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International Courts

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This report summarizes significant developments in 2008 concerning international courts and tribunals, particularly the International Court of Justice, the Permanent Court of Arbitration, the Ethiopia-Eritrea Commission, the Iran-U.S. Claims Tribunal, and arbitral tribunals constituted under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. This report covers the period of activity from December 1, 2007 to November 30, 2008.

I. International Court of Justice¹

The International Court of Justice (ICJ, or the Court) is the principal judicial organ of the United Nations (U.N.). The ICJ's jurisdiction is two-fold: to deliver judgments in contentious cases submitted to it by sovereign states, and to issue non-binding advisory opinions at the request of certain U.N. organs and agencies.² This section reports briefly on an advisory opinion requested by the U.N. General Assembly and the contentious cases decided by the Court.

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1. All International Court of Justice decisions, pleadings, and other related materials referenced in this section are available at <http://www.icj-cij.org>.

2. U.N. CHARTER ARTS. 92, 96; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, June 26, 1945, 59 Stat. 1055, available at <http://www.icj-cij.org/documents/>.

A. ADVISORY OPINIONS

On October 10, 2008, the Court registered a request for an advisory opinion by the United Nations General Assembly on whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was consistent with international law.³

On October 17, 2008, the Court issued an order fixing April 17, 2009, as the deadline for presenting written statements on the question and July 17, 2009, as the deadline for States and organizations, which have presented written statements, to submit written comments on other submitted statements.⁴ The Court specifically invited the authors of the unilateral declaration of independence to submit written contributions within these time limits.⁵

B. CONTENTIOUS CASES

The Court delivered four substantive judgments and two orders in response to requests for the indication of provisional measures:

1. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*

On December 13, 2007, the Court delivered its judgment on the preliminary objections in this case, which was initiated by Nicaragua against Colombia on December 6, 2001, in respect of territory and maritime delimitation in the Western Caribbean.⁶

Nicaragua sought to base the Court's jurisdiction on Article XXXI of the American Treaty on Pacific Settlement signed on April 30, 1948, officially designated as the "Pact of Bogotá," as well as on the Parties' acceptances of the Court's compulsory jurisdiction.⁷ Colombia objected to the Court's jurisdiction, claiming that Nicaragua's claims were previously settled by the "Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua" signed on March 24, 1928, at Managua (Treaty), and by the Protocol of Exchange of Ratifications, signed on May 5, 1930 (Protocol).⁸ The Treaty stipulates that the islands of San Andrés, Providencia and Santa Catalina belong to Colombia.⁹ Nicaragua argued that the Treaty was invalid at the time the Pact of Bogotá was concluded.¹⁰

On Colombia's first preliminary objection, the Court found that the Treaty was valid at the time of the entry into force of the Pact of Bogotá because Nicaragua had acted as if the Treaty were valid for over fifty years since its conclusion.¹¹ It further found that the issue

3. Press Release, International Court of Justice, The General Assembly of the United Nations requests an advisory opinion from the Court on the unilateral declaration of independence of Kosovo, (Oct. 10, 2008).

4. Press Release, International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion) (Oct. 21, 2008).

5. *Id.* ¶¶ 2-3.

6. Territorial and Maritime Dispute (Nicar. v. Colom.), 2007 I.C.J. 124, ¶ 1 (Dec. 13), available at <http://www.icj-cij.org/docket/files/124/14305.pdf>.

7. *Id.*

8. *Id.* ¶¶ 39, 41.

9. *Id.* ¶ 18.

10. *Id.* ¶ 75.

11. *Id.* ¶ 81.

of sovereignty over San Andrés, Providencia and Santa Catalina was settled by the Treaty and thereby fell outside the scope of the Pact of Bogotá.¹² Thus, the Court upheld Colombia's first preliminary objection.¹³ It found, however, that it had jurisdiction by virtue of the Bogotá Pact over all other maritime features subject to Nicaragua's claims, as well as over the maritime delimitation between the Parties.¹⁴

On Colombia's second preliminary objection, the Court found that since it had jurisdiction under the Bogotá Pact over all aspects of the dispute, except the three islands named above, it would examine its jurisdiction under the optional clause (Article 36, paragraph 2, of the Statute) only as to the issue of sovereignty over these islands.¹⁵ Because the optional clause required there to be a legal dispute between the Parties, and since no such dispute existed with regard to the three islands, the Court upheld this Colombian objection to its jurisdiction.¹⁶

2. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*

On May 23, 2008, the Court delivered its judgment in this case, which was initiated jointly by Malaysia and Singapore on July 24, 2003, regarding the sovereignty over three maritime features: Pedra Branca/Pulau Batu Puteh (an island with a lighthouse), Middle Rocks (some rocks permanently above the sea level), and South Ledge (an elevation visible above the sea only during low tide).¹⁷

Regarding Pedra Branca/Pulau Batu Puteh, the Court held that sovereignty belonged to Singapore.¹⁸ The Court stated that although Malaysia's predecessor, the Sultanate of Johor, had original title to the island, a 1953 exchange of letters between the respective authorities demonstrated, together with Singapore's subsequent largely uncontested conduct *à titre de souverain*, that title had passed to Singapore by the time the dispute had arisen in 1980.¹⁹

The Court further found that the ancient title of the Sultan of Johor also covered Middle Rocks. Because none of the particular circumstances leading to the transfer of title over Pedra Branca from Malaysia to Singapore applied to Middle Rocks, they remained with Malaysia, according to the Court.²⁰

Finally, the Court found that South Ledge lay within the apparently overlapping territorial waters of mainland Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks. Because the Parties had not mandated the Court to delimit their territorial waters, the Court only stated that South Ledge "belongs to the State in the territorial waters of which it is located."²¹

12. *Id.* ¶ 90.

13. *Id.* ¶ 142.

14. *Id.* ¶¶ 104, 120, 142.

15. *Id.* ¶ 132.

