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Latest Developments in Investor–State Dispute Settlement

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I. Recent trends

In 2008, the number of known treaty-based investor–state dispute settlement cases filed under international investment agreements (IIAs) grew by at least 30, bringing the total number of known treaty-based cases to 317 by the end of 2008 (figure 1).[1] Although this constitutes a slight decrease from 2007 (when 35 new cases were filed), it continues a trend that began in 2002, with between 28 and 48 new cases every year, indicating that international investment arbitration is no longer an exceptional phenomenon, but a part of the "normal" investment landscape. Since the International Centre for Settlement of Investment Disputes (ICSID) is the only arbitration facility to maintain a public registry of claims, the total number of actual treaty-based cases is likely to be higher.[2]

Of the total 317 known disputes, 201 were filed with ICSID (or the ICSID Additional Facility), 83 under the United Nations Commission on International Trade Law (UNCITRAL), 17 with the Stockholm Chamber of Commerce, five with the International Chamber of Commerce and five were ad hoc. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration and one was administered by the Permanent Court of Arbitration. In four cases, the applicable rules are unknown so far.

At least 77 governments have faced investment treaty arbitration: 47 developing countries, 17 developed countries and 13 countries with economies in transition. Most claims were initiated by investors from developed countries. Of the 96 concluded cases at the end of 2008, approximately half were decided in favour of the State (51) and half in favour of the investor (45), although four of these cases are still pending before an ICSID annulment committee. In one case, the tribunal found treaty violations but awarded no damages. At the same timer, 48 cases were discontinued

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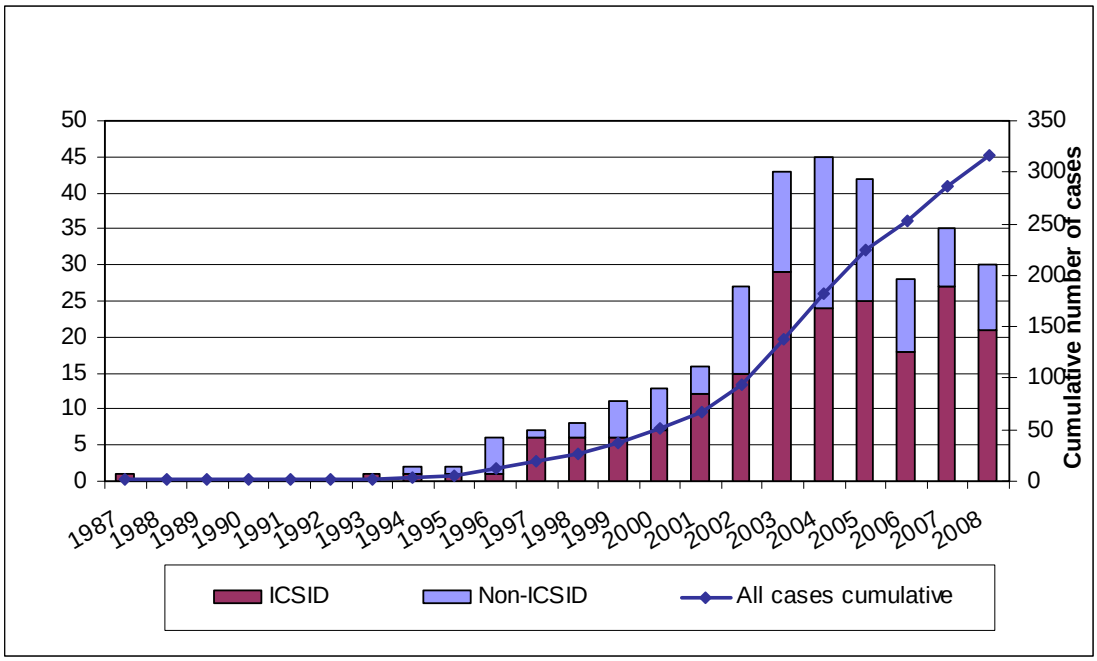
[1] Due to new information becoming available last year, the number of total known IIA-based ISDS cases at end-2007 was revised to 287 (down from 288 reported in last year's Monitor). This number does not include cases that are exclusively based on investment contracts (state contracts) and cases where a party has so far only signalled 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.

