



POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION

The Centre from time to time initiates reviews of the framework for ICSID arbitration and suggests initiatives to respond to any practice changes and address the needs that may be identified. In this regard, the ICSID Secretariat in October 2004 prepared a Discussion Paper entitled "Possible Improvements of the Framework for ICSID Arbitration." The Discussion Paper was sent to members of the Administrative Council of ICSID, as well as to business and civil society groups, arbitration experts and institutions around the world, inviting their comments on the proposals in the Paper.

The Discussion Paper suggested some changes to the ICSID Arbitration Rules and the Additional Facility Arbitration Rules, concerning the following issues:

- Preliminary procedures—to provide for expedited filing of a request for provisional measures and all of the observations of the parties on the request, while the tribunal is being constituted, so that it may upon its constitution consider and decide on the request within a brief time limit; and to make clear that the tribunal may at an early stage of the case be asked on an expedited basis to dismiss all or part of a claim.
- Publication of awards—not merely to authorize, but to require, ICSID to publish excerpts from all rendered awards.

- Participation of third parties—to make clear that the tribunals have the authority to accept and consider submissions from third parties; and to allow for the possibility of third party attendance at hearings.
- Disclosure requirements for arbitrators—to require arbitrators to disclose, not only any past or present relationships with the parties, but more generally any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment; and to make it clear that the

[continued on page 13 ▶](#)

MEMBERSHIP NEWS

Yemen deposited its instrument of ratification of the ICSID Convention on October 21, 2004. This was followed by Cambodia's ratification of the Convention on December 20, 2004. Pursuant to its Article 68(5), the Convention entered into force for Yemen on November 20, 2004, and for Cambodia on January 19, 2005.

The new ratifications have brought to 142 the number of the ICSID Contracting States.

A complete list of the 154 signatory States, of which 142 have become ICSID Contracting States following completion of all membership requirements, is available on the Centre's website at <http://www.worldbank.org/icsid> and from the Centre upon request. ■

IN THIS ISSUE

Disputes before the Centre.....	2
ICSID and Provisional Measures: An Overview.....	10
New Panel Designations.....	14
Recent Books and Articles on ICSID.....	15
New ICSID Publications.....	16

DISPUTES BEFORE THE CENTRE

In the period September 1 – December 31, 2004, the Centre registered seven new arbitration proceedings. A total of 85 proceedings were pending before the Centre at the end of 2004.

One of the new cases was brought to ICSID on the basis of the investor-State dispute settlement provision of the Investment Chapter of NAFTA. The remaining six cases were instituted on the basis of provisions contained in bilateral investment treaties of the host States involved. Four of the new proceedings are being conducted under the ICSID Additional Facility Rules; the ICSID Convention and the arbitration rules adopted pursuant to the Convention apply to three of the recently registered cases.

In addition to the newly instituted seven arbitration proceedings, ICSID registered three applications for annulment of awards.

Arbitral tribunals were constituted in nine of the cases. In two further cases, the tribunals were reconstituted following the resignation of a tribunal member. An *ad hoc* committee was also constituted in a pending annulment proceeding.

Three arbitration cases were concluded. Two of the cases were discontinued, on the request of the parties following settlement of the disputes, by an order of the arbitral tribunals concerned. A final award on the merits was rendered by the tribunal in the third of these cases.

Among other decisions of ICSID tribunals in the period are a decision on jurisdiction in one of the pending cases and a decision on the respondent's request for supplementation of the award in that case.

In addition to administering the ICSID cases, the Centre also provided administrative support for the conduct of the proceedings in five cases under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Procedural developments in the disputes before the Centre during the period September 1–December 31, 2004 are set out below. The latest developments are posted on the Centre's website at <http://www.worldbank.org/icsid/>.

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

November 24, 2004

The Claimants file their memorial on the merits.

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

November 19, 2004

The Tribunal declares the proceeding closed.

December 29, 2004

The Tribunal renders its award.

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

September 13, 2004

The Tribunal renders its Decision on Respondent's Request for a Supplementary Decision.

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

- (b) Interpretation Proceeding**

November 11, 2004

The Tribunal is constituted. Its members are: Klaus M. Sachs (German), President; Ibrahim Fadlallah (Lebanese); and Carl F. Salans (U.S.).

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

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

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

- (b) Annulment Proceeding**

October 23, 2004

The Tribunal holds its first session via telephone conference.

November 30, 2004

The *ad hoc* Committee issues its Decision on the Stay of Enforcement of the Award.

December 27, 2004

The Claimant files its counter-memorial.

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

(b) Annulment Proceeding

October 25, 2004
The Claimant files its memorial.

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

December 15, 2004
The Tribunal issues a procedural order concerning a hearing on preliminary issues on the merits.

December 28, 2004
The Claimant files its Observations on the Respondent's Request for Security for Costs.

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

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

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

November 17, 2004
The Claimants file their memorial on the merits concerning the ancillary claim.

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

(b) Annulment Proceeding

September 30, 2004
The Secretary-General registers an application for institution of annulment proceedings.

