

# NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

Vol. 19, No. 1

Spring 2002

## Disputes Before the Centre

A total of forty-five ICSID Convention and Additional Facility proceedings are currently pending or have been concluded since the publication of the last issue of the *News from ICSID* in December 2001. Eight new arbitration proceedings have been registered during the period, of which seven are ICSID Convention proceedings and one has been initiated under the Additional Facility Rules. The majority of these new arbitration cases were brought to ICSID by foreign investors invoking investor-to-State dispute-settlement provisions contained in multilateral or bilateral investment treaties of the host States concerned. With these new cases, ICSID has, by the end of June 2002, registered a total of 103 cases.

Eight proceedings have been concluded since the publication of the last issue of *News from ICSID*. Two of the concluded proceedings involved applications for annulment of the respective awards, and one was a proceeding for supplementation and rectification of an award. In addition, two proceedings were discontinued at the request of one or both of the parties involved, and one was discontinued by the tribunal for lack of payment of advances for costs. Awards were rendered in two further cases. Jurisdiction was declined by one of these awards; the other allowed part of the claims. Summaries of recent developments in the disputes currently pending before the Centre are provided on pages 2-7 of this issue.

## Malta Signs the ICSID Convention

His Excellency Mr. George Saliba, Malta's Resident Ambassador Extraordinary and Plenipotentiary to the United States and non-resident Ambassador to Mexico and High Commissioner to Canada, signed the ICSID Convention on behalf of his country on April 24, 2002.

Malta thus became the 150<sup>th</sup> State to sign the ICSID Convention. As of the end of June 2002, the number of the signatory States that have also ratified the ICSID Convention to become Contracting States stands at 134.

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](http://www.worldbank.org/icsid)) and from the Centre on request.

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## Disputes Before the Centre

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

*January 8, 2002*  
The Respondent files its rejoinder on annulment.

*January 31 and February 1, 2002*  
The *ad hoc* Committee holds a hearing in Washington, D.C.
- **Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (Case No. ARB/97/4)**

*February 27, 2002*  
The Respondent files its rejoinder.
- **Víctor Pey Casado and President Allende Foundation v. Republic of Chile (Case No. ARB/98/2)**

*May 10, 2002*  
The Tribunal issues a decision joining the objections to jurisdiction to the merits.
- **International Trust Company of Liberia v. Republic of Liberia (Case No. ARB/98/3)**

*June 27, 2002*  
The Centre notifies the parties that, pursuant to Administrative and Financial Regulation 14(3)(d), the Secretary-General will move that the Tribunal discontinue the proceeding.
- **Wena Hotels Limited v. Arab Republic of Egypt (Case No. ARB/98/4)—Annulment Proceeding**

*February 5, 2002*  
The *ad hoc* Committee renders its decision. The decision rejects the application for annulment.
- **The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Case No. ARB(AF)/98/3)**

*January 25, 2002*  
The Respondent files an additional objection to jurisdiction.

*March 1, 2002*  
The Respondent files its memorial on the additional objection to jurisdiction.

*March 31, 2002*  
The Loewen Group, Inc. files its counter-memorial on the additional objection to jurisdiction.

*April 26, 2002*  
The Respondent files its reply on the additional objection to jurisdiction.

*May 24, 2002*  
The Loewen Group, Inc. files its rejoinder on the additional objection to jurisdiction.

*June 6, 2002*  
The Tribunal holds a hearing on the additional objection to jurisdiction in Washington, D.C.
- **Alex Genin and others v. Republic of Estonia (Case No. ARB/99/2)—Supplementary Decision and Rectification Proceeding**

*February 28, 2002*  
The Tribunal declares the proceeding closed.

*April 4, 2002*  
The Tribunal renders its decision on the Claimants' request for supplementary decisions and rectification.
- **Philippe Gruslin v. Malaysia (Case No. ARB/99/3)—Annulment Proceeding**

*March 5, 2002*  
The Secretary-General moves that the *ad hoc* Committee discontinue the proceeding for lack of payment of advances pursuant to Administrative and Financial Regulation 14(3)(d).

*April 2, 2002*

The *ad hoc* Committee issues an order for the discontinuance of the proceeding for lack of payment of advances pursuant to Administrative and Financial Regulation 14(3)(d).

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

*April 12, 2002*

The Claimant submits additional documentation.

*April 17, 2002*

The Tribunal seeks additional observations from the parties.