[2] UNCTAD's database on investor-state dispute settlement cases (available at www.unctad.org/iia) is continuously updated. Due to new information becoming available, numbers can change from one year to the next. For example, for 2006 26 newly filed cases were reported in the IIA Monitor 1/2008. This number now stands at 28.

following settlement, 142 cases were still pending and for 31 cases the status was unknown.

Figure 1. Known investment treaty arbitrations (cumulative and newly instituted cases), 1989–2008



Source: UNCTAD.

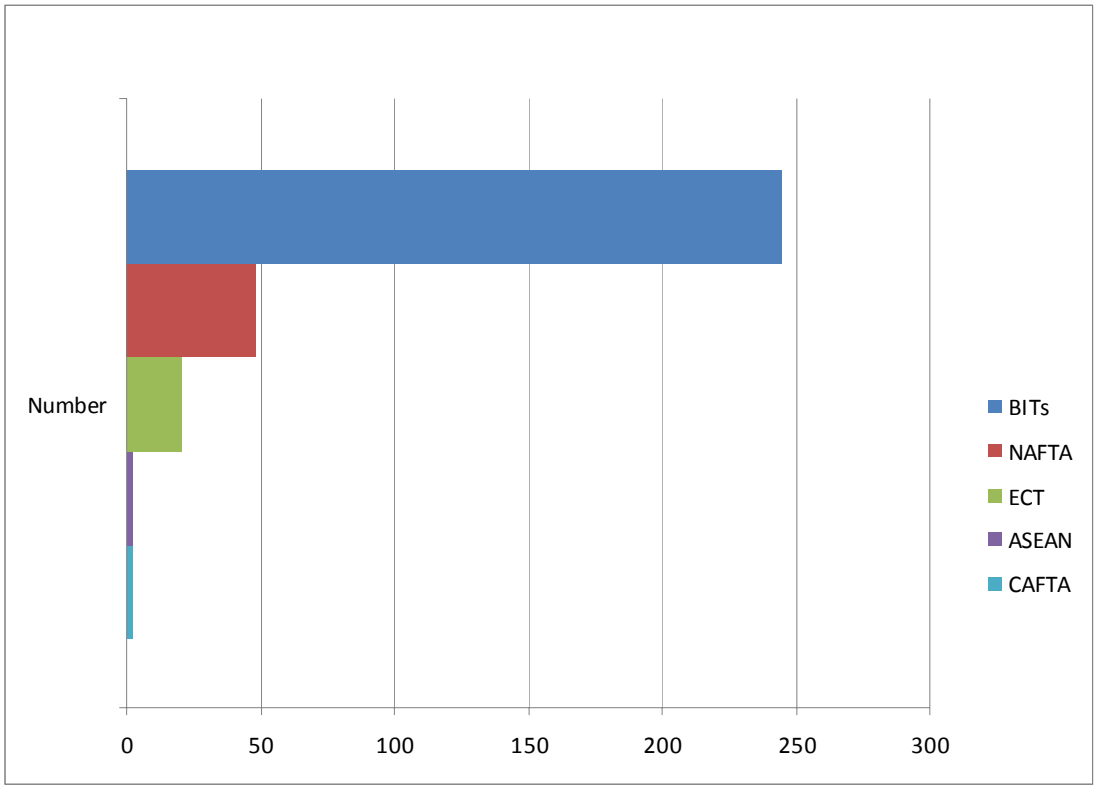
In 2008, Ecuador and Ukraine faced four new cases each, followed by Georgia with three new cases, while Argentina, Costa Rica and the Bolivarian Republic of Venezuela each faced two new cases. Gabon, Senegal and Uzbekistan faced arbitration for the first time. Overall, Argentina still tops the list with 48 claims lodged against it. Mexico has the second highest number of known claims (18). The Czech Republic follows with 15 cases (with one new case filed in 2008) and Ecuador with 14 cases (four new cases filed in 2008). Canada (with one new case in 2008) and the United States of America have 13 and 12 cases, respectively (see annex 1).