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

September 20, 2004
The parties file their posthearing briefs.

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

(b) Annulment Proceeding

September 14, 2004
The *ad hoc* Committee is constituted. Its members are: Judd L. Kessler (U.S.), President; Piero Bernardini (Italian); and Gonzalo Biggs (Chilean).

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

September 3, 2004
The Tribunal issues a procedural order concerning the forthcoming hearing on the merits.

October 5–9, 2004
The Tribunal holds a hearing on the merits in Washington, D.C.

October 19, 2004
The Tribunal issues a procedural order concerning post-hearing briefs.

November 24, 2004
The parties file their post-hearing briefs.

December 21, 2004
The parties file their reply post-hearing briefs.

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

September 9, 2004
The Tribunal issues a procedural order concerning the production of documents.

October 4–13, 2004
The Tribunal holds its hearing on the merits in Paris.

December 8, 2004
The proceeding is suspended, in accordance with ICSID Arbitration Rule 9(6), following a proposal for disqualification of an arbitrator.

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

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

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

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

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

September 27, 2004
The Respondent files its rejoinder on the merits.

November 1, 2004
The Claimants file two motions regarding witnesses statements.

November 23, 2004
The Tribunal issues a procedural order concerning the admissibility of certain witnesses.

continued on next page ▶

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

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

■ **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)**

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

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

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

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

November 12, 2004

The Secretary-General registers an application for institution of annulment proceedings.

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

October 19, 2004

The Respondent files its counter-memorial on the merits.

December 7, 2004

The proceeding is suspended, in accordance with ICSID Arbitration Rule 9(6), following a proposal for disqualification of an arbitrator.

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

December 13, 2004

The Tribunal holds a hearing on witnesses' depositions in Paris.

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

November 8, 2004

The Tribunal issues an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1).

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

October 13, 2004

The Tribunal issues an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1).

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

November 29, 2004

The Tribunal issues its decision on jurisdiction.

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

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

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

November 15, 2004

The Tribunal decides to join the objections to jurisdiction to the merits.

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

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

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

October 23–24, 2004

The Tribunal holds a hearing on jurisdiction in Paris.

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

September 1, 2004

The Respondent files an objection regarding diplomatic protection.

September 7, 2004

The Claimant files its observations on the Respondent's objection regarding diplomatic protection.

September 8, 2004

The Claimant files a request for production of documents.

September 13, 2004

The Respondent files its comments on the Claimant's observations of September 7, 2004, and on the Claimant's request for production of documents.

September 14, 2004

The Claimant files a request for provisional measures.

September 21, 2004

The Respondent files a request for production of documents.

September 24, 2004

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

September 27, 2004

The Claimant files its comments on the Respondent's observations of September 13, 2004, regarding the production of documents.

October 5, 2004

The Claimant files its observations on the Respondent's request for production of documents.

October 7, 2004

The Claimant files its comments on the Respondent's observations of September 24, 2004.

October 8, 2004

The Claimant files further observations on the Respondent's objection regarding diplomatic protection.

October 21, 2004

The Respondent files further comments on the Claimant's observations of October 8, 2004.

October 22, 2004

The Respondent files its observations on the Claimant's comments of October 7, 2004; its further comments on the Claimant's request for production of documents; and its final observations on its objection regarding diplomatic protection.

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

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

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

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

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

September 2–3, 2004

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

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

September 21, 2004

The Respondent files its reply on jurisdiction.

November 8, 2004

The Claimants file their rejoinder on jurisdiction.

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

September 14, 2004

The Respondent files its reply on jurisdiction.

October 1, 2004

The Claimants file their rejoinder on jurisdiction.

December 13–14, 2004

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

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

November 11–12, 2004

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

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

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

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

September 14, 2004

The Claimant appoints V.V. Veeder (British) as an arbitrator following the resignation of Elihu Lauterpacht (British).

October 14, 2004

The proceeding is resumed following the notification to the parties of V.V. Veeder's acceptance of his appointment.

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

October 29, 2004

The Tribunal issues a procedural order fixing a date and an agenda for a hearing on the preliminary questions on jurisdiction.

continued on next page ▶

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

(b) Annulment Proceeding

December 22, 2004

The Secretary-General registers an application for institution of annulment 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)**

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

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

September 21, 2004

The Respondent files its memorial on jurisdiction.

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

September 17, 2004

The Tribunal is constituted. Its members are: Ahmed S. El-Kosheri (Egyptian), President; Marc Lalonde (Canadian); and Catherine Kessedjian (French).

October 21, 2004

The Tribunal holds its first session in Paris.

December 10, 2004

The Tribunal issues a procedural order concerning the schedule for the filing of written pleadings.

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

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

■ **ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (Case No. ARB/03/16)**

September 3, 2004

The proceeding is suspended following the resignation of Allan Phillip (Danish).

September 23, 2004

After consultation with the parties, the party-appointed arbitrators appoint Neil Kaplan (British) as the third and presiding arbitrator to fill the vacancy created by the resignation of Alan Phillip.

