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Editorial

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A l'heure où Forum s'engage dans une nouvelle année de publication, la tragédie dans le sud est asiatique inspire à chacun d'entre nous des sentiments de compassion pour les milliers de victimes du tsunami. Il est particulièrement étonnant qu'il soit nécessaire de voir des centaines de milliers de morts et une multitude de personnes déplacées, dépourvues de toutes ressources, pour se souvenir que la nature ne doit pas être sur-exploitée et qu'il est grand temps que les principes du développement durable soient enfin traduits en actions concrètes.

Notre colère est encore décuplée en constatant qu'à la catastrophe naturelle vient s'ajouter le chaos, cette fois, du fait de l'être humain. L'élan de générosité de la communauté internationale (devrions-nous dire « des peuples du monde » ?) semble en effet paralysé par le manque de coordination des aides en tout genre qui se pressent sur place. Le balai des politiques qui se rendent sur les lieux ne cesse d'interpeller les citoyens que nous sommes.

Les ennemis cyniques de l'ONU, affaiblie par le scandale pétrole contre nourriture, ne manqueront pas de souligner l'incompétence de cette institution pour mieux servir leurs desseins impérialistes. Que peut faire l'ONU face à une action humanitaire devenue, à l'instar du règlement des conflits armés, un terrain où s'affrontent rivalités économiques et politiques entre divers acteurs privés ou publics ?

Toutefois, les raisons de garder un peu d'espoir ne manquent pas. Mentionnons simplement la décision de la Cour suprême du Chili confirmant l'arrêt de la cour d'appel de Santiago qui avait estimé que la santé mentale de l'ancien dictateur Augusto Pinochet lui permet de se défendre. On peut considérer cette décision comme une « victoire » longuement attendue pour les victimes. Gardons-nous cependant de tout triomphalisme, l'application de la norme juridique est infiniment plus complexe dans les situations de crise.

Ainsi sur le continent africain, les massacres des populations civiles du Darfour continuent de faire rage, alors que la commission internationale d'enquête de l' ONU chargée de déterminer si le crime de génocide est commis au Darfour, demande au Conseil de Sécurité de saisir la Cour pénale internationale aux fins d'enquêter sur les atrocités commises. Ce décalage entre l'application stricte du droit international et la nécessité d'intervenir d'urgence met en évidence les limites du droit international dans des situations de crise. N'aurait-il pas été logique d'accompagner la création de cette commission de la possibilité de prendre des mesures conservatoires?

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La rubrique thèmes récurrents de ce numéro de FORUM consacrée aux mesures conservatoires en droit international fournit indirectement des éléments de réponse à cette interrogation.

FORUM propose en effet à ses lecteurs dans le présent numéro un thème récurrent consacré au contentieux provisoire. Il n'est plus besoin de démontrer l'importance de ce contentieux dans la pratique judiciaire internationale. Des causes célèbres du droit international comme l'affaire *LaGrand* soumise à la Cour internationale de justice ou plus récemment l'affaire *Mamakulov* tranchée par la Cour européenne des droits de l'homme ont montré l'intérêt de disposer devant les juridictions internationales, qu'elles soient directement organisées par les Etats ou constituées à l'initiative des parties, d'une forme de recours permettant d'organiser à brève échéance le court terme des relations entre parties. Ces affaires ont aussi mis en lumière les difficultés d'organiser de telles procédures dans l'ordre juridique international. Aux traditionnels obstacles posés par le contentieux provisoire dans la sphère interne – définition des mesures visées, nécessité ou non d'une condition liée à l'urgence, relations difficiles entre le juge du provisoire et le juge du fond, etc. – s'ajoutent des difficultés propres au contexte international.

Nous sommes convaincus que les réflexions de spécialistes qui se sont penchés sur les questions que soulève le contentieux provisoire dans des contextes aussi différents que l'arbitrage CIRDI, la mission de la Cour européenne des droits de l'homme ou encore l'arbitrage CCI apporteront les premiers éléments de réponse aux interrogations de nos lecteurs.

Nous avons aussi retenu pour le tour des conférences deux événements importants pour la communauté des juristes de droit international: le colloque annuel de la société française de droit international dont la liberté de ton nous réjouit et la conférence inaugurale de la société européenne de droit international qui s'est inscrite dans le courant résolument universaliste, même si l'on peut regretter que cette dernière se soit constituée autour d'un concept étroit et suranné de la division entre le droit public et le droit privé.

Comme les années précédentes, FORUM encourage tous ses lecteurs à lui faire part de leurs souhaits pour qu'il y soit étudié certains sujets particuliers. Votre opinion nous intéresse ! Ecrivez-nous !

Recurring Themes / Thèmes récurrents

Interim Measures in International Law / Les mesures provisoires en droit international

The Continuing Controversy over Provisional Measures in International Disputes

CAMPBELL McLACHLAN*

I. Of Practice and Principle

The dramatic events in the recent case of *Motorola Credit Corporation v. Uzan et al*[1] demonstrate the global potency of provisional measures in modern international litigation. Following a multi-billion dollar default on its loans to a Turkish mobile telephone operator, Motorola brought a complaint of fraud against its Turkish partner's owners to the Southern District of New York. It then pursued an application for a freezing injunction in support of the New York proceedings in England. Its *coup de grâce* was to seek enforcement of that order in Switzerland, a strategy which has now received the blessing of the Swiss Federal Supreme Court. The experience of this case could be multiplied many times from the law reports in both public and private international litigation. Very often the availability of provisional measures is of huge practical importance to the parties, and may be decisive of the outcome of the case. This is not only true of the large multi-jurisdictional commercial and fraud cases typified by the *Motorola* litigation. In international tribunals, too, the interim measures jurisdiction may overshadow the settlement of disputes on the merits, as the initial experience of the International Tribunal for the Law of the Sea demonstrates.

It is doubtless true, as Jiménez de Aréchaga held in the *Aegean Sea Continental Shelf* case in the International Court of Justice, that the interim protection of rights is a general principle of law recognized by civilised nations:[2]

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1 322 F. 3d 130 (USCA 2nd Cir); [2002]EWCA Civ 989 (English CA); BGE 129 III 626 (Swiss Federal Sup Ct), and see: Veit and Sprange 'Enforcing English Worldwide Freezing Injunctions in Switzerland' (2004) 5 BLI 400.

2 ICJ Rep 1976, 3 at 15-16.

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> … the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision … is that the action of one party *'pendente lite'* causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour.

Collins, in his seminal series of Hague lectures on the topic,[3] showed the common issues faced by tribunals, whether they be domestic courts, arbitral tribunals, or international courts, in setting the boundaries for the availability of such relief. The American Law Institute and UNIDROIT, in developing their Principles and Rules of Transnational Civil Procedure, have recognised a general right to grant provisional relief "when necessary to provide effective relief by final judgment or to regulate the status quo."[4]

Given this general recognition of the importance of provisional relief, it is therefore both surprising and disturbing to have to report that there remain major controversies over the extent and conditions of its availability in international cases. These controversies have engaged the attention of supreme courts around the world. They have also taxed international tribunals and law reform bodies. They go to the very heart of the matter by raising fundamental issues in (at least) the following five areas:

(1) the *substantive type* of orders which may be made as provisional measures;

(2) the *territorial scope* of such orders;

(3) the *jurisdiction* to grant them and their availability in aid of proceedings on the merits in another tribunal;

(4) the availability of *ex parte* relief; and,

(5) the *enforceability* of such orders outside the tribunal granting them.

It is the burden of this paper to suggest that, while a general trend towards an international consensus may be discerned, there remain serious shortcomings in the law in this area. The judicial decisions and international debates on the matter over the last five years have done little to dispel these deficiencies. They stem from a widespread failure properly to analyse the international context in which applications for such measures arise. In the compass of this short note it is not possible

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[3] Collins 1992.

[4] American Law Institute 'ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure' Council Draft no 2 (2003), Principle 8, p. 18.

to do more than to outline the broad contours of these controversies, and then to suggest where their solution may more properly lie.[5]

II. Five Continuing Controversies

(1) Substantive Protection

It has been suggested elsewhere[6] that, despite the huge diversity of procedural law, all provisional measures essentially perform one of two functions:

(a) to maintain the status quo pending determination of the issues at trial; or,

(b) to secure assets out of which an ultimate judgment may be satisfied.

Yet, unexceptional as these objectives may be, case-law in major commercial centres continues to depart from this central core, either by failing to meet even these basic needs, or by ranging into matters which are not provisional at all.

It took until 1975 for the English courts to reverse the Nineteenth Century rule that "[y]ou cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property."[7] The subsequent flowering of the *Mareva* injunction[8] into one of the most effective remedies in the commercial litigator's arsenal took even Continental lawyers, with their well developed procedures of arrest and *saisie*, by surprise.

But what had developed by judicial innovation in London was to be still-born upon attempted transplant to the United States. In its decision in *Grupo Mexicano*[9] in 1999, the United States Supreme Court decided that the Mareva remedy was not available in U.S. federal courts. Delivering the judgment for the majority, Justice Scalia held that, because such a remedy did not exist in 1789, the federal courts had no power to create it. In this way, the dead hand of originalism atrophied the range of provisional remedies available to U.S. courts, especially to meet the second basic objective outlined above.

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[5] A list of further reading at the end will enable the reader to pursue the ideas of the author and of others on these issues in more detail.

[6] ILA 1996, pp. 192-3, following Collins 1994, pp.11-2

[7] *Robinson v. Pickering* (1881) 16 Ch D 660,1 (CA, per James LJ).

[8] After *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509

[9] *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc* 527 US 308; 119 S Ct 1961 (1999).

In Europe, the problem has rather been the reverse one of over-extension of the scope of provisional measures. Since Europe enjoys a common regime for jurisdiction and the enforcement of judgments in civil and commercial matters, the delimitation of the proper extent of the provisional remedies power is of the first importance. By article 31 of the Brussels Regulation:[10]

> Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

What, then, of the remedy, commonly found in many Member States' systems of civil procedure, of the interim payment order? One would have thought that such an order, even though made at an interlocutory stage in the proceedings, would not qualify as a provisional measure, since (however reversibly) it involves a determination on the merits.[11] Thus, for that reason, the French courts will not grant such an order where an arbitration clause exists. To do so would be to trammel upon the jurisdiction of the arbitral tribunal to whom the parties have vouchsafed the sole right of decision upon the merits of their claim.[12] Similarly, to allow a court to exercise its own jurisdiction to order such a payment irrespective of the Regulation's rules regarding allocation of jurisdiction on the merits would seem to be a perforation of the Regulation's cooperative scheme.

However, in 1998, the European Court of Justice gave a guarded reception to the inclusion of interim payment orders within the framework of provisional measures, provided:[13]

> … first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

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[10] Council Regulation (EC) no 44/2001 OJ L12, 16.01.01. The rule was formerly found in article 24 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968; and see, to same effect, article 24 of the Lugano Convention 1988.

[11] See Collins 1994, pp. 37-9.

[12] See the references cited in Collins 1994, p. 39 at note 122.

[13] *Van Uden Africa Line v. Deco-Line* [1998] ECR I-7091, para 47; applied in *Mietz v. Intership Yachting Sneek BV* [1999] ECR I-2277.

