

NEWS FROM ICSID



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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TWENTIETH JOINT AAA/ICC/ICSID JOINT COLLOQUIUM ON INTERNATIONAL ARBITRATION WASHINGTON, D.C., NOVEMBER 14, 2003

This is the twentieth year in which ICSID, the American Arbitration Association (AAA), the International Chamber of Commerce (ICC) International Court of Arbitration will be co-sponsoring their series of joint colloquia on international arbitration. The colloquium will be hosted this year by ICSID, and will be held on November 14, 2003, at the headquarters of the World Bank in Washington, D.C.

The program of the colloquium has been divided into two sessions, which will include four panel discussions on topics of current interest in international arbitration. The panels will address issues pertaining to instituting arbitral proceedings, publication of proceedings and awards and will examine distinctive features of procedure and applicable law of arbitration involving state parties. Periods for informal discussions will follow the presentations of the speakers of each of the four panels.

The program, including information on registration, is announced on the back page of this issue and on the website of the Centre at www.worldbank.org/icsid.

LCIA SYMPOSIUM IN CO-OPERATION WITH ICSID

This symposium will be held at the Fairmont Hotel, Washington, D.C. on November 15, 2003.

For further details see page 15 ▶

CAVEAT INVESTOR: THE MEANING OF "EXPROPRIATION" AND THE PROTECTION AFFORDED INVESTORS UNDER NAFTA

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The following paper was delivered at the District of Columbia Bar, International Law Section, International Dispute Resolution Committee workshop on "The Emerging Law of Foreign Investment: Substantive Issues Arising under NAFTA and BITs" held in Washington, D.C. on January 8, 2003. The author would like to thank his partner, Stephen L. Drymer, for his invaluable help in the preparation of this paper.

The substantive meaning of many of the investor-protection standards common to bilateral investment treaties (BITs) and other international trade and investment agreements is still "very much in flux."

continued on page 10 ▶

IN THIS ISSUE

Disputes before the Centre	2
New Designations to the ICSID Panels of Conciliators and of Arbitrators	9
Membership News	13
New ICSID Publications	14
Recent Books and Articles on ICSID	14
LCIA Symposium in co-operation with ICSID	15

DISPUTES BEFORE THE CENTRE

Since the publication of the last issue of *News from ICSID*, the caseload of the Centre continued its rapid growth. Fifteen new arbitration proceedings were registered in the period January-June 2003. These new proceedings were all initiated under investor-to-State dispute-settlement provisions of bilateral investment treaties. With these new cases, ICSID has, by the end of June 2003, registered a total of 129 cases.

Awards have been rendered in five of the arbitration proceedings that have been concluded since the publication of the last issue of *News from ICSID*. Three of these awards upheld the claims involved in whole or in part. The other two dismissed the claims on the merits or for lack of jurisdiction. NAFTA Chapter Eleven claims were involved in two of the cases that were concluded with awards in the period. One further ICSID arbitration proceeding was discontinued at the request of the parties concerned following an amicable settlement, of the dispute, and another proceeding was discontinued by a decision of the tribunal for non-payment of the required advances.

Another development was the conclusion of two proceedings in which parties involved sought post-award remedies. An *ad hoc* committee, hearing a request for supplementary decisions and rectification of a decision on annulment of an awards pursuant to Article 52 of the ICSID Convention, rendered its final decision. In another proceeding, a party applied to the tribunal for rectification and interpretation of the award. The tribunal recently rendered its decision, partially granting the request for rectification of its award and denying the request for interpretation.

Developments, since the publication of the last issue of *News from ICSID*, in the disputes currently pending before the Centre are set out below.

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

May 28, 2003

The *ad hoc* Committee renders its decision concerning the Argentine Republic's request for supplementary decisions and rectification.

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

January 31, 2003

The parties file their first post-hearing briefs.

April 14-18, 2003

The Tribunal holds a hearing in Prague.

June 20, 2003

The parties file post-hearing submissions.

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

February 3, 2003

The Respondent files its counter-memorial on jurisdiction and the merits.

March 3, 2003

The Claimants file their reply on jurisdiction and the merits.

April 4, 2003

The Respondent files its rejoinder on jurisdiction and the merits.

May 4-6, 2003

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

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

June 26, 2003

The Tribunal renders its award.

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

January 30, 2003

The Respondent files a request for interpretation, correction and supplementary decision.

February 26, 2003

The Claimant files his observations on the Respondent's request of January 30, 2003.

March 5, 2003

The Respondent files its response to the Claimant's observations of February 26, 2003.

March 12, 2003

The Claimant files his reply on the Respondent's request of January 30, 2003.