September 28, 2004

Following Neil Kaplan's acceptance of his appointment, the Tribunal is reconstituted and the proceeding resumed in accordance with Arbitration Rule 12.

■ **Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic (Case No. ARB/03/17)**

September 20, 2004

The Claimants file their memorial on the merits.

November 26, 2004

The Respondent files its memorial on jurisdiction.

■ **Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (Case No. ARB/03/18)**

October 5, 2004

The Claimants file their memorial on the merits.

December 22, 2004

The Respondent files its memorial on jurisdiction.

■ **Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (Case No. ARB/03/19)**

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

■ **Telefónica S.A. v. Argentine Republic (Case No. ARB/03/20)**

December 6, 2004

The Claimant files its memorial on the merits.

■ **EnerSis, S.A. and others v. Argentine Republic (Case No. ARB/03/21)**

October 8, 2004

The Respondent files its memorial on jurisdiction.

December 17, 2004

The Claimants file their counter-memorial on jurisdiction.

■ **Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic (Case No. ARB/03/22)**

September 1, 2004

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

- **EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic (Case No. ARB/03/23)**

September 1, 2004
The Tribunal holds its first session in Washington, D.C.
- **Plama Consortium Limited v. Republic of Bulgaria (Case No. ARB/03/24)**

September 20–21, 2004
The Tribunal holds a hearing on jurisdiction in Paris.

October 25, 2004
The Respondent files its post-hearing submission.

November 22, 2004
The Claimant files its post-hearing submission.

December 6, 2004
The Respondent files its post-hearing reply.
- **Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (Case No. ARB/03/25)**

December 21, 2004
The Respondent files its counter-memorial on liability and objections to jurisdiction.
- **Inceysa Vallisoletana S.L. v. Republic of El Salvador (Case No. ARB/03/26)**

September 15, 2004
The Respondent raises objections to jurisdiction and files a request for an order pursuant to Arbitration Rule 28(1) and for a recommendation of security for costs as a provisional measure.

September 23, 2004
The Tribunal issues a procedural order concerning the timetable on jurisdiction.

October 14, 2004
The Claimant files its observations regarding the Respondent's request of September 15, 2004.

October 28, 2004
The Respondent files its reply regarding its request of September 15, 2004.

November 4, 2004
The Claimant files its counter-memorial on jurisdiction.

November 8, 2004
The Claimant files its rejoinder regarding the Respondent's request of September 15, 2004.

November 29, 2004
The Respondent files its reply on jurisdiction.

December 22, 2004
The Claimant files its rejoinder on jurisdiction.
- **Unisys Corporation v. Argentine Republic (Case No. ARB/03/27)**

September 3, 2004
The Tribunal is constituted. Its members are: Juan Fernandez-Armesto (Spanish), President; Piero Bernardini (Italian); and Jean Paul Chabaneix (Peruvian).

October 27, 2004
Following a request by the parties, the first session is postponed until further notice.
- **Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru (Case No. ARB/03/28)**

October 4, 2004
The Respondent files its memorial on jurisdiction and admissibility.
- **Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (Case No. ARB/03/29)**

September 24, 2004
The Tribunal holds a session on procedural matters and provisional measures in Paris.

November 29, 2004
The Tribunal issues a decision on the Claimant's request for provisional measures.

December 31, 2004
The Respondent files its memorial on jurisdiction.
- **Azurix Corp. v. Argentine Republic (Case No. ARB/03/30)**

There have been no new developments to report in this case since the last issue of *News from ICSID*.
- **TG World Petroleum Limited v. Republic of Niger (Case No. CONC/03/1)**

There have been no new developments to report in this case since the last issue of *News from ICSID*.
- **Corn Products International, Inc. v. United Mexican States (Case No. ARB(AF)/04/1)**

September 16, 2004
The Tribunal holds its first session in London.
- **Total S.A. v. Argentine Republic (Case No. ARB/04/1)**

November 15, 2004
The Tribunal holds its first session in Washington, D.C.

continued on next page ▶

- **Western NIS Enterprise Fund v. Ukraine (Case No. ARB/04/2)**

September 28, 2004
The Tribunal holds its first session in Paris.

- **Cemex Asia Holdings Ltd v. Indonesia (Case No. ARB/04/3)**

October 19, 2004
The Respondent files its memorial on jurisdiction.

November 16, 2004
The Claimant files its counter-memorial on jurisdiction.

December 6, 2004
The Respondent files its reply on jurisdiction.

December 21, 2004
The Claimant files its rejoinder on jurisdiction; the Tribunal issues a procedural order concerning the admissibility of certain evidence.

- **SAUR International v. Argentine Republic (Case No. ARB/04/4)**

September 3, 2004
The Tribunal is constituted. Its members are: Juan Fernández-Armesto (Spanish), President; Bernard Hanotiau (Belgian); and Christian Tomuschat (German).

November 13, 2004
The Tribunal holds its first session in Washington, D.C.

- **Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Republic of Gabon (Case No. ARB/04/5)**

December 10, 2004
The Tribunal is constituted. Its members are: Ibrahim Fadlallah (Lebanese), President; Charles Jarrosson (French); and Michel Gentot (French).