The overwhelming majority of claims were lodged by investors from developed countries (92 per cent). At the end of 2008, only 20 cases were filed by investors from developing countries, and nine cases originated from investors headquartered in transition economies.

As far as the legal instruments used in international arbitration are concerned, bilateral investment treaties (BITs) remain by far the most common type of treaty used by foreign investors to file claims against host States. In particular, the BIT between Argentina and the United States was the basis for at least 18 claims, followed by the BIT between Ecuador and the United States (nine), that between the Russian Federation and the Republic of Moldova (nine), the BIT between the Czech Republic and the Netherlands (five), and the Argentina–Italy BIT (five).

With regard to regional and plurilateral international investment agreements, the North American Free Trade Agreement (NAFTA) alone was used in 48 claims while the Energy Charter was used for at least 20 claims. The Central American Free Trade Agreement (CAFTA) has been used in at least two claims since its entry into force. This shows that investors are increasingly using investment chapters of free trade agreements (FTAs) for filing claims against host states (figure 2).

Figure 2. Most used international investment agreements in investment treaty arbitrations, end 2008



Source: UNCTAD.

As far as the substantive implications are concerned, tribunals in 2008 rendered significant awards on a variety of issues.

II. Substantive issues[3]

On the definition of "investor" for purposes of establishing jurisdiction under article 25 of ICSID, several decisions rendered in 2008 highlight the different approaches followed by tribunals. Some tribunals seem to adopt a looser interpretation of the jurisdictional requirement *ratione personae* pursuant to article 25 ICSID. For example, in *Rompetrol v. Romania*[4] the tribunal upheld its jurisdiction to hear a claim brought by a Dutch-incorporated company despite the respondent's allegation that the

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

[4] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Netherlands-Romania BIT), Decision on Jurisdiction and Admissibility, 18 April 2008.

company was controlled or owned by a Romanian national. Without exploring the merits of those allegations, the tribunal concluded that "neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality under The Netherlands–Romania BIT, and that the Claimant qualifies as an investor entitled to invoke the jurisdiction of this Tribunal by virtue of Article 1(b)(ii) of the BIT".[5] In *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*[6] the tribunal upheld its jurisdiction, despite the respondent's claim that the claimant's corporate veil should be pierced, noting that "nowhere in the ICSID Convention is there a basis for piercing the corporate veil of a designated claimant".[7] Equally, in *Micula et al. v. Romania*[8], the tribunal rejected the application of the test of effective nationality in order to determine, for purposes of establishing jurisdiction pursuant to article 25 ICSID, whether the claimants (holding valid Swedish passports) were effectively Romanian nationals.[9]

Adopting a more sympathetic stance towards the allegation of abuse of the ICSID mechanism (echoing Professor Weil's dissent in *Tokios Tokeles v. Ukraine*[10]), in *TSA Spectrum de Argentina SA v. Argentina*,[11] a divided ICSID tribunal ruled that the "corporate veil must be pierced" in order to determine whether a locally-incorporated entity is truly controlled by a foreigner for purposes of article 25(2)(b) of the ICSID Convention. Despite the fact that TSA Spectrum de Argentina was wholly owned by the Dutch company TSI Spectrum International NV, the majority declined jurisdiction because it determined that a citizen of Argentina was the ultimate owner of the investment vehicle.[12]

In this regard, it may be noted that in 2008 there were at least 16 decisions where tribunals had to decide an objection to its jurisdiction (at times this decision was rendered together with a decision on the merits). In four of these cases, the tribunal accepted such an objection dismissing the entire claim (*TSA Spectrum v. Argentina*, *Wintershall v. Argentina*,[13] *African Holding Company of America v. Democratic Republic of the Congo*[14] and *Canadian Cattlemen for Fair Trade v. United States*[15]).

