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International Commercial Dispute Resolution

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I. Introduction

The first section of this survey examines significant decisions from U.S. courts in 2008 that will be of interest to practitioners in the field of international commercial arbitration. Of particular note, the U.S. Supreme Court issued two significant decisions construing the Federal Arbitration Act (FAA). In *Preston v. Ferrer*, the Court affirmed the supremacy of the FAA over inconsistent state laws. In *Hall Street Associates v. Mattel*, the Court held that parties may not expand through contract the scope of judicial review of arbitral awards set forth in the FAA. *Hall Street* has already divided lower courts regarding the continuing viability of "manifest disregard of the law" as a ground for vacating awards under the FAA. In its decision, the Court considered but did not decide whether "manifest disregard" was a non-statutory ground and thus impermissible, or simply a judicial gloss on the express statutory grounds and thus still viable. In other decisions concerning the enforcement of arbitration clauses, U.S. courts continued to interpret broadly the preemptive reach of the New York Convention.

Similarly, the courts firmly rejected collateral attacks on arbitral awards falling under the Convention. The Fifth Circuit, for example, dismissed one petitioner's creative efforts to repackage its allegations of arbitrator corruption as RICO claims. It held that any attempt to set aside the award had to be made in a court of "primary jurisdiction," i.e., one located in the country designated as the place of arbitration. A district court imposed heavy contempt sanctions on a party that refused to comply with its order confirming a foreign arbitral award, finding that the party had been using the Ukrainian courts in a vexatious and collusive attempt to avoid its obligations. Several district courts also considered when it is appropriate to stay enforcement of awards, either because of pending set aside actions in foreign jurisdictions or because of related arbitration proceedings. Finally, the Second Circuit ruled that section 7 of the FAA does not permit pre-hearing document

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discovery from non-parties, while two district courts joined an emerging consensus that 28 U.S.C. § 1782 does permit discovery in aid of foreign private arbitrations.

The second section of this survey looks at major developments from 2008 in the field of investment treaty arbitration. Significant jurisdictional awards demonstrated continuing debates over issues concerning investor nationality, indirect investment, use of Most Favored Nation clauses, the availability of local remedies, and the timeliness of claims. Among procedural awards from 2008, the first decision was issued regarding the use of ICSID Rule 41(5) to dismiss claims "manifestly without legal merit." There were also several significant decisions regarding the availability of interim measures, including two that considered a State's right to enforce criminal laws and one that considered the right to enforce tax laws. The merits awards saw continued development of fair and equitable treatment obligations, which were once again at the center of numerous arbitrations. Two merits awards also ruled on Argentina's use of the necessity defense to justify actions during its financial crisis, reaching opposite conclusions. The tribunal in *Continental Casualty* was the first to uphold Argentina's necessity defense, a development that Argentina will no doubt seek to extend to numerous pending cases arising out of the financial crisis.

II. Arbitration Developments in U.S. Courts

A. Interpretation and Enforcement of Arbitration Clauses

1. *Preemption of State or Domestic Law*

The U.S. Supreme Court in *Preston v. Ferrer* held that where parties have agreed to arbitrate contractual disputes, the FAA preempts any state law that attempts to lodge primary jurisdiction over the dispute in another forum, whether judicial or administrative.[1] In *Preston*, a California statute regulating talent agent agreements conflicted with the FAA in two respects. First, it granted a state administrative body exclusive jurisdiction to decide an issue that the parties had decided to arbitrate. Second, it imposed preconditions on the enforcement of an arbitration agreement not applicable to contracts generally.[2]

The Court held that where the parties had agreed to arbitrate, the FAA barred the state from placing jurisdiction in a state administrative forum. In doing so, the Court refused to distinguish between administrative and judicial forums, holding that the FAA prohibited states from vesting jurisdiction in any forum other than arbitration.[3] The Court further held that even if the state statute was construed only to postpone arbitration until after initial state administrative review, it nonetheless interfered with the federal interest in streamlined proceedings and expeditious results underlying the FAA.[4] The result in *Preston* represents a natural extension of Supreme Court authority on the issue.[5]

Two other notable decisions reaffirmed the principle that the New York Convention preempts domestic laws that limit the enforceability of arbitration agreements. In *Safety*

1. Preston v. Ferrer, 128 S. Ct. 978, 988 (2008).
2. *See id.* at 980.
3. *See id.* at 987.
4. *See id.* at 986.
5. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Southland Corp. v. Keating, 465 U.S. 1 (1984).

National Casualty Corp. v. Certain Underwriters at Lloyd's, London,[6] the Fifth Circuit held that the New York Convention supersedes the McCarran-Ferguson Act,[7] a federal statute providing that state laws regulating insurance take precedence over federal laws not specifically related to insurance. The court held that the parties' arbitration clause was enforceable under the Convention despite a Louisiana law that would otherwise exclude insurance disputes from arbitration. The decision, which follows a string of recent district court cases holding that the Convention supersedes the McCarran-Ferguson Act,[8] disagreed with a Second Circuit case to the contrary.[9] In *Rogers v. Royal Caribbean Cruise Line,*[10] the Ninth Circuit joined the Fifth and Eleventh Circuits in holding that the New York Convention governed the arbitration clause in a seafarer's employment contract, thus preempting the Seaman's Wage Act.

2. *Contracting for Expanded Judicial Review*

One of the most significant developments in 2008 was the U.S. Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, which held that parties to an arbitration agreement may not contract for broader judicial review of arbitral awards than that provided for in the FAA.[11] The arbitration agreement at issue purported to endow the district court with the right to vacate, modify, or correct any arbitral award where the findings of fact were not supported by substantial evidence or the conclusions of law were erroneous—grounds not available under the FAA. Hall Street made two arguments to the Supreme Court in support of its contention that the court was required to apply these contractually created grounds. First, it argued that if courts could expand statutory review through such judicially created doctrines as "manifest disregard of the law," then parties could do so as well.[12] Second, Hall Street claimed that the grounds set forth in Section 10 of the FAA were merely default rules applicable when the parties have not contracted for a different standard of review. The Court rejected both arguments and confirmed the award, holding that the FAA provides the exclusive grounds for vacatur of an arbitral award. The Court rejected the notion that the existence of the judicially created "manifest disregard" standard permitted private parties to expand judicial review by contract. The Court also found no indication in the language of the FAA that section 10 was meant merely to provide "default" rules.

Perhaps more important than its prohibitions on parties' ability to contract for broader judicial review, *Hall Street* calls into question whether parties may continue to seek vacatur of an award on judicially created grounds not expressly set forth in the FAA, including manifest disregard of the law or complete irrationality.[13]

6. Safety Nat'l Cas. Co. v. Certain Underwriters at Lloyd's, London, 543 F.3d 744 (5th Cir. 2008).

7. 15 U.S.C. § 1011 (2006).

8. *See* Certain Underwriters at Lloyd's, London v. Simon, No. 1:07-cv-0899-LJM-WTL, 2007 WL 3047128 (S.D. Ind. Oct. 18, 2007); Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co., No. 07-CV-1071, 2007 WL 2752366 (W.D. Ark. Sept. 20, 2007); Clow v. Ins. Corp. of B.C., No. 07-403-ST, 2007 WL 2292689 (D. Or. Aug. 6, 2007); Goshawk Dedicated Ltd. v. Portsmouth Settlement Co., 466 F. Supp. 2d 1293 (N.D. Ga. 2006).

9. *See* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1996).

10. Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148 (9th Cir. 2008).

11. Hall Street Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008).

12. *Id.* at 1403.

13. *See* discussion *infra* Section B.1.

3. *Removal to Federal Court*

Several noteworthy cases concerned Section 205 of the FAA, which permits defendants to remove an action to federal court "at any time before trial" where the subject matter of the action "relates to an arbitration agreement or award" falling under the New York Convention.[14] These cases highlight the complex procedural issues that arise in disputes involving multiple parties and contracts. For example, the district court in *NPI, Inc. v. Pagoda Ventures, Ltd.* held that removal under Section 205 requires unanimity among all defendants, following a majority of district courts to rule on the issue.[15] In *Realty Trust Group, Inc. v. Ace American Insurance Co.*, the district court ruled that non-signatories to an arbitration clause could not remove an action to federal court where their claims were not sufficiently intertwined with arbitrable claims and the connection to the arbitration clause was too tenuous.[16] Significantly, the plaintiff had dismissed the two defendants who were signatories to the relevant arbitration clauses after the case was removed in order to defeat federal subject-matter jurisdiction.

Such complexities, however, are not always fatal to removal. The district court in *Huntsman Corp. v. International Risk Insurance*[17] declined to remand an action that had been removed by a third-party defendant pursuant to Section 205 and 28 U.S.C. § 1441(c), which permits removal of an entire action where there are "separate and independent" claims that are within federal-question jurisdiction. The court held that the claims between the defendant and the third-party defendants were separate and independent within the meaning of Section 1441(c) and also that federal question jurisdiction existed because the contracts contained arbitration agreements that fell under the New York Convention.[18]

4. *Appellate Jurisdiction*

Section 16(a)(1) of the FAA permits parties to take an immediate appeal from any district court order denying an application to compel arbitration. Federal circuit courts have split, however, over whether a non-signatory to an arbitration agreement also has an immediate right to appeal under section 16(a)(1). In *Sourcing Unlimited, Inc. v. Asimco International, Inc.*,[19] the First Circuit ruled that non-signatories to arbitration agreements falling under the New York Convention have the right to an immediate appeal, regardless of the appropriate rule applicable to domestic arbitration agreements, as to hold otherwise would contravene the pro-arbitration thrust of the Convention. Whether non-signatories have an immediate right to appeal under section 16(a)(1) was also taken up by the U.S. Supreme Court in *Arthur Anderson LLP v. Carlisle*,[20] to be decided in 2009.

14. 9 U.S.C. § 205 (2007).

15. NPI, Inc. v. Pagoda Ventures, Ltd., No. 08-CV-346-TCK-SAJ, 2008 WL 3387467, at *9 (N.D. Okla. Aug. 8, 2008).

16. Realty Trust Group, Inc. v. Ace Am. Ins. Co., No. 1:07CV73-HSO-JMR, 2007 WL 4365352, at *3-5 (S.D. Miss. Dec. 11, 2007).

17. Huntsman Corp. v. Int'l Risk Ins., No. H-08-1542, 2008 WL 4453170 (S.D. Tex. Sept. 26, 2008).

18. *See id.* at *14-19.

19. Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38 (1st Cir. 2008).

20. *See* Arthur Anderson v. Carlisle, No. 08-146 (U.S. 2008).

5. *Class Actions in Arbitration*

The relationship between class actions and arbitration has been the subject of much litigation in U.S. courts in recent years, but the issue has rarely involved the realm of international arbitration. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[21] the Second Circuit held that an arbitral tribunal did not manifestly disregard the law in construing an arbitration clause in an international maritime agreement as permitting class arbitration when the clause was silent on that issue. The court stated that in the absence of federal maritime law or New York State law establishing a rule of construction prohibiting class arbitration where the arbitration clause is silent on that issue, the tribunal was free to determine that the contract's "silence bespeaks an intent not to preclude class arbitration."[22]

B. Enforcement of Awards

1. *Limitations on Judicial Review*

The U.S. Supreme Court's decision in *Hall Street*[23] calls into question whether courts may vacate awards on traditional grounds not expressly set forth in the FAA, including manifest disregard of the law or complete irrationality. Whether "manifest disregard" will continue to be a viable standard for vacatur likely will depend on whether the standard is deemed an extra-statutory ground for review–which would call its viability into doubt—or whether the standard instead refers collectively to the grounds set forth in section 10 of the FAA or is merely shorthand for, or a gloss on, sections 10(a)(3) or 10(a)(4) of the FAA, which authorize vacatur when the arbitrators are "guilty of misconduct" or "exceeded their powers."[24] Until the Court resolves the issue, the continued availability of "manifest disregard" as a basis for vacatur will remain uncertain.

This issue is important to international practitioners due to the many U.S. arbitral awards that are "not considered as domestic" under the New York Convention and are therefore subject to the grounds for vacatur established under U.S. law.[25] Lower courts are divided on the status of the "manifest disregard" standard after *Hall Street*. The Second Circuit has affirmed the continued viability of "manifest disregard" on the statutory "shorthand" theory, indicating that this standard is a "judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA" and thus "remains a valid ground for vacating arbitration awards."[26] In an unpublished decision, the Sixth Circuit likewise held that "manifest disregard" remains a viable ground.[27] Other cases continue to work their way through the district courts. The "manifest disregard" standard has been

21. Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008).
22. *Id.* at 99.
23. *Hall Street*, 128 S. Ct. at 1396.
24. *Id.* at 1404.
25. *See, e.g.*, Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20-23 (2d Cir. 1997).
26. *Stolt-Nielsen*, *supra* note 21, at 94.
27. Coffee Beanery, Ltd. v. WW, L.L.C., No. 07-1830, 2008 WL 4899478 (6th Cir. Nov. 14, 2008).

upheld by district courts in the Third[28] and Seventh[29] Circuits but has been cast into doubt by district courts in the First,[30] Fifth,[31] Eighth,[32] and Tenth Circuits.[33]

2. *Collateral Attacks on Foreign Awards*

A pair of cases in 2008 rejected collateral attacks on foreign arbitral awards. The Fifth Circuit's ruling in *Gulf Petro Trading Co. v. Nigerian National Petroleum Corp.*[34] demonstrated that challenges to awards based upon arbitrator malfeasance may only be pursued in the country where the award was made. *Gulf Petro* concluded a lengthy dispute in which the petitioner accused prominent arbitrators of bribery, fraud, and corruption in connection with a Swiss arbitration. Gulf Petro had unsuccessfully challenged the panel's final award in Swiss federal court but several years later brought suit in U.S. district court, claiming to have discovered evidence of arbitrator misconduct. Gulf Petro's complaint included RICO and Texas state law claims and requested that the court vacate the arbitral tribunal's final award under the FAA.

The court drew a clear distinction between review of awards rendered in a "primary," as opposed to "secondary," jurisdiction.[35] Primary jurisdiction vests in the courts at the seat of the arbitration and allows such courts to set aside or modify an award on the grounds available under domestic arbitration law, as well as those set forth in Article V of the New York Convention. Courts in other jurisdictions are limited to reviewing whether the award should be recognized and enforced pursuant to Article V of the Convention. In addition, a court of secondary jurisdiction can only adjudicate challenges that are raised defensively when enforcement of an award is sought. Consequently, "a United States court sitting in secondary jurisdiction lacks subject matter jurisdiction over claims seeking to vacate, set aside, or modify a foreign arbitral award."[36] Thus, Gulf Petro could only affirmatively move to have the award vacated in Switzerland.

28. *See* Southco, Inc. v. Reell Precision Mfg. Corp., 556 F. Supp. 2d 505, 510 (E.D. Pa. 2008).

29. *See* Joseph Stevens & Co. v. Cikanek, No. 08 C 706, 2008 WL 2705445, at *4 (N.D. Ill. July 9, 2008).

30. *Compare* E. Seaboard Concrete Constr. Co. v. Gray Constr. Inc., No. CIV. 08-37-P-S, 2008 WL 1803781, at *4 (D. Me. Apr. 18, 2008) (manifest disregard "is really a shorthand reference to the statutory grounds for vacatur listed in sections 10(a)(3) and 10(a)(4) of the FAA"), *with* ALS & Assocs., Inc. v. AGM Marine Constructors, Inc., 557 F. Supp. 2d 180, 181 (D. Mass. 2008) (questioning whether "manifest disregard" remains valid ground for vacatur). *See also* Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 (1st Cir. 2008) (stating in dicta that "manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award").

31. *Compare* Acuna v. Aerofreeze Inc., No. 2:06-CV-432 (TJW), 2008 WL 4755749, at *2 (E.D. Tex. Oct. 29, 2008) (noting that the Fifth Circuit had not yet decided the point) *and* Millmaker v. Bruso, No. H-07-3837, 2008 WL 4560624, at *6-7 (S.D. Tex. Oct. 9, 2008) (same), *with* Householder Group v. Caughran, No. 4:07-CV-316, 2008 WL 4254586, at *3 (E.D. Tex. Sept. 17, 2008) (rejecting "manifest disregard" standard). *See also* Rogers v. KBR Tech. Servs., No. 08-20036, 2008 WL 2337184, at *3 (5th Cir. June 9, 2008) (noting that Hall Street called into doubt the viability of the "manifest disregard" standard).

32. *See* Prime Therapeutics, L.L.C. v. Omnicare, Inc., 555 F. Supp. 2d 993, 999 (D. Minn. 2008).

33. DMA Int'l., Inc. v. Qwest Communications Int'l., No. 08-CV-00358-WDM-BNB, 2008 WL 4216261, at *4 (D. Colo. Sept. 12, 2008) (noting that no court in the Tenth Circuit had addressed the impact of Hall Street).

34. Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 512 F.3d 742 (5th Cir. 2008).

35. *Id.* at 746-47.

36. *Id.* at 747.

The Fifth Circuit also held that the RICO and state law claims constituted an impermissible collateral attack on the award. Although the claims regarding arbitrator misconduct were new, Gulf Petro did "seek to relitigate certain issues" since the requested damages were "the award it believes it should have received in the arbitration."[37] The court then found that "the ultimate significance of the conduct [Gulf Petro] complains of can only be found in the effect that it had on the Final Award."[38] Thus, because Gulf Petro had not alleged that the arbitrators' purported wrongdoing caused any harm independent of the award itself, the U.S. court was without jurisdiction to hear the claims.

In *Steel Corp. of the Philippines v. International Steel Services., Inc.*,[39] the district court denied the respondent's request that an arbitral award rendered in Singapore be denied enforcement pursuant to Article V(1)(e) of the New York Convention, which permits courts to deny enforcement of an award that "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."[40] The respondent claimed that the award had been set aside by a Philippines appellate court. The court rejected that argument, finding that the Philippines was not the "country in which, or under the law of which, [the] award was made."[41] Notwithstanding that the relevant contract was governed by Philippine law, the court stated that "Singapore, as the country in which the award was made and whose procedural law applied to the arbitration, is the only country with primary jurisdiction to set aside or vacate the award."[42]

3. *Preclusion of Further Review of Awards*

U.S. courts in the past year have strictly precluded parties from seeking to vacate arbitral awards more than once, even where the issues raised in the subsequent challenge appear to be distinct. In *Tembec Inc. v. United States*,[43] the district court granted a motion to dismiss Tembec's petition to vacate an arbitral award issued by a NAFTA tribunal. Tembec had previously filed a petition with the district court in 2005 challenging the selection of the NAFTA tribunal, the tribunal's jurisdiction, and its authority to award fees and costs and to consolidate various claims. That earlier petition was dismissed pursuant to stipulation by the parties, although Tembec unsuccessfully sought to set aside the stipulation of dismissal pursuant to Rule 60(b), arguing that it had been misled by the United States. Noting that Tembec's second petition raised some of the same arguments raised in that earlier Rule 60(b) motion, the district court concluded that Tembec was seeking "the proverbial second bite of the apple"[44] and held that the second petition was barred by res judicata and collateral estoppel. The court considered it irrelevant that the second petition also raised certain distinct grounds, as Tembec's second petition was "based on the very same nucleus of facts" underlying the prior action.[45]

37. *Id.* at 750.
38. *Id.*
39. Steel Corp. of Phil. v. Int'l Steel Servs., Inc., No. 06-386, 2008 WL 342036 (W.D. Pa. Feb. 6, 2008).
40. *Id.* at *4.
41. *Id.*
42. *Id.*
43. Tembec Inc. v. United States, 570 F. Supp. 2d 137 (D.D.C. 2008).
44. *Id.* at 138.
45. *Id.* at 141.

4. *Stays of Enforcement*

Three notable awards in 2008 addressed when it is appropriate for courts to stay the enforcement of an arbitral award, whether because of set aside proceedings in another jurisdiction or related arbitral proceedings that might have an impact on the award.

