International Commercial Dispute Resolution

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I. Introduction

The first section of this survey looks at significant decisions in U.S. courts from 2007 that will be of interest to practitioners in the field of international commercial arbitration. With some significant exceptions, federal courts continued to reinforce the strong policy favoring enforcement of arbitration agreements and awards. Although refusing to compel arbitration where it was clear that parties had not agreed to be bound by arbitration clauses, the courts upheld the enforceability of arbitration agreements in the face of challenges based on the state-law defense of unconscionability, an allegedly defective arbitration clause, and domestic legislation that allegedly preempted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). In a major exception to the trend favoring enforcement of arbitration awards, however, both the Second and Ninth Circuits produced potentially groundbreaking decisions upholding challenges to awards based on the arbitrators' failure to disclose potential conflicts that arose during the course of arbitration. In addition, the D.C. Circuit refused to enforce an award that had been set aside at the seat of arbitration, thus signaling the further isolation of the *Chromalloy* decision. This past year also produced significant decisions supporting the use of courts in aid of arbitration. For example, the Second Circuit delivered two decisions upholding the use of foreign anti-suit injunctions to enjoin overseas litigation of arbitrable claims. District court decisions also affirmed the availability of state-law provisional remedies and a federal discovery statute in aid of international arbitration.

The second section of this survey focuses on major developments from 2007 in the field of investor-state arbitration. Significant jurisdictional awards concerned the determination of nationality under the ICSID Convention, the qualification of investments under ICSID and specific investment treaties, investor compliance with local law, and timeliness under relevant treaties. Procedural awards from 2007 show that parties continue to have

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little success in challenging arbitrators and only mixed success in seeking provisional measures, but that tribunals have continued to be receptive to participation by nonparties. Numerous merits awards from 2007 contributed to the development of standards for assessing fair and equitable treatment, indirect expropriation, and full protection and security, while tribunals continue to disagree over the scope of so-called "umbrella clauses." Significantly, 2007 saw three additional merits decisions and an annulment decision relating to disputes arising out of the Argentine financial crisis. The three merits awards all rejected Argentina's necessity defense, while the annulment committee criticized without overturning a tribunal's handling of that defense. These awards will be studied with great interest as more disputes relating to the Argentine financial crisis come to decision. Also of great interest was Bolivia's formal decision to withdraw from the ICSID Convention, which may spark other disgruntled Latin American nations to follow suit.

II. Arbitration Developments in U.S. Courts

A. Interpretation and Enforcement of Arbitration Clauses

In notable decisions from 2007 concerning the enforcement of arbitration clauses, U.S. courts consistently upheld the strong policy in favor of arbitration, rejecting efforts to expand the grounds by which enforcement of an arbitration clause can be denied under the Federal Arbitration Act (FAA)[1] and the New York Convention.[2]

1. *Choice of Law Provisions and Arbitration Clauses*

In *Khan v. Parsons Global Services*, the district court severely limited the applicability of state law in governing the scope of international arbitrations in favor of the FAA. The court specifically refused to apply California's arbitration law to a dispute concerning the enforceability of an arbitration clause in an employment agreement—despite the contract's express reference to California law in the choice-of-law provision of the arbitration clause.[3]

The defendant employee in *Khan*, a British citizen, opposed the plaintiff U.S. employer's motion to compel arbitration under the employment contract's arbitration clause by invoking California's unconscionability defense.[4] The plaintiff employer countered that, because the defendant employee was not a U.S. citizen, the FAA applied by default and that pursuant to the FAA only the New York Convention's defenses to enforcement were applicable.[5] Because the defense of unconscionability is not recognized under Article II(3) of the New York Convention, the plaintiff claimed that the defendant could not resist arbitration on such grounds.[6]

1. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2002).
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (implemented into U.S. law at 9 U.S.C. §§ 201-208) [hereinafter New York Convention].
3. *Khan v. Parsons Global Servs.*, 480 F. Supp. 2d 327 (D.D.C. 2007).
4. *Id* at 335-36.
5. *Id.* at 336; Federal Arbitration Act §§ 201-202.
6. *Khan*, 480 F. Supp. 2d, at 336.

The *Khan* court determined that arbitration agreements meeting the requirements of the FAA or the New York Convention must, by default, be governed by federal law.[7] In reaching its decision, the court referenced the Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, which stated that a choice-of-law clause invoking state law does not automatically indicate that the parties intended to opt out of federal default rules.[8] In *Mastrobuono*, the Supreme Court determined that, in order to opt-out of federal default rules, the parties must clearly evidence such intent.[9] The *Khan* court relied on this precedent in determining that a generic choice-of-law clause, by itself, is insufficient to provide clear evidence that the parties intended to opt out of the default federal standards.[10] It is notable that the *Khan* court reached this conclusion despite noting that the California choice-of-law clause was contained withing the employment agreement's arbitration clause.

The *Khan* decision contrasts with the decision in *Felman Production, Inc. v. Bannai*. In the *Bannai* case, the district court held that the enforceability of an arbitration clause against a non-signatory would be governed by English law, rather than the FAA, pursuant to the English choice-of-law provision contained in the arbitration clause.[11] Relying on the Supreme Court's decision in *Volt Information Sciences v. Board of Trustees*,[12] the court concluded that the parties had chosen English law to govern the arbitration and that the FAA could not override the parties' choice. Determining that English law did not permit an arbitration clause to be enforced against a non-signatory under the circumstances, the court refused to compel arbitration.

2. *Potentially Defective Arbitration Clauses*

In *Apple & Eve, LLC v. Yantai North Andre Juice Co.*, the district court compelled arbitration in China despite the arbitration clause's vague reference to arbitration "in the country of defendant in accordance with the arbitration organization of the defendant country."[13] The court agreed that the inclusion of a non-existent forum is properly classified as a mistake and is therefore grounds for an exception to enforcement under Article II(3) of the New York Convention.[14] The court stated that the arbitration clause did not reference a non-existent forum because once the facts of the dispute were applied, the clause clearly identified China as the situs of the arbitration.[15]

The court also rejected the alternative argument that an arbitration agreement that fails to designate an arbitration commission is null and void and incapable of being performed under Chinese law.[16] The court noted, however, that Chinese law also allows the parties

7. *Id.* at 338.

8. *Id.* at 337 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995)).

9. *Id.*

10. *Id.* at 338.

11. *Felman Prod., Inc. v. Bannai*, 476 F. Supp. 2d 585 (S.D. W.Va. 2007).

12. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989).

13. *Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 499 F. Supp. 2d 245, 246 (E.D.N.Y. 2007).

14. *Id.* at 249 (citing *Rosgoscirc v. Circus Show Corp.*, 1993 WL 277333, at *4 (S.D.N.Y. 1993), which declared an arbitration clause null and void as a mistake where it referred to arbitration before a non-existent entity—"the International Arbitration in the Hague (the Netherlands)").

15. *Id.* at 248-49. The respondent in the arbitration was a citizen of China.

16. *Id.* at 250 (citing Article 16 of the Peoples Republic of China's Arbitration Law, which requires an arbitration agreement to include: "(1) an expression of intention to apply for arbitration; (2) matters for

to correct such a defect through a supplementary agreement, and only if such efforts fail is the agreement invalid.[17] The court ruled that because the alleged defect in the arbitration clause was curable under Chinese law, it was not incapable of being performed.[18]

3. *Ability to Compel Arbitration Against Successor*

In *Republic of Ecuador v. ChevronTexaco Corp.*, the district court addressed whether an arbitration agreement could be enforced against a successor that had never formally adopted its predecessor's obligations under the agreement.[19] The dispute at issue involved allocation of responsibility for environmental liabilities arising from the joint operation of an Ecuadorian oil field by a state-owned oil and gas company, CEPE, and Chevron. In addressing whether CEPE should be estopped from denying that it was bound by the arbitration agreement, the court sought to determine whether Chevron reasonably relied on the laws of Ecuador in its belief that CEPE was bound as a successor to the agreement.[20] Thus, CEPE's ability as a government entity to succeed to the joint operating agreement under Ecuador's Constitution and other relevant domestic law became central to the court's determination.[21]

Examining Ecuadorian law at the time CEPE took over joint operation of the oil fields, the court found that an Ecuadorian court would not have enforced the arbitration agreement because: 1) there were uncertainties under Ecuador's Constitution as to whether CEPE could even assume its predecessor's obligations under the arbitration agreement;[22] and 2) even if it could, there were further uncertainties under Ecuador's domestic law as to whether the proper contracting procedures were followed to bind CEPE, as a government entity, to the joint operating agreement's arbitration clause.[23] The court also noted that Chevron had never expressed a belief that the joint operating agreement was still in effect at the time of the dispute.[24] Based upon the uncertainties under Ecuador's law at the time CEPE began jointly operating the oilfields and the conduct by Chevron evidencing that it did not believe the former operating agreement was still in effect, the court determined that Chevron could not prove it reasonably relied on an understanding that the arbitration agreement bound CEPE. The court therefore rejected Chevron's estoppel argument and refused to compel arbitration.[25]

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arbitration, and (3) a designated arbitration commission."). The party opposing the arbitration noted that, at that time, there were 186 arbitration commissions located in China. *Id.*

17. *Id.* (citing Article 18 of the Peoples Republic of China's Arbitration Law).

18. *Id.* at 251-52.

19. *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007). The decision resulted from a foreign law hearing under Federal Rule of Civil Procedure 44.1.

20. *Id.* at 459-60 (citing *Frederick v. Comm'r*, 126 F.3d 433, 448-49 (3d Cir. 1997) and Restatement (Second) of Contracts § 90 (1981)).

21. *Id.* at 459-460.

22. *Id.* at 463-465. The court determined that the state of Ecuador's arbitration law at the time CEPE succeeded its U.S. predecessor was "too unsettled" because there were uncertainties as to whether Ecuador's Constitution at that time would have precluded arbitration in Ecuador. *Id.* at 465.

23. *Id.* at 461-63.

24. *Id.* at 467-68.

25. *Id.* The court determined that an Ecuadorian court would find no reasonable expectation on the U.S. company's part that the joint operation agreement would bind CEPE to arbitration sought for the first time thirty years after CEPE joined in the operation of the oil fields. *Id.* at 468.

4. *Preemption of Domestic Law Limiting the Enforcement of Arbitration Clauses*

Several decisions in 2007 reaffirmed the principle that the New York Convention preempts domestic law that would otherwise limit the enforceability of arbitration clauses. Three federal district court decisions from 2007 and one from late 2006 considered whether the New York Convention supersedes the McCarran-Ferguson Act, under which state law regulating the business of insurance takes precedence over federal laws that do not specifically relate to insurance. All four cases held that the New York Convention supersedes the McCarran-Ferguson Act and that arbitration clauses falling under the Convention were enforceable despite state law that would otherwise render them unenforceable.[26] These decisions declined to follow the Second Circuit's decision in *Stephens v. American International Insurance Co.*, which had held to the contrary.[27] The district courts relied on principles of international comity as well as the strong federal policy in favor of arbitration.[28] Some of the courts also noted that the New York Convention was implemented in the United States after passage of the McCarran-Ferguson Act and that the legislative history of the McCarran-Ferguson Act indicated that it was limited to domestic interstate commerce and was not intended to reach foreign commerce.[29]

Two cases also held that the New York Convention supersedes the Seaman's Wage Act, which gives seamen the right to access federal courts to resolve wage disputes. The Eleventh Circuit held in *Lobo v. Celebrity Cruises* that the New York Convention controls and that any arbitration clause falling under the Convention was enforceable despite the terms of the Act.[30] This decision was followed by the district court in *Balen v. Holland America Line*.[31]

B. Enforcement of Awards

Decisions from 2007 illustrated that U.S. courts are generally willing to respect the decisions of foreign courts regarding the enforceability of arbitration awards and, when the circumstances warrant, to take steps to protect their own determinations regarding enforceability from being vitiated in foreign jurisdictions. Two appellate court decisions, however, show that U.S. courts are willing to vacate awards where arbitrators demonstrate evident partiality.

1. *Arbitrator Challenges—Evident Partiality*

Two significant decisions in 2007 considering arbitrator challenges both found that arbitrators had exhibited "evident partiality" in failing to disclose potential conflicts. In *New*

26. *See Certain Underwriters at Lloyd's, London v. Simon*, 2007 WL 3047128 (S.D. Ind. Oct. 18, 2007); *Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co.*, 2007 WL 2752366 (W.D. Ark. Sept. 20, 2007); *Clow v. Ins. Corp. of British Columbia*, 2007 WL 2292689 (D. Or. Aug. 6, 2007); *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co.*, 466 F. Supp. 2d 1293 (N.D. Ga. 2006).