June 13, 2003

The Tribunal issues its decision on the Respondent's request of January 30, 2003.

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

January 15, 2003

The Respondent files its reply to the Claimant's additional observations.

March 10, 2003

The Tribunal submits questions to the parties.

April 29, 2003

The parties file their responses to the Tribunal's questions of March 10, 2003.

May 27, 2003

The Claimant files his reply to the Respondent's response of April 29, 2003.

June 17, 2003

The Respondent files its reply to the Claimant's response of April 29, 2003.

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

January 24, 2003

The Tribunal renders its award.

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

January 27-30, 2003

The Tribunal holds a hearing on the merits in Paris.

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

February 7, 2003

The parties file their post-hearing briefs.

March 21, 2003

The parties file their post-hearing replies.

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

March 17-20, 2003

The Tribunal holds a hearing on the merits in Paris.

May 16, 2003

The Claimant files its final memorial on the merits.

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

April 21, 2003

The Respondent files its counter-memorial.

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

August 14, 2002 – June 16, 2003

The Tribunal issues successive procedural orders suspending the proceeding.

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

January 2, 2003

The Tribunal declares the proceeding closed.

January 9, 2003

The Tribunal renders its award.

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

April 9, 2003

The Tribunal declares the proceeding closed.

May 29, 2003

The Tribunal renders its award.

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

January 23, 2003

The Claimant files its reply on the merits.

March 7, 2003

The Respondent files its rejoinder on the merits.

April 7-10, 2003

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

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

February 17-21, 2003 and March 17-21, 2003

The Tribunal holds hearings on jurisdiction and the merits in Paris.

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

January 10, 2003

The Claimants file their memorial on jurisdiction and the merits.

May 8, 2003

The Respondent files its counter-memorial on jurisdiction and the merits.

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

January 17, 2003

The Respondent files its memorial on jurisdiction.

March 25, 2003

The Claimants file an additional claim.

March 31, 2003

The Claimants file their counter-memorial on jurisdiction.

May 20, 2003

The Respondent files its reply on jurisdiction.

June 26, 2003

The Claimants file their rejoinder on jurisdiction.

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

February 25, 2003

The Tribunal renders its award.

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

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

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

January 29, 2003

The Tribunal is reconstituted. Its members are: Andrés Rigo Sureda (Spanish), President; Marc Lalonde (Canadian); and Rodrigo Oreamuno Blanco (Costa Rican).

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

February 11, 2003

The Respondent files its reply on jurisdiction.

March 25, 2003

The Claimant files its rejoinder on jurisdiction.

April 7-8, 2003

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

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

January 30, 2003

The Claimant files its rejoinder on jurisdiction and the merits.

February 17, 2003

The Respondent files its reply to the Claimant's rejoinder on jurisdiction and the merits.

March 25, 2003

The Claimant files a request for the discontinuance of the proceeding and the Respondent advises the Tribunal that it has no objections to the discontinuance.

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

January 23, 2003

The Tribunal issues its decision on jurisdiction.

March 12, 2003

The Claimant files its memorial on the merits.

April 16, 2003

The Respondent files its counter-memorial on the merits.

May 8, 2003

The Claimant files its reply.

May 29, 2003

The Respondent files its rejoinder.

June 5, 2003

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

June 23-25, 2003

The Tribunal holds a hearing on the merits in Quito.

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

January 15, 2003

The Tribunal is constituted. Its members are: Karl-Heinz Böckstiegel (German), President; Jeremy Lever (British); and Pierre-Marie Dupuy (French).

March 10, 2003

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

June 3, 2003

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

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

March 7, 2003

The Respondent files its objections to jurisdiction.

May 13, 2003

The Claimant files its counter-memorial on jurisdiction.

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

January 10, 2003

The Respondent files its reply on jurisdiction.

February 10, 2003

The Claimant files its rejoinder on jurisdiction.

February 13-14, 2003

The Tribunal holds a hearing on jurisdiction in Paris.

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

February 28, 2003

The Claimant files its memorial on the merits.

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

February 6-7, 2003

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

February 27, 2003

Canada and the United States of America file their NAFTA Article 1128 submissions.

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

March 31, 2003

The Claimants file their memorial on the merits.

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

January 17, 2003

The Respondent files its objection to jurisdiction.

April 8, 2003

The Tribunal issues a procedural order on the production of evidence and on the schedule for the filing of submissions on jurisdiction.

June 4, 2003

The Claimant files its memorial on the Respondent's objections to jurisdiction.

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

June 13, 2003

The proceeding is discontinued at the request of the parties following an amicable settlement of the dispute.