Article VI of the New York Convention expressly authorizes courts to "adjourn" the decision on the enforcement of a foreign award where "an application for the setting aside or suspension of the award" has been made to a court in the primary jurisdiction.[46] U.S. courts regularly grant such adjournments in appropriate circumstances.[47] Applying Article VI in *CPConstruction Pioneers Baugesellschaft Anstalt v. Ghana*,[48] the district court agreed to stay the petitioner's application to confirm two awards against Ghana, as applications to set aside the awards were pending before the Ghana High Court. Noting that "there are circumstances under which the [U.S.] court might choose to enforce the Awards even in the face of a Ghana decision to set them aside," the court stated the petitioner could raise such arguments if and when the Ghanaian court set aside the awards.[49]

In contrast to the express authority granted in Article VI, courts have sometimes recognized an "inherent authority" to stay enforcement of an award when related arbitral proceedings are still pending.[50] This issue was raised in two decisions in 2008. In *Interdigital Communications Corp. v. Samsung Electronics Co.*,[51] the respondent argued that enforcement of an award should be stayed pending the conclusion of a related arbitration between the same parties, as the pending arbitration would "supersede" and "render moot" the award from the first arbitration. While suggesting that it had the inherent authority to grant a stay in such circumstances, the court ultimately denied the request. The court noted that such a stay "should not be lightly granted lest it encourage abusive tactics by the party that lost in arbitration."[52] The court also determined that the strong policy goal of expeditiously resolving disputes would be seriously undermined by granting the request, given the likelihood that the later-filed arbitration would be drawn out. The court further noted that the latest arbitration was only in its most preliminary stages and had been filed by Samsung after the earlier arbitration had concluded, which led the court to suspect that Samsung had initiated the arbitration as a means of prolonging resolution of the previous dispute.[53]

In *Wartsila Finland OY v. Duke Capital LLC*,[54] the Fifth Circuit similarly refused to stay enforcement of an arbitral award despite a pending related arbitration. Like the *Samsung* court, the Fifth Circuit indicated that it might have "inherent power" to stay enforcement

46. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. VI, June 10, 1958, 21 U.S.T. 2571, 330 U.N.T.S. 3.

47. *See, e.g.*, Steven L. Smith, *Enforcement of International Arbitration Awards Under the New York Convention*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION § 8.05[5] (Rufus von Thulen Rhoades et. al. eds., 2d ed. 2007).

48. CPConstruction Pioneers Baugesellschaft Anstalt v. Ghana, 578 F. Supp. 2d. 50 (D.D.C. 2008).

49. *Id.* at 55 n.3 (citing *In re* Chromalloy Aeroservices, 939 F. Supp. 907 (D.D.C. 1996)).

50. *See, e.g.*, Hewlett-Packard Co. v. Berg, 61 F.3d 101, 106 (1st Cir. 1995) (incidental to its inherent power to control disposition of cases on its docket, a court may stay enforcement proceedings under the New York Convention).

51. Interdigital Commc'ns Corp. v. Samsung Elecs. Co., 528 F. Supp. 2d 340 (S.D.N.Y. 2007).

52. *Id.* at 360 (internal citation and quotations omitted).

53. *See id.* at 360-61.

54. Wartsila Finland OY v. Duke Capital L.L.C., 518 F.3d 287 (5th Cir. 2008).

in such situations but found that prudential concerns were not present, as there was no evidence that the respondent would have trouble collecting on an eventual favorable award.[55]

5. *Contempt Sanctions*

In *Telenor Mobile Communications AS v. Storm LLC*,[56] a U.S. district court imposed heavy contempt sanctions against the respondent and its alter ego parent corporations for failing to comply with a court order confirming an award in favor of the petitioner. The court's ruling sent a strong message that efforts to thwart orders enforcing arbitral awards by engaging in "collusive" litigation abroad will not be tolerated.

Throughout the arbitration, the respondent unsuccessfully argued that various Ukrainian court decisions precluded any award against it. In explaining its failure to comply with the confirmed award, the respondent contended that subsequent orders by the Ukrainian court "prohibited" it from complying. The district court rejected this contention, stating that the Ukrainian litigation had been "often vexatious and collusive—in an attempt to prevent the arbitration from occurring and, after it occurred, from being enforced."[57] The court went on to find that the respondent and its parent corporations had an "extensive and brazen history" of "using the Ukrainian courts to avoid compliance with their legal obligations."[58] Even absent the evidence of collusion in the Ukrainian litigation, the court found that the respondent had to "accept the consequences" of its decision to resolve disputes via arbitration in New York, "knowing that this might present conflicts with the laws and courts in Ukraine."[59] The district court imposed fines of $100,000 per day, doubling every thirty days, until the respondent complied with the award.[60]

C. Availability of Discovery in Aid of Arbitration

1. *Discovery 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."[61] Although two circuit court decisions had previously held that this statute did not apply to foreign private arbitrations,[62] those decisions were cast into doubt by the U.S. Supreme Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*[63] In 2006 and 2007, three U.S. district court decisions held

55. *Id.* at 295.
56. Telenor Mobile Commc'ns AS v. Storm L.L.C., 587 F. Supp. 2d. 594 (S.D.N.Y. 2008).
57. *Id.* at 598.
58. *Id.* at 612.
59. *Id.* at 617.
60. *Id.* at 621.
61. 28 U.S.C. § 1782 (1996). Rule 12.
62. *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999); Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).
63. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

that parties may use Section 1782 to obtain evidence in aid of a foreign private arbitration.[64]

Two district court decisions in 2008 added to this emerging consensus. The first case, *In re Babcock Borsig AG*,[65] held that a private ICC tribunal was properly classified as a "foreign or international tribunal" within the meaning of Section 1782.[66] In an exercise of discretion, however, the court declined to compel discovery because the petitioner had not yet taken any formal steps toward initiating arbitration and because there was no "authoritative proof" that the ICC tribunal would be receptive to the requested discovery materials.[67] The district court in *Comision Ejecutiva v. Nejapa Power Co.*[68] likewise agreed that Section 1782 could apply to private foreign arbitrations, and the court accordingly granted the petitioner's application for discovery pursuant to the statute.

This view, however, did not go unchallenged in 2008. The district court for the Southern District of Texas concluded in *Comision Ejecutiva v. El Paso Corp.*[69] that *Intel* never explicitly overruled the prior Fifth Circuit decision in *Biedermann* precluding the application of Section 1782 to private foreign arbitrations. Firmly rejecting the reasoning of the other district court decisions, the court stated that the Supreme Court's *Intel* decision "shed no light on the issue" and did not address 'the application of § 1782 to arbitral tribunals, not even indicta."[70] The court accordingly denied the petitioner's application for discovery in aid of a Swiss UNCITRAL arbitration. This decision signals the likelihood of further disagreement among the courts on the proper scope of section 1782.

2. *Discovery Under 9 U.S.C. § 7*

Section 7 of the FAA authorizes arbitrators to "summon in writing any person to attend before them" and to bring "any book, record, document, or paper which may be deemed material as evidence in the case."[71] The courts have divided, however, over whether this statute permits arbitrators to compel pre-hearing document discovery from non-parties to the arbitration.[72] The Second Circuit weighed in on the issue in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,[73] holding that section 7 does not allow arbitrators to order pre-hearing production of documents by non-parties. Relying on the plain statutory language, the court held that documents in the possession of non-parties "are only

64. *See In re* Hallmark Capital Corp., 534 F. Supp. 2d 951 (D. Minn. 2007); *In re* Oxus Gold PLC, No. 06-82-GEB, 2007 WL 1037387 (D.N.J. Apr. 2, 2007); *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

65. *In re* Babcock Borsig AG, 583 F. Supp 2d. 233 (D. Mass. 2008).

66. *Id.* at 238 (quoting and citing *Intel Corp.*, 542 U.S. at 255, 258).

67. *Id.* at 242.

68. Comision Ejecutiva v. Nejapa Power Co., No. 08-135-GMS, 2008 WL 4809035 (D. Del. Oct. 14, 2008).

69. La Comisión Ejecutiva Hidroeléctrica del Río Lempa v. El Paso Corp., MISC No. H-08-335, 2008 WL 5070119 (S.D. Tex. Nov. 20, 2008).

70. *Id.* at *4.

71. 9 U.S.C. § 7.

72. *See, e.g.*, Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004) (denying pre-hearing document discovery); Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc., 228 F.3d 865 (8th Cir. 2000) (allowing pre-hearing document discovery); Comsat Corp. v. Nat'l Science Found., 190 F.3d 269 (4th Cir. 1999) (allowing pre-hearing document discovery only upon "a showing of special need or hardship").

73. Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008).

discoverable when brought before arbitrators by a testifying witness."[74] The court noted that this interpretation was consistent with the Federal Rules of Civil Procedure at the time the statute was enacted, which did not allow federal courts to issue pre-hearing document subpoenas on non-parties. While acknowledging that its decision might reduce the efficiency of arbitral proceedings, the court emphasized that arbitrators still possessed "a variety of tools to compel discovery from non-parties."[75]

III. Investor-State Disputes

A. Jurisdiction and Admissibility

1. *Investor Standing*

Whether a claimant qualifies as an investor under the ICSID Convention or the relevant investment treaty was again an important threshold issue in several cases in 2008. In *Micula v. Romania*,[76] two claimants, both of whom had renounced their Romanian nationality in favor of Swedish citizenship, alleged that Romania violated its bilateral investment treaty (BIT) with Sweden by prematurely terminating certain investment subsidies. Romania argued that the tribunal lacked jurisdiction because the two individuals failed both the "positive" and "negative" nationality requirements imposed by Article 25(2) of the ICSID Convention.[77] Romania asked the tribunal to adopt an "effective nationality" test by examining an investor's links to a country instead of looking at the country of formal citizenship. The tribunal declined to do so, noting that effective nationality was "disputable in public international law" and did not apply to the ICSID regime.[78]

In *The Rompetrol Group N.V. v. Romania*,[79] the tribunal addressed a central and recurring question—whether the ICSID Convention and investment treaties govern claims asserted by corporations controlled by citizens of the host state. Although The Rompetrol Group was incorporated in the Netherlands, a Romanian national held an eighty percent stake in the company.[80] Romania contended that the tribunal lacked jurisdiction under Article 25(2) because the dispute was, in reality, between a Romanian national and Romanian authorities.[81] The tribunal rejected the argument that international law required it to

74. *Id.* at 216.

75. *Id.* at 218.

76. Decision on Jurisdiction and Admissibility, Micula v. Romania, ICSID (W. Bank) Case No. ARB/05/20 (Sept. 24, 2008).

77. *Id.* ¶ 49. Article 25(2) of the Washington Convention governs ICSID's nationality requirements. The principle of positive nationality requires that the claimant be a national 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 principle of negative nationality requires that the claimant not also be a national of the respondent contracting State on those dates. *See also*, *id.* ¶ 83.

78. *Id.* at ¶¶ 99-100 (citing Decision on Jurisdiction, Siag & Vecchi v. Egypt, ICSID (W. Bank) Case No. ARB/05/15 (May 28, 2007)). In addition, the tribunal held that Romania failed to meet its burden of establishing that the claimants had obtained Swedish citizenship through fraud, error or in a manner inconsistent with international law. *Id.* ¶ 91.

79. Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, Rompetrol Group N.V. v. Romania, ICSID (W. Bank) Case No. ARB/06/3 (Apr. 18, 2008).

80. *See id.* ¶ 43.

81. *See id.* ¶ 50.

disregard the corporate form in favor of the nationality of the company's shareholders.[82] Rather, it concluded that the ICSID Convention allows contracting States to define nationality in investment treaties and that the Netherlands-Romania BIT did not bar the company's claim[83]

At issue in *Rumeli Telekom A.S. v. Kazakhstan*[84] was whether the claimants could bring an ICSID arbitration after being taken over by the Turkish Savings Deposit Insurance Fund (TSDIF), a state agency. Kazakhstan contended that the seizure by the TSDIF deprived the tribunal of jurisdiction under Article 25(2) because Turkey was the real party in interest.[85] The tribunal disagreed. Although the TSDIF now managed the claimants, the tribunal concluded that Turkey did not actually own the companies. Despite state management, the two firms enjoyed a separate corporate existence under Turkish law, which preserved their claims against Kazakhstan.[86]

2. *Qualifying Investments*

a. Indirect Investments

In *Noble Energy, Inc. v. Ecuador*,[87] Ecuador argued that Noble Energy could not bring a claim under the ICSID Convention or the U.S.-Ecuador BIT in its capacity as an indirect shareholder of a local energy company. Although Noble Energy controlled 100% of the shares of the local company through two intermediate companies, Ecuador maintained that the indirect interest did not satisfy the definition of "investor" within the meaning of the BIT. The tribunal recognized that "there should be a cut-off point in the string of companies to be taken into account" but declined to identify the cut-off point and instead found that the connection in this case was not too remote to establish jurisdiction.[88]

In contrast to *Noble Energy*, the tribunal in *Berschader v. Russian Federation*[89] held that shareholders of a Belgian construction firm had not made investments within the meaning of the Belgium-Soviet BIT. Although the corporation itself could seek arbitration for impairments to investments arising out of a construction contract with the Russian Federation, ownership of shares in the company did not qualify as an investment.[90] The tribunal reasoned that, absent clear language in the BIT, permitting the corporation to bring a claim was sufficient to protect the shareholders' interests. Professor Todd Weiler filed a dissenting opinion. He acknowledged that the question was close but maintained that the

82. *See id.* ¶ 92.
83. *See id.* ¶ 109.
84. Award, Rumeli Telekom A.S. v. Kazakhstan, ICSID (W. Bank) Case No ARB/05/16 (July 29, 2008).
85. *See id.* ¶ 241. Under Article 25(1), the ICSID Convention applies only to disputes between a "Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State . . . ." *See id.* ¶ 312.
86. *See id.* ¶¶ 325-27. The tribunal also rejected Kazakhstan's arguments that it lacked jurisdiction because the claimants' investments were fraudulent. It concluded that the record lacked "conclusive evidence" to support the allegation. *Id.* ¶ 323.
87. Decision on Jurisdiction, Noble Energy, Inc. v. Ecuador, ICSID (W. Bank) Case No. ARB/05/12, (Mar. 5, 2008).
88. *Id.* ¶¶ 81-82.
89. Award, Berschader v. Russian Federation, SCC Case No. 080/2004 (Apr. 21, 2006). Although issued in 2006, the *Berschader* award became public in 2008.
90. *See id.* ¶¶ 115-23.

majority placed "form over substance" in barring claims by the shareholders for mistreatment to the corporation.[91]

In a third "indirect investor" proceeding, *Société Générale v. Dominican Republic*,[92] the Dominican Republic argued that the claimant's status as an indirect investor in a local joint venture precluded jurisdiction under the France-Dominican Republic BIT. It contended that Société Générale's interest did not qualify as an investment because its status as an indirect investor in the joint venture was too attenuated, and its holdings did not contribute to economic development as required by the preamble to the BIT. In rejecting the argument, the tribunal stated that the general pronouncements found in the preamble could not alter the meaning of "investment" as specifically defined elsewhere in the treaty.[93] Further, the tribunal concluded that the complex corporate structure at issue did not affect Société Générale's ability to pursue its claim because the BIT allowed for "great flexibility" in structuring investments.[94]

b. Challenges to the Existence of an Investment

The tribunal in *Helnan Int'l Hotels v. Egypt*[95] analyzed whether a prior contractual arbitration could deprive it of jurisdiction in a subsequent treaty arbitration. Helnan sought redress for what it alleged was unreasonable and discriminatory treatment under the Egypt-Denmark BIT. Egypt argued that the prior arbitration had definitively resolved all claims relating to the parties' contractual obligations and that, following the termination of the contract, Helnan no longer had a legal interest or "investment" under the BIT. In addressing the distinction between the contractual claim and the BIT claim, the tribunal stated that even "in the absence of a valid contract, it is possible that a certain kind of conduct of the host state is inconsistent with its obligations under a BIT."[96] The tribunal rejected as irrelevant the argument that Helnan's investment had ceased to exist by the time it filed its request for arbitration.[97] Here, the existence of the investment itself had never been contested, and the essence of Helnan's claim was that Egypt's treaty violations had caused the investment to cease to exist.

In *Duke Energy Electroquil Partners v. Ecuador*,[98] the tribunal addressed claims rooted in two power purchase agreements between an Ecuadorian state-owned entity and a local energy contractor, Electroquil. After Duke Energy acquired a controlling interest in Electroquil, it entered into an arbitration agreement with Ecuador to submit certain claims to an ICSID tribunal.[99] The tribunal asserted jurisdiction under both the U.S.-Ecuador BIT and the arbitration agreement. For those claims arising under the arbitration agreement, the tribunal treated the relevant time of nationality as the time of the

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91. *Id.* ¶ 14 (Weiler, T. dissenting).

92. Award on Preliminary Objections to Jurisdiction, Société Générale v. Dominican Republic, LCIA Case No. UN 7927 (Sept. 19, 2008).

93. *See id.* ¶¶ 32-33.

94. *See id.* ¶¶ 48, 51.

95. Award, Helnan Int'l Hotels v. Egypt, ICSID (W. Bank) Case No. ARB/05/19 (June 7, 2008).

96. *Id.* ¶ 103.

97. *Id.* ¶ 120.

98. Award, Duke Energy Electroquil Partners v. Ecuador, ICSID (W. Bank) Case No. ARB/04/19 (Aug. 18, 2008).

99. *See id.* ¶ 62.

agreement itself.[100] For the two claims arising solely under the BIT, the tribunal found that one claim met the ICSID nationality requirements, and one claim did not, in part because it arose from the original power purchase agreements entered into by the then-domestic contractor.[101]

The scope of NAFTA's protection of investments made entirely in a national's home state was again an issue in 2008, as it was in *Bayview Irrigation District v. Mexico* in 2007.[102] In *Canadian Cattlemen for Fair Trade v. United States*, the claimants challenged under NAFTA chapter eleven a ban on the import of Canadian cattle imposed by the United States after a case of bovine spongiform encephalopathy was discovered in Alberta.[103] The United States contended that the tribunal lacked jurisdiction because the cattlemen were not "investors of another party," as the relevant investments were in Canada, not the United States. The cattlemen countered that NAFTA was broader than other investment treaties, requiring non-discriminatory treatment regardless of nationality.[104] The tribunal disagreed with the claimants' reading of chapter eleven. Consistent with the decision in *Bayview*, the tribunal held that Article 1101's reference to "investors of another party" limited jurisdiction to disputes arising from investments made in the territory of another contracting state.[105]

3. *Most Favored Nation Clauses*

The use of Most Favored Nation (MFN) clauses to import dispute resolution provisions from other investment treaties has generated controversy in recent years.[106] Two awards published in 2008 highlight the divergence of authority in this area. The first, *RosInvest Co. U.K. v. Russian Federation*,[107] is one of several arbitrations arising out of the seizure of oil and gas giant Yukos by the Russian Federation. RosInvest is a U.K. corporation that owned seven million shares of Yukos prior to the alleged expropriation. The tribunal determined that the U.K.-Soviet BIT conferred jurisdiction over claims "concerning the amount or payment of compensation"[108] following an expropriation but not over disputes concerning "whether an expropriation occurred and was legal."[109] But the tribunal went on to consider whether the BIT could confer jurisdiction over liability determinations through the MFN clause, which prohibited "treatment less favourable than that which it [the Contracting State] accords to investments or returns of investors of any third

100. *See id.* ¶ 147.
101. *See id.* ¶¶ 163-70, 183.
102. Award, Bayview Irrigation Dist. v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/05/1 (June 19, 2007).
103. Canadian Cattlemen for Fair Trade v. United States, NAFTA/UNICITRAL, Award on Jurisdiction, (Jan. 28, 2008).
104. *See id.* ¶ 39.
105. *See id.* ¶ 127.
106. *Compare, e.g.*, Decision of the Tribunal on Objections to Jurisdiction, Maffezini v. Spain, ICSID (W. Bank) Case No. ARB/97/7 (Jan. 25, 2000) (noting claimant could rely on MFN clause in Argentina-Spain BIT to trigger dispute resolution clause of Chile-Spain BIT) *with* Decision on Jurisdiction, Plama Consortium Ltd. v. Bulgaria, Case No. ARB/03/24 (Feb. 8, 2005) (stating MFN did not apply to arbitrations absent clear statement in the BIT).
107. Award on Jurisdiction, RosInvest Co. U.K. v. Russian Federation, SCC Case No. V079/2005 (Oct. 5, 2007).
108. *Id.* ¶ 110.
109. *Id.* ¶ 114.