- **OKO Osuuspankki Keskuspankki Oyj and others v. Republic of Estonia (Case No. ARB/04/6)**

November 17, 2004
The Respondent files its counter-memorial on objections to jurisdictions and the merits.

- **Sociedad Anónima Eduardo Vieira v. Republic of Chile (Case No. ARB/04/7)**

September 24, 2004
The Tribunal is constituted. Its members are: Claus von Wobeser (Mexican), President; Susana B. Czar de Zalzuendo (Argentine); and W. Michael Reisman (U.S.).

December 15, 2004
The Tribunal holds its first session in Washington, D.C.

- **BP America Production Company and others v. Argentine Republic (Case No. ARB/04/8)**

September 20, 2004
The Respondent files its memorial on jurisdiction.

- **CIT Group Inc. v. Argentine Republic (Case No. ARB/04/9)**

November 11, 2004
The Tribunal is constituted. Its members are Pierre-Marie Dupuy (French), President; Claus von Wobeser (Mexican); and Christian Tomuschat (German).

- **Alstom Power Italia SpA and Alstom SpA v. Republic of Mongolia (Case No. ARB/04/10)**

September 8, 2004
The Tribunal is constituted. Its members are: Marc Lalonde, (Canadian), President; Jan Paulsson (French); and Anthony Mason (Australian).

December 2, 2004
The Tribunal holds its first session.

- **Russell Resources International Limited and others v. Democratic Republic of the Congo (Case No. ARB/04/11)**

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

- **ABCI Investments N.V. v. Republic of Tunisia (Case No. ARB/04/12)**

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

- **Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (Case No. ARB/04/13)**

September 14, 2004
The Tribunal is constituted. Its members are: Gabrielle Kaufmann-Kohler (Swiss), President; Pierre Mayer (French); and Brigitte Stern (French).

November 10, 2004
The Tribunal holds its first session in Paris.

- **Cargill, Incorporated v. Republic of Poland (Case No. ARB(AF)/04/2)**

November 2, 2004
The Tribunal is constituted. Its members are: Gabrielle Kaufmann-Kohler (Swiss), President; Emmanuel Gaillard (French); and Bernard Hanotiau (Belgian).

- **Wintershall Aktiengesellschaft v. Argentine Republic (Case No. ARB/04/14)**

There have been no new developments to report in this case since the last issue of *News from ICSID*.
- **Telenor Mobile Communications AS v. Republic of Hungary (Case No. ARB/04/15)**

There have been no new developments to report in this case since the last issue of *News from ICSID*.
- **Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (Case No. ARB/04/16)**

There have been no new developments to report in this case since the last issue of *News from ICSID*.
- **Interbrew Central European Holding B.V. v. Republic of Slovenia (Case No. ARB/04/17)**

There have been no new developments to report in this case since the last issue of *News from ICSID*.
- **France Telecom S.A. v. Argentine Republic (Case No. ARB/04/18)**

There have been no new developments to report in this case since the last issue of *News from ICSID*.
- **Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States (Case No. ARB(AF)/04/3)**

September 29, 2004

The Secretary-General registers the request and on the same day notifies the parties of the registration.
- **Talsud, S.A. v. United Mexican States (Case No. ARB(AF)/04/4)**

September 29, 2004

The Secretary-General registers the request and on the same day notifies the parties of the registration.
- **Archer Daniels Midlands Company and A.E. Staley Manufacturing Company v. United Mexican States (Case No. ARB(AF)/04/5)**

September 29, 2004

The Secretary-General registers the request and on the same day notifies the parties of the registration.
- **Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador (Case No. ARB/04/19)**

October 7, 2004

The Secretary-General registers the request and on the same day notifies the parties of the registration.
- **Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela (Case No. ARB(AF)/04/6)**

October 28, 2004

The Secretary-General registers the request and on the same day notifies the parties of the registration.
- **RGA Reinsurance Company v. Argentine Republic (Case No. ARB/04/20)**

November 11, 2004

The Secretary-General registers the request and on the same day notifies the parties of the registration.
- **Motorola Credit Corporation, Inc. v. Republic of Turkey (Case No. ARB/04/21)**

December 28, 2004

The Secretary-General registers the request and on the same day notifies the parties of the registration.

ICSID AND PROVISIONAL MEASURES: AN OVERVIEW

By Aurélia Antonietti, Counsel, ICSID

This overview is based on an article published in French, in *International Law Forum/Forum du droit international* (<http://www.ila-hq.org>), Volume 7/1 (2005))

INTRODUCTION

Lately, authors and commentators seem to be neglecting the topic of provisional measures in ICSID arbitration. Yet, the instances of requests for interim measures in ICSID cases have never been so frequent. Although most of the procedural decisions rendered by ICSID tribunals are not published, this should not be taken to reflect a decrease in the numbers of requests presented nor does it signify the parties' disinterest in such measures.

Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 are sparse in detail on the nature of the measures that can be obtained and on the conditions to be met for them to be granted.