■ **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)**

January 8, 2003

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

April 3, 2003

The Respondent files its memorial on jurisdiction.

June 27, 2003

The Claimants file their counter-memorial on jurisdiction.

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

January 31, 2003

The Claimant files its counter-memorial on jurisdiction.

March 14, 2003

The Respondent files its reply on jurisdiction.

May 6, 2003

The Claimant files its rejoinder on jurisdiction.

May 26-27, 2003

The Tribunal holds a hearing on jurisdiction in Paris.

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

February 3, 2003

The Respondent files its memorial on jurisdiction.

March 3, 2003

The Claimant files its counter-memorial on jurisdiction.

March 31, 2003

The Respondent files a supplementary pleading on jurisdiction.

May 2, 2003

The Claimant files a supplementary pleading on jurisdiction.

May 7, 2003

The Tribunal holds a hearing on jurisdiction in London.

June 30, 2003

The parties file post-hearing briefs on jurisdiction.

■ **Siemens A.G. v. Argentine Republic (Case No. ARB/02/8)**

February 13, 2003

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

March 17, 2003

The Claimant files its memorial on the merits.

■ **Champion Trading Company and others v. Arab Republic of Egypt (Case No. ARB/02/9)**

January 31, 2003

The Tribunal is constituted. Its members are: Robert Briner (Swiss), President; L. Yves Fortier (Canadian); and Laurent Aynès (French).

March 7, 2003

The Tribunal holds its first session in Paris.

April 18, 2003

The Respondent files its memorial on jurisdiction.

May 30, 2003

The Claimants file their counter-memorial on jurisdiction.

June 19, 2003

The Respondent files a supplementary pleading on jurisdiction.

June 27, 2003

The Tribunal holds a hearing on jurisdiction in Paris.

■ **IBM World Trade Corp. v. Republic of Ecuador (Case No. ARB/02/10)**

April 15, 2003

The Tribunal is constituted. Its members are: Rodrigo Jijón Letort (Ecuadorian), President; Alejandro Ponce Martínez (Ecuadorian); and León Roldós Aguilera (Ecuadorian).

June 5, 2003

The Tribunal holds its first session in Quito.

■ **Enrho St Limited v. Republic of Kazakhstan (Case No. ARB/02/11)**

April 15, 2003

The Tribunal is constituted. Its members are: Jan Paulsson (French), President; Ahmed S. El-Kosheri (Egyptian); and Albert Jan van den Berg (Netherlands).

June 10, 2003

The Tribunal holds its first session in London.

■ **JacobsGibb Limited v. Hashemite Kingdom of Jordan (Case No. ARB/02/12)**

February 4, 2003

The Tribunal is constituted. Its members are: Karl-Heinz Böckstiegel (German), President; Giorgio Sacerdoti (Italian); and James R. Crawford (Australian).

April 25, 2003

The Tribunal holds its first session in Paris.

May 30, 2003

The Respondent files a memorial in opposition to the Claimant's request for provisional measures.

June 6, 2003

The Claimant files a further submission concerning its request for provisional measures.

June 16, 2003

The Respondent files a further reply in opposition to the Claimant's request for provisional measures.

■ **Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan (Case No. ARB/02/13)**

March 18, 2003

The Tribunal is constituted. Its members are: Gilbert Guillaume (French), President; Bernardo Cremades (Spanish); and Eric Schwartz (U.S.).

June 3, 2003

The Tribunal is reconstituted. Its members are: Gilbert Guillaume (French), President; Bernardo Cremades (Spanish); and Ian Sinclair (British).

■ **CDC Group plc v. Republic of the Seychelles (Case No. ARB/02/14)**

February 10, 2003

The Sole Arbitrator holds his first session in Sydney.

March 17, 2003

The Respondent files its counter-memorial on jurisdiction and the merits.

April 17, 2003

The Claimant files its reply on jurisdiction and the merits.

April 29, 2003

The Respondent supplements its submission of March 17, 2003.

May 13, 2003

The Respondent files its rejoinder.

■ **Ahmonseto, Inc. and others v. Arab Republic of Egypt (Case No. ARB/02/15)**

January 29, 2003

The Tribunal is constituted. Its members are: Pierre Tercier (Swiss), President; Ibrahim Fadlallah (Lebanese/French); and Alain Viandier (French).

March 4, 2003

The Tribunal holds its first session in Paris.

April 2, 2003

The Claimants file a request for provisional measures.

April 30, 2003

The Respondent files its reply to the Claimants' request for provisional measures.

May 22, 2003

The Claimants file their reply in support of their request for provisional measures.