16. *Id.* ¶¶ 138, 140, 142.

17. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)*, 2008 I.C.J. 130 (May 23), available at www.icj-cij.org/docket/files/130/14492.pdf.

18. *Id.* ¶¶ 274-277, 300.

19. *Id.* ¶¶ 192-272.

20. *Id.* ¶¶ 290, 300.

21. *Id.* ¶ 299.

3. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*

The ICJ rendered a judgment in the matter concerning *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France) on June 4, 2008.²² The case was brought by Djibouti on January 9, 2006, alleging violations of the Treaty of Friendship and Co-operation of June 27, 1977, (Treaty) and the Convention on Mutual Assistance in Criminal Matters between France and Djibouti, dated September 27, 1986, (Convention).²³

Djibouti principally challenged the refusal by French governmental and judicial authorities to execute an international letter rogatory requesting the transmission to the judicial authorities in Djibouti of the official record concerning the investigation of the murder of Bernard Borrel.²⁴ Djibouti also asserted that, in summoning certain internationally protected nationals of Djibouti (including the Head of State) as witnesses in connection with the *Borrel* case, France violated its international law obligation to prevent attacks on the person, freedom or dignity of protected individuals.²⁵

On the merits of Djibouti's application, the Court first found no violation of the Treaty. While noting that the provisions of the Treaty are relevant rules of international law that have "a certain bearing" on relations between the Parties, the Court concluded that the fields of cooperation envisaged in the Treaty do not include cooperation in the judicial field and that the relevant rules therefore do not impose any concrete obligations.²⁶

As for the alleged violations of the Convention on Mutual Assistance, the Court first found that France did not violate the principle of reciprocity contained in Article 1 of the Convention. Under that provision one State's granting of assistance in respect of a particular matter does not impose on the other State an obligation to reciprocate when assistance is requested of it.²⁷ Second, it held that the requirement in Article 3 of the Convention—to put in motion the procedure for executing requests for assistance—did not mean that France had to guarantee the outcome of such requests.²⁸ Third, the Court turned to Article 2(c) of the Convention, which provides that a requested State may refuse to execute a letter rogatory if it considers that execution is likely to prejudice its sovereignty, its security, its *order public* or otherwise compromise its essential interests. The Court recalled that the French investigating judge refused Djibouti's request for mutual assistance because that case file contained declassified "defence secret" documents, together with information and witness statements concerning another pending case.²⁹ The Court concluded that the reasons given by the judge fell within the scope of the Convention's exception.³⁰

22. *Certain Questions of Mutual Assistance in Criminal Matters* (Djib. v. Fr.), 2008 I.C.J. 136 (June 4), available at <http://www.icj-cij.org/docket/files/136/14550.pdf> [hereinafter *Mutual Assistance*].

23. *Certain Questions of Mutual Assistance in Criminal Matters* (Djib. v. Fr.) 2006 I.C.J. 136 (Jan. 9), (Application Instituting Proceedings), available at <http://www.icj-cij.org/docket/files/136/13104.pdf>.

24. *Mutual Assistance*, *supra* note 22, ¶ 1.

25. *Id.* ¶ 16.

26. *Id.* ¶ 114.

27. *Id.* ¶ 119.

28. *Id.* ¶ 123.

29. *Id.* ¶ 147.

30. *Id.* ¶ 148.

Finally, the Court unanimously found that France failed to state the reasons for its refusal to comply with Djibouti's request for assistance in its letter dated June 6, 2005.³¹ That failure violated Article 17 of the Convention, which requires that "[r]easons shall be given for any refusal of mutual assistance."³²

The Court then proceeded to reject Djibouti's claims that certain summons issued by France in connection with the *Borrel* case were in violation of international law. In particular, it ruled that the first summons, dated May 17, 2005, addressed to Djibouti's President by the French investigating judge were "merely an invitation to testify which the Head of State could freely accept or decline."³³ The Court noted, however, that there were certain formal defects under French law surrounding the issuance of the summons, for which France should have taken responsibility.³⁴ The second summons, dated February 14, 2007, was issued in accordance with French law.³⁵

Further, the Court rejected for lack of proof Djibouti's claim that the communication to the media of sensitive information (allegedly by the French Government) in breach of the confidentiality of the investigation was an attack on the honour or dignity of its Head of State³⁶ Finally, the Court found that France did not infringe the immunities allegedly enjoyed by the Procureur de la République and the Head of National Security of Djibouti, since those officials were not entitled to personal immunities under international law.³⁷

With regard to the remedies, the Court decided not to order the *Borrel* file to be transmitted with certain pages redacted, as Djibouti requested.³⁸ At the same time, recalling that France committed a violation under Article 17 of the Convention by failing to state reasons for its refusal to execute the letter rogatory, the Court determined that its finding "constitutes appropriate satisfaction."³⁹

4. *Avena and Other Mexican Nationals (Mexico v. United States of America)*

On July 16, 2008, by a vote of seven to five, the ICJ delivered an order for provisional measures in the *Avena* case.⁴⁰ The case was initiated by Mexico on June 5, 2008, when it requested the Court to interpret paragraph 153(9) of the Judgment delivered by the Court on March 31, 2004, in the *Case concerning Avena and Other Mexican Nationals (Mexico v.*

31. *Id.* ¶ 144 ("In reply, France's Ambassador sent the Minister a letter of refusal on 6 June 2005, worded as follows: 'I regret to inform you that we are not in a position to comply with this request.'").

32. *Id.* ¶ 152.

33. *Id.* ¶ 171 ("Consequently, there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State, since no obligation was placed upon him in connection with the investigation of the *Borrel* case.").

34. *Id.* ¶ 173.

35. *Id.* ¶ 179.

36. *Id.* ¶ 180; *see also id.* ¶ 175.

37. *Id.* ¶ 194.

38. *Id.* ¶ 202.

39. *Id.* ¶ 204.

40. Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals, Provisional Measures (Mex. v. U.S.)*, (Order of July 16, 2008), available at <http://www.icj-cij.org/docket/files/139/14639.pdf> [hereinafter Request for Interpretation].

United States of America) (*Avena Judgment*).⁴¹ In its Request, Mexico recalled that in the *Avena Judgment* the Court found that the United States had breached Article 36 of the Vienna Convention on Consular Relations by failing to inform fifty-one Mexican nationals of their rights to consular access and assistance. Mexico added that in paragraph 153(9) of the Judgment, the Court determined the United States' remedial obligations, namely "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences" of the affected Mexican nationals.⁴²

The United States opposed the application for provisional measures on the grounds that there was no dispute between the two countries. It argued that it agreed with Mexico that the *Avena Judgment* imposed an obligation of result and it was urgently considering how to comply with the judgment, admitting that its previous attempts at compliance had failed.⁴³

Nevertheless, the majority of the Court accepted that there was a dispute for the purposes of Article 60 of the ICJ Statute, which gives the Court the power to interpret its previous judgments.⁴⁴ Therefore, the Court had jurisdiction to indicate provisional measures under Article 41 of the ICJ Statute.⁴⁵ The majority of the Court also ruled that other conditions for the indication of provisional measures were satisfied. The Court determined that the execution of the Mexican nationals (the meaning and scope of whose rights were in question) before the Court delivered its judgment on the Request for Interpretation would render it impossible for the Court to order the relief that Mexico sought and thus could cause irreparable harm to the rights it claims.⁴⁶

The ICJ thus rejected by a vote of seven to five the United States' request to dismiss Mexico's application. It ordered the United States to take "all measures necessary" to ensure that five Mexican nationals, including José Ernesto Medellín Rojas, not be executed pending resolution of the dispute between Mexico and the United States over the interpretation the *Avena Judgment*.⁴⁷ Despite this Order, Texas executed José Ernesto Medellín Rojas on August 5, 2008.

5. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*

On October 15, 2008, by eight votes to seven, the ICJ delivered an Order on the request for the indication of provisional measures submitted by Georgia in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*.⁴⁸

41. Request for the Indication of Provisional Measures of Protection Submitted by the Government of the United Mexican States, (*Mex. v. U.S.*) (June 5, 2008) ¶ 1, available at <http://www.icj-cij.org/docket/files/139/14580.pdf>.

42. *Id.* ¶ 1.

43. Request for Interpretation, *supra* note 40, ¶ 41.

44. *Id.* ¶¶ 8, 57.

45. *Id.* ¶ 65.

46. *Id.* ¶¶ 72-74.

47. *Id.* ¶ 80.

48. Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Provisional Measures (*Geor. v. Russ.*) (Order of Oct. 15, 2008), available at <http://www.icj-cij.org/docket/files/140/14917.pdf>.

Georgia instituted the proceedings against Russia on August 12, 2008, immediately after the conflict in South Ossetia erupted.⁴⁹ On August 14, 2008, Georgia requested provisional measures from the Court to preserve its rights under the International Convention on the Elimination of All Forms of Racial Discrimination (CEDR) and to “protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries.”⁵⁰ Georgia claimed, among other things, that on August 8, 2008, the Russian Federation launched a full-scale military invasion against Georgia in support of ethnic separatists in South Ossetia and Abkhazia. It asserted that this invasion resulted in widespread loss of life and property, as well as the displacement of virtually the entire ethnic Georgian population in South Ossetia.⁵¹

On August 15, 2008, Rosalyn Higgins, the President of the ICJ, acting pursuant to Article 74(4) of the Rules of Court, addressed an urgent communication to the parties in which she called upon them “to act in such a way as will enable any order the Court may take on the request for provisional measures to have its appropriate effects.”⁵²

On August 25, 2008, Georgia, referring to “the rapidly changing circumstances in Abkhazia and South Ossetia,” amended its request, claiming that the Russian Federation had assumed complete control over South Ossetia, Abkhazia, and other areas inside Georgia.⁵³

The Russian Federation opposed Georgia’s request, arguing that the Court lacked jurisdiction to entertain the case under the CEDR, and in any event, Georgia had not produced credible evidence of the existence of an imminent risk of irreparable harm and urgency, especially in light of the ongoing process of post-conflict settlement.⁵⁴ It also argued that, in any event, acts committed by organs of South Ossetia and Abkhazia or private groups and individuals were not attributable to the Russian Federation, which lacks effective control over South Ossetia, Abkhazia or any other adjacent parts of Georgia.⁵⁵

At the outset, the ICJ found that the CEDR appears, *prima facie*, to afford a jurisdictional basis to grant provisional measures.⁵⁶ It ruled, however, that under the circum-

49. Application of the International Convention of the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.) (Application Instituting Procedures) (Aug. 12, 2008), *available at* <http://www.justice.gov.ge/haaga/12%20August%202008%20Application%20Instituting%20Proceedings%20.pdf>.

50. Request for the Indication of Provisional Measures of Protection submitted by the Government of Georgia (Geor. v. Russ.) (Aug. 14, 2008), ¶ 1, *available at* <http://www.justice.gov.ge/haaga/13%20August%202008%20Request%20for%20the%20Indication%20of%20Provisional%20Measures%20of%20Protection%20submitted%20by%20the%20Government%20of%20Georgia.pdf>.

51. *Id.* ¶ 6.

52. Urgent Communication to the Parties From the President Under Article 74, para. 4, of the Rules of Court (Geor. v. Russ.), (Aug. 15, 2008), *available at* <http://www.icj-cij.org/docket/files/140/14669.pdf>.

53. Amended Request for the Indication of Provisional Measures of Protection (Geor. v. Russ.) (Aug. 25, 2008) ¶ 1, *available at* <http://www.icj-cij.org/docket/files/140/14689.pdf?PHPSESSID=146632c08606b30ff4889d88e15c199c#view=FitH&pagemode=none&search=%22submitted%22>.

54. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), (Provisional Measures) (Order of Oct. 15, 2008) ¶ 83, *available at* <http://www.icj-cij.org/docket/files/140/14801.pdf>.

55. *Id.*

56. *Id.* ¶ 117 (Article 22 of the CEDR provides that “[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute,

stances, it was appropriate to indicate measures addressed to both parties, not just to the Russian Federation.⁵⁷

Therefore, the Court ordered both Russia and Georgia to refrain from targeting ethnic groups in South Ossetia and Abkhazia and to abstain from sponsoring, defending or supporting racial discrimination.⁵⁸ The Court also ordered that both nations should “do all in their power. . .to ensure without distinction as to national or ethnic origin (i) security of persons, (ii) the right of persons to freedom of movement and residence within the border of the state, [and] (iii) the protection of the property of displaced persons and of refugees.”⁵⁹ Finally, it directed both countries not to hamper humanitarian aid and to keep the Court informed of compliance measures.⁶⁰

To date, the Court has not examined the question of whether the CEDR gives it jurisdiction over the merits of the case.⁶¹

6. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*

On November 18, 2008, the Court rendered its judgment in this case on the preliminary objections to jurisdiction and the admissibility of an application filed on July 2, 1999, by the Republic of Croatia against the Federal Republic of Yugoslavia.⁶²

Croatia alleged that Yugoslavia had breached its legal obligations toward the people and nation of Croatia under a number of articles of the Convention on the Prevention and Punishment of the Crime of Genocide (Convention).⁶³ In addition, Croatia sought the submission to trial of certain persons within Serbian jurisdiction, information on missing persons, restitution of cultural property, and reparations for damages.⁶⁴ Croatia invoked Article IX of the Convention as the jurisdictional basis of its action.⁶⁵

Having identified the Republic of Serbia (the successor state of Serbia and Montenegro, previously known as Yugoslavia) as the sole Respondent in the case,⁶⁶ the Court proceeded to address Serbia’s first preliminary objection to its jurisdiction, namely (a) that Serbia lacked capacity to participate in the proceedings since it was not a party to the Statute of the Court (Statute) when the action was brought⁶⁷ and (b) that the Court lacked jurisdiction since Serbia did not accede to the Convention until June 2001, at which time it made a reservation to exclude the application of Article IX of the Convention.

be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”)

57. *Id.* ¶ 146.

58. *Id.* ¶ 149 (“Both parties shall refrain from any acts of racial discrimination against persons, groups of persons or institutions” and “abstain from sponsoring, defending or supporting racial discrimination.”)

59. *Id.*

60. *Id.*

61. *Id.* ¶ 141.

62. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Croat. v. Serb. & Mont.), 2008 I.C.J. 118 (Nov. 18), available at <http://www.icj-cij.org/docket/files/118/14891.pdf> [hereinafter *Croatia*].

63. *Id.* ¶¶ 20, 21.

64. *Id.* ¶¶ 1-2.

65. *Id.* ¶ 1.

66. *Id.* ¶¶ 11, 34.

67. *Id.* ¶ 63; see Statute of the International Court of Justice, *supra* note 2, art. 35, ¶. 1.

The Court found that Serbia had the capacity to participate in the proceedings.⁶⁸ While Serbia might not have been a party to the Statute when Croatia filed its Application in 1999, the Court, relying on the *Mavrommatis* judgment,⁶⁹ established that the relevant date for assessing jurisdiction was the date of Serbia's accession to the Statute on November 1, 2000.⁷⁰ The Court also held that since Serbia was the successor state of Yugoslavia, a state which had acceded to the Convention without reservations, it was bound by the Convention, including Article IX.⁷¹

Next, the Court addressed Serbia's second preliminary objection: that the Croatian claims were based on acts and omissions committed before the creation of Yugoslavia in 1992 and thus inadmissible and beyond the Court's jurisdiction. The Court noted that the Convention did not limit its jurisdiction *ratione temporis*.⁷² It added that Serbia's objection was not exclusively preliminary in nature and would therefore be dealt with at the merits stage.⁷³ It involved both the question of the applicability of the obligations under the Convention in respect of facts that occurred before 1992, before Yugoslavia came into existence as a separate state, and the question of whether these facts were attributable to Yugoslavia under the rules on state responsibility. On both issues, the Court required more information before making any findings.⁷⁴

Finally, the Court rejected Serbia's third preliminary objection against Croatia's requests for submission of certain persons to trial, for information on missing persons and for return of cultural property, since these issues would be better considered at the merits stage of the proceedings.⁷⁵

D. CHANGES IN THE COURT'S COMPOSITION

On November 7, 2008, the U.N. General Assembly and Security Council elected five ICJ Members to serve a term of nine years, beginning on February 6, 2009. Judges Awn Shawkat Al-Khasawneh (Jordan) and Ronny Abraham (France) were re-elected as Members of the Court. Messrs. Antônio Augusto Cançado Trindade (Brazil), Christopher Greenwood (United Kingdom), and Abdulqawi Ahmed Yusuf (Somalia) were elected as new Members of the Court.⁷⁶

68. Croatia, *supra* note 62, ¶ 146.

69. The *Mavrommatis* Palestine Concessions, Judgment, (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30) ¶ 34, available at http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis/.

70. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 62, ¶ 79 (Jurisdiction is normally assessed based on the date of the proceedings are initiated; however, under *Mavrommatis*, jurisdiction—even if lacking when the case was initiated—can be established where the conditions for jurisdiction have been satisfied after the filing but before the Court's ruling on jurisdiction).

71. *Id.* ¶¶ 117-118, 146.

72. *Id.* ¶ 123.

73. *Id.* ¶¶ 129-30, 146.

74. *Id.* ¶ 124.

75. *Id.* ¶¶ 136, 139, 143, 144, 146.

