

NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

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Spring 2001

Bulgaria Ratifies the ICSID Convention

On April 13, 2001, Bulgaria ratified the ICSID Convention. In accordance with its Article 68, the Convention entered into force for Bulgaria 30 days later, on May 13, 2001. This brought to twenty-one the number of the ICSID Contracting States from Central and Eastern Europe and the Commonwealth of Independent States.

In total, there are now 148 signatories of the ICSID Convention, of which 134 have also ratified the Convention to become Contracting States. An up-to-date list of the ICSID Contracting States and Other Signatories of the Convention is available on the ICSID website (www.worldbank.org/icsid) and from the Centre on request.

Eighteenth ICSID/AAA/ICC Joint Colloquium on International Arbitration Paris, November 16, 2001

ICSID, the American Arbitration Association (AAA) and the International Court of Arbitration of the International Chamber of Commerce (ICC) will this year be co-sponsoring the eighteenth of their series of joint colloquia on international

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The ICSID Convention: A Commentary

The ICSID Convention: A Commentary by Christoph H. Schreuer, Professor of International Law at the University of Vienna, was recently published as an ICSID publication by Cambridge University Press. In this book, the text and Professor Schreuer's updated commentary on the entire Convention are set out, Article by Article. In addition to providing textual analysis of the provisions, the book considers the preparatory work of each of the Articles of the Convention and how these have been interpreted in the literature and applied in ICSID cases as at June 2000. The author also discusses ICSID's non-Convention activities such as the operation of the ICSID Additional Facility. The book incorporates a table of cases, a bibliography and indices by Article and by subject.

The book may be purchased from Cambridge University Press, Customer Service Department, Cambridge University Press, 110 Midland Avenue, Port Chester, NY 10573, USA, at US\$ 225 (shipping and handling excluded) or may be ordered on-line at www.cup.org.

Ibrahim F.I. Shihata

1937-2001

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Disputes Before the Centre

Since the publication of the last issue of *News from ICSID*, nine new proceedings have been initiated before the Centre. Six of these are new ICSID Convention arbitration proceedings and three are annulment proceedings. All but one of the new cases have been instituted by foreign investors relying for the host States' consent to ICSID arbitration recorded in bilateral investment treaties. In one of these new cases, the investor-to-State dispute-settlement provisions of the Energy Charter Treaty has also been invoked. ICSID has now registered a total of 87 cases, three of which have been ICSID Convention conciliation cases, 10 ICSID Additional Facility arbitration cases, and 74 ICSID Convention arbitration cases.

Thirty-eight of the cases are currently pending or have been concluded since the publication of the last issue of *News from ICSID*. These include 32 arbitration proceedings under the ICSID Convention and six arbitration proceedings under the ICSID Additional Facility Rules. Five of the Additional Facility proceedings have been instituted under the North American Free Trade Agreement (NAFTA). As mentioned above, annulment proceedings are now pending in three ICSID Convention cases. Further details on developments in these cases are provided below.

- **Misima Mines Pty. Ltd. v. Independent State of Papua New Guinea (Case No. ARB/96/2)**

April 2, 2001

The Claimant requests the discontinuance of the proceeding.

April 25, 2001

The Respondent informs the Tribunal that it has no objection to the Claimant's request for the discontinuance of the proceeding.

May 14, 2001

The Tribunal issues an order taking note of the discontinuance of the proceeding pursuant to Arbitration Rule 44.

- **Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Case No. ARB/97/3)—Annulment Proceeding**

March 23, 2001

The Secretary-General registers an application submitted by the Claimants for annulment of the award of November 21, 2000.

May 18, 2001

The *ad hoc* Committee is constituted. Its members are: L. Yves Fortier (Canadian), President; James R. Crawford (Australian); and José Carlos Fernández Rozas (Spanish).

June 21, 2001

The *ad hoc* Committee holds its first session with the parties in Washington, D.C.

- **Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (Case No. ARB/97/4)**

February 16, 2001

The Tribunal issues a procedural order concerning the production of documents.

April 20, 2001

The Respondent files its counter-memorial on the merits.

- **Houston Industries Energy, Inc. and Others v. Argentine Republic (Case No. ARB/98/1)**

January 23, 2001

The Tribunal issues an order fixing a time-limit for the parties to file a memorial regarding the issue of cost allocation.

March 20, 2001

The Claimants file their memorial on the issue of cost allocation.

Ibrahim F.I. Shihata 1937–2001

Ibrahim F.I. Shihata passed away in Washington, D.C. on May 28, 2001.

Mr. Shihata was Senior Vice President and General Counsel of the World Bank for 15 years and Secretary-General of ICSID for 17 years. His achievements included leading the initiative for the creation of the Multilateral Investment Guarantee Agency; chairing the task force that prepared the World Bank Guidelines on the Treatment of Foreign Direct Investment; and playing a major role in the establishment of the World Bank Inspection Panel.

Mr. Shihata began his career as a member of the Egyptian *Conseil d'Etat* and also served as a member of the Technical Bureau of the President of the United Arab Republic. After obtaining his S.J.D. from Harvard Law School in 1964, Mr. Shihata joined the law faculty of Ain-Shams University, Cairo, where he taught international law.