June 9, 2003

The Respondent files its rejoinder on provisional measures.

June 13, 2003

The Tribunal holds a hearing on provisional measures in Paris.

■ **Sempre Energy International v. Argentine Republic (Case No. ARB/02/16)**

May 5, 2003

The Tribunal is constituted. Its members are: Francisco Orrego Vicuña (Chilean), President; Marc Lalonde (Canadian); and Sandra Morelli Rico (Colombian).

■ **AES Corporation v. Argentine Republic (Case No. ARB/02/17)**

June 3, 2003

The Tribunal is constituted. Its members are: Pierre-Marie Dupuy (French), President; Karl-Heinz Böckstiegel (German); and Domingo Bello Janeiro (Spanish).

■ **Tokios Tokelés v. Ukraine (Case No. ARB/02/18)**

April 29, 2003

The Tribunal is constituted. Its members are: Prosper Weil (French), President; Daniel M. Price (U.S.); and Piero Bernardini (Italian).

June 3, 2003

The Tribunal holds its first session in Paris. The Claimant files a request for provisional measures.

June 12, 2003

The Respondent files preliminary observations on jurisdiction.

June 13, 2003

The Respondent files a reply on provisional measures.

June 17, 2003

The Claimant files a reply on preliminary observations on jurisdiction.

■ **Ed. Züblin AG v. Kingdom of Saudi Arabia (Case No. ARB/03/1)**

January 28, 2003

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

■ **Camuzzi International S.A. v. Argentine Republic (Case No. ARB/03/2)**

February 27, 2003

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

May 5, 2003

The Tribunal is constituted. Its members are: Francisco Orrego Vicuña (Chilean), President; Marc Lalonde (Canadian); and Sandra Morelli Rico (Colombian).

■ **Impregilo S.p.A. v. Islamic Republic of Pakistan (Case No. ARB/03/3)**

March 3, 2003

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

■ **Lucchetti S.A. and Lucchetti Peru, S.A. v. Republic of Peru (Case No. ARB/03/4)**

March 26, 2003

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

■ **Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (Case No. ARB/03/5)**

April 7, 2003

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

■ **M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador (Case No. ARB/03/6)**

April 8, 2003

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

■ **Camuzzi International S.A. v. Argentine Republic (Case No. ARB/03/7)**

April 23, 2003

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

■ **Consortium Groupement L.E.S.I.-DIPENTA v. Algeria (Case No. ARB/03/8)**

May 20, 2003

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

■ **Continental Casualty Company v. Argentine Republic (Case No. ARB/03/9)**

May 22, 2003

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

■ **Gas Natural SDG, S.A. v. Argentine Republic (Case No. ARB/03/10)**

May 29, 2003

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

■ **Joy Mining Machinery Limited v. Arab Republic of Egypt (Case No. ARB/03/11)**

June 2, 2003

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

■ **Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A. v. Argentine Republic (Case No. ARB/03/12)**

June 5, 2003

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

■ **Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic (Case No. ARB/03/13)**

June 6, 2003

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

■ **Miminco LLC and others v. Democratic Republic of the Congo (Case No. ARB/03/14)**

June 9, 2003

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

■ **El Paso Energy International Company v. Argentine Republic (Case No. ARB/03/15)**

June 12, 2003

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

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 Cyprus and Slovenia.

Cyprus

Panel of Conciliators and of Arbitrators

Designations effective February 14, 2003:

Andrew J. Jacovides (re-appointment), Petros Klerides, Lazaros Lazarou, and Georgios Pikiis.

Slovenia

Panel of Conciliators

Designations effective June 6, 2003:

Peter Falatov, Bojan Pečenko, Matej Krumberger, Sergej Simoniti.

Panel of Arbitrators

Designations effective June 6, 2003:

Marko Ilešič, Peter Grilc, Marko Pavliha and Konrad Plauštajner.

CAVEAT INVESTOR: THE MEANING OF “EXPROPRIATION” AND THE PROTECTION AFFORDED INVESTORS UNDER NAFTA

(Continued from cover)

Perhaps nothing better illustrates this proposition than the treatment by international tribunals of claims alleging “expropriation” by the host state. On the one hand, the legal principles applicable to expropriations are relatively clear; one could say that they are generally taken for granted by investors. These principles are reflected in NAFTA Article 1110(1), in the following terms:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a *public purpose*;
- (b) on a *non-discriminatory* basis;
- (c) in accordance with *due process* of law and Article 1105(1); and
- (d) on *payment of compensation* in accordance with paragraphs 2–6 [which provide that compensation must: be “equivalent to the *fair market value* of the expropriated investment immediately before the expropriation took place;” be *paid without delay*; be fully *realizable*; include *interest*; and be freely *transferable*]. (emphasis added)

On the other hand, it is immediately apparent that these provisions, although relatively detailed, lack a precise definition of the term “expropriation.” This is equally true in respect of the vast majority of BITs. Whereas certain factors, or conditions, descriptive of expropriatory conduct by a state are identified—the most common being those relating to “public purpose” and “prompt and adequate compensation”—the question “*what is an expropriation?*” is not addressed directly.