The second condition represents a welcome piece of judicial law-making by the Court which certainly mitigates some of the undesirable effects of its decision. However, the Court's overriding desire was to preserve the freedom of operation of a well-recognized domestic remedy in many domestic European legal systems. This led it to disregard the true preservative function of provisional measures. Focusing on this objective becomes of particular importance when such remedies are to be translated and applied in an international scheme.

(2) Territorial Scope

It is perhaps unsurprising, however much Common lawyers may bemoan its loss as a means of controlling unscrupulous forum-shopping litigants, that the anti-suit injunction has recently been held by the European Court not to constitute a permissible provisional measure, when applied to proceedings in other Member States. Indeed, in such cases, anti-suit injunctions have been held to infringe the common regime of the Brussels Regulation altogether.[14] Common law courts are now therefore precluded from ordering litigants to refrain from pursuing litigation in other Member States, whether or not it is an abuse of the process of the court, or in breach of an exclusive jurisdiction clause, or otherwise contrary to the Regulation's jurisdictional rules. All of these are matters for the court seized to decide. As it has been memorably put:[15]

> It is a state of affairs which makes one rub one's eyes in disbelief. But along with pounds and ounces, there are no anti-suit injunctions in Utopia.

What is more remarkable is the extent to which the English worldwide *Mareva* injunction seems to have embedded itself into international practice.[16] As *Motorola* demonstrates, the remedy is widely applied for even by litigants who are trying the merits of their claim elsewhere, and strenuous efforts have been made by courts in other states to accommodate and give effect to such injunctions over assets in their own countries.

Despite this enthusiasm for the worldwide injunction as a judicial response to the globalisation of assets, one must ask whether it really represents the best solution to the international problem it is designed to address. In form, of course, the injunction scrupulously purports to avoid conflict with foreign courts and laws by operating only upon the person of the defendant. The standard form of such

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[14] *Turner v. Grovit* [2004] IL Pr 25.

[15] Briggs (2004)120 LQR 529, 533.

[16] See further Collins 1989 and McLachlan 1989.

injunctions expressly disavows any effect upon the obligations of third parties outside the jurisdiction of the court. Yet, for practical purposes, provisional measures need to bite upon the property to which they are directed if they are to be effective.

It is difficult to resist the conclusion that the worldwide *Mareva*, for all its grand pretensions, is really of more significance for the remedy which is supposed to be ancillary to it: the order to the defendant to disclose all of the assets caught by the injunction.[17] Especially if the defendant is within the jurisdiction, and therefore amenable to the contempt powers of the court, or if there is evidence within the jurisdiction, disclosure of which can be compelled, this so-called ancillary power may in fact offer the real benefit of the worldwide injunction. Armed with information about the location of the defendant's foreign assets, the plaintiff can then go and get more territorially-limited provisional measures in the courts of the countries where the assets are located. What is therefore really being addressed, in a roundabout fashion, is a continuing weakness in many Civil Law systems of provisional measures in their failure to provide any effective means of disclosure so as to make their arrests and seizures effective.

(3) Jurisdiction and Ancillary Support

The requirement of a real connecting link between the subject-matter of the measure sought and the territorial jurisdiction of the state of the court before whom the measures are sought is widely recognised as basic to the exercise of provisional measures in a cross-border setting.[18] But it is disturbing to have to report that the recent reconsideration of the rules of the Brussels Convention consequent upon its transformation into a Community Regulation did nothing to remove those awesome relics of the past, the *forum arresti* and *forum patrimonii* from enjoying trans-European currency as regards non-European domiciliaries.[19] Jurisdiction over the merits thus assumed on the basis only of the grant of provisional measures over assets within the jurisdiction should surely hold no place in a modern civil justice system, even as a last resort.[20]

But it has been equally difficult to persuade Common Law countries to do the reverse, namely to assume jurisdiction only to grant provisional measures over assets within their territorial jurisdiction, where the courts of another state have

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[17] A point first made by Collins 1994, p. 223; and explored in McLachlan 1998.

[18] *Van Uden*, supra n. 13, para 48.

[19] Brussels Regulation article 4 and Annex 1.

[20] The current draft of the ALI/UNIDROIT Rules still recognise such a residual role, supra n. 4, Rule 4.4.2, p. 35.

jurisdiction over the merits. The decision of the Privy Council on appeal from Hong Kong in *Mercedes Benz AG v. Leiduck*[21] highlighted the potential injustice and absurdity of this formalism, which restricted the availability of provisional measures to cases where the court already enjoyed a basis for *in personam* jurisdiction over the merits. Of course there might be cases where this jurisdiction could be enjoyed in a virtual sense, but where the case would actually be tried elsewhere. This was what had made an English *Mareva* available in aid of an international arbitration in Belgium in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd*.[22] But *Leiduck* was not such a case. Mercedes Benz' claim of fraud proceeded against Mr Leiduck in Monaco, where he was imprisoned. But the Monégasque court's *saisie* power did not extend to Mr Leiduck's substantial assets in Hong Kong. The Privy Council's decision that it had no power to act in this case created a "judicial black hole"[23] which was filled by legislation in England.[24] Unfortunately, however, *Leiduck* remains the law in many other Common Law countries.

(4) Ex Parte *Applications*

A fourth area of continuing, and unnecessary, confusion has been the circumstances in which provisional measures should be awarded *ex parte*, and the recognition and enforcement of orders made on such a basis outside the jurisdiction of the tribunal making them. Of course, there will always be cases where it is necessary to be able to make an application for provisional measures on an *ex parte* basis, especially where the matter is urgent, or there is a real fear that the defendant will move to frustrate the plaintiff's application if forewarned of it. The ability to act quickly in this way is of the essence of the protective function of such measures.

In the international context, the more problematic questions are:

(a) what effect should be given to such orders by other courts before they have been confirmed *inter partes*; and,

(b) which tribunal is best placed to make such orders.

Within Europe, it had long been assumed, on the basis of the language of the Conventions and authority,[25] that *ex parte* orders would be unenforceable outside

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[21] [1996] 1 AC 284, as to which see: McLachlan 1997.

[22] [1993] AC 334.

[23] See the dissent of Lord Nicholls, supra n. 21, at p. 305.

[24] Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997 No. 302).

[25] See especially *Denilauler v. SNC Couchet Frères* [1980] ECR 1553.

the state in which they were rendered. That is because, in order to enforceable in other Contracting States, a court order had to have been made *after* the defendant had been given a reasonable opportunity to be heard.[26] However, the recent decision of the Swiss Federal Supreme Court in *Motorola* has held that such an order was still enforceable under the Convention's scheme provided that the defendant still had an opportunity to challenge the order *ex post*. This decision makes much practical sense where, for example, a defendant may have deliberately chosen not to appear in the proceedings. The Convention, after all, provides only that the defendant should have a reasonable opportunity to be heard. It does not exempt default judgments from its regime. But, in so far as the decision may be read as allowing the plaintiff to take his order abroad and enforce it before a defendant who desires to protest has been heard, it represents a very bold interpretation of the Convention's due process protections.

In the field of international commercial arbitration, a similar attempt to extend the *ex parte* jurisdiction is currently being pursued in the context of the discussions of an UNCITRAL Working Group examining possible revisions to Article 17 of the UNCITRAL Model Law.[27] The suggestion, which has been vigorously pursued by one of the members of the Group, is that arbitral tribunals should have the power to make such orders *ex parte*, and that courts should come under an obligation to enforce such orders. Quite apart from the long discussed difficulties of fitting such orders within the enforcement regime of the New York Convention,[28] in the author's view, this proposal is wholly misguided. The ICC in its communication on the matter pointed to the potential for such a power to undermine confidence in the arbitral process by depriving it of an essential due process protection.[29] But more fundamentally, it may be questioned whether the existence of a power to act *ex parte* is really consistent with the consensual nature of the arbitral process.

If there are in fact circumstances of urgency or the potential for frustration of the arbitral process which might justify a claimant in applying *ex parte*, then the proper forum in which to apply is a national court which can make orders in support of the arbitration. Such orders have the great merit that they are directly enforceable

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[26] Brussels Regulation art 34 (2).

[27] UNCITRAL 2000. For the most recent report and draft see: UN Doc. A/CN.9/WG.II/WP.134, 19 November 2004.

[28] See, e.g. Craig Park and Paulsson *International Chamber of Commerce Arbitration* (3rd edn, 2000, Dobbs Ferry: Oceana), pp. 464-7.

[29] UN Doc A/CN.9/WG.II/WP.129, 3 February 2004.

against the property and/or affected third parties. Although such a power to act in aid of arbitration is widely recognised in many legal systems,[30] as well as in the rules of prominent arbitral institutions,[31] it is not well established in the United States.[32] Perhaps the enthusiasm currently being shown in certain quarters of the U.S. for an extended *ex parte* power for arbitral tribunals may in part be explained by the failure of the courts in that country to develop a suitable power to act *ex parte* in support of arbitral proceedings. Indeed, after *Grupo Mexicano*, the ability of federal courts to grant any kind of provisional measure freezing assets will be very limited.

(5) Enforcement

Finally, given the importance of provisional measures, it is remarkable how limited the extent of their recognition and enforcement outside the court awarding them has been. It is not necessary to go so far as the Swiss Federal Supreme Court did in *Motorola* to afford effective enforcement. Outside Europe, the normal rule is that provisional measures are not enforceable transnationally. Enforcement of foreign judgments regimes typically extend only to judgments which are final and conclusive as to the merits. Provided the defendant has received due process in a court of competent jurisdiction over the merits granting the measure, it is difficult to see why the order should be refused full faith and credit by other courts.

The orders of international courts have been even slower to achieve enforceability. As Olivier De Schutter discusses later in this issue,[33] international human rights tribunals have been slow to find that their own provisional measures are binding on the states parties. The European Court of Human Rights, for example, only reached this conclusion as recently as 4 February this year.[34]

Even in the case of the orders of the International Court of Justice, there was for a long time uncertainty about whether its provisional measures were binding and enforceable. The Court finally resolved this for itself in the *La Grand* case, which concerned the consular rights of a German national on Death Row in the United

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[30] UNCITRAL Model Law article 9

[31] E.g. ICC Rules art 23.

[32] See; Sentner, R 'Judicial Ordered Provisional Measures in New York: the Vacuum Remains' (2004) 21 Jnl Intl Arb 509.

[33] Infra, p. 16.

[34] *Mamatkulov and Askarov v. Turkey*, Appln nos. 46827/99 & 46951/99.

States.[35] Regrettably, the Court's own finding that its provisional measures were binding was not shared by the Supreme Court of the United States, which held that the ICJ's order was not cognisable or enforceable in U.S. courts.[36]

III. Reasserting the International Context

These continuing controversies and shortcomings in the law in this area suggest a pervasive failure of courts to come to grips with the implications for their decisions of the international context in which orders for provisional measures were sought. Whatever may be the position within the legal order in which the measures are granted, there are strong grounds for an autonomous approach where the matter crosses legal boundaries.