*May 8, 2002*

The parties submit their additional observations.

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

*May 20–24, 2002*

The Tribunal holds a hearing on competence and liability with the parties in Washington, D.C.

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

*February 14, 2002*

The Tribunal informs the parties that it has declared the proceeding closed.

*April 12, 2002*

The Tribunal renders its award.

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

*January 29, 2002*

The Secretary of the Tribunal informs the parties of the passing away of Mr. Willard Z. Estey. The proceeding is suspended and the

Claimant is invited to appoint a new arbitrator.

*February 7, 2002*

The Claimant files his counter-memorial on jurisdiction.

*February 8, 2002*

The Claimant appoints Marc Lalonde as the new arbitrator.

*February 13, 2002*

The Secretary of the Tribunal informs the parties that Marc Lalonde has accepted his appointment. The Tribunal is reconstituted and the proceeding is resumed.

*March 4, 2002*

The Tribunal fixes time limits for the filing of the reply and the rejoinder on jurisdiction.

*April 19, 2002*

The Respondent files its reply on jurisdiction.

*May 29, 2002*

The Claimant files his rejoinder on jurisdiction.

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

*February 11–15, 2002*

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

*March 26, 2002*

The parties file their post-hearing reply submissions.

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

*March 15, 2002*

The Tribunal renders its award.

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## Disputes Before the Centre

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

*January 17, 2002*

The Centre notifies the parties that, pursuant to Administrative and Financial Regulation 14(3)(d), the Secretary-General will move that the Tribunal discontinue the proceeding.

*February 5, 2002*

The Tribunal issues an order for the discontinuance of the proceeding for lack of payment of advances pursuant to Administrative and Financial Regulation 14(3)(d).

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

*January 31, 2002*

The Claimants file their memorial on the merits.

*May 6, 2002*

The Respondent files its counter-memorial.

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

*May 31, 2002*

The Respondent files its counter-memorial on the merits.

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

*February 22, 2002*

The Claimant files its memorial on the merits.

*June 18, 2002*

The Respondent files its counter-memorial on the merits.

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

*January 17, 2002*

The Claimant files its response to the preliminary objections of the Respondent.

- **Ridgepointe Overseas Developments, Ltd. v. Democratic Republic of the Congo and Générale des Carrières et des Mines (Case No. ARB/00/8)**

*February 22, 2002*

The Respondents file their counter-memorials.

*April 22, 2002*

The proceeding is suspended at the request of the parties.

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

*January 18, 2002*

Canada and Mexico file submissions pursuant to NAFTA Article 1128.

*January 28, 2002*

The Claimant files its reply on competence and liability.

*March 29, 2002*

The Respondent files its rejoinder on competence and liability.

*April 15–18, 2002*

The Tribunal holds a hearing on competence and liability in Washington, D.C.

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

*February 12, 2002*

The Respondent files its counter-memorial on the merits.

*May 20–24, 2002*

The Tribunal holds a hearing on the marshalling of evidence.

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

*February 2, 2002*

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

*February 19, 2002*

The parties file submissions in connection with further information requested by the Tribunal.

*June 28, 2002*

The Tribunal renders its Decision on Mexico's Preliminary Objection Concerning the Previous Proceeding.

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

*March 1, 2002*

The Respondent files its counter-memorial.

*May 6, 2002*

The Claimant submits its reply.

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

*June 25, 2002*

The Tribunal is constituted. Its members are: Prosper Weil (French), President; Jean-Denis Bredin (French); and Ahmed S. El-Kosheri (Egyptian).

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

*February 25, 2002*

At the request of the Claimant, the proceeding is suspended for 90 days.

*May 28, 2002*

The Tribunal resumes the proceedings.

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

*January 3, 2002*

Following a settlement agreed by the parties, the Tribunal issues an order taking note of the discontinuance of the proceeding pursuant to Arbitration Rule 43(1).

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

*February 15, 2002*

The Respondent files its counter-memorial.

*March 14, 2002*

The Claimant files its reply.

*April 16, 2002*

The Respondent files its rejoinder.

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

*February 15, 2002*

The Claimants file their memorial on the merits.

*June 2, 2002*

The Tribunal holds its second session in Paris.

- **MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile (Case No. ARB/01/7)**

*March 5, 2002*

The Tribunal is constituted. Its members are: Guillermo Aguilar Alvarez (Mexican), President; James H. Carter (U.S.); and W. Michael Reisman (U.S.).

