over by the purchaser, which as the acquiring company, takes over its assets and liabilities, including its liability for breaches of EU law (judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 25)

41 In that connection, Asfaltmix argues, in essence, that the case-law cited in paragraphs 36 to 40 of this judgment has been developed in a context in which the Commission imposes fines for the implementation of Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), that case-law is not applicable to an action for damages such as that at issue in the main proceedings.

42 That argument cannot be accepted.

43 As stated in paragraph 25 of this judgment, the right to claim compensation for damage caused by an agreement or conduct prohibited by Article 101 TFEU ensures the full effectiveness of that article and, in particular, the effectiveness of the prohibition laid down in paragraph 1 thereof.

44 That right strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 23 and the case-law cited).

45 As the Advocate General stated essentially, in point 80 of his Opinion, actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct.

46 Therefore, if the undertakings responsible for damage caused by infringement of the EU competition rules could escape liability by simply changing their identity through restructurings, sales or other legal or organisational changes, the objective pursued by that system and the effectiveness of those rules would be jeopardised (see, by analogy, judgment of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 41 and the case-law cited).

47 It follows that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules.

48 In the case in the main proceedings, it is apparent from the information provided by the referring court that SIS, NCC and Asfaltmix acquired all the shares in Sata-Asfaltti, Interasfaltti and Asfalttineliö respectively, which participated in the cartel in question and, subsequently, when those companies went into voluntary liquidation in 2000, 2001 and 2003, took over all those commercial activities of those companies and wound them up.

49 Therefore, it appears, subject to the definitive assessment by the referring court having regard to all the relevant evidence that, from an economic perspective, SIS, NCC and Asfaltmix, on one hand, and Sata-Asfaltti, Interasfaltti and Asfalttineliö respectively, on the other, are the same, and that the three latter companies have ceased to exist as legal persons.

50 It must therefore be held that, SIS, NCC and Asfaltmix, successors to Sata-Asfaltti, Interasfaltti, and Asfalttineliö respectively, have assumed liability for the damage caused by the cartel in question, as they have, as legal persons, ensured that those companies were able to continue their economic activities.

51 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares in the companies which participated in a cartel prohibited by that article were acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question.

52 In view of the answer to the first and second questions, it is unnecessary to reply to the third question.

The request that the effects of the present judgment should be limited in time

53 At the hearing, NCC requested the Court to limit the temporal effects of the present judgment in the event that it considers that the economic continuity test applies to the determination of persons required to provide compensation for damage caused by an infringement of EU competition rules.

54 In support of its request, NCC argued that that interpretation could not have been foreseen, that it therefore had retroactive effect on those rules, and that it had unforeseen consequences for the conduct of undertakings.

55 In that connection, it should be recalled that, according to settled case-law of the Court, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 59 and the case-law cited).

56 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict, for any person concerned, the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 60 and the case-law cited).

57 More specifically, the Court has taken that step only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the

conduct of other Member States or the Commission may even have contributed (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 61 and the case-law cited).

58 In the present case, since the NCC has in no way substantiated its arguments, it has failed to establish that the criteria referred to in paragraph 56 of this judgment have been satisfied in the present case.

59 It is therefore not appropriate to limit the temporal effects of the present judgment.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares in the companies which participated in a cartel prohibited by that article were acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question.

[Signatures]

* Language of the case: Finnish.

i The wording of paragraph 46 of this document has been modified after it was first put online.

ANNEX 398

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding between

Urbaser S.A.
and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa
(Claimants)

and

The Argentine Republic
(Respondent)

ICSID Case No. ARB/07/26

AWARD

Rendered by

Professor Andreas Bucher, President
Professor Pedro J. Martínez-Fraga, Arbitrator
Professor Campbell McLachlan QC, Arbitrator

Secretary of the Tribunal: Mr. Marco Tulio Montañés-Rumayor

Date of dispatch to the Parties: December 8, 2016

Representing Claimants:

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Legal Representative
Del Carril, Colombres, Vayo y Zabalía Lagos

Representing Respondent:

Dr. Carlos Francisco Balbín
Procurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Buenos Aires, Argentina

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to enforce their unpaid invoices and that their right to enforcement was recognized in Article 59 of Provincial Decree No. 878/03 approving the NRF.

1079. In conclusion, the measures adopted by the Argentine Republic were justified, since they were reasonable and proportional to the objective pursued.

D. The Tribunal's findings

1. The meaning and purpose of Article III(1) of the BIT

1080. Claimants' claims regarding discriminatory and unjustified measures overlap significantly with their claim based on fair and equal treatment and their attempt to bring purely contractual claims under the BIT. Claimants, of course, have expressly admitted that purely contractual disputes fall outside of this Tribunal's jurisdiction under the BIT. Therefore, while assessing the relevance of Claimants' claims raised in reference to Article III(1), the Tribunal will also incorporate the evidence and the comments contained in the respective chapters on Claimants' allegations on violation of the Contract and their claim based on an alleged violation of the standard of fair and equitable treatment.

1081. In light of a reasonable reading of Article III(1) in conjunction with the other provisions of the BIT providing specific protections to investors' interest (Art. IV to VIII), the protection afforded by Article III(1) cannot have the meaning of supplementing the rules on more specific protections by an additional or extended protection or guarantee. For instance, the investor's guarantee for fair and equitable treatment of its investment is determined in Article IV(1) in its content and all its limits (subject to more favorable terms under Article VII). Article III(1), which is placed before Article IV, cannot have as its meaning and purpose to provide for an extended guarantee as to the treatment of an investment, above the range of what is to be understood as "fair and equitable."

1082. The Tribunal does not retain an additional requirement based on nationality. While it is correct to say that nationality is often a factor for testing whether a measure or decision qualifies as discrimination, as stated by Respondent, it does not appear as a criterion circumscribing the notion of "discriminatory measures" in Article III(1). The BIT is based on the foreign origin in relation to the definition of investments exclusively. Claimants comply with this requirement and therefore rightly object to Respondent's restrictive interpretation.

1083. The Tribunal further observes that the interpretation of the core terms of "unjustified or discriminatory measures" must follow the provisions relating to the law to be applied by this Tribunal pursuant to Article X(5) of the BIT. This provision states that the Tribunal has to make its decision on the basis of the BIT. This means that the concepts used in Article III(1) are of an autonomous character, specific to this BIT. General principles of international law may also be relevant in certain respects. Article X(5) also permits the application of the Argentine Republic's domestic law "where appropriate."

1084. Contrary to Claimants' repeated assertions that they have themselves accepted as not relevant for this Tribunal, the Concession Contract is not a basis for this Tribunal's decision and is therefore not a basis either to understand and determine the content of the "unjustified or discriminatory measures" referred to in Article III(1).

1085. On the other hand, the rights and obligations arising out of the Concession Contract, and Argentina's domestic law (to extent its consultation appears "appropriate"), are important elements of reference for the Tribunal. They determine AGBA's and Claimants' respective situation that has necessarily to be considered for the purpose of assessing whether a measure taken by Respondent appears "justified" or not, "discriminatory" or not, according to the standards set in Article III(1) of the BIT.

1086. The Tribunal also draws the attention to another element of text in Article III(1) that is not commented by Claimants but noted as a restriction by Respondent. Indeed, the terms "unjustified or discriminatory measures" are not standing alone. The protection afforded to the investors potentially faced with such measures has the meaning that these measures "shall not obstruct" ("no obstaculizará") investments, and more specifically "the management, maintenance, use, enjoyment, extension, sale and, where appropriate, liquidation of such investments." In other words, the investor is not protected against such measures when they are not "obstructing" its operation and activity.

1087. The requirements resulting from Article III(1) are at the very basis of Claimants' claims in this respect. The burden of proving the applicable conditions falls on Claimants. The Tribunal does not share Claimants' view that once Respondent has accepted that AGBA was afforded differential treatment, the burden of proof that such treatment was validly justified would shift to Respondent.

1088. The Tribunal basically agrees with a position stating that measures affecting an investor are discriminatory if they are clearly less favourable that those accorded to other investors operating under the same or similar circumstances, they intend to harm the foreign investor and cause actual damage, and if they are not justified by sufficient reasons. Article III(1) requires adding the requirement that such measure had to obstruct one of the activities related to an investment as listed in the provision.

1089. The Tribunal recognizes the difficulty to provide the concept of "unjustified measures" with a meaning reflecting the initial intentions of the Contracting Parties to the BIT and suitable in comparison to the other rules covering the protection of investors in the BIT. The Tribunal notes that the measures referred to are supplied by a negative and not by a positive qualifier. Article III(1) does not ensure the investor to be faced with measures only that are "justified." The protection is more restrictively circumscribed as a bar against measures that have "no justification." Such justification could be based on the applicable law as determined by Article X(5), including, where appropriate, the host State's domestic law. However, the measure to be addressed in a particular case must not necessarily be "lawful" in order to meet the standard required under Article III(1). This provision does not use the term "unlawful" but instead the word "unjustified," which can imply possible justifications by reference to grounds other than legal ones, in particular in case of measures justified by reasons based on equity or good faith.

2. The claims based on allegedly discriminatory measures

1090. Claimants' numerous comparisons between the treatment afforded to AGBA and the more favorable conditions offered to other concessionaires suffer in general from several flaws making those explanations imprecise, vague or meaningless. In a great number of cases, it is simply affirmed that a concessionaire compared with AGBA operated under the same or "like" conditions, without any demonstration based in particular on the contract and the undertakings for performance applicable to such concessionaire. Claimants do not distinguish between those concessionaires that were operating an investment covered by a BIT and state-owned companies placed on an entirely different legal, economic and financial framework.

1091. Comparisons are made between treatments afforded to AGBA in 2002-2005 and more favorable measures taken for entities operating in 2008 when the economic situation of Argentina and the population's health and employment rate had seriously improved. Claimants object that the same Province signed a Memorandum of Understanding with AZURIX as concessionaire, while AGBA was barred from such a deal, without considering that the conditions offered by AZURIX might have been more attractive for the Province, in particular due to the very different and more favorable economic environment in Regions A and C and in comparison with AGBA's record of non-compliance in respect of the first Five-Year POES for the high-risk Region B. Claimants also complain about reliefs offered to other concessionaires or entities in respect of investment to be provided and expansion work to be achieved without observing that similar measures were envisaged for AGBA during the renegotiation but rejected by the Concessionaire.

1092. Claimants complain extensively about the favorable conditions that were offered to ABSA when it took over the AZURIX and the AGBA Concessions and allege that the difference was so significant that it amounted to discriminatory treatment.

1093. The Tribunal observes, however, that ABSA was a state-controlled entity that did not need to achieve an economic and financial equilibrium as this is sustained by Claimants as private investors interested in a positive return and profit. The most important

ANNEX 399

THE MATTER OF AN ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES 1976

SALUKA INVESTMENTS BV (THE NETHERLANDS)
Claimant
v
THE CZECH REPUBLIC
Respondent

PARTIAL AWARD

Arbitral Tribunal

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On the basis of such and similar definitions, one cannot say much more than the tribunal did in *S.D. Myers* by stating that an infringement of the standard requires

> treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.[33]

This is probably as far as one can get by looking at the "ordinary meaning" of the terms of Article 3.1 of the Treaty.

ii) The Context

298. The immediate "context" in which the "fair and equitable" language of Article 3.1 is used relates to the level of treatment to be accorded by each of the Contracting Parties to the investments of investors of the other Contracting Party. The broader "context" in which the terms of Article 3.1 must be seen includes the other provisions of the Treaty. In the preamble of the Treaty, the Contracting Parties

> recognize[d] that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable.

The preamble thus links the "fair and equitable treatment" standard directly to the stimulation of foreign investments and to the economic development of both Contracting Parties.

iii) The Object and Purpose of the Treaty

299. The "object and purpose" of the Treaty may be discerned from its title and preamble. These read:

> Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic
>
> The Government of the Kingdom of the Netherlands
>
> And
>
> The Government of the Czech and Slovak Federal Republic,
>
> hereinafter referred to as the Contracting Parties,
>
> Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investor of one Contracting Party in the territory of the other Contracting Party,
>
> Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable.

> Taking note of the Final Act of the Conference on Security and Cooperation in Europe, signed on August, 1st 1975 in Helsinki.

300. This is a more subtle and balanced statement of the Treaty's aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.

301. Seen in this light, the "fair and equitable treatment" standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.

302. The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations[34] which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations. As the tribunal in *Tecmed* stated, the obligation to provide "fair and equitable treatment" means:

> to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment.[35]

Also, in *CME*, the tribunal concluded that the Czech authority

> breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.[36]

The tribunal in *Waste Management* equally stated that:

> In applying [the "fair and equitable treatment"] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[37]

303. The expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.[38] And the tribunal in *OEPC* went even as far as stating that

> [t]he *stability* of the legal and business framework is thus an essential element of fair and equitable treatment.[39]

304. This Tribunal would observe, however, that while it subscribes to the general thrust of these and similar statements, it may be that, if their terms were to be taken too literally, they would impose upon host States' obligations which would be inappropriate and unrealistic. Moreover, the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances*.

305. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. As the *S.D. Myers* tribunal has stated, the determination of a breach of the obligation of "fair and equitable treatment" by the host State

> must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.[40]

306. The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.

307. A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.

308. Finally, it transpires from arbitral practice that, according to the "fair and equitable treatment" standard, the host State must never disregard the principles of procedural propriety and due process[41] and must grant the investor freedom from coercion or harassment by its own regulatory authorities.

iv) Conclusion

309. The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore 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. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.