The key to development of the proper role of provisional measures in international litigation is to recognise the essentially adjectival character of such measures. Since they are granted to preserve the status quo, it is crucial that such measures should operate directly where the preservation is required, in a manner which supports, and does not detract from the jurisdiction of the tribunal charged with determination of the merits of the claim. The existence of such an ancillary jurisdiction to act in aid of other tribunals is of foundational importance in this area, whether the other tribunal is a national court, an arbitral tribunal or an international tribunal.

The recognition and development of the implications of this fact was perhaps the most useful contribution of the ILA Committee on International Civil and Commercial Litigation in developing the Helsinki Principles on Provisional and Protective Measures in International Litigation.[37] These Principles were proposed by UNCITRAL's Secretary-General as a suitable precedent for the work of the UNCITRAL Working Group on International Commercial Arbitration.[38] As has been seen, the common aspects of the problems in this field outweigh the differences between the modes of dispute resolution. In each case, the best guide to decision will come from a clear analysis of the international context – in other words, the practical problem to be addressed in international cases. It is to be hoped that, in completing its work, the UNCITRAL Working Group will eschew some of the tangents currently being pursued. There is a continuing need for those who are shaping the law in this area (whether law reformers or judges) to return to the

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[35] ICJ Rep 2001, para 102. See further the article by Pieter Bekker, infra, p. 24.

[36] *Federal Republic of Germany v. United States* 526 US 111, 119 S. Ct. 1016 (1999); and see *Breard v. Greene* 523 US 371, 118 S. Ct. 1352 (1998).

[37] ILA 1996, Helsinki Principles 10-15.

[38] UNCITRAL 2000, paras 106-8.

achievement of the central purpose of provisional measures, namely to provide, through judicial cooperation, appropriate preservative remedies in international cases which are both effective and fair to all parties.

Further Reading

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The Binding Character of the Provisional Measures adopted by the European Court of Human Rights

OLIVIER DE SCHUTTER*

On 4 February 2005, the Grand Chamber of the European Court of Human Rights considered for the first time in a final judgment that a refusal by a State party to the European Convention on Human Rights[1] to comply with an interim measure indicated by a Chamber of the Court or its President on the basis of Article 39 of the Rules of the Court constitutes a violation of Article 34 of the Convention, which imposes an obligation on the Contracting Parties "not to hinder in any way the effective exercise" of the right to individual application.[2] This is a remarkable development. It represents a clear break with the previous case-law of the European Court of Human Rights, which had previously considered that not only the provisional measures indicated by the European Commission of Human Rights under Article 36 of its Rules of Procedure,[3] but also the provisional measures

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1 Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, entered into force on 3 September 1953 (CETS No. 5).

2 Eur. Ct. HR (GC), judgment of 5 February 2005 in the case of *Mamatkulov and Askarov v. Turkey*, Appl. No. 46827/99 and 46951/99, nyr. The judgment was adopted after the *Mamatkulov and Abdurasulovic v. Turkey* judgment delivered on 6 February 2003 by a Chamber constituted within the 1st section of the Court had been accepted for referral to the Grand Chamber, upon the request of the defending State (see Art. 43 ECHR).

3 Eur. Ct. HR, *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, pp. 36-37, §§ 102-103. This judgment led to a voluminous commentary: R. Bernhardt, "Interim Measures of Protection under the European Convention on Human Rights", in R. Bernhardt (ed.), *Interim Measures indicated by International Courts*, Berlin, Springer Verlag, 1994, p. 102; G. Cohen-Jonathan, "De l'effet juridique des 'mesures provisoires' dans certaines circonstances et de l'efficacité du droit de recours individuel: à propos de l'arrêt Cruz Varas de la Cour européenne des droits de l'homme", *Revue universelle des droits de l'homme*, 1991, p. 205; E. Garcia de Enterria, "De la légitimité des mesures provisoires prises par la Commission et la Cour européennes des droits de l'homme. L'affaire Cruz Varas", *Rev. trim. dr. h.*, 1992, p. 251; R. St. J. Mcdonald, "Interim measures in international law, with special reference to the European system for the protection of human rights", 52(3-4) *ZaöRV* 703 (1992); K. Oellers-Frahm, "Zur verbindlichkeit einstweiliger Anordnungen der Europäischen Kommission für Menschenrechte", 18 *EuGRZ* 197 (1991); D. Spielmann,

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itself may choose to indicate under the Rules of Court[4] were not binding upon the States Parties to whom such measures are addressed. Indeed, such a power has not been conferred upon the European Court of Human Rights by the drafters of the Convention. It was not provided in the original version of the Convention, as adopted in 1950 when both the jurisdiction of the Court and the right to individual application were still optional, and despite the fact that a proposal had been made in that respect when the Convention was amended in 1994 in order to create a permanent and single Court – whose jurisdiction since 1 November 1998 is compulsory for all States parties to the Convention[5] – nor was such a power then granted to the Court.

The facts of the *Mamatkulov* case may be briefly recalled. The applicants were two Uzbek nationals, Rustam Mamatkulov and Abdurasulovic Askarov, both members of an opposition party in Uzbekistan, and whom the Uzbek authorities suspected of murder, causing injuries by the explosion of a bomb in Uzbekistan, and an attempted terrorist attack on the President of the Republic. After their arrival in Turkey from Kazakhstan, Uzbekistan requested their extradition in accordance with a bilateral extradition treaty. However, after they had lodged applications with the European Court of Human Rights when faced with the threat of being extradited, the President of the Chamber on 18 March 1999 indicated to the Turkish Government, under Rule 39 of the Rules of Court, that "it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to Uzbekistan until the Court had had an opportunity to examine the application further at its forthcoming session on 23 March." On that date, the Chamber extended the interim measure until further notice. In the meantime however, on 19 March 1999, the Turkish Cabinet

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"Les mesures provisoires et les organes de protection prévus par la Convention européenne des droits de l'homme", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu*, Bruxelles, Bruylant, 1992, t. II, p. 1204; C.A. Norgaard, "Interim Measures under the European System for Protection of Human Rights", in *Festskrift Ole Due*, Stockholm, 1993, p. 283.

[4] Eur. Ct. HR (3d sect.)*, Čonka and Others v. Belgium* (dec.), No. 51564/99, 13 March 2001.

[5] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, opened for signature in Strasbourg on 11 May 1994, and entered into force on 1 November 1998 (CETS No. 155). The Swiss delegation had submitted a proposal with a view to including an Article in the Convention on provisional measures to the effect that "the Court may … prescribe any necessary interim measures" (doc. DH-PR(93)20, 22 November 1993).

had issued a decree for the applicants' extradition. They were handed over to the Uzbek authorities on 27 March 1999. Three months later, the High Court of the Republic of Uzbekistan found the applicants guilty of the offences as charged and sentenced them to 20 and 11 years' imprisonment respectively. In a Chamber judgment of 6 February 2003, while concluding that the other provisions invoked by the applicants had not been violated, the Court held, by six votes to one, that there had been a breach of Article 34 of the Convention because Turkey had not complied with the interim measures indicated by the Court. It is this which the Grand Chamber of the Court confirms in its judgment of 4 February 2005, by 14 votes to three. The Court considers that "by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention."[6]

The interim measures adopted by the European Court of Human Rights are based on Rule 39(1) of the Rules of the Court, which provides that "The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." This Rule reproduces the wording of Rule 36 of the Rules of the former Court, which came into force on 1 January 1983, inspired in turn by Article 36 of the Internal Rules of the European Commission of Human Rights which, in the *Cruz Varas* case of 1991, the Court had considered did not have the power to adopt interim measures binding upon the parties to whom they are addressed. However, when it adopted its Rules with the entry into force of Protocol No. 11 on 1 November 1998, the new Court added two paragraphs suggesting that the provisional measures it would "indicate" as desirable "in the interests of the parties or of the proper conduct of the proceedings before it" might be recognized an obligatory character which the measures indicated by the European Commission of Human Rights did not have: Rule 39(2) provided that notice of the provisional measures shall be given to the Committee of Ministers, implying that at least a certain political pressure should weigh on the States to which such measures are indicated; and Rule 39(3) added that the Chamber "may request information from the parties on any matter connected with the implementation

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[6] *Mamatkulov and Askaraov* judgment, § 128.

of any interim measure it has indicated," which did create the impression that such interim measures, when indicated as desirable, could not simply be ignored by the Parties.

Despite the opportunity created by these modifications, the Court simply confirmed its previous case-law in its admissibility decision adopted on 13 March 2001 in the case of *Conka*, after the Belgian authorities decided in October 1999 to ignore a request by the Court to suspend the expulsion of a family of Slovak nationals of Roma ethnic origin who had been denied asylum in Belgium. While expressing its regret at the failure of the Belgian authorities to "cooperate in good faith" with the European Court of Human Rights, the Court still considered that compliance with the provisional measures it indicated under Rule 39 was a matter of judicial comity rather than a legal obligation deriving from the European Convention on Human Rights.[7] Even taking into account the almost uniform practice of the States parties to the Convention to comply with the interim measures indicated by the Court – like, previously, with those indicated by the Commission,[8] the hesitation of the Court to go further is quite understandable. The Rules of the Court are adopted by the plenary Court under Article 26 of the European Convention on Human Rights. Their status therefore differs markedly from that of Article 41 of the Statute of the International Court of Justice, which the International Court of Justice interpreted in the *LaGrand (Germany v. the United States)* judgment of 27 June 2001 as imposing on the States parties to a dispute before the Court an obligation to comply with the provisional measures indicated under that provision,

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[7] See supra note 4.

[8] In the *Cruz Varas* judgment of 20 March 1991, the Court summarized thus this practice and the interpretation it could be given, falling short from identifying the emergence of a rule of a customary nature in the application of the European Convention on Human Rights: "The practice of Contracting Parties in this area shows that there has been almost total compliance with Rule 36 indications. Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see, mutatis mutandis, [the *Soering v. the United Kingdom* judgment of 7 July 1989], Series A no. 161, pp. 40-41, § 103, and Article 31 § 3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset (…). In any event, as reflected in the various recommendations of the Council of Europe bodies [calling upon the States parties to the Convention to agree to recognizing the Court a power to adopt provisional measures of a binding character], the practice of complying with Rule 36 indications cannot have been based on a belief that these indications gave rise to a binding obligation (…). It was rather a matter of good faith co-operation with the Commission in cases where this was considered reasonable and practicable" (*Cruz Varas v. Sweden* judgment, cited above n. 3, at § 100).

despite the vague character of the wording of that provision. Nor may Article 39 of the Rules of the Court adopted by the European Court of Human Rights be considered equivalent to Article 63(2) of the American Convention on Human Rights, which provides explicitly for a power of the Inter-American Court of Human Rights to adopt provisional measures "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons". Both the Statute of the International Court of Justice and the American Convention on Human Rights are international treaties to whose terms the States parties have agreed. No equivalent clause exists in the European Convention on Human Rights.