Article 47 of the ICSID Convention provides as follows: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

Arbitration Rule 39 states:

- (1) At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after

giving each party an opportunity of presenting its observations.

- (5) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests.

At the time of the first requests for provisional measures in the 1980s, the discussion was focused on the exclusivity of ICSID tribunals' powers and the authority of local courts to grant provisional measures whilst an ICSID arbitration was pending (for an overview of the discussion see Antonio R. Parra, *The Practices and Experience of the ICSID*, 37 *Conservatory and Provisional Measures in International Arbitration* (1993), ICC Publication No. 159). In 1984, the fifth paragraph was added to Arbitration Rule 39 and, since then, commentators seem to have lost interest in the discussion. It is clear that under the ICSID Convention, the parties can only request provisional measures from local courts or any other authority, whilst an ICSID case is pending, if they had previously so agreed.

Faced with little guidance in the ICSID Convention and the Arbitration Rules, some tribunals have turned to precedents of the International Court of Justice in determining applications for provisional measures; Article 41 of the Statute of the Court being presented as an inspiration for Article 47 of the ICSID Convention. Nonetheless, no consistent approach seems to have been followed by ICSID tribunals thus far.

What follows is a brief look at the lessons to be drawn from the decisions rendered by ICSID tribunals on requests for provisional measures to date and the current questions faced by them.

AT WHAT STAGE OF THE PROCEEDING CAN A REQUEST FOR PROVISIONAL MEASURES BE MADE?

In accordance with Arbitration Rule 39, the tribunal shall give priority to the consideration of the request, after giving each party an opportunity of presenting its observations. The request could be presented at any time during the proceedings. It could even be presented before the tribunal is constituted. If this is the case, in practice, the request would be examined at the first session of the tribunal, which would ordinarily take place within 60 days from the constitution of the tribunal, *i.e.*, an average of three to six months from the registration of the request for arbitration. For the parties' benefit, and since the parties are not supposed to apply to local courts if they had not so agreed in their consent document, the Centre is contemplating modifying Arbitration Rule 39. The amendment might take the form of offering to the parties an expedited process that would allow the request to be examined by the tribunal, as soon as it is constituted, after each party would have had an opportunity to present its observations whilst the tribunal was being constituted.

It is clear that a tribunal can render a decision on provisional measures even if its jurisdiction is challenged. In some cases, the tribunals have concluded at the outset that their jurisdiction is *prima facie* established, while in others, the parties and the tribunals have omitted the question of jurisdiction from their reasoning.

WHAT TYPES OF MEASURES CAN BE REQUESTED AND GRANTED?

While the parties can request any type of measures, the reliefs that are in fact granted are at the discretion of the arbitrators. To date, requests sought have concerned the release of confidential information, obtaining of evidence, securing financial guarantees, obtaining stay of execution of an administrative decision, stopping prejudicial interference by one party, and obtaining a stay of parallel domestic or arbitral proceedings. Among the measures recently recommended are a stay of a local arbitration, a stay of a bankruptcy proceeding, a recommendation for the parties to refrain from pursuing or initiating local proceedings with an obligation to notify the tribunal of the action taken in implementation of the tribunal's decision and a recommendation that a State take whatever steps necessary to ensure that a public corporation refrain from enforcing a final judgment against the claimant in the ICSID arbitration.

In any event, the measure requested must be sufficiently specific in its object and its scope. Specificity is evaluated and determined on a case-by-case basis. For example, in the *SGS v. Pakistan* case, the Claimant requested *inter alia* that the Tribunal recommend that the Respondent refrain from commencing or participating in any other domestic proceeding relating to the ICSID proceeding. The Tribunal considered this request to be too broad. (For details of the ICSID cases cited in this article, see the ICSID website at <http://www.worldbank.org/icsid/cases/awards.htm>.)

The measure must also relate to the facts of the case. In the *Mafezzini v. Spain* case, Spain's request aimed at obtaining a guarantee bond as security for costs was not successful as it had no relation with the subject matter of the case before the tribunal, namely an investment. The Tribunal in *Amco v. Indonesia* case already held that the measure had to relate to the right to be preserved. In that case, the measure requested by Indonesia, which aimed at stopping the publication of articles, was found not to present a sufficient link with the right to be preserved.

WHOSE RIGHTS NEED TO BE PRESERVED?

In principle, the investor, who is typically the claimant in the ICSID arbitration, submits the request in order to preserve its rights, but it is not always as simple. In one of the many cases brought recently against Argentina, the requested measure was aimed at the preservation of the right of a local entity (the vehicle for the investment) to continue or initiate administrative and judicial proceedings to defend its rights. The tribunal recalled that the rights that it might preserve with a recommendation of provisional measures were limited to those that the applicable treaty accords to the investors of the other Contracting Party. To a certain extent, this relates to the issue of *prima facie* jurisdiction. Furthermore, the tribunal recalled that the matter concerned some of the actions of a Province and that it had not been established that the Province's actions or omissions entailed the Respondent's international responsibility as a State. The request was ultimately dismissed in order not to prejudice the merits of the case.