It is therefore not surprising that, in many investor-state disputes, a key issue is whether the actions of the respondent-state constitute or not an “expropriation”—or a “taking”—giving rise to a duty of compensation, as opposed, for example, to mere regulation. In fact, the language of most investor-protection provisions relating to expropriation, and thus the protection actually afforded investors allegedly subject to expropriation, is typically of such generality as to be difficult to apply in specific cases.

The NAFTA provisions which I have cited above go further than many similar clauses, by explicitly bringing within the scope of the concept of “expropriation” not only direct takings, but as well what the Agreement refers to as “*indirect*” expropriation and measures “*tantamount to expropriation*.” This language encompasses a potentially wide variety of state regulatory activity that may interfere with an investor’s property rights in his investment. While acknowledging that the notion of “expropriation” covers such activity, however, what the NAFTA language does *not* do is alleviate the difficulty of determining precisely what sort of conduct by a state constitutes an expropriation.

Outright expropriation is relatively easy to recognize; the state takes over a business, or nationalizes an entire industry, depriving the investors of all meaningful benefits associated with ownership and control. However, it is less clear when state action that interferes with an investor’s property rights “crosses the line” from otherwise valid regulation to compensable taking. For example, taxation measures, by their very nature, could be said to be expropriatory. More particularly, they constitute a form of *indirect* expropriation; they have an effect that is *tantamount to expropriation*; and when implemented over a period of time they could also be called “creeping expropriation.” The term “creeping expropriation” is defined in the American Law Institute’s *Restatement of the Law Third, The Foreign Relations of the United States* (Restatement) as state action which seeks “to achieve the same result [as an out-

right taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned" (*Restatement*, Volume 1, Section 712, Reporter's Note 7 (1987)).

My purpose, however, is not to embark upon a detailed taxonomy of the myriad ways in which states may interfere with foreign investments. Innumerable angels may dance on the head of that pin. And as Shakespeare opined (in *Romeo and Juliet*, II, ii, 43), "What's in a name? / That which we call a rose / By any other name would smell as sweet."

My point is more simple. Simply put, the determination as to whether state conduct is compensable as an expropriation under NAFTA Article 1110(1) (or similar provisions in other agreements) is, in almost all instances, based on the facts of the case in question. Whether characterized as direct, indirect, tantamount to, or creeping—call it as you like it—it inevitably falls to the adjudicator to determine, in the light of the facts at issue, whether particular conduct by a state "crosses the line" that separates valid regulatory activity from expropriation. What this means to foreign investors is that the substance of the protection against expropriation of their investments is not necessarily as sound, and certainly less definitive, than they might otherwise believe.

The *Restatement*, to which I have already referred, is useful in understanding the law in this area. With respect to expropriation, its Section 712 reads in relevant part as follows:

A state is responsible under international law for injury resulting from:

- (1) a taking by the state of the property of a national of another state that
 - (a) is not for a public purpose, or
 - (b) is discriminatory, or
 - (c) is not accompanied by provision for just compensation.

While this language differs considerably from NAFTA Article 1110, many of the essential elements are clearly the same. This is no coincidence: as I have remarked, the legal principles generally appli-

cable to expropriations are relatively clear and, indeed, ubiquitous.

As regards the distinction between indirect expropriation and valid regulation, Section 712 of the *Restatement* provides as follows:

A state is responsible as for an expropriation of property under Subsection (1) [cited above] when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory ... *A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory ...* (emphasis added)

The Reporter's Note 5 to Section 712 of the *Restatement* further states that "[w]hether an action by the state constitutes a taking and requires compensation under international law, or is a police power regulation or tax that does not give rise to an obligation to compensate even though a foreign national suffers loss as a consequence," must be determined in light of all the circumstances.

As it was said of Juliet, so you may choose to say of me: "[He] speaks, yet [he] says nothing." (II, ii, 12) For in a sense I have offered nothing but a variation on the old bromide: "I may not know what to call it, but I know it when I see it." Yet the reality is, as I have suggested, that it is difficult to define with precision, in the abstract, the term "expropriation" and thus the scope of the protection from expropriation afforded international investors. Drawing the line between expropriation and regulation has proved difficult both in the bilateral investment treaties context and in the handful of NAFTA Chapter 11 cases in which the issue has been considered.