27. *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).

28. *See Simon*, 2007 WL 3047128, at *6-7; *Murphy Oil*, 2007 WL 2752366, at *3-4; *Clow*, 2007 WL 2292689, at *4 n.6; *Goshawk*, 446 F. Supp. 2d at 1304-06.

29. *See Murphy Oil*, 2007 WL 2752366, at *3; *Clow*, 2007 WL 2292689, at *4 n.5; *Goshawk*, 446 F. Supp. 2d, at 1305 n.9.

30. *Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891 (11th Cir. 2007).

31. *Balen v. Holland America Line, Inc.*, 2007 WL 4190407 (W.D. Wash. Nov. 20, 2007).

Regency Productions, Inc. v. Nippon Herald Films, Inc., the Ninth Circuit affirmed that an award was properly vacated on grounds of evident partiality where an arbitrator had failed to disclose a possible conflict that had arisen when the arbitrator changed employers during the arbitration proceedings.[32] The motion to vacate centered upon the arbitrator's failure to disclose that his new employer was in negotiations to finance and co-produce a significant motion picture with a production executive of one of the parties to the arbitration—even though there was no evidence that the arbitrator was aware of these negotiations.[33]

The Ninth Circuit determined that an arbitrator has a duty to affirmatively investigate possible conflicts resulting from a change in his employment circumstances and to disclose the change in circumstances to the parties, especially where the new employment is in the same industry as that of the parties.[34] Based upon this duty, the court relied on its previous decision in *Schmitz v. Zilveti* to hold that knowledge of the potential conflict is irrelevant.[35] The Ninth Circuit was also influenced by the fact that the arbitrator had disclosed potential conflicts at the beginning of the arbitration that were similar to the potential conflict at issue but had failed to continue this pattern of disclosure throughout the arbitration.[36] In reaching its decision, the Ninth Circuit cited to decisions by the Second, Fourth, and Eighth Circuits for support and noted that the Eleventh Circuit is the only federal court of appeal to hold that a lack of actual knowledge of the potential conflict precluded the finding of evident partiality.[37]

The Second Circuit decision cited by the Ninth Circuit in *New Regency* was also decided in 2007. In *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, the Second Circuit affirmed that an award was properly vacated on grounds of evident partiality where the arbitrator failed either: 1) to investigate what he knew to be a potential business relationship between his corporation and one of the parties or 2) to inform the parties that he had created a "Chinese wall" to prevent himself from learning more.[38] The Second Circuit determined that, while not having a "free-standing duty to investigate," an arbitrator who has reason to believe in the existence of a nontrivial conflict of interest must either investigate the circumstances or disclose an intention not to investigate.[39] The court believed that otherwise the parties would be misled into believing that no nontrivial conflict exists.[40]

The Second Circuit's refusal to impose a free-standing duty to investigate seems at odds with the Ninth Circuit's decision in *New Regency*, which found an affirmative duty to investigate when a change in circumstances could potentially create conflicts. Like the

32. *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007).

33. *Id.* at 1110-11. The court noted that the high-profile nature of the film that was the subject of the negotiations meant that the possible partiality was not trivial. *Id.* at 1111.

34. *Id.* at 1109-10.

35. *Id.* at 1106, 1108-09 (citing *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994)).

36. *Id.* at 1110.

37. *Id.* at 1108-09 (citing *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007); *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999); *Olson v. Merrill Lynch, Inc.*, 51 F.3d 157 (8th Cir. 1995); *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309 (11th Cir. 1998)).

38. *Applied Indus. Materials Corp.*, 492 F.3d at 138.

39. *Id.*

40. *Id.* at 138-39.

Ninth Circuit, however, the Second Circuit noted that the arbitrator's initial disclosure statements created a reasonable expectation among the parties that they would be notified of any future developments. The court determined that the failure to make a later disclosure, when viewed in light of the initial disclosures, created the appearance of partiality.[41]

In a footnote regarding the potential use of a "Chinese wall," the Second Circuit declined to hold that such a protective measure is an adequate substitute for investigation. Rather, the court determined that the arbitrator should have consulted with the parties before putting the wall into place, instead of merely informing them after unilaterally choosing to take such an action.[42]

2. *Enforcement of Awards Set Aside by Courts at the Seat of Arbitration*

In *Termorio S.A. E.S.P. v. Electranta S.P.*, the D.C. Circuit refused to enforce an arbitral award that had been set aside by a Columbian court as contrary to Columbian law.[43] The *Termorio* court based its determination on Article V(1)(e) of the New York Convention, which allows the courts of a contracting state to refuse to enforce an arbitral award upon proof that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[44] The D.C. Circuit noted that to hold otherwise through application of the FAA would undermine the finality of international arbitration awards and lead to conflicting judgments.[45]

Noting the apparent discretionary nature of Article V(1),[46] the *Termorio* court recognized that there is an implicit "public policy gloss" on Article V(1)(e) that could potentially allow enforcement despite the award being set aside in a domestic court in the jurisdiction where the arbitration occurred.[47] The court determined, however, that "[w]hen a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances . . . ."[48] Because the appellant did not provide any evidence indicating that the proceedings before the Columbian court violated basic notions of justice, the court determined that no such "extraordinary circumstances" existed and denied the appeal.[49]

The *Termorio* decision casts further doubt on the continuing viability of the *Chromalloy* decision, which is the only U.S. case confirming an arbitral award set aside in the country

41. *Id.* at 136, 139.

42. *Id.* at 138 n.1.

43. *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007). The arbitration clause at issue required arbitration under the ICC Rules. The Columbian Council of State overturned the arbitral tribunal's award because Columbian law as of the date of the arbitration agreement did not expressly permit use of the ICC Rules in arbitration. *Id.* at 931.

44. *Id*, at 934 (as implemented by the Federal Arbitration Act, *supra* note 1, § 207).

45. *Id.* at 936 (citing *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999)).

46. *Id.* (noting that the language of Article V(1) states that "[r]ecognition and enforcement may be refused" and quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984), which stated that "a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests").

47. *Id.* at 937 (citing *Baker Marine*, 191 F.3d, at 197 n.3).

48. *Id.* at 938 (quoting Appellees' Br. at 12)

49. *Id.* at 939.

where the award was made.[50] In contrast, European courts have appeared more willing in such circumstances to allow enforcement of the award under domestic arbitration law.[51]

3. *Anti-Suit Injunctions in Aid of Enforcement*

In *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, the Second Circuit clarified that the proper test to apply in determining whether to issue an anti-suit injunction in aid of enforcement of an international arbitral award is the "*China Trade* Test," as set forth in *China Trade & Development Corp. v. M.V. Choong Yong*.[52] In *Karaha Bodas*, the prevailing party in a Swiss arbitration had the award confirmed in the United States and sought enforcement of the resulting judgment in the Southern District of New York.[53] In the meantime, the losing party filed an action in the Cayman Islands seeking damages against the prevailing party for, among other losses, the amount of the arbitral award.[54] The prevailing party then sought an anti-suit injunction in the Southern District of New York to prevent the Cayman Islands action.[55]

The district court, in examining the Second Circuit's *China Trade* decision, noted that *China Trade* involved an anti-suit injunction prohibiting a foreign defendant from pursuing a parallel proceeding in a foreign forum while a proceeding was pending in the Southern District of New York. The district court determined that a "more lenient standard" for anti-suit injunctions applied after the domestic judgment had already been rendered.[56] The Second Circuit determined that the district court erred in making this distinction and held that the *China Trade* Test was the proper test in all instances of anti-suit injunctions aimed at foreign proceedings.[57] The Second Circuit nevertheless determined that, despite applying the wrong legal standard, the district court reached the proper result and affirmed the decision. It noted that federal courts should not attempt to protect a party seeking enforcement of an award under the New York Convention from all legal hardships associated with foreign litigation over an award.[58] Nevertheless, federal courts do have inherent power to protect their own judgments from being vitiated by vexatious litigation in other jurisdictions.[59] Because the losing party was attempting to re-litigate issues in the

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50. *In re Chromalloy Aero Services*, 939 F. Supp. 907 (D.D.C. 1996).

51. *See, e.g.*, Steven L. Smith, *Enforcement of International Arbitration Awards Under the New York Convention*, *in* Rhoades, *et al.*, *Practitioner's Handbook on International Arbitration and Mediation* (2d ed. 2007) at § 8.05[8].

52. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 112 (2d Cir. 2007) (citing *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987)). The *China Trade* Test allows an anti-suit injunction against foreign litigation "only if two threshold requirements are met: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined." *Id.* at 119. Once these two threshold issues are satisfied, the court must also consider whether the parallel litigation would: "(1) frustrate a policy in the enjoining forum; (2) be vexatious; (3) threaten the issuing court's *in rem* or *quasi in rem* jurisdiction; (4) prejudice other equitable considerations; or (5) result in delay, inconvenience, expense, inconsistency, or a race to judgment." *Id.*

53. *Karaha Bodas*, 500 F.3d, at 114, 116.

54. *Id.* at 117.

55. *Id.* at 117-18.

56. *Id.* at 119.

57. *Id.*

58. *Id.* at 123.

59. *Id.* at 124.

Cayman Islands that had already been decided in the U.S. courts, the issuance of an anti-suit injunction under the *China Trade* Test served such ends.[60]

Karaha Bodas was one of two Second Circuit decisions in 2007 to consider use of a foreign anti-suit injunction in aid of arbitration. Earlier, the same court upheld an anti-suit injunction in *Ibeto Petrochemical Industries, Inc. v. M/T Beffen*, barring parties to an ongoing London arbitration from pursuing litigation of the same matter in Nigeria.[61] The court also applied the *China Trade* Test to find that an anti-suit injunction was warranted. The court also noted, however, that in light of concerns for international comity, such injunctions should be used sparingly. The court accordingly ordered that the injunction be modified so that it applied only to the parties before the court and lasted only until the conclusion of the arbitration.

On a related note, two decisions in 2007 also confirmed international arbitral awards that included anti-suit injunctions as part of their remedies. In *Rintin Corp. v. Domar, Ltd.*, the Eleventh Circuit upheld an award that ordered one of the parties to terminate foreign lawsuits it had initiated against affiliates of other parties to the arbitration.[62] The court held that because this remedy did not exceed the scope of the dispute before the arbitral tribunal, it was within the tribunal's jurisdiction. Likewise, the district court in *Telenor Mobile Communications AS v. Storm L.L.C.* confirmed an arbitral award that enjoined one of the parties from pursuing litigation in Ukraine.[63] The court held that the tribunal had broad discretion to determine appropriate remedies for the dispute before it and had acted within its powers. These two decisions suggest that parties to international arbitrations may look to arbitral tribunals, in addition to the courts, for anti-suit injunctions to aid in the resolution of litigation related to the parties' arbitration.

C. Availability of Court-Ordered Provisional Remedies and Discovery

1. *Provisional Remedies*

Faced with the question of whether federal courts have authority to grant injunctions and other provisional remedies in the context of pending international arbitrations, the Second Circuit courts continue to stand apart from other circuits by providing for such authority. In *Bahrain Telecommunications Co. v. DiscoveryTel, Inc.*, the district court for the District of Connecticut denied a motion to dismiss an application under Connecticut law for a *pendente lite* order, concluding that the New York Convention did not deprive the court of jurisdiction to issue such orders.[64] After the parties had commenced arbitration in the London Court of International Arbitration (LCIA), the petitioner sought an order from the district court to discover, attach, and garnish assets of the respondents sufficient to secure the petitioner's damages claim. The respondents moved to dismiss the motion on the ground that the district court lacked jurisdiction to do so while the arbitration was pending.[65]

60. *Id.* at 121-22, 124.

61. *Ibeto Petrochemical Indus. v. M/T Beffen*, 475 F.3d 56 (2d Cir. 2007).

62. *Rintin Corp. v. Domar, Ltd.*, 476 F.3d 1254 (11th Cir. 2007).

63. *Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F.Supp. 2d 332 (S.D.N.Y. 2007).

64. *Bahrain Telcomms. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176 (D. Conn. 2007) (referring to Conn. Gen. Stat. § 52-422 (2007)).

65. *Id.* at 178-79.

