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Latest developments in investor-State dispute Settlement*

IIA MONITOR No. 1 (2008)
International investment agreements

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IIA MONITOR

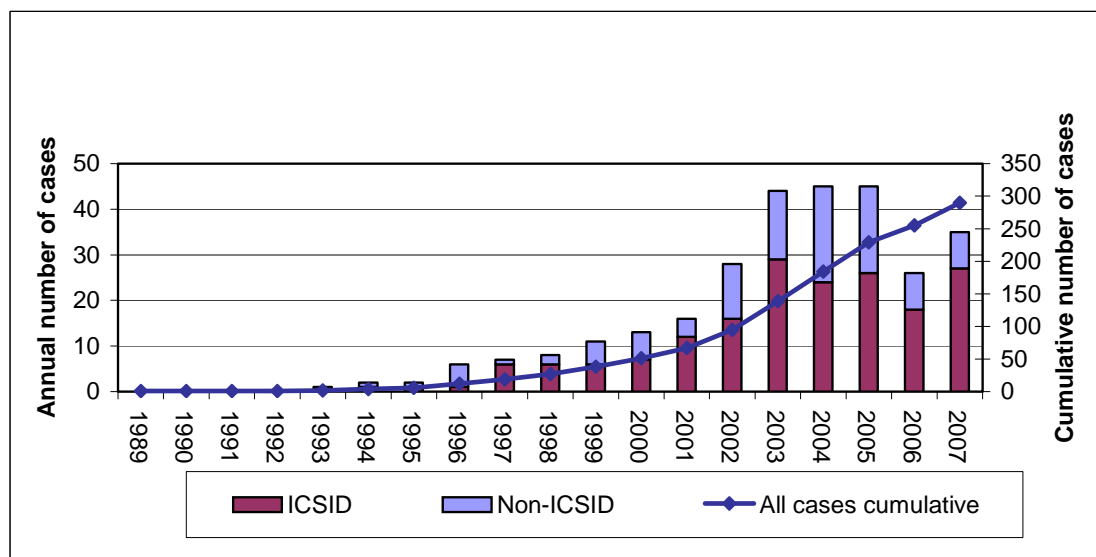
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I. Recent trends

In 2007, at least 35 new investor-State cases were filed under international investment agreements (IIAs), 27 of which were filed with the International Centre for Settlement of Investment Disputes (ICSID).¹ This is a marked increase over 2006, where only 26 new cases were reported. Since the only arbitration facility to maintain a public registry of claims is ICSID, the total number of actual treaty-based cases is likely to be still higher. Seventeen of the new cases were filed against developing countries, seven against transitional economies in South-Eastern Europe and the Commonwealth of Independent States, and 11 against developed countries.

Figure 1. Known investment treaty arbitrations (cumulative and newly instituted cases, 1987-2007)



Source: UNCTAD.

The total cumulative number of known treaty-based cases reached 290 (figure 1). These disputes were filed with ICSID (or the ICSID Additional Facility) (182), under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) (80), the Stockholm Chamber of Commerce (14), the International Chamber of Commerce (5), and ad-

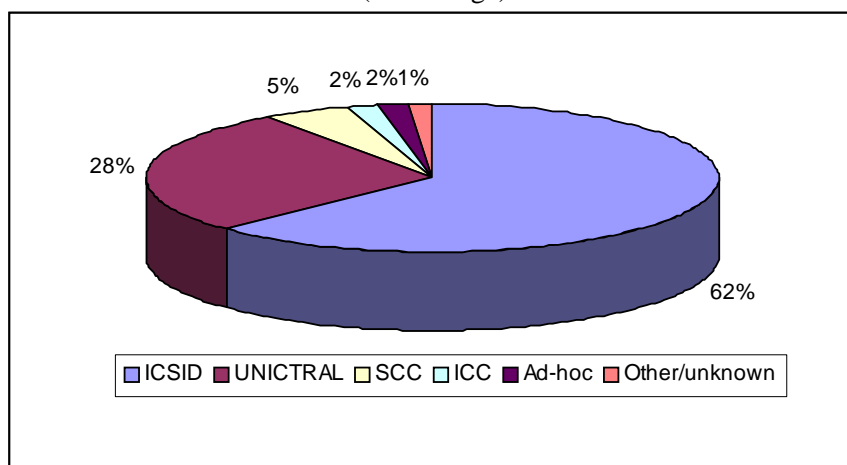
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¹ This number does not include cases that are exclusively based on investment contracts (State contracts) and cases where a party has so far only signaled its intention to submit a claim to arbitration, but has not yet commenced the arbitration (notice of intent); if these latter cases are submitted to arbitration, the number of pending cases will increase. See UNCTAD 2005a and 2005b.

hoc arbitration (5). One further case was filed with the Cairo Regional Centre for International Commercial Arbitration, one was administered by the Permanent Court of Arbitration and for two cases the exact venue was unknown at the time of writing (figure 2).