76. Press Release, International Court of Justice, United Nations General Assembly and Security Council Elect Five Members of the Court, (Nov. 7, 2008).

II. The Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) is the oldest of the existing dispute settlement bodies. It was established by the 1899 Hague Convention on the Pacific Settlement of International Disputes,⁷⁷ subsequently revised in 1907,⁷⁸ to facilitate the settlement of international disputes. The PCA is an institutional framework that provides disputing parties—should they agree, or have agreed, to arbitrate with administrative support services such as: an updated list of leading scholars and practitioners to be appointed as arbitrators or conciliators; a channel of communication between the parties; holding and disbursing deposits for costs; safe custody of documents; efficient secretarial, language and communications services; and, a courtroom and office space, if needed.

Under its own rules of procedure, which are based upon the UNCITRAL Arbitration Rules, the PCA administers arbitration, conciliation and fact finding in disputes involving various combinations of states, private parties and intergovernmental organizations. The PCA renders its services to sovereign states, including for disputes where only one of the parties is a sovereign state, and is also available for transnational disputes between private parties (commercial arbitration).

A. INSTITUTIONAL DEVELOPMENTS

In 2008, there were two noteworthy institutional developments relating to the PCA. First, on August 29, 2008, the Kingdom of Bahrain acceded to the Convention for the Pacific Settlement of International Disputes and became the PCA's 108th member.⁷⁹ Second, on September 1, 2008, Christian Kröner succeeded Tjaco T. van den Hout as the PCA's Secretary-General. Kröner had previously served as Netherlands Ambassador to the United States, France, Italy, and Israel.

B. CASES

Five new arbitrations were added to the list of active cases in 2008. Moreover, the PCA also listed being involved in eighteen investor-state arbitrations under bilateral or multilateral investment treaties and four more arbitrations under contracts or other agreements where at least one party is a state, state-controlled entity, or intergovernmental organization.⁸⁰ The Eurotunnel arbitration and the Eritrea-Ethiopia Claims Commission remain active. Finally, two bodies working under the auspices of the PCA concluded their work: the Eritrea-Ethiopia Boundary Commission and the arbitral tribunal of the *Ireland v. United Kingdom* (MOX Plant Case).

77. For the text of the Convention of July 29, 1899, see TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, Vol. I, 230-46 (Charles I. Bevans ed., 1968).

78. Hague Convention on the Pacific Settlement of International Disputes, July 29, 1899, U.N.T.S. 392, 32 Stat. 1779 (1899), available at http://avalon.law.yale.edu/19th_century/hague01.asp.

79. Permanent Court of Arbitration, New Member State—September 2008, http://www.pca-cpa.org/shownews.asp?ac=view&nws_id=229&pag_id=1261 (last visited Mar. 9, 2009).

80. Permanent Court of Arbitration, Cases, http://www.pca-cpa.org/showpage.asp?pag_id=1029 (last visited Mar. 9, 2009).

1. *New Cases*a. *Government of Sudan v. Sudan People's Liberation Movement/Army* (Abyei Arbitration)

On June 8, 2008, the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM) agreed to refer a dispute over the Abyei area to arbitration under the PCA's Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State.⁸¹

The dispute is derivative of the larger conflict pitting the Sudanese Government against the SPLM, which has engulfed southern Sudan for several years. The Arab Misseriya and the Ngok Dinka ethnic groups have long held competing claims for access to the grazing pastures and resources of the Abyei region in Sudan.

On January 9, 2005, the government of Sudan and the SPLM entered into a Comprehensive Peace Agreement (CPA), which included the Protocol on the Resolution of the Abyei Conflict (Abyei Protocol).⁸² Included in the Abyei Protocol was the establishment of the Abyei Boundary Commission (ABC) to define and demarcate the Abyei Area.⁸³ The final report of the ABC was completed in July 2005.⁸⁴ The Government of Sudan rejected it. In particular, it claimed the Commission had exceeded its mandate under the CPA, the Abyei Protocol, or the ABC terms of reference or rules of procedure.

The parties have agreed to submit the issue to a five-member arbitral tribunal (Professor Pierre-Marie Dupuy (President), H.E. Judge Awn Al-Khasawneh, Professor Gerhard Hafner, Professor W. Michael Reisman, and Judge Stephen Schwebel).⁸⁵ The tribunal is mandated to resolve the dispute using applicable provisions of the CPA and the Interim National Constitution of the Republic of Sudan (2005) and any general principles of law and practice the tribunal deems appropriate.⁸⁶

Should the tribunal find that ABC exceeded its mandate, it will demarcate the boundaries of the Abyei Area based on the submissions of the Parties. Should it find the ABC did not exceed its mandate, it will make a declaration to that effect and immediately implement the ABC report.⁸⁷

81. Arbitration Agreement Between the Government of Sudan and the Sudan People's Liberation Movement/ Army on Delimiting Abyei Area, www.pca-cpa.org/upload/files/Abyei%20Arbitration%20Agreement.pdf (last visited Mar. 9, 2009) [hereinafter Arbitration Agreement].

82. The Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, <http://www.unmis.org/english/documents/cpa-en.pdf> (last visited Mar. 9, 2009).

83. See Arbitration Agreement, *supra* note 81.

84. Abyei Boundaries Commission Report Part I, <http://www.sudantribune.com/spip.php?article11633> (last visited Mar. 9, 2009).

85. Permanent Court of Arbitration, The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration), http://www.pca-cpa.org/showpage.asp?pag_id=1306 (last visited Mar. 9, 2009).