Differentiating Second Circuit precedent from that of the Third and Ninth Circuits, the district court determined that nothing in the FAA or the New York Convention deprives federal courts of jurisdiction to grant injunctions and provisional remedies in the context of pending arbitrations.[66] The district court then ruled that the Connecticut's adoption of the UNCITRAL Model Law on International Commercial Arbitration authorized the court to grant *pendent lite* relief in connection with international arbitrations.[67] The district court further noted that the ability of the arbitral tribunal to grant *pendente lite* relief, as authorized by the LCIA Rules, does not act to deprive the federal courts of this power.[68] The court also rejected the respondent's suggestion that Second Circuit precedent applied only to injunctive relief and not to prejudgment remedies.[69]

2. *Discovery in Aid of Arbitration Under 28 U.S.C. § 1782*

A U.S. federal statute, 28 U.S.C. § 1782, authorizes district courts to compel persons located in their district to provide testimony or produce documents "for use in a proceeding in a foreign or international tribunal."[70] Two circuit court decisions have previously held that the phrase "foreign or international tribunal" does not include a foreign arbitral tribunal.[71] These decisions were cast into doubt, however, by the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, in which the Court stated in dicta that the term "tribunal" as used in Section 1782 "includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional . . . courts."[72]

In the wake of the *Intel* decision, two district court decisions have held that parties may use Section 1782 to seek evidence in aid of a foreign arbitration. In *In re Roz Trading, Ltd.*, decided in late 2006, the court, expressly relied on *Intel* to hold that an Austrian arbitral tribunal was a foreign tribunal within the meaning of Section 1782 and ordered the production of documents pursuant to the statute.[73] This decision was followed by *In re Oxus Gold PLC*, where the court held that it had authority under Section 1782 to order third-party discovery in connection with a bilateral investment treaty (BIT) arbitration between a U.K. company and a state-owned Kyrgyz company.[74] The court did not rely on *Intel* but instead based its holding on the fact that the arbitration was conducted pursuant to a

66. *Id.* at 180 (relying on *Am. Express Fin. Advisors, Inc. v. Thorley*, 147 F.3d 229, 231 (2d Cir. 1998) and rejecting both *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999) and *McCreary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032 (3d Cir. 1974)).

67. *Bahrain Telecomms.*, 476 F. Supp. 2d, at 184 (citing Conn. Gen. Stat. §§ 50a-139). The court noted that the most recent report of the UNCITRAL Working Group on Arbitration confirms that the provisional remedy section was not intended to be limited to arbitrations pending within the forum state. *Id.* (citing *U.N. Comm. on Int'l Trade Law, Working Group II* (Arbitration), *Settlement of Commercial Disputes: Interim Measures of Protection*, at 7-8, U.N. Doc. A/CN.9/WG.II/WP.141 (Dec. 5, 2005)).

68. *Id.* at 180, 182 (noting that the court was also significantly persuaded by the fact that the Article 25.3 of the LCIA Rules expressly allowed the parties to seek provisional remedies outside of the tribunal in "exceptional cases").

69. *Id.* at 181, 182.

70. 28 U.S.C. § 1782 (1996).

71. *See Nat'l Broad. Co.v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

72. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004).

73. *In re Roz Trading, Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

74. *In re Oxus Gold PLC*, 2007 WL 1037387 (D.N.J. 2007).

BIT agreement between two governments. According to the court, this framework meant that the arbitral panel was a foreign tribunal for purposes of Section 1782.

III. Investor-State Disputes

A. Jurisdiction and Admissibility

1. *Investor Standing—Defining Nationality*

Investment treaty arbitration has been described as "arbitration without privity" because dispute settlement procedures in investment treaties permit an investor to bring claims against a state without the parties' prior agreement to arbitrate.[75] The desirability of a neutral forum for settling investment disputes has inevitably led to legal wrangling over who may invoke the benefits of the ICSID Convention or a BIT. Thus, whether a claimant qualifies as an investor under the relevant treaty is a critical threshold issue.

The protections of the ICSID Convention and BITs extend only to investors of another contracting state, where diversity of nationality is required between the investor and the state involved in the dispute. The decision in *Siag & Vecchi v. Egypt* addressed whether investors who were Egyptian citizens before becoming citizens of another state had, as a result, lost their Egyptian nationality for purposes of the ICSID Convention.[76] The ICSID Convention imposes both positive and negative nationality requirements.[77] The principal question in *Siag* concerned whether the claimants met the negative nationality requirement. "That is, were the Claimants, at the relevant times under Article 25, nationals of the Host State, Egypt, and so barred from bringing their claim before ICSID under the ICSID Convention?"[78] The tribunal, relying on *Soufraki v. United Arab Emirates*[79] and Egyptian law, held that official documents, such as a passport, provided only *prima facie* evidence of nationality[80] and did not relieve the tribunal of its duty under international law to interpret Egyptian law in order to determine the claimants' nationality.[81] The tribunal concluded that the claimants were no longer Egyptian nationals under Egyptian law and therefore had jurisdiction over the dispute. Citing *Champion Trading Co. v. Egypt*,[82] the tribunal stated that evidence of the investor's substantial connections to Egypt

75. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. 32, 232-257 (1995).

76. *Siag & Vecchi v. Egypt*, Decision on Jurisdiction, ICSID Case No. ARB/05/15 (May 28, 2007) [hereinafter *Siag*].

77. The positive nationality requirement is governed by the first part of Article 25(2)(a) of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States (ICSID). It requires that the claimant have the nationality of a contracting state of the ICSID Convention on the date the parties gave their arbitration consent and on the date the dispute was registered. The negative nationality requirement is governed by the second part of Article 25(2)(a). It requires that the claimant not also have the nationality of the respondent contracting state on those dates.

78. *Siag*, *supra* note 76, ¶ 142.

79. *Soufraki v. United Arab Emirates*, Award, ICSID Case No. ARB/02/7 (July 7, 2004) [hereinafter *Soufraki*].

80. *Id.* ¶¶ 150-53.

81. *Id.* ¶ 153.

82. *Champion Trading Co. v. Egypt*, Decision on Jurisdiction, ICSID Case No. ARB/02/9 (Oct. 21, 2003).

was irrelevant because "the regime established under Article 25 of the ICSID [Convention] does not leave room for a test of dominant or effective nationality."[83]

Professor Francisco Orrego Vicuña filed a partial dissenting opinion. The dissent advocated the application of an effective nationality test,[84] noting that "[t]he investor was Egyptian at the time the investment was made, benefited from Egyptian legislation granting exclusive rights to Egyptian citizens and was at all times considered to be Egyptian, not just by the Egyptian Government but this was also his own understanding and that of his family."[85] "The principle of effectiveness," the dissent argued, prevented the more convenient nationality (for the investor) to "prevail over the real and effective nationality."[86]

2. *Defining Investment*

The definition of investment is at heart of many challenges in treaty arbitration proceedings. These challenges emanate from two sources: the applicable investment treaty and the ICSID Convention itself. In 2007, both grounds for challenging the existence of an investment were argued and both succeeded, but not without controversy.

a. Qualifying Investments Under the ICSID Convention

The ICSID Convention does not define what constitutes an investment but instead leaves this definition to the specific instruments of state consent to arbitration.[87] Consequently, states have experienced more success arguing that a particular foreign economic contribution is not an investment under a BIT than by arguing that it fails under the Convention. For example, in *Saipem v. Bangladesh*[88] the tribunal applied the four-part test developed in *Salini v. Morocco*[89] to determine whether the claimant had made an investment under the ICSID Convention, looking at the following factors: 1) the contribution of monetary or other value to the host state, 2) duration, 3) risk, and 4) a contribution to the development of the host state.[90] The tribunal noted that the need for a contribution to the development of the host state "is sometimes put in doubt."[91] In finding jurisdiction, the tribunal rejected Bangladesh's arguments that the project did not qualify as an investment under the ICSID Convention based on its duration and the local origin of the underlying funds.[92] *Saipem* is in accord with the decision in *Siag*, which also declined to

83. *Siag, supra* note 76, ¶ 198.
84. *Id.* ¶ 62-63.
85. *Id.* ¶ 63.
86. *Id.* ¶ 68. The dissent further argued for a change to the understanding of state consent as dependent on investor consent. Such a change would require that an investor show that he was not the national of the respondent state at the time of the coming into effect of the instrument of state consent—in this case, the BIT. *Id.* ¶ 64-65.
87. *See Report of the Executive Directors on the Convention of Settlement of Investment Disputes Between States and Nationals of other States, reprinted in* 1 ICSID Reports (R. Raytuse eds. Grottius 1993) ¶ 27 (Mar. 18, 1965).
88. *Saipem v. Bangladesh*, Decision on Jurisdiction & Recommendation on Provisional Measures, ICSID Case No. ARB/05/07 (Mar. 21, 2007) [hereinafter *Siapem*].
89. *Salini Construttori v. Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/04 (July 23, 2001) [hereinafter *Salini*].
90. *Saipem, supra* note 88, ¶ 99.
91. *Id.* at n.22.
92. *Id.* ¶¶ 102-111.

apply an "origin of capital" test to determine whether the claimants' investment qualified under ICSID.[93]

Malaysian Historical Salvors v. Malaysia came to a different conclusion in the context of a service contract for marine salvage of valuable Chinese porcelain from a shipwreck.[94] The sole arbitrator in that case surveyed prior awards analyzing Article 25(1) of the ICSID Convention, including *Salini.* After discussing various approaches distilled from previous decisions, the arbitrator applied "a fact-specific and holistic assessment" to determine whether the hallmarks of investment—regularity of profit, contributions made, duration, risk assumed, and contribution to the economic development of the host State—had been met.[95] The arbitrator concluded that "the weight of the authorities . . . swings in favour of requiring a significant contribution to be made to the host State's economy."[96] Due to the relative weakness of the other factors, the arbitrator found that the contribution requirement assumed "significant importance."[97] In finding that a qualifying investment under the ICSID Convention had not been made, the arbitrator accepted Malaysia's argument that recovery of the shipwrecked porcelain brought benefits to Malaysia that were "largely cultural and historical" rather than economic.[98] *Malaysia Historical Salvors* is at odds with a 2006 award that discounted the importance of "contribution to the host State's economic development" as a factor in determining whether an investment qualified under ICSID.[99] A commentator noted that the dismissal on jurisdictional grounds in *Malaysian Historical Salvors* "is probably the most controversial award since the decision in the *Salini* case."[100]

b. Qualifying Investments Under Investment Treaties

A tribunal constituted pursuant to NAFTA Chapter 11 wrestled with the jurisdictional question of whether the treaty protected an investment located in the United States against actions by Mexico.[101] In *Bayview v. Mexico*, a group of Texas water districts argued that NAFTA covered investments made in the United States by U.S. investors, which they claimed that Mexico had undermined by diverting water from the Rio Grande River in violation of a 1944 treaty.[102] In addition, the claimants contended that they had made investments in Mexico in the form of water rights guaranteed by the 1944 treaty.[103] The

93. *Siag, supra* note 76, ¶ 207. *Saipem* imposed a modest burden on the claimant to establish jurisdiction. Citing a number of arbitral decisions and Judge Higgins's opinion in Cases Concerning Oil Platforms (Iran v. United States), 1996 I.C.J. 902 (Dec. 12), the tribunal held that the party asserting jurisdiction bears a *prima facie* burden of showing a breach of the treaty by alleging facts that, if established, could fall within the ambit of the investment treaty. *Saipem, supra* note 88, ¶¶ 83-91.

94. *Malaysian Historical Salvors SDN, BHD v. Malaysia*, Award on Jurisdiction, ICSID Case No. ARB/05/10 (May 17, 2007) [hereinafter *Malaysian Historical Salvors*].

95. *Id.* ¶¶ 107-125.

96. *Id.* ¶¶ 123-124.

97. *Id.* ¶ 132.

98. *Id.*

99. *Id.* at 123; *See L.E.S.I. v. Algeria*, Decision on Jurisdiction, ICSID Case No. ARB/05/3 (July 12, 2006) [hereinafter *L.E.S.I.*].

100. *See* Crina Baltag, *Precedent on Notion of Investment: ICSID Award in MHS v. Malaysia*, 4(5) Transnat'l Disp. Mgmt. (2007).

101. *Bayview Irrigation District v. Mexico*, Award, ICSID Case No. ARB(AF)/05/1 (June 19, 2007) [hereinafter *Bayview*].

102. *Id.* ¶¶ 43-47.