At least 73 governments – 44 of them in the developing world, 15 in developed countries and 14 in South-Eastern Europe and the Commonwealth of Independent States – have faced investment treaty arbitration (annex 1). The Argentine Republic still tops the list with 46 claims lodged against it, 44 of which relate at least in part to that country’s financial crisis early in this decade (UNCTAD 2005a). Four new arbitration cases were launched against the Argentine Republic in 2007. Mexico continues to have the second highest number of known claims (18), with no new cases in 2007. The Czech Republic has the third highest number of claims filed against it, with 14 (with two new cases filed in 2007). Canada and the United States come next, with 12 cases each. Ecuador, India and Poland (with 9 cases each), Egypt, Romania, and the Russian Federation (with 8 cases each), Ukraine and Venezuela (7 cases each), Turkey (6 cases), Hungary, Kazakhstan and Moldova (with 5 cases each) also figure prominently. Six countries faced arbitration proceedings for the first time in 2007, all from the developing world or economies in transition (Armenia, Bosnia and Herzegovina, Costa Rica, Guatemala, Nigeria, and South Africa).

Figure 2. ISDS disputes by forum of arbitration
(Percentage)



Source: UNCTAD.

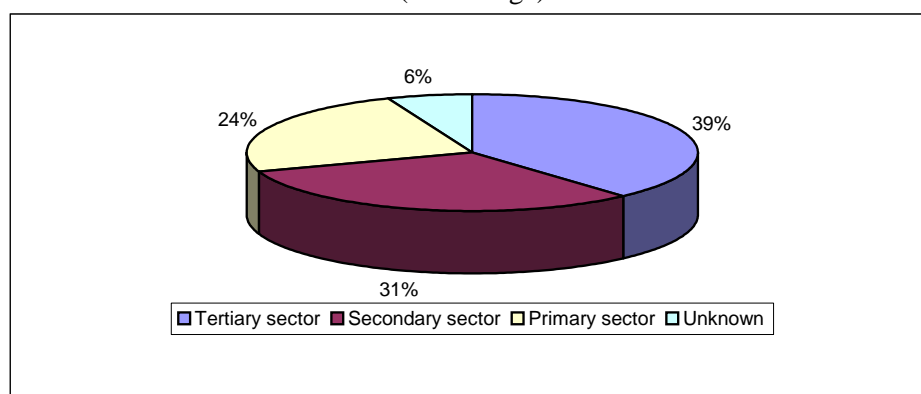
Note: SCC = Stockholm Chamber of Commerce; ICC = International Chamber of Commerce.
PCA = Permanent Court of Arbitration

A little less than half of the cases (39 %) involved the services sector, including electricity distribution, telecommunications, debt instruments, water services and waste management. All primary sector cases relate to mining and oil and gas exploration activities (figure 3).

The overwhelming majority of these cases were initiated on grounds of violating a bilateral investment treaty (BIT) provision (78 per cent), followed by the North American Free Trade Agreement (NAFTA) (13 per cent) and the Energy Charter Treaty (6 per cent). 2007 saw the first two cases initiated on the grounds of alleged violations of the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR).

Tribunals rendered at least 28 awards in 2007, 24 of which are in the public domain. Of these, 10 decisions dealt with jurisdictional matters (6 asserted the tribunal’s jurisdiction), 10 were awards on the merits (7 of which were awarded in favour of the investor's claim), and 4 dealt with annulment claims (3 applications for annulment were dismissed and one award was partially annulled). In all, the awards rendered in 2007 did not tilt the overall balance of all cumulative decisions in favour of either party, with overall 42 cases decided in favour of the State, 40 cases decided in favour of the investor, 37 cases settled amicably, and 154 pending cases. For 17 cases that were decided, the decision is not in the public domain.

Figure 3. Sectors involved in known investment treaty arbitration
(Percentage)



Source: UNCTAD.

II. Substantive issues²

As far as the substantive implications are concerned, tribunals in 2007 rendered significant awards on a variety of issues:

On the definition of “investment” for purposes of establishing jurisdiction under Article 25 of the ICSID Convention, several cases in 2007 have highlighted once again the different approaches followed by tribunals. In *Saipem S.p.A. v. Bangladesh*³, the tribunal applied the so-called “Salini test” in order to determine whether *Saipem* has made an "investment" within the meaning of Article 25 of the ICSID Convention. According to such a test, the notion of "investment" implies the presence of the following elements: (a) a contribution of money or other assets of economic value; (b) a certain duration; (c) an element of risk; and (d) a contribution to the host country’s development.⁴ By contrast, in *M.C.I. Power Group L.C. v. Ecuador*⁵, the tribunal noted that these elements “must be considered as mere examples and not necessarily as elements that are required for” the existence of an "investment" for purposes of Article 25 of the ICSID Convention.⁶ However, despite the different approaches,

² A list of the reviewed cases is included in annex 2.

³ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07 (Bangladesh-Italy BIT), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.

⁴ *Saipem*, at para. 99.

⁵ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6 (Ecuador-United States BIT), Award, 31 July 2007.

⁶ *M.C.I.*, at 165.

both tribunals concluded that the dispute at hand indeed arose out of an “investment” as defined by Article 25 of the ICSID Convention.

In *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*⁷, the tribunal emphasized the apparent divergence in the arbitral practice with regard to the definition of “investment” for purposes of ICSID jurisdiction. However, it tried to suggest a compromising approach by adopting a “fact-specific and holistic assessment”. The tribunal concluded that the underwater salvaging project in Malaysia failed the definitional test of “investment” under Article 25 of the ICSID Convention. Having noted that “the question of contribution to the host State’s economic development assumes significant importance because the other typical hallmarks of ‘investment’ are either not decisive or appear only to be superficially satisfied”,⁸ the tribunal found that the project “did not benefit the Malaysian public interest in a material way or serve to benefit the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant.”⁹

On the requirement that the investment be made “in accordance with the laws of” the host State, the tribunal in *Fraport v. the Philippines*¹⁰ declined its jurisdiction based on the BIT between Germany and the Philippines (1997) after having established that the claimant had not made an investment “in accordance with the laws of the Philippines”. This award follows from the 2006 award in the *Inceysa Vallisoletana S.L. v. Republic of El Salvador*¹¹ case, where the tribunal accepted that El Salvador’s consent to ICSID jurisdiction embodied in the BIT between El Salvador and Spain (1995) did not extend to investments that were made fraudulently, and therefore not in accordance with the law.