2. Application of the Standard

310. In applying Article 3 of the Treaty to the present case, the Claimant contends that the Czech Republic has violated the "fair and equitable treatment" standard in Article 3.1 of the Treaty in a number of ways. The Claimant principally contends that

(a) the Czech Republic gave a discriminatory response to the systemic bad debt problem in the Czech banking sector, especially by providing State financial assistance to the other Big Four banks to the exclusion of IPB, and thereby created an environment impossible for the survival of IPB;

(b) the Czech Republic failed to ensure a predictable and transparent framework for Saluka's investment;

(c) the Czech Republic's refusal to negotiate with IPB and its shareholders in good faith prior to the forced administration was unreasonable and discriminatory;

(d) the provision by the Czech Republic of massive financial assistance to IPB's business, once the beneficiary of such assistance had become CSOB following the forced administration, was unfair and inequitable; and

(e) the Czech Republic's failure to prevent the unjust enrichment of CSOB at the expense of the IPB shareholders, including Saluka, upon the transfer of IPB's business to CSOB and the aforementioned State aid following the forced administration was equally unfair and inequitable.

311. The Tribunal will examine each of these claims separately.

a) The Czech Republic's Discriminatory Response to the Bad Debt Problem

312. The Claimant contends that, whereas the "systemic" bad debt problem which contributed to the serious difficulties of the Czech banking sector from 1998 to 2000 equally affected the Big Four banks (*i.e.* IPB, KB, CS and CSOB), the Czech Republic, in assisting these banks to overcome the problem, treated IPB differently in an unreasonable way which made it impossible for IPB to survive, especially by excluding IPB from the state assistance that was granted to its competitors, and which resulted in Saluka's loss of its investment.

313. State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.

ANNEX 400

Date of Dispatch to the Parties: January 19, 2007

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the Proceeding Between

PSEG GLOBAL INC. AND KONYA ILGIN ELEKTRİK ÜRETİM VE TİCARET LİMİTED ŞİRKETİ
(CLAIMANTS)

and

REPUBLIC OF TURKEY
(RESPONDENT)

(ICSID Case No. ARB/02/5)

AWARD

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Mr. L. Yves Fortier, CC, QC
Professor Gabrielle Kaufmann-Kohler

Secretary of the Tribunal
Mr. Ucheora Onwuamaegbu

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Ms. Jennifer Haworth McCandless
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Washington, DC

Judge Stephen M. Schwebel
Washington, DC

Mr. Serdar Paksoy
Paksoy & Co.
Istanbul, Turkey

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236. The Respondent argues that the Claimants only had a right to apply for a private law contract under Law 4501, and that the Law offered no guarantee that such private contract would be automatically granted. It further argues that arbitrariness and discrimination are thus unfounded allegations, which could not lead to the frustration of any legitimate expectation. For the Respondent, there can be no legitimate expectation that the proposed revisions of the Contract would be accepted no matter the cost to the Government.

237. The Respondent concludes that it acted in an equitable, transparent, and reasonable manner, in good faith and full compliance with the domestic law, and that there is thus no breach of the fair and equitable treatment standard under the Treaty. The Respondent further concludes that absent evidence to the contrary, negotiations must be presumed to be done in good faith,[112] and in light of both the UNIDROIT Principles of International Commercial Contracts (Article 2.1.15) and the *Wintershall* case,[113] there is no obligation to reach an agreement or liability for failure to do so.

2. *The Tribunal's Findings*

238. The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.

239. Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards. This role has resulted in the concept of fair and equitable treatment acquiring a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded.

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[112] *Mobil Oil Iran, Inc. v. Government of the Islamic Republic of Iran and National Iranian Oil Company*, Award No. 311-74-3 of July 14, 1987, para. 160.

[113] *Wintershall, A.G. et al v. Government of Qatar*, 28 I.L.M. 795, 814–15 (1989).

240. Recent awards have applied this standard to the assessment of rights affected by inconsistent State action,[114] arbitrary modification of the regulatory framework[115] or endless normative changes to the detriment of the investor's business and the need to secure a predictable and stable legal environment.[116] This includes most significantly the issue of legitimate expectations which, as the Tribunal in *Tecmed* concluded, requires a treatment that does not "detract from the basic expectations on the basis of which the foreign investor decided to make the investment."[117]

241. Although the Claimants, as noted above, provide a long list of legitimate expectations that in their view have not been met, the Tribunal is not persuaded that all such complaints relate to legitimate expectations. Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed.[118]

242. In fact, the Claimants invoke issues on which the Tribunal has found that no promise or commitment had been made by the Respondent. This is particularly the case of the lack of evidence about the alleged agreement of the commercial terms of the Project. Had these terms been missing, no Energy Sales Agreement or Fund Agreement, and ultimately no Treasury Guarantee could have been issued. As no such agreements were reached, the Tribunal finds that the Respondent is right in arguing that they could not be later revoked.

243. Neither does the Tribunal find merit in the Claimants' argument that the investment was actively requested by the Turkish Government. True enough, the whole BOT policy was built on the premise that foreign investments would be needed, encouraged and welcome,[119] but this was a matter of general policy that did not entail a promise made specifically to the Claimants about the success of their proposed project.

244. The evidence in fact points to the contrary conclusion. A witness for the Claimants testified that two high-ranking corporate executives made two short trips to

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[114] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of May 25, 2004, para. 164).
[115] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, para. 154.
[116] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award of July 1, 2004, para. 183.
[117] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, para. 154.
[118] *See J*, Decision No. 349, World Bank Administrative Tribunal, 2006.
[119] Opening Statement of Ms. Carolyn Lamm, April 3, 2006, Hearing transcripts, Vol. 1, at 80–81.

Turkey, because they "wanted to meet with senior government officials, make sure they're aware of the Project, make sure that they viewed this as a beneficial development that they were happy to host in their country."[120] It thus appears that it was rather the Claimants who approached the Turkish Government.

245. In the present case, the Claimants contend, moreover, that the breach of fair and equitable treatment goes as far as to have reached the level of bad faith and have entailed the deliberate attempt by the Respondent to destroy the investment without paying compensation. The Tribunal, however, has found no evidence of bad faith or ultimately of a kind of conspiracy to take away legitimately acquired rights that could result in the deliberate termination of the Project. To that extent, the role of fair and equitable treatment in this case does not bring the standard near to expropriation or other forms of taking.

246. The Tribunal is persuaded nonetheless that the fair and equitable treatment standard has been breached, and that this breach is serious enough as to attract liability. Short of bad faith, there is in the present case first an evident negligence on the part of the administration in the handling of the negotiations with the Claimants. The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, are all manifestations of serious administrative negligence and inconsistency. The Claimants were indeed entitled to expect that the negotiations would be handled competently and professionally, as they were on occasion.

247. Secondly, there is a breach of the obligation to accord fair and equitable standard of treatment in light of abuse of authority, evidenced in particular, but not exclusively, by the discussion of the Claimants' application under Law 4501. As noted above, MENR's demands for a renegotiation went far beyond the purpose of the Law and attempted to reopen aspects of the Contract that were not at issue in this context or even within MENR's authority.

248. Inconsistent administrative acts are also evident in this case in respect of some matters. On occasion the administration would ignore rights granted by law as a matter

[120] Testimony of Mr. Robert Dougherty, April 6, 2006, Hearing transcripts, Vol. 4, at 815–16; Written Statement of Mr. Robert Dougherty, December 9, 2005, para. 9.

of policy or practice. This was particularly the case of the foreign branch corporate structure, recognized under the law, the Implementation Contract, the Letter of Undertaking and the Danıştay, but was nevertheless ignored by MENR from February 1998 onward when it demanded the establishment of a Turkish corporation. A witness for the Claimants testified that since 1996 "the various groups determining energy policy in Turkey have not worked harmoniously."[121]

249. Similar was the situation in respect of the Constitutional Court decision upholding the rights acquired under a contract, which was simply ignored by MENR in its dealings with the Claimants. Such inconsistent acts might be unlawful under Turkish law, but in light of the provisions of the Treaty they are also in breach of the standard of fair and equitable treatment.

250. Thirdly, the Tribunal also finds that the fair and equitable treatment obligation was seriously breached by what has been described above as the "roller-coaster" effect of the continuing legislative changes. This is particularly the case of the requirements relating, in law or practice, to the continuous change in the conditions governing the corporate status of the Project, and the constant alternation between private law status and administrative concessions that went back and forth. This was also the case, to a more limited extent, of the changes in tax legislation.

251. Even if some of these changes were introduced to facilitate investments and the conclusion of projects, and to that extent cannot be open to criticism under this standard, the administration again failed to address the consequences of such changes in the negotiations and to accommodate the factors in the equation under discussion, with particular reference to the commercial terms of the Project.

252. Various examples of the breach of fair and equitable treatment obligation are to be found in the record of this case. Among such breaches, the most prominent are indeed those that have been discussed earlier in connection with the administration's negligence in the handling of the negotiations with the Claimants: an abuse of authority by MENR, in particular with respect to the latter's demands for renegotiation in connection with the Claimants' application under Law 4501, and the numerous changes in the legislation and inconsistencies in the administration's practice, in particular with

[121] Third Written Statement of Mr. Ahmet Eltekin, February 18, 2005, para. 18; Reply Statement of Mr. Ahmet Eltekin, December 9, 2005, para. 8.

respect to the corporate status of the Project Company and the legal status of the concession.

253. The aggregate of the situations explained raise the question of the need to ensure a stable and predictable business environment for investors to operate in, as required not only by the Treaty but also by the Turkish Constitution as noted above. This is what the United States Technical Memorandum on the BIT had very much in mind when it referred to fair and equitable treatment as a standard "that can be invoked in arbitration to protect investments against possible vagaries of the host-Party's national laws and their administration."

254. The handling of the case shows the exact opposite. Stability cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation. While in complex negotiations, such as those involved in this case, many changes will occur beyond the control of the government, as was particularly the case with the increased costs, the issue is that the longer term outlook must not be altered in such a way that will end up being no outlook at all. In this case, it was not only the law that kept changing but notably the attitudes and policies of the administration.

255. While noting that no investor "may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged," the Tribunal in *Saluka* held that the investor can still expect that the conduct of the host State subsequent to the investment will be fair and equitable as the investor's decision to invest is based on "an assessment of the state of the law and the totality of the business environment at the time of the investment."[122]

256. Even if all the above conduct were to comply with good faith, which the Tribunal has no reason not to believe, there still would be an evident breach of the fair and equitable treatment standard under the Treaty, and under Turkish law. To the extent that this caused damage, compensation will of necessity be awarded.

[122] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, paras. 301, 305.

B. Was there a Breach of the Obligation to Provide Full Protection and Security?

257. The Claimants have also alleged a breach of the obligation to provide full protection and security as a separate heading of liability. This obligation is indeed embodied in Article II (3) of the Treaty. The Claimants have advanced two arguments in this respect. The first is that, following *CME*, full protection and security includes the adverse effects of the amendments of the law or administrative actions on the investment. The second argument is that, following *OEPC*, the breach of fair and equitable treatment automatically entails the absence of full protection and security. The Respondent opposes both arguments.

258. The Tribunal is mindful of the fact that this particular standard has developed in the context of the physical safety of persons and installations, and only exceptionally will it be related to the broader ambit noted in *CME*. To the extent that there is such an exceptional situation, the connection with fair and equitable treatment becomes a very close one.

259. The Tribunal does not find that in the present case there has been any question of physical safety and security, nor has any been alleged. Neither does the Tribunal find that there is an exceptional situation that could qualify under this standard as a separate heading of liability. The anomalies that have been found are all included under the standard of fair and equitable treatment discussed above. This heading of liability is accordingly dismissed.

C. Was there Arbitrariness or Discrimination?

260. The Treaty also provides in Article II (3) for protection against arbitrary and discriminatory measures that impair the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of the investment. This, the Claimants argue, occurred in the present case, particularly in respect of the repudiation of the Ministerial Approval and of the rights under the Contract, the refusal to reinstate such rights following the decision of the Constitutional Court, as well as in connection with the demands related to the application under Law 4501.

261. Again in this different context, the Tribunal finds that, to the extent supported by the facts, the anomalies that took place in connection with the conduct just referred to

are included in the breach of fair and equitable treatment and that there is no ground for a separate heading on liability on account of arbitrariness.

262. As far as discrimination is concerned, the Tribunal notes that all the measures adopted, rightly or wrongly, related to the whole array of BOT projects under consideration, as the Claimants themselves have repeatedly argued. Thus, it is quite evident that Konya Ilgın was not singled out in a discriminatory manner. The Claimants' argument about foreign investments having been discriminated against is equally not supported by the facts. The changes in macroeconomic policy that would have occurred concerned the economy as a whole. The question of foreign investment being particularly intense in the energy sector is a separate matter unrelated to the claim on discrimination. This heading of liability is accordingly also dismissed.

D. Was there a Breach of Obligations Entered into with Regard to the Investment?

263. The Claimants also argue that the Respondent has breached the obligation under Article II (3) of the Treaty to "observe any obligation it may have entered into with regard to investments," including therein not just the undertakings under the Contract but also a host of other commitments originating in the legislative, administrative and regulatory undertakings concerning the investment. Prominent among such alleged breaches is the failure to permit the Claimants to benefit from the laws enacted specifically to improve the financing of the Project, the failure to observe the regulatory undertakings under Article 8 of the Contract, and the failure to exercise the regulatory and administrative authority in good faith and in a reasonable manner.

264. As noted above, the Respondent asserts that under Article 8 of the Contract it had discretion to approve the revised tariff. The discretion contrasted with the more limited language of Article 5.1 of the Implementation Contract,[123] with the sole requirement of reasonable grounds, which the Respondent argues was amply satisfied in light of the public interest.[124] Judge Schwebel also concluded in this respect that

[123] Affidavit of Judge Harun Çetintemel, September 9, 2006, para. 11.
[124] Legal Opinion of Professor Zehreddin Aslan, September 14, 2005, para. 22; Legal Opinion of Professor Ender Ethem Atay, September 15, 2005, para. 22; Second Legal Opinion of Professor Ergun Özsunay, September 13, 2005, para. 12.