State."[110] The tribunal held that the MFN clause extended to procedural guarantees such as access to arbitration, and that RosInvest could therefore rely on the more expansive dispute resolution provisions of the Denmark-Russia BIT to confer jurisdiction over its expropriation claims.[111]

The tribunal in *Berschader* reached a different result in its application of the MFN clause contained in the Belgium-Russia BIT.[112] After analyzing previous decisions construing MFN provisions,[113] the tribunal ultimately sided with those decisions holding that MFN clauses were intended to cover "material benefits afforded by the BIT" and not dispute resolution clauses unless "the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties."[114] In a dissenting opinion, Professor Weiler wrote that "MFN clauses apply to all aspects of the regulatory environment governed by an investment protection treaty, including availability of all means of dispute settlement."[115]

4. *Impact of Local Remedies*

In the latest chapter of a long-running dispute between Ecuador and Occidental Petroleum, an ICSID tribunal held that it had jurisdiction over Occidental's claims that Ecuador breached an oil exploration and development contract.[116] The tribunal rejected Ecuador's twin arguments that (i) the contract carved out the dispute from ICSID arbitration, and (ii) the dispute could only be heard in the Ecuadorian administrative courts.[117] The tribunal concluded that the relevant carve-out provision did not establish the unambiguous waiver of ICSID jurisdiction. "More fundamentally," the tribunal wrote, Ecuador could not "invoke its domestic law for the purpose of avoiding ICSID jurisdiction" under the U.S.-Ecuador BIT.[118]

The close of 2008 saw the first investment arbitrations brought under the Central American Free Trade Agreement (CAFTA). In *Railroad Development Corp. v. Guatemala*,[119] Guatemala argued that the tribunal lacked jurisdiction under CAFTA Article 10.18 because the claimant, through its subsidiary, had initiated two local arbitrations concerning the same facts. Article 10.18 precludes arbitration of a claim unless accompanied by a waiver of any right to maintain an action in a local court or tribunal regarding the same issues.[120] Guatemala contended that this provision required the subsidiary to desist from all local proceedings before the claimant could bring a CAFTA claim. The tribunal held that the waiver requirement applied to "the specific claim and not the whole

110. *Id.* ¶ 126.
111. *See id.* ¶¶ 133-36.
112. *Berschader*, SSC Case No. 080/2004, ¶ 185.
113. *See id.* ¶¶ 162-67.
114. *Id.* ¶¶ 179, 206.
115. *Id.* ¶ 20 (Weiler, T. dissenting).
116. Decision on Jurisdiction, Occidental Petroleum Corp. v. Ecuador, ICSID (W. Bank) Case No. ARB/06/11 (Sept. 9, 2008).
117. *See id.* ¶ 24.
118. *Id.* ¶¶ 86-89. The tribunal also held that Occidental Petroleum had complied with the six-month waiting period required by the U.S.-Ecuador BIT before filing its request for arbitration. *See id.* ¶ 93.
119. Decision on Objection to Jurisdiction, Railroad Dev. Corp. v. Guatemala, ICSID (W. Bank) Case No. ARB/07/23 (Nov. 17, 2008).
120. *See id.* ¶ 18.

arbitration in which that claim is maintained."[121] Accordingly, the claims relating to the investment dispute, as distinguished from the subsidiary's breach of contract claims, could move to the merits stage.

5. *Timeliness*

The timeliness of treaty claims was again an issue in several arbitrations in 2008. In a split decision, an ICSID tribunal held that it lacked jurisdiction over claims brought by a U.S. investor in the Democratic Republic of the Congo because the dispute arose prior to the claimant's purchase of the investments.[122] The dissent argued that, in actuality, the core dispute arose after the date the U.S. investor took control.[123] In contrast, the tribunal in *Société Générale* accepted the claimant's argument that the dispute involved continuing and composite acts. Although the tribunal recognized that treaties generally do not apply retroactively, it held that it had jurisdiction to consider acts that arose before the BIT entered into force to the extent that those acts had a continuing effect.[124] It could not, however, maintain jurisdiction over acts that took place before *Société Générale* acquired its interest in the investment.[125]

B. Procedure

1. *ICSID Arbitration Rule 41(5)*

Rule 41(5) of the ICSID Arbitration Rules permits a party to object to any claim "no later than 30 days after the constitution of the Tribunal" on the basis that the claim is "manifestly without legal merit."[126] The tribunal in *Trans-Global Petroleum Inc. v. Jordan*[127] was the first to accept an objection under this rule since the rule's introduction in April 2006. Trans-Global asserted three claims against Jordan under the U.S.-Jordan BIT: (1) failure to provide fair and equitable treatment; (2) impairment of investment through unreasonable and discriminatory measures; and (3) failure to consult. The failure to consult claim alleged a breach of Article VIII of the BIT, which requires parties "to consult promptly" to resolve any disputes in connection with the treaty. Jordan objected that all of Trans-Global's claims were "manifestly without legal merit" and should be dismissed pursuant to Rule 41(5).[128]

In determining whether to uphold Jordan's objections, the tribunal examined Rule 41(5) in light of its legislative history, other ICSID Rules, and the ICSID procedural schedule,[129] but declined to consider different arbitral or national procedural rules that

121. *Id.* ¶ 75.
122. Decision on Jurisdiction and Admissibility, African Holding Co. of America, Inc v. Democratic Republic of the Congo, ICSID (W. Bank) Case No. ARB/05/21 (July 23, 2008).
123. *Id.* at 10.
124. *Société Générale*, LCIA Case No. UN 7927, ¶¶ 94, 101.
125. *Id.* ¶ 107.
126. International Centre for Settlement of Investment Disputes (ICISD) Arbitration Rule 41(5).
127. Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, Trans-Global Petroleum Inc. v. Jordan, ICSID (W. Bank) Case No. ARB/07/25 (May 12, 2008).
128. *Id.* ¶ 19.
129. *See id.* ¶¶ 77-92.

have objectives similar to those implicit in Rule 41(5).[130] The tribunal found that Rule41(5) required it to examine "the *legal* merits" of each claim and uphold an objection only in "clear" and "obvious" cases in which the claim is "patently unmeritorious."[131] It also found that although a tribunal should not weigh the credibility of a disputed factual allegation when considering the legal merits, it "need not accept at face value any factual allegation which [it] regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith."[132] Applying these principles, the tribunal accepted Jordan's objection to Trans-Global's claim concerning failure to consult. The tribunal held that Jordan has an obligation under Article VIII of the BIT "to consult with the USA as its Contracting Party" but "owes no similar obligation" to Trans-Global.[133] Since Trans-Global had "no legal rights under Article VIII" and "the essential legal basis for [its] claim is entirely missing," the tribunal found the claim "manifestly without legal merit" within the meaning of Rule 41(5).[134]

2. *Provisional Measures*

Two significant decisions on interim measures in 2008 concerned a contracting State's right to enforce its criminal laws. In *Libananco Holdings Co. v. Turkey*,[135] Libananco alleged that a Turkish court had ordered the interception of private email correspondence with its counsel and that Turkey had access to approximately 2,000 communications concerning the preparation and development of its case.[136] Libananco sought to exclude Turkey from the "current phase of the arbitral process" and requested that the tribunal make a decision on jurisdiction and the merits without receiving any further evidence from either party.[137]

Turkey acknowledged the investigation, but argued that it was directed at a third party, not Libananco's counsel. Turkey also argued that, as a sovereign, it was entitled to investigate a serious crime within its jurisdiction regardless of the arbitration. Finally, Turkey contended that Libananco had not been prejudiced by the investigation since Turkey's counsel gave assurances that they had neither been offered nor seen any of the material obtained through the court order except when they superficially reviewed certain documents for privilege. Libananco responded that none of Turkey's assurances addressed the fact that privileged material might have been seen by Turkish officials who in turn provided information or instructions to Turkey's counsel.[138]

The tribunal observed that "parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with."[139] It also observed that a sovereign does "have a right and duty to

130. *See id.* ¶ 104.
131. *Id.* ¶¶ 92-93.
132. *Id.* ¶ 105.
133. *Id.* ¶ 118.
134. *Id.* ¶¶ 118-19.
135. Decision on Preliminary Issues, Libananco Holdings Co. Ltd. v. Turkey, ICSID (W. Bank) Case No. ARB/06/8 (June 23, 2008).
136. *Id.* ¶ 72.
137. *Id.* ¶ 73.
138. *See id.* ¶¶ 45-46, 75-76.
139. *Id.* ¶ 78.

pursue the commission of serious crime" that cannot be affected by the existence of an ICSID arbitration.[140] Nevertheless, the sovereign's right to investigate crime "cannot mean that the investigative power may be exercised without regard to other rights and duties, or that, by starting a criminal investigation, a State may baulk an ICSID arbitration."[141] Applying these basic precepts, the tribunal declined to grant the relief Libananco requested or to decide whether Libananco had suffered prejudice. Instead, the tribunal ordered Turkey to ensure that privileged information is not shared with anyone having a role in the arbitration and to desist from intercepting communications of Libananco's counsel. The tribunal then undercut the second order by making it subject to the observation that Turkey "may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities," so long as the information obtained is not made available to anyone having a role in the arbitration.[142]

In *City Oriente Ltd. v. Ecuador*,[143] a Panamanian oil company alleged that Ecuador had improperly filed criminal embezzlement charges against its personnel in order to force payment under a recently-enacted tax on hydrocarbon investments and requested interim measures prohibiting Ecuador from pursuing the charges. Although the tribunal acknowledged "Ecuador's sovereign right to prosecute and punish crimes of all kinds perpetrated in its territory," it held that such an undisputed right should not be used as a means to coerce the payment of the allegedly owing tax amounts.[144] The tribunal issued provisional measures ordering Ecuador to refrain from prosecuting any judicial action against representatives of City Oriente and to cease demanding payment of the tax.[145]

Days after the ruling, the Ecuadorian General Prosecutor nevertheless proceeded with efforts to take certain representatives of City Oriente into custody.[146] Ecuador subsequently filed a request for revocation of the provisional measures, arguing that those measures protected "an inexistent right" and were "not necessary to prevent irreparable harm" and that the "decision on provisional measures entail[ed] a ruling on the merits."[147] The tribunal denied the request.

A third decision on interim measures concerned a State's ability to enforce its tax laws. In *Paushok v. Mongolia*,[148] the tribunal granted a request for provisional measures suspending the enforcement of two Mongolian laws relating to the taxation of gold mining and the import of foreign workers. The tribunal observed that the UNCITRAL Rules provide wider discretion in awarding provisional measures than the ICSID Rules.[149] Nevertheless, it noted that even under "the discretion granted to the Tribunal under the UN-

140. *Id.* ¶ 79.
141. *Id.*
142. *Id.* ¶ 82.
143. Decision on Provisional Measures, City Oriente Limited v. Ecuador, ICSID (W. Bank) Case No. ARB/06/21 (Nov. 19, 2007).
144. *Id.* ¶ 62.
145. *Id.* ¶¶ 19, 59-66.
146. *See* Damon Vis-Dunbar & Luke Eric Peterson, *Tribunal Orders Ecuador To Cease Legal Action Against Foreign Oil Company*, INVESTMENT TREATY NEWS, Dec. 14, 2007, at 9, *available at* http://www.iisd.org/pdf/2007/itn_dec14_2007.pdf.
147. Decision on Revocation of Provisional Measures and Other Procedural Matters, City Oriente Limited v. Ecuador, ICSID (W. Bank) Case No. ARB/06/21 ¶¶ 14, 19 (May 13, 2008).
148. Order on Interim Measures, Sergei Paushok v. Mongolia, UNCITRAL Arbitration (Sept. 2, 2008).
149. *See id.* ¶ 36.