On fair and equitable treatment (FET), several recent awards have highlighted the potential broad scope of the FET standard. In *Siemens v. Argentine Republic*¹², the tribunal noted, first, that “from the ordinary meaning of ‘fair’ and ‘equitable’ and the purpose and object of the Treaty [...] these terms denote treatment in an even-handed and just manner, conducive to fostering the promotion and protection of foreign investment and stimulating private initiative.”¹³ Secondly, the tribunal excluded bad faith or malicious intention of the host State as a necessary element in the failure to treat investment fairly and equitably, as that would be inconsistent with the purpose and expectations created by the BIT.¹⁴ The tribunal’s decision establishing a breach of the FET standard rested, inter alia, on the finding that Argentina’s conduct vis-à-vis the investor lacked transparency and did not conform with the principle of good faith.¹⁵

⁷ *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10 (Malaysia-United Kingdom BIT), Decision on Jurisdiction, 17 May 2007.

⁸ *Malaysian Historical Salvors*, para. 130.

⁹ *Malaysian Historical Salvors*, para. 131.

¹⁰ *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25 (Germany-Philippines BIT), Award, 16 August 2007.

¹¹ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (El Salvador-Spain BIT). Award, 2 August 2006.

¹² *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08 (Argentina-Germany BIT), Award, 6 February 2007.

¹³ *Siemens* at para. 290.

¹⁴ *Siemens* at para. 300.

¹⁵ *Siemens* at para. 308. See also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007.

In several of the awards dealing with the FET standard in 2007, tribunals have emphasized the relevance of the host State's obligation to maintain a stable and predictable legal and business framework in line with the investor's legitimate expectations. In *PSEG v. Turkey*¹⁶, the tribunal emphasized that the changes in both the legislative environment as well as in the attitudes and policies of the administration vis-à-vis investments were contrary to the need to "ensure a stable and predictable business environment for investors to operate in, as required [...] by the Treaty."¹⁷ For purposes of deciding the FET claim, the tribunal in *Enron v. Argentine Republic*¹⁸ linked the requirement of a stable framework for the investment with the protection of the expectations that were taken into account by the foreign investor to make the investment. The tribunal found that Argentina had violated the FET standard as "the stable legal framework that induced the investment is no longer in place and that a definitive framework has not been made available for almost five years."¹⁹

In *MCI Power Group v. Ecuador*²⁰, the tribunal emphasized that the investor's expectations of fair and equitable treatment and good faith must be paired with a *legitimate* objective. Eventually rejecting the FET claim, the tribunal noted that the "legitimacy of the expectations for proper treatment entertained by a foreign investor protected by the BIT does not depend solely on the intent of the parties, but on certainty about the contents of the enforceable obligations."²¹

In *Parkerings-Compagniet AS v. Lithuania*²², the tribunal expressly set out certain criteria for determining the legitimacy of the investor's expectation in the stability of the legal system, including (a) explicit promise or guarantee from the host State; (b) implicit assurances or representation from the host State that the investor took into account in making the investment; (c) where the host State made no assurance or representation, the circumstances surrounding the conclusion of the agreement; and (d) the conduct of the State at the time of the investment.²³ Underscoring that each State has an undeniable right to exercise its sovereign legislative power – albeit in a reasonable and fair manner – and that an investor must anticipate a possible change of circumstances, and thus structure its investment in order to adapt it to the new legal environment (particularly of a country in transition), the tribunal rejected the FET claim, concluding that the Republic of Lithuania had not given any explicit or implicit promise that the legal framework of the investment would remain unchanged.²⁴

¹⁶ *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award 19 January 2007.

¹⁷ *PSEG* at para. 252-253.

¹⁸ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007 (Decision on Rectification, 25 October 2007).

¹⁹ *Enron* at para. 267. See also *Sempra Energy v. Argentine Republic* (ICSID Case No. ARB/02/16, Award, 28 September 2007) where the Tribunal found that the "measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented." At para. 303.

²⁰ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6 (Ecuador-United States BIT), Award, 31 July 2007.

²¹ *MCI* at para. 278.

²² *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007.

²³ *Parkerings* at para. 331.

²⁴ *Parkerings* at para. 334-338.