103. *Id.* ¶¶ 48-51.

tribunal rejected both arguments. Although Chapter 11's reference to "investors of another party" did not on its face limit NAFTA to protecting only foreign investors,[104] the tribunal concluded that NAFTA protected only foreign investments.[105] The claimants had invested in water distribution infrastructure, but those investments were in Texas, not Mexico. That the actions of Mexico adversely affected an enterprise in Texas was insufficient to bring the investment within the protection of NAFTA. While not necessarily determinative, the tribunal articulated a test for assessing the existence of a foreign investment under NAFTA: "that the investment is primarily regulated by the law of a State other than the State of the investor's nationality, and this law is created and applied by that State which is not the State of the investor's nationality."[106]

In *Saipem*, the tribunal considered whether rights embodied in an ICC arbitration award constituted an investment under the Italy-Bangladesh BIT. Saipem had contracted with the Bangladesh Oil Gas and Mineral Corporation (Petrobangla) to build a pipeline.[107] After Saipem took a dispute under the contract to ICC arbitration, Bangladeshi courts enjoined Saipem from pursuing the arbitration and later nullified an award in Saipem's favor.[108] In the BIT arbitration, Saipem alleged that the actions of Petrobangla and the Bangladeshi courts constituted expropriation.[109] The tribunal noted that it was an open question whether the ICC award "itself qualifies as an investment."[110] Nevertheless, it held that the "ICC Award crystallized the parties rights and obligations under the [pipeline] contract," and "the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT."[111]

c. "Acceptance of Investment in Accordance with Law"

Tribunals frequently encounter BITs that require investments, as a definitional matter, to comply with local law. In *Fraport v. Philippines*, an ICSID tribunal examined a clause in the Germany-Philippines BIT that defined investment as "any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State."[112]

The *Fraport* majority found that it lacked jurisdiction because the investor—through the secret exercise of managerial control over a Filipino corporation that had won an airport terminal concession—had violated the Philippines so-called "Anti-Dummy Law," which restricts foreign ownership of public utilities. The majority determined that

104. *Id.* ¶ 88 (citing North American Free Trade Agreement, U.S.-Can.-Mex., art. 1139, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]).
105. *Id.* ¶¶ 96, 101, 105 (citing NAFTA, art. 1139, 1101(a)).
106. *Id.* ¶ 98.
107. *Saipem*, *supra* note 88, ¶¶ 6-7.
108. *Id.* ¶¶ 31-36.
109. *Id.* ¶ 61. The tribunal also determined that interference with the ICC Arbitration by the courts of Bangladesh, which deprived Saipem of sums of money due under the contract, could amount to expropriation. *Id.* ¶¶ 129-32. The tribunal reserved for the merits stage the questions of whether Petrobangla's acts were attributable to Bangladesh and whether the conduct of the courts should be characterized as a denial of justice claim for purposes of the exhaustion of local remedies requirement. *Id.* ¶¶ 143, 152-53.
110. *Id.* ¶ 127.
111. *Id.*
112. *Fraport AG Frankfurt Airport Servs. v. Philippines*, Award, ICSID Case No. ARB/03/25, ¶ 335 (Aug. 16, 2007) (citing Germany-Philippines BIT, Art. 1(1)) [hereinafter *Fraport*]. *See* Eric Luke Peterson, *Divided ICSID Panel Declines Jurisdiction Over Philippines Airport Terminal Case*, INVESTMENT TREATY NEWS, August 30, 2007 at 6, *available at* http://www.iisd.org/pdf/2007/itn_aug30_2007.pdf.

Fraport knew that in order to qualify for BIT protection its investment had to be "in accordance with the host state's law;" local counsel had warned it that the management structure "would violate a serious provision of Philippines law;" and Fraport understood that the investment would not turn a profit unless it exerted secret managerial control "in a way which [it] knew were [sic] not in accordance with the law of the Philippines."[113]

In a strongly worded dissent, Bernando Cremades argued that Fraport's conduct did not contravene the Anti-Dummy Law and, even if it did, any violations of that law did not deprive Fraport of protection under the BIT.[114] He acknowledged that illegal conduct by investors was a serious matter, but one that was properly reserved for the merits phase.[115] For Dr. Cremades, the jurisdictional inquiry was properly limited to "determining whether the type of asset is legal in domestic law."[116] Otherwise, the dissent worried, "the phrase 'according to the laws and regulations of the Host State' might provide the Achilles Heel of investment arbitration if jurisdiction depends on the Claimant passing a full legal compliance audit."[117] Dr. Cremades implied that Fraport had grounds for seeking an annulment because the majority decision was "fundamentally wrong in its approach to illegality."[118]

Another tribunal clarified that, to defeat jurisdiction, the illegality must be related to the investor's actions in entering into the investment.[119] In *Kardassopoulos v. Georgia*, Georgia argued that state-owned enterprises had exceeded their authority and that the agreements were therefore "void ab initio" under Georgian law.[120] Acknowledging that the ordinary meaning of the relevant clause—"consistent with Georgia's [the host state's] legislation"—supported Georgia's interpretation, the tribunal nevertheless determined that the treaty's object and purpose of providing "broad protection for investors and their investments" prevented the host state from invoking its own unlawful conduct to defeat jurisdiction.[121] The tribunal also justified its decision by reference to the law of state responsibility, pointing out that an act in excess of governmental authority is nevertheless attributable to the state under international law.[122]

3. *Dispute with A Contracting State*

The issue of whether the conduct giving rise to the investment dispute is attributable to the host state has arisen with some frequency in recent years.[123] In 2007, a NAFTA panel addressed whether the actions of Canada's postal monopoly were attributable to Ca-

113. *Id.* ¶ 398.
114. *Id.*, Dissent, § 13.
115. *Id.*, Dissent, §§ 14, 35, 38, 40.
116. *Id.*, Dissent, § 38 (emphasis added).
117. *Id.*, Dissent, § 37.
118. *Id.*, Dissent, § 41.
119. *Kardassopoulos v. Georgia*, Decision on Jurisdiction, ICSID Case No. ARB/05/18 (July 6, 2007) [hereinafter *Kardassopoulos*].
120. *Id.* ¶ 142.
121. *Id.* ¶¶ 14, 181-84.
122. *Id.* ¶¶ 190-91.
123. *See, e.g., Eureko B.V. v. Republic of Poland*, Partial Award, Ad Hoc Arbitral Tribunal (Aug. 19, 2005) [hereinafter *Eureko*].

nada.[124] United Parcel Service (UPS) alleged that Canada had breached its national treatment and minimum standard of treatment obligations under Articles 1102 and 1105 based on certain anti-competitive practices employed by Canada Post.[125] The tribunal determined, however, that NAFTA's regulation of monopolies and state enterprises (embodied in Articles 1502 and 1503) displaced the default rule that a state is responsible for the acts of its organs, as articulated in Article 4 of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts.[126] By distinguishing between the "Parties" on the one hand, and "monopolies" or "state enterprises" on the other, the text of Articles 1502 and 1503 established a *lex specialis* attribution regime.[127] Thus:

> The governments which negotiated and agreed to NAFTA did not simply and directly apply the rather generally stated obligations of Chapter 11 to government and other monopolies and to State enterprises as well as to themselves. Rather they elaborated a more detailed set of provisions about competition, monopolies and State enterprises and incorporated them in a distinct chapter (chapter 15) of the Agreement.[128]

The tribunal also rejected the argument that Canada Post exercised elements of "governmental authority" and thus declined to attribute its conduct to Canada under Article 5 of the ILC Draft Articles on State Responsibility.

4. *Timeliness*

Whether a treaty claim is too late or too early was once again an important issue in 2007. In *Eastern Sugar v. Czech Republic*, the tribunal faced the novel issue of whether the Czech Republic's accession to the E.U. terminated the Dutch-Czech BIT, rendering the BIT claims untimely[129]. Relying in part on Article 59 of the 1969 Vienna Convention on the Law of Treaties (governing treaty termination), the Czech Republic argued that the BIT was no longer applicable after its date of accession to the E.U.[130] Declining to refer the dispute to the European Court of Justice, the tribunal rejected the argument. Finding that neither the E.U. Accession Treaty nor the BIT addressed the question, the tribunal analyzed the requirements of Article 59 of the Vienna Convention. The tribunal determined that E.U. law and the BIT did not cover the same subject matter. In particular, the tribunal noted that the BIT's dispute resolution clause—guaranteeing access to a neutral arbitration panel—was a key element absent from the E.U. regime.[131] The tribunal also

124. *United Parcel Serv. of America Inc. v. Canada*, Award on the Merits, UNCITRAL (NAFTA) (May 24, 2007) [hereinafter *United Parcel Serv.*].
125. *Id.* ¶¶ 45-46.
126. *Id.* ¶ 59; Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. Doc. No. A/56/10 (2001) [hereinafter ILC Draft Articles on State Responsibility].
127. *United Parcel Serv.*, *supra* note 124, ¶ 59 (citing ILC Draft Articles on State Responsibility, *supra* note 126, at art. 55).
128. *Id.* (citing NAFTA, at art. 1502, 1503).
129. *Eastern Sugar B.V. v. Czech Republic*, Partial Award, SCC No. 088/2004, UNCITRAL (March 27, 2007) [hereinafter *Eastern Sugar*].
130. *Id.* ¶¶ 97-110; *see* Vienna Convention on the Law of Treaties, art. 59, May 23, 1969, 1155 U.N.T.S. 331 (later concluded treaty must have same subject matter as earlier treaty) [hereinafter Vienna Convention].
131. *Eastern Sugar*, *supra* note 129, ¶¶ 165-166.

found that the dispute arose before the Czech Republic's accession to the E.U. "and could not have been affected if the BIT had been terminated after that [date]."[132]

Rejecting the argument that a claim was in effect premature, the *Kardassopoulos* tribunal decided that the Energy Charter Treaty (ECT) applied provisionally and thus bound state parties prior to its entry into force.[133] The award's discussion is important because provisional application of the ECT is at issue in several closely watched treaty arbitrations.[134] In *Kardassopoulos*, Georgia argued that the ECT had not entered into force when the dispute arose and that the municipal laws of Georgia and Greece did not allow for the provisional application of treaties.[135] Article 45(1) of the ECT provides that "[e]ach signatory agrees to apply this Treaty provisionally pending its entry into force."[136] The use of the phrase "this Treaty," the tribunal concluded, required the provisional application of the entire ECT.[137] In addition, Article 45's requirement that provisional application be "not inconsistent with [the signatory's] constitution, laws or regulations"—an exception to provisional application—did not bar the claim because neither Greece nor Georgia at the relevant times prohibited the provisional application of treaties as a matter of domestic law.[138]

Article 45 of the ECT is unusual because treaties do not typically provide for provisional application. As a result, parties seeking to broaden the temporal reach of investment treaties frequently argue that the wrongful acts constitute a continuing or composite course of conduct.[139] In *M.C.I. Power Group v. Ecuador*,[140] the tribunal found that acts that began before, but continued after, the entry into force of the Argentina-Ecuador BIT were nevertheless outside the tribunal's jurisdiction.[141] Prior events could only be considered "for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force."[142] The tribunal also determined that the obligation of a state party not to defeat the object and purpose of a treaty after signature but before its entry into force did not trigger the retroactive application of the BIT[143] and that the claimant could not rely on a "Most Favored Nation" clause to receive the protections offered by the earlier- concluded Argentina-Ecuador BIT.[144]

132. *Id.* ¶ 176.

133. *Kardassopoulos, supra* note 119, ¶¶ 202-03; *see* Vienna Convention, art. 25(1).

134. The main arbitrations in question are *Yukos Universal Ltd. (UK—Isle of Man) v. Russian Federation; Hulley Enterprises Ltd. (Cyprus) v. Russian Federation;* and *Veteran Petroleum Trust (Cyprus) v. Russian Federation.*

135. *Kardassopoulos, supra* note 119, ¶¶ 71-79.

136. *Id.* ¶ 202 (quoting The Energy Charter Treaty, art. 45(1), Dec. 17, 1994, 34 I.L.M. 360 (emphasis added) [hereinafter ECT]).

137. *Id.* ¶ 210.

138. *Id.* ¶ 246.

139. *See* ILC Draft Articles on State Responsibility, *supra* note 126, at art. 14, 15.

140. *M.C.I. Power Group L.C. v. Ecuador*, Award, ICSID Case No. ARB/03/6 (July 31, 2007).

141. *Id.* ¶¶ 66, 97.

142. *Id.* ¶ 93.

143. *Id.* ¶ 116.

144. *Id.* ¶¶ 127-128. In *Sociedad Anónima Eduardo Vieira v. Chile*, Award, ICSID Case No. ARB/04/7 (Aug. 21, 2007), the tribunal similarly determined that the dispute arose before the entry of the BIT. In dissent, Susana B. Czar de Zalduendo argued that the tribunal had jurisdiction over those claims arising out of a new dispute after the effective date of the BIT. *See* Fernando Cabrera Diaz, *Majority Declines Jurisdiction Against Chile*, INVESTMENT TREATY NEWS, August 30, 2007 at 9, *available at* http://www.iisd.org/pdf/2007/itn_aug 30_2007.pdf.