CITRAL Rules, the Tribunal still has to deem provisional measures urgent and necessary to avoid 'irreparable' harm and not only convenient or appropriate."[150] The tribunal explained that it is "internationally recognized that five standards have to be met" before a tribunal will issue interim measures: "(1) prima facie jurisdiction, (2) prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality."[151]

With respect to "urgency," the tribunal concluded that the case had "specific features" indicating urgency because the likelihood of the claimant's bankruptcy had become "very real" insofar as the claimant could neither immediately pay the tax nor receive outside financing.[152] With respect to "imminent danger of serious prejudice," the tribunal observed that the commonly accepted concept of "irreparable harm" has a flexible meaning in international law and does not necessarily require that the injury be incapable of being remedied by an award of damages.[153] Interim measures need only be "necessary," a standard that is satisfied if the delay in the adjudication of the claim caused by arbitral proceedings "would lead to a 'substantial' but not necessarily 'irreparable'" prejudice to the requesting party.[154] The tribunal found that claimants were facing "very substantial prejudice" because immediate payment of the tax "would likely lead to the insolvency and bankruptcy" and the complete loss of claimants' investment.[155]

Finally, in *Railroad Development Corp. v. Guatemala*, the tribunal addressed the first request for interim measures under CAFTA.[156] After observing that there were "no qualifications to the power of an ICSID tribunal to recommend provisional measures" in either the ICSID Convention or CAFTA, the tribunal held that "the standard to be applied is one of reasonableness, after consideration of all the circumstances of the request and after taking into account the rights to be protected and their susceptibility to irreversible damage."[157]

The claimant requested an interim order directing Guatemala to preserve certain documents during the pendency of the arbitration. To prove the urgent need for such provisional measures, the claimant relied on a recent change of government in Guatemala, the destruction or loss of documentation during previous changes of administration, and frequent changes in high positions in the current administration. The tribunal declined the request, observing that a "change of government in the normal course of constitutional transfer of power" does not justify measures for preservation of documents.[158]

3. *Challenges to Arbitrators*

Two members of the arbitral tribunal in *Suez v. Argentina* rejected a second bid by Argentina to disqualify arbitrator Dr. Gabrielle Kaufmann-Kohler from the tribunal pre-

150. *Id.* ¶ 39.
151. *Id.* ¶ 45.
152. *Id.* ¶ 61.
153. *Id.* ¶ 68.
154. *Id.* ¶¶ 67-68.
155. *Id.* ¶ 77.
156. Decision on Provisional Measures, Railroad Dev. Corp. v. Guatemala, ICSID (W. Bank) Case No. ARB/07/23 (Oct. 15, 2008).
157. *Id.* ¶ 34.
158. *Id.* at 35.

siding over three investment treaty disputes arising out of water-services investments in Argentina.[159] The two arbitrators ruled that sufficient grounds for removal were presented neither by Dr. Kaufmann-Kohler's service on the board of UBS, which held shares in the claimants, nor by her failure to disclose her election to the board.[160] The tribunal identified four criteria for evaluating whether a relationship with a party undermines the arbitrator's independence and impartiality: (1) proximity (how "closely connected is the challenged arbitrator to one of the parties by reason of the alleged connection?"); (2) intensity (how "intense and frequent are the interactions between challenged arbitrator and one of the parties as a result of the alleged connection?"); (3) dependence (to "what extent is the challenged arbitrator dependent on one of the parties for benefits as a result of the connection?"); and (4) materiality (to "what extent are any benefits accruing to the challenged arbitrator as a result of the alleged connection significant and therefore likely to influence in some way the arbitrator's judgment?").[161] Applying these standards, the tribunal concluded that the relationship between Dr. Kaufmann-Kohler and the claimants did not indicate "a manifest lack of the quality of being a person of independent judgment and impartiality of judgment."[162] It also found that Dr. Kaufmann-Kohler did not violate ICSID rules concerning disclosure obligations.[163] Argentina also unsuccessfully challenged Dr. Kaufmann-Kohler in a separate ICSID arbitration in 2008.[164]

C. Decisions on the Merits

1. *Fair and Equitable Treatment*

One of the more frequent claims asserted in investment arbitrations is violation of fair and equitable treatment provisions. Given the broad scope of such provisions, fair and equitable treatment claims can encompass a wide array of state actions that are arbitrary or unfair but fall short of expropriation. Although this trend continued in 2008, several tribunals attempted to scale back fair and equitable treatment obligations.

An emerging standard for fair and equitable treatment provisions is the State's obligation to provide a stable legal and regulatory environment for the investment. This issue was crucial in *BG Group, Plc. v. Argentina*,[165] where the tribunal held that Argentina violated the fair and equitable treatment provision of the UK-Argentina BIT by fundamentally revising the regulatory framework for private natural gas distributors after that country's financial crisis. The tribunal noted that the contracting State's duties "must be examined in the light of the legal and business framework as represented to the investor at the time that it decided to invest."[166] Although this standard does not require "a freezing

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159. *See* Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008), Suez v. Argentina, ICSID (W. Bank) Case No. ARB/03/19, Suez v. Argentina, ICSID (W. Bank) Case No. ARB/03/17, and AWG Group Ltd. v. Argentina, UNCITRAL Arbitration.

160. *Id.* ¶¶ 11-12, 30.

161. *Id.* ¶ 35.

162. *Id.* ¶ 40.

163. *See id.* ¶ 48.

164. *See* Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, EDF International S.A. v. Argentina, ICSID (W. Bank) Case No. ARB/03/23 (June 25, 2008).

165. Final Award, BG Group, Plc. v. Argentina, UNCITRAL Arbitration (Dec. 24, 2007).

166. *Id.* ¶ 298.

of the legal system," it does require States to adhere to "the principles of stability and predictability" in its treatment of investors.[167] The tribunal found that Argentina violated those principles by suspending inflation adjustments to gas tariffs, converting dollar-denominated tariffs into pesos, and requiring renegotiation of public service licenses.[168]

Violations of fair and equitable treatment obligations can also occur where the State's actions fall short of altering the regulatory framework but nevertheless thwart an investor's "justified expectations" at the time of the investment. In *Duke Energy Electroquil*,[169] the tribunal held that Ecuador had violated its fair and equitable treatment obligations by failing to implement a system of payment trusts to guarantee prompt payment by a state-owned electricity company under two power purchase agreements. The tribunal explained that "a stable and predictable legal and business environment is considered an essential element of the fair and equitable treatment standard" and that this stability "is directly linked to the investor's justified expectations."[170] The tribunal further explained that these expectations must "take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State."[171] The tribunal concluded that Ecuador's failure to establish the payment trusts violated the claimants' legitimate expectations because they had been aware of the payment problems and specifically requested guarantees from the state as a condition for investment.[172]

In *Rumeli Telekom*,[173] the tribunal found that the State breached its fair and equitable treatment obligations by terminating an investment contract without first suspending the contract and allowing the investors an opportunity to cure their non-performance, as mandated by the contract. The tribunal also found that Kazakhstan breached its obligations when it subsequently established a working group to evaluate the decision to terminate the contract. According to the tribunal, the process that led to the working group's decision "lacked transparency and due process" as the investors had no "real possibility to present their position."[174] The tribunal emphasized that fair and equitable treatment required the State not only to respect the investor's reasonable and legitimate expectations, but also to act in a good faith and transparent manner, respect procedural propriety and due process, and not engage in arbitrary or grossly unfair conduct. In this respect, the tribunal noted that fair and equitable treatment is "not precisely defined," but instead "depends on the interpretation of specific facts for its content."[175]

Despite the broad application of the fair and equitable treatment standards, other tribunals sought to limit the reach of the doctrine. For example, the tribunal in *Metalpar S.A. v. Argentina*[176] held that Argentina had not breached its obligations to two Chilean investors during its financial crisis. The claimants contended that Argentina failed to provide

167. *Id.* ¶¶ 298, 307.
168. *Id.* ¶¶ 303-10.
169. *Duke Energy Electroquil*, ICSID (W. Bank) Case No. ARB/04/19.
170. *Id.* ¶¶ 339-40.
171. *Id.* ¶ 340.
172. *Id.* ¶¶ 359-64.
173. *Rumeli Telekom*, ICSID (W. Bank) Case No. ARB/05/16.
174. *Id.* ¶ 617.
175. *Id.* ¶ 610.
176. Award on the Merits, Metalpar S.A. v. Argentina, ICSID (W. Bank) Case No. ARB/03/05 (June 6, 2008).

fair and equitable treatment by imposing temporary limitations on the transfer of assets abroad and by converting dollar-denominated contractual obligations into pesos. Rejecting these contentions, the tribunal concluded that no legitimate expectations were breached by Argentina as the investors had not entered into any type of contract or license with the State and had been aware of Argentina's precarious financial condition at the time of their investment.[177] Because the tribunal rejected all of the investors' claims, *Metalpar* represents Argentina's first complete victory in the cases arising out of the financial crisis.

In *Helnan International*,[178] the tribunal rejected a fair and equitable treatment claim where a government entity terminated a hotel management contract after the hotel's rating was downgraded. The claimant was a Danish hotel management company that had contracted with a government tourism body to manage a five-star hotel in Cairo. The claimant alleged that Egypt had orchestrated the downgrading of the hotel's rating to four stars in order to justify termination of the management contract and privatization of the hotel. Although the tribunal agreed that there were procedural irregularities in the government's handling of the situation, it did not find that these irregularities rose to the level of unfair or inequitable treatment. The tribunal found it significant that the claimant never challenged the substantive basis for the downgrading of the hotel, only its responsibility for financing improvements. The claimant's failure to make reasonable efforts to obtain redress from national authorities also cast doubt on the claim in the eyes of the tribunal.