In fact, there has been only one decision to date in which a NAFTA tribunal has found that a taking occurred under NAFTA Article 1110—*Metalclad v. Mexico*—and, as most of you will know, the principal rationale for that decision was vacated by the reviewing court in British Columbia (the seat of the arbitration).

It is by now well established that state regulatory conduct can, in certain circumstances, constitute a taking under NAFTA Article 1110. For example, in *Pope & Talbot v. Canada*, the Tribunal held:

Regulations can indeed be characterized in a way that would constitute creeping expropriation.... Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation. (Interim Award, June 26, 2000, para. 99)

And in *Metalclad v. Mexico*, the Tribunal found that Article 1110:

... includes not only open, deliberate and acknowledged takings of property...but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host state. (Award, August 30, 2000, para. 103)

However, it is equally evident that not every instance of government interference with a foreign investment can be characterized as an expropriation. As the Tribunal observed in *Azinian v. Mexico*:

It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities.... It may be safely assumed that many Mexican parties can be found who [just like the foreign investor in this case] had business dealings with governmental entities which were not to their satisfaction.... (Award, November 1, 1999, para. 83) (emphasis in the original)

In other words, not all regulatory or legislative activity that renders an investment less profitable, or even unfeasible, is an expropriation under Article 1110.

For example, *S.D. Myers v. Canada* involved a case of state action barring exports of hazardous waste. There, the Tribunal noted that expropriation normally constitutes

a taking of "property" (which may include a "right" to engage in certain activities, such as exporting) with a view toward transfer of ownership, a situation that the Tribunal found did not prevail in that case (see Partial Award, November 13, 2000, para. 280).

In *Pope & Talbot*, which also concerned the alleged denial of a right to export (softwood lumber), the Tribunal found that Canada's lumber export control regime came within Article 1110. However, the Tribunal also held that because the investor was able to continue to export and to earn profit on those exports, and because it remained in control of the investment, including the direction of day-to-day operations, the investor had not been deprived of "full ownership and control of his investment." (The Claimant had argued that Canada's lumber export control regime had "deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market," and that by reducing the Claimant's quota of lumber that could be exported to the United States without paying a fee, Canada violated NAFTA Article 1110 (see Interim Award, June 26, 2000, para. 81)). On those grounds, the Tribunal declined to find that an expropriation had taken place. The Tribunal declared that in determining "whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from its owner" (see Interim Award, June 26, 2000, paras. 100, 120).

Finally, and very recently, in the case of *Marvin Feldman v. Mexico*, the Tribunal also declined to find a violation of Article 1110, ruling that the investor had not been the victim of expropriation. The Tribunal summarized its rationale as follows:

- (1) As *Azinian* suggests, not every business problem experienced by a foreign investor is an expropriation under Article 1110;
- (2) NAFTA and principles of customary international law do not require a state to permit "gray market" exports of cigarettes [the business in which the investor was engaged in Mexico];
- (3) at no relevant time has the...law, as written, afforded Mexican cigarette resellers such as [the investor's Mexican company] a "right" to export cigarettes...; and
- (4) the Claimant's "investment," the exporting business known as CEMSA, as far as this

Tribunal can determine, remains under the complete control of the Claimant, in business with the apparent right to engage in the exportation of alcoholic beverages ... and any other Mexican products (Award, December 16, 2002, para. 111) (emphasis in the original)

The Tribunal concluded, in words that convey the delicate, fact-specific and difficult-to-pin-down approach typical of the case law: "While none of these factors alone is necessarily conclusive, in the Tribunal's view taken together they tip the expropriation/regulation balance away from a finding of expropriation." (Award, December 16, 2002, para. 111)

So, what is to be made of all this? Are foreign investors protected—under NAFTA, or under BITs containing similar protections—in the event of expropriation of their property? Clearly, the answer is "yes." Ascertaining just what this protection entails, determining what sort of governmental activity is "sufficiently restrictive" to constitute a "taking," drawing the line between "regulation" and compensable "expropriation" is, however, another matter altogether. It is also a matter which, due to time constraints, must be left to another day.