86. See Arbitration Agreement, *supra* note 81, art. 3.

87. See *id.* at art. 2.

The tribunal will have six months to render the final award, with three additional months to complete proceedings, if necessary.⁸⁸ Proceedings will take place in The Hague.⁸⁹

b. *TCW Group, Inc. and Dominican Energy Holdings, L.P. v. The Dominican Republic*

In December 2007, the TCW Group Inc. (TCW), a financial services company incorporated in Nevada, United States and the Dominican Energy Holdings L.P. (DEH) initiated arbitration against the Dominican Republic.⁹⁰

In 1999, TCW and DEH had formed a joint venture with AES Distribución Dominicana Ltd., creating the Empresa Distribuidora de Electricidad del Este, S.A. (EDE Este), to distribute electric power throughout the Dominican Republic. Upon creating EDE Este, AES entered into four agreements with the government of the Dominican Republic, in accordance with the regulatory framework. Starting late 2004, the joint venture partners became concerned that certain actions by the government of the Dominican Republic, directly and indirectly through its instrumentalities and related state enterprises, had wrongfully hindered EDE Este and therefore prejudiced their investments. On June 17, 2008, TCW and DEH started arbitral proceedings against the Dominican Republic under the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR).⁹¹

Claimants appointed the late Professor Thomas Wälde. Respondent appointed Professor Juan Fernandez Armesto. Both parties appointed Professor Karl-Heinz Böckstiegel.⁹² Proceedings are to be held in New York City.

Claimants assert that the Dominican Republic violated the substantive provisions of the CAFTA-DR.⁹³ In particular, claimants assert that while, in the 1990s, the Dominican Republic had instituted a modern regulatory framework and an agency to aid in the capitalization of the electricity sector by foreign investors, the regulatory framework (and in particular the method of calculating electricity tariffs) provided for in the Basic Contracts had been subsequently unilaterally altered, causing catastrophic losses to the joint venture, its companies, and electricity consumers in the Dominican Republic.

88. The tribunal must state reasons upon which the award is based and shall communicate it to the parties on the day of its rendering. Parties must make it public that same day. Final award is final and binding. *See id.* art. 9.

89. The Proceedings shall consist of two phases, one for written pleadings and one for oral pleadings. *See id.* arts. 4, 6, 7, 8.

90. Paul, Hastings, Janofsky, & Walker LLP, TCW Group, Inc. v. The Dominican Republic, Notice of Arbitration and Statement of Claim, Pursuant to the Central America—Dominican Republic—United States Free Trade Agreement, *available at* <http://server.nijmedia.nl/pca-cpa.org/upload/files/02%20Notice%20of%20Arbitration%20and%20Statement%20of%20Claim.pdf>.

91. Paul, Hastings, Janofsky, & Walker LLP, TCW Group, Inc. & Dominican Energy Holdings, L.P. v. The Dominican Republic, Amended Notice of Arbitration and Statement of Claim Pursuant to the Central America—Dominican Republic—United States Free Trade Agreement, *available at* <http://server.nijmedia.nl/pca-cpa.org/upload/files/06%20Amended%20NoA%20and%20SoC.PDF> [hereinafter Notice of Arbitration and Statement of Claim].

92. In the Matter of an Arbitration Before a Tribunal Constituted in Accordance with the United States—Dominican Republic—Central America Free Trade Agreement, Final Award in the Matter of an UNCITRAL Arbitration, Procedural Order No. 1 (June 23, 2008), *available at* <http://server.nijmedia.nl/pca-cpa.org/upload/files/10%20PO1.pdf>.

93. Notice of Arbitration and Statement of Claim, *supra* note 91.

c. *Vito G. Gallo v. Government of Canada*

The PCA is also acting as registrar in *Vito G. Gallo v. Government of Canada*.⁹⁴ Gallo is a U.S. citizen and resident of Pennsylvania. He owns and controls a waste management company (1532382 Ontario Inc., or the Enterprise), incorporated under the laws of Ontario, Canada. The Enterprise owns and operates the Adams Mine property, a former open pit iron-ore mine located in northern Ontario.

In 1986, the city of Toronto and its surrounding municipalities determined that existing landfills had limited life-spans. Accordingly, they started exploring alternative locations. The Enterprise's predecessor in title, Norte Development Corporation (Norte), identified the Adams Mine as suitable landfill and purchased it, to this end, from two mining companies. By late 2001, Norte had received all required approvals from several governmental authorities. In May 2002, the Enterprise bought the Adams Mine from Norte. In October 2003, a new government in Ontario reversed the Province's earlier environmental approvals and the general approval previously given by the Progressive Conservative cabinet. On July 17, 2004, the Act to Prevent the Disposal of Waste at the Adams Mine Site was enacted.⁹⁵

On March 29, 2007, Gallo started arbitral proceedings against Canada under Chapter 11 of the North American Free Trade Agreement (NAFTA), claiming specifically \$355 million for an alleged violation of article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation).⁹⁶

Juan Fernández-Armesto (Presiding Arbitrator), Jean-Gabriel Castel OC, QC, and John Christopher Thomas QC are serving as arbitrators.⁹⁷ Proceedings are set to take place in Vancouver, Canada, with the applicable law being the NAFTA and relevant rules of international law. Arbitration is to be conducted under the UNCITRAL rules. The parties agreed to keep proceedings confidential.

d. *Chemtura (Crompton) Corp. v. Government of Canada*⁹⁸

Chemtura (formerly known as Crompton) is a Connecticut-based U.S. corporation that produces pest control products. In Canada it operates through a subsidiary, organized under the laws of Nova Scotia and located in Ontario. It is Canada's biggest manufacturer of products containing one particular pest control chemical, Lindane.

During the 1990s, use of Lindane was permitted in the United States and Canada on a number of crops, but with different exceptions. In particular, use on canola seeds was

94. Arbitration Under Chapter Eleven of the NAFTA and UNCITRAL, Arbitration Rules Between Vito G. Gallo and Government of Canada, Procedural Order No. 1, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrder12008-06-04.pdf>.

95. Under the UNCITRAL Arbitration Rules and Section B of the Chapter 11 of the North American Free Trade Agreement Between Vito G. Gallo v. Government of Canada, Notice of Arbitration, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Gallo2007.pdf> (last visited Mar. 9, 2009).

96. *Id.* ¶ 56.