On the full protection and security standard, the tribunal in *Compagnia del Agua Aconquija and Vivendi v. Argentine Republic*²⁵ rejected the respondent's argument that the guarantee of "protection and full security" in Article 5 of the BIT between Argentina and France (1991) would only apply to "physical interferences". The tribunal noted that "the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security [...]."²⁶

On most-favoured-nation treatment, an award on jurisdiction (*RosInvestCo UK Ltd v. The Russian Federation*)²⁷ permitted an investor to avail itself of the most-favoured nation (MFN) clause in the underlying BIT between the Soviet Union and the United Kingdom (1989) in order to extend the tribunal's jurisdiction to issues of occurrence and validity of expropriation, which were not covered by the limited jurisdiction clause in the BIT. Through the applicable MFN clause, the tribunal based its jurisdiction on the broader jurisdiction clause in the BIT between Denmark and the Russian Federation (1993). This appears to be the first award where a tribunal has employed the MFN clause to extend its jurisdiction to categories of claims excluded by the jurisdiction clause of the applicable BIT.²⁸

In another award (*Parkerings-Compagniet AS v. Lithuania*)²⁹, the tribunal addressed the Norwegian investor's MFN claim alleging that a competing Dutch firm had received more favourable treatment with regard to a similar parking construction project. The award turned on whether the two foreign projects were "in like circumstances". Although the tribunal accepted that the two foreign firms were indeed competitors, it then distinguished the two parking projects as to their archaeological and environmental impacts. According to the tribunal, "[t]he historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the 'Parkerings' project".³⁰

On national treatment, the tribunal in *United Parcel Service of America (UPS) v. Canada*³¹ found that Canada did not breach its national treatment obligation under NAFTA by providing distribution assistance to Canada Post. Such assistance, the tribunal found, was not based on nationality, but rather on the fact that Canada Post is able to deliver to individuals

²⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007.

²⁶ *Vivendi*, para. 7.4.15. See also *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08 (Argentina-Germany BIT), Award, 6 February 2007. Here, the tribunal adopted a similarly broad approach to the applicability of the full protection and security standard. "As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than 'physical' protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, 'security' is qualified by 'legal'. [...] It is clear that in the context of this meaning the Treaty refers to security that it [*sic*] is not physical. In fact, one may question given the qualification of the term 'security', whether the Treaty covers physical security at all. Arguably it could be considered to be included under 'full protection', but that is not an issue in these proceedings." Para. 303.

²⁷ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, October 2007.

²⁸ For example, this interpretation of the MFN clause had previously been rejected in *Plama Consortium Ltd v. Bulgaria* (ICSID Case No. ARB/03/24, 2005) and *Telenor Mobile Communications A.S. v. Republic of Hungary* (ICSID Case No. ARB/04/15, 2006).

²⁹ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007.

³⁰ *Parkerings* at para. 392.

³¹ *United Parcel Service (UPS) of America Inc. v. Canada*, UNCITRAL (NAFTA), Award on the Merits, 24 May 2007.

across the country, while UPS does not have this capacity. The tribunal found that UPS was not “in like circumstances” with Canada Post, and was therefore not entitled to the same treatment or benefits. This decision is in line with *Methanex v. United States*³², where the tribunal also used a narrow comparator to the national treatment provision. In *Occidental Exploration and Production Company v. Ecuador*³³, the tribunal interpreted “in like circumstances” in a broader sense which asserted that the meaning of “in like circumstances” did not refer to those companies involved in the same sector, but to all companies involved in exports, even if they operated in different sectors.

On expropriation, the tribunal in *Sempra v. Argentine Republic*³⁴ reiterated that in order for a claim of indirect expropriation to be successful it would be required that “the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated”. As this was not the case in the present dispute, the tribunal rejected the investor’s expropriation claim.³⁵ Similarly, in *PSEG v. Turkey*³⁶ the tribunal required “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.”³⁷ As the tribunal was not persuaded that any such extreme forms of interference had taken place in that case, it rejected the investor’s claim of indirect expropriation. The tribunal in *Eastern Sugar v. Czech Republic*³⁸ noted that a violation of the expropriation clause in the BIT would be applicable only if there was “a substantial deprivation of the entire investment or a substantial part of the investment.”³⁹ As such deprivation had not even been alleged by the claimant, the tribunal rejected the expropriation claim.

A few awards in 2007 dealt with the issue of expropriation of contractual rights. In *Parkerings v. Lithuania*⁴⁰, the tribunal accepted that contract rights might be expropriated but only under three cumulative conditions: (a) the State must have acted in its capacity of sovereign authority – that is to say using its sovereign power – and not only in its capacity of party to the agreement; (b) the existence of a contractual breach under domestic law must be determined by the appropriate forum to remedy the breach, unless a party is denied the possibility to complain about the wrongful termination of the agreement before the forum contractually chosen; and (c) the breach of the contract must give rise to a substantial decrease of the value of the investment.⁴¹ The tribunal rejected the existence of expropriation as none of these conditions had been met.

³² *Methanex v. United States*, UNCTIRAL, Final Award, 3 August 2005 (NAFTA).

³³ *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467 (Ecuador-United States BIT), Judgment of the Court of Appeal regarding Challenge to Arbitral Award, 4 July 2007.

³⁴ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Argentina-United States BIT), Award, 28 September 2007.

³⁵ *Sempra*, paras. 283-285.

³⁶ *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007.

³⁷ *PSEG*, para. 278.

³⁸ *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004 (Czech Republic-Netherlands BIT), Final Award, 12 April 2007.

³⁹ *Eastern Sugar*, at para. 210.

⁴⁰ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007.

⁴¹ *Parkerings* at paras. 443-456.