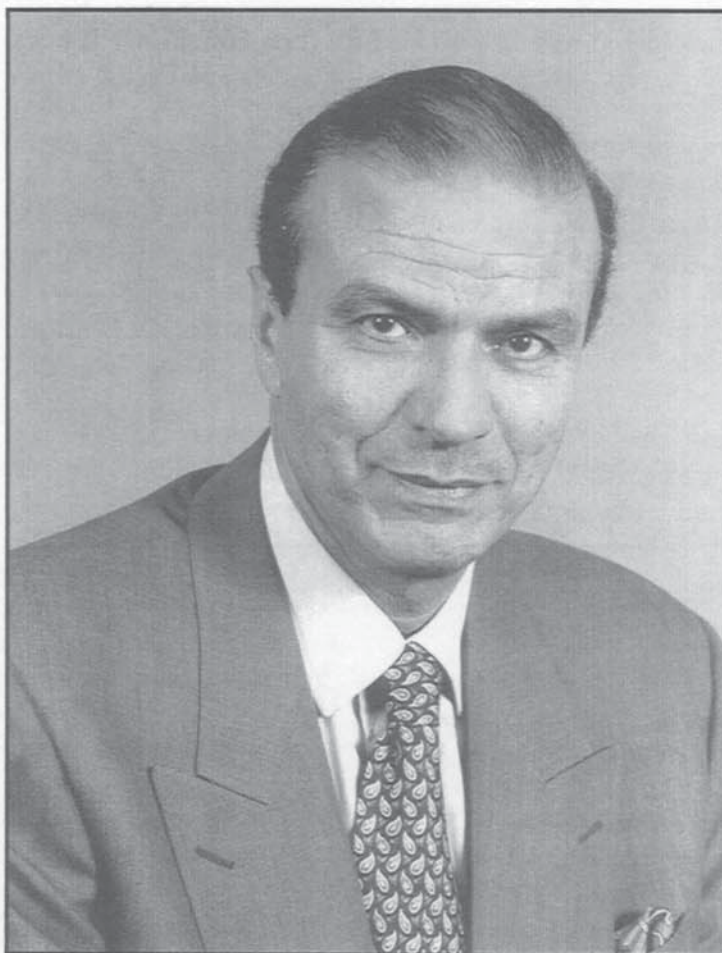
Mr. Shihata interrupted his academic career in 1966 to become for four years Legal Adviser of the Kuwait Fund for Arab Economic Develop-

ment, a post that he took up again in 1972 for another four years. As Legal Adviser of the Kuwait Fund, Mr. Shihata was the principal drafter of the constituent treaties of a number of regional development finance institutions—the Arab Fund for Economic and Social Development,

the Inter-Arab Investment Guarantee Corporation and the Arab Bank for Economic Development in Africa. Mr. Shihata was also the main drafter of the Agreement Establishing the OPEC Special Fund, which subsequently became the OPEC Fund for International Development. The many development finance institutions that Mr. Shihata helped to create include, in addition, the International Fund for Agricultural Development: its charter was prepared by a committee that he chaired.

From 1976 until he joined the World Bank, Mr. Shihata served as the first Director-General of the OPEC Fund. Under his guidance,

this initially temporary development assistance facility was transformed into a permanent institution. Mr. Shihata combined his duties at the OPEC Fund with service as a member of the



*Ibrahim F.I. Shihata
Secretary-General, International Centre
for Settlement of Investment Disputes, 1983–2000
Senior Vice-President and General Counsel,
World Bank, 1983–1998*

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Disputes Before the Centre

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May 15, 2001

The Respondent files its memorial on the issue of cost allocation.

June 5, 2001

The Tribunal declares the proceeding closed and invites the parties to submit any additional statement on the costs incurred by them in connection with the proceeding.

June 12, 2001

The parties make submissions concerning their respective statements of costs.

- **Victor Pey Casado and President Allende Foundation v. Republic of Chile (Case No. ARB/98/2)**

April 11, 2001

The Tribunal is reconstituted following the resignation of Judge Francisco Rezek. Its members are: Pierre Lalive (Swiss), President; Mohammed Bedjaoui (Algerian); and Galo Leoro Franco (Ecuadorian).

April 23, 2001

The Claimants file a request for provisional measures pursuant to Article 39 of the Arbitration Rules.

May 11, 2001

The Tribunal issues a procedural order regarding the Claimants' request for provisional measures and a request for provisional measures filed previously by the Respondent.

May 17, 2001

The Claimants file their observations on the Respondent's request for provisional measures.

May 21, 2001

The Respondent files its observations on the Claimants' request for provisional measures.

June 13, 2001

The Tribunal issues a procedural order concerning the schedule of a hearing on provisional measures.

June 21, 2001

The Tribunal holds a hearing on provisional measures with the parties in Geneva.

June 22, 2001

The Tribunal issues a procedural order regarding ICSID Arbitration Rule 12.

- **International Trust Company of Liberia v. Republic of Liberia (Case No. ARB/98/3)**

There have been no new developments to report in this case since the publication of the last issue of *News from ICSID*.