MENR "rejected Claimants' various tariff proposals for what it saw as reasonable grounds and that it did not do so roughly, abruptly, arbitrarily or capriciously."[125]

265. The Respondent further asserts that at all times it proceeded to negotiate in good faith and, as discussed above, there could be no liability attached to the failure to conclude an agreement if it was deemed to be too onerous for Turkey and if less expensive alternatives were available.[126]

266. The Tribunal concluded in its Decision on Jurisdiction that the existence of the Contract, its validity and binding effects were beyond doubt. The issue that was then left pending for the merits stage was whether the parties had reached agreement on any amendment to some important commercial terms of the Project. As noted above, the Claimants maintain that the parties were under an obligation to complete the negotiations and finalize the Project, while the Respondent asserts that the discretion envisaged in Article 8 was broad enough so as to allow for the disagreements that followed. The Tribunal has found above that important as the Feasibility Study and the Implementation Contract were, they were not self-contained as some of the essential commercial terms were still open to discussion, a conclusion that Article 8 of the Contract clearly corroborates.

267. Although negotiations on the commercial terms were pursued for a long time there is no decisive evidence about an agreement having been unequivocally reached. In view of the fact that the Contract provided for such negotiations to be carried forward, it follows that liability cannot be attached to the fact that agreement was not reached.

268. While a legal expert for the Claimants expressed the view that MENR's legal options were limited either to approve or disapprove on reasonable grounds,[127] this was hardly realistic to expect in a project as complex as this. In fact the Claimants were greatly interested in exhausting the possibilities of reaching a negotiated agreement.

269. It follows from the above that the Tribunal cannot conclude that there was a breach of the Contract obligations, except to the extent that the sixty-day time line for a rejection of the revised tariff was never complied with. Such a time limit was in any event not essential as both parties pursued negotiations for many more months and it

[125] Opening Statement of Judge Stephen Schwebel, April 4, 2006, Hearing transcripts, Vol. 2, at 332–35.
[126] Affidavit of Mr. Cumhur Ersümer, September 14, 2005, para. 11.
[127] Legal Opinion of Professor Sait Güran, December 9, 2005, para. 21.

could hardly be expected that it could be met in the context of a negotiation as complex as this.

270. The Tribunal has also found that while both parties were required under the Contract to pursue the negotiations on the additional agreements needed to complete the Project, such as the Treasury Guarantee, the Energy Sales Agreement and the Fund Agreement, such agreements were dependent upon the finalization of the commercial terms of the Contract, a key event that never occurred. It follows that, in spite of the fact that the Contract envisaged these agreements as a part of the overall commitments undertaken by the parties, compliance with such objectives could not be achieved irrespectively of or separately from the commercial terms.

271. A number of recent awards have extensively discussed the meaning of the "umbrella clause"[128] and there is no point for this Tribunal to go over this discussion again. In the context of the present dispute, it suffices to note that there are different views about whether a contract breach can be transformed into a treaty breach or should be handled differently as an ordinary commercial breach of contract.[129] As the Tribunal has not found a specific breach of obligations under the Contract, the issue does not arise in this case. Questions concerning the interference arising from the exercise of sovereign powers of the State have been discussed above in connection with the breach of fair and equitable treatment and are, in the light of the facts of this case, independent from contract rights.

E. Was the Investment Expropriated through Measures Tantamount to Expropriation?

272. Although the Claimants have not argued the existence of direct expropriation in this dispute, they have requested a finding of liability on account of the breach of Article III (1) of the Treaty in that various measures adopted are tantamount to expropriation and have resulted in indirect expropriation. Regulatory or creeping

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[128] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003; *SGS Société Générale de Surveillance S.A. v. Republic of Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction of November 19, 2004; *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of October 12, 2005.

[129] *Joy Mining Machinery Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction of August 6, 2004, paras. 78, 81.

expropriation, the Claimants recall, has been long accepted in the literature of international law and the decisions of international courts and tribunals.

273. Such measures can include, the Claimants assert, covert or incidental interference with the property resulting in the deprivation of economic benefits,[130] the taking of contract rights and the imposition of unreasonable regulatory regimes.[131] For the Claimants, the aggregate of measures taken in this case resulted in the termination of the Project and the complete destruction of the investment made.

274. The Respondent opposes such allegations on the ground that, as held by the tribunal in Feldman, "not every business problem experienced by a foreign investor is an indirect or creeping expropriation"[132] nor does the protection under the Treaty cover commercial risks.[133]

275. In the Respondent's view, the disputed actions were not expropriatory in nature as no rights under the Contract were taken and no vested rights arose from the Implementation Contract, which was only initialed and never signed, from the June 19, 1998 Ministerial Approval, which contained no contractual commitment, or from Law No. 4501, which gave no automatic rights to the conversion of contracts.

276. The Respondent further asserts that neither was there a deprivation of substantial rights, and the Claimants were free, and are still free, to pursue the proposed Project under the terms originally agreed in the Feasibility Study. However, the Claimants chose to abandon the Project even before the actual alleged date of expropriation.

277. In any event, the Respondent argues that, as held in *OEPC*, the deprivation must affect a significant part of the investment, which was also the reason that led the Tribunal in *Noble Ventures* to conclude that no viable company or valuable assets were concerned in the actions taken in that case.[134] Given that the Respondent asserts that the Project had no economic viability, no value could have been affected by its actions.

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[130] *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of August 6, 2004, para. 103.

[131] *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002, at par 103; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, para. 603.

[132] *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002, para. 112.

[133] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, (ICSID Case No. ARB/99/6), Award of April 12, 2002, para. 153.

[134] *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of October 12, 2005, para. 216.

278. The Tribunal has no doubt that indirect expropriation can take many forms. Yet, as the tribunal in *Pope & Talbot* found, there must be some form of deprivation of the investor in the control of the investment, the management of day-to day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.[135]

279. The Tribunal is not persuaded that any such extreme forms of interference took place in this case. Many things were wrongly handled, but none could be considered to amount to regulatory expropriation. The rights that were affected one way or the other, including the Claimants' legitimate expectation, have indeed resulted in a finding of breach of the standard of fair and equitable treatment, yet none of the measures adopted envisaged the taking of property, which is still the essence of expropriation, even indirect expropriation. Although measures tantamount to expropriation may well make the question of ownership irrelevant,[136] it does require a strong interference with clearly defined contract rights that in this case were in the end incomplete.

280. The Tribunal accordingly concludes that the Respondent has not breached Article III (1) of the Treaty. This conclusion does not mean that there was no value of property or rights affected, but this is a separate question that the Tribunal will address next in the assessment of damages.

IV. Damages and Compensation

A. Claims

1. *The Claim for Compensation of Damages*

281. In the Claimants' view, the Respondent's violations of the BIT were so severe as to deprive them of the value of their entire investment in the Project, thus resulting in the complete loss of the benefit of such investment and of the value of the contract rights. The Claimants accordingly request, in light of the *Chorzów Factory* case, the full reparation for the injuries caused so as to "as far as possible, wipe out all the

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[135] *Pope and Talbot, Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, para. 100.
[136] *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of April 30, 2004, para. 143.

ANNEX 401

International Centre for Settlement of Investment Disputes

IOAN MICULA,
VIOREL MICULA,
S.C. EUROPEAN FOOD S.A.,
S.C. STARMILL S.R.L.
AND
S.C. MULTIPACK S.R.L.

CLAIMANTS

v.

ROMANIA

RESPONDENT

ICSID Case No. ARB/05/20

AWARD

Rendered by an Arbitral Tribunal composed of:

Dr. Laurent Lévy, President
Dr. Stanimir A. Alexandrov, Arbitrator
Prof. Georges Abi-Saab, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Assistant to the Tribunal
Ms. Sabina Sacco

Date of Dispatch to the Parties: 11 December 2013

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664. According to the Respondent, "[a]ll of this belies any suggestion that Messrs Micula made investment decisions relying upon a belief that the facilities would remain unchanged until 2009. Indeed, the investment expansions in 2005 and thereafter cannot possibly assist the Claimants' legitimate expectations arguments: they espoused, rather than avoided, Romania's regulatory framework" (R-CM, ¶ 131).

c. The Tribunal's analysis

i. The standard to determine whether a legitimate expectation has been breached

665. As the Respondent puts it, the key issue before the Tribunal is "who bore the risk of regulatory change: the state or the investors who benefitted from the existing regulatory regime" (R-Rejoinder, ¶ 9).

666. In the Tribunal's view, the fair and equitable treatment standard does not give a right to regulatory stability *per se*. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability. Thus, the Claimants' "regulatory stability" argument must be analyzed in the context of the protection of an investor's legitimate expectations.

667. Cases supporting the doctrine of legitimate expectations are numerous. As noted by Dolzer and Schreuer, the protection of legitimate expectations is by now "firmly rooted in arbitral practice."[132] Although the question of whether these legitimate expectations were breached is a factual one, an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation.[133]

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[132] Dolzer & Schreuer, p. 134.

[133] See, e.g., *Saluka v. Czech Republic*, ¶¶ 302 (The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations"); *Tecmed v. Mexico,* ¶ 154 (where the tribunal found that the obligation to provide "fair and equitable treatment" meant "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment"); *CME v. Czech Republic*, ¶ 611 (where the tribunal concluded that the Czech authority "breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon with the foreign investor was induced to invest"); *Waste Management v. Mexico II*, ¶ 98 ("In applying [the 'fair and equitable treatment'] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."); *International Thunderbird v. Mexico*, ¶ 147 ("[t]he concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages")

668. The Parties agree that, in order to establish a breach of the fair and equitable treatment obligation based on an allegation that Romania undermined the Claimants' legitimate expectations, the Claimants must establish that (a) Romania made a promise or assurance, (b) the Claimants relied on that promise or assurance as a matter of fact, and (c) such reliance (and expectation) was reasonable.[134] This test is consistent with the elements considered by other international tribunals.[135]

669. In the Tribunal's view, elements (a) and (c) are related. There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability. It is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance. The element of reasonableness cannot be separated from the promise, assurance or representation, in particular if the promise is not contained in a contract or is otherwise stated explicitly. Whether a state has created a legitimate expectation in an investor is thus a factual assessment which must be undertaken in consideration of all the surrounding circumstances.

670. In this regard, the Tribunal subscribes to the view of the tribunal in *Duke Energy v. Ecuador* (quoted in *Bayindir v. Pakistan,* ¶ 179):

> The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment [*Tecmed,* ¶ 154; *Occidental,* ¶ 185; *LG&E,* ¶ 127]. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest [*SPP v. Egypt*[136]*,* ¶ 82; *LG&E,* ¶¶ 127-130; *Tecmed,* ¶ 154].[137]

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[134] In their final briefs, both Parties refer to the reasonableness of the reliance, although Romania at first had focused on the reasonableness of the expectation. In the Tribunal's view, both must be reasonable, but in particular the expectation itself.

[135] For example, the late Prof. Thomas Wälde explained that a claim of legitimate expectations required "an expectation of the investor to be caused by and attributed to the government, backed-up by investment relying on such expectation, requiring the legitimacy of the expectation in terms of the competency of the officials responsible for it and the procedure for issuing it and the reasonableness of the investor in relying on the expectation" (*International Thunderbird v. Mexico,* Separate Opinion of Thomas Wälde, 1 December 2005, ¶ 1). It must be noted that Prof. Wälde did not dissent on the standard, but rather on the application of that to the facts of the case).

[136] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award, 20 May 1992 (hereinafter *"SPP v. Egypt"*).

[137] *Duke Energy v. Ecuador*, ¶ 340. *See also Generation Ukraine v. Ukraine*, ¶ 20.37 ("it is relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations").

671. This promise, assurance or representation may have been issued generally or specifically, but it must have created a specific and reasonable expectation in the investor. That is not to say that a subjective expectation will suffice; that subjective expectation must also have been objectively reasonable. As stated by the *Saluka* tribunal, "the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances."[138]

672. The Claimants must also have relied on that expectation when they made their investments. However, it is not necessary for the entire investment to have been predicated solely on such expectation. Businessmen do not invest on the basis of one single consideration, no matter how important. In the Tribunal's view, that expectation must be a determining factor in an investor's decision to invest, or in the manner or magnitude of its investments.

673. When the alleged legitimate expectation is one of regulatory stability, the reasonableness of the expectation must take into account the underlying presumption that, absent an assurance to the contrary, a state cannot be expected to freeze its laws and regulations. As noted by the *Saluka* tribunal, "[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."[139] Accordingly, for a state to violate the fair and equitable treatment standard by changing the regulatory framework, the investor must have received a legitimate assurance that the relevant laws and regulations would not be changed in his or her respect. By legitimate assurance, the Tribunal refers to the considerations identified in paragraph 669 above.

ii. Did Romania make a promise or assurance that gave rise to a legitimate expectation?

674. In Section A on the umbrella clause, the Tribunal found that the EGO 24 framework, in conjunction with the PICs, created a specific entitlement for the Claimants, according to which they were entitled to receive the incentives until 1 April 2009. To recall, the Tribunal found that EGO 24 created a general scheme of incentives available to investors who fulfilled certain requirements, which were later "granted" to qualifying investors through a specific administrative act (the PIC). In other words, the legislation created a generalized entitlement that could be claimed by qualifying investors, but this general entitlement was later crystallized with respect to qualifying investors through the granting of the PICs, becoming from that moment on a specified entitlement with respect to specified investors.

138 *Saluka v. Czech Republic*, ¶ 304.

139 *Id*, ¶ 305.