In *Biwater Gauff (Tanzania) Ltd. v. Tanzania*,[179] the tribunal rejected most of the allegations that Tanzania had breached its fair and equitable treatment obligations during its oversight and regulation of a water concession operated by the claimant. Although the tribunal held that certain actions taken by Tanzania violated the treatment standards, including its termination and seizure of the concession, most of Tanzania's actions did not rise to the level of unfair or inequitable treatment. In particular, the tribunal concluded that Tanzania's failure to ensure government agencies promptly paid their water bills and its failure to adjust the water tariff to account for changing conditions did not amount to breaches, as the concession contract provided no clear right to these actions.[180] Moreover, to the extent that certain actions amounted to technical breaches of the BIT, the tribunal held that these violations did not result in any damages because the claimant's own poor performance led to termination of the concession.

2. *Expropriation*

It has become increasingly difficult for claimants to prevail on expropriation claims in recent years, as tribunals have tightened the standards by which such claims are evaluated. Although claimants often assert claims for indirect expropriation along with claims for violations of other treaty protections, the indirect expropriation claims tend to be less

177. *See id.* ¶¶ 182-88.
178. *Helnan International*, ICSID (W. Bank) Case No. ARB/05/19.
179. Award, Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID (W. Bank) Case No. ARB/05/22 (July 24, 2008).
180. *See id.* ¶¶ 763-775.

successful. That trend continued in 2008. The only significant decisions finding an expropriation involved the State's direct seizure of an investment.

The award in *Metalpar* demonstrates the heavy burden claimants bear in trying to establish a claim for indirect expropriation. The claimants alleged that certain rights and credits under loan agreements with local companies in the Argentinean automotive sector were indirectly expropriated as a result of the measures taken by Argentina during its financial crisis. The tribunal rejected the claim, finding that the claimants failed to show that the measures had a "sufficiently severe" effect on their investments to warrant a finding of expropriation.[181] The tribunal specifically noted that the investors' Argentinean subsidiary "continued performing its business activities, negotiating with the customers that had already signed the contracts and with future customers" and in fact "improved its production and sales in the Argentine market."[182]

Two decisions in 2008 found that direct expropriations had occurred. In *Rumeli Telekom*, the tribunal held that a creeping expropriation by Kazakhstan had deprived two Turkish investors of their majority stake in a local telecommunications company. According to the tribunal, this expropriation commenced when the State terminated the claimants' investment contract without first suspending the contract and allowing the investors an opportunity to cure, as required under the contact. The expropriation was completed when the Kazakh courts upheld a vote by local shareholders to compulsorily redeem the claimants' shares and awarded claimants only a nominal sum for their sixty percent stake in the company, even though the entire company was later sold for $350 million.[183]

An unusual result was reached in *Biwater Gauff*, where the tribunal found that a technical expropriation had occurred but refused to award any damages. The tribunal held that the State had expropriated the claimant's water concession through a series of actions, including premature announcement of contract termination, occupation of the concession's facilities, usurpation of management control, and deportation of staff. The tribunal nevertheless concluded that when these actions were taken, termination of the contract "was inevitable, and was going to materialize within a matter of weeks."[184] The tribunal further held that, due to a poorly organized bid and various financial problems in the concession, the fair market value of the concession at the time of the expropriation was effectively zero. As a result, the claimant could not show that the expropriation caused it to suffer any economic loss.[185] Although a majority of the tribunal held that the claimant had failed to establish a causal link between the treaty violations and its losses, a concurring and dissenting opinion by Gary Born argued that the claim failed because the claimant could not establish that it suffered any losses, not because it failed to show causation.[186]

181. *Metalpar*, ICSID (W. Bank) Case No. ARB/03/05, ¶ 173.

182. *Id.* ¶ 174.

183. *See Rumeli Telekom*, ICSID (W. Bank) Case No. ARB/05/16, ¶¶ 705-08, 752.

184. *Biwater Gauff*, ICSID (W. Bank) Case No. ARB/05/22, ¶ 518.

185. *See id.* ¶¶ 788-807.

186. *Biwater Gauff*, ICSID (W. Bank) Case No. ARB/05/22, ¶¶ 15-31 (Born, G. concurring & dissenting).

3. *Necessity Defense*

A number of recent ICSID cases involving actions taken by Argentina during its financial crisis required tribunals to rule on Argentina's assertion that its actions were justified under a state of necessity defense recognized both by customary international law and the relevant BIT. This defense has generated some controversy, as conflicting decisions have raised concerns over inconsistent awards. While a 2006 award in the *LG&E* arbitration upheld the necessity defense for part of the financial crisis,[187] decisions in *CMS*,[188] *Enron*,[189] and *Sempra*[190] rejected the defense in its entirety. Adding further controversy, one of the arbitrators that served on the *Enron* tribunal also served on the *LG&E* tribunal.

Two additional awards were issued in 2008 that considered Argentina's necessity defense, reaching opposite conclusions. In *BG*, Argentina argued that measures it enacted in response to the financial crisis were justified because there was a national emergency under Article 4 of the UK-Argentina BIT as well as a state of necessity under customary international law. The tribunal rejected both defenses. With respect to the BIT defense, the tribunal concluded that the terms of Article 4 did not exonerate Argentina's attempts to handle the financial crises. Instead, the language of Article 4 simply guaranteed that foreign investors would be treated no less favorably than other investors with respect to compensation for losses caused by a national emergency. The tribunal noted that the UK-Argentina BIT did not contain a "national security" exception analogous to Article XI of the U.S.-Argentina BIT, the provision relied on by the *LG&E* tribunal in partially upholding Argentina's necessity defense.[191]

The tribunal also rejected Argentina's alternative defense that its actions were excused under customary international law based on a state of necessity, as codified in Article 25 of the ILC Draft Articles on State Responsibility.[192] Although the tribunal doubted that the Articles even applied in this situation, it concluded that Argentina had in any case failed to meet all the elements of the defense.[193] The tribunal emphasized that the necessity defense was "a most exceptional remedy subject to very strict conditions because otherwise it would open the door to elude any international obligation."[194] The *BG* decision will likely generate further controversy, as one of the arbitrators, Albert Jan van den Berg, also served on the *LG&E* and *Enron* tribunals. In fact, Argentina cited the failure to disqualify Mr. van den Berg as a ground for vacating the award in a petition filed in a U.S. district court.[195]

187. Decision on Liability, LG&E Energy Corp. v. Argentina, ICSID (W. Bank) Case No. ARB/02/1 (Oct. 3, 2006).

188. Award, CMS Gas Transmission Co. v. Argentina, ICSID (W. Bank) Case No. ARB/01/8 (Apr. 25, 2005).

189. Award, Enron Corp. v. Argentina, ICSID (W. Bank) Case No. ARB/01/3 (May 22, 2007).

190. Award, Sempra Energy Int'l v. Argentina, ICSID (W. Bank) Case No. ARB/02/16 (Sept. 28, 2007).

191. *BG*, UNCITRAL Arbitration, ¶¶ 381-87.

192. U.N. Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 25, U.N. Doc. A/56/10(SUPP) (2001).

193. *See BG*, UNCITRAL Arbitration, ¶¶ 407-12.

194. *Id.* ¶ 410 (quoting *Enron*, ICSID (W. Bank) Case No. ARB/01/3, ¶ 304).

195. *See* Petition to Vacate or Modify Arbitration Award, Republic of Argentina v. BG Group Plc., Case. No. 1:08-cv-00485-RBW (D.D.C. 2008) ¶¶ 69-78.

Further muddying the waters, a subsequent award in *Continental Casualty Co. v. Argentina*[196] accepted Argentina's necessity defense for the bulk of the claims asserted against it. That case involved a U.S. insurance company that provided workers compensation insurance through an Argentinean subsidiary. The claimant challenged several actions taken during Argentina's financial crises, including the forced conversion of dollar-denominated assets into pesos and restrictions on asset transfers out of Argentina. At issue was Article XI of the U.S.-Argentina BIT, which states that "measures necessary" for the protection of the State's "essential security interests" and the "maintenance of public order" do not violate the treaty.[197] The tribunal held that Article XI could apply to a severe economic crisis[198] and reasoned that protection of public order and essential security interests does not require that a "total collapse" or "catastrophic situation" has already occurred, as there is "no point in having such protection if there is nothing left to protect."[199] Although the tribunal rejected Argentina's contention that the necessity defense is "self-judging," it nevertheless recognized that evaluation of the defense "must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments."[200]

Significantly, the *Continental Casualty* tribunal relied on cases from the GATT and WTO context in formulating the standards for the Article XI necessity defense, concluding that the defense did not require the actions to be "indispensible" or "of absolute necessity."[201] Instead, it found that necessity should be determined through a balancing of several factors, including the importance of the interests at stake, the degree to which the challenged measures advance those interests, the restrictive impact on international commerce, and the availability of alternative measures that do not violate the treaty.[202] On the facts, the tribunal held that all but one of Argentina's actions were justified under Article XI.[203]

4. *NAFTA Awards*

A long-awaited NAFTA award was issued in late 2007, although not published until 2008. In *Archers Daniels Midland Co. v. Mexico*,[204] two U.S. producers of high fructose corn syrup challenged a twenty percent excise tax levied by Mexico on soft drinks made with sweeteners other than cane sugar. The tribunal ruled in favor of the U.S. claimants, holding that the tax had violated two separate Chapter 11 protections. First, the tribunal held that the tax violated Article 1102, which guarantees that investors will be treated no less favorably than nationals of the contracting State. Mexico violated this guarantee be-

196. Award, Continental Cas. Co. v. Argentina, ICSID (W. Bank) Case No. ARB/03/9 (Sept. 5, 2008).

197. Argentina Bilateral Investment Treaty, U.S.-Arg., Nov. 14, 1991, S. Treaty Doc. 103-2 (1991).

198. *See Continental Cas. Co.*, ICSID (W. Bank) Case No. ARB/03/9, ¶¶ 71-73.

199. *Id.* ¶ 180.

200. *Id.* ¶ 181.

201. *Id.* ¶¶ 189-95.

202. *See id.* ¶ 195.

203. *See id.* ¶¶ 196-233.