- **Wena Hotels Limited v. Arab Republic of Egypt (Case No. ARB/98/4)**

December 8, 2000

The Tribunal renders its award.

Annulment Proceeding

January 24, 2001

The Secretary-General registers an application submitted by the Arab Republic of Egypt for annulment of the award of December 8, 2000, and notifies the parties of the provisional stay of the enforcement of the award.

March 6, 2001

The *ad hoc* Committee is constituted. Its members are: Konstantinos D. Kerameus (Greek), President; Andreas Bucher (Swiss); and Francisco Orrego Vicuña (Chilean).

April 5, 2001

The *ad hoc* Committee issues a procedural order concerning the continuation of the stay of enforcement of the award.

May 7, 2001

The *ad hoc* Committee holds its first session with the parties in Paris.

June 29, 2001

The Arab Republic of Egypt files its memorial on its application for annulment.

- **Eudoro A. Olguín v. Republic of Paraguay (Case No. ARB/98/5)**

December 18, 2001

The Respondent files its rejoinder on the merits.

March 11–12, 2001

The Tribunal holds a hearing on the merits in Washington, D.C.

May 8, 2001

The Tribunal declares the proceeding closed.

- **Compagnie Minière Internationale Or S.A. v. Republic of Peru (Case No. ARB/98/6)**

December 18, 2000

The parties inform the Centre that they agree to terminate the proceeding and file a joint request asking the Secretary-General to take note of the discontinuance of the proceeding under Arbitration Rule 43(1).

February 23, 2001

The Secretary-General issues an order taking note of the discontinuance of the proceeding pursuant to Arbitration Rule 43(1).

- **The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Case No. ARB(AF)/98/3)**

January 9, 2001

The Tribunal issues a decision on the Respondent's objection to competence and jurisdiction.

March 30, 2001

Respondent files its counter-memorial on the merits.

June 8, 2001

The Claimants file their reply on the merits.

- **Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited (Case No. ARB/98/8)**

February 9, 2001

The Tribunal renders its decision on tariff and other remaining issues.

March 26, 2001

The Claimant files its memorial regarding remaining tariff issues.

April 2, 2001

The Respondent files its counter-memorial regarding remaining tariff issues.

April 17, 2001

The Claimant files its rejoinder regarding remaining tariff issues.

April 20, 2001

The Respondent files its reply regarding remaining tariff issues.

April 29, 2001

The Tribunal holds a hearing in Washington, D.C.

May 24, 2001

The Tribunal issues its decision on all further remaining issues.

- **Alex Genin and others v. Republic of Estonia (Case No. ARB/99/2)**

November 17, 2000

At the request of the Tribunal, the Claimants submit additional information.

December 19, 2000

The parties exchange and submit their respective post-hearing memorials.

December 29, 2000

The Respondent files additional documentation concerning costs.

January 5, 2001

The Claimants file additional documentation concerning costs.

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Disputes Before the Centre

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May 18, 2001

The Tribunal declares the proceeding closed.

June 25, 2001

The Tribunal renders its award.

- **Philippe Gruslin v. Malaysia (Case No. ARB/99/3)—Annulment Proceeding**

December 19, 2000

The Secretary-General registers an application submitted by the Claimant for annulment of the award of November 28, 2000.

January 26, 2001

The *ad hoc* Committee is constituted. Its members are: Thomas Buergenthal (U.S.), President; Kamal Hossain (Bangladeshi); and Gabrielle Kaufmann-Kohler (Swiss).

April 25, 2001

The *ad hoc* Committee informs the parties that it has decided to stay the annulment proceeding for lack of payment in accordance with Administrative and Financial Regulation 14(3)(d).

- **Marvin Roy Feldman Karpa v. United Mexican States (Case No. ARB(AF)/99/1)**

December 6, 2000

The Tribunal issues its Interim Decision on Preliminary Questions of Jurisdiction and a procedural order on the schedule of the proceeding and other procedural issues raised by the parties.

December 29, 2000

The parties file their respective submissions on the production of documents.

February 5, 2001

The Tribunal issues directions regarding the production of documents.

March 30, 2001

The Claimant files his memorial on the merits.

May 24, 2001

The Respondent files its counter-memorial on the merits.

June 11, 2001

The Claimant files his reply.

June 19, 2001

The Tribunal issues a procedural order concerning the marshalling of evidence at the hearing.

June 25, 2001

The Respondent files its rejoinder.

- **Empresa Nacional de Electricidad S.A. v. Argentine Republic (Case No. ARB/99/4)**

December 14, 2000

The Claimant requests the discontinuance of the proceedings under Arbitration Rule 44 and on the same date the Respondent informs the Tribunal that it has no objection to the Claimant's request for the discontinuance of the proceedings.

February 7, 2001

The Tribunal issues an order taking note of the discontinuance of the proceedings pursuant to Arbitration Rule 44.

- **Alimenta S.A. v. Republic of The Gambia (Case No. ARB/99/5)**

March 20, 2001

The parties inform the Centre that they have reached a settlement agreement and request the Tribunal to issue an order taking note of the discontinuance of the proceeding.