675. Although the majority of the Tribunal found that it had insufficient evidence as to whether that entitlement gave rise to a legal obligation for purposes of the umbrella clause, it stated that the same set of facts could give rise to a breach of the fair and equitable treatment standard, if it found that the EGO 24 framework, in conjunction with the PICs, provided the Claimants with the legitimate expectation that they would be entitled to receive the incentives until 1 April 2009.

676. Another question remained open in the majority's analysis of the umbrella clause: whether there was an element of stabilization in the EGO 24 framework (in other words, whether PIC holders (including the Claimants) were entitled to receive the incentives in the same form (or substantially the same form) as when they were first given their PICs during the entire period, regardless of changes in the Romanian legislation). Although the majority of the Tribunal was not able to answer that question as a matter of Romanian law, it will do so now as a matter of fair and equitable treatment.

677. After a review of all of the facts and circumstances surrounding the Claimants' investment and Romania's enactment of EGO 24 and related legislation, the Tribunal (again by majority[140]) answers both questions in the affirmative. For the reasons set out below, it finds that, even from an objective standpoint the legislative framework in Romania between the years 1998-2002 (taking into consideration EU law, as it applied to Romania at the time), together with the PICs, instilled in the Claimants a legitimate expectation that they would be entitled to the EGO 24 incentives, in substantially the same form as when they received their PICs, until 1 April 2009. Specifically, the Tribunal finds that, through an interplay of the purpose behind the EGO 24 regime, the legal norms, the PICs, and Romania's conduct, Romania made a representation that created a legitimate expectation that the EGO 24 incentives would be available substantially in the same form as they were initially offered.

678. First, the purpose behind the EGO 24 regime was to attract investment in the disadvantaged areas, preferably long-term investment that created employment. In the context in which this legislation was passed, it is evident that Romania was eager to attract investment in order to boost its economy and work towards EU accession. If Romania had spelled out that it retained the right to eliminate the incentives at its discretion, despite the stated duration term for the incentives, Romania likely would not have achieved its objective of attracting investment. Investors require legal certainty, and Romania knew this full well, otherwise it would not have specified in several different documents that the incentives would be available during the period in which Ştei-Nucet was declared a disadvantaged area. Indeed, it is evident from Romania's conduct that it intended for the regime to remain in place until 1 April 2009 and, absent the EU's intervention, this is what would have happened, as discussed further below.

[140] Arbitrator Abi-Saab does not concur with this view, as expressed in his separate opinion.

679. <u>Second</u>, the regime required a certain *quid pro quo* from the investors. As specified in EGO 24 itself and in the Methodological Norms, investors had to fulfill certain requirements to obtain their PIC, and undertook certain obligations:

a. Investors were required to create employment. The 2001 Methodological Norms required 10 employees, 5 of which must have been previously unemployed (Article 4(4) of the 2001 Methodological Norms).

b. Investors were required to create new investments. In this regard, Article 6(1) of EGO 24 provided that the facilities would be granted to qualifying investors "for their new investments in [the disfavoured] regions." Only three of the Claimants' companies benefitted from the EGO 24 incentives, but the Claimants have argued (and Romania has not disputed) that for each new investment they had to submit an investment plan and amend their PIC.

c. PIC holders had to undergo substantial monitoring to continue receiving the incentives under their PICs (Articles 14 and 16 of the 1999 Methodological Norms, Articles 6, 8, 14 and 15 of the 2001 Methodological Norms). Indeed, the Claimants' witnesses have described audits and monitoring procedures that seem to go beyond what is provided in the Methodological Norms, but it is not surprising that actual administrative procedures were more detailed than the relevant norms set out. The Respondent has not challenged these descriptions.

d. Investors were required to maintain their investments in the disadvantaged area for at least twice the time they benefitted from the incentives (Articles 7 and 9 of EGO 24).

680. This last obligation was set out in Articles 7 and 9 of EGO 24, as follows:

> Art. 7. - If an investment which is benefiting from the provisions of the present Emergency Ordinance is ***voluntarily liquidated in a period of time shorter than twice the period of time in which they enjoyed the advantages*** granted through the Government Decision to create the underprivileged area, ***the liquidator(s) is/are obligated first to pay the funds related to the advantages*** granted in accordance with the provisions of the present Emergency Ordinance, to the State Budget, the State Social Insurance Budget and the Special Funds Budgets from the funds resulting from the liquidation procedure.
>
> Art. 9. - Businesses established in a disadvantaged area ***may voluntarily cease to operate in the respective area***, and those opening subsidiaries as legal entities in such an area may ***close them or move the location of their headquarters out of the disadvantaged area in a period shorter than the one provided in Art. 7 only if they pay the funds they owe*** to the State Budget, the State Social Insurance Budget and the Special Funds Budgets ***related to the advantages granted*** in accordance with the provisions of the present Emergency Ordinance. (Emphasis added)

681. Thus, Articles 7 and 9 of EGO 24 put investors on notice that, if they planned to benefit from the incentives for the full period they were offered, they had to be prepared to make long-term commitments and investments in the region, and make

sure that their investments would continue to be profitable without the incentives when the incentives were no longer available.

682. Third, the Respondent did not merely "trim down" the incentives, as the Respondent contends. It is true that the incentives were amended several times, and that by 2002 the Machinery Incentive had been eliminated and the Raw Materials Incentive could not apply to raw materials for the production, processing and preservation of meat. (The Profit Tax Incentive had also been eliminated but grandfathered for existing PIC holders). However, three of the original six incentives remained (four counting the grandfathered Profit Tax Incentive). These three remaining incentives (other than the Profit Tax Incentive) were eliminated by EGO 94/2004. Therefore, the incentives were virtually eliminated rather than simply modified or amended.

683. Specifically, Chapter II, Section 3, Article VI(2) of EGO 94/2004 provided (Exh. R-94):

> Art. VI. - Emergency Government Ordinance no. 24/1998 on Less-Favoured Areas, republished in the Official Gazette of Romania, Part I, Issue 545 of 8 November 1999, as subsequently amended and supplemented, shall be amended and supplemented as follows:
>
> 1. After paragraph (1) of Article 14^1 insert a new paragraph, paragraph (1^1) with the following content:
>
> "(1^1) In calculating the intensity of State aid, eligible costs related to investments made before 15 September 2004 shall be taken into account."
>
> 2. Article 6(1)b)d) and e) shall be repealed within 90 days from the date of entry into force of this Ordinance."

684. As can be seen from the text of EGO 94/2004, the amendment eliminated the incentives and added rules for the calculation of the intensity of state aid. In turn, it left in place all remaining provisions of the regime, including its obligations, which is however disputed. In turn, this stripped EGO 24 of most of its practical content and reduced almost to nothing its advantages given that the purpose of the regime for disadvantaged areas was to attract investment in exchange for certain tax benefits. After EGO 94/2004, the only tax benefit that remained was the Profit Tax Incentive, and only for existing PIC holders. This is not a "trimming down" of the incentives. It was an outright termination.

685. The Tribunal thus finds that Romania's representation that the EGO 24 incentives would be available to PIC holders until 1 April 2009 meant that the Claimants would continue to benefit from substantially the same incentives that were available when the Claimants obtained their PIC.

686. As stated above, the Tribunal considers that, in determining whether the Claimants had a legitimate expectation, it must take account of the accepted principle that Romania is free to amend its laws and regulations absent an assurance to the contrary. However, in this case the Tribunal finds that Romania's conduct had included an element of inducement that required Romania to stand by its statements and its conduct. Romania launched a program directed to attract investors to the

disfavored regions. To obtain that investment, it offered certain tax benefits for a certain amount of time. In other words, Romania created the appearance of a ten-year tax holiday for investors who decided to invest in the disadvantaged area (and this appearance conformed to what Romania did in fact wish to enact). The Tribunal has noted in particular that the former president of the NARD, Mr. Neculai Liviu Marcu, testified that the incentives were to be understood to be granted for the full duration of the disadvantaged area (WS of Mr. N. Marcu, ¶¶ 28, 32; Tr., Day 7, 15:2-9 (Marcu)). In the Tribunal's view, Romania thereby made a representation that gave rise to the PIC holders' legitimate expectation that during this tax holiday they would receive substantially the same benefits they were offered when they committed their investments.

687. What is at stake is not Romania's regulatory sovereignty, which is not to be questioned. However, it cannot be fair and equitable for a state to offer advantages to investors with the purpose of attracting investment in an otherwise unattractive region, require these investors to maintain their investments in that region for twice the period they receive the investments, and then maintain the formal shell of the regime but eviscerate it of all (or substantially all) content.

688. The record shows that Romania itself shared that belief. It did all it could to preserve the incentives regime through its accession negotiations (*see* Section 4 below). Whether or not it felt committed to existing PIC holders, it certainly wished to maintain the regime for as long as possible and publicly stated so. Romania thereby created the legitimate expectation that the regime would not be repealed or fundamentally altered during the duration of each PIC.

689. Romanian officials also stated that investors would be compensated if the regime were repealed or fundamentally altered. In particular, in his interview in May 2004 (Exh. C-652), Prime Minister Nastase indicated that during its negotiations with the European Union, Romania would see if it was "able to obtain some transition periods" for PIC holders, as well as "some compensation packages, established during direct negotiations." The Prime Minister also stated that the government would talk to the investors, and "based on the conclusions of the negotiations of the Competition Chapter, we will negotiate with those who initially obtained these fiscal incentives" (Exh. C-652, pp. 7-9 of translation). These statements confirm that Romania itself understood that the EGO 24 regime was to last for 10 years, and that in repealing it prematurely Romania was undermining PIC holders' legitimate expectations and causing them to suffer damages.

iii. Was this expectation reasonable?

690. In broad terms, the Tribunal will analyze the reasonableness of the Claimants' expectation from two perspectives: (i) the legitimacy of the expectation in the context of Romania's accession to the EU, and (ii) the legitimacy of the expectation under Romanian law.

(a) Reasonableness in the context of Romania's Accession to the EU

691. After a careful review of the record, the Tribunal has come to the conclusion that between 1998 and late 2003 it was reasonable for the Claimants to believe that the EGO 24 incentives were compatible with EU law. The Tribunal agrees with Prof. Dashwood's conclusion that "a strong case can be made that the Romanian authorities were justified in treating the disputed aid as a valid regional operating aid, up until the moment when they abolished it" (ER of A. Dashwood ¶ 55).

692. There seems to be no dispute that, throughout the period during which the Claimants received the EGO 24 incentives (that is, from receipt of European Food's TIC in 1999 until the incentives were abolished in February 2005), the EGO 24 scheme was subject to the state aid regime of the Europe Agreement (which was the operative pre-accession treaty; ER of A. Dashwood, ¶ 31). As explained by Prof. Dashwood (with no convincing rebuttal by Romania's experts), under the Europe Agreement regime, the substantive rules to assess the compatibility of the EGO 24 incentives with the common market were the substantive rules of the EU state aid regime contained in Article 87 of the EC Treaty (through the operation of Article 64(2) of the Europe Agreement), as amplified by case law and Commission practice, and as subsequently clarified by the Implementing Rules that were annexed to Decision 4/2000 of the Romania-EU Association Committee (Exh. R-65; C-579).

693. Article 64 of the Europe Agreement provides in relevant part:

> 1. The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and Romania: [...] (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.
>
> 2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86, and 92 of the Treaty establishing the European Economic Community.
>
> 3. The Association Council shall, within three years of the entry into force of the Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.
>
> 4. (a) For the purposes of applying the provisions of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Romania shall be assessed taking into account the fact that Romania shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Romania, decide whether that period should be extended by further periods of five years. [...]

694. Article 64 of the Europe Agreement incorporated Article 87 of the EC Treaty, which is the primary source of the EU's substantive rules on state aid. Article 87(1) of the EC Treaty contains the general principle that "any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall,

in so far as it affects trade between Member States, be incompatible with the common market." However, Article 87(3)(a) (which replaced Article 92(3)(a) of the Treaty establishing the European Economic Community) expressly permitted "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment."

695. In turn, Art. 64(4)(a) of the Europe Agreement expressly stated that all of Romania would be considered an underdeveloped area for purposes of Article 87(3)(a) of the EC Treaty for the first five years after the entry into force of the Europe Agreement:

> For the purposes of applying the provisions of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Romania shall be assessed taking into account the fact that Romania shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Romania, decide whether that period should be extended by further periods of five years. [...] (Art. 64(4)(a) of the Europe Agreement).

696. Article 64(3) of the Europe Agreement provided that "[t]he Association Council shall, within three years of the entry into force of the Agreement, adopt the necessary rules for the implementation of paragraphes 1 and 2." With some delay, on 10 April 2001, the EU-Romania Association Council adopted Decision 4/2000 which contained these "Implementing Rules", Exh. R-65; C-579), which prescribed the manner in which Article 64 of the Europe Agreement would be implemented by Romania.[141]

697. Article 2(1) of the Implementing Rules provided that "[t]he assessment of compatibility of individual aid awards and programmes with the Europe Agreement, as provided for in Article 1 of these Rules, shall be made on the basis of the criteria arising from the application of the rules of Article 87 of the Treaty establishing the European Community, including the present and future secondary legislation, frameworks, guidelines and other relevant administrative acts in force in the Community, as well as the case law of the Court of First Instance and the Court of Justice of the European Communities and any decision taken by the Association Council pursuant to Article 4(3)."

698. The criteria applied by the European Commission when examining the Article 87(3)(a) exception were set down in the 1998 Guidelines on Regional Aid (first published in 1998 (Exh. RJ-9) and since replaced by a revised version for the years 2007-2013) (Exh. C-298).