97. Permanent Court of Arbitration, *Vito G. Gallo v. Government of Canada*, available at http://www.pca-cpa.org/showpage.asp?pag_id=1299.

98. Foreign Affairs and International Trade Canada, Cases Filed Against the Government of Canada, http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/crompton_archive.aspx?lang=en (last visited Mar. 9, 2009).

prohibited in the United States while it was allowed in Canada. In 1998, U.S. authorities warned Canada that it would block imports of crops treated with pesticides (including Lindane) not allowed for use in the United States. To avoid a trade dispute, Canada and the United States entered into an agreement to voluntarily cease the use of Lindane products. As a result, Canada immediately de-registered Lindane's use.

On October 17, 2002, Chemtura initiated arbitral proceedings against Canada under NAFTA Chapter 11, arguing, in essence, that by de-registering the pesticide in the absence of scientific evidence showing that the use of Lindane on canola seeds is harmful for human health or the environment, the Canadian regulatory agency took measures tantamount to expropriation.⁹⁹ Additionally, Chemtura argues that the chemical should have been phased out instead of been abruptly de-registered. Claimant is requesting compensation through reinstatement of all registrations relating to Lindane products and damages and costs for past and future actions of the government of Canada (approximately \$100 million).¹⁰⁰

The Parties agreed to conduct arbitration in Ottawa under the UNCITRAL Arbitration Rules with the substantive law being the NAFTA and relevant principles of international law. Members of the arbitral tribunal are Professor Gabrielle Kaufmann-Kohler (President), The Honorable Charles N. Brower, and Professor James Crawford QC.¹⁰¹ The parties agreed to keep proceedings confidential.

2. *Other Work*

a. Ethiopia-Eritrea Commissions

Eritrea seceded from Ethiopia in 1993. The two states coexisted peacefully until May 1998 when a violent border dispute erupted resulting in the loss of thousands of lives and displacement of thousands of Ethiopian and Eritrean citizens from their homes. The parties entered into a peace agreement on December 12, 2000.¹⁰² Besides putting an end to hostilities, with the aim of creating the conditions for lasting peace, the agreement established two commissions: the Boundary Commission that was responsible for determining a common boundary between the two and the Claims Commission that was responsible for resolving claims of each party against the other arising out of acts of war in violation of international law.

In December 2005, the Claims Commission issued a series of awards regarding claims of Eritrea relating to bombardment by Ethiopia. The most notable of these awards are discussed in the 2006 review, and Decisions 7 and 8 are discussed in the 2007 review.¹⁰³

99. Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Crompton Corporation v. Government of Canada*, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CromptonCorpdoc3.pdf>.

100. *Id.* ¶ 46(i).

101. Permanent Court of Arbitration, *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, http://www.pca-cpa.org/showpage.asp?pag_id=1278 (last visited Mar. 9, 2009).

102. Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Dec. 12, 2000, 40 I.L.M. 260 (2001), available at <http://www.pca-cpa.org/upload/files/E-E%20Agreement.html>.

103. Yulia Andreeva *et al.*, *International Courts Committee*, 42 INT'L LAW. 345, 356-58 (2008).

In May 2008, the Commission held a second round of hearings in the damages phase.¹⁰⁴ Results of the second round of hearings are yet to be disclosed and are not available at the time of this review.

On January 7, 2008, the Boundary Commission reported that there has been no progress towards the construction of boundary pillars as was required by paragraph 22 of the Statement of November 27, 2006.¹⁰⁵ The Commission added that it has completed its mandate and therefore now remains in existence only to deal with administrative matters.¹⁰⁶

b. *Ireland v. United Kingdom* (MOX Plant Case)

On June 6, 2008, Ireland withdrew its claim against the United Kingdom, terminating proceedings. The tribunal decided that costs shall be borne equally by both parties pursuant to article 16(1) of the tribunal's rules of procedure.¹⁰⁷ Additionally, in accordance to article 17 of the tribunal's rules of procedure, it stated that each party shall bear its own costs in presenting its case.¹⁰⁸

III. Iran-U.S. Claims Tribunal

The Iran-United States Claims Tribunal was established in 1981 through the Algiers Declarations¹⁰⁹ as part of the resolution of the Iran Hostage Crisis. The Tribunal hears two categories of claims: private claims, which are claims brought by a national of one country against the other country, and inter-governmental claims, which are claims brought by one country against the other, alleging either a violation of the Algiers Declarations (denominated A cases) or breach of contract (B cases). After twenty-seven years in operation, the Tribunal has decided all of the private claims, dispensing with nearly 4,000 cases and awarding more than \$2.5 billion to the United States and U.S. nationals and approximately \$1 billion to Iran and Iranian nationals. Its docket now consists only of inter-governmental claims.

The focus of Tribunal activity in 2008 was the continuation of deliberations in a large government-to-government case, Case No. B/61. At issue is the question of the extent and nature of the U.S. undertaking in the Accords to permit the transfer to Iran of Iranian property, and, specifically, how that obligation should be interpreted in light of the "subject to the provisions of U.S. law in effect prior to November 14, 1979," clause of para-

104. Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Mar. 9, 2009).

105. U.N. Missions in Ethiopia and Eritrea [UNMEE], *Report of the Secretary-General on Ethiopia and Eritrea*, Annex II ¶ 3, U.N. Doc. S/2008/40 (Jan. 23, 2008).

106. *Id.* ¶ 40.

107. Permanent Court of Arbitration, The MOX Plant Case, *Ireland v. United Kingdom*, Order No. 6 Termination of Proceedings, <http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf> (last visited Mar. 9, 2009).

108. *Id.* ¶¶ 2, 3.

109. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 1 Iran-U.S.C.T.R. 3 [hereinafter General Declaration]; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 1 Iran-U.S.C.T.R. 9 [hereinafter Claims Settlement Declaration].

graph 9 of the General Declaration. The hearing concluded on March 2, 2007, with closing arguments by both sides.