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[5] *Sempra Energy v. Argentine Republic*, ICSID Case No. ARB/02/16, (Argentina - United States BIT), Award, 28 September 2007, at para. 110.
[6] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Turkey-Kazakhstan BIT), Award, 29 July 2008.
[7] *Sempra*, at para. 205.
[8] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20 (Sweden-Romania BIT), Decision on Jurisdiction and Admissibility, 24 September 2008.
[9] "There is little support for the proposition that the genuine link test has any role to play in the context of ICSID proceedings." *Micula*, at para. 100.
[10] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (Lithuania-Ukraine BIT), Award and separate opinion, 26 July 2007.
[11] *TSA Spectrum de Argentina S.A. v. Argentina Republic*, ICSID Case No. ARB/05/5 (Netherlands-Argentina BIT), Award, 19 December 2008.
[12] *Sempra*, at para. 162.
[13] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008.
[14] *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No ARB/05/21 (United States-Democratic Republic of the Congo BIT), Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008.
[15] *Canadian Cattlemen for Fair Trade v. United States*, UNCITRAL (NAFTA), Award on Jurisdiction. 28 January 2008.

On the definition of "investment" for purposes of establishing jurisdiction under Article 25 of ICSID, the tribunal in *Biwater Gauff Ltd v. Tanzania*[16] noted the problematic nature of the so-called *Salini* test if the "typical characteristics" of an investment as identified in that decision (namely, (a) duration; (b) regularity of profit and return; (c) assumption of risk; (d) substantial commitment; (e) significance for the host state's development) are elevated into a fixed and inflexible test and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. The Tribunal found that "a more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID".[17] This approach to the definition of "investment" in article 25 of ICSID should be contrasted with previous decisions such as that by the ad hoc committee in *Patrick Mitchell v. Congo,* making all the typical characteristics an essential but not sufficient criteria for purposes of determining the existence of an investment.

On most favoured nation treatment (MFN), the tribunal in *Wintershall Aktiengesellschaft v. Argentina* declined jurisdiction over a claim by the German investor refusing to permit Wintershall to invoke the MFN clause in the Argentina-Germany BIT in order to dispense of an 18-month period in which investors must pursue their claims before local courts. Such an interpretation appears to contradict a 2004 decision by the tribunal in *Siemens v. Argentina,*[18] which upheld its jurisdiction despite the investor's apparent non-compliance with the 18-month requirement found in the same Argentina-Germany BIT.

On fair and equitable treatment (FET), several awards have highlighted the centrality as well as the breadth of scope of the FET standard. With regard to the latter, in *Biwater v. Tanzania*, the tribunal found that a series of public announcements denigrating the investor's poor performance and announcing that a new public entity would be taking over the service were in violation of the FET standard. The tribunal noted that, despite its poor record, the investor "still had a right to the proper and unhindered performance of the contractual termination process [and] the Republic's public statements at this time constituted an unwarranted interference in this".[19]

In *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, the tribunal noted the parties' agreement that the FET standard encompasses inter alia the following concrete principles: (a) the state must act in a transparent manner; (b) the state is obliged to act in good faith; (c) the state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; (d) the state must respect procedural propriety and due process. It also added that "the case law confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations".[20] The tribunal found

[16] *Biwater Gauff Ltd v. Tanzania*, ICSID Case No. ARB/05/22 (United Kingdom-Tanzania BIT), Award, 18 July 2008, at para. 314.
[17] *Sempra*, at para. 316.
[18] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.
[19] *Biwater Gauff Ltd*, at para. 627.
[20] *Rumeli Telekom*, at para. 609.

the Kazakh government in violation of the FET standard as it did not act vis-à-vis the investors in a transparent manner and with respect for due process.

Despite emphasizing the relevance, for purposes of the FET standard, of the host state's obligations to maintain a stable and predictable legal framework and to protect the investor's legitimate expectations, a few tribunals have taken steps to clarify (and apparently limit) these obligations. In *Duke Energy et al. v. Ecuador,*[21] having acknowledged that the investor's expectations about the stability of the legal and business environment are an important element of FET, the tribunal emphasized the following limitations:

> To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. 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.[22]

The tribunal found that Ecuador failed to accord FET to the investor by not implementing a specific payment guarantee which had expressly been promised in one of the investment contracts.