Nevertheless, the *Mamatkulov* case-law is not unprecedented in human rights jurisprudence. Under Rule 86 of its rules of procedure, the Human Rights Committee "may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation."[9] Under the International Covenant on Civil and Political Rights, the Human Rights Committee adopts its own rules of procedure.[10] It nevertheless considered in its final views of 19 October 2000 adopted in the case of *Dante Piandiong, Jesus Morallos and Archie Bulan v. The Philippines*, that a refusal of a State to comply with such measures, "especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol."[11] The Human Rights Committee has repeated this statement since.[12] It still falls short, however, of seeing a violation of the Covenant itself in the failure by a State party to comply with the interim measures adopted by the Committee, and it remains hesitant as to the precise nature of this violation: thus, it did not include in its General comment No. 31 – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted in 2004 at its 80th session[13] – a paragraph restating this obligation, although such a paragraph

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[9] See now Rules of Procedure of the Human Rights Committee, UN doc. CCPR/C/3/Rev. 6, 24 April 2001, Article 86.

[10] Article 39(2) of the International Covenant on Civil and Political Rights.

[11] Human Rights Committee, final views adopted on the Communication No. 869/1999, *Annual Rep.* I, p. 181.

[12] Human Rights Committee, *Weiss v. Austria*, communication No. 1086/02, final views of 8 May 2003.

[13] Compilation of the general comments or general recommendations adopted by human rights treaty bodies, HRI/GEN/1/Rev.7, 12 May 2004, p. 192.

was included in the draft text.[14] In the framework of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture, when it adopted in accordance with Article 18(2) of the Convention its Rules of Procedure, included a Rule 108 § 9 enabling it to adopt provisional measures in proceedings brought by individuals alleging a violation of the Convention against Torture. It considered that non-compliance with such provisional measures should be considered a violation of the Convention, as "the State party, in ratifying the Convention and voluntarily accepting the Committee's competence [to examine individual communications] under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee."[15] These developments, to which the European Court of Human Rights refers in its *Mamatkulov and Askarov* judgment of 4 February 2005, undoubtedly emboldened it to follow suit, and to overcome its previous hesitations to ignore the absence of an explicit power to do so under the text of the Convention. The development achieved in the *Mamatkulov and Askarov* case thus illustrates the emergence of a *jus commune* in the international law of human rights, whereby international courts and human rights bodies contribute to its evolution through a form of interjurisdictional dialogue, relying on one another's case-law rather than feeling constrained by the international instrument which they interpret:[16] it is its status as a participant in this dialogue, rather than the legal reasoning behind its decision, which best explains the attitude of the European Court of Human Rights and why it felt empowered to go beyond the explicit text of the Convention.

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[14] The draft text of General Comment No. 31 contained a para. 19 which read: "Failure to implement provisional measures indicated by the Committee in cases under the Optional Protoocol [providing for individual communications to be submitted to the HRC] with a view to avoiding irreparable harm pending the Committee's consideration of a case should be regarded as incompatible with the obligation to respect in good faith the Covenant, in particular its article 2 [defining the general obligations of the States parties to the ICCPR, in particular the obligation to respect and ensure the Covenant rights of the individuals under the jurisdiction of the State] and the right of individual communication under the Optional Protocol."

[15] Committee against Torture, *Cecilia Rosana Núñez Chipana v. Venezuela*, 10 November 1998.

[16] See C. McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights", 20 *Oxford J. Legal Studies 499-532 (2000); A.-M. Slaughter, Judicial Globalization, 40 Virginia* J. Int'l L. 1103 (2000).

Because it contributes to the effectiveness of the rights protected under the European Convention on Human Rights, such a development is to be welcomed. We may nevertheless note the discrepancy between the clear statement of the Court that any refusal by a State to comply with the interim measures indicated under Rule 39 will be treated as a violation of the right lodge an individual application – the "effective exercise" of which, under Article 34 of the Convention, the Contracting States undertake "not to hinder in any way" – on the one hand, and the justifications which may be given for establishing such a presumption, on the other hand. Indeed, there may be situations where, despite the failure by a State to comply with the interim measures indicated by the Court, the right to individual application is not interfered with in any way, in particular where the contacts between the individual applicant and his or her lawyers are not affected by such a refusal to comply.[17] And, although the Court emphasizes that "interim measures … play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted,"[18] there may be situations where the refusal to comply with the interim measures indicated by the Court will not deprive the individual application lodged under Article 34 of the European Convention on Human Rights of its object and purpose, because the consequences which are feared are not irreparable but may be restored in full. These tensions between the rule which is affirmed and its purported justifications indicate what (we may anticipate) will constitute the future use by the European Court of Human Rights of the powers it has asserted for itself under Article 39 of the Rules of Court. These powers will be used sparingly in the future, as they have in the past: interim measures will be afforded by the Court either where there is a risk that otherwise the right to individual application will be seriously hindered, for instance where the removal of a non-national from the national territory risks interrupting the communications between the applicant and his or her lawyers, or where there appears a need to avoid the creation of an irreversible situation, in particular where a non-national faces the threat of being extradited or returned to a country where he/she runs a real risk of being ill-treated or executed. The affirmation of the obligatory character of the interim measures indicated by the Court, in that

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[17] See para. 2 of the joint partly dissenting opinion of Mr Caflisch, Mr Türmen and Mr Kovler, appended to the judgment of the Court in *Mamatkulov and Askarov*.

[18] *Mamatkulov and Askarov* judgment of 4 February 2005, at § 125.

sense, may imply that their use will be frugal, and probably exclusively limited in fact to deportation and extradition proceedings.[19]

[19] The situation which presented itself in the case of *Öcalan* should remain highly exceptional: see Eur. Ct. HR (1st sect.), *Abdullah Öcalan v. Turkey*, Appl. No. 46221/99, dec. of 14 December 2000. There, Article 39 of the Rules of the Court was used twice by the Court, first to ensure that the criminal proceedings against Mr Öcalan would comply with the requirements of the right to a fair trial under Article 6(1) ECHR, and secondly to avoid the death penalty being executed against him. Although disputed by Turkey, the adoption of interim measures in this case may be explained by the need to avoid serious and irreparable harm being caused to the applicant. See for further details, O. De Schutter, "La protection juridictionnelle provisoire devant la Cour européenne des droits de l'homme", in H. Ruiz Fabri and J.-M. Sorel, *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales: regards croisés*, Paris, Pedone, 2001, pp. 105-148, at pp. 115-117.

Provisional Measures in the Recent Practice of the International Court of Justice

PIETER H.F. BEKKER*

Introduction

It is not my intention in this short article to revisit the work done previously on this subject by others.[1] Rather, my goal is to advance the understanding of the instrument of provisional measures in the law and practice of the International Court of Justice (ICJ) by providing an update of that previous work in the light of developments between 1994 and 2004. During that decade, the ICJ received requests for provisional measures in no fewer than eighteen cases, albeit that ten of the requests were submitted in substantially related proceedings. Five requests resulted in provisional measures. By comparison, there were seventeen cases in which the ICJ was called upon to consider requests for provisional measures between 1946 (the year of its inaugural sitting) and 1994, about half of which were granted. Of the six provisional measures cases dealt with by the Permanent Court of International Justice (PCIJ), the ICJ's predecessor (1921-1946), only two resulted in such measures. Table 1 presents the ICJ's recent record on provisional measures.

Table 1. Requests for provisional measures (1994-2004)

1. *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria)

– Request of February 12, 1996
– Hearings on March 5-6, 8, 1996
– Order of March 15, 1996 (ICJ Reports 1996, p. 13)
– Partly granted

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[1] *See, especially*, Shigeru Oda, "Provisional Measures: The practice of the International Court of Justice", in *Fifty Years of the International Court of Justice*, at 541 (V. Lowe & M. Fitzmaurice eds, 1996). Jerzy Sztucki, *Interim Measures in the Hague Court* (1983).

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2. *Vienna Convention on Consular Relations* (Paraguay v. U.S.)
– Request of April 3, 1998
– Hearing on April 7, 1998
– Order of April 9, 1998 (ICJ Reports 1998, p. 248)
– Granted

3. *LaGrand Case* (Germany v. U.S.)
– Request of March 2, 1999
– No hearing
– Order of March 3, 1999 (ICJ Reports 1999, p. 9)
– Granted

4–13. *Legality of Use of Force* (Yugoslavia v. [10 NATO Members])
– Requests of April 29, 1999
– Hearings on May 10-12, 1999
– Orders of June 2, 1999 (ICJ Reports 1999, pp. 124, 259, 363, 422, 481, 542, 656, 761, 826, 916)
– Rejected

14. *Armed Activities on the Territory of the Congo* (DRC v. Uganda)
– Request of June 19, 2000
– Hearings on June 26 & 28, 2000
– Order of July 1, 2000 (ICJ Reports 2000, p. 111)
– Partly granted

15. *Arrest Warrant of 11 April 2000* (DRC v. Belgium)
– Request of October 17, 2000
– Hearings on November 20-23, 2000
– Order of December 8, 2000 (ICJ Reports 2000, p. 182)
– Rejected

16. *Armed Activities on the Territory of the Congo (New Application: 2002)* (DRC v. Rwanda)
– Request of May 28, 2002
– Hearings on June 13-14, 2002
– Order of July 10, 2002 (ICJ Reports 2002, p. 219)
– Rejected

17. *Avena and other Mexican Nationals* (Mexico v. U.S.)
– Request of January 9, 2003
– Hearing on January 21, 2003
– Order of February 5, 2003
– Granted

18. *Certain Criminal Proceedings in France* (Rep. of the Congo v. France)
– Request of December 9, 2002
– Hearings on April 28-29, 2003
– Order of June 17, 2003
– Rejected

The Law

The Court's governing documents provide little guidance regarding the legal requirements for the indication of provisional measures, which is a form of incidental proceeding. Article 41(1) of the ICJ Statute states that the Court has the power "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." This provision indicates that the use of this instrument is discretionary and that its statutory purpose is to preserve rights pending the ICJ's final decision. Pursuant to Article 41(2), notice of provisional measures must be given to the UN Security Council.

The Rules of Court supplement the single Statute provision dealing with provisional measures through six articles under the heading "Interim Protection" (Articles 73-78). While requests for provisional measures may be submitted at any time during a proceeding, in practice they have been filed by applicants simultaneously with the submission of an application initiating a case.[2]

Article 74(1) of the Rules stipulates that requests for provisional measures have priority over all other cases. Article 75(2) confers upon the ICJ the power to indicate measures that are in whole or in part other than those requested.

The Practice

Most of the law governing provisional measures has developed through the ICJ's jurisprudence. According to well-established case law, although the ICJ need not, before deciding whether or not to indicate provisional measures, finally satisfy itself that it has jurisdiction over the merits of a case, it will indicate provisional measures only if the bases of jurisdiction invoked appear, *prima facie*, to afford a basis on which the Court's jurisdiction over the case might be founded.[3] The ICJ

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[2] During the period reviewed, however, the DRC submitted its request in the case against Uganda almost a year after filing its Application, and Cameroon did so almost two years after instituting proceedings against Nigeria.

[3] *See* the firmly-established formula in *Nuclear Tests (Australia v. France)*, Order, 1973, 1973 ICJ Reports 101 (June 22).

will not entertain jurisdictional arguments of deep complexity, such matters being reserved to the main proceeding.[4] The *prima facie* jurisdiction test is met if, in the instruments alleged to provide ICJ jurisdiction (such as treaties or Optional Clause declarations under Article 36(2) of the ICJ Statute), "no reservations obviously excluding its jurisdiction" exist.[5]

In addition, it must be demonstrated that, unless provisional measures are indicated, there will be a risk of irremediable harm, or irreparable prejudice, to the rights that are the subject of the dispute in pending proceedings. Finally, provisional measures are justified only if there is urgency.