*May 29, 2002*

The Tribunal holds its first session in New York.

- **CMS Gas Transmission Company v. Argentine Republic (Case No. ARB/01/8)**

*January 11, 2002*

The Tribunal is constituted. Its members are: Francisco Orrego Vicuña (Chilean), Presi-

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## Disputes Before the Centre

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dent; Marc Lalonde (Canadian); and Francisco Rezek (Brazilian).

February 4, 2002

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

- **Booker plc v. Co-operative Republic of Guyana (Case No. ARB/01/9)**

February 19, 2002

The parties appoint Brigitte Stern as Sole Arbitrator.

May 2, 2002

The Sole Arbitrator holds the first session with the parties in London.

- **Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador) (Case No. ARB/01/10)**

May 22, 2002

The Tribunal is constituted. Its members are: Rodrigo Oreamuno (Costa Rican), President; Bernardo Tobar Carrión (Ecuadorian); and Alberto Wray Espinosa (Ecuadorian).

June 28, 2002

The proceeding is suspended following the resignation of Bernardo Tobar Carrión.

- **Noble Ventures, Inc. v. Republic of Romania (Case No. ARB/01/11)**

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

- **Azurix Corp. v. Argentine Republic (Case No. ARB/01/12)**

April 8, 2002

The Tribunal is constituted. Its members are: Andres Rigo Sureda (Spanish), President; Elihu Lauterpacht (British); and Daniel H. Martins (Uruguayan).

May 16, 2002

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

- **SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (Case No. ARB/01/13)**

April 25, 2002

The Tribunal is constituted. Its members are: Florentino P. Feliciano (Philippines), President; André J.E. Faurès (Belgian); and Toby Landau (British).

May 7, 2002

The Claimant files a request for provisional measures.

- **F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago (Case No. ARB/01/14)**

June 19, 2002

The Tribunal is constituted. Its members are: Fali S. Nariman (Indian), President; Franklin Berman (British); and Michael Mustill (British).

- **Fireman's Fund Insurance Company v. United Mexican States (Case No. ARB(AF)/02/1)**

January 15, 2002

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

May 17, 2002

The Tribunal is constituted. Its members are: Albert Jan van den Berg (Dutch), President; Andreas F. Lowenfeld (U.S.); and Francisco Carrillo Gamboa (Mexican).

- **LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (Case No. ARB/02/1)**

January 31, 2002

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

- **Impregilo S.p.A. v. Islamic Republic of Pakistan (Case No. ARB/02/2)**

February 12, 2002

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

June 11, 2002

Following a request of the Claimant for the discontinuance of the proceeding, the Secretary-General issues an order taking note of the discontinuance pursuant to Arbitration Rule 44.

- **Aguas del Tunari S.A. v. Republic of Bolivia (Case No. ARB/02/3)**

February 25, 2002

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

- **Lafarge v. Republic of Cameroon (Case No. ARB/02/4)**

April 22, 2002

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

- **PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (Case No. ARB/02/5)**

May 2, 2002

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

- **SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Case No. ARB/02/6)**

June 6, 2002

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

- **Hussein Nuaman Soufraki v. United Arab Emirates (Case No. ARB/02/7)**

June 18, 2002

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

## American Society of International Law Honors Memory of Ibrahim F.I. Shihata

*At its Annual Dinner held on March 15, 2002 in the Washington Monarch Hotel, the American Society of International Law awarded Honorary Membership in the Society to the late Ibrahim F.I. Shihata, past Senior Vice-President and General Counsel of the World Bank and Secretary-General of ICSID. The Certificate of Election to Honorary Membership was presented to the family of Dr. Shihata by Judge Charles N. Brower, former President of the Society. Below are Judge Brower's remarks on that occasion:*

Periodically the Society elects as honorary member a person not a citizen of the United States of America who has rendered "distinguished contributions or service in the field of international law."

This year the Society has elected Dr. Ibrahim F.I. Shihata, formerly Senior Vice President and General Counsel of the World Bank, who, sadly, died May 28 of last year.

Among our peers to be held a gentleman and a scholar is the ultimate attainment.

That Ibrahim was a scholar is evident. From the publication in 1965 of his Harvard S.J.D. thesis on "The Power of the International Court of Justice to Determine Its Own Jurisdiction" through his early years in the academy at Ain Shams University in Cairo and his more than 250 articles and two dozen books to his membership in the Institut de Droit International his scholarship was of the highest order.