In contrast, the tribunal in *United Parcel Service* rejected Canada's argument that the claims were time-barred under NAFTA's three-year limitation period.[145] The tribunal held that "continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly."[146] Thus, UPS was entitled to bring claims related to conduct that "began before and extended past three years before a claim was filed."[147] UPS bore the burden, however, of establishing losses within the limitation period because a "continuing course of conduct might generate losses of a different dimension at different times."[148]

B. Procedure

1. *Challenges to Arbitrators*

Despite a variety of grounds raised by parties, there were no successful arbitrator challenges in 2007. One of the more unusual grounds for challenge involved an arbitrator who was serving as counsel for a party in another arbitration involving similar legal issues. In *Eureko v. Poland*,[149] Poland requested that the Brussels Court of Appeals remove Judge Stephen Schwebel from the tribunal shortly after it issued a partial award on liability.[150] Poland's request related to the relationship between Judge Schwebel and the law firm Sidley Austin, which represents a claimant in an unrelated arbitration against Poland and serves as co-counsel with Judge Schwebel in the *Vivendi v. Argentina* arbitration.[151] Poland argued that acting as an arbitrator in a case against Poland while having ties to a law firm representing a claimant in another case against Poland cast doubt on Judge Schwebel's impartiality.[152] Poland also pointed out that Judge Schwebel and Sidley Austin, acting as co-counsel in *Vivendi*, asserted legal arguments that were premised on the partial award coauthored by Judge Schwebel in *Eureko*.[153] The Belgian court was not convinced that Judge Schwebel's work with Sidley Austin would undermine his impartiality in the *Eureko* arbitration.

Similarly, in *Grand River Enterprises v. United States*, an ongoing NAFTA arbitration, the United States challenged Professor James Anaya on the ground that he represented or assisted parties adverse to United States in matters before the Commission on the Elimination of Racial Discrimination (CERD) and the Inter-American Commission on Human Rights (IAC).[154] ICSID took the view that "representing or assisting" parties adverse to

145. *United Parcel Serv.*, *supra* note 124, ¶ 28.
146. *Id.*
147. *Id.* ¶ 29.
148. *Id.* ¶ 30.
149. *Eureko*, *supra* note 123.
150. *The Republic of Poland v. Eureko BV*, Case No RG 2006/1542/A, Court of First Instance of Brussels (4th Chamber); *see also* Damon Vis-Dunbar & Luke Eric Peterson, *Belgian Appeals Court Rejects Poland's Challenge to Arbitrator in Eureko Case*, Investment Treaty News, Nov. 15, 2007, at 3, *available at* http://www.iisd.org/pdf/2007/itn_nov15_2007.pdf.
151. *Compañiá de Aguas del Aconquija S.A. v. Argentina*, Award, ICSID Case No. ARB/97/3 (Aug. 20, 2007).
152. Vis-Dunbar & Peterson, *supra* note 150 at 3.
153. *Id.*
154. Letter from Nassib G. Ziade, Deputy Secretary Gen., Int'l Ctr. of Inv. Disputes, to Prof. James Anaya (Nov. 28, 2007), *available at* http://www.naftaclaims.com/Disputes/USA/GrandRiver/GRE-USA-Anaya_Challenge-28-11-07.pdf.

United States before CERD and the IAC "would be incompatible with simultaneous service as arbitrator in the NAFTA proceeding."[155] Upon ICSID's request, however, Professor Anaya informed ICSID that he had ceased his work before the IAC and CERD but continued to work as an instructor in a law school clinic on matters concerning indigenous peoples and the CERD. Observing that "[a] reasonable distinction can be made between : [(1)] representing parties in international fora where the underlying aim is similar to the aim of the current arbitration . . . and [(2]) supervising students as part of a clinical course," ICSID found that Prof. Anaya's work did not "give rise to justifiable doubts as to impartiality or independence" and denied the United States' request.[156]

2. *Amicus Curiae and Non-Party Participation*

In *Biwater Gauff v. Tanzania*,[157] a group of non-governmental organizations sought *amicus curiae* status and an opportunity to submit briefs, access case documents, and attend the hearing. The tribunal noted at the outset that the ICSID Rules do not provide for an *amicus curiae* status insofar as this "might be taken to denote a standing in the overall arbitration akin to that of a party," and explained that the ICSID Rules allow only two specific and carefully delineated types of participation: filing of written submissions and attendance at hearings.[158] The tribunal then granted permission for the group to file a written submission, noting that such submissions had the "reasonable potential" to assist the tribunal and that allowing such submissions was "an important element in the overall discharge of the Arbitral Tribunal's mandate and in securing wider confidence in the arbitral process itself."[159] The tribunal denied the petitioners' request to attend oral hearings on the ground that one of the parties objected,[160] and denied the request for access to key arbitration documents on the ground that the proper role of an *amicus curiae* is not to rebut the arguments of the parties or to suggest how the tribunal ought to determine issues of fact or law presented, but to provide a broader policy perspective.[161]

In *Suez v. Argentina*, the tribunal granted permission to a group of NGOs to file an *amicus curiae* brief after finding that they had "expertise, experience, and independence" and that the "case presented an appropriate subject matter for an *amicus* submission because it involved matters of public interest."[162] The tribunal denied the petitioners' request for "timely, sufficient, and unrestricted access to all the documents" since they had sufficient information to carry out their function even without being granted access to the arbitral record.[163]

155. *Id.*

156. *Id.*

157. *Biwater Gauff Ltd. v. Tanzania*, Procedural Order No. 6, ICSID Case No. ARB/05/22 (Apr. 25, 2007).

158. *Id.* ¶ 46.

159. *Id.*¶ 50.

160. *Id.*¶¶ 70-71.

161. *Id.* ¶¶ 63-65.

162. *Suez v. Argentina*, Order in Response to *Amicus* Petition, ICSID Case No. ARB/03/19 (Feb. 12, 2007).

163. *Id.*

3. *Provisional Measures*

In 2007, tribunals again proved reluctant to award provisional measures, granting such relief only in the *Saipem* case.[164] After an ICC tribunal ordered Petrobangla, the Bangladeshi state-owed entity, to pay certain retention money and return a warranty bond to Saipem, the Bangladeshi courts refused to enforce the award. Saipem then instituted an ICSID arbitration seeking return of the warranty bond and retention money.[165] Finding a risk that Petrobangla might draw on the warranty bond while keeping the retention money, the ICSID tribunal, after determining that there was "both necessity and urgency" and a risk of irreparable harm with respect to the warranty bond, "recommend[ed] that Bangladesh take the steps necessary to ensure that Petrobangla refrain from encashing the Warranty Bond."[166] The tribunal, however, dismissed Saipem's request for return of the retention money because such a payment was not necessary and urgent and because the granting of the request would have amounted to "a *de facto* enforcement of part of the ICC Award."[167] The tribunal explained that it was "prepared to recommend measures preventing an increase of the harm allegedly suffered by one of the parties, [but] not inclined to recommend measures guaranteeing an award in favour of Saipem."[168]

The International Court of Justice (ICJ) rejected Uruguay's request for provisional measures in its dispute with Argentina over the construction of pulp mills on the River Uruguay.[169] The ICJ found that public protests and blockades erected by Argentine protestors posed no imminent risk of irreparable prejudice to Uruguay's rights and declined Uruguay's demand that Argentina be ordered to take all reasonable and appropriate steps at its disposal "to 'prevent or end the interruption of transit' between the two [countries]."[170] The ICJ similarly declined Uruguay's demand that Argentina be ordered to abstain from any measure that might "aggravate, extend or make more difficult the settlement" of the dispute" or which might "prejudice the rights of Uruguay in dispute before the Court," on the ground that there was no risk of irreparable prejudice to the rights of Uruguay in the dispute before the ICJ.[171]

The ICSID tribunal in *Occidental Petroleum v. Ecuador* set a high bar for claimants seeking to obtain provisional remedies.[172] Contesting Ecuador's termination of a contract to carry out oil exploration and exploitation activities in the Amazon, Occidental petitioned the tribunal to enjoin Ecuador from assigning its rights to a third party and to order Ecuador to mitigate further damages. Reciting the well established standard that provisional remedies will only be granted where it is "necessary to preserve a party's rights and where the need is urgent in order to avoid irreparable harm,"[173] the tribunal found that

164. *Saipem, supra* note 88.
165. *Id.* ¶¶ 34-36.
166. *Id.* ¶ 182, Recommendation.
167. *Id.* ¶ 185.
168. *Id.*
169. Pulp Mills on the River Uruguay (Arg. v. Uru.), Request for the Indication of Provisional Measures, 2007 I.C.J. 135 (Jan. 23).
170. *Id.* ¶¶ 41-43.
171. *Id.* ¶¶ 44, 66.
172. *Occidental Petroleum Corp. v. Republic of Ecuador*, Decision on Provisional Matters, ICSID Case No. ARB/06/11 (Aug. 17, 2007) [hereinafter *Occidental Petroleum*].
173. *Id.* ¶ 59 (emphasis in original).

Occidental had not established "a strongly arguable case that there exists a right to specific performance where a natural resources concession agreement has been terminated or cancelled by a sovereign State."[174] In rejecting the request for specific performance, the tribunal further reasoned that "[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions."[175] Finally, with respect to mitigation of damages, the tribunal recognized the utility of provisional measures to avoid aggravation of a dispute, but noted that provisional measures "are not designed to merely mitigate the final amount of damages."[176] The tribunal reasoned that Occidental was not seeking "to avoid aggravation of the dispute *per se*, but rather aggravation of the monetary damages resulting from an already existing dispute."[177] The tribunal therefore denied both of Occidental's requests for provisional measures.

C. Decisions on the Merits

1. *Fair and Equitable Treatment*

Numerous merits awards in 2007 adjudicated claims for breach of "fair and equitable treatment" provisions. These awards will contribute to the further development and refinement of fair and equitable treatment standards, particularly with respect to the concept of legitimate expectations. The awards also show that tribunals continue to wrestle with the overlap between customary international law and treaty provisions requiring fair and equitable treatment.

In *Enron v. Argentina*, the tribunal revisited the question of whether fair and equitable treatment under a BIT requires something more than meeting the minimum standard owed under customary international law.[178] Citing the recent evolution of the doctrine, the tribunal held that fair and equitable treatment under an investment treaty was broader and thus "can also require a treatment additional to, or beyond that of, customary law."[179] The tribunal noted that the goal of a stable framework for investment was enshrined in the BIT's preamble and was therefore "a key element" of fair and equitable treatment under the treaty.[180] This view was further supported by recent decisions in which the concept of a stable legal and regulatory environment had become "an emerging standard of fair and equitable treatment under international law."[181] The tribunal also noted that the requirement of a stable framework for investment was closely related to a state's obligation to protect the legitimate expectations taken into account by a foreign investor at

174. *Id.* ¶ 86.
175. *Id.* ¶¶ 87-89.
176. *Id.* ¶ 97.
177. *Id.* ¶ 98.
178. *Enron Corp. & Ponderosa Assets, L.P. v. Argentina*, Award, ICSID Case No. ARB/01/3 (May 22, 2007) [hereinafter *Enron*].
179. *Id.* ¶ 258. The Tribunal in this context referred to the role that should be played by general principles of law in giving further definition to treatment standards. *Id.* ¶ 257. For a recent discussion of the fair and equitable treatment standard and how it could be developed further in the context of analyzing it as a general principle of law, *see* Elizabeth Snodgrass, *Protecting Investor's Legitimate Expectations—Recognizing and Delimiting a General Principle*, 21 ICSID Rev. 1 (2006).
180. *Enron*, *supra* note 178, ¶ 259.
181. *Id.* ¶ 260 (quoting *LG&E Energy Corp. v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1 (Oct. 3, 2006) [hereinafter *LG&E*]).

the time of investment. The essential considerations were "that these expectations derived from the conditions that were offered by the State to the investor at the time of investment and that such conditions were relied upon by the investor when deciding to invest."[182] The tribunal also rejected the contention that a violation of the fair and equitable treatment standard required a showing that the state acted in bad faith.[183]

While noting that fair and equitable treatment does not require "the freezing of the legal system or the disappearance of the regulatory power of the State,"[184] the tribunal held that Argentina's response to the financial crisis "substantially changed the legal and business framework under which the investment was decided and implemented," thus violating the treaty.[185] In particular, the tribunal cited specific guarantees made to investors during the privatization of Argentina's gas sector, including promises that tariffs would be calculated in U.S. dollars, would be indexed to inflation and would not be subject to freezing and price controls without compensation. Because Enron had reasonably relied upon these conditions when investing, Argentina's dismantling of this tariff regime constituted an objective breach of the treaty's requirement of fair and equitable treatment.[186] A similar analysis was set forth in *Sempra v. Argentina*, which also found that Argentina had breached the fair and equitable treatment provision of the treaty through its overhaul of the gas tariff system.[187]

In *Siemens v. Argentina*, the tribunal emphasized that "bad faith or malicious intention" was not a necessary element in a claim for breach of a fair and equitable treatment provision.[188] The tribunal similarly rejected the contention that fair and equitable treatment only required meeting the minimum standard under international law. In particular, the tribunal noted that customary law on this issue had evolved and that the relevant consideration was the state of customary law at the time the specific investment treaty was entered.[189] According to the tribunal, the current international standard of fair and equitable treatment includes the duty to protect an investor's legitimate expectations at the time it made the investment.[190] On that basis, the tribunal found a violation of the fair and equitable treatment provision of the BIT.