WHAT RIGHTS CAN BE PRESERVED?

The measure should aim at the preservation of a right that the requesting party has for example under a contract or a bilateral investment treaty (BIT). In *TanESCO v. the Independent Power Tanzania*, which concerned a contractual dispute, the tribunal decided that the right to be preserved could be of a contractual nature but that the request could not be

aimed at obtaining specific performance of the contract. In other cases considering provisions under BITs, it has been held that the right of access to an international tribunal constituted under the auspices of ICSID constitutes a right to be preserved under these treaties.

More debated is the issue of establishing the existence of the right to be preserved. It suffices to recall that in the case of *Pey Casado and Fundacion Presidente Allende v. Chile*, the Tribunal specified that it could not require, as a pre-requisite to a measure sought under Arbitration Rule 39, that the requesting party establish the existence, reality or current aspect of the rights to be preserved by that measure, as such aspects went to the merits of the case.

WHAT ARE THE CIRCUMSTANCES THAT REQUIRE PROVISIONAL MEASURES?

The requesting parties regularly invoke urgency, which they must prove. Such urgency relates to the possibility of occurrence of the damage to be caused to the right sought to be preserved. This is evaluated on a case-by-case basis, provided that the measures must be appropriate and necessary. Thus far, tribunals have taken into consideration the necessity to preserve the *status quo* or the occurrence of irreparable damage. Doing so, the tribunals assess the risks at stake and the consequences, should the measure not be recommended.

The question arises whether the fact that an ICSID case is pending renders the measure necessary *ipso facto*. In 1991, two authors considered the possibility of an ICSID tribunal recommending provisional measures to stay local parallel proceedings. They considered that, in the event of two identical parallel proceedings, the need to preserve an ICSID tribunal's authority to decide over its own jurisdiction was a sufficient reason to recommend the stay of the municipal proceeding. Their reasoning was based on Article 26 of the ICSID Convention, the exclusivity of the ICSID system and on non-ICSID precedents (see Charles N. Brower and Ronald E.M. Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings*, 6/2 *ICSID Review—Foreign Investment Law Journal* 1991).

Some ICSID tribunals seem to have confirmed this reasoning. In the case of *CSOB v. the Slovak*

Republic, the recommendation for the suspension of local bankruptcy proceedings was granted in 1999 and 2000 "to the extent that such proceedings might include determinations as to whether the (...) [Slovak recovery company] has a valid claim in the form of a right to receive funds from the Slovak Republic to cover its losses as contemplated in the Consolidation Agreement at issue in this arbitration"; facts, which were indeed submitted to the ICSID arbitral tribunal. The parties were also required to bring this recommendation to the attention of the appropriate local authorities.

With the increase of cases based on BITs, requests to stay a non-ICSID arbitration proceeding and/or domestic proceedings are also increasing. The scenario would be as follows: an ICSID proceeding is initiated under an ICSID arbitration provision contained in a BIT for facts related to the performance of a contract; in parallel, a commercial arbitration takes place pursuant to an arbitration clause contained in the contract, or a domestic court hears the same matter. The facts would be similar but the legal basis and the claims in the two proceedings would differ. The scenario could vary further: the parties might not necessarily be the same; the local arbitration could involve a public entity and/or a local subsidiary, which could be signatories to the underlying contract.

In *SGS v. Pakistan*, the ICSID Tribunal recommended the stay of a local arbitration, initiated in Pakistan pursuant to a contract, because the claims before the local arbitrators might be linked to the claims presented before the ICSID Tribunal. In that case, the parties were identical in the two proceedings. In another similar proceeding, the claimant requested the stay of judicial proceedings initiated by a public entity, non-party to the ICSID proceeding, with which it had a contract. The same contract formed the basis of the ICSID claims. The claimant also requested that the State be ordered to bring the recommendation to the attention of the local courts. In that case, the tribunal dismissed the request since there appeared to be no urgent risk of irreparable damage. The local proceeding was far from being concluded at the time. The tribunal also noted that the proceeding was still at its jurisdictional phase. Moreover, the fact that there was a non-ICSID party involved seemed particularly troubling to the tribunal. This is a further, although incidental, illustration of the difficulties linked with the

increase of the so-called “Contract-Treaty claims” arbitrations.

CONCLUSION

When the proceeding is at the phase of jurisdiction, the tribunal’s task in deciding on requests for provisional measures is even more complex, and many tribunals do not wish to prejudge the merits of the case. Tribunals are also careful not to restrain the ordinary exercise of the normal processes of criminal, administrative and civil justice within the State’s own territory, as recalled by the *SGS v. Pakistan* Tribunal. Those appear to be the reasons why the vast majority of the ICSID tribunals’ decisions have dismissed or only partially recommended provisional measures. Notwithstanding this mixed result, the effect of a request for provisional measures is not to be underestimated. Indeed, tribunals recall almost systematically the principle of non-aggravation of the dispute by the parties. Similarly, it is recalled that one party should refrain from any act that could prejudge the rights of the other party; which right the award might ultimately acknowledge. Finally, it is not rare in the course of the proceeding that a party undertakes to take certain actions or undertakes to refrain from taking certain actions; and tribunals systematically take note of such restraint or positive action and will take them into consideration in the final determination of the case. ■

POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION

(Continued from page 1)

expanded disclosure requirement would apply throughout the entire proceeding and not just at its commencement.