In *Continental Casualty Co. v. Argentina,*[23] the tribunal listed several factors to be evaluated for purposes of a claim based on the protection of legitimate expectations under the FET standard:

> (i) the specificity of the undertaking allegedly relied upon;
> (ii) general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*;
> (iii) unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance;
> (iv) centrality to the protected investment and impact of the changes on the operation of the foreign owned business in general including its profitability is also relevant.[24]

The tribunal rejected most of the investor's claim based on FET as the investor had not proven the existence of reasonable legitimate expectations.

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[21] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 (United States-Ecuador BIT), Award, 18 August 2008.
[22] *Sempra*, at para. 340.
[23] *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9 (United States-Argentina BIT), Award, 5 September 2008.
[24] Ibid., at para. 261.

It should also be noted that FET remains the most relied upon and successful basis for a treaty claim. In all 13 decisions on the merits rendered in 2008, a claim based on FET was addressed by the tribunal. While the claims based on FET were rejected in six instances (*LESI v. Algeria*,[25] *Jan de Nul v. Egypt*,[26] *Plama Consortium v. Bulgaria*,[27] *Helnan International Hotels v. Egypt*,[28] *Metalpar v. Argentina*,[29] and *AMTO v. Ukraine*[30]), the tribunals accepted the FET claims in seven other cases (*National Grid v. Argentina*,[31] *Continental Casualty v. Argentina*, *Duke Energy v. Ecuador*, *Rumeli Telekom v. Kazakhstan*, *Biwater Gauff v. Tanzania*, *Pey Casado v. Chile*,[32] and *Desert Line Projects v. Yemen*[33]).

On expropriation, the difficulty of drawing the line between indirect expropriation and legitimate regulatory measures has been once again highlighted by investment tribunals. For example, in *Continental Casualty v. Argentina*, the tribunal contrasted, on the one hand, "certain types of measures or state conduct that are considered a form of expropriation because of their material impact on property" and which entail indemnification and, on the other hand, "limitations to the use of property in the public interest that fall within typical government regulations of property entailing mostly inevitable limitations imposed in order to ensure the rights of others or of the general public", which do not require indemnification "provided however that they do not affect property in an intolerable, discriminatory or disproportionate manner".[34] The tribunal, however, admitted that "the distinction is not always easy" and "that in different historical and social contexts the line has been drawn differently and that different international tribunals, including arbitration tribunals under various BITs, have relied on different criteria and have given different weight to them, such as those recognizing the public interest on the one side and those protecting the integrity of property rights on the other".[35]

In this regard, it may be worthwhile noting that in the seven decisions rendered in 2008 where a claim based on expropriation was addressed by the tribunal, only in two instances did the tribunal find in favour of the claimant (*Rumeli Telekom v.*

[25] *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID Case No. ARB/05/3 (Italy-Algeria BIT), Award, 12 November 2008.
[26] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Belgium-Luxembourg-Egypt BIT), Award, 6 November 2008.
[27] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (Energy Charter Treaty), Award, 27 August 2008.
[28] *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/09 (Denmark-Egypt), Award, 7 June 2008.
[29] *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5 (Chile-Argentina BIT), Award, 6 June 2008.
[30] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (Energy Charter Treaty), Final Award, 26 March 2008.
[31] *National Grid plc v. The Argentine Republic*, UNCITRAL (United Kingdom-Argentina BIT), Award, 3 November 2008.
[32] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2 (Spain-Chile BIT), 2008.
[33] *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17 (Oman-Yemen BIT), Award, 6 February 2008.
[34] *Continental Casualty Company*, at para. 276.
[35] Ibid., at para 277.

Kazakhstan and *Biwater Gauff v. Tanzania*), and only in the former case did the tribunal actually award damages to the investor.