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[141] Article 4(1) of the Implementing Rules also extended the time period in which Romania would be considered an underdeveloped area pursuant to Article 64(4)(a) of the Europe Agreement:

> In accordance with and within the limits of Article 64(4)(a) of the Europe Agreement, Romania shall be regarded as an area identical to those areas of the Community referred to in Article 87(3)(a) of the Treaty establishing the European Community. (Article 4(1) of Decision 4/2000).

699. The Guidelines on Regional Aid distinguished between various types of state aid, and described the circumstances under which certain state aid could be granted, including where the economic situation was extremely unfavorable in relation to the Community as a whole. In such cases, the aid could be granted as tax exemptions. In addition, although operating aid aimed at reducing a firm's current expenses is normally prohibited, the Guidelines recognize that, exceptionally, such aid may be granted in regions eligible under the derogation in Article 87(3)(a), subject to certain conditions. Specifically, the 1998 EU Guidelines on Regional Aid (RJ-9) provided:

> Operating aid
>
> 4.15. Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 92(3)(a) provided that (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate (36). It is for the Member State to demonstrate the existence of any handicaps and gauge their importance.
>
> 4.16. In the outermost regions qualifying for exemption under Article 92(3)(a) and (c), and in the regions of low population density qualifying either for exemption under Article 92(3)(a) or under 92(3)(c) on the basis of the population density test referred to at point 3.10.4, aid intended partly to offset additional transport costs (37) may be authorised under special conditions (38). It is up to the Member State to prove that such additional costs exist and to determine their amount.
>
> 4.17. With the exception of the cases mentioned in point 4.16, operating aid must be both limited in time and progressively reduced. In addition, operating aid intended to promote exports (39) between Member States is ruled out.

700. The Tribunal agrees with Prof. Dashwood that the EGO 24 incentives appeared to meet most of the criteria for regional operating aid set forth in the 1998 Guidelines (ER of A. Dashwood, ¶¶ 52-53). Specifically:

a. EGO 24/1998 was created to contribute to regional development, and there is evidence that it did in fact contribute to such development.

b. The level of disputed aid appears to have been proportional to the handicaps of the disadvantaged areas that the aid was designed to alleviate, and the Romanian government could have been able to demonstrate this.

701. The only unsatisfied criterion would be its "non-degressive character" (i.e., the fact that the EGO 24 incentives were not meant to be progressive, as mandated by Article 4.17 of the 1998 Guidelines). However, given the level of unemployment in the Ştei-Nucet-Drăgăneşti area Prof. Dashwood did not consider it a determinative factor (ER of A. Dashwood, ¶ 54).

702. Neither the Respondent nor its experts contested Prof. Dashwood's conclusions persuasively, and the Tribunal finds Prof. Dashwood's assessment reasonable.

703. As a result, the Tribunal concludes that the EGO 24 incentives could have reasonably been thought (both by the Romanian government and the Claimants) to be valid regional operating aid under EU law. Indeed, Romania itself appears to have believed that, at the time EGO 24 was enacted, the incentives were compatible with EU state aid requirements. In its Counter-Memorial, Romania stated:

> Especially given Romania's status as an 'underdeveloped area' within the meaning of Article 87(3)(a) of the EC Treaty, the government could reasonably conclude at the time that the EGO 24/1998 regime was not incompatible with the Europe Agreement's provisions. Furthermore, given the economic dislocation that existed at the time, measures to ameliorate conditions in the disfavoured regions were necessary. Romania was not alone among EU candidate States in making the policy choice to implement new economic-assistance measures based upon such an assessment of the legal position. For example, Poland passed similar legislation authorizing State aid for underdeveloped regions in 1994, while it was a candidate for EU admission (R-CM, ¶ 29).

704. Similarly, in its comments to the Commission's Written Submission, Romania acknowledged that:

> The facilities in EGO 24/1998 appeared to be regional aid for economically disadvantaged areas. Thus, EGO 24/1998 was reasonably considered as falling within the exceptions in Article 87(3)(a) and 87(3)(c) EC Treaty. (Respondent's Comments to the Commission's Written Submission, 16 Nov. 2009, ¶ 2).

705. Romania's expert, Prof. Rudolf Streinz confirms the reasonableness of that position:

> In my opinion, in 1998 and particularly in the absence of effective State aid control and support from the European Commission, Romania could, in the exercise of its discretion, reasonably have considered that the EGO 24/1998 regime fell under one of the State aid exceptions of the EC Treaty [...]. For example, Romania, having been designated in its entirety in Article 64(4) of the Europe Agreement as underdeveloped within the meaning of Article 87(3)(a) of the EC Treaty, could have considered itself permitted to enact EGO 24/1998. EGO 24/1998 provided for State aid to foster economic development of areas – i.e. the whole of Romania – where the standard of living was abnormally low or where there was serious underemployment. Alternatively, Romania might have considered that the State aid granted pursuant to EGO 24/1998 was exempt under Article 87(3)(c), because the regime amounted to assistance of regions which are disadvantaged compared to the national average, based on national criteria (First ER of R. Streinz, ¶ 19).

706. As expressly acknowledged by Romania, many government officials maintained this "sincere belief" until after the Competition Council issued Decision 244 in 2000, and the Respondent's expert Mr. Petersen acknowledged that "Romanian politicians and officials who thought that EGO 24 was legal were incorrect, but they were not unreasonable, and they acted in good faith" (R-PHB, ¶ 174, Tr., Day 6, 111, 178). The Tribunal does not believe that investors should be held to a higher standard than the government. Investors are entitled to believe that the government is acting legally.

707. The question is when should the Claimants have realized that the incentives were (or became) vulnerable because they contravened EU law and, as a consequence, at what time they might be phased out. As late as June 2002, Romania's "National Programme for Accession of Romania to the European Union" (Exh. HEC-7) stated that "[t]he provisions of the normative acts on facilities granted for 'D areas' will be maintained till the moment of Romania's accession to the European Union" (p. 148). Mr. Orban testified that this was Romania's intention, and that it "battled a lot with the Commission to get this" (Tr., Day 8, 219-220 (Orban)). Indeed, when asked when it should have been clear to the public that the facilities would not survive, Mr. Orban testified that it could have been as late as April/May 2004 (Tr., Day 8, 12-14 (Orban)).

(b) Reasonableness under Romanian law

708. Determining whether the Claimants' expectations were reasonable under Romanian law is less straightforward. On the one hand, the Claimants argue that the purpose of EGO 24 and its enacting legislation, as well as the issuance and content of the PICs, made their expectations reasonable. Romania argues that, to the contrary, nothing in the regulation and the PICs themselves assured the Claimants that the incentives would remain in place for 10 years. However, the Tribunal has already found that the content of the legislation and the PICs themselves gave rise to a legitimate expectation that the incentives would last until 1 April 2009.

709. On the other hand, Romania argues that the regulatory framework as it existed at the time of the Claimants' alleged investment in reliance on Romania's assurances (from 2000 to 2004, if the issuance of European Food's PIC is taken as starting point) contemplated the possibility that the incentives could be subject to repeal. Romania argues that the incentives could have been revoked as a matter of general administrative law, or because in 1999, prior to the issuance of the PICs, Romania passed the Competition Law, which allowed the Competition Council to determine whether any existing aid was compatible with the Europe Agreement and, if it was not compatible, to recommend cancellation of such aid and request its repayment (Articles 12-13 of the Competition Law). In Romania's submission, the fact that Romanian legislation allowed the Competition Council to recommend the revocation of the incentives undermines the reasonableness of any expectation that these incentives would remain unchanged for 10 years. Indeed, Romania argues that this is exactly what the Competition Council did with Decision 244/2000.

710. In the Tribunal's view, two distinct but related issues must be analyzed: (i) the possibility that the incentives would be found incompatible with Romanian law, and (ii) Romania's interaction with the Competition Council with respect to Decision 244/2000.

711. With respect to the first point, the Respondent argues that, under the existing regulatory framework, the incentives were inherently subject to the Competition Council's review and possible cancellation. Thus, the fact that the fate of all existing legal aid could depend on a decision by the Competition Council weakens any reasonable belief that any incentives would remain unchanged for any particular

period of time. In other words, the Claimants should have known, when they obtained the PICs, that the incentives could be at any time declared by the Competition Council to be incompatible with Romanian law.

712. This proposition cannot be sustained. Any piece of legislation must comply with higher ranking norms. That does not change the fact that enacted rules are supposed to be valid and enforceable for so long as they have not been repealed or annulled. Law-abiding actors may not violate enacted laws or regulations because they question their validity or legality: they may know that such validity or legality is debatable, and seek appropriate relief in court or otherwise, but, in the meantime, they must obey the law. Romania has not argued that the incentives were illegal or that there were any doubts as to their legality. In other words, the possibility of cancellation of the incentives by order of the Competition Council is in itself not a valid argument.

713. With respect to the second point, on 15 May 2000, the Competition Council issued Decision 244/2000, which recommended that the Raw Materials Incentive be abolished. However, the Romanian Government (with the approval of the judiciary) overruled this decision, and thus confirmed the incentives' legality under Romanian law.

714. The Claimants' expectation that the incentives were compatible with Romanian law was particularly reasonable given the sequence of events with respect to the process surrounding Decision 244 and the granting of the Claimants' PICs. Decision 244 was rendered on 15 May 2000, European Food's PIC was issued on 1 June 2000, and EGO 75/2000 (which amended EGO 24 but maintained the Raw Materials Incentive) was enacted on 16 June 2000. The Competition Council brought a law suit against the Government, which the High Court of Cassation dismissed on admissibility grounds on 19 February 2002. Multipack and Starmill's PICs were issued on 17 May 2002.

715. In the Tribunal's view, given that the Government, in this case through Parliament, did not follow the Competition Council's recommendation to abolish the incentives, and decided instead to confirm them via new legislation (EGO 75/2000), and immediately afterwards issued the Claimants PICs confirming their eligibility for the questioned incentives, it was reasonable for the Claimants to believe that the Government considered that such incentives were legitimate and intended to maintain them for the stated period. The fact that the Competition Council sought to enforce Decision 244 in Romanian courts and that its action was dismissed by the original and appellate courts, further enhances the notion that the Government (at its legislative and judicial level) endorsed the legitimacy of the incentives. In other words, the Government implicitly confirmed the incentives' legality under Romanian law.

716. The fact that the court action was dismissed on admissibility grounds does not change this conclusion. Indeed, by determining that the Competition Council did not have the power to challenge legislative acts, the courts merely confirmed that, as a matter of Romanian law, the existence and legitimacy of the incentives depended on

Parliament, not on the Competition Council. And as a matter of Romanian law, the Claimants were entitled to rely on the assumption that the incentives were legal. The fact that Starmill and Multipack received their PICs after the challenge was dismissed further confirms that it was reasonable for the Claimants to believe that the incentives were legitimate.

717. In conclusion, the Tribunal finds that it was reasonable for the Claimants to believe that the incentives were legal under Romanian law and would be maintained for the full 10 year period.

iv. Did the Claimants in fact rely on that expectation?

718. There is no dispute that the Claimants invested in Bihor County, and that they made use of the incentives. However, it is also evident from the record that their initial investments were not made in reliance on the EGO 24 incentives, because they began to invest in the early 90s, before these incentives were created. Indeed, the Claimants concede that their initial investments were made in reliance on previous incentive regimes (R-Reply, ¶¶ 62-124). The Claimants have also stated that their expectation that the Raw Materials Incentive would be available for 10 years arose when the PICs (or TIC, in the case of European Food) were granted (Tr., Day 12, 91 (Reed)). In the Tribunal's view, a legitimate expectation could only have been crystallized at the time when the Corporate Claimants were granted their permanent investor certificates, not temporary certificates. A temporary certificate is, by its own nature, granted only for a limited time and does not necessarily guarantee that a permanent certificate will be issued. A TIC can give rise to an expectation that its beneficiary is temporarily entitled to some benefits but not that the permanent certificate will actually be issued as the beneficiary will have to prove that, in the meantime, it has satisfied some conditions. Thus, the only investments that could have been made in reliance on that expectation are those made after European Food obtained its PIC in June 2000, and after Starmill and Multipack obtained theirs in May 2002. Whether the Claimants relied on previous incentive programs neither proves their reliance on the EGO 24 incentives nor strengthens their reliance argument.

719. In addition, there is evidence that, further to the EGO 24 incentives, there were other reasons why the Miculas invested in Bihor County. The Tribunal recalls that, according to Mr. Viorel Micula's cross-examination, there were other reasons for the Claimants' investment in Bihor apart from the availability of the Raw Materials Facility for the planned 10 year period until 2009. Mr. Viorel Micula testified as follows:

> Q. Mr Micula, let's not beat around the bush. I will read out a proposition to you and you tell me if you agree. Your investment in Bihor in the European Food and Drinks Group only made economic sense if you could count on the benefits of the raw materials facility for the planned ten-year period until 2009, is that correct? Is it true to say that your investment makes economic sense only if you have the raw materials facility?
>
> A. It is wrong, Mr Petrochilos. I think no one, either myself or my brother who knew about this leverage had made such a mistake. That would have been a big mistake. Maybe you made that mistake.

(Tr., Day 6, 279 (Petrochilos/V. Micula)).

720. In addition, the Micula brothers were born in Bihor County and Ioan Micula conceded that that there was "a very emotional drive" behind their business initiative (Tr. Jur., Day 2, 23). However, he also stated that "it was not just a question of us being born there, it was also a question of long-standing facilities and exemptions that have been there for a very long time and many of them are still there" (Tr. Jur., Day 2, 54).