May 3, 2001

The Tribunal issues an order taking note of the discontinuance of the proceeding in accordance with Arbitration Rule 43(1).

• **Mondev International Ltd. v. United States of America (Case No. ARB(AF)/99/2)**

December 13, 2000

The Respondent informs the Tribunal that it has received a request, pursuant to the United States Freedom of Information Act, for the release of certain documents submitted during the course of this proceeding.

December 28, 2000

The Claimant files its objections to the release of documents by the Respondent.

January 8, 2001

The Respondent files its observations on the Claimant's objections of December 28, 2000.

January 9, 2001

The Claimant responds to the Respondent's observations of January 8, 2001.

January 25, 2001

The Tribunal issues an order regarding the Respondent's compliance with the United States Freedom of Information Act request.

January 31, 2001

The parties submit a joint request for clarification of the Tribunal's order of January 25, 2001.

February 1, 2001

The Claimant submits its memorial on Liability and Competence.

February 27, 2001

The Tribunal issues an order regarding the parties' joint request for clarification of January 31, 2001.

June 1, 2001

The Respondent submits its counter-memorial on Competence and Liability.

• **Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (Case No. ARB/99/6)**

January 15, 2001

The Claimant files its memorial on the merits.

February 28, 2001

The Respondent files its counter-memorial on the merits.

March 29, 2001

The Claimant files its reply memorial on the merits.

April 12, 2001

The Tribunal grants an extension of the time period within which the Respondent may file its rejoinder memorial on the merits.

May 8, 2001

The Respondent files its rejoinder memorial on the merits.

• **Patrick Mitchell v. Democratic Republic of the Congo (Case No. ARB/99/7)**

January 15, 2001

The Tribunal holds its first session with the parties in Washington, D.C.

March 29, 2001

The Claimant files his memorial on the merits.

• **Zhinvali Development Ltd. v. Republic of Georgia (Case No. ARB/00/1)**

December 19, 2000

The Tribunal holds its first session with the parties in Washington, D.C.

December 22, 2000

The proceeding is suspended pending a decision of the Tribunal on a challenge by the Respondent of an arbitrator.

January 19, 2001

A decision is issued by the other members of the Tribunal rejecting the challenge of an arbitrator.

February 21, 2001

The Claimant files an additional claim.

June 6, 2001

The Claimant files its memorial on the merits.

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Disputes Before the Centre

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- **Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (Case No. ARB/00/2)**

February 16, 2001

The Respondent files its counter-memorial on jurisdiction.

February 28, 2001

The Claimant files its reply on jurisdiction.

March 28, 2001

The Respondent files its rejoinder on jurisdiction.

April 30 and May 1, 2001

The Tribunal holds a hearing on jurisdiction in Washington, D.C.

- **GRAD Associates, P.A. v. Bolivarian Republic of Venezuela (Case No. ARB/00/3)**

January 25, 2001

The Tribunal decides to stay the proceeding for lack of payment from the parties.

- **Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (Case No. ARB/00/4)**

December 21, 2001

The Respondent files its memorial on jurisdiction.

February 16, 2001

The Claimants file their counter-memorial on jurisdiction.

March 16, 2001

The Respondent files its reply on jurisdiction.

April 16, 2001

The Claimants file their rejoinder on jurisdiction.

May 3, 2001

The Tribunal holds its hearing on jurisdiction with the parties in Paris.

- **Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (Case No. ARB/00/5)**

January 16, 2001

The Tribunal is constituted. Its members are: Gabrielle Kaufmann-Kohler (Swiss), President; Karl-Heinz Böckstiegel (German); and Bernardo M. Cremades (Spanish).

February 16, 2001

The Tribunal holds its first session with the parties in Paris.

April 5, 2001

The Respondent files its memorial on jurisdiction.

May 8, 2001

The Claimant files its counter-memorial on jurisdiction.

May 22, 2001

The Respondent files its reply on jurisdiction.

June 6, 2001

The Claimant files its rejoinder on jurisdiction.

June 14, 2001

The Tribunal issues a procedural order regarding a hearing on jurisdiction.

June 28, 2001

The Tribunal holds a hearing on jurisdiction with the parties in Washington, D.C.

- **Consortium R.F.C.C. v. Kingdom of Morocco (Case No. ARB/00/6)**

December 27, 2000

The Respondent files its memorial on jurisdiction.

February 26, 2001

The Claimant files its counter-memorial on jurisdiction.

March 23, 2001

The Respondent files its reply on jurisdiction.

May 4, 2001

The Tribunal holds its hearing on jurisdiction with the parties in Paris.

- **World Duty Free Company Limited v. Republic of Kenya (Case No. ARB/00/7)**

January 15, 2001

The Tribunal holds its first session with the parties in London.

January 29, 2001

The Respondent files a request for provisional measures pursuant to Article 39 of the Arbitration Rules.

February 2, 2001

The Tribunal is reconstituted following the resignation of James R. Crawford. Its new members are: Gilbert Guillaume (French), President; Andrew J. Rogers (Australian); and V.V. Veeder (British).