As noted in last year's review, in November 2007 and February 2008 Iran filed two challenges to the President of the Tribunal, the first of which was dismissed by the Appointing Authority in its opinion of April 2, 2008, along with a challenge of one of the Iranian arbitrators that had been filed by the United States. On April 8, 2008, the Appointing Authority summarily dismissed Iran's second challenge against the President. With Iran's second challenge resolved, the Tribunal was prepared to resume deliberations in Case B/61. On June 18, 2008, however, Iranian arbitrator Mr. Oloumi Yazdi submitted a letter of resignation, followed the next day by letters of resignation from the two remaining Iranian arbitrators, Messrs. Ameli and Aghahosseini. Both Mr. Oloumi Yazdi and Mr. Aghahosseini cited the Tribunal's treatment of Case B/61 as a basis for their resignations. In its Communication of June 20, 2008, the Tribunal stated that it would address the resignation at its next meeting, scheduled for October 6, 2008. In that meeting, the Tribunal accepted generally the resignations of the Iranian arbitrators, but with respect to Case B/61, only after an award has been issued in that case. Deliberations in this case continue.

IV. Arbitral Tribunals Constituted under the ICSID Convention

The International Centre for Settlement of Investment Disputes (ICSID), one of the five constituent institutions of the World Bank Group, was established under the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention). The Bank's main consideration in creating ICSID was to facilitate the settlement of investment disputes between governments and foreign investors that, in turn, could help to promote increased flows of international investment.¹¹⁰

Pursuant to the Convention, ICSID provides facilities for the resolution, by conciliation and arbitration, of disputes between its member states and investors from other member States. The Convention requires each ICSID member country, whether or not a party to the dispute at issue, to recognize and enforce the award of an ICSID tribunal.

In addition to proceedings under the Convention, the ICSID Secretariat has authority under a set of Additional Facility Rules to administer other types of proceedings between States and foreign nationals that fall outside the scope of the Convention. These proceedings include: conciliation and arbitration proceedings where either the state party or the home state of the foreign national is not a member of ICSID; cases where the dispute is not an investment dispute provided it is distinguishable from an ordinary commercial transaction; and, fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry to examine and report on facts.

A. INSTITUTIONAL DEVELOPMENTS

Membership of the Centre remained unchanged: 154 signatories, 143 of which have ratified the Convention to become Contracting States or Members.

110. International Centre for Settlement of Investment Disputes, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *available at* <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section01.htm>.

On December 4, 2007, the Secretary-General received the Republic of Ecuador's notification under Article 25(4) of the ICSID Convention. Pursuant to that provision, a Contracting State may notify the Centre at any time of the class or classes of disputes that the State would or would not consider submitting to the jurisdiction of the Centre. Ecuador's notification provided that it:

will not consent to submit to the jurisdiction of [ICSID] the disputes that arise in matters concerning the treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals or others. Any instrument containing the Republic of Ecuador's previously expressed will to submit that class of disputes to the jurisdiction of the Centre, which has not been perfected by the express and explicit consent of the other party given prior to the date of submission of the present notification, is hereby withdrawn by the Republic of Ecuador with immediate effect as of this date.

B. PENDING CASES

During the reporting period, there were 124 cases pending at the Centre, as compared to 119 last year. The Centre registered twenty new cases: three against Argentina involving highway construction projects and debt instruments; one against Canada concerning a petroleum development project; two against Costa Rica concerning a tourism project and an agricultural enterprise; four against Ecuador involving hydrocarbon and oil exploration projects; one each against Jordan, Honduras, Georgia, and Kazakhstan involving projects in waterway construction, highway rehabilitation, gas distribution, and oil exploration, respectively; three against Ukraine concerning maritime activities, hotel development, and petroleum exploration; and, three against Venezuela concerning an oil and gas project, a telecom enterprise, and cement production.

1. *Post-Award Remedies*

The Centre registered a number of applications for post-award remedies. In the past year, ICSID received applications for different and concurrent post-award remedies in the same cases. For instance, in one case, *Siemens v. Argentina*, while the annulment proceeding was pending the Centre also received and registered an application for revision of the same award.

2. *Amendments to Arbitration Rules*

Several of the new provisions in the amended ICSID Arbitration Rules¹¹¹ were invoked in different cases and addressed by tribunals. For instance, Arbitration Rule 41(5), which provides for the summary dismissal of claims deemed to be "manifestly without legal merit," was unsuccessfully invoked in *Transglobal v. Jordan*.¹¹² In that case, the Tribunal interpreted the word "manifest" as requiring the invoking party "to establish its objection

111. The Rules came into effect on April 10, 2006.

112. *Trans-global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, The Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (May 12, 2008).

clearly and obviously, with relative ease and despatch. The standard is thus set high.”¹¹³ Also, the Tribunal interpreted the adjective “legal” as being “clearly used in contradistinction to ‘factual’” but recognized that “it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced.”¹¹⁴

New Arbitration Rule 37, which confirmed the tribunal’s authority to receive *amicus curiae* submissions in appropriate instances, was invoked in several cases. For instance, in August 2008, the European Commission filed applications under that provision in two separate cases, *AES v. Hungary* and *Electrabel v. Hungary*.

3. *Requests for Disqualification*

Since ICSID’s inception in 1966, there have been twenty-nine proposals for disqualification of arbitrators. Of these proposals, ten were filed in the last two years although notably six of them were against the same arbitrator sitting in six separate cases involving the same government. Also encountered were challenges to counsel. In one such case, *Vanessa Ventures v. Venezuela*, the Claimant, sought the disqualification of one of the Respondent’s counsel who practiced in the same set of UK barristers’ chambers as the Tribunal President. Although noting that barristers are sole practitioners whose chambers do not function like law firms, the tribunal concluded that in the specific circumstances of the case the counsel’s further participation in the case would be “inappropriate and improper.”

113. *Id.*

114. *Id.*