Likewise, the tribunal in *Vivendi v. Argentina* rejected the notion that fair and equitable treatment only required meeting the minimum standard under international law.[191] According to the tribunal, there was no basis in the language of the treaty to limit fair and equitable treatment to the minimum standard, and the reference to "principles of international law" in the treaty "invites consideration of a wider range of international law principles than the minimum standard alone," including contemporary principles.[192] The

182. *Id.* ¶ 262.
183. *Id.* ¶ 263.
184. *Id.* ¶ 261.
185. *Id.* ¶ 264.
186. *Id.* ¶¶ 264-68.
187. *Sempra Energy* Int'l *v. Argentina*, Award, *ICSID Case No. ARB/02/16*, ¶¶ 296-304 *(Sept. 28, 2007)* [*hereinafter Sempra*].
188. *Siemens A.G. v. Argentina*, Award, ICSID Case No. ARB/02/08 (Feb. 6, 2007) [hereinafter *Siemens*].
189. *Id.* ¶¶ 293-300.
190. *Id.* ¶ 299.
191. *Compañiá de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina*, Award, ICSID Case No. ARB/97/3 (Aug. 20, 2000) [hereinafter *Vivendi*].
192. *Id.* ¶ 7.4.7.

tribunal reaffirmed that fair and equitable treatment was an objective standard requiring that, "in all of the circumstances of the particular case, the conduct properly attributable to the state has been fair and equitable," and that this objective standard did not allow for considerations of good faith.[193]

The tribunal in *Parkerings-Compagniet v. Lithuania*[194] devoted extensive discussion to the concept of legitimate expectations in determining whether Lithuania had breached its obligation of "equitable and reasonable treatment" under the Norway-Lithuania BIT.[195] The tribunal stated that expectations are legitimate when the state has made explicit guarantees or implicit assurances at the time of investment. Even in the absence of such guarantees, "an investor has a right to a certain stability and predictability of the legal environment of the investment."[196] Because the state retains its sovereign legislative power, however, "an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment."[197] Thus, the tribunal held that ongoing regulatory changes should have been reasonably expected during Lithuania's transition to a market economy. Because the parties had not included a stabilization clause in their contract, the investor had assumed the business risk that Lithuania might pass legislative or regulatory measures that harmed its investment.[198]

In contrast, the tribunal in *PSEG Global v. Turkey* held that the "roller-coaster effect" of Turkey's continuing legislative changes had breached the fair and equitable treatment obligation.[199] Although investors cannot reasonably expect that the legal environment will remain totally unchanged, an investor's basic expectations of stability cannot be met "in a situation where the law kept changing continuously and endlessly."[200]

2. *Expropriation*

Claimants frequently assert expropriation claims in conjunction with claims for breach of fair and equitable treatment provisions. Indeed, the two types of claims often have significant overlap, especially when the expropriation claim is for indirect expropriation, rather than direct expropriation involving outright nationalization or confiscation of property. Nevertheless, the awards from 2007 show that it is much more difficult to prevail on indirect expropriation claims as opposed to fair and equitable treatment claims.

For instance, the *Sempra* tribunal noted that "on occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin."[201] Nevertheless, the tribunal believed that "judicial prudence and deference to

193. *Id.* ¶ 7.4.12.

194. *Parkerings-Compagniet AS v. Lithuania*, Award, ICSID Case No. ARB/05/8 (Sept. 11, 2007) [hereinafter *Parkerings*].

195. The tribunal held that there was no significant difference between standards of "equitable and reasonable" treatment and "fair and equitable" treatment and therefore would interpret the two interchangeably. *See id.* ¶¶ 276-78.

196. *Id.* ¶ 333.

197. *Id.*

198. *See id.* ¶¶ 335-38.

199. *PSEG Global v. Turkey*, Award, ICSID Case No. ARB/02/5 (Jan. 19, 2007) [hereinafter *PSEG Global*].

200. *Id.* ¶ 254.

201. *Sempra*, *supra* note 187, ¶ 301.

State functions are better served by opting for a determination in the light of the fair and equitable treatment standard."[202] Accordingly, the tribunal rejected Sempra's expropriation claim, finding that there had been no showing of "substantial deprivation" such that the regulatory measures had deprived the investor of control of its business or left the value of the business virtually annihilated.[203] Indirect expropriation claims were rejected for similar reasons in *Enron*[204] and *PSEG Global*.[205] In all three cases, the fair and equitable treatment claims were successful while the indirect expropriation claims failed.

An indirect expropriation claim was also rejected in *Parkerings*.[206] In determining whether a state's wrongful termination of contract could rise to an expropriation, the tribunal held that three conditions needed to be met. First, the state must have acted in its sovereign capacity, rather than as a mere contracting party.[207] Second, the investor must have been deprived of the ability to seek redress before the appropriate domestic court.[208] Third, the termination must have resulted in a substantial decrease in the value of the investment.[209] Because Lithuania had been acting merely as a contracting party when it terminated the contract, and because the investor had not sought relief in the Lithuanian courts pursuant to the contract's forum selection clause, the tribunal found that no expropriation occurred.

Fireman's Fund Insurance v. Mexico produced another decision in which a claim for indirect expropriation was rejected.[210] In analyzing whether Mexico's actions in connection with the unsuccessful recapitalization plan for a failing bank had resulted in an expropriation under Article 1110 of NAFTA, the tribunal looked to customary international law and previous NAFTA cases for guidance. The tribunal set forth a comprehensive list of factors it would consider in analyzing the claim. In particular, the tribunal stated that an expropriation requires a taking by a governmental entity of an investment covered by NAFTA; covered investments include tangible and intangible property; the taking must result in a substantially complete deprivation of the use and enjoyment of the property; the taking must be permanent; the taking need not involve a transfer of ownership; the effects of the state's actions, not the state's intent, are dispositive; the taking may be *de jure* or *de facto*; the taking may be direct or indirect; the taking may result from a single measure or a series of measures (so-called creeping expropriation); and the investor's reasonable expectations may be considered.[211] The tribunal also distinguished compensable expropriation and non-compensable state regulation based on whether the measure was within the recognized police powers of the state, the public purpose and effect of the measure, whether the measure was discriminatory, the proportionality between the intended goal and the means employed, and the bona fide nature of the measure.[212] On the facts, the tribunal held that no expropriation had occurred.

202. *Id.*
203. *See id.* ¶¶ 285-86.
204. *Enron, supra* note 178, ¶¶ 244-46.
205. *PSEG Global, supra* note 199, ¶¶ 278-80.
206. *Parkerings, supra* note 194.
207. *See id.* ¶¶ 443-47.
208. *See id.* ¶¶ 448-54.
209. *See id.* ¶ 455.
210. *Fireman's Fund Ins. Co. v. Mexico*, Award, ICSID Case No. ARB(AF)/02/1 (July 17, 2007).
211. *See id.* ¶ 176.
212. *See id.* ¶ 176(j).

In contrast to these awards, indirect expropriation was found to have occurred in two merits decisions in 2007. In *Vivendi*, the tribunal concluded that the provincial government's actions in unilaterally lowering water tariffs and mounting a campaign against the water concessionaire aimed at reversing the privatization of the water sector, ultimately resulting in termination of the Concession Agreement, constituted an indirect expropriation.[213] In particular, the tribunal held that as a result of the state's measures, the concessionaire "was effectively deprived of the right to operate the concession and to be compensated in accordance with the Concession Agreement."[214] The tribunal also rejected Argentina's claim that a measure should be presumed regulatory absent a finding of bad faith, holding that "the *effect* of the measure on the investor, not the state's intent, is the critical factor."[215] The tribunal did not reach the question of whether the actions were taken for a public purpose; since no compensation had been paid, the question of purpose was irrelevant under the terms of the treaty.[216]

In the second decision, the *Siemens* tribunal found that Argentina had committed an indirect expropriation when it terminated Siemens' contractual rights to implement and run a national identification system.[217] In reaching this conclusion, the tribunal held that only the effects of the government's actions need be considered, not the state's intent to expropriate.[218] The tribunal held that the state had clearly violated the terms of the treaty because no compensation had been paid for the expropriation.[219]

3. *Full Protection and Security*

Also closely related to fair and equitable treatment is the obligation to provide "full protection and security." In general, tribunals have been unwilling to extend this standard of treatment beyond the duty to provide physical protection for an investor's property and personnel. This trend largely continued in 2007, as three awards rejected attempts to construe "full protection and security" clauses as requiring a broader legal security for investments.[220] As the *Enron* tribunal noted:

> [H]istorically this particular standard has been developed in the context of physical protection and security of the company's officials, employees or facilities. The Tribunal cannot exclude as a matter of principle that there might be cases where a broader interpretation could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation.[221]

Two decisions offered broader interpretations. In *Siemens*, the tribunal found that Argentina had violated the full protection and security provision of the treaty by pushing for

213. *Vivendi*, *supra* note 191.
214. *Id.* ¶ 7.5.19.
215. *Id.* ¶ 7.5.20 (emphasis in original).
216. *Id.* ¶ 7.5.21.
217. *Siemens*, *supra* note 188.
218. *Id.* ¶ 270.
219. *Id.* ¶ 273.
220. *See PSEG Global*, *supra* note 199, ¶¶ 257-59; *Enron*, *supra* note 178, ¶¶ 284-87; *Sempra*, *supra* note 187, ¶¶ 321-24.
221. *Enron*, *supra* note 178, ¶ 286.

contractual renegotiation for the sole purpose of reducing its costs, without any declaration of public purpose.[222] The tribunal, however, noted that the relevant BIT specifically imposed an obligation to provide legal security so that the scope of the obligation was much broader than providing only physical security.[223] In *Vivendi*,[224] the tribunal likewise declined to limit full security and protection to physical security, holding that the scope of such a clause is congruent with the duty to provide fair and equitable treatment.[225] According to the tribunal, security and protection "can apply to more than physical security."[226]

4. *National Treatment Standards*

In *United Parcel Service*, a divided tribunal held that Canada did not breach its NAFTA obligations by allowing Canada Post, the national postal monopoly, to engage in discriminatory and anti-competitive practices.[227] In particular, the majority found that Canada did not breach the national treatment obligations under NAFTA Article 1102, which requires NAFTA parties to treat investors from other NAFTA states as favorably as domestic investors. To establish breach of this obligation, it is necessary to show that foreign and domestic investors were in "like circumstances" to one another. Here, the majority held that Canada Post and UPS were not in like circumstances, highlighting various differences between postal and courier service.[228] Significantly, the majority also held that Canada's Publications Assistance Program qualified for the "cultural industries exception" under NAFTA Article 2106.[229]

While accepting the majority's test for determining national treatment, the dissent would have held that UPS and Canada Post were in fact in like circumstances. The dissent believed that economic competition between the two entities, which involved competing products and competition for market share, presented a *prima facie* case that they were in like circumstances, which had not been rebutted by Canada.[230] The dissent would also have found that Canada had violated Article 1102 by according UPS less favorable treatment than Canada Post, including less favorable customs treatment, abuse of Canada Post's monopoly infrastructure and less favorable treatment under the Publications Assistance Program.[231]

5. *Umbrella Clauses*

The debate over the scope of so-called "umbrella clauses" in BITs continued in 2007. Under the broad interpretation of such provisions, which typically require parties to observe "any other obligation" entered into with respect to investments, any breach of con-

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222. *Siemens, supra* note 188.
223. *Id.* ¶¶ 303-08.
224. *Vivendi, supra* note 191.
225. *See id.* ¶ 7.4.15.
226. *See id.* ¶ 7.4.17.
227. *United Parcel Serv., supra* note 124.
228. *Id.* ¶¶ 99-120.
229. *Id.* ¶ 137.
230. *Id.*, Dissent and Concurrence, ¶¶ 18-52.
231. *Id.*, Dissent and Concurrence, ¶ 63.

tract between a state and an investor may be elevated into a breach of the treaty.[232] Under the narrow interpretation, umbrella clauses apply only to obligations of a state acting in its sovereign rather than commercial capacity and thus do not include ordinary commercial breaches of contract.[233] Of the three awards considering this issue in 2007, two inclined toward the broad approach. Both of those cases, however, involved Argentina acting in its sovereign capacity, so the outcome would have been the same under the narrow approach as well.