April 25, 2001

The Tribunal issues its decisions on the Respondent's request for provisional measures.

June 22, 2001

The Claimant files its memorial on the merits.

- **Ridgepointe Overseas Development, Ltd. v. Democratic Republic of the Congo (Case No. ARB/00/8)**

March 26, 2001

The Tribunal is constituted. Its members are: Raúl E. Vinuesa (Argentine), President; Andreas F. Lowenfeld (U.S.); and Brigitte Stern (French).

April 30, 2001

The Tribunal holds its first session with the parties in Geneva.

- **ADF Group Inc. v. United States of America (Case No. ARB(AF)/00/1)**

January 11, 2001

The Tribunal is constituted. Its members are: Florentino P. Feliciano (Philippines), President; Carolyn B. Lamm (U.S.); and Armand de Mestral (Canadian).

February 3, 2001

The Tribunal holds its first session via teleconference with the participation of the parties.

February 26, 2001

The Claimant files its submission on the place of arbitration.

March 19, 2001

The Respondent files its submission on the place of arbitration.

April 3, 2001

The Claimant files its response on the place of arbitration.

April 4, 2001

The parties file a joint submission on the schedule of proceedings and evidence.

April 14, 2001

The Respondent files its observations on the place of arbitration.

May 3, 2001

The Tribunal issues a procedural order concerning the schedule of proceedings and the production of documents.

- **Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2)**

March 13, 2001

The Tribunal is constituted. Its members are: Horacio A. Grigera Naón (Argentine), President; José Carlos Fernández Rozas (Spanish); and Guillermo Aguilar Alvarez (Mexican).

May 7, 2001

The Tribunal holds its first session with the parties in Paris.

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Disputes Before the Centre

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- **Waste Management, Inc. v. United Mexican States (Case No. ARB(AF)/00/3)**

April 30, 2001

The Tribunal is constituted. Its members are: James R. Crawford (Australian), President, Guillermo Aguilar Alvarez (Mexican); and Benjamin R. Civiletti (U.S).

June 8, 2001

The Tribunal holds its first session with the parties in Washington, D.C.

June 8, 2001

The Tribunal issues a procedural order regarding the question of the place of arbitration and the preliminary objection of the Respondent.

- **Generation Ukraine Inc. v. Ukraine (Case No. ARB/00/9)**

February 15, 2001

The Tribunal is constituted. Its members are: Ibrahim F.I. Shihata (Egyptian), President; Eugen Salpius (Austrian); and Jürgen Voss (German).

March 16, 2001

The proceeding is suspended pending a decision on a challenge by the Claimant of an arbitrator.

March 23, 2001

The Respondent files its objections to jurisdiction.

April 13, 2001

The Respondent files an addendum to its objections to jurisdiction.

April 24, 2001

The Tribunal is reconstituted following the resignation of Ibrahim F.I. Shihata. Its members are: Jan Paulsson (French), President; Eugen Salpius (Austrian); and Jürgen Voss (German).

- **Impregilo S.p.A. and Rizanni de Eccher S.p.A. v. United Arab Emirates (Case No. ARB/01/1)**

February 15, 2001

The Secretary-General registers a request for the institution of arbitration proceedings.

- **Antoine Goetz & others v. Republic of Burundi (Case No. ARB/01/2)**

March 27, 2001

The Secretary-General registers a request for the institution of arbitration proceedings.

- **Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (Case No. ARB/01/3)**

April 11, 2001

The Secretary-General registers a request for the institution of arbitration proceedings.

- **AES Summit Generation Limited v. Republic of Hungary (Case No. ARB/01/4)**

April 25, 2001

The Secretary-General registers a request for the institution of arbitration proceedings.

- **Société d'Exploitation des Mines d'Or de Sadiola S.A. (SEMOS) v. Republic of Mali (Case No. ARB/01/5)**

May 24, 2001

The Secretary-General registers a request for the institution of arbitration proceedings.

- **AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan (Case No. ARB/01/6)**

June 4, 2001

The Secretary-General registers a request for the institution of arbitration proceedings.

Federalism, NAFTA Chapter Eleven and the Jay Treaty of 1794

By Barton Legum

Remarks presented in a panel discussion on "Investment Disputes and NAFTA Chapter Eleven" at the 95th Annual Meeting of the American Society of International Law held in Washington, D.C. on April 4-7, 2001.

Mr. Legum is an attorney in the Office of the Legal Adviser, United States Department of State, where he represents the United States in investor-State arbitrations under the NAFTA. The views expressed here are made in Mr. Legum's private capacity and do not necessarily represent those of the Department or the United States Government.

I would like to address here a question that I am sometimes asked by US lawyers. The question usually comes up in the course of my explaining the curious thing I am now doing for a living and why it is exactly that Canadian and Mexican investors can now, in some special international forum, sue the US federal government for acts of state and local governments within the US. The question often includes a reference to traditional notions of national sovereignty and the proper relationship between the federal and state governments within the US constitutional system. It is a question that—as the recent constitutional challenge to NAFTA Chapter Eleven in Canada suggests—may be of some interest to Canadian and Mexican jurists as well.