On emergency exceptions, one award in 2008 followed a significantly different approach compared to that adopted by previous tribunals (e.g., the 2005 award in *CMS v. Argentina*[36]) with regard to the availability of the defence based on the state of necessity or emergency. In *Continental Casualty Co v. Argentina*, the tribunal first emphasized the different conditions of application of the customary defence (article 25 ILC Articles) and the exception found in the Argentina-United States BIT (article XI). Second, rejecting the claimant's narrow interpretation of article XI, the tribunal noted that "actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society (especially of a democratic society such that of Argentina), to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties, and therefore to cope with and aim at removing these difficulties, do fall within the application under Art. XI".[37] Third, the tribunal noted that, although it would accord deference to the host state decisions dealing with these emergencies, the treaty exception was not self-judging and it was up to the tribunal to review whether these decisions were indeed necessary (i.e., whether no reasonably available less restrictive alternatives existed).

In this context, it is noteworthy that a subsequent tribunal has once again rejected Argentina's necessity defence (*National Grid v. Argentina)*. In that case, however, the respondent's claim was based on the necessity defence under customary law only, as the underlying BIT did not include a security or public order exception.

On obligations of investors, in *Plama Consortium v. Bulgaria*, the tribunal rejected the investor's substantive claims based on the Energy Charter Treaty because the claimant obtained its investment through misrepresentation. Citing the decisions in *Inceysa v. El Salvador*[38] and *World Duty Free v. Kenya*,[39] the tribunal found that the investor had acted contrary to the following three principles of international law: the principle of good faith, the principle of *nemo auditor propriam turpitudinem allegans* (that nobody can benefit from his own wrong – understood as the prohibition for an investor to "benefit from an investment effectuated by means of one or several illegal acts") and the principle of international public policy.[40]

The six decisions (rendered in 2008) where tribunals awarded damages to the investor show the difference in amounts of damages awarded by investment arbitral tribunals. The highest damages award was granted by the ICSID tribunal in *Rumeli Telekom v. Kazakhstan*, where the investor was awarded $125 million plus interest (compared to the $458 million sought by the investor). The lowest damages award was granted by

[36] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (United States-Argentina BIT), Award, 12 May 2005.
[37] *Continental Casualty Company*, at para. 174.
[38] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (Spain-El Salvador BIT), Award, 2 August 2006.
[39] *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7 (jurisdiction based on contract not BIT), Award, 4 October 2006.
[40] "In consideration of the above and in light of the *ex turpi causa* defence, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT [Energy Charter Treat]." Ibid., at para. 146.

the ICSID tribunal in *Continental Casualty v. Argentina*, where the investor received $2.8 million plus interest (original claim by investor: $114 million). Other relevant damages awards are those rendered in *Duke Energy v. Ecuador*, where the investor received $5.5 million plus interest (original claim: $25 million) and in *National Grid v. Argentina*, where the ICSID tribunal awarded $53.5 million plus interest (the original investor claim was for $112 million).

Total damages awarded in the 45 cases decided against States to date amount to $2.8 billion with Argentina fined the highest amount ($1.05 billion), followed by Slovakia, with $800 million. Although substantial in magnitude, these amounts constitute only a fraction of what was originally sought by investors.

On third-party participation, the tribunal in *AES Summit Generation Limited et al. v. Hungary*[41] ruled that the European Commission may intervene pursuant to new ICSID arbitration rule 37(2) in the arbitration based on the Energy Charter Treaty (ECT) to present a limited set of legal arguments (including the relevance of European Community law to the ECT dispute).

On provisional measures, the tribunal in *RDC v. Guatemala*[42] recognized its power to recommend any provisional measures without reference to any particular phase of the proceeding, as expressly acknowledged by article 47 ICSID and rule 39(1) of the Arbitration Rules. With regard to the circumstances that are required to recommend any provisional measure, the tribunal noted that, "since no qualifications to the power of an ICSID tribunal to recommend provisional measures found their way in the text of the ICSID Convention, the standard to be applied is one of reasonableness, after consideration of all the circumstances of the request and after taking into account the rights to be protected and their susceptibility to irreversible damage should the tribunal fail to issue a recommendation".[43]