In *Enron*, the tribunal unequivocally adopted a broad interpretation of the umbrella clause, noting that "the phrase 'any obligation' refers to obligations regardless of their nature" and includes both contractual obligations and obligations assumed through law or regulation.[234] The only limitation on the scope of the umbrella clause was that the obligation must be "with regard to investments" pursuant to the language of the treaty.[235] Accordingly, the tribunal held that Argentina had breached the umbrella clause through its contract breaches and breaches of various obligations assumed through the legislation that implemented the gas tariff regime.[236] This broad approach was also adopted in *Siemens*. This view was only dicta, however, as the tribunal found that Siemens could not state a claim under the umbrella clause because it was not a party to the relevant contract with Argentina—its local subsidiary was.[237]

In *Sempra*, the tribunal also found that Argentina violated the terms of the umbrella clause but appeared to adopt a more limited approach. Specifically, the tribunal noted that ordinary contract breaches by the state acting in its commercial capacity, rather than in its sovereign capacity, would generally not qualify as breaches of the umbrella clause.[238] The tribunal accordingly took pains to note that the relevant actions were not "mere ordinary contractual breaches of a commercial nature" but rather the acts of a state as sovereign.[239]

Further clouding this issue was the annulment decision in *CMS Gas v. Argentina*.[240] Without recommending either approach, the annulment committee found "major difficulties with [the tribunal's] broad interpretation."[241] Nevertheless, the committee annulled only a limited portion of the award on the ground that the tribunal failed to explain its reasoning, without deciding if the tribunal manifestly exceeded its power.[242]

232. *See, e.g., LG&E, supra* note 181, ¶ 170; *Eureko, supra* note 123, ¶ 256; *SGS v. Philippines*, Decision on Jurisdiction, ICSID Case No. ARB/02/6, ¶¶ 125-28 (Jan. 29, 2004).

233. *See, e.g., Pan American Energy LLC v. Argentina*, Decision on Preliminary Objections, ICSID Case No. ARB/03/13, ¶¶ 108-10 (July 27, 2006); *El Paso Energy Int'l v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/03/15, ¶¶ 79-82 (Apr. 27, 2006); *SGS v. Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/01/13, ¶¶ 171-73 (Aug. 9, 2003).

234. *Enron, supra* note 178, ¶ 274.

235. *Id.*

236. *Id.* ¶¶ 275-77.

237. *Siemens, supra* note 188, ¶¶ 204-06.

238. *Sempra, supra* note 187, ¶ 310.

239. *Id.* ¶ 311.

240. *CMS Gas Transmission Co. v. Argentina*, Annulment Decision, ICSID Case No. ARB/01/8 (Sept. 25, 2007) [hereinafter *CMS Annulment Decision*].

241. *Id.* ¶ 95.

242. *Id.* ¶¶ 97-98.

6. *The Necessity Defense*

Three major decisions in 2007 addressed the "state of necessity" defense. All three decisions concerned the Argentine financial crisis and will surely be considered in the numerous other ICSID disputes concerning Argentina's actions during that period. Previously, the tribunals in *CMS*[243] and *LG&E* [244] had reached inconsistent decisions on whether Argentina had a legitimate necessity defense for actions taken during the currency crisis. While the *LG&E* tribunal held that a state of necessity existed for a seventeen-month period beginning in late 2001, the *CMS* tribunal rejected this defense based on substantially the same facts.

In *Enron*, the tribunal once again considered Argentina's necessity defense for actions taken during the crisis.[245] Although the president of the *Enron* tribunal had also served as president of the *CMS* tribunal, and one arbitrator had also served on the *LG&E* tribunal, the award did not address the two previous decisions. Instead, the tribunal decided on the facts that Argentina had not made out a valid necessity defense under customary international law or the terms of the treaty. In particular, the tribunal doubted that Argentina's actions were the only means of safeguarding its essential interest and also suggested that Argentina had contributed to the situation of necessity.[246]

In *Sempra*, the tribunal likewise rejected Argentina's necessity defense under both the treaty and customary international law.[247] Unlike *Enron*, however, the *Sempra* award addressed the previous decisions on the issue. The tribunal stated that although

> the *CMS* and *Enron* tribunals have not been persuaded by the severity of the Argentine crisis as a factor capable of triggering the state of necessity, *LG&E* has considered the situation in a different light and justified the invocation of emergency and necessity, albeit for a limited period of time.[248]

The tribunal, however, was not persuaded that the crisis justified "the operation of emergency and necessity" and reached the same result as the tribunals in *CMS* and *Enron*.[249] The annulment decision in *CMS* was issued shortly after the *Sempra* award.[250] Although the annulment committee criticized the tribunal's handling of the necessity defense for failing to separately analyze the defense under the treaty as well as under customary international law,[251] it nevertheless held that it was without authority to correct the tribunal's legal errors since it had not acted in manifest excess of its powers.[252]

In light of this mixed record, Argentina is currently contemplating whether to ask the United States for a written interpretation of the treaty confirming that the necessity provi-

243. *CMS Gas Transmission Co. v. Argentina*, Award, ICSID Case No. ARB/01/08 (May 12, 2005) [hereinafter *CMS*].
244. *LG&E, supra* note 181.
245. *Enron, supra* note 178.
246. *See id.* ¶¶ 305-13.
247. *Sempra, supra* note 187.
248. *Id.* ¶ 346.
249. *Id.*
250. *CMS Annulment Decision, supra* note 240.
251. *Id.* ¶¶ 123, 131
252. *Id.* ¶¶ 135-36.

sion is in fact self-judging.[253] It is unclear whether Argentina will be successful in reaching an agreement with the United States on the interpretation of that provision. Moreover, by operation of the Vienna Convention, it is also unclear whether tribunals must give retroactive effect to such an agreement, or whether they should treat it as an amendment of the treaty with only prospective effect.[254] The *Sempra* tribunal has indicated that it is the latter.[255]

D. Damages

A number of tribunals granted substantial damages awards in 2007, including several involving arbitrations against Argentina: US$217 million in *Siemens v. Argentina*; US$128 million in *Sempra v. Argentina*; US$105 million in *Vivendi v. Argentina*;[256] US$106 million in *Enron v. Argentina*; and US$57.4 million in *LG&E v. Argentina*. Although four of these cases dealt at least in part with claims stemming from emergency legal and regulatory measures taken by Argentina in the wake of the financial crisis, the tribunals varied in the valuation methodology they applied and the extent to which they were willing to assign Argentina the costs of the arbitration.

1. *Valuation Methodology*

All of the tribunals issuing damages awards followed the full reparation standard of customary international law, as enunciated by the Permanent Court of International Justice in *Factory at Chorzow*,[257] but they diverged in the method of quantification. The *LG&E* tribunal noted the difficulty in accurately and fairly crafting a compensation award, as "[t]hese questions are particularly thorny when it comes to defining the standard and measure of compensation" and "pre-existing guidance in arbitral jurisprudence is very limited."[258] The tribunal concluded that when the applicable investment treaty does not specify how to quantify compensation, arbitrators should consider it to be "the intention of the parties 'to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case.'"[259]

a. Actual Loss vs. Fair Market Value

The majority of the tribunals issuing damages awards in 2007 sought to determine the fair market value (FMV) of the claimant's investment as the appropriate measure of com-

253. *See* Shane Romig, *Argentina Seeks Diplomatic Exit from ICSID Suits*, Dow Jones News Report, Oct. 12, 2007.
254. *See* Vienna Convention, art. 33(3).
255. *See Sempra*, *supra* note 187, ¶¶ 385-86.
256. *Vivendi*, *supra* note 191.
257. *Factory at Chorzów* (Germany v. Pol.), 1928 P.C.I.J. (ser. A) No 17, at 47 (Sept. 13, 1928) (stating that reparations "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"). All the 2007 awards at least tacitly invoked the *Factory at Chorzów* standard. *See Siemens*, *supra* note 188, ¶ 349; *LG&E Energy Corp. v. Argentina*, Award on Damages, ICSID Case No. ARB/02/1, ¶ 31 (July 25, 2007) [hereinafter *LG&E Damages Award*]; *Sempra*, *supra* note 187, ¶ 400; *Eastern Sugar*, *supra* note 129, ¶ 347; *PSEG Global*, *supra* note 199, ¶ 281; *Vivendi*, *supra* note 191, ¶ 8.1.1.
258. *LG&E Damages Award*, *supra* note 257, ¶ 30.
259. *Id.* ¶ 40.

pensation. In order to determine FMV, the *Enron* tribunal took a painstaking, fact-specific approach. It started with the difference in value of Enron's investment before the government's adverse action and the current value then made several adjustments to "reflect the reality of the crisis that took place in Argentina and the specific influence it has in connection with valuation and compensation."[260] Likewise, the *Siemens* and *Vivendi* tribunals focused on compensating for the lost value of the investment due to the government's unlawful acts. Rather than going by strict book value, however, the tribunals scrutinized the facts to ascertain the applicability of such factors as tax credits, profitability, debt financing, and related investment expenses.[261]

In contrast, the *LG&E* tribunal rejected LG&E's proposal to determine compensation by assessing the FMV of its investment. The tribunal noted that the FMV approach is only "appropriate in cases of expropriation in which the claimants have lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of investment."[262] Instead, the tribunal held that the appropriate method was based on the "actual losses incurred as a result of the internationally wrongful act."[263] In calculating the actual loss, the tribunal reasoned that the guiding question should be one of causation—that is, "what did the investor lose by reason of the unlawful acts?"[264] Ultimately, the tribunal's damages award reflected the fact that LG&E had been able to recoup much of its initial losses, thus compensating for "the dividends that would or could have been generated without any change in the [Argentine] tariff system."[265] Dividends received by LG&E from its investment were accordingly subtracted from the damages awarded by the tribunal.

b. Compensation for Future Lost Profits

Damages awards in 2007 also differed in their treatment of compensation for future lost profits. Interestingly, only the tribunal in *Enron* allowed a full evaluation of future profits in its compensation valuation. Citing "established international practice" for doing so, the tribunal ruled that a fair valuation of the investment at issue "should include the measure of its future prospects."[266] In contrast, the *LG&E* tribunal denied a claim for $174 million in future damages running from January 2008 until the expiration of gas distribution licenses in 2027. The tribunal conceded that LG&E faced continuing breaches of the treaty, but reasoned that it could only award compensation for losses that are certain.[267] Because future losses were too uncertain, the tribunal declined to provide compensation for them. Reaching the same conclusion, the *Vivendi* tribunal accepted in principle that future lost profits were relevant to its valuation of damages, but found that such profits had not been established "with a sufficient degree of certainty."[268] The *PSEG Global* tri-

260. *Enron*, *supra* note 178, ¶ 407.
261. *Siemens*, *supra* note 188, ¶¶ 355-89; *Vivendi*, *supra* note 191, ¶ 8.3.2.
262. *LG&E Damages Award*, *supra* note 257, ¶ 35.
263. *Id.* ¶ 43 (emphasis added).
264. *Id.* ¶ 45 (emphasis added).
265. *Id.* ¶ 59.
266. *Enron*, *supra* note 178, ¶ 384.
267. *LG&E Damages Award*, *supra* note 257, ¶ 51 ("The question is one of *certainty*. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements") (internal quotations omitted).
268. *Vivendi*, *supra* note 191, ¶¶ 8.3.3, 8.3.5.

bunal also affirmed this high standard of proof in determining lost profits, dismissing PSEG Global's claim for US$301.7 million of lost profits because such compensation "cannot be justified from a legal or economic point of view in the circumstances of the case."[269]

The *Siemens* tribunal attempted to stake out a middle ground between these two approaches. The tribunal rejected a bid by the German firm to collect a further US$124 million for future lost profits, finding that such profits were "very unlikely to have ever materialized" for a multitude of reasons.[270] Citing language from *Factory at Chorzów* that compensation must take into account "all financially assessable damages," the tribunal did, however, find Siemens entitled to "not just the value of its enterprise as of . . . the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages."[271] Thus, the tribunal declined to award damages accruing beyond the award date as too speculative, but awarded damages incurred by Siemens during the arbitration proceedings.

2. *Award of Costs*

Parties to investor-state arbitrations have traditionally borne their own attorneys' fees and costs, even though Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules grant tribunals discretion to apportion such costs. Recently, however, tribunals have been increasingly inclined to consider the so-called "loser pays" principle.[272] Although tribunals still tend to favor an equal division of costs in the absence of "exceptional circumstances,"[273] several awards in 2007 reflected an apportionment more explicitly tied to the merits of the arbitration.