While the Rules of Court do not prescribe any particular form in which the ICJ may announce the measures that the Statute empowers it to indicate, the Court in practice has done so in the form of an Order, including a reasoned discussion, and attaching individual declarations or opinions of Judges.

An Order indicating provisional measures cannot be taken itself as establishing jurisdiction in a case; it does not preclude a subsequent finding that the ICJ lacks jurisdiction or that the application instituting proceedings is inadmissible. In other words, such an Order leaves unaffected any future findings on the ICJ's jurisdiction, the admissibility of the application, or the merits – issues on which the parties may advance any arguments in the subsequent stages of the proceedings.

In the period reviewed, the only requests for provisional measures that were readily accepted by the ICJ were those submitted in three death-penalty-related cases against the United States in 1998-99 and 2003. All the other requests, relating to cases of armed clashes and diplomatic crises, were either rejected or resulted in measures other than those requested. The ICJ took between one and forty-nine days, or about seven days on average, to rule in each case, compared to an average of thirty-three days in the period between 1946 and 1994.

A. "Death Penalty" Cases

In its Order in the *Breard* Case between Paraguay and the United States, the ICJ ruled unanimously that, pending final judgment in the case, the "United States should take all measures at its disposal" to prevent the execution of Paraguayan national Angel Breard, scheduled for April 14, 1998, and "should inform the Court

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[4] As the ICJ stated in its 1996 Order: "the Court, in the context of the proceedings concerning the indication of provisional measures, cannot make definitive findings of fact or of imputability." Land and Maritime Boundary between Cameroon and Nigeria, ICJ Reports 1996, p. 13, at 23, para. 43.

[5] See the separate opinion of Judge Lauterpacht in *Interhandel* (Switz. v. U.S.), Order, ICJ Reports 1957, p. 105, at 118-19.

of all the measures which it has taken in implementation of this Order."[6] The ICJ made it clear that the case concerned alleged violations of the Vienna Convention on Consular Relations (i.e., the failure to notify a foreign detainee of his right to consular access) and that the Court is "not to act as a court of criminal appeal."[7] The Governor of Virginia ignored the ICJ's Order, and Breard was executed on the scheduled date. Since Breard's execution had made it impossible for the ICJ to render the relief sought by Paraguay, the proceedings were discontinued later that year at Paraguay's request.[8]

The *LaGrand* Order of March 3, 1999, issued in response to Germany's request for provisional measures aimed at preventing the execution of a German national on death row in Arizona prison, not only contained the two familiar measures included in the *Breard* Order, but also required the United States to transmit the Order to Arizona's Governor.[9] Notwithstanding the compliance issues that arose so prominently in the aftermath of the almost identical Order in *Breard*,[10] the 1999 Order failed to state whether provisional measures orders are *binding*, a question on which the ICJ's governing documents are silent. It did, however, contain a reminder that "the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be" and that "the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States."[11] While the United States can be said to have complied at least with the transmittal element of the measures indicated in the 1999 Order, the Arizona Governor allowed the execution of Walter LaGrand on March 4, 1999, after the U.S. Supreme Court rejected a last-minute appeal by Germany.

The ICJ in this case for the first time ever employed the power assigned to it by Article 75(1) of the Rules of Court to indicate provisional measures by its own

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6 ICJ Reports 1998, p. 248, at 258, para. 41.

7 *Id.*, at 257, para. 38.

8 For this author's review, *see* Pieter H.F. Bekker, World Court Decisions at the Turn of the Millennium (1997-2001) 93 (2002) [hereinafter Bekker, Millennium]. *See also* William Aceves's review in 92 AJIL 517 (1998).

9 *Cf. Breard* Order, at 258, para. 41, and *LaGrand Case* Order, at 16, para. 29. For this author's review, *see* Bekker, Millennium, at 129. *See also* William Aceves' review in 93 AJIL 924 (1999).

10 *See* Agora: *Breard*, 92 AJIL 666 (1998).

11 ICJ Reports 1999, p. 9, at 16, para. 28.

motion (*proprio motu*). It explained that this power may be used irrespective of whether or not it has received a request for provisional measures.[12]

In the *Avena* case in 2003, the ICJ again unanimously granted provisional measures against the United States, albeit of a more limited scope than those requested by Mexico. According to the Court, the United States had to "take all measures necessary" to ensure that three Mexican inmates facing an imminent risk of execution in the United States would not be put to death pending the Court's final decision in the case and had to inform the ICJ "of all measures taken in implementation" of the Order.[13] The U.S. authorities appear to have been more cautious in the aftermath of that Order.

B. NATO Cases

In the *Legality of Use of Force* cases instituted simultaneously by Yugoslavia against ten different member states of the North Atlantic Treaty Organization (NATO), Yugoslavia's requests for provisional measures asking the ICJ to order each of the respondents to "cease immediately [their] acts of force" at the time of NATO's bombing campaign against Yugoslavia, was rejected by Orders dated June 2, 1999.[14] The rejection was based on the ICJ's finding that it lacked jurisdiction *prima facie* in light of the instruments invoked by Yugoslavia. Never before had the ICJ dismissed a request for provisional measures on this ground.

The NATO cases demonstrate that, absent manifest lack of jurisdiction, a case may proceed to a consideration of jurisdictional and other issues notwithstanding a finding that the ICJ lacks the *prima facie* jurisdiction necessary to indicate provisional measures.

C. African Cases

The 1996 Order issued in the case between Cameroon and Nigeria appears to be the first instance in which the ICJ, using its power under Article 75(2) of the Rules of Court, unanimously indicated provisional measures for the sole purpose of preventing an aggravation or extension of a pending dispute. This implies that the ICJ is interpreting Article 41 of its Statute more widely than in previous decades.

The Democratic Republic of the Congo (DRC) on two separate occasions asked the ICJ to indicate provisional measures in cases concerning armed activities involving the DRC and Uganda and Rwanda, respectively. Agreeing with Rwanda

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[12] *Id.*, at 14, para. 21

[13] *Avena* Order, para. 59.

[14] For this author's review, *see* 93 AJIL 928 (1999).

that it lacked *prima facie* jurisdiction, the ICJ in 2000 indicated certain measures only in the case against Uganda. The request in that case was triggered by clashes between the armies of Uganda and Rwanda on Congolese territory. On July 1, 2000, the ICJ issued a unanimous Order ruling, pursuant to Article 75(2) of the Rules, that, pending final judgment, both parties "must" refrain from any armed action that might aggravate their dispute, and must ensure full respect within the zone of conflict for fundamental human rights and applicable provisions of humanitarian law.[15]

In a third case, the DRC in 2000 asked the ICJ to indicate measures against Belgium aimed at lifting an international arrest warrant issued against a DRC Cabinet minister. Failing evidence of both irreparable prejudice and urgency, the ICJ found that the circumstances, as they then presented themselves to it, were not such as to require provisional measures.[16] It did not entertain the suggestions made by both parties to consider the indication of alternative measures of protection.

Finally, the ICJ rejected the Republic of the Congo's 2003 request seeking the immediate suspension of certain investigative proceedings initiated by the judicial authorities of France against high-ranking Congolese officials. The ICJ acted on the request, which accompanied the original application filed on December 9, 2003, only after France gave its *ad hoc* consent to jurisdiction on April 8, 2003. There being no evidence of irreparable prejudice and urgency, the ICJ rightly found that the circumstances were not such as to require provisional measures.

To Bind or Not to Bind: the *LaGrand* Case

Prior to the *LaGrand* case, the ramifications of non-compliance with Orders "indicating" provisional measures were unclear. The ICJ's final decision in that case contains the first-ever pronouncement on whether or not such Orders are binding.[17] The ICJ concluded that the object and purpose of the Statute, which is to enable the Court to fulfill the functions provided for in that document, and especially the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute, together with the terms of Article 41 read in their context, dictate that provisional measures are binding, inasmuch as

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[15] For this author's review, *see* Bekker, Millennium, at 231. The replacement of the word "should" in the similar Order issued in *Cameroon v. Nigeria* in 1996 with "must" is explained by the aftermath of the *Breard* and *LaGrand* Orders.

[16] For this author's review, *see* Bekker, Millennium, at 241.

[17] *LaGrand Case*, Judgment, ICJ Reports 2001, p. 466 (June 27). For this author's review, *see* Bekker, Millennium, at 313.

the Court's power to indicate such measures is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the Court's final judgment.

Based on its review of the steps taken by the U.S. authorities following the issuance of the Order in *LaGrande*, the ICJ concluded that, given that the various competent authorities had failed to take all steps that they could have taken to give effect to the Order, the United States had not complied with the Order.

As the ICJ President commented in the aftermath of the landmark ruling in this case, "[t]he Court anticipates that in future [provisional] measures will as a result [of its explicit holding] be better executed than when the matter was subject to doubt," expressing the hope "that the Court's contribution to the maintenance of international peace and security will thereby be enhanced."[18] The aftermath of the Order in the case between the DRC and Uganda suggests much less optimism.

To Hear or Not To Hear

The *LaGrand* case was the first instance in which the ICJ issued an Order indicating provisional measures without having first heard the parties concerning the request. But this was a case of extreme urgency, involving the possibility of a death sentence being carried out by the Respondent in the days following the submission of the request. It seems, therefore, that only in cases of extreme urgency is the ICJ likely to dispense with hearings, which usually do not last more than two or three days. Importantly, none of the Orders reviewed were made *in absentia*. To guarantee full state participation and compliance, every effort should be made to schedule a hearing in each case and to allow any observations (oral and/or written) if possible.

Practice Direction XI

On July 30, 2004, the ICJ announced a new Practice Direction (No. XI) stating that in the oral pleadings on provisional measures (there usually are no written pleadings), the parties should "limit themselves to what is relevant to the criteria for the indication of provisional measures as indicated in the Statute, Rules and jurisprudence of the Court."[19] Specifically, the parties "should not enter into the merits of the case beyond what is strictly necessary for that purpose." This practice direction, which is in response to states making matters belonging to the merits

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[18] Address by the President of the International Court of Justice, Judge Gilbert Guillaume, to the United Nations General Assembly, Oct. 30, 2001, text available from the ICJ Web site, www.icj-cij.org/icjwww/ipresscom/SPEECHES.

[19] ICJ Press Release 2004/30 (July 30, 2004).

phase the object of the requested measures, should end speculation about the ICJ being amenable to delivering interim judgments under the name of provisional measures. The *LaGrand*, *Arrest Warrant* and *Avena* cases demonstrate that the ICJ considers an expeditious deliberation on the merits as the ultimate solution for cases involving urgency.

Conclusion

The past decade featured significant developments regarding provisional measures that will guide the future employment of this instrument of interim relief by the International Court of Justice. Notwithstanding the ICJ's recent statement that it "has noticed the increasing tendency of parties to request the indication of provisional measures,"[20] only three requests for provisional measures have been submitted since it ruled that such measures are binding, and no request has been filed since January 2003.