Confronted with a claim of expropriation of contractual rights, the tribunal in *Vivendi v. Argentine Republic*⁴² seems to have focused at least on the first and third condition set out by the *Parkerings* tribunal. Noting that the conduct of the Argentinean Province constituted "sovereign acts designed illegitimately to end the concession or to force its renegotiation" which "struck at the economic heart of, and crippled, Claimants' investment", the tribunal concluded that the claimants' concession rights had been expropriated.⁴³

Of the seven awards rendered in 2007 that examined claims based on expropriation, only two decided in favour of the investor (*Siemens v. Argentine Republic* and *Vivendi v. Argentine Republic*)⁴⁴, while five rejected such claims (*Enron v. Argentine Republic*, *Parkerings v. Lithuania*, *Sempra v. Argentine Republic*, *Eastern Sugar v. Czech Republic*, *PSEG v. Turkey*).⁴⁵ Three of the five tribunals that rejected the expropriation claims nonetheless found that the host countries had violated other treaty provisions, in particular the fair and equitable treatment standard (*Enron v. Argentine Republic*, *Sempra v. Argentine Republic*, *PSEG v. Turkey*).⁴⁶

On the "umbrella clause", recent awards have emphasized once more the divergent views followed by arbitral tribunals since the issue was first decided in *SGS v. Pakistan*⁴⁷. The tribunal in *Enron v. Argentine Republic*⁴⁸ found that the ordinary meaning of the phrase "any obligation" included both contractual obligations and statutory obligations undertaken with regard to investments.⁴⁹ On the other hand, in *Sempra v. Argentine Republic*⁵⁰, the tribunal distinguished between "ordinary commercial breaches of a contract" and "treaty breaches", implying that only the latter would fall under the scope of an umbrella clause. In line with the

⁴² *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 Award, 20 August 2007

⁴³ *Vivendi*, at paras. 7.5.22 and 7.5.25. See also *Siemens v. Argentine Republic*, Award, 6 February 2007.

⁴⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08 (Argentina-Germany BIT), Award, 6 February 2007, and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (Argentina-France BIT), Award, 20 August 2007

⁴⁵ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007 (Decision on Rectification, 25 October 2007); *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Argentina-United States BIT), Award, 28 September 2007; *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004 (Czech Republic-Netherlands BIT), Final Award, 12 April 2007; *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007.

⁴⁶ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007 (Decision on Rectification, 25 October 2007); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Argentina-United States BIT), Award, 28 September 2007; *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007.

⁴⁷ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Pakistan-Switzerland BIT), Award on Jurisdiction, 6 August 2003.

⁴⁸ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007.

⁴⁹ *Enron*, para. 274. See also *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08. Award, 6 February 2007. "In regards to the scope of Article 10(1), the Tribunal concurs with the submission that reference to disputes related to investments would cover contractual disputes for purposes of the consent of the parties to arbitration given the wide meaning of the term 'investments' and the terms of Article 7(2). However, to the extent that the obligations assumed by the State party are of a contractual nature, such obligations must originate in a contract between the State party to the Treaty and the foreign investor as, for instance, in the SGS cases." At para. 205.

⁵⁰ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Argentina-United States BIT), Award, 28 September 2007.

reasoning in *SGS v. Pakistan*⁵¹, the *Sempra* tribunal noted that “such a distinction is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause”.⁵²

On the "state of necessity", two awards rendered in 2007 followed the approach adopted by the 2005 tribunal in *CMS v. Argentine Republic*⁵³ with regard to the availability of the defense based on the state of necessity or emergency (whether under the BIT or customary international law). In *Sempra v. Argentine Republic*, the tribunal adopted a “restrictive interpretation” of Article XI of the BIT between the Argentine Republic and the United States (1991), highlighting the Treaty’s general object and purpose to protect rights of investors in situations of economic difficulty and hardship.⁵⁴ While the tribunal found that Article XI in principle covered economic emergencies, it also concluded that the provision was not self-judging. The tribunal in *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* followed the same approach.⁵⁵ These awards contrast with the 2006 decision on liability in *LG&E v. Argentine Republic*⁵⁶, where the tribunal accepted Argentina's defense that its actions following the financial crisis in the late 1990s were taken due to a state of necessity that imperiled the essential interests of the country at the time, thus excluding (albeit temporally) Argentina's liability under international law.

In terms of damages, five awards in 2007, all of them rendered against Argentina, are noteworthy:

- In February 2007, an ICSID tribunal awarded *Siemens*⁵⁷ US\$ 217.8 million plus interest (2.66%) after having found Argentina to be in breach of several provisions of the BIT with Germany (1991). The investor had originally claimed US\$ 462.5 million.
- In May 2007, an ICSID tribunal awarded *Enron Corporation and Ponderosa Assets LP*⁵⁸ US\$ 106.2 million plus interest (2%) after having found Argentina in breach of the FET standard and umbrella clause of the BIT with the United States (1991). The investor had originally claimed up to US\$ 582 million.

⁵¹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Pakistan-Switzerland BIT), Award on Jurisdiction, 6 August 2003.

⁵² *Sempra*, at para. 310. However, the Tribunal in *Sempra* found that the measures at issue were far from “ordinary” contractual breaches; rather, they were “the outcome of major legal and regulatory changes introduced by the State” and gave expression to a sweeping “change of policy” that could be performed only by the State, “and not an ordinary contract party”.

⁵³ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 (Argentina-United States BIT), Award, 12 May 2005.

⁵⁴ *Sempra*, at paras. 373-386. “The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness. Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness [...]” Para. 388.

⁵⁵ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007 (Decision on Rectification, 25 October 2007).

⁵⁶ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 (Argentina-United States BIT), Decision on Liability, 3 October 2006.

⁵⁷ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08 (Argentina-Germany BIT). Award, 6 February 2007.

⁵⁸ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007 (Decision on Rectification, 25 October 2007).