Noting that "there is no uniform practice in treaty arbitration with regard to this matter," the *LG&E* tribunal opted for the traditional approach.[274] Although the tribunal had awarded substantial damages against Argentina, it reasoned that the case called "for an equitable allocation of costs" because not all of the claims were successful and Argentina had prevailed on some of its defenses.[275] The tribunal therefore assigned each party its own attorney's fees and costs. The *Siemens* tribunal, however, went a step further by apportioning fees "to take into account that the Claimant has not fully prevailed in these proceedings."[276] Diverging from the traditional equal division rule, the tribunal split the

269. *PSEG Global, supra* note 199, ¶ 315.

270. *Siemens, supra* note 188, ¶ 379.

271. *Id.* ¶ 352.

272. The loser pays principle is set out in Article 40 of the UNCITRAL Arbitration Rules, although ICSID arbitrations not subject to the UNCITRAL Rules have also considered this approach. *See, e.g., Int'l Thunderbird Gaming Corp. v. Mexico*, UNCITRAL (NAFTA), Award (Jan. 26, 2006); *Methanex v. United States*, Award, UNCITRAL (NAFTA) (Aug. 3, 2005); *Ceskoslovenska Obchodni Banka v. Slovakia*, Award, ICSID Case No. ARB/97/4 (Dec. 14, 2004).

273. *See, e.g., Enron, supra* note 178, ¶ 453; *Sempra, supra* note 187, ¶ 486; *Canfor Corp. v. United States, Tembec v. United States, and Terminal Forest Products Ltd. v. United States*, Consolidated Arbitration pursuant to article 1126 of NAFTA and the UNCITRAL Rules, at 89 (July 19, 2007).

274. *LG&E Damages Award, supra* note 257, ¶ 112.

275. *Id.* ¶ 113.

276. *Siemens, supra* note 188, ¶ 402.

costs of the arbitration by a 75 percent to 25 percent margin favoring Siemens, although each party was still ordered to bear its own legal costs.[277]

The *Eastern Sugar* tribunal also awarded some costs to the claimant in the arbitration. Adopting a "'broad brush' costs-follow-the-outcome approach," the tribunal declared that costs should be borne in proportion to the outcome.[278] Noting that the Czech Republic had failed with its plea of lack of jurisdiction and other defenses, the tribunal allocated costs on a 70 percent to 30 percent basis in favor of Eastern Sugar. Similarly, the *PSEG Global* tribunal divided costs in the proportion of 65 percent to Turkey and 35 percent to PSEG Global, as the latter party had prevailed on its jurisdiction and liability claims.[279] That tribunal, defending the loser-pays approach to cost apportionment, noted that "[t]o obtain justice, [claimant] had no option but to bring this arbitration forward and to incur the related costs."[280] Notably, this apportionment resulted in Turkey reimbursing PSEG Global a total of US$4.6 million.

In the sharpest break from the traditional rule of equal apportionment, the *Vivendi* tribunal considered both the arbitration's outcome on the merits as well as the adequacy and presentation of the parties' initial arguments. Noting that several of Argentina's jurisdictional objections "were not only without merit" but had already been rejected by "numerous other tribunals before which Argentina has appeared," the tribunal held that Argentina had "unnecessarily extended and added considerably to the cost of these proceedings."[281] The tribunal therefore ordered Argentina to reimburse the claimants for "the whole of their reasonable costs and counsel fees" covering the jurisdictional phase of the arbitration.[282]

E. Annulment and Set Aside Actions

Annulment committees have occasionally found fault with the reasoning of tribunals, but have emphasized the very limited role envisioned for annulment committees under Article 52 of the ICSID Convention.[283] In 2007, five ad hoc annulment committees convened to hear claims for dismissal of ICSID arbitral awards.[284] With one partial excep-

277. *Id.* Even this small apportionment of fees, however, drew criticism in Professor Janeiro's concurrence. He contended that it would be more appropriate and in line with arbitral practice for each side to bear half of the cost of the proceedings. Only "exceptional circumstances," he reasoned, would justify an apportionment reflecting the decision's award on the merits. "In this case," he concluded "neither Claimant has prevailed in all of its claims, nor have there been exceptional circumstances." *Siemens, supra* note 188 (Prof. Janeiro, separate opinion).

278. *Eastern Sugar, supra* note 129, ¶ 379.

279. *PSEG Global, supra* note 199, ¶ 352.

280. *Id.*

281. *Vivendi, supra* note 191, ¶¶ 10.2.3-10.2.5.

282. *Id.* ¶ 10.2.6.

283. *Industria Nacional de Alimentos S.A. v. Peru*, Annulment Proceeding, ICSID Case No. ARB/03/4, ¶¶ 97, 116 (Sept. 5, 2007) (finding tribunal's decision "summary and somewhat simplified" but not so excessive as to warrant annulment; Sir Franklin Berman filed a vigorous dissent); *Soufraki v. United Arab Emirates*, Annulment Proceeding, ICSID Case No. ARB/02/7 (June 5, 2007) (decision to dismiss annulment claim takes note of Statement of Dissent).

284. In addition, several challenges to investor-state arbitral awards were also rejected by national courts in 2007. In *International Thunderbird Gaming Corp. v. Mexico*, 473 F. Supp. 2d 80 (D.D.C. 2007), the U.S. district court held that the NAFTA tribunal had not acted in manifest disregard of law. This decision was summarily affirmed by the D.C. Circuit. *See Int'l Thunderbird Gaming Corp. v. Mexico*, 2007 WL 4165398

tion, none succeeded. A tribunal's determination that Argentina violated the umbrella clause of the US-Argentina BIT was annulled in *CMS v. Argentina*—a decision with no effect on the damages award.[285]

The *CMS* annulment decision highlights the ongoing controversy over inconsistent awards. Though dozens of cases are presently pending against Argentina, only four awards have been handed down by ICSID tribunals and they have reached contradictory outcomes about the scope of the necessity defense as applied to Argentina's financial crisis.[286] While the tribunals in *CMS*, *Sempra*, and *Enron* found the necessity defense inapplicable, the tribunal in *LG&E* found the clause properly invoked and Argentina's liability precluded for part of the crisis.[287] These conflicting decisions have raised concerns about whether a system without appellate review can resolve, in a consistently principled fashion, such a large number of cases all arising from the same host state actions.

The committee in *CMS* dismissed Argentina's application for annulment of the tribunal's rejection of the necessity defense.[288] Although the committee felt that the tribunal applied the law incorrectly, it dismissed the application in light of the very limited scope of review under Article 52.[289] It remains to be seen whether the committee's dicta will shift the weight of opinion toward the *LG&E* tribunal's conclusions regarding the Argentine financial crisis.

F. Bolivia Withdraws from the ICSID Convention

On May 2, 2007, Bolivia provided formal notice that it was withdrawing from the ICSID Convention effective November 3, 2007.[290] Because no other signatory to the ICSID Convention has ever withdrawn, the implications of Bolivia's actions are unclear. A state may "denounce" the Convention by filing a written notice with the ICSID depository, and the withdrawal takes effect "six months after receipt of such notice."[291] It has been argued that the denunciation of the ICSID Convention has immediate effect and would deny new

(D.C. Cir. Nov. 15, 2007). In *Ecuador v. Occidental Exploration & Petroleum Co.*, [2007] EWCA (Civ) 656, [2007] 2 Lloyd's Rep. 352, the English Court of Appeal affirmed a decision by the Commercial Court rejecting Ecuador's application to set aside an arbitral award for lack of jurisdiction under the U.S.-Ecuador BIT. In *Czech Republic v. European Media Ventures SA*, [2007] EWHC (Comm) 2851, the English Commercial Court similarly dismissed a set aside action challenging an UNCITRAL tribunal's determination that it had jurisdiction to hear a dispute under the BIT between the Czech Republic and the Belgian-Luxembourg Economic Union.

285. *CMS Annulment Decision*, *supra* note 240, ¶¶ 100, 160.

286. *CMS*, *supra* note 243; *Sempra*, *supra* note 187; *LG&E*, *supra* note 181, ¶¶ 226, 266.

287. *CMS*, *supra* note 243; *LG&E*, *supra* note 181, ¶¶ 226, 266 (finding that Argentina is exempt of responsibility and that the claimants should accordingly bear the consequences of the measures taken by the host state).

288. *CMS Annulment Decision*, *supra* note 240, ¶ 160.

289. *Id.* ¶ 136.

290. News Release, ICSID, *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, (May 16, 2007). According to Pablo Solon, Bolivia's Charge D'affaires for Trade, Bolivia also intends to revise or terminate many of its BITs. *See* Damon Vis-Dunbar, *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, Investment Treaty News, May 9, 2007.

291. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art 71, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (noted as ICSID Convention, *supra*).

claimants the right to file a claim against a denouncing state.[292] This position has not found widespread support.[293] Others have pointed out that at least in the six months following denunciation, claimants are not precluded from proceeding against a denouncing state.[294] Finally, the possibility has been raised that a BIT constitutes independent consent.[295] In any case, the language of the Convention clearly indicates that the denunciation does not affect requests for arbitration submitted prior to denunciation.[296]

An arbitral tribunal may soon address what acts constitute consent to jurisdiction—including whether a BIT's reference to dispute settlement under ICSID qualifies—in a case brought by Euro Telecom.[297] On October 13, 2007, Euro Telecom successfully registered a case with the ICSID Secretariat to challenge Bolivia's alleged expropriation of its business investments. Bolivia contends that ICSID lacks jurisdiction to hear the case because Euro Telecom did not consent to arbitration before withdrawal.[298] Both parties agree that prior to Bolivia's notice of withdrawal Euro Telecom lodged a complaint in writing about the nationalization of segments of the telecommunications industry, but Bolivia insists that the letter made no reference to ICSID and therefore does not constitute consent. Euro Telecom made its formal request for ICSID arbitration well after Bolivia's notice of withdrawal.[299] Whether an ICSID tribunal has jurisdiction over this case will be decided by the arbitral panel,[300] as the ICSID Secretariat registers all cases unless they are manifestly outside the Center's jurisdiction.[301]

Bolivia's withdrawal from the Convention may represent the first in a series of moves by other Latin American countries to modify their investment treaty obligations. For example, while Ecuador has not denounced the ICSID Convention, it threatened in early May 2007 that it would not renew its BIT with the United States, and on October 29, 2007, it formally withdrew consent to ICSID jurisdiction over disputes concerning non-renewable resources pursuant to Article 25(4) of the Convention.[302] This latter move may have been intended to exclude claims stemming from Ecuador's new tax on hydrocarbon investors. Foreign investors promise to challenge the denial of jurisdiction, claiming that Ecuador's consent to ICSID arbitration can also be found in relevant BITs and contract terms.[303]

292. *See* Christoph Schreuer, The ICSID Convention: A Commentary (2001) at 1285; Vis-Dunbar, *supra* note 290.

293. See Vis-Dunbar, *supra* note 290; Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y.L.J., June 26, 2007.

294. Gaillard, *supra* note 293.

295. See *id.*; Michael Nolan, *The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuelan Case Study*, Transnat'l Disp. Mgmt. (forthcoming 2008).

296. ICSID Convention, at art. 72.

297. Damon Vis-Dunbar, *ICSID Registers Arbitration Claim in Face of Bolivian Objections*, Investment Treaty News, Nov. 15, 2007.

298. *Id.*; ICSID Convention, art. 25(1), 72.

299. Vis-Dunbar, *supra* note 297.

300. ICSID Convention, art. 41(1).

301. ICSID Convention, art. 28(3).

302. *See* ICSID Convention, art 25(4); Luke Eric Peterson, *Ecuador Wants ICSID to Stop Presiding over Mining and Energy Arbitrations*, Investment Treaty News, Nov. 30, 2007.

303. Peterson, *supra* note 302.

IV. Institutional Developments

Among notable institutional developments occurring in 2007, the Singapore International Arbitration Centre (SIAC) issued a new set of arbitration rules taking effect July 1, 2007.[304] Significantly, the rule changes bring the SIAC rules into closer conformity with the ICC rules. The new rules require the drawing up of a "Memorandum of Issues" at the outset of the arbitration, similar to the Terms of Reference procedure used in ICC arbitration; require scrutiny of awards by the SIAC Registrar, a feature that is also part of ICC arbitration; and determine fees based on a sliding scale relative to the amount in controversy, which is also the method used in the ICC Rules.

304. *See* Press Release, New SIAC Rules & Schedule of Fees, Singapore International Arbitration Centre (May 28, 2007), *available* at http://www.siac.org.sg/whatsnew-arch07.htm.