And anyone who ever met Ibrahim could not help but conclude that this was above all a true gentleman.

But gentlemanliness and scholarship in Ibrahim's case also formed the roots from which there flourished a long and broad career as a builder of institutions, devoted to designing,

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## American Society . . .

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creating and guiding a series of international organizations. They numbered a dozen and all of them relate to economic development:

- Kuwait Fund for Arab Economic Development
- Arab Fund for Economic and Social Development
- Inter-Arab Investment Guarantee Corporation
- Arab Bank for Economic Development in Africa
- OPEC Fund for International Development
- International Fund for Agricultural Development
- International Development Law Institute
- International Bank for Reconstruction and Development
- Multilateral Investment Guarantee Agency
- Global Environmental Facility
- World Bank Inspection Panel
- International Centre for Settlement of Investment Disputes

Ibrahim's commitment to the betterment of the human condition was total and it was unremitting. My wife Carmen and I will long remember the day several years ago when at the conclusion of a conference at Hurghada on the Red Sea, Ibrahim, accompanied by his daughter Yasmin, invited us to motor up the Red Sea coast with them by boat to visit one of Ibrahim's oldest and best friends, a very successful Egyptian businessman, who lived in quite comfortable circumstances. Amidst the creature comforts that surrounded all of us that day, Ibrahim pointedly reminded his friend, with unmistakable purpose, that it continued to be incumbent upon them both to see to it that the lot of their far less fortunate countrymen should improve.

Ibrahim's was a life dedicated to mankind, informed by intellectual excellence and conducted on the highest moral principles.

It is my great pleasure on behalf of the Society now to present the certificate of his election to honorary membership to his widow Samia and

his daughter Nadia, who, in the best Shihata tradition, serve currently, respectively, as a senior official of the International Monetary Fund and Editor-in-Chief of the Michigan Law Review.

## 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 Honduras, Luxembourg, Saudi Arabia and Venezuela.

### HONDURAS

#### *Panels of Conciliators and of Arbitrators*

Designations effective February 13, 2002: Policarpo Callejas Bonilla and Carlos López Contreras.

### LUXEMBOURG

#### *Panels of Conciliators and of Arbitrators*

Designations effective January 15, 2002: Philippe Dupont, Steve Jacoby, Alex Schmitt and Marc Seimetz.

### SAUDI ARABIA

#### *Panels of Conciliators and of Arbitrators*

Designation effective May 6, 2002: Sherif Omar Hassan.

### VENEZUELA

#### *Panel of Arbitrators*

Designation effective March 7, 2002: Gustavo Alvarez Arias. Designation effective April 25, 2002: Jesús Eduardo Cabrera Romero.



## Arbitration and Investment Disputes — Are We Heading in the Right Direction?

By Margrete Stevens, Senior Counsel, ICSID

*A paper delivered at the AAA/Canadian Bar Association Conference on “International Dispute Resolution — A View from Within,” held in Montreal on April 26-27, 2002.*

The question that I have been asked to address today — “Arbitration and Investment Disputes — Are We Heading in the Right Direction?” — is one that initially caused me some ambivalence. This was because an assessment of the “Right Direction” might require a discussion of whether this type of dispute settlement mechanism has shown itself to balance sufficiently the interests of investors with those of host States, particularly in cases brought under investment treaties. My reluctance to embark on such a discussion stemmed in part from the belief that it seemed premature to examine a system that so far has produced relatively few awards. But it also stemmed from the fact that the issues on which tribunals have been called upon to decide have been marked by tremendous diversity: they have included legal issues arising under the ICSID Convention, under investment treaties, under general international law, and under different systems of domestic law. Furthermore, there has been great variety in the fact situations underlying the disputes, requiring tribunals to examine economic activity in many different sectors of the economy, in all parts of the world.

I did not think, therefore, that one could speak of investor-state arbitration going in a particular direction, at least not yet. What I propose to do instead is to share with you some of the issues that have been addressed by tribunals in recent decisions, showing the considerable complexity of bringing cases under bilateral investment treaties (BITs). First, however, I would like to say a few words about the International Centre for Settlement of Investment Disputes, or ICSID, and about the impact that the explosion of investment treaties has had on ICSID’s caseload.