The question, simply put, is what would the Framers of the United States Constitution think of a dispute resolution mechanism that, like investor-State arbitration under the NAFTA, has the following, five characteristics:

First, it allows foreign investors to sue the United States government for damages under international, and not domestic, law;

Second, it allows those investors to claim that state governments within the United States have taken their property or otherwise violated international law;

Third, it requires the federal government of the United States, and not the state govern-

ments, to assume liability for those state-government acts;

Fourth, it requires the federal government's liability to be decided not by judges appointed by the President with the advice and consent of the Senate, but by a panel of international arbitrators; and

Fifth, it contemplates a panel of arbitrators that may be composed of United States nationals, nationals of the State of the foreign investor and a presiding arbitrator who is presumptively selected by agreement.

What, exactly, would the authors of the *Federalist Papers* think of such a derogation from state sovereignty within the US federal system?

Well, the answer to this question is clear, but perhaps not obvious. It is an answer that lies in the early history of the republic.

Each of the five characteristics which I have just outlined is encountered in another setting: that of the dispute resolution mechanism established by the Jay Treaty of 1794 between the US and Great Britain. That treaty was negotiated and signed by John Jay, the first Chief Justice of the United States Supreme Court and one of the authors of *The Federalist Papers*. President George Washington, who eight years earlier had signed the Constitution on

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behalf of Virginia, transmitted the treaty to the United States Senate for its advice and consent in June of 1795. Edmund Randolph, a delegate to the constitutional convention, was Secretary of State. The Senate at that time included six other delegates to the constitutional convention. Alexander Hamilton, another author of the *Federalist Papers*, wrote a series of pamphlets in passionate defense of the treaty. And one of the arbitrators later appointed by the United States pursuant to the treaty was John FitzSimons, another signor of the Constitution.

The Jay Treaty provisions that we are concerned with here focused on a bone of contention between the US and Britain that was first addressed by the Treaty of Peace of 1783 with Britain. The fourth article of that treaty “agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts heretofore contracted.” The fifth article agreed that “the Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects” The sixth article provided that “there shall be no future confiscations made, nor any prosecutions commenced against any . . . persons for or by reason of the part he or they may have taken in the . . . war” of Independence.

The weak central government established in the United States under the Articles of Confederacy proved to be inadequate to ensure enforcement by the states of these provisions of the Treaty of Peace. The refusal of certain of the states to conform to these obligations prevented full implementation of the peace treaty and threatened to cause a renewed war with Britain—a daunting prospect for a country in its infancy. At the constitutional convention convened in 1787, this failure of the Articles of Confederacy was repeatedly held up as a reason for adopting a new constitution.

The 1787 convention adopted a Constitution that proclaimed the supremacy of federal law—including treaties with foreign nations—over

state laws. The new Constitution’s Supremacy Clause provided for judicial enforcement of treaty obligations, even those inconsistent with state laws.

During the course of the first administration under the new Constitution, tensions with Britain increased over the US’s failure to compensate British creditors as promised in the 1783 peace treaty. The US courts’ early implementation of the new Constitution’s Supremacy Clause, unfortunately, did not inspire complete confidence. Notably, one of the newly established federal circuit courts declined to grant relief to a British creditor based on the 1783 treaty—a decision later famously reversed in the case of *Ware v. Hylton*.

Early into his second term, President George Washington proposed to nominate Chief Justice John Jay as a plenipotentiary to negotiate a treaty with Britain resolving these and other issues. After some debate over whether it would be proper for a sitting chief justice to serve the Executive Branch in such a capacity, the Senate gave its advice and consent.

The sixth article of the treaty John Jay negotiated in 1794 acknowledged the difficulty that British creditors had experienced obtaining justice in state courts within the United States. It obligated the US to pay full compensation to the extent that the state courts had failed to satisfy the demands of justice. To adjudicate the creditors’ claims, the treaty provided for five commissioners to be appointed: two by the British government, two by the President of the US with the advice and consent of the Senate, and the fifth by the unanimous consent of the other four, or, failing that, by lot. Two other, similarly constituted tribunals were also established under the treaty, one to arbitrate claims by US nationals against Britain and one to fix part of the border between the United States and Canada.

The commissioners for the claims against the US were selected and sworn in Philadelphia in May 1797. In March 1798, Congress appropriated \$300,000 to fund the payment of awards by the arbitral commission. The commission began its work early in 1798.

Today, the arbitral commissions established under the Jay Treaty are generally viewed as beginning the modern era of international arbitration. The procedure followed by the commission in Philadelphia is familiar in a number of respects: individual British creditors commenced the arbitral proceedings by submitting a "claim"; the parties supplemented their initial pleadings with memoranda called "memorials"; the commission held hearings at which testimony and argument were presented; and the commission rendered reasoned decisions.

The commission continued its work through July 1799, when, following a heated disagreement over the local remedies rule and the date of independence of the United States, and amid severe personality clashes, the US commissioners withdrew. The issue of compensation for the British creditors was finally resolved by a lump-sum settlement agreed to in a Convention of 1802 between Britain and the US.