To paraphrase a former partner (and mentor) of mine: the meaning of "expropriation" and the protection against expropriatory conduct afforded international investors is "*clearly ambiguous*." The law is, truly, in a state of flux. My modest purpose today, in these brief remarks, has been to draw attention to that fact, and to propose that counsel and their clients take to heart a maxim that reverberates throughout the cases: *caveat investor!*

MEMBERSHIP NEWS

Since the publication of the Winter 2002 issue of *News from ICSID*, the ICSID Convention was signed by one and ratified by two countries. On March 26, 2003, the Convention was signed on behalf of the Lebanese Republic by its Ambassador to the United States, His Excellency Dr. Farid Abboud. Lebanon's signature brought the total number of signatory States to 154, of which 12 belong to the Middle East and North Africa region. On the date of the signature, Lebanon also deposited its instrument of ratification of the ICSID Convention. In accordance with its Article 68(2), the Convention entered into force for Lebanon thirty days after the deposit of the instrument of ratification, i.e., on April 25, 2003.



His Excellency Dr. Farid Abboud, Ambassador Extraordinary and Plenipotentiary of Lebanon to the United States, signing the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States on behalf of Lebanon.

The second country to ratify the ICSID Convention in the period was Guatemala. Having signed the ICSID Convention on November 9, 1995, Guatemala deposited its instrument of ratification on January 21, 2003. The Convention entered into force for Guatemala on February 20, 2003.

With the ratifications of the ICSID Convention by Guatemala and Lebanon, the number of the ICSID Contracting States now stands at 139. An up-to-date list of the Contracting States and other Signatories of the Convention is available on the ICSID website and from the Centre on request.

PUBLICATIONS

NEW ICSID PUBLICATIONS

The Fall 2002 issue of the *ICSID Review—Foreign Investment Law Journal*, which was published recently, featured articles by Joachim Karl on policy issues related to future negotiations, under the auspices of WTO, of a multilateral framework for long-term cross-border investment; and by Céline Lévesque on the challenges faced by NAFTA Investment Chapter tribunals when deciding on jurisdictional objections. The issue also contained excerpts from an award in a recently concluded ICSID case. In addition, the full texts of the award of the arbitral tribunal and of the decision on the claimant's request for supplementary decisions and rectification of the award in another ICSID case were also published. Two book reviews were included in the issue. Robert W. Hawkins provided a review of the book of Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation, and Institutional Development*. The second book review in the issue was by Stanimir Alexandrov, who provided a review of the recently published book of Hans van Houtte, *The Law of International Trade*.

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 Co-operation and Development and US\$35 for others.

Other recent publications of the Centre include a new release, issued in March 2003 of ICSID's collection of *Investment Treaties*, which contained texts of twenty bilateral investment treaties concluded by some twenty-two countries in the period 1993-2003. With this new release, the collection now contains texts of some 900 bilateral investment treaties.

A release for the collection of *Investment Laws of the World* was also prepared and will be published in August 2003. It contains new investment legislation from Angola, Belize, Benin, Ethiopia and Mongolia.

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.

RECENT BOOKS AND ARTICLES ON ICSID

Frutos-Peterson, Claudia, L'émergence de l'arbitrage commercial international en Amérique latine : l'efficacité de son droit, 105-116, 200-207 (L'Harmattan, 2003).

Lévesque, Céline, Investor-State Arbitration Under NAFTA Chapter 11: What Lies Beneath Jurisdictional Challenges, 17 *ICSID Review—Foreign Investment Law Journal* 320 (2002).

Hornick, Robert N., The Mihaly Arbitration—Pre-investment Expenditures as a Basis for ICSID Jurisdiction, 20/2 *Journal of International Arbitration* 189 (2003).

Rubins, Noah D., Must the Victorious Investor-Claimant Relinquish Title to Expropriated Property, 4/3 *Journal of World Investment* 481 (2003).

Vinuesa, Raul Emilio, Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience, 8 *NAFTA: Law & Business Review of the Americas* 501 (2002).

Werner, Jacques, Some Comments of the NAFTA Chapter 11 Case: ADF Group Inc. and Unites States of America, 4/1 *Journal of World Investment* 113 (2003).

Williams, David, International Commercial Arbitration and Globalization: Review and Resource against Awards Rendered under Investment Treaties, 4/2 *Journal of World Investment* 251, 266-72 (2003).

LCIA SYMPOSIUM

IN CO-OPERATION WITH ICSID

Saturday, November 15, 2003 • The Fairmont Hotel • Washington, D.C.

FORMAT:

The symposium immediately follows the AAA/ICC/ICSID 20th Joint Colloquium on International Arbitration.

In traditional LCIA style, the symposium will be based around current issues of key interest in the field of arbitration and ADR, proposed in advance by delegates and hotly debated from the floor, under the expert guidance of well-known co-chairs. The format is unique and has been used very successfully by the LCIA in venues throughout the world.