- In August 2007, an ICSID tribunal awarded *Compañía de Aguas del Aconquija S.A. and Vivendi Universal*⁵⁹ \$105 million plus interest (6% per year from 1997 over \$51million and from 2002 over \$54 millions), after having found Argentina to be in breach of the FET standard and expropriation provision of the BIT with France (1991). The investor had originally claimed \$317 million.
- In July 2007, an ICSID tribunal awarded *LG&E*⁶⁰ US\$ 57.4 million including interest following a 2006 decision establishing Argentina's liability under the BIT with the United States (1991). The investor had originally claimed up to \$268 million.
- In September 2007, an ICSID tribunal awarded *Sempra*⁶¹ \$128.6 million plus interest (successive 6-month LIBOR rates plus a 2% annualized premium) after having found Argentina to be in breach of the FET standard and umbrella clause of the BIT with the United States (1991). The investor had originally claimed \$209.3 million.

Out of a total of \$1,838 billion in claimed damages, these five tribunals have awarded a total of \$615 million (approximately 33%).

As far as *the allocation of costs and attorney's fees* by tribunals are concerned, awards in 2007 confirm the lack of any uniform approach. While some seem to reinforce the recent trend that allocates at least part of the legal fees and arbitration costs to the losing party, whether the State or the investor, other awards do not award any costs. For example, the ICSID tribunal in *Vivendi v. Argentine Republic*⁶² awarded the claimants approximately \$702,000 for its legal costs relating to the jurisdictional phase, while both parties had to bear their legal costs for the substantive phase and the arbitration costs equally.⁶³ On the other hand, the tribunal in *Bayview Irrigation District v. Mexico*⁶⁴, emphasizing that the claims were not frivolous and were pursued and defended in good faith and with all due expedition, concluded that there was no “reason to depart from the normal practice in such cases, according to which each Party shall bear its own costs and the costs of the tribunal shall be divided equally between the Parties.”⁶⁵

⁵⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007.

⁶⁰ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 (Argentina-United States BIT), Decision on Liability, 3 October 2006.

⁶¹ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Argentina-United States BIT), Award, 28 September 2007.

⁶² *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 Award, 20 August 2007.

⁶³ Some form of apportionment was decided in *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08 (Argentina- Germany BIT), Award, 6 February 2007 (each party to bear its own legal costs but respondent and claimant to pay 75% and 25% respectively of the arbitration costs); *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (respondent and claimant to pay 65% and 35% respectively of all the costs). Noteworthy is the decision in the consolidated arbitration pursuant to Article 1126 of NAFTA (*Canfor Corporation v. US; Tembec et al. v. US and Terminal Forest Products Ltd. v. US* (Consolidated NAFTA Arbitration, UNCITRAL Arbitration Rules), Joint Order on the Cost of Arbitration and for the Termination of Certain Arbitral Proceedings, 19 July 2007) where an UNCITRAL Tribunal decided to apply the general principle that the costs of arbitration shall be borne by the unsuccessful, expressly contemplated in Article 40(1) of the UNCITRAL Arbitration Rules.

⁶⁴ *Bayview Irrigation District et al. v. Mexico*, ICSID Case No. ARB/AF/05/1 (NAFTA), Award, 19 June 2007.

⁶⁵ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007. The Tribunal noted that “there is no rule in international arbitration that costs must follow the event”. Para. 462. See also *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case

On third-party participation, the trend towards admitting the submission of *amicus curiae* briefs continued. On the basis of new ICSID Arbitration Rules (Article 37), both tribunals in *Biwater Gauff (Tanzania) v. United Republic of Tanzania* and *Suez, Sociedad General de Agua de Barcelona S.A and Vivendi Universal S.A. v. Argentine Republic* permitted written submissions from amici curiae.⁶⁶ However, both orders denied access to documents and attendance to hearings.

In terms of **review of arbitral awards**, 2007 saw four annulment proceedings under ICSID coming to a conclusion. Three applications were dismissed in toto (*Empresas Lucchetti v. Peru*⁶⁷, *MTD Equity v. Chile*⁶⁸, *Soufraki v. United Arab Emirates*).⁶⁹ A fourth application was upheld in part (*CMS v. Argentine Republic*⁷⁰), although it did not change the substance of the original decision in terms of liability and compensation.⁷¹

Furthermore, in 2007 three domestic courts have reviewed arbitral awards on the basis of the *lex arbitri*. The first judgment was rendered in a proceeding brought by an investor in order to set aside and vacate the arbitral award that had rejected its claim (*International Thunderbird Gaming v. Mexico*).⁷² The second judgment was rendered in a longer proceedings brought by the host State in order to set aside an arbitral award accepting jurisdiction and establishing State liability under international law (*Occidental Exploration and Production Company v. Ecuador*).⁷³ The third judgment was rendered in proceedings brought by the host State in order to set aside an arbitral award establishing jurisdiction based on a BIT (*European Media Venture v. Czech Republic*).⁷⁴ All three challenges were unsuccessful.

No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007 (Decision on Rectification, 25 October 2007); *United Parcel Service of America Inc. v. Canada* (UNCITRAL (NAFTA), Award on the Merits, 24 May 2007); *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 (Ecuador-United States BIT); *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1 (Argentina-United States BIT) where tribunals required each party to bear its own costs.

⁶⁶ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Tanzania-United Kingdom BIT), Procedural Order N. 5, 2 February 2007; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (Argentina-France and Argentina-Spain BITs), Order in response to amicus curiae, 12 February 2007.

⁶⁷ *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Peru*, ICSID Case No. ARB/03/4 (Chile-Peru BIT), previously *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Peru*, Decision on Annulment and Dissenting Opinion, 5 September 2007 (Award 2005).