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What lessons can we learn from this story of the Jay Treaty arbitrations? First, that many of the Framers of the US Constitution considered and approved of an international dispute resolution mechanism with significant overlap in both subject matter and procedure with NAFTA Chapter Eleven. Now, I am not suggesting that the Jay Treaty was uncontroversial two centuries ago—Alexander Hamilton published his defense of the treaty precisely because there *was* a vigorous national debate on the treaty and its compatibility with the new federal-state system. But the pedigree of the Jay Treaty—including Washington, Jay, Adams, Hamilton and others as supporters—and its ratification in the Constitution's first decade provide evidence that the Framers of the Constitution would be far from shocked at NAFTA Chapter Eleven's dispute resolution provision.

A second lesson is that the NAFTA governments' efforts to promote openness in investor-State arbitrations is not a recent innovation. Quite the contrary. The awards in the arbitrations under the Jay Treaty were published. The French and American Claims Commission published over 75 volumes of pleadings, arguments, transcripts, evidence and awards between 1880

and 1884; the Court of Commissioners of Alabama Claims published over 150 volumes during the same decade. The mixed claims commissions established after World War I published thousands of awards in a ten-volume set. Thus, in the historical antecedents to contemporary investor-State arbitration, transparency—not secrecy—was the rule, and not the exception.

A final lesson is that the roots of investor-State arbitration, in this country and elsewhere, run deep. While bilateral investment treaties and ICSID are relatively recent developments, international arbitration addressing similar subjects has existed for centuries. This visible college of international law was founded long ago.

This paper, with reference notes, will be published in the forthcoming 2001 *Proceedings of the 95th Annual Meeting* of the American Society of International Law. We are grateful to the American Society of International Law for its permission to reproduce the paper in *News from ICSID* prior to its publication in the *Proceedings*.

Ibrahim F.I. Shihata

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Board of Executive Directors of the International Fund for Agricultural Development.

During his tenure as Secretary-General of ICSID, Mr. Shihata oversaw a growth of 60 percent in the membership of the Centre to 132 countries and a sixfold increase in the caseload to a total of 75 registered cases. He also greatly strengthened the Centre's research and publications activities, notably by founding the *ICSID Review—Foreign Investment Law Journal*.

Mr. Shihata was the Chairman of the Board of the International Development Law Institute, a member of the *Institut de Droit International* and a member of the International Council for Commercial Arbitration. A prolific writer with three honorary doctorates in law, Mr. Shihata published almost 30 books and more than 200 essays.

His passing away is a great loss to the World Bank and ICSID.

Eighteenth ICSID/AAA/ICC Joint Colloquium

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arbitration. The eighteenth colloquium will be hosted by the ICC International Court of Arbitration. It will take place at the ICC International Secretariat, 38, Cours Albert 1^{er}, 75008 Paris, on Friday, November 16, 2001.

The presentations and the discussions at the eighteenth colloquium will focus on three topics: "Arbitration and ADR: Partners or Adversaries?"; "Defining a 'Party' to an International Arbitration"; and "Recent National Court Developments Regarding International Arbitration."

The colloquium will start with opening remarks on recent institutional developments by Robert Briner, Chairman of the ICC International Court of Arbitration, by William K. Slate II, President and Chief Executive Officer of the AAA, and by Ko-Yung Tung, Secretary-General of ICSID.

The speakers on the topics of the three main sessions of the colloquium will include C. Mark Baker, Horacio Grigera Naón, Louis B. Kimmelman, Carolyn B. Lamm, Serge Lazareff, Francisco Orrego Vicuña, Antonio R. Parra, William K. Slate II and Peter M. Wolrich.

The final program of the colloquium and registration details for participation will be available from ICSID, 1818 H Street, NW, MC6-611, Washington, D.C. 20433, U.S.A. (telephone 202-458-1534; fax 202-522-2027) upon request.

New Designations to the ICSID Panels of Conciliators and of Arbitrators

In accordance with Articles 3 and 12 to 16 of the ICSID Convention, the Centre maintains a Panel of Conciliators and a Panel of Arbitrators. Each party to the Convention may designate to each Panel up to four persons who may but need not be its nationals. The following designations to the Panels have recently been made by Italy, Jordan, New Zealand, Panama and Spain.

Italy

Panels of Conciliators and of Arbitrators

Designations effective June 14, 2001: Piero Bernardini (re-appointment), Andrea Giardina (re-appointment), Umberto Leanza and Georgio Sacerdoti (re-appointment).

Jordan

Panel of Conciliators

Designations effective June 7, 2001: Mohammad E. Bundukji, Hamzeh Ahmed Haddad, Taher M. Hikmet and Rateb A. Wazani.

Panel of Arbitrators

Designations effective June 7, 2001: Hisham R. Hashem (re-appointment), Ahmad Masa'deh, Omar N. Nabulsi (re-appointment) and Samer Salem.

New Zealand

Panel of Arbitrators

Designations effective March 22, 2001: Lord Cooke of Thorndon, Sir Kenneth Keith (re-appointment) and David A.R. Williams (re-appointment).

Panama

Panel of Arbitrators

Designation effective March 4, 2001: Mr. William D. Rogers.