A major possibility raised in the Discussion Paper concerned the introduction of international appellate procedures for investment treaty arbitrations. In this respect, there was general agreement that, if such procedures were to be introduced, then this might best be done through a single ICSID mechanism rather than by different mechanisms established under each treaty concerned. However, most of those who provided comments considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper. The Secretariat will therefore continue to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism. The Secretariat is separately following up on the other possible improvements mentioned in the Discussion Paper, including in particular the suggested changes to the Arbitration Rules. These will be reported on in the next issue of *News from ICSID*. ■

NEW PANEL DESIGNATIONS DURING THE PERIOD JULY 1 – DECEMBER 31, 2004

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 Barbados, Bolivia, Burkina Faso, Chad, Costa Rica, Ecuador, Indonesia, Ireland, Jamaica, Mongolia, Spain and Uruguay.

Barbados

Panels of Conciliators and of Arbitrators

Designations effective July 20, 2004:

Edward Bushell (re-appointment), Trevor A. Carmichael (re-appointment), Woodbine Augustus Davis (re-appointment) and Ken Hewitt (re-appointment)

Bolivia

Panel of Conciliators

Designations effective October 12, 2004:

Bernarda Flores Ivanovic and Fernando Rodriguez Mendoza

Panel of Arbitrators

Designations effective October 12, 2004:

Fernando Aguirre Bastos and Gonzalo Péres Arenas

Burkina Faso

Panel of Conciliators

Designations effective September 8, 2004:

Ambroise Marie Balima, Mamadou Guira, Gertrude M. Ouedraogo (re-appointment) and Adama Traore

Panel of Arbitrators

Designations effective September 8, 2004:

Sibili Franck Compaore, Viktor Kafando, Ignace Yerbanga (re-appointment) and Dobo Martin Zonou

Chad

Panel of Arbitrators

Designations effective October 18, 2004:

Alain Fénéon, Domaye Nodjigoto, Aziz Mahamat Saléh and Ahmat Mahamat Hassan

Costa Rica

Panels of Conciliators and of Arbitrators

Designations effective July 23, 2004:

Thomas Buerghenthal (re-appointment), Charles N. Brower (re-appointment), Rodrigo Oreamuno (re-appointment) and Manuel Peralta

Ecuador

Panel of Conciliators

Designations effective October 26, 2004:

Alvaro Galindo Cardona, Luis Herrería Bonnet (re-appointment), Juan Naranjo Martínez and Ramiro Salazar Cordero

Panel of Arbitrators

Designations effective October 26, 2004:

José Ramón Jiménez Carbo, Juan Larrea Holguín (re-appointment), Alejandro Ponce Martínez (re-appointment) and Alberto Wray Espinosa

Indonesia

Panels of Conciliators and of Arbitrators

Designations effective July 6, 2004:

H. Priyatna Abdurrasyid, Ir. Harianto Sunidja and M. Husseyn Umar

Ireland

Panels of Conciliators and of Arbitrators

Designations effective July 13, 2004:

James Connolly, Eoghan Fitzsimons (re-appointment), Paul Gallagher (re-appointment) and Ercus Stewart (re-appointment)

Jamaica

Panel of Conciliators

Designations effective August 11, 2004:

Christopher Bovell (re-appointment) and Jean Dixon

Panel of Arbitrators

Designations effective August 11, 2004:

B. St. Michael Hylton, Stephen Shelton and Stephen Vascianne

Mongolia

Panel of Arbitrators

Designation effective Sept. 24, 2004:

J. William Rowley

NEW ICSID PUBLICATIONS

Spain

Panels of Conciliators and of Arbitrators

Designation effective July 15, 2004:

Bernardo M. Cremades (re-appointment) and José Carlos Fernández Rozas (re-appointment)

Uruguay

Panel of Conciliators

Designations effective July 7, 2004:

Fernando Jiménez de Aréchaga, Carlos Enrique Delpiazco Rodríguez, José Luis Shaw and Jorge Rodolfo Tállice

Panel of Arbitrators

Designations effective July 7, 2004:

Elías Bluth, Carlos Enrique Delpiazco Rodríguez, José Luis Shaw and Jorge Rodolfo Tállice

The Centre has published, since September 2004, a new issue of the *ICSID Review—Foreign Investment Law Journal* and two releases for its loose-leaf collections of *Investment Treaties* and *Investment Laws of the World*.