Obtaining interim relief remains a long shot, with fewer requests being granted than rejected and significant modifications being applied by the ICJ. Of the eighteen requests reviewed, three were rejected because evidence of irreparable prejudice and urgency was lacking, while the absence of *prima facie* jurisdiction caused the rejection of Yugoslavia's requests in the ten cases against individual NATO Members and of the DRC's request in the case against Rwanda. Of the three Orders in death-penalty-related cases against the United States that were adopted unanimously, two were not complied with and thus had no effect. In one such case, the ICJ adopted provisional measures unsuccessfully *ex parte*, while in others it indicated measures differing from those requested.

It appears from the aftermath of the *Avena* Order that the United States is adjusting its position regarding provisional measures since the ICJ finally clarified in its 2001 Judgment in the *LaGrand* case that Orders indicating such measures are binding. Thus, the ICJ Order appears finally to be given real effect. This is a welcome development. On the other hand, Orders issued in situations of acute military conflict continue to have little practical effect. Non-compliance with provisional measures Orders will trigger the international responsibility of the non-complying state, on which the ICJ may, and should, pronounce itself if requested.

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[20] *Id.*

L'utilité de développer une procédure arbitrale permettant d'obtenir certaines mesures provisoires ou conservatoires à côté des possibilités offertes par les juridictions ordinaires : l'exemple du Référé Pré-arbitral de la CCI

DENIS BENSAUDE*

Introduction

Si l'arbitrage offre aux acteurs du commerce international une solution rapide à leurs conflits, cette rapidité n'est que relative. Ce constat aura certainement été fait par ceux qui, croyant bénéficier de sa neutralité et de son efficacité, se sont trouvés démunis jusqu'à la constitution du tribunal arbitral pour obtenir une décision qui mette promptement fin aux troubles la justifiant, sans qu'il soit atteint au fond du litige. On pense aux mesures nécessaires à la conservation de preuves ou à la prévention de conséquences que ne saurait réparer l'allocation de dommages intérêts en fin de procédure, que ce soit l'exercice prématuré d'une garantie financière par un co-contractant à la solvabilité compromise, l'inexécution délibérée et grossière de ses obligations par une partie, comme tout acte de celle-ci susceptible de mettre en jeu l'équilibre entre les parties à la date de dépôt d'une demande arbitrale, comme par exemple, tout acte visant la cession contestée de titres sociaux.

Les législations modernes sur l'arbitrage prévoient bien que nonobstant l'existence d'une convention arbitrale, les juridictions nationales pourront prendre des mesures provisoires dans l'attente de la saisine du tribunal arbitral. Mais le choix de l'arbitrage a généralement pour objet d'exclure leur compétence. Certainement, ces juridictions conservent une compétence exclusive pour les questions inarbitrables, celles relevant de leur *imperium* – saisie ou constitution forcée de sûretés –, ou encore pour admettre des sentences arbitrales dans leur ordre juridique et en déterminer les modalités d'exécution. Par souci de cohérence procédurale, la compétence parallèle des juridictions nationales pour prononcer d'autres mesures dans l'attente de la constitution du tribunal arbitral, même sans constituer une renonciation à la convention arbitrale, reste à notre avis, insatisfaisante.

Car la période courant du dépôt d'une demande d'arbitrage à la saisine du tribunal arbitral peut être de plusieurs mois et les parties qui ont inclu une convention d'arbitrage à leur contrat sont le plus souvent supposées avoir souhaité renoncer dans la mesure du possible à la compétence d'une juridiction nationale. C'est ce qui a conduit certaines institutions à offrir un complément procédural visant à pallier à la

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durée de ce délai. La Chambre de Commerce Internationale (*CCI*) a ainsi publié dès 1990 un Règlement de Référé Pré-Arbitral (*Règlement de Référé*) dont les premières applications ont confirmé l'efficacité[1]. Dans ces quelques instances, l'inclusion au contrat de la clause type du Règlement de Référé[2] a permis au demandeur de ne pas attendre la constitution du tribunal arbitral de trois membres prévu par la clause d'arbitrage contenu à leur contrat, et aux parties d'éviter les coûts de diverses procédures nationales qui auraient sinon pu être conduites sous différents droits et dans plusieurs langues, pour prononcer ou refuser de prononcer des mesures différentes, ou contradictoires, et en tout cas susceptibles d'appel. C'est pourquoi, voulant donner à ce règlement toute la publicité qu'il mérite, nous commenterons brièvement la seule jurisprudence nationale récente relative au Règlement de Référé, après avoir souligné les caractéristiques de cette procédure.

I. Caractéristiques principales du Règlement de Référé

Le Règlement de Référé propose une procédure rapide et confidentielle, conduisant à une décision obligatoire pour les parties, prise par un tiers désigné par le Président de la Cour internationale d'arbitrage de la CCI à défaut d'accord des parties, qui dispose d'un large pouvoir, sous réserve de respecter le contradictoire et sans que sa décision n'affecte le fond du litige.

Décision obligatoire rendue rapidement et confidentiellement

La réponse doit être communiquée dans les huit jours de la réception de la demande, et dès que possible après l'expiration de ce délai, un tiers neutre sera désigné et saisi par l'institution, une fois les frais minima payés[3], pour qu'il décide de la demande dans les trente jours de sa saisine[4]. Le délai entre le dépôt d'une demande et la saisine du tiers est en pratique de quelques jours, et le choix de cette procédure n'exclue pas en soi la compétence des juridictions nationales, qui restent le mieux à même sur le territoire qu'elles couvrent, de rendre des décisions dans l'heure, ou celles qui relèvent de leur compétence exclusive.

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1 Voir par exemple « *The ICC Pre-Arbitral Referee: First Practical Experiences* » par Emmanuel Gaillard et Philippe Pinsolle, Arb. Int'l, Vol. 20 N. 1, LCIA 2004, pp. 13-37 et les références citées, ou encore « *The ICC Rules for a Pre-Arbitral Referee Procedure* », par Bernard Hanotiau, Int. ALR 2003, No. 3, pp. 75-77.

2 L'accord des parties sur l'application du Règlement de Référé doit être écrit (Articles 2.1.1 et 3.1 du Règlement de Référé).

3 US$ 4.000 selon l'Article B.1 de l'appendice au Règlement de Référé.

4 En vertu de l'article 6.2 du Règlement de Référé qui prévoit que ce délai peut être étendu par accord des parties ou par décision du Président de la Cour internationale d'arbitrage.

Surtout, le Règlement de Référé prévoit que la procédure est confidentielle[5] et que la décision du tiers est obligatoire pour les parties. En souscrivant au Règlement de Référé, les parties s'engagent en effet à exécuter sans délai l'ordonnance rendue et renoncent à tout recours auquel elles peuvent valablement renoncer[6].

Prise par un tiers devant respecter le contradictoire

Les pouvoirs du tiers sont déterminés par l'article 2 du Règlement de Référé et peuvent être aménagés par les parties. La compétence du tiers est préalablement vérifiée par le Président de la Cour internationale d'arbitrage[7] s'il est invité à le désigner, puis si nécessaire, par le tiers lui même[8]. Les mesures qu'il peut prendre comme les conditions de leur obtention ne sont pas strictement encadrées, mais le tiers ne peut aller au-delà de ce qui lui est demandé[9]. L'urgence n'est pas une condition de sa compétence ou de la recevabilité d'une demande, puisque le tiers peut, selon l'article 2.1 (c) du Règlement de Référé « *ordonner à une partie de prendre toute mesure qui devrait être prise en vertu du contrat liant les parties* ». C'est également le cas pour les demandes en paiement[10], en conservation et établissement de preuves[11]. *A contrario*, l'urgence reste une condition du prononcé d'autres décisions qui, justifiées par un dommage imminent, un préjudice irréparable ou la sauvegarde d'un droit ou d'un bien d'une partie, ne découle pas du contrat liant les parties[12]. L'absence de référence à une loi applicable ou à un lieu de procédure dans le Règlement de Référé confirme également la liberté du tiers dans le choix de son raisonnement, comme de la procédure à suivre pour rendre sa décision, sous réserve de dispositions contractuelles spécifiques et de ce qui suit.

Le tiers peut en effet conduire la procédure « *de la manière qu'il considère la plus appropriée* »[13] et à défaut d'accord contraire, ne peut ensuite intervenir comme arbitre dans le différend au fond[14]. Tenu par le délai de trente jours pour rendre sa décision, il

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5 Articles 5.4 et 6.7 du Règlement de Référé.

6 Article 6.6 du Règlement de Référé.

7 Contrôle *prima facie*, selon l'Article 4.1 du Règlement de Référé.

8 En application de l'Article 5.2 du Règlement de Référé.

9 Article 2.2 du Règlement de Référé.

10 Article 2.1 (b) du Règlement de Référé.

11 Article 2.1 (d) du Règlement de Référé.

12 Article 2.1 (a) du Règlement de Référé.

13 Article 5.3 du Règlement de Référé.

14 Article 2.3 du Règlement de Référé.

peut suivre les procédures habituellement pratiquées devant les tribunaux arbitraux, comme par exemple, auditionner des témoins sous les feux croisés des questions posées par les conseils des parties. Mais les échanges d'écriture et audiences fleuves ne sont pas dans l'esprit de célérité qui sous-tend cette procédure. Le Règlement de Référé impose surtout au tiers et aux parties de respecter le contradictoire[15] sous le contrôle du Secrétariat de la Cour internationale d'arbitrage, et exclue qu'une mesure temporaire soit prise *ex-parte*[16]. Ce Règlement permet ainsi que sur le fondement de l'évidence ou de la vraisemblance, dont le tiers appréciera le degré, celui-ci prenne une décision immédiatement applicable impactant l'attitude ou les droits des parties (l'ordonnance de référé).

Sans affecter le fond du litige

Même obligatoires et motivées[17], les ordonnances de référé sont temporaires et l'objet de la procédure y conduisant n'est pas tant de voir trancher définitivement des questions de fait ou de droit, que de voir ordonner à une partie, le cas échéant sous astreinte, et pendant une période courant du prononcé de l'ordonnance jusqu'à sa réformation, de faire, ne pas faire, ou donner, selon les circonstances de fait portées à la connaissance du tiers, et sur la base de l'évidence ou de la vraisemblance qu'il constate de l'existence ou de l'étendue de ces faits et droits. Aucune ordonnance de référé ne peut donc être rendue sans que le tiers n'examine des questions touchant au fond, que ce soit sur sa compétence, l'existence et les termes du contrat, ou encore la vraisemblable réalité des prétentions et arguments des parties. Mais ces déterminations superficielles n'ont pas d'autorité de chose jugée au principal, comme le confirme l'article 6.3 du Règlement de Référé, qui rappelle que l'ordonnance de référé ne préjuge pas le fond et ne lie pas la juridiction compétente.

On notera enfin que pour assurer la célérité qui le caractérise, le Règlement de Référé ne prévoit ni examen préalable de l'ordonnance de référé, ni la signature d'un acte de mission, comme l'impose le Règlement d'arbitrage de la CCI pour les procédures conduites sous son égide. Il faut donc avoir conscience que le sceau de l'institution ne saurait apporter le même gage de qualité aux ordonnances de référé rendue en vertu du Règlement de Référé qu'aux sentences rendues en application du Règlement d'arbitrage de la CCI.