Spain

Panels of Conciliators and of Arbitrators

Designation effective April 27, 2001: Dr. Andrés Rigo Sureda.

New ICSID Publications

The Centre has recently published the Fall 2000 issue of *ICSID Review—Foreign Investment Law Journal*. This special issue of the journal was dedicated to the late Ibrahim F.I. Shihata. The issue reproduced eight tributes originally written for the *Liber Amicorum Ibrahim F.I. Shihata: International Finance and Development Law* (Sabine Schlemmer-Schulte and Ko-Yung Tung (eds.), Kluwer Law International, 2001) on occasion of his retirement from the World Bank and ICSID.

The tributes featured in the issue include: "Settlement of Disputes Between Parties from Developing and Industrial Countries" by Karl-Heinz Böckstiegel; "Ibrahim Shihata and the Resolution of International Investment Disputes: The Masterful Missionary" by Charles N. Brower; "Arbitrating Entitlement to Dormant Bank Accounts" by Thomas Buergenthal; "Freedom of Establishment, Freedom of Capital Movements, and Freedom of Investment" by Patrick Juillard; "Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement" by Francisco Orrego Vicuña; "The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold" by W. Michael Reisman; "Direct Foreign Investment and the Law in Developing Countries" by Jeswald W. Salacuse; and "The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage À Trois*" by Prosper Weil.

Other contributions include an article on the ICC International Court of Arbitration by Richard J. Graving. In addition, the issue contains the full texts of the arbitral awards rendered in two ICSID cases and a decision on jurisdiction issued in another case.

The *ICSID Review—Foreign Investment Law Journal*, which appears twice yearly, is available on a subscription basis from the Johns

Hopkins University Press, Journals Publishing Division, 2715 North Charles Street, Baltimore, Maryland 21218-4363, U.S.A. Annual subscription rates (excluding postal charges) are US\$ 68 for subscribers with a mailing address in a member country of the Organisation for Economic Cooperation and Development and US\$ 35 for others.

Other recent publications of the Centre include *The ICSID Convention: A Commentary*, by Christoph H. Schreuer, which is featured on page 1 of this issue of *News from ICSID*. In addition, two new releases (2000–2) and (2001–1) of ICSID's collection of *Investment Treaties* were issued in December 2000 and March 2001, respectively. The releases contain the texts of 40 bilateral investment treaties concluded by some 41 countries in the period 1991–1999. A new release (2001–1) of the *Investment Laws of the World* collection was also published. The release contains basic foreign investment legislation of Cape Verde, Ecuador, Fiji, Gabon and Nigeria.

Investment Laws of the World (ten volumes) and *Investment Treaties* (seven volumes) may be purchased from Oceana Publications, Inc., 75 Main Street, Dobbs Ferry, New York 10522, U.S.A., at US\$ 950 for the *Investment Laws of the World* collection and US\$ 550 for the *Investment Treaties* collection.

Since the publication of the last issue of *News from ICSID*, a new reprint of the four-volume *History of the ICSID Convention* was published. It consists of a systematic and complete presentation of all relevant preparatory documents, including successive drafts with annotations, proposed amendments, staff memoranda and the records of or the reports on the debates in the Consultative Meetings and the Legal Committee and by the Executive Directors and the Board of Governors of the World Bank. The documents are presented in English, French and Spanish.

The *History of the ICSID Convention* may be purchased from ICSID, 1818 H Street, NW, Washington, D.C. 20433, USA at US\$ 250 for the set of four volumes.

Recent Publications on ICSID

- Dumberry, Patrick, The NAFTA Investment Dispute Settlement Mechanism: A Review of the Latest Case-Law, 2 *Journal of World Investment* 151 (2001).
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- Mignolli, Alessandra, Arbitrato ICSID e tempestività dell'assoggettamento agli arbitri, *Rivista dell'arbitrato* No. 3/2000, at 565–90.
- Obadia, Eloïse, Current Issues in Investment Disputes: Comments, 2 *Journal of World Investment* 219 (2001).
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- Reisman, W. Michael, The Regime for *Lacunae* in ICSID Choice of Law Provision and the Question of Its Threshold, 15 *ICSID Review—Foreign Investment Law Journal* 362 (2000).
- Schreuer, Christoph H., *The ICSID Convention: A Commentary* (Cambridge University Press, 2001).
- Sornarajah, M., *The Settlement of Foreign Investment Disputes* 163–72 (2000).
- Stern, Brigitte, Le consentement à l'arbitrage CIRDI en matière d'investissement international : que disent les travaux préparatoires ?, in *Souveraineté étatique et marchés internationaux à la fin du 20^{ème} siècle, Mélanges en l'honneur de Philippe Kahn, Travaux du CREDIMI, Vol. 20, Paris, Librairies Techniques* (2001), p. 224.

News from ICSID

is published twice yearly by the International Centre for Settlement of Investment Disputes. ICSID would be happy to receive comments from readers of *News from ICSID* about any matters appearing in these pages including the personal contributions of individual writers. Please address all correspondence to: ICSID, 1818 H Street, N.W., Washington, D.C. 20433, U.S.A.