721. Taking all of this into consideration, it is clear that (i) not all of the Claimants' investments were predicated on the EGO 24 incentives; and (ii) even when the Claimants' took the EGO 24 incentives into account in making investment decisions, other factors also influenced the Claimants' decisions. However, the Tribunal is satisfied that a significant part of the Claimants' investments (from 2000 to 2004) were made in reliance on the incentives. In particular, the Tribunal is satisfied that the existence of the incentives was one of the reasons for the scale and manner of those investments. It is evident from the record that the Claimants built a large and complex platform for the production of food and drink products, and that its profits depended largely on the reduction of their operating costs resulting from the Raw Materials Incentive (Third WS of I. Micula, ¶¶ 44-67, 83-84; Third WS of V. Micula, ¶ 33, 51-52; WS of M. Ban ¶ 38; WS of M. Halbac, ¶¶ 12-61; First ER of D. Lessard, ¶¶ 32-42; ER of R. Boulton, Sections 4 and 5; ER of C. Osborne, ¶¶ 1.11-1.15; Section 4; Exh. C-385, C-987). Accordingly, the Tribunal is satisfied that the Claimants in fact relied on the incentives to build and develop their investment in the manner in which it stood at the date of the revocation of those incentives.

722. It goes without saying that the BIT only protects investments made in reliance on legitimate expectations (*see* paragraphs 667 to 673 above). It does not protect investments made after such an expectation has been destroyed. The Tribunal has found that the Claimants' expectations arose in June 2000, with the granting of European Food's PIC. This expectation was shattered once it became clear that Romania would revoke the incentives without compensation, which, as discussed further below, occurred on 31 August 2004, with the issuance of GO 94/2004. Although Prime Minister Nastase publicly announced the termination of the regime for the first time in January 2004, it was still uncertain at that time whether PIC holders would be compensated (*see* Section 4 below). Accordingly, the BIT can only protect the Claimants' investments made between 1 June 2000 and 31 August 2004.

723. The Tribunal does not ignore the fact that the Respondent has challenged the credibility and reliability of the Claimants' witnesses, in particular with respect to the question of whether, in making their investment decisions, the Claimants' relied on an expectation that the incentives would remain in place for 10 years, and with respect to their damages case.

724. The Tribunal will address the Respondent's arguments with respect to damages in due course. With respect to Claimants' legitimate expectations, however, the Tribunal is not persuaded that the testimony of the Claimants and their witnesses is unreliable. The key issue before the Tribunal is whether and to what extent the

Claimants relied on the EGO 24 incentives to make and develop their investments, and if that reliance was reasonable. It is evident from the documentary record that the Claimants did in fact rely on the EGO 24 regime to expand their business (*see* paragraph 721 above). The Tribunal has also found that the Claimants' expectation that the EGO 24 regime would be in place for 10 years was objectively reasonable. It was also reasonable to rely, at least until 31 August 2004, on the survival of that regime.

* * *

725. For the reasons set out above, the majority of the Tribunal finds that Romania violated the Claimants' legitimate expectations with respect to the availability of the EGO 24 incentives.

726. Although the majority of the Tribunal has found a breach of legitimate expectations, in order to provide a complete ruling on Romania's compliance with its obligation to provide fair and equitable treatment, the Tribunal will address the Parties' remaining arguments with respect to this standard. The Tribunal will next address Romania's defense that it acted reasonably (Section 4 below). It will then address whether Romania acted in bad faith (Section 5 below). Finally, it will address the Claimants' argument that Romania failed to act transparently and consistently (Section 6 below).

4. Did Romania act unreasonably?

727. The Respondent's main defense with respect to the Claimants' fair and equitable treatment and unreasonableness claims is that it acted reasonably when it terminated the EGO 24 incentives regime. It thus argues that it did not engage in what it has called "substantively improper conduct", and it should not be made to compensate for reasonable general regulation. Although the Respondent has acknowledged that the Tribunal may find a breach of the BIT if it finds that Romania promised that the incentives would remain unchanged for ten years and the Claimants reasonably relied on that expectation (see paragraph 500 above, Tr., Day 13, 19-43 (King)), the Respondent devoted considerable time and effort to establishing that it acted reasonably.

728. The Claimants have not addressed this defense directly in the context of their fair and equitable treatment claim, other than to argue that Romania's subjective motivation is irrelevant to determine if it has breached the fair and equitable treatment standard. However, in the context of their claim for "impairment by unreasonable or discriminatory measures" under the second section of Article 2(3) of the BIT (the "impairment clause"), the Claimants also argue that Romania acted unreasonably when it repealed the EGO 24 incentives. When discussing unreasonableness in the context of fair and equitable treatment, the Tribunal will thus refer to the arguments made by the Claimants on that issue in the context of the impairment clause.

a. The Claimants' position

729. The Claimants argue that Romania acted unreasonably by:

ANNEX 402

International Centre for Settlement of Investment Disputes
Washington, D.C.

Total S.A.

v.

Argentine Republic

(ICSID Case No. ARB/04/1)

Decision on Liability

Members of the Tribunal

Professor Giorgio Sacerdoti, President

Mr. Henri C. Alvarez, Arbitrator

Dr. Luis Herrera Marcano, Arbitrator

Secretary of the Tribunal

Ms. Natalí Sequeira

Representing Total S.A.:

Mr. Jan Paulsson, Mr. Nigel Blackaby,
Mr. Georgios Petrochilos, Mr. Noah Rubins,
Ms. Sylvia Noury, Mr. Craig Chiasson,
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Mr. Luis A. Erize and Mr. Sergio M. Porteiro
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Date of Dispatch to the Parties: December 27, 2010

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that, under its own terms, the Licence, namely, the "contractual instrument allegedly violated"[88] that is subject to Argentina's law, could be modified by a Law passed by the Argentine Congress, such that Total had to account for this possibility as part of its legitimate expectations.[89]

6. Legal Evaluation by the Tribunal of Total's Claims

99. The first issue for the Tribunal is to determine whether the legislation, regulation and provisions invoked by Total constitute a set of promises and commitments towards Total whose unilateral modifications entail a breach of the legitimate expectations of Total and, as a consequence, are in breach of the fair and equitable treatment standard in the BIT. The opposite view held by Argentina is that Argentina has not breached any promise or guarantee made to Total because "[T]he Argentine State did not execute any contract with Total"[90] nor did it induce Total to invest in TGN.[91] The provisions invoked by Total as "guarantees" are in Argentina's view nothing other than the totality of the regulatory framework effective from time to time.[92]

100. It is undisputed that Total did not enter into a contractual relationship with Argentina's authorities in 2000-2001 when it acquired an indirect share in TGN by buying a share of Gasinvest from TransCanada, one of the various foreign shareholders of TransCanada. All of the laws and regulations, which Total invokes as a source of the promises that it relies upon (the Gas Law and the Gas Decree of 1992), are instruments of general application, enacted by the Congress or the Executive branch of Argentina pursuant to the powers vested in these bodies under the Constitution of Argentina. Further, Total does not submit that it had participated in any way in the privatization of the gas transportation utilities of Argentina in 1991-1992 through which the first private investors in TGN had become its shareholders.

101. As concerns Total's reliance on TGN's Licence as a contractual commitment undertaken by Argentina, it is clear that this instrument establishes the rights and obligations of the parties (namely TGN and Argentina's authorities) to that licence.

[88] See Argentina's Post-Hearing Brief, para. 200.
[89] See Argentina's Post-Hearing Brief, para. 193.
[90] See Argentina's Counter-Memorial, para. 311.
[91] See Argentina's Post-Hearing Brief, para. 253.
[92] See Argentina's Counter-Memorial, para. 81.

Specifically, the TGN Licence sets forth the obligations of the Argentine authorities *vis-à-vis* the concessionaire. These obligations encompass details of how those authorities may (and should) exercise, with respect to the concessionaire, the regulatory powers granted to them by the Gas Law and Gas Decree in order to preserve the general interest underlying the performance of the public service. Since Total is not a party to the concession, a more accurate description of the situation would be that Total has invested in a public utility (namely TGN) which operated a public service activity regulated by a defined legal regime set forth (also) in the concession. Therefore TGN Licence cannot be regarded as a source of contractual legal obligations of a specific character assumed directly by Argentina towards Total. Accordingly, it is not correct to qualify and treat the TGN Licence provisions as stabilisation clauses agreed between Total and Argentina. Stabilisation clauses are clauses, which are inserted in state contracts concluded between foreign investors and host states with the intended effect of freezing a specific host State's legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned (even by law of general application and without any discriminatory intent by the host State) would be illegal. For the reasons stated above, this characterization does not fit the relationship between Total and Argentina as to Total's investment in TGN.

102. Total submits that legitimate expectations with respect to the stability of the legal framework under which a foreign company makes an investment may derive not only from contractual undertakings, but also from legislation and regulation that was precisely meant to attract foreign investment. Total points out that the gas regulatory framework was devised and enacted in order to attract long term private foreign investments in utilities, which until then had been run by the State, that were badly in need of modernization through massive investment by competent operators and others, especially in view of the past record of high inflation in Argentina. This regime was based on a sound economic underpinning, an integral part of which was the overarching commitment to reasonable and fair tariffs for the operators and specifically the US dollar peg.

103. Subjectively, Total submits that the existence of such a framework, which had been in place for almost nine years when it decided to become a shareholder of TGN, was a major consideration in carrying out such an investment.

104. To the contrary, Argentina points to the agreed suspensions of the PPI, which were in place when Total made its acquisition of the shareholding in TGN from TransCanada, that should have put Total on notice that the Gas Regulatory Framework was being undermined. Argentina also submits that Total was careless in making its investment in that it did not carry out the due diligence analysis that is commonly undertaken before making such a large direct investment abroad. Had Total carried out proper due diligence, it would have been aware of the looming economic difficulties of Argentina and of their possible impact on the future stability of the Gas Regulatory Framework.

105. The legal issue for the Tribunal is thus to determine whether the fair and equitable treatment standard of Article 3 of the BIT, in particular as far as it includes the "protection of legitimate expectations" of the foreign investor, has been breached by the unilateral changes of legislation and regulation effected by Argentina and challenged by Total.

6.1 Applicable Standard: the Fair and Equitable Treatment Standard in General

106. The undertaking of the host country to provide fair and equitable treatment to the investors of the other party and their investments is a standard feature in BITs, although the exact language of such undertakings is not uniform. The generality of the fair and equitable treatment standard distinguishes it from specific obligations undertaken by the parties to a BIT in respect of typical aspects of foreign investment operations such as those concerning monetary transfers, visas, etc. At the same time, the fair and equitable treatment standard can be distinguished from other general standards included in BITs, namely the national and the most favoured nation treatment standards, which guarantee a variable protection that is contingent upon the treatment given by the host State to its own nationals or to the nationals of the best treated third state.

107. The fair and equitable treatment standard is, by contrast, an autonomous standard, although its exact content is not predefined, except in cases where a treaty provides additional specifications, which is not the case for the France-Argentina BIT.[93] Since this standard is inherently flexible, it is difficult, if not impossible, "to anticipate in the abstract the range of possible types of infringements upon the investor's legal position".[94] Its application in a given case must take into account relevant State practice and judicial or arbitral case law as well as the text of the BIT and other sources of customary or general international law.[95]

108. The meaning of various fair and equitable treatment clauses has been tested in several investment disputes and the issue has been dealt with by a number of academic writings, including by the most prominent scholars in the field of international investment law. Some tribunals have started from the ordinary meaning of the term, in accordance with Article 31(1) of the Vienna Convention of the Law of Treaties ("VCLT"), recalling the dictionary definitions of just, even-handed, unbiased, legitimate.[96] On the other hand, one cannot but agree with Judge Higgins' observation in the *Oil Platforms* case, that "the key terms "fair and equitable treatment to nationals and companies"… are legal terms of art well known in the field of overseas investment protection".[97]

109. On the premise that a "judgement of what is fair and equitable cannot be reached in the abstract; it must depend on the fact of the particular case" and that "the standard is to some extent a flexible one which must be adapted to the circumstances of each case"[98], tribunals have endeavoured to pinpoint some typical obligations that may be included in the standard, as well as types of conduct that would breach the standard, in order to be guided in their analysis of the issue before them.

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[93] For instances of more specific content see the NAFTA Free Trade Commission Note of Interpretation of 31 July 2001 available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en and the US Model BIT of 2004 available at http://www.state.gov/documents/organization/117601.pdf

[94] C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Trade,(2005/3), 357, 365.

[95] *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, para. 184.

[96] See *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 290.

[97] See *Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, at p. 858 (Separate Opinion).

[98] See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 118, and *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, para. 99, respectively.

110. A breach of the fair and equitable treatment standard has been found in respect of conduct characterized by "arbitrariness"[99] and of "acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[100] It has been also held that the standard requires "treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment",[101] thereby condemning conduct that is arbitrary, grossly unfair, unjust or idiosyncratic or that "involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in administrative process."[102] Awards have found a breach in cases of discrimination against foreigners and "improper and discreditable" or "unreasonable" conduct.[103] This does not mean that bad faith is necessarily required in order to find a breach: "A State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[104]

111. In determining the scope of a right or obligation, Tribunals have often looked as a benchmark to international or comparative standards.[105] Indeed, as is often the case for general standards applicable in any legal system (such as "due process"), a comparative analysis of what is considered generally fair or unfair conduct by domestic public authorities in respect of private firms and investors in domestic law may also be relevant to identify the legal standards under BITs.[106] Such an approach is justified because, factually, the situations and conduct to be evaluated under a BIT occur within the legal system and social, economic and business environment of the host State. Moreover, legally, the fair and equitable treatment standard is derived

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[99] See *ElettronicaSicula S.P.A.* (ELSI), Judgment, I.C.J. Reports 1989, p. 15, para. 128 where an "arbitrary action" was defined as "as a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial property."
[100] *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367.
[101] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, *supra* note 96, para. 113.
[102] *Waste Management, Inc. v. United Mexican States*, *supra* note 98, para. 98 (as to infringement of "the minimum standard of treatment of fair and equitable treatment").
[103] *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 309.
[104] *Mondev International Ltd. v. United States of America*, *supra* note 98, para. 116. See also *Siemens v Argentina*, *supra* note 96, para. 299, reviewing precedents.
[105] *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000, paras. 263-264; *Genin and others v. Estonia*, Award, 25 June 2001, para. 367 ff.
[106] There is a substantial body of authority to this effect. See *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras 177-178 stating that a legal proceeding that exists in virtually all legal systems, such as bankruptcy proceedings, cannot be regarded as arbitrary.

from the requirement of good faith which is undoubtedly a general principle of law under Article 38(1) of the Statute of the International Court of Justice.