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[15] Articles 3.2, 3.3, 3.4, 4.3, 4.4, 5.1, 5.3, 5.5 et 5.6 du Règlement de Référé.

[16] Comme il découle des articles 3.2, 3.3 et 4.3 du Règlement de Référé.

[17] Article 6.1 du Règlement de Référé.

II. Nature de la procédure et conséquences de sa qualification

Une seule juridiction nationale s'est prononcée à ce jour sur la qualification juridique du Règlement de Référé à notre connaissance. C'est la Cour d'appel de Paris, qui par un arrêt du 29 avril 2003[18], a déclaré irrecevable un recours en annulation à l'encontre d'une ordonnance de référé, fondé sur les dispositions relatives aux sentences arbitrales internationales. En effet, pour la juridiction française, le Règlement de Référé n'organise pas un arbitrage, car l'ordonnance de référé auquel il conduit n'a qu'une force contractuelle, que seule la juridiction compétente au fond peut sanctionner. Une telle ordonnance ne pourrait donc être revêtue de l'*exequatur* en France, comme une sentence rendue en application du Règlement d'arbitrage de la CCI le peut.

Le Référé Pré-Arbitral est-il un arbitrage ?

La solution retenue par la Cour d'appel de Paris a été critiquée par ceux qui considèrent que les caractéristiques du Règlement de Référé suffisent à en faire un arbitrage, même s'il ne conduit à aucune détermination définitive sur le fond de l'affaire.

Les articles 6.8.1 et 6.8.2 du Règlement de Référé qui posent qu'il appartient à la juridiction compétente de déterminer les conséquences d'une inexécution ou d'une mauvaise exécution de l'ordonnance, comme les conséquences de l'exécution dommageable de celle-ci, apparaissent surabondants et ont probablement conduit la Cour d'appel de Paris à considérer que la sanction de l'ordonnance, ou de son exécution, relève seulement de la juridiction compétente au fond. Ces articles devraient à notre avis être supprimés, si d'aventure le Règlement de Référé était révisé[19], car ils n'apportent rien et participent de la confusion existante sur la nature de la procédure.

En tout état de cause, on remarquera que selon les demandes qui lui sont présentées, le tiers sera le plus souvent invité à trancher l'opposition des parties sur les mesures destinées à préserver ou permettre la mise en œuvre effective de leurs droits. La fonction du tiers est donc nécessairement juridictionnelle, puisqu'il devra trancher un litige en imposant ou en refusant d'imposer un comportement à une

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[18] Cour d'appel de Paris 1re chambre, section C, 29 avril 2003, Société nationale des pétroles du Congo c/ Société Total Fina Elf E&P Congo, J.D.I. 2, 2004, p. 511, note Pierre Mayer.

[19] Une commission informelle d'experts réunis à la demande du Président de la Cour internationale d'arbitrage sous la Direction d'Emmanuel Gaillard s'est attachée à proposer des modifications du Règlement de Référé qui comprennent cette suppression.

partie qui a accepté le caractère obligatoire de son ordonnance. Cette procédure ressemble donc étrangement, et selon nous, à un arbitrage « *fast track* », où la motivation de la décision obligatoire pour les parties, ne lie ni les parties, ni le tribunal compétent au fond.

Les ordonnances de référé pourraient-elles être des sentences ?

Supposant que la position de la Cour d'appel de Paris sur la nature de cette procédure puisse être remise en cause à l'avenir, on relèvera que la majeure partie des lois nationales sur l'arbitrage n'interdit pas aux tribunaux arbitraux de prononcer des mesures provisoires ou conservatoires. La nature conventionnelle de l'arbitrage suppose d'ailleurs, comme le confirment ces lois, qu'il n'en soit autrement que si les parties s'y opposaient. Une partie de la doctrine[20] et des juridictions nationales, considère cependant que seules les décisions définitives, insusceptibles de recours et statuant sur le fond du litige peuvent être qualifiées de sentences, et être couvertes par la Convention de New York de 1958. Or, lors de leur prononcé, les ordonnances de référé sont définitives, car elles tranchent définitivement le conflit portant sur la question de savoir si, indépendamment du contentieux de fond existant entre les parties et sans ignorer les points de fait ou de droit qui en sont la cause, une partie devrait se voir ordonner pendant un temps, de faire, ne pas faire ou donner, ou encore de respecter un droit dont le contenu véritable ne sera révélé qu'en fin d'instance.

Le caractère « définitif » exigé par la Convention de New York avait d'ailleurs pour seul objet à l'origine, d'éviter la procédure du double *exequatur* et non d'interdire l'exécution forcée comme l'annulation des décisions aux effets temporaires. Même si la Convention de New York ne contient pas de définition des sentences, elle n'apparaît pas en exclure les décisions obligatoires, intervenues au terme d'une procédure contradictoire et non susceptible de recours[21], qui ne statuent pas définitivement sur le fond du litige. Dans la plupart des législations nationales sur l'arbitrage et en vertu de la majeure partie des règlements d'arbitrages publiés par les institutions spécialisées, les parties peuvent solliciter d'un tribunal arbitral qu'il impose à une autre, par voie de sentence, d'exécuter les termes particuliers d'un contrat ou s'abstenir d'en entraver la bonne exécution, dans l'attente de la décision au fond sur sa validité ou la signification de ses termes. La CNUDCI envisage d'ailleurs d'une part de modifier l'article 17 de la loi type sur l'arbitrage

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[20] « *Arbitrage international et mesures provisoires – Etude de droit comparé* », Sébastien Besson, Schulthess Polygraphischer Verlag, Zurich 1998.

[21] Voir la note en bas de page No. 6, *supra*.

commercial international pour préciser les conditions dans lesquelles les tribunaux arbitraux pourront prononcer de telles mesures, et d'autre part, d'ajouter un article *17 bis* à la loi type pour poser les conditions de reconnaissance et d'exécution de ces mesures[22]. Il ne faut pas en conclure qu'il serait aujourd'hui interdit aux arbitres de prendre des mesures provisoires par voie de sentence, au contraire[23].

Par ailleurs, si les mesures provisoires sont susceptibles d'être révisées à la demande d'une partie, au gré d'un changement de circonstances, ou à l'occasion du prononcé d'une décision réglant tout ou partie du fond du litige, cette révision n'est pas un appel et n'affecte pas le caractère obligatoire de la mesure. En effet, le tribunal compétent au fond n'aura pas à rejuger de l'ordonnance de référé ou à en critiquer les motifs, mais peut être invité à examiner ses effets ou son utilité, selon l'évolution des circonstances ou l'appréciation des faits ou du droit que ce tribunal estimerait nécessaire ou utile de rétablir, maintenir ou rééquilibrer en attendant la solution du litige sous-jacent. Parce que prononcée rapidement sur le fondement de l'évidence ou de la vraisemblance, il est souhaitable que les motifs de l'ordonnance de référé ne s'imposent pas à la juridiction compétente au fond, mais en revanche, par sa force obligatoire et par la renonciation des parties à tout recours à l'encontre de l'ordonnance de référé, son dispositif doit pouvoir s'imposer aux parties pendant sa durée.

Nous ne voyons donc pas d'objection sérieuse à admettre qu'une décision rendue en vertu du Règlement de Référé, même qualifiée d'ordonnance par celui-ci, et rendue par un arbitre unique qu'il qualifie de tiers, soit prise par voie de sentence. Mais que les autorités judiciaires nationales acceptent de donner ou non force exécutoire aux ordonnances de référé, leur contenu ou les modalités de leur exécution colorera nécessairement le débat devant le tribunal saisi du fond. Dès lors, admettre l'exécution forcée d'une mesure provisoire et obligatoire que la Convention de New York n'interdit pas, n'empêche pas non plus de considérer irrecevable, comme l'a fait la Cour d'appel de Paris, le recours en annulation contre une décision qui ne tranche pas le principal.

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[22] Pour plus de détails, voir le document de travail de la CNUDCI A/CN.9/547, disponible sur le site de la CNUDCI http://www.uncitral.org/fr-index.htm.

[23] Voir l'article 26(2) du Règlement d'arbitrage de la CNUDCI, ainsi que l'arrêt de la Cour d'appel de paris rendu dans l'affaire *S.A. Otor Participations et autres c/ s.a.r.l. Carlyle (Luxembourg) Holdings 1 et autres*, le 7 octobre 2004, inédit, où la Cour d'appel de Paris a approuvé un tribunal arbitral d'avoir statué par voie de sentence sur une demande conservatoire, donc provisoire.

Conclusion

Il ne fait aucun doute que la procédure envisagée par le Règlement de Référé est un complément utile et efficace qui doit avoir de beaux jours devant elle, quelle que soit les déterminations à venir des juridictions nationales sur sa nature, comme sur celle des décisions prises sur son fondement. Il conviendrait pour cela de lui donner une plus large publicité, pour l'offrir véritablement au choix des parties. Ceux qui l'ont expérimenté sont unanimes pour le voir être annexé au Règlement d'arbitrage de la CCI. Mais tant que la procédure instituée par le Règlement de Référé n'est pas un usage constant de la pratique – ce qui n'est pas encore le cas –, nous pensons que les parties doivent avoir la possibilité d'en inclure les dispositions dans leur convention d'arbitrage (*opt-in*), mais ne se voient pas imposer d'en exclure l'application (*opt-out*).

Le CIRDI et les mesures conservatoires : récentes expériences

AURÉLIA ANTONIETTI*

Depuis quelques années, les auteurs et commentateurs semblent avoir délaissé la question des mesures conservatoires dans les arbitrages régis par la Convention du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats (la Convention) et par le Règlement de procédure relatif aux instances d'arbitrage (le Règlement d'arbitrage ou le Règlement). Pourtant, jamais dans les arbitrages conduits en vertu de cette Convention les demandes de mesures conservatoires n'ont été si fréquentes. Il est vrai que la vaste majorité des décisions rendues par les tribunaux arbitraux CIRDI sur ce point ne sont pas publiées[1] mais ceci ne saurait traduire, ni s'analyser, en une baisse d'activité ou un désintérêt des parties pour des mesures dont l'importance pratique est évidente.

L'on se souviendra que lors des premières demandes de mesures conservatoires portées devant le Centre, les principales interrogations concernaient l'exclusivité de l'arbitrage CIRDI et la compétence résiduelle des juridictions locales pour ordonner des mesures conservatoires, alors même qu'un tribunal arbitral constitué sous l'égide du CIRDI était saisi et n'avait pas disposé de l'affaire.[2] La portée de cette discussion a été nettement réduite depuis l'ajout en 1984 d'un cinquième paragraphe à l'article 39 du Règlement d'arbitrage. Ainsi, « *les dispositions du présent article ne font pas obstacle, dans la mesure où les parties en ont convenu dans l'accord contenant leur consentement, à ce que les parties demandent à toute autorité judiciaire ou autre d'ordonner des mesures conservatoires soit antérieurement à l'introduction de l'instance ou en cours d'instance en vue de protéger leurs droits et intérêts respectifs* ». Les parties ne peuvent donc, en principe, recourir à des juridictions locales ou autre autorité une fois que le Centre a été saisi, sauf à l'avoir envisagé expressément dans le document contenant leur consentement à l'arbitrage CIRDI. Ce dernier cas de figure ne s'est pas encore présenté en pratique.