The new issue of the *ICSID Review* (Volume 19, Number 1) included three articles and texts of two recent awards and an *ad hoc* committee decision rendered in ICSID proceedings. One of the articles, by Giorgio Sacerdoti, reflected on aspects of investment arbitration under the arbitration rules of UNCITRAL and ICSID evaluating the advantages of each method and focusing in particular on issues of prerequisites, applicable law and the competence of domestic courts in examining challenges against awards. The other article, by Rudolf Dolzer and Terry Myers, commented on recent interpretation by arbitral tribunals of the most-favored-nation provisions contained in investment treaties. The third article in the issue, by Gonzalo Biggs, analyzed substantive provisions on treatment of foreign investment and procedures for investor-State dispute settlement in the Chile-U.S. Free Trade Agreement on the background of a historic overview of the evolution of Latin American policies in regard to protection of foreign investment and international arbitration.

In addition, the issue reproduced an *ad hoc* Committee's decision on annulment of an award and its subsequent decision on a request for supplementation and rectification of the annulment decision. Also included in the issue was the text of a recent award in one of the cases and a decision on jurisdiction rendered in another case.

In the fall of 2004, the Centre also published a new release of its *Investment Laws of the World* collection. This release included new or amended foreign investment legislation of the Democratic Republic of the Congo, Jordan, Namibia, Turkey, Vietnam and Yemen. A new release, containing the texts of 20 bilateral investment treaties concluded by some twenty-seven countries during the period of 1992–2003, was also issued for the *Investment Treaties* collection. ■

RECENT BOOKS AND ARTICLES ON ICSID

- Alexandrov, Stanimir A., Breaches of Contract and Breaches of Treaty—The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*, 5/4 *Journal of World Investment and Trade* 555 (2004).
- Biggs, Gonzalo, The Latin American Treatment of International Arbitration and Foreign Investments and the Chile–U.S. Free Trade Agreement, 19 *ICSID Review—Foreign Investment Law Journal* 61 (2004).
- Dodge, William S., *Loewen Group, Inc. v. United States* and *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, ICSID Case No. ARB(AF)/98/3, 98 *American Journal of International Law* 155 (2004).
- Dolzer, Rudolf and Myers, Terry, After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements, 19 *ICSID Review—Foreign Investment Law Journal* 49 (2004).
- Fernández Masiá, Enrique, Arbitraje en inversiones extranjeras: el procedimiento arbitral en el CIADI (2004).
- Frutos-Peterson, Claudia, El arbitraje de CIADI y su impacto en el arbitraje internacional latinoamericano en materia de inversión, 1/2 *Revista de Arbitragem E Mediação* 155 (2004).
- Gaillard, Emmanuel, Centre international pour le règlement des différends relatifs aux investissements (CIRDI): chronique des sentences arbitrales, 131 *Journal du droit international* 213 (2004).
- Garcia-Bolivar, Omar E., Comments on Some ICSID Decisions on Jurisdiction, 32/4 *International Business Lawyer* 167 (2004).
- Hornick, Robert N., The *Mihaly* Arbitration—Pre-Investment Expenditure as a Basis for ICSID Jurisdiction, 20 *Journal of International Arbitration* 189 (2003).
- Karamanian, Susan L., Overstating the Americanization of International Arbitration: Lessons from ICSID, 19 *Ohio State Journal on Dispute Resolution* 5 (2003).
- Larsen, Clifford, ICSID Jurisdiction: The Relationship of Contracting States to Sub-states Entities, in *Arbitrating Foreign Investment Disputes* 353 (Norbert Horn and Stefan Kröll, eds., 2004).
- Lew, Julian D.M., ICSID Arbitration: Special Features and Recent Developments, in *Arbitrating Foreign Investment Disputes* 267 (Norbert Horn and Stefan Kröll, eds., 2004).
- Pinsolle, Philippe, Jurisdictional Review of ICSID Awards, 5/4 *Journal of World Investment and Trade* 613 (2004).
- Sacerdoti, Giorgio, Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards, 19 *ICSID Review—Foreign Investment Law Journal* 1 (2004).
- Schlemmer, Engela C., Bilateral Investment Treaties, Protection of Shareholders, and ICSID: *CMS Gas Transmission Company v. the Republic of Argentina*, 28 *South African Yearbook of International Law* 292 (2003).
- Schreuer, Christoph, Non-pecuniary Remedies in ICSID Arbitration, 20/4 *Arbitration International* 325 (2004).
- Sedlak, David R., ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?, 23 *Penn State International Law Review* 147 (2004).
- Sinclair, Anthony C., Nationality of Individual Investors in ICSID Arbitration, 7/6 *International Arbitration Law Review* 191 (2004).
- Onwuamaegbu, Ucheora, Resolution of Oil and Gas Disputes at ICSID, 21/1 *News from ICSID* 1 (2004).
- Wallace, Jr., Don, Case Study under NAFTA: Lessons for the Wise?, in *Arbitrating Foreign Investment Disputes* 267 (Norbert Horn and Stefan Kröll, eds., 2004).
- Weiler, Todd, Dodging Bullets—A First Look at the Final Award in *The Loewen Group and Raymond L. Loewen v. U.S.A.*, 4 *Journal of World Investment and Trade* 659 (2003).
- Wisner, Robert and Gallus, Nick, Nationality Requirements in Investor-State Arbitration, 5/6 *Journal of World Investment and Trade* 927 (2004).