112. UNCTAD has followed such an approach in its publication on the topic, besides referring to arbitral practice, in order:

> "to identify certain forms of behaviour that appear to be contrary to fairness and equity in most legal systems and to extrapolate from this the type of State action that may be inconsistent with fair and equitable treatment, using the plain meaning approach. Thus, for instance, if a State acts fraudulently or in bad faith, or capriciously and wilfully discriminates against a foreign investor, or deprives an investor of acquired rights in a manner that leads to the unjust enrichment of the State, then there is at least a *prima facie* case for arguing that the fair and equitable standard has been breached".[107]

6.2. The Notion of Legitimate Expectations of Foreign Investors

113. We turn now to the more specific concept, which Total asserts forms part of the fair and equitable treatment standard, of the protection of "legitimate expectations" on the part of an investor concerning the stability of the legal framework under which it has made its investment.

114. Tribunals have often referred to the principle of the protection of the investor's legitimate expectations, especially with reference to the "stability" of the legal framework of the host country applicable to the investment, as being included within the fair and equitable treatment standard. However, case law is not uniform as to the preconditions for an investor to claim that its expectations were "legitimate" concerning the stability of a given legal framework that was applicable to its investment when it was made. On the one hand, stability, predictability and consistency of legislation and regulation are important for investors in order to plan their investments, especially if their business plans extend over a number of years. Competent authorities of States entering into BITs in order to promote foreign investment in their economy should be aware of the importance for the investors that

[107] UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Investment Agreements, 1999 UN Doc. UNCTAD/ITE/IIT/11, Vol. III, at 12.

a legal environment favourable to the carrying out of their business activities be maintained.[108]

115. On the other hand, signatories of such treaties do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed.[109] In fact, even in those BITs where stability of the legal framework for investment is explicitly mentioned, such as in the BIT between the United States and Argentina of 1991 (in accordance with the U.S. Model BIT of the time) such a reference appears only in the preamble.[110]

116. In various disputes between U.S. investors and Argentina under that BIT, tribunals have relied on the explicit mention in its preamble of the desirability of maintaining a stable framework for investments in order to attract foreign investment as a basis for finding that the lack of such stability and related predictability, on which the investor had relied, had resulted in a breach of the fair and equitable treatment standard.[111] This reference is justified because, although such a statement in a preamble does not create independent legal obligations, it is a tool for the interpretation of the treaty since it sheds light on its purpose.[112] However, the BIT between France and Argentina does not contain any such reference, following the

[108] See M. Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 *American Journal of International Law* (2007) 711, 750, according to whom the fair and equitable standard as developed in the case law protects "legitimate commercial expectations" and requires that "governmental acts need to conform to international standards of transparency, non arbitrariness, due process and proportionality to the policy aims involved."

[109] In applying the fair and equitable standard under Article 1105 (1) NAFTA the Tribunal in *S.D. Myers, Inc. v. Canada, supra* note 105, para. 263 considered that a determination of breach "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own border", taking also into account any specific rule of international law.

[110] See *Continental Casualty Company v. Argentina*, *supra* note 53, para. 258, with reference to the U.S.-Argentina BIT of 1991 which includes the following preambular language, following the U.S. Model BIT of the time: "Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources…".

[111] See *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras 124-125 citing similar findings by other tribunals "in light of the same or similar language"; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 259. The Tribunal notes that the U.K.-Argentina BIT does not include any reference to such stability. See *National Grid plc v. Argentina*, UNCITRAL, Award, 3 November 2008, paras. 168 ff. and in particular para. 170.

[112] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 relies explicitly on the language of the preamble in order to hold that "the stability of the legal and business framework is thus an essential element of fair and equitable treatment."

French BIT model.[113] This absence indicates, at a minimum, that stability of the legal domestic framework was not envisaged as a specific element of the domestic legal regime that the Contracting Parties undertook to grant to their respective investors.[114] The operative provisions of the France-Argentina BIT must in any case be read taking into account, within the object and purpose of the treaty, the reference in the Preamble to the desire of the Parties to create favourable conditions for the investments covered.[115]

117. In the absence of some "promise" by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a "guarantee" of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly "legitimate", and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.[116]

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[113] The BIT at issue here includes the obligation of each Party to extend "full protection and security" to covered investments of nationals of the other Party in its territory, "in accordance with the principle of just and equitable treatment in Article 3 of this Agreement" (Article 5(1) of the BIT). As to the scope of this kind of clause, some awards (see *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408; *National Grid plc v. Argentina*, *supra* note 111, para. 187) have considered that this protection is not limited to physical assets and that it encompasses the stability of the legal framework and legal security of the investment. Other awards have instead stuck to the original limitation of physical security (*BG Group Plc v. Argentina*, UNCITRAL, Award, 24 December 2007, para. 326).

[114] Total has pointed out, however, the official statement made by the representative of the Government of Argentina to Congress in relation to the ratification of the BIT by Argentina: "*Bearing in mind that the main purpose of this type of agreements is to bolster genuine and productive investment, in consequence, certain situations or measures which may affect negatively the value or product of the investment are foreseen. Hence, by way of this agreement, the States agree to maintain the status, during the term of such, of certain rules concerning the treatment of investments and enshrines among the signatory States the commitment not to contravene rules which, being part of this subject, belong to the group of principles common to all nations… This way, a stable and satisfactory environment is created which mitigates the concerns of foreign investors related to non-commercial risks –called political risks- and promotes the international capital flow within in compliance with the laws of the host State*." (Exhibit C-89, *Mensaje del Poder Ejecutivo al Congreso de la Nación* for Law 24.100/92, 10 June 1992). The Tribunal notes that this statement does not include a reference to stability, such as the one found in the corresponding message relating to the 1992 BIT of Argentina with the U.K. : "*By way of such [agreements], States accord to maintain during its term certain rules concerning investment treatment, in order to establish an environment of stability and trust to attract investments.*" (Exhibit C-87)

[115] Connected with this statement is the general obligation of Article 2 of the BIT, according to which each Contracting Party shall admit and promote investments made by investors of the other Party, however "within the frame of its legislation and provisions hereof."

[116] See *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 611 concerning interference with contractual rights by a regulatory authority; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154 relating to the replacement of an unlimited licence by one of limited duration for the operation of a landfill**.** See also *Waste*

118. The situation is similar when public authorities of the host country have made the private investor believe that such an obligation existed through conduct or by a declaration.[117] Authorities may also have announced officially their intent to pursue a certain conduct in the future, on which, in turn, the investor relied in making investments or incurring costs.[118] As stated within the NAFTA framework "the concept of "legitimate expectations" relates […] to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages."[119]

119. In fact, when relying on the concept of legitimate expectations, arbitral tribunals have often stressed that "specific commitments" limit the right of the host State to adapt the legal framework to changing circumstances.[120] Representations made by the host State are enforceable and justify the investor's reliance only when they are specifically addressed to a particular investor.[121] "Where a host State which seeks foreign investment acts intentionally, so as to create expectations in potential investors with respect to particular treatment or comportment, the host state should,

Management, Inc. v. United Mexican States, *supra* note 98, where the claim of the investor under Article 1105(1) NAFTA was rejected. In particular the Tribunal considered at para. 98 that the fair and equitable standard would be violated by the "breach of representations made by the host State which were reasonably relied upon by the claimant."

[117] See the case of assurances provided by senior government officials to an investor in *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award on Merits, 8 December 2000, paras. 59 ff.

[118] For a review of such instances see M. Reisman and M.H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes,* 19 *ICSID Review-Foreign Investment Law Journal* 328 (2004).

[119] See *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL, Arbitral Award, 26 January 2006, para. 147. This is defined as "detrimental reliance" by T.J. Grierson-Weiler and I.I. Laird, *Standards of Treatment*, Chapter 8 of P. Muchlinski, F. Ortino and C. Schreuer (Eds.), *The Oxford Handbook of International Investment Law*, Oxford, 2008, 275.

[120] See *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 27, holding that when general measures are challenged: "A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments."

[121] See *International Thunderbird Gaming Corporation v. Mexico*, *supra* note 119, para. 147. On the facts of the various cases some tribunals have, however, concluded that the legal order of the host State as it stood at the time when the investor acquired the investment grounded the legitimate expectations of the investor with respect to the stability of the relevant regulations: *Gami Investments, Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, para. 93; *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award on Merits, 16 December 2002, para. 128.

we suggest, be bound by the commitments and the investor is entitled to rely upon them in instances of decision".[122]

120. In other words, an investor's legitimate expectations may be based "on any undertaking and representations made explicitly or implicitly by the host State. A reversal of assurances by the host State which have led to legitimate expectations will violate the principle of fair and equitable treatment. At the same time, it is clear that this principle is not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect."[123]

121. The balance between these competing requirements and hence the limits of the proper invocation of "legitimate expectations" in the face of legislative or regulatory changes (assuming that they are not contrary to a contractual, bilateral or similar undertaking, binding in its own right) has been based on a weighing of various elements pointing in opposite directions. On the one hand, the form and specific content of the undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future. Similarly, the more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith. Hence, this accounts for the emphasis in many awards on the government having given 'assurances', made 'promises', undertaken 'commitments', offered specific conditions, to a foreign investor, to the point of having solicited or induced that investor to make a given investment. Total itself described the acts of Argentina on which it relies in this way. As a result of such conduct by the host authorities, the expectation of the foreign investor may "rise to the level of legitimacy and reasonableness in light of the circumstances."[124] When those features are not present, a cautious approach is warranted based on a case specific contextual analysis of all relevant facts.

[122] Conclusions by M. Reisman and M.H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Dispute*s, *supra* note 118, 342.
[123] See C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, *supra* note 94, 374.
[124] See *Saluka Investments BV v. The Czech Republic*, *supra* note 103, para. 304.

122. Indeed, the most difficult case is (as in part in the present dispute) when the basis of an investor's invocation of entitlement to stability under a fair and equitable treatment clause relies on legislation or regulation of a unilateral and general character. In such instances, investor's expectations are rooted in regulation of a normative and administrative nature that is not specifically addressed to the relevant investor. This type of regulation is not shielded from subsequent changes under the applicable law. This notwithstanding, a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations. This is the case for regimes, which are applicable to long-term investments and operations, and/or providing for "fall backs" or contingent rights in case the relevant framework would be changed in unforeseen circumstances or in case certain listed events materialize. In such cases, reference to commonly recognized and applied financial and economic principles to be followed for the regular operation of investments of that type (be they domestic or foreign) may provide a yardstick. This is the case for capital intensive and long term investments and operation of utilities under a license, natural resources exploration and exploitation, project financing or Build Operate and Transfer schemes. The concept of "regulatory fairness" or "regulatory certainty" has been used in this respect.[125] In the light of these criteria when a State is empowered to fix the tariffs of a public utility it must do so in such a way that the concessionaire is able to recover its operations costs, amortize its investments and make a reasonable return over time, as indeed Argentina's gas regime provided.

123. On the other hand, the host State's right to regulate domestic matters in the public interest has to be taken into consideration as well.[126] The circumstances and reasons (importance and urgency of the public need pursued) for carrying out a change impacting negatively on a foreign investor's operations on the one hand, and the seriousness of the prejudice caused on the other hand, compared in the light of a standard of reasonableness and proportionality are relevant. The determination of a breach of the standard requires, therefore, "a weighing of the Claimant's reasonable and legitimate expectations on the one hand and the Respondent's legitimate

[125] See T.J. Grierson-Weiler and I.I. Laird, *Standards of Treatment*, *supra* note 119, 277.
[126] See *Saluka Investments BV v. The Czech Republic*, *supra* note 103, paras 305-306. See also *Feldman v. Mexico*, *supra* note 121, para. 112: "[G]overnments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue."

regulatory interest on the other."[127] Thus an evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation, considering only their bilateral relations. The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account.[128] Additional criteria for the evaluation of the fairness of national measures of general application as to services are those found in the WTO General Agreement on Trade of Services (GATS). The Tribunal recalls that Article VI of the GATS of 1994 on "Domestic regulation" provides that "In sectors where specific commitments are undertaken, each member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner" (emphasis added). This reference concerning services (as undoubtedly Total's operations in the gas transportation and electricity were) in a multilateral treaty to which both Argentina and France are parties offers useful guidance as to the requirements that a domestic regulation must contain in order to be considered fair and equitable. The Tribunal refers to the requirements found in Article VI GATS just as "guidance" because it has not been submitted that the GATS is directly applicable here. This would require that Argentina had admitted Total's investment in the electricity sector on the basis of a specific commitment in respect of the opening of electricity generation to investors from other WTO Members.

124. Besides such an objective comparison of the competing interests in context, the conduct of the investor in relation to any undertaking of stability is also, so to speak "subjectively", relevant. Tribunals have evaluated the investor's conduct in this respect, highlighting that BITs "are not insurance policies against bad business

[127] See *Saluka Investments BV v. The Czech Republic*, *ibid*. See also D. Carreau, P. Juillard, *Droit international économique*, 2ième édition, 2005, 442, para. 1265 according to whom the "equitable" requirement of the standard implies that a satisfactory equilibrium be ensured between the interests of the investor, of its nationality State and of the host State.