ICSID is one of the five organizations that form the World Bank group. The Centre offers facilities for the conciliation and arbitration of investment disputes between Contracting States

and nationals of other Contracting States. The Centre came into existence nearly forty years ago when the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) entered into force.

While membership of ICSID grew at a steady pace, the number of cases brought to ICSID remained small for many years. This changed in the mid to late 1980s when countries widely began to conclude bilateral investment treaties containing the consent or “offer” of each state to submit to ICSID arbitration disputes with investors from the other state. There are today some 2,000 bilateral investment treaties. In the past ten years the NAFTA and several other multilateral treaties covering investment have also been concluded.

Most of the investment treaties include dispute settlement provisions that refer to ICSID, that is to ICSID Convention arbitration and, in increasing numbers, to arbitration under ICSID’s Additional Facility Rules. These are the rules under which the Centre may administer certain types of disputes that fall outside the Convention including arbitration proceedings where either the host state or the home state of the investor is not an ICSID member.

The explosion in the number of BITs is reflected in ICSID’s caseload. This week ICSID registered its 100th case. While this might seem a modest milestone for an institution that has been around for nearly forty years, the reality is different: Of ICSID’s 100 cases, 60 proceedings were instituted in the past five years; and of these, three quarters were brought under investment treaties.

The proliferation of investor-state disputes has brought about considerable interest in the dispute settlement provisions contained in investment treaties. Such interest stems in part from the increase in the number of cases but

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## Arbitration and Investment Disputes

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perhaps more so, from the broad scope of the clauses that allow investors to bring arbitral proceedings against sovereign states. Most investment treaties, for example, include expansive, non-exhaustive definitions of the notion of investment covering a wide range economic activities. Covered investments and investors are, under most treaties, guaranteed national and most favored nation treatment, as well as fair and equitable treatment. The treaties generally prohibit the expropriation of investments — and measures tantamount to expropriation — except in the public interest and against prompt, adequate and effective compensation.

I will now turn to some recent awards that have been decided under BITs.

The first case, brought under the US – Sri Lanka bilateral investment treaty, concerned a claim for pre-contractual expenditures incurred in connection with the development of a power plant project in Sri Lanka. The claimant was a US corporation organized under the laws of California. In bringing the case the claimant sought to file claims under the ICSID Convention both in its own name as well as on behalf of its Canadian partner, a company organized under the laws of Ontario. The claimant based its right to do so on two grounds: first, that the laws of California, under which the partnership was founded, allowed it to proceed in this manner. Second, that it was the lawful assignee of all rights, interests and claims of its Canadian partner insofar as the assignment agreement was valid both under the laws of California and of Ontario.

Sri Lanka opposed these arguments saying that there was no evidence of any partnership; that its negotiations had taken place only with the Canadian entity; and that the nature of its relationship with the Canadian company precluded any possibility of assignment.

The tribunal decided the partnership issue first. It noted that there was no doubt as to the status of the US company as the claimant in the case. It also noted that the partnership had not acquired separate legal personality, nor had it

divested any of the partners of their original nationality.

The tribunal went on to say that the existence of such a partnership, wherever or however formed, could neither add to, nor subtract from, the capacity of the claimant to bring a case against the respondent. As a result, the US company was precluded from bringing claims on behalf of its Canadian partner under the partnership agreement.

In regard to the assignment agreement, the tribunal observed that the Canadian company could not invoke the ICSID Convention because Canada was not an ICSID member country. The tribunal said that it followed that whatever rights the claimant had against Sri Lanka could not be improved by the process of assignment, because no one could transfer a better title than what he had. The tribunal also recalled that the ICSID Convention was a “carefully structured system” under which a claim could not be assigned as if it were some type of negotiable instrument. The tribunal therefore concluded that the US corporation could proceed with a claim against Sri Lanka but only in its own name.

The tribunal then had to deal with the second objection to jurisdiction, namely that there was no investment. On this issue the claimant submitted that it had been granted a period of exclusivity by the government of Sri Lanka for the development of the power project. A Letter of Intent had been issued which spelled out certain steps in the negotiations while providing that “it did not constitute an obligation binding on any party.”

It did say, however, that the government had to use its best efforts to consummate the transactions contemplated by the Letter. There followed negotiations which led to the issuance of a Letter of Agreement which again stipulated that there was no contractual obligations on any party. This was followed by a Letter of Extension under which the exclusivity period was extended. In the event, the parties failed to enter into a contract.