⁶⁸ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7 (Chile-Malaysia BIT), Decision on Annulment, 21 March 2007 (Award 2004).

⁶⁹ *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (Italy-United Arab Emirates BIT), Decision on the Application for the Annulment of the Award, 5 June 2007.

⁷⁰ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 (Argentina-United States BIT), Award, 12 May 2005.

⁷¹ It should be noted that at the end of 2006 the Annulment Committee in *Mitchell v. Democratic Republic of Congo* (*Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 (Democratic Republic of Congo-United States BIT)) annulled the original award rendered in 2004 on the grounds of manifest excess of powers and failure of the Arbitral Tribunal to state reasons as to the existence of an investment within the meaning of the Washington Convention.

⁷² *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Judgment of the United States District Court for the District of Columbia on petition to set aside award, 14 February 2007.

⁷³ *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467 (Ecuador-United States BIT), Judgment of the Court of Appeal regarding Challenge to Arbitral Award, 4 July 2007.

⁷⁴ *European Media Ventures SA v. Czech Republic* (UNCITRAL), Award on Jurisdiction, 15 May 2007.

Twenty-three of the 24 public decisions (on jurisdiction, on the merits and on annulment requests) rendered in 2007 were issued by arbitral tribunals consisting of more than one arbitrator.⁷⁵ Nine of these were rendered either in toto or in part by a majority of the arbitral tribunal, with a member of the tribunal submitting a *separate or dissenting opinion*.⁷⁶

* * *

After a substantial decrease in the number of investor-State disputes in 2006, a new surge of approximately 35 per cent took place in 2007. Awards rendered in 2007 cover a broad range of issues, including the definition of "investment", the standards of fair and equitable treatment and full protection and security, the principles of national treatment and most-favoured nation treatment, the expropriation article and the umbrella clause. This means that most of the substantive provisions usually contained in IIAs have become the subject of investor-State dispute settlement procedures. Thus, no country can be sure that its IIAs remain unchallenged before international tribunals.

Another distinctive feature of the 2007 awards is the relatively high amount of damages that host countries have to pay. Five tribunals alone awarded a total of \$615 million to foreign investors.

As in previous years, 2007 saw several arbitration awards that were inconsistent with other decisions rendered on similar issues. Such inconsistency related, for instance, to the definition of "investment", the scope of the umbrella clause and the issue of "like circumstances" in connection with the national treatment principle.

To these diverging awards must be added the substantial number of dissenting opinions – almost 40 per cent of all cases – that individual arbitrators expressed in the 2007 awards. All this demonstrates that the development of case law on international investment issues is still very much in flux and far from being consolidated.

In view of the broad variety of IIA provisions that may become the subject of investor-State dispute settlement, the potentially high amount of damages awarded and the complexity of the

⁷⁵ The only decision rendered by a sole arbitrator in 2007 is *Malaysian Historical Salvors SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10 (Malaysia-UK BIT), Decision on Jurisdiction, 17 May 2007.

⁷⁶ Dissenting opinions were included in: *Sempra v. Argentine Republic*, see footnote 34; *Lucchetti v. Peru* (Annulment Committee), see footnote 67; *Sociedad Anónima Eduardo Vieira v. Chile*, ICSID Case No. ARB/04/7 (Chile-Spain BIT), Award and Dissenting Opinion, 21 August 2007; *Fraport v. The Philippines*, see footnote 10; *Soufraki v. United Arab Emirates*, see footnote 69; *Siag and Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15 (Egypt-Italy BIT), Decision on Jurisdiction, 11 April 2007; *Eastern Sugar v. Czech Republic*, see footnote 38; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08 (Argentina-Germany BIT), Award, 6 February 2007; *The Channel Tunnel Group Ltd and France-Manche SA v. United Kingdom – France*, Ad hoc—PCA Rules (Treaty of Canterbury, Concession Agreement), Partial Award on Jurisdiction, 30 January 2007. The Tribunal decided unanimously in: *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005 (UK-Soviet Union BIT), Award on Jurisdiction, October 2007; *CMS v. Argentine Republic* (Annulment Committee), see footnote 53, Annulment Decision, 25 September 2007; *Parkerings v. Lithuania*, see footnote 22; *Vivendi v. Argentine Republic*, see footnote 25; *M.C.I Power v. Ecuador*, see footnote 5; *Kardassopoulos v. Georgia*, ICSID Case No ARB/05/18, (Energy Charter Treaty), Decision on Jurisdiction, 6 July 2007; *LG&E v. Argentine Republic*, see footnote 56; *Bayview v. Mexico*, see footnote 64; *United Parcel Service v. Canada* (UNCITRAL (NAFTA), Award on the Merits, 24 May 2007); *Enron v. Argentine Republic*, see footnote 18; *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07 (Bangladesh-Italy BIT), Decision on Jurisdiction, 21 March 2007; *PSEG v. Turkey*, see footnote 16; *Repsol YPF Ecuador SA v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/01/10, Decision on Annulment, 8 January 2007.

issues involved, developing countries, in particular the least developed countries, require ongoing technical assistance and capacity-building on these matters.