As far as the allocation of arbitration costs and attorney's fees by tribunals are concerned, awards in 2008 confirm a variety of approaches. The majority of awards seem to adopt the traditional approach whereby the parties bear the costs of the arbitration equally and all their own legal costs and expenses (*TSA Spectrum v. Argentina*, *Wintershall v. Argentina*, *Jan de Nul v. Egypt*, *Continental Casualty v. Argentina*, *Duke Energy v. Ecuador*, *African Holding Company of America v. Democratic Republic of the Congo*, *Biwater Gauff v. Tanzania*, *Helnan International Hotels v. Egypt*, *Metalpar v. Argentina*, *AMTO v. Ukraine*, and *Canadian Cattlemen for Fair Trade v. United States*). However, in some instances, the tribunals have allocated a higher percentage of the arbitration costs to the losing party (for example, in *National Grid v. Argentina* the tribunal ordered the respondent to pay 75 per cent of the arbitration costs, while parties were ordered to bear their respective legal fees and costs) or ordered the losing party to reimburse a share of the winning party's legal fees (for example, in *Rumeli Telekom v. Kazakhstan* the tribunal ordered the respondent to pay 50 per cent of the claimant's legal costs and fees but ordered both

[41] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Procedural order concerning the application of a non-disputing party to file a written submission pursuant to ICSID Arbitration Rule 37(2), 26 November 2008 (not public).
[42] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures, 15 October 2008.
[43] *Sempra*, at para. 34.

parties to bear equally the arbitration costs). In three other instances, tribunals ordered the losing party to bear a share of both the arbitration costs and the winning party's legal fees: *Pey Casado v. Chile* (respondent ordered to pay 75 per cent of the arbitration costs and $2 million in claimant's legal fees), *Desert Line Projects v. Yemen* (respondent ordered to pay 70 per cent of arbitration costs and $400,000 in claimant's legal fees) and *Plama Consortium v. Bulgaria* (claimant ordered to pay all arbitration costs and half of respondent's legal costs).

In terms of arbitration costs and legal fees incurred by the parties in connection with investment arbitration, some 2008 awards shed some light on the order of magnitude involved: in *National Grid v. Argentina*, arbitration costs amounted to $1.3 million (of which $1 million in arbitrators' fees and expenses)[44] and in *Pey Casado v. Chile*, arbitration costs amounted to $ 4.2 million.[45]

With regard to parties' legal fees, in *Plama Consortium v. Bulgaria*, the claimant's legal costs (relating to both the jurisdiction and merits phases of the arbitration) amounted to $4.6 million while the respondent's legal costs (for both phases) were $13.2 million,[46] and in *Pey Casado v. Chile*, the claimant's legal costs (relating to both the jurisdiction and merits phases) totalled approximately $11 million, while the respondent's legal costs for both phases amounted to $4.3 million.[47]

Contrary to the high number of separate or dissenting opinions submitted in 2007, of the 24 public decisions rendered in 2008 (on jurisdiction, on admissibility, and on the merits), only three were rendered either *in toto* or in part by a majority of the arbitral tribunal with a member of the tribunal submitting a dissenting opinion.[48]

With regard to the enforcement of an ICSID award, the ad hoc committee in *Enron v. Argentina* has noted that "it would be inconsistent with the purpose of the ICSID Convention if an award creditor had to bring proceedings pursuant to national law enforcement mechanisms established under Article 54(1) as a prerequisite for compliance with the award by the award debtor".[49] Interestingly, the ad hoc committee in *Vivendi v. Argentina*, although clearly emphasizing that articles 54 and 55 ICSID are worded in a manner that excludes any possible domestic court intervention over the enforcement process of pecuniary obligations under a finally binding ICSID award, seemed to accept the fact that a judicial or other authority may exercise a "merely administrative" function "in the sense of undertaking the operation of receiving the copy of the award '*certified by the ICSID Secretary-General'* as required under Article 49, paragraph 1 of the ICSID Convention".[50]

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[44] *National Grid*, at para. 296.
[45] *Pey Casado*, at para. 731.
[46] *Plama Consortium*, at paras. 310–312.
[47] *Pey Casado*, at paras. 723–724.
[48] Dissenting opinions were included in *TSA Spectrum v. Argentina*, *African Holding Company of America v. Democratic Republic of the Congo* and *Biwater Gauff v. Tanzania*.
[49] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Request for Continued Stay of Enforcement, 7 October 2008, at para. 68.
[50] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Request for a Continued Stay of Enforcement, 4 November 2008, at paras. 35–36.