[128] For instance, see *Genin and others v. Estonia*, *supra* note 105, para. 348, where the Tribunal states that in considering the revocation of a banking license to a financial institution (Estonian Innovation Bank) in which a U.S. investor made its investments "... the Tribunal considers it imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which Claimants knowingly chose to invest in an Estonian financial institution, EIB."

judgments" and that the investor has its own duty to investigate the host State's applicable law.[129]

6.3 The Content of Article 3 of the Argentina-France BIT

125. The commitment to fair and equitable treatment in Article 3 of the BIT relates to a treatment that must be in conformity with the principles of international law ("*conforme a los principios de Derecho International / en conformité des principes du droit international")*. The parties have discussed whether this reference is to a minimum standard, as suggested by Argentina,[130] or whether it sets forth an autonomous standard, as submitted by Total.[131] For the reasons stated hereunder the Tribunal is of the opinion that the phrase "fair and equitable in conformity with the principles of international law" cannot be read as "treatment required by the minimum standard of treatment of aliens/investors under international law."[132] This is irrespective of the issue of whether today there really is a difference between this traditional minimum standard and what international law generally requires as to treatment of foreign investors and their investments.[133]

126. In order to elucidate the content of the treatment required by Article 3 in conformity with international law, a tribunal is directed to look not just to the BIT in isolation or the case law of other arbitral tribunals in investment disputes interpreting and applying similarly worded investment protection treaties, but rather to the content of international law more generally.

127. The Tribunal will, therefore, proceed to further interpret the "fair and equitable treatment" standard looking also at general principles and public international law in

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[129] See *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award on the Merits, 13 November 2000, para. 64. See also *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, *supra* note 96, para. 178.
[130] According to Argentina (Opening Statement, Hearing Day 2, 443:19-444-1) the minimum standard would not include the obligation to maintain a stable legal environment and protect legitimate expectations of the investor.
[131] See Total's Post-Hearing Brief, 210 ff.
[132] See to this effect the analysis of UNCTAD, *Fair and Equitable Treatment*, *supra* note 107, 40. A detailed review of different opinions and statements on the issue is found in OECD, *International Investment Law, A Changing Landscape*, 2005, at 81-96.
[133] Several arbitral tribunals dealing with investment disputes have held that the law of the international protection of foreign investors (of which the fair and equitable treatment standard is part) has considerably evolved since the *Neer* decision of 1926 that was considered to restate the minimum treatment standard existing at that time (see *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 257; *Mondev International Ltd. v. United States of America*, *supra* note 98, paras 116-117). See also R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2008, 128-130.

a non-BIT context. This approach is consistent with the interpretation of Article 3 of the France-Argentina BIT by the "*Vivendi II*" tribunal which has expressed the view we have developed above, namely, that: "The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment … the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard".[134] The views expressed by commentators on the French model BIT, from which the phrase derives, are consistent with these conclusions.[135]

6.4 Comparative Analysis

128. Since the concept of legitimate expectations is based on the requirement of good faith, one of the general principles referred to in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law, the Tribunal believes that a comparative analysis of the protection of legitimate expectations in domestic jurisdictions is justified at this point. While the scope and legal basis of the principle varies, it has been recognized lately both in civil law and in common law jurisdictions within well defined limits.[136]

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[134] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (hereinafter also "*Vivendi II*"), paras. 7.4.6-7. referred to by Total in its Post Hearing Brief, para. 213.

[135] See D. Carreau, P. Juillard, *Droit international économique*, 2ième édition, *supra* note 127, para. 1286 at p. 456. We do not read otherwise the *Introductory Note* of H. Goldsong to the France-U.S.S.R. BIT of 1989, 29 ILM 317 (1990) on which Argentina relies, where the author expresses the view that the reference to international law "qualifies" the scope of the undertaking of fair and equitable treatment. This qualification rather directs the interpreter to take fully into account the protection afforded by international law, without going beyond that in the context of the BIT, but also without reducing it below that level. As stated by Carreau, Juillard, *Droit international économique*, 2ième éd., *supra* note 127, para. 1266 at p. 442: "the treatment granted to the investment by national law could not breach the treatment required by the totality of the combined sources of international law."

[136] The concept is considered to have originated in German law where it is extensively used, CF Forsyth, *The Provenance and Protection of Legitimate Expectations*, Cambridge L.J. 47, 241 (1988). As to civil law, see Argentina *Industria Madera Lanin,* Corte Suprema 1977, Fallos 298:223. The State was required there to compensate for the breach of *la expectativa razonable* of an enterprise to which a forest concession had been initially promised, but was thereafter revoked. In English law (leading case: *Schmidt v Secretary of State for the Home Affairs* [1969] 2 Ch 149, *per* Lord Denning) the House of Lords has stated that "the doctrine of legitimate expectations is rooted in fairness", *R. v Inland Revenue Commissioners ex p. Preston* [1985] 2 All E.R. 327, para. 835 *per* Lord Bingham. See also *R. v North and East Devon Health Authority ex p. Coughlan* [1999] LGR 703, para. 57, holding that where "a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power". Generally, as to the notion in administrative law of Common Law countries, see W. Wade and CF Forsyth, *Administrative Law,* OUP Oxford 2004, 372-376.

129. In domestic legal systems the doctrine of legitimate expectations supports "the entitlement of an individual to legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation".[137] This doctrine, which reflects the importance of the principle of legal certainty (or rule of law), appears to be applicable mostly in respect of administrative acts and protects an individual from an incoherent exercise of administrative discretion, or excess or abuse of administrative powers.[138] The reasons and features for changes (sudden character, fundamental change, retroactive effects) and the public interest involved are thus to be taken into account in order to evaluate whether an individual who incurred financial obligations on the basis of the decisions and representations of public authorities that were later revoked should be entitled to a form of redress. However it appears that only exceptionally has the concept of legitimate expectations been the basis of redress when legislative action by a State was at stake. Rather a breach of the fundamental right of property as recognized under domestic law has been the basis, for instance, for the European Court of Human Rights to find a violation of the First Protocol to the European Convention on Human Rights protecting the peaceful enjoyment of property.[139]

130. From a comparative law perspective, the tenets of the legal system of the European Community (now European Union), reflecting the legal traditions of twenty-seven European countries, both civil and common law (including France, the home country of the Claimant) are of relevance, especially since the recognition of the principle of legitimate expectations there has been explicitly based on the

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[137] C. Brown, *The Protection of Legitimate Expectations as A "General Principle of Law": Some Preliminary Thoughts*, Transnational Dispute Management, www.transnational-dispute-management.com, March 2009. See also J. Temple Lang, *Legal Certainty and Legitimate Expectations as General Principles of Law*, U. Bernitz, J. Nergelius (Eds.), *General Principles in European Community Law*, Kluwer, 2000, 163-184.
[138] See C. McLachlan, *Investment Treaties and General International Law*, 57 Int'l & Comp. L.Q. 361 (2008), at p. 377 with reference to the holding of the Annulment Committee in *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 67-71; *Gami Investments, Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, 44 ILM 545, 560 (2005).
[139] See generally the review by the former president of the ECHR, L. Wildhaber, *The Protection of Legitimate Expectations in European Human Rights Law,* M. Monti, N. Liechtenstein, B. Vesterdorf, L. Wildhaber, *Economic Law and Justice in Times of Globalisation*, Festschrift Baudenbacher, 2007, 253, at 263: "the concept appears to have no meaningful autonomous existence as far as its applicability is concerned. Where the applicants can point to a possession, however, and to interference with their peaceful enjoyment of same, it is arguably the legitimacy of their claim more than their subjective expectations that will weight in the balance". In a case involving the legitimate expectations of beneficiaries to future social benefits provided by legislation, the European Court of Human Rights found a breach of Article 1 of the Protocol in the later withdrawing of such benefits by governmental action, *Doldeanu v. Moldova,* Application 17211/03, Decision 13 November 2007.

international law principle of good faith.[140] Based on this premise, the Tribunal of the European Union has upheld the legitimate expectations of importers that the Community would respect public international law.[141] According to the Court of Justice of the European Union ("ECJ") private parties cannot normally invoke legitimate expectations against the exercise of normative powers by the Community's institutions, except under the most restrictive conditions (which the Court has never found in any case submitted to it).[142]

6.5 Public International Law

131. Under international law, unilateral acts, statements and conduct by States may be the source of legal obligations which the intended beneficiaries or addressees, or possibly any member of the international community, can invoke. The legal basis of that binding character appears to be only in part related to the concept of legitimate expectations—being rather akin to the principle of "estoppel". Both concepts may lead to the same result, namely, that of rendering the content of a unilateral declaration binding on the State that is issuing it.[143] According to the International Court of Justice, only unilateral acts that are unconditional, definitive and "very specific" have binding force, which derives from the principle of good faith. This fundamental principle requires a State to abide by its unilateral acts of such a

[140] See *Opel Austria GmbH (formerly General Motors Austria GmbH) v. Council of the European Union*, Case T-115/94, Judgment, 22 January 1997 stating that "The principle of protection of legitimate expectations which according to the case law, forms part of the Community legal order, is the corollary of the principle of good faith in public international law."

[141] In the case mentioned in the previous footnote, contrary to Article 18 of the VCLT (according to which signatories to a treaty not yet in force may not adopt measures that would defeat the treaty's object and purpose), the Community had increased a customs duty contrary to the treaty of accession of Austria to the EC due to enter into force shortly.

[142] Under ECJ case law, a competent businessman cannot invoke legitimate expectations in respect of the stability of a regulation that the Commission has wide discretion to modify (see *Di Lenardo Adriano Srl, Dilexport Srl and Ministero del Commercio con l'Estero,* Case C-37/02 and C-38/02, Judgment, 15 July 2004, para. 63, 82). The liability of the EC for a legitimate normative act requires in principle, besides damage and causation, that the damage be "unusual and special". This is so if a particular category of economic operators are affected in a disproportionate manner in comparison with others ("unusual damage"), and if the damage ("special damage") goes beyond the inherent risk of a given economic activity, without the legislative measure that gave rise to the alleged damage being justified by a general economic interest. See *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Commission of the European Communities*, Case T-184/95, Judgment, 28 April 1998, para. 80, affirmed by the EC Court of Justice, Case C-237/98 P, Judgment, 15 June 2000.

[143] See D.W. Bowett, *"Estoppel" Before International Tribunals and its Relation to Acquiescence*, 33 *B.Y.I.L.* 176 (1957): "It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of act, or as a necessary assumption of the risk of another party acting upon the statement" referred to by M. Reisman and M.H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *supra* note 118, 340.

character and to follow a line of conduct coherent with the legal obligations so created.[144]

132. The recent "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations"[145] ("the Guidelines"), which were formulated by the International Law Commission in 2006 as a restatement of international (inter-state) case law in the subject matter, are of interest here. We are aware that the Guidelines deal with the legal effects of unilateral acts of States addressed to other subjects of international law, and not with domestic normative acts relied upon by a foreign private investor. Still, we believe that the conditions required for unilateral declarations of a State to give rise to international obligations are of relevance here since the issue before the Tribunal has to be resolved by application of international law.[146]

133. Relevant provisions for our analysis are found in Article 7 of the Guidelines:

> "A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligation, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."
>
> Also of relevance is the final article of the Guidelines. Article 10 on revocation provides that:
>
> "[a] unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: (i) Any specific terms of the declaration relating to revocation; (ii) The extent to which those to whom the obligations are owed have relied on such obligations; (iii) The extent to which there has been a fundamental change of circumstances".

134. International law on the binding nature of unilateral commitments, as evidenced by the Guidelines, relies on concepts found in investment arbitral practice and in

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[144] See *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, para. 46 at p. 472 and W. Fiedler, "Unilateral Acts in International Law", *IV Encyclopedia of Public International Law* 1018 (2000).

[145] Adopted by the International Law Commission at its 58th session in 2006 together with commentaries thereto (ILC Report, A/61/10, 2006, Chapter IX), based on the analysis of the jurisprudence of the ICJ and pertinent State practice summarized in the eighth report of the Special Rapporteur (A/CN.4/557).

[146] The preamble to the Guidelines states that "it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law" (4th sentence).

comparative law concepts, such as the importance of factual circumstances, the relevance of content and intent, non-arbitrariness in case of revocation and the restrictive interpretation of unilateral acts invoked as a source of commitments for the issuing party.[147] The cautious approach that emerges appears to be consistent, *mutatis mutandis,* with that of domestic legal systems, European Union legal system and the European Court of Human Rights case law.

7. Application of the Fair and Equitable Treatment Standard

135. We turn now to apply the legal principles that we have highlighted to the facts of the case so as to evaluate Total's various claims of breach by Argentina. In this respect we find it appropriate to distinguish and sub-divide the three distinct claims made by Total, as follows:

- the elimination of the calculation of the tariffs in US dollars;
- the elimination of the automatic adjustments of the US dollar tariffs every six months in accordance with the US PPI, distinguishing in this respect the 6-month automatic adjustment in itself from its pegging to the US dollar based PPI;
- the non-application or elimination of the promises of economic equilibrium and a reasonable rate of return through the ongoing suspension of the Five-Year and Extraordinary Reviews, thus freezing the tariffs since 2002.

7.1 The Elimination of the Calculation of Gas Tariffs in US Dollars

136. The Tribunal recalls that the calculation of the gas transportation tariffs in US dollars was provided for by Article 41 of the Gas Decree as an element of the "normal and periodic adjustment of the tariffs authorized by the body" [ENARGAS]. The provision established further that the tariffs ("*el cuadro tarifario*") would be expressed in convertible pesos in conformity with Law 23.928, that is, Argentina's convertibility law of March 1991 (the "Convertibility Law"), with the reconversion

[147] See Guidelines, Commentary to Article 7, *supra* note 145.