Annex 1

Known investment treaty claims, by defendants (December 2007)

Country	Number of cases
Argentina	46
Mexico	18
Czech Republic	14
Canada	12
United States of America	12
Ecuador	9
India	9
Poland	9
Egypt	8
Romania	8
Russian Federation	8
Ukraine	7
Venezuela (Bolivarian Republic of)	7
Turkey	6
Hungary	5
Kazakhstan	5
Moldova, Republic of	5
Chile	4
Congo, Democratic Republic of	4
Bolivia	3
Estonia	3
Georgia	3
Jordan	3
Kyrgyz Republic	3
Pakistan	3
Albania	2
Algeria	2
Azerbaijan	2
Bangladesh	2
Burundi	2
Dominican Republic	2
Ghana	2
Latvia	2
Lebanon	2
Lithuania	2
Malaysia	2
Morocco	2
Paraguay	2
Peru	2
Philippines	2
Slovak Republic	2
Slovenia	2
Sri Lanka	2
United Arab Emirates	2
Armenia	1
Bosnia and Herzegovina	1
Bulgaria	1
Costa Rica	1
Croatia	1

El Salvador	1
France/United Kingdom	1
Germany	1
Guatemala	1
Guyana	1
Indonesia	1
Mongolia	1
Myanmar	1
Nicaragua	1
Nigeria	1
Panama	1
Portugal	1
Saudi Arabia	1
Serbia-Montenegro	1
Seychelles	1
South Africa	1
Spain	1
Tanzania, United Republic of	1
Thailand	1
Trinidad and Tobago	1
Tunisia	1
Viet Nam	1
Yemen	1
Zimbabwe	1
Unknown country	9
ALL CASES	290

Annex 2

List of cases reviewed

Bayview Irrigation District et al. v. Mexico, ICSID Case No. ARB(AF)/05/1 (NAFTA), Award, 19 June 2007.

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22 (Tanzania-United Kingdom BIT), Procedural Order N. 5, 2 February 2007.

Canfor Corporation v. US; Tembec et al. v. US and Terminal Forest Products Ltd. v. US (Consolidated NAFTA Arbitration, UNCITRAL Rules), Joint Order on the Cost of Arbitration and for the Termination of Certain Arbitral Proceedings, 19 July 2007.

Channel Tunnel Group Ltd and France-Manche SA v. United Kingdom — France, Ad hoc—PCA Rules (Treaty of Canterbury, Concession Agreement), Partial Award on Jurisdiction, 30 January 2007.

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8 (Argentina-United States BIT), Award, 12 May 2005.

Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3 (Argentina-France BIT), Award, 20 August 2007.

Eastern Sugar B.V. v. Czech Republic, SCC Case No. 088/2004 (Czech Republic-Netherlands BIT), Final Award, 12 April 2007.

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007 (Decision on Rectification, 25 October 2007).

European Media Ventures SA v. Czech Republic (UNCITRAL), Award on Jurisdiction, 15 May 2007.

Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25 (Germany-Philippines BIT), Award, 16 August 2007.

Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26 (El Salvador-Spain BIT), Award, 2 August 2006.

Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Peru, ICSID Case No. ARB/03/4 (Chile-Peru BIT) (Previously *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Peru*), Decision on Annulment and Dissenting Opinion, 5 September 2007 (Award 2005).

International Thunderbird Gaming Corporation v. Mexico, UNCITRAL (NAFTA), Judgment of the US District Court for the District of Columbia on petition to set aside award, 14 February 2007.

Kardassopoulos v. Georgia, ICSID Case No ARB/05/18, (Energy Charter Treaty), Decision on Jurisdiction, 6 July 2007.

LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1 (Argentina-United States BIT), Decision on Liability, 3 October 2006.

Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10 (Malaysia-United Kingdom BIT), Decision on Jurisdiction, 17 May 2007.

M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador, ICSID Case No. ARB/03/6 (Ecuador-United States BIT), Award, 31 July 2007.

Methanex v. United States, UNCITRAL, Final Award, 3 August 2005 (NAFTA).

Mitchell v. Democratic Republic of Congo (Patrick Mitchell v. Democratic Republic of the Congo), ICSID Case No. ARB/99/7 (Democratic Republic of Congo-United States BIT), Decision on the Application for Annulment of the Award, 1 November 2006 (Award 9 February 2004).

MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7 (Chile-Malaysia BIT), Decision on Annulment, 21 March 2007 (Award 2004).

Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467 (Ecuador-United States BIT), Judgment of the Court of Appeal regarding Challenge to Arbitral Award, 4 July 2007.

Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007.

Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24 (Energy Charter Treaty), Decision on Jurisdiction, 8 February 2005, and Order on Provisional Measures, 6 September 2005.

PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007.

Repsol YPF Ecuador SA v. Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No ARB/01/10, Decision on Annulment, 8 January 2007.

RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. Arb. V079/2005 (UK-Soviet Union BIT), Award on Jurisdiction, October 2007.

Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07 (Bangladesh-Italy BIT), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.

Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16 (Argentina-United States BIT), Award, 28 September 2007.

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 (Pakistan-Switzerland BIT), Award on Jurisdiction, 6 August 2003.

Siag and Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15 (Egypt-Italy BIT), Decision on Jurisdiction, 11 April 2007.

Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/08 (Argentina-Germany BIT), Award, 6 February 2007.

Sociedad Anónima Eduardo Vieira v. Chile, ICSID Case No. ARB/04/7 (Chile-Spain BIT), Award and Dissenting Opinion, 21 August 2007.

Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7 (Italy-United Arab Emirates BIT), Decision on the Application for the Annulment of the Award, 5 June 2007.

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (Argentina-France and Argentina-Spain BITs), Order in Response to Amicus Curiae, 12 February 2007.

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