204. Award, Archer Daniels Midland Co. v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/04/05 (Nov. 21, 2007).

cause the tax was aimed at protecting domestic sugar producers from competition by foreign producers of high fructose corn syrup, two groups that were in direct competition.[205]

Second, the tribunal held that Mexico also violated Article 1106.3, which prohibits States from imposing certain performance requirements on investors, either to achieve a given level of domestic content or to accord a preference to goods produced domestically. According to the tribunal, Article 1106.3 "prohibits Member States from imposing performance requirements upon any investor from the NAFTA region, including [Mexico's] own investors."[206] Because Mexico required domestic bottlers to use cane sugar to receive exemption from the tax and thus accorded a preference to domestically produced cane sugar, the tribunal found the tax violated Article 1106.3.[207] The tribunal rejected, however, the claim for indirect expropriation under Article 1110, finding that the investors had not lost control over their investment or been deprived of most of its economic value.[208]

In another notable aspect of the award, the tribunal rejected Mexico's contention that the tax was a valid countermeasure under customary international law because the United States had breached its own NAFTA obligations by restricting U.S. market access for Mexican sugar exporters. The tribunal concluded that the tax was neither enacted in response to alleged breaches by the United States nor intended to induce compliance by the United States, as required under Article 49 of the ILC Articles.[209] The tribunal also found that the alleged countermeasure was not proportional to the alleged wrongful act, as required by Article 51 of the ILC Articles.[210] Arbitrator Arthur Rovine issued a separate concurring opinion, challenging in principle the availability of a defense based on countermeasures. In his view, rights under NAFTA Chapter 11 belong to individual investors and cannot be suspended as a result of countermeasures taken against the State of the investor.[211]

ADM was one of three NAFTA cases filed against Mexico in connection with the tax on high fructose corn syrup. An award on liability was also issued in *Corn Products International v. Mexico*[212] in January 2008, although that award has yet to be released. The tribunal in *Corn Products* also found Mexico to have breached NAFTA, and a hearing on damages was held in July 2008. A third case, *Cargill, Inc. v. Mexico*,[213] is still pending.

D. Damages

The damage awards issued in 2008 included two very large assessments–$185.3 million in *BG*[214] and $125 million in *Rumeli Telekom*[215]–and a number of smaller awards–$33.5

205. *See id.* ¶¶ 193-213.
206. *Id.* ¶ 221.
207. *See id.* ¶¶ 219-27.
208. *See id.* ¶¶ 237-52.
209. *See id.* ¶¶ 134-51.
210. *See id.* ¶¶ 152-60.
211. Archer Daniels Midland, ICSID (W. Bank) Case No. ARB(AF)/04/05 (Rovine, A. concurring opinion).
212. Corn Prods. Int'l, Inc. v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/04/1 (May 20, 2005).
213. Cargill, Inc. v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/05/02 (Oct. 5, 2007).
214. *See BG*, UNCITRAL Arbitration.
215. *See Rumeli Telekom*, ICSID (W. Bank) Case No ARB/05/16.

million in *ADM*,[216] $25 million in *Desert Line Projects v. Yemen*,[217] $5.6 million in *Duke Energy Electroquil*,[218] $18.4 million in *Duke Energy International Peru Investments No. 1 Ltd. v. Peru*,[219] and $2.8 million in *Continental Casualty*.[220] The award in *BG* is the latest in a growing number of large awards against Argentina involving claims stemming from measures taken in response to its financial crisis.

One noteworthy development in 2008 was the consideration and assignment of so-called "moral damages." In *Desert Line Projects*, for example, the claimant sought moral damages for the harm sustained to its reputation, credit, and business opportunities, as well as for the physical stress and anxiety inflicted upon its company executives as a result of being harassed, threatened, and detained. The tribunal rejected the respondent's argument that such damages were unduly speculative and unsubstantiated, writing that "non-material damages 'may be very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated.'"[221] Finding that the respondent had acted maliciously in harming the claimant, the tribunal awarded $1 million in compensation for moral damages.[222]

There was frequent discussion in 2008 damage awards concerning the appropriate quantum of interest to afford full and fair compensation to the claimant, with an increasing number of tribunals awarding compound rather than simple interest. Finding that "simple interest cannot be relied upon to produce full reparation for a claimant's loss," the *Continental Casualty* tribunal interpreted various case precedents, arbitration rules, and legal commentaries to endorse the discretionary award of compound interest "if it is necessary to ensure full reparation."[223] The tribunal noted that a study of fourteen recent ICSID arbitrations had found that eight of the tribunals ordered compound interest, three ordered simple interest, and one ordered no interest (the remaining two did not disclose whether compound or simple interest was ordered).[224] Interest determinations in damage awards issued in 2008 were more evenly split: four tribunals ordered simple interest and three tribunals ordered compound interest.[225]

As to the assignment of costs and legal fees, a growing number of tribunals are espousing the "loser pays" principle in lieu of the traditional practice of assigning costs in equal portion and leaving the parties to cover their own legal fees. Under this approach, tribunals may take into account "the nature of the dispute, the novelty of the legal issues, and

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216. *See Archer Daniels Midland*, ICSID (W. Bank) Case No. ARB(AF)/04/05.
217. Award, Desert Line Projects L.L.C. v. Yemen, ICSID (W. Bank) Case No. ARB/05/17 (Feb. 6, 2008).
218. *See Duke Energy Electroquil*, ICSID (W. Bank) Case No. ARB/04/19.
219. Award, Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Peru, ICSID (W. Bank) Case No. ARB/03/28 (Aug. 18, 2008).
220. *See Continental Cas.*, ICSID (W. Bank) Case No. ARB/03/9.
221. *Desert Line Projects*, ICSID (W. Bank) Case No. ARB/05/17, ¶ 289 (quoting Opinion in the Lusitania Cases (U.S. v. F.R.G.), 7 R. Int'l Arb. Awards 32 (1923).
222. *See id.* ¶¶ 290-91.
223. *Continental Cas.*, ICSID (W. Bank) Case No. ARB/03/9, ¶¶ 308-12.
224. *Id.* ¶ 312.
225. *See Desert Line Projects*, ICSID (W. Bank) Case No. ARB/05/17, ¶ 295 (simple); *Duke Energy Electroquil*, ICSID (W. Bank) Case No. ARB/04/19, ¶ 457 (simple); *Duke Energy Int'l*, ICSID (W. Bank) Case No. ARB/03/28, ¶ 488 (simple); Archer Daniels Midland, ICSID (W. Bank) Case No. ARB(AF)/04/05, ¶ 296 (simple); *BG*, UNCITRAL Arbitration, ¶ 456 (compound); *Rumeli Telekom*, ICSID (W. Bank) Case No ARB/05/16, ¶ 818 (compound); *Continental Cas.*, ICSID (W. Bank) Case No. ARB/03/9, ¶ 313 (compound).

the conduct of the parties in the proceedings."[226] In *Rumeli Telekom*, for example, the ICSID tribunal "condemned" the respondent to pay fifty percent of the claimants' legal costs and fees because they "had no option but to bring this arbitration forward and to incur the related costs" to obtain justice.[227] The tribunal further justified this apportionment because the claimants had "prevailed on the substance of the dispute" but "failed on a number of their allegations and the amount of damages awarded is less than the [amount] claimed."[228] Similarly, the *Desert Line Projects* tribunal assessed against the respondent seventy percent of the costs and a large portion of claimant's legal fees due to its loss on the merits and its "insufficient" cooperation in providing documents and testimonial evidence.[229] In contrast, the *ADM* tribunal followed the traditional rule of splitting costs and fees, noting that the proceedings "were expeditiously and efficiently conducted by the representatives of both parties."[230]

E. Annulment and Set Aside Actions

No significant final decisions on annulment requests were issued by ad hoc annulment committees in 2008.[231] But in two annulment proceedings brought by Argentina, annulment committees addressed the standards applicable to a request for security pending the annulment decision.[232] Consistent with its recent practice of challenging every ICSID award, Argentina sought annulment of the *Azurix* and *Enron* awards in 2008. Argentina has publicly adopted the position that an ICSID award does not trigger an immediate obligation to pay because award creditors must submit to a court proceeding in Argentina to collect on their award.[233] This led both companies to request that Argentina post a security to guarantee payment in the event the committee rejected Argentina's annulment request.

The committee found that Argentina's stated position was in breach of the ICSID Convention and its BIT with the United States.[234] Nevertheless, the committee made clear that requiring security was disfavored and thus rejected both requests.[235] The committee

226. *Continental Casualty*, ICSID (W. Bank) Case No. ARB/03/9, ¶ 318.
227. *Rumeli Telekom*, ICSID (W. Bank) Case No ARB/05/16, ¶ 819.
228. *Id.*
229. *Desert Line Projects*, ICSID (W. Bank) Case No. ARB/05/17, ¶ 304. *See also BG*, UNCITRAL Arbitration, ¶¶ 458-60 (assigning respondent seventy percent of the arbitration costs and all of claimant's legal fees because BG "prevailed with respect to 78% of the amount if claimed" in the action).
230. *Archer Daniels Midland*, ICSID (W. Bank) Case No. ARB(AF)/04/05, ¶¶ 302-03.
231. Two decisions on set aside actions challenging NAFTA tribunal awards were issued in 2008, one in the U.S. District Court for the District of Columbia and the other in the Ontario Superior Court of Justice. *See* Tembec, Inc., et al. v. United States, 570 F. Supp. 2d 137 (D.D.C. 2008); Bayview Irrigation Dist. #11 v. Mexico, 2008 CarswellOnt 2682 (Ont. S.C.J. 2008). Both courts found that the arbitrators properly exercised their authority and declined to vacate the arbitral award.
232. *See* Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, Azurix Corp. v. Argentina, ICSID (W. Bank) Case No. ARB/01/12 (2007); *See* Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, Enron Corp. v. Argentina, ICSID (W. Bank) Case No. ARB/01/3, ¶ 87 (2008).
233. Azurix Corp., ICSID (W. Bank) Case No. ARB/01/12, ¶¶ 11, 15(h); *Enron Corp.*, ICSID (W. Bank) Case No. ARB/01/3, ¶¶ 14(b), 15(q)(ii).
234. *Enron Stay Decision*, ICSID (W. Bank) Case No. ARB/01/3, ¶ 82.
235. *Azurix Corp.*, ICSID (W. Bank) Case No. ARB/01/12, ¶ 44; *Enron Corp.*, ICSID (W. Bank) Case No. ARB/01/3, ¶ 47-53.

agreed, however, to revisit its decision if Argentina had not reconsidered within sixty days its policy on the enforceability of arbitral awards.[236]

236. *Enron Corp.*, ICSID (W. Bank) Case No. ARB/01/3, ¶ 103.