Delegates to both conferences will have an opportunity to continue the debate on themes arising at the previous day's AAA/ICC/ICSID Colloquium.

The LCIA will contact delegates in advance to request topics for discussion. These will then be grouped and allocated to the working sessions as appropriate.

The number of participants will be limited to preserve the format and early registration is recommended.

TO REGISTER:

If you wish to attend the Symposium, please contact Irene Bates at the LCIA office:

T. +44 (0) 20 7405 8008

F. +44 (0) 20 7405 8009

E. ib@lcia-arbitration.com

WWW.LCIA-ARBITRATION.COM

PROGRAM:

09.15 – 09.30 Welcome
L Yves Fortier CC QC
Hon Vice-President of LCIA
Court and Former President

09.30 – 10.45 Session A
Margrete Stevens
ICSID, The World Bank,
Washington, D.C.
V V Veeder QC
Essex Court Chambers, London

10.45 – 11.15 Coffee/tea break

11.15 – 12.30 Session B
Dushyant Dave
New Delhi
Gavan Griffith QC
Owen Dixon Chambers West,
Melbourne

12.45 – 14.15 Lunch

14.15 – 15.30 Session C
Dr Pierre A Karrer
Pestalozzi, Lachenal Patry, Zurich
The Hon Benjamin Greenberg QC
Stikeman Elliott LLP, Montreal

15.30 – 16.00 Coffee/tea break

16.00 – 17.15 Session D
L Yves Fortier CC QC
Ogilvy Renault, Montreal
Professor Giorgio Sacerdoti
Piergrossi Villa Ricardi Bianchi, Milan

17.15 Close of symposium

19.00 Reception and dinner

20TH AAA/ICC/ICSID JOINT COLLOQUIUM ON INTERNATIONAL ARBITRATION

MORNING SESSION

8:30 a.m.

Registration and Coffee

9:30 a.m. – 10:00 a.m.

Welcome and Introduction

Recent Developments at the American Arbitration Association, the ICC International Court of Arbitration and the International Centre for Settlement of Investment Disputes

Roberto Dañino

Senior Vice President and General Counsel, World Bank

Robert Briner

Chairman, ICC International Court of Arbitration

William K. Slate II

President and Chief Executive Officer, American Arbitration Association

10:00 a.m. – 10:45 a.m.

Instituting Arbitral Proceedings

Luis M. Martinez

Vice President, AAA International Center for Dispute Resolution

Anne-Marie Whitesell

Secretary General, ICC International Court of Arbitration

Antonio R. Parra

Deputy Secretary-General, ICSID

10:45 a.m. – 11:15 a.m.

Discussion led by

Charles N. Brower

Judge, Iran – U.S. Claims Tribunal, The Hague

11:15 a.m. – 11:45 a.m.

Coffee Break

11:45 a.m. – 12:30 p.m.

Publication of Proceedings and Awards

Joseph Neuhaus

Sullivan & Cromwell, New York

Robert H. Smit

Simpson Thacher & Bartlett, New York

Meg Kinnear

Department of Foreign Affairs and International Trade, Ottawa

12:30 p.m. – 1:00 p.m.

Discussion led by

Ulf Franke

Secretary General, Arbitration Institute of the Stockholm Chamber of Commerce

1:00 p.m. – 2:30 p.m.

Luncheon

Speaker: **V.V. Veeder**

Essex Court Chambers, London

AFTERNOON SESSION

2:30 p.m. – 3:15 p.m.

Arbitration Involving States: Procedural Issues

Nigel Blackaby

Freshfields Bruckhaus Deringer, Paris

Louis B. Kimmelman

O'Melveny & Myers LLP, New York

Hugo Perezcano Díaz

Dirección General de Consultoría Jurídica de Negociaciones, Mexico City

3:15 p.m. – 3:45 p.m.

Discussion led by

Bola A. Ajibola

Former Judge, International Court of Justice, The Hague

3:45 p.m. – 4:15 p.m.

Coffee Break

4:15 p.m. – 5:00 p.m.

Arbitration Involving States: Applicable Law

Carolyn B. Lamm

White & Case, Washington, D.C.

Gerald Aksén

Arbitrator & ADR Neutral, New York

Barton Legum

U.S. Department of State, Washington, D.C.

5:00 p.m. – 5:30 p.m.

Discussion led by

Anthony Mason

Former Chief Justice, Australia

5:30 p.m. – 5:45 p.m.

Closing

5:45 p.m.

Adjournment

6:00 p.m.

Reception

For registration contact: **Sylvie Grégoire**, Telephone: 202.473.9365, Fax: 202.522.2615/2027, Email: sgregoire@worldbank.org