The issue before the tribunal was whether the expenditures incurred by the claimant following the execution of the Letter of Intent constituted an investment under the ICSID Convention. The tribunal did not reject the fact that the claimant had incurred certain expenses.

It said, however, that the claimant had not succeeded in proving that treaty interpretation or the practice of States — let alone that of developing countries — automatically included pre-contractual expenses in the definition of investment. The tribunal said that the unilateral or internal characterization of certain expenditures did not suffice to qualify such expenditures as an investment. The tribunal emphasized the particular circumstances of the case, and said that similar expenditures might be an investment under different circumstances. If, for example, the contract had been concluded, capitalized development costs might, retrospectively, have been subsumed under “the umbrella of an investment.” In the present case, however, the tribunal noted that none of the documents created a contractual obligation for the building, ownership and operation of the power station; and that the claimant’s right to exclusivity never matured into a final contract.

The tribunal concluded that Sri Lanka had made sufficiently clear that it was not willing to accept that contractual relations had been entered into and that an investment had been made. The tribunal said that during negotiations, even in the absence of any contractual relationship, obligations might arise such as, for example, the obligation to act in good faith. Further, that such obligations, if breached, might entitle a party to damages, or some other remedy. The tribunal made clear, however, that such remedies did not arise because of an investment, but because the requirements of proper conduct in relation to negotiations for an investment might have been breached. That type of claim, the tribunal said, “is not one to which the Convention has anything to say. They are not arbitrable as a consequence of the Convention.”

In another recent case the tribunal was called upon to determine whether the revocation by a central bank of a banking license constituted a breach of the bilateral investment treaty. The tribunal noted that while the procedure followed for the withdrawal conformed to domestic law, and did not amount to a denial of due process, it could nevertheless be characterized as contrary to generally accepted banking and regulatory practice.

The procedures that were challenged included that:

- no formal notice had been given that the license would be revoked unless certain demands were met by a certain time; that
- no representative of the license holder had been asked to attend the session at the central bank that considered the revocation; and that
- the revocation of the license had been made effective with immediate effect, thereby depriving the license holder of any opportunity to challenge it in court before it was publicly announced.

The tribunal said that while the procedures followed appeared very technical and invited criticism, they did not rise to the level of a violation of any provision of the BIT. The tribunal said that the decision taken by the central bank had to be taken in its proper context — “a context comprised of serious and entirely reasonable misgivings regarding the licensee’s management, its operations, its investments and, ultimately, its soundness as a financial institution.”

The tribunal, however, not only examined the context for the withdrawal of the license. It also took into account the importance of the particular circumstances under which the dispute had arisen in the first place, noting that the respondent was “a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown.”

Let me conclude by saying the following:

Arbitration has been used as a method for the settlement of investment disputes for many years. The new dimension is the proliferation of investor-state arbitration clauses in investment treaties, including the references to international law standards that the treaties contain. The new network of treaties has without doubt expanded investors’ access to arbitration of disputes with host States. Having said that, there can also be no doubt that succeeding in such proceedings remains a complex matter as the two cases that I have described today illustrate.

## New ICSID Publications

The Centre recently published the thirty-second (Fall 2001) issue of the *ICSID Review—Foreign Investment Law Journal*. The issue included an article by Patrick G. Foy and Robert J.C. Deane on recent developments in cases under the Investment Chapter of the NAFTA; by John P. Bownan on dispute resolution planning for the oil and gas industry; and by Markham Ball on assessing damages in claims by foreign investors against host States. An article by Maurizio Ragazzi on the signing and ratifying international financial agreements was also published in the issue. English translations of the texts of the Kyrgyz and Romanian laws on treaties appear as annexes to that article.

In addition, the issue reproduced the full texts of the decision upholding jurisdiction in *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5); and the decision on provisional measures rendered in *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2). The issue also contained the full text of the award rendered in *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic* (ICSID Case No. ARB/97/3).

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\$70 for subscribers with 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 a new release (2002-1) of ICSID's collection of *Investment Treaties*. The release was issued in April 2002, and contained the texts of twenty bilateral investment treaties concluded by some twenty-nine countries in the period 1991–1999. With this new release, the collection now contains texts of some 860 bilateral investment treaties.

A new release for the collection of *Investment Laws of the World* was also published in February 2002. The release contained the relevant foreign investment legislation of the Federated States of Micronesia, Lithuania, Mauritius, Moldova, Nepal and Nicaragua.

*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.

### 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.