Developments in 2008 confirm the trend towards increased use of international arbitration to resolve investment disputes. While an effective system for settling disputes is an important means to strengthen the rule of law and to increase legal stability, the particular mechanism of investor–state dispute settlement is posing a considerable burden, especially to developing countries.

(a) First, there is a trend towards divergent interpretations of treaty obligations made by international tribunals. This has led to new investor uncertainties and has resulted in a growing number of conflicting awards;
(b) Second, differences in arbitration rules, while offering foreign investors the choice between various options, also contribute to incoherence and lack of predictability in the system;
(c) Third, the costs involved in conducting arbitrations, and indeed the size of awards rendered against states are worrisome, especially for developing countries.

A number of possibilities exist to deal with these issues, and states have begun exploring their options in this regard. Among others, this issue was discussed during the UNCTAD multi-year expert meeting on investment for development held in Geneva on 10 and 11 February 2008. Apart from preventive means such as clarifying treaty language and treaty interpretation, one possibility would be to enhance the role of alternative methods of treaty-based investor–state dispute resolution in IIAs. Another way would be to consider establishing a facility that developing countries could draw on for support in investment law and investor–state disputes. Initial steps to set up such a facility have been taken in the Latin American context, where countries are discussing the creation of an "Advisory Facility for International Investment Law and Investor–State Dispute Settlement", a process supported by the UNCTAD secretariat.

Developments in 2008 once again underlined that developing countries, in particular the least developed countries, will continue to require ongoing technical assistance and capacity-building in these matters. The current financial and economic crisis might further exacerbate this need, as some of the emergency response measures implemented by a number of countries might negatively impact on foreign direct investment and transnational corporation operations and trigger new disputes.

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Annex 1. Known investment treaty claims, by defendants

(December 2008)

Country	Cases
Argentina	48
Mexico	18
Czech Republic	15
Ecuador	14
Canada	13
United States	12
Ukraine	11
Poland	10
Egypt	9
India	9
Venezuela (Bolivarian Republic of)	9
Russian Federation	8
Romania	7
Turkey	7
Georgia	6
Kazakhstan	6
Hungary	5
Republic of Moldova	5
Bolivia (Plurinational State of)	4
Democratic Republic of Congo	4
Jordan	4
Chile	3
Costa Rica	3
Estonia	3
Kyrgyzstan	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
Mongolia	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
Croatia	1
El Salvador	1
France/United Kingdom	1
Gabon	1
Germany	1
Guatemala	1
Guyana	1
Indonesia	1
Iran (Islamic Republic of)	1
Myanmar	1
Nicaragua	1
Nigeria	1
Panama	1
Portugal	1
Saudi Arabia	1
Senegal	1
Serbia	1
Seychelles	1
South Africa	1
Spain	1
Thailand	1
Trinidad and Tobago	1
Tunisia	1
United Kingdom	1
United Republic of Tanzania	1
Uzbekistan	1
Viet Nam	1
Yemen	1
Zimbabwe	1
Unknown	7
TOTAL	**318**

Source: UNCTAD.

Annex 2

List of cases reviewed

African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008.

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Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008.

Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008.

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Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Request for Continued Stay of Enforcement, 7 October 2008.

Helnan International Hotels A/S v. Egypt, ICSID Case No. ARB/05/09, Award, 7 June 2008.

Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008.

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

Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008.

L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria, ICSID Case No. ARB/05/3, Award, 12 November 2008.

Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award, 26 March 2008.

Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case No. ARB/03/5, Award, 6 June 2008.

National Grid plc v. The Argentine Republic, UNCITRAL, Award, 3 November 2008.

Patrick Mitchell v. Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.

Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008

Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Decision on Provisional Measures, 15 October 2008.

The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility, 18 April 2008.

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008.

Sempra Energy v. Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007.

Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award and separate opinion, 26 July 2007.

TSA Spectrum de Argentina S.A. v. Argentina Republic, ICSID Case No. ARB/05/5, Award, 19 December 2008.

Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, 2008.

Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008.

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