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[1] Pour un état des décisions publiées et les références complètes des affaires citées ci-après voir le site internet du CIRDI : http://www.worldbank.org/icsid/cases/awards.htm. Seules les décisions ayant fait l'objet d'une publication sont ci-après mentionnées par le nom de l'affaire.

[2] Pour un rappel de la discussion, voir Antonio R. Parra, « The Practices and Experience of the ICSID », *Conservatory and Provisional Measures in International Arbitration*, 37 (1993) ICC Publication No.159.

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L'article 47 de la Convention et l'article 39 du Règlement d'arbitrage contiennent peu d'indications sur la nature des mesures que les parties peuvent solliciter ou sur les conditions à remplir pour obtenir de telles mesures. Face à cette situation, certains tribunaux ont fait un appel de plus en plus marqué au fil du temps aux travaux de la Cour Internationale de Justice ; l'article 41 du Statut de la Cour étant présenté comme ayant inspiré l'article 47 de la Convention. Cependant, les tribunaux CIRDI ne semblent pas avoir encore adopté d'approche uniforme dans l'examen de ces demandes. Ce bref article revient sur les enseignements pratiques découlant des décisions rendues ces quinze dernières années dans des procédures arbitrales conduites en vertu de la Convention, et se penche sur quelques questions récurrentes auxquelles certains tribunaux sont aujourd'hui confrontés.

Quand soumettre une requête aux fins de mesures conservatoires ? Aux termes de l'article 39(1) du Règlement, au cours de la procédure, une partie peut à tout moment requérir que des mesures provisoires pour la conservation de ses droits soient recommandées par le tribunal. Une demande de mesure provisoire sollicitée par l'une des parties doit être examinée en priorité par le tribunal, et ce après avoir donné à chaque partie la possibilité de présenter ses observations. Certaines demandes sont formulées alors même que le tribunal n'est pas encore constitué. En pratique, une telle demande est au mieux examinée lors de la première session du tribunal avec les parties, qui se tient en principe dans les soixante jours de la constitution du tribunal, soit en moyenne dans les trois à six mois suivant l'enregistrement de la requête. Cependant, dans l'intérêt des parties, et afin d'offrir une alternative à l'absence de recours aux juridictions locales pendant la constitution du tribunal si les parties ne l'ont pas envisagé, le Centre envisage de modifier son Règlement d'arbitrage.[3] Cette alternative consisterait à offrir aux parties un mécanisme accéléré d'examen de la demande de telle sorte que la demande puisse être examinée par le tribunal immédiatement après sa constitution et après que les parties aient eu l'occasion de faire part de leurs observations pendant le processus de constitution du tribunal.

Il est aujourd'hui fermement établi qu'une décision d'un tribunal sur les mesures conservatoires peut intervenir alors même que la compétence du tribunal est contestée, et ce, avant que le tribunal ne se soit prononcé sur cette question. Certains tribunaux relèvent que leur compétence est établie *prima facie*, mais il semble que les parties et le tribunal fassent l'économie de cette discussion dans la majorité des affaires.

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[3] « Rapport sur les possibles améliorations à apporter au cadre des arbitrages CIRDI » disponible en langue anglaise sur le site internet du Centre.

Quel type de mesures peuvent être sollicitées ? La requête aux fins de mesures conservatoires doit spécifier les droits devant être préservés, les mesures dont la recommandation est sollicitée et les circonstances rendant ces mesures nécessaires. Aux termes de la Convention de Washington et du Règlement d'arbitrage, les mesures conservatoires sont laissées à l'appréciation des arbitres. A ce jour, les demandes ont notamment eu pour objet la nature confidentielle de certaines informations, la préservation de la preuve, des garanties financières, le sursis à exécution de décisions administratives, l'arrêt d'interférences préjudiciables d'une partie dans le cours de la procédure et surtout la suspension de procédures nationales ou arbitrales parallèles. Au nombre des mesures récemment recommandées par les tribunaux arbitraux CIRDI figurent la suspension d'un arbitrage local, la suspension d'une procédure de faillite, et la recommandation pour les parties de ne pas continuer ou initier de procédures locales avec obligation de fournir au tribunal la preuve des démarches entreprises en ce sens.

En tout état de cause, la mesure sollicitée doit être suffisamment spécifique tant dans son objet que dans sa portée. La spécificité d'une mesure s'apprécie au cas par cas. La mesure sollicitée ne doit être ni trop vague, ni trop étendue. Ainsi, dans l'affaire SGS contre le Pakistan, le demandeur a sollicité entre autre qu'il soit recommandé au défendeur de s'abstenir dans le futur de saisir toute juridiction nationale en relation avec l'arbitrage CIRDI en cours. Cette demande a été rejetée par le tribunal en raison de son manque de spécificité et de sa généralité.

La mesure doit également être en relation avec les faits de l'espèce portés devant le tribunal. Dans l'affaire Mafezzini, la demande de l'Espagne tendant à obtenir une garantie du paiement des dépens de l'instance dans l'hypothèse où le demandeur ne prévaudrait pas a été rejetée, faute de présenter un lien nécessaire avec le fond de l'affaire, à savoir un investissement. Le tribunal, dans l'affaire Amco contre l'Indonésie avait déjà rappelé que la mesure doit se rapporter au droit à préserver en l'espèce. Or, la mesure sollicitée par l'Etat défendeur, qui visait à arrêter la publication de certains articles, ne présentait pas selon le tribunal de lien suffisant avec le droit à préserver.

Quels droits peuvent être préservés ? La mesure doit viser à la « sauvegarde », selon le texte de la Convention, ou à la « conservation » d'un droit à préserver, selon le texte du Règlement, bien que le texte anglais ne fasse aucune distinction linguistique de ce genre. En pratique, les cas de figures varient. Dans l'affaire Tanesco contre Independent Power Tanzania Ltd concernant un différend contractuel, il a été décidé que le droit à préserver pouvait être de nature contractuelle, mais qu'en l'espèce la mesure ne pouvait viser à obtenir l'exécution forcée du contrat. Dans le cadre de traités bilatéraux de protection et de promotion des investissements (TBIs), il

est admis que le droit d'accès à un tribunal international constitué sous l'égide du CIRDI est un droit à préserver aux termes de ces traités.

La question de la preuve de la réalité ainsi que de l'existence du droit à préserver reste sujet à discussion. L'on rappellera cependant que le tribunal, dans l'affaire Pey Casado et Fondation Presidente Allende contre la République du Chili, a relevé que *« le tribunal ne saurait exiger, comme une condition préalable à l'octroi d'une recommandation au sens de l'article 39 du Règlement, la preuve par le Requérant de l'existence, de la réalité ou de l'actualité des droits que la mesure tend à sauvegarder ou préserver »,* question qui en l'espèce ressortait de la sentence au fond.

Quel est le titulaire de ce droit ? Il s'agit de l'investisseur demandeur à l'arbitrage CIRDI, mais cela n'est pas toujours aussi simple. Dans l'une des nombreuses affaires impliquant la République argentine, la mesure sollicitée a visé la préservation du droit pour une entreprise locale (qui constituait en elle-même l'investissement) de poursuivre ou d'initier localement des procédures administratives ou judiciaires pour défendre ses droits. Le tribunal a rappelé qu'en vertu du TBI, seuls pouvaient faire l'objet d'une protection les droits accordés aux bénéficiaires de ce même traité, à savoir les ressortissants de l'autre pays contractant. Nous rejoignons là dans une certaine mesure la question de la compétence *prima facie* du tribunal. D'autre part, il a été rappelé que la mesure concernait les faits d'une Province, alors même qu'il n'était pas établi que les faits et omissions de la Province entraîneraient la responsabilité internationale de l'Etat, défendeur à l'arbitrage. Sauf à préjuger du fond, la mesure devait être rejetée selon ce tribunal.

Quelles sont les circonstances qui rendent de telles mesures conservatoires nécessaires ? L'urgence, dont la charge de la preuve appartient à la partie requérante, est régulièrement invoquée par les parties et les tribunaux pour motiver une demande ou une décision de mesures conservatoires. Cette urgence se rapporte à la possibilité et à l'éventualité d'une atteinte portée au droit à préserver, et s'apprécie à l'aune des faits de l'espèce, étant entendu que la mesure sollicitée doit être nécessaire et appropriée. Ainsi, sont pris en compte la nécessité de préserver un *status quo* ou le fait qu'un préjudice irréparable puisse être causé. Pour déterminer si la sauvegarde ou la conservation de ce droit est nécessaire, les arbitres procèdent à une évaluation des risques et envisagent quelles seraient les conséquences si la mesure n'était pas recommandée.

Le fait qu'un tribunal CIRDI soit saisi d'un arbitrage constitue-t-il une circonstance rendant la mesure nécessaire ? En 1991, deux auteurs[4] ont envisagé la possibilité pour

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[4] Charles N. Brower et Ronald E.M. Goodman, "*Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings*", ICSID Review – Foreign Investment Law Journal 1991, vol. 2.

un tribunal CIRDI de recommander des mesures conservatoires visant à suspendre une procédure locale parallèle. La nécessité de sauvegarder la capacité d'un tribunal CIRDI de décider de sa compétence en présence de procédures identiques et parallèles suffisait pour ces auteurs à motiver une telle mesure sur le fondement de l'article 26 de la Convention, de l'exclusivité du système CIRDI et de précédents internationaux allant dans ce sens.

Certains tribunaux CIRDI se sont déclarés en ce sens. Dans l'affaire CSOB contre la Slovaquie, la suspension d'une procédure de faillite pendante devant des juridictions locales fut recommandée en 1999 et 2000 « *dans la mesure où une telle procédure pourrait avoir à déterminer si (…) [la Société de Recouvrement slovaque] a un titre valable sous la forme d'un droit à recevoir des fonds de la République slovaque pour couvrir ses pertes, comme envisagé par l'Accord de Consolidation en cause dans cet arbitrage* »,[5] et partant des faits soumis au tribunal CIRDI saisi. A ce titre, les parties devaient également porter cette recommandation à l'attention des autorités judiciaires locales.

Avec la multiplication des affaires fondées sur des TBIs, les demandes de suspension d'une procédure arbitrale non-CIRDI et/ou des procédures judiciaires locales se font plus nombreuses. Les circonstances factuelles entourant la demande sont les suivantes : un arbitrage CIRDI est initié sur le fondement d'une clause CIRDI contenue dans un TBI pour des faits en relation avec l'exécution d'un contrat ; parallèlement un arbitrage commercial a lieu en vertu de la clause compromissoire contenue dans ce contrat ou une juridiction locale est saisie pour des faits identiques mais dont la qualification juridique est distincte dans les deux procédures. Le scénario peut connaître des variantes : les parties ne sont pas nécessairement identiques dans les deux procédures, la procédure arbitrale commerciale pouvant impliquer une entité para-étatique et/ou une filiale de l'investisseur, signataires du contrat sous jacent. Il est à noter que ces demandes vont souvent de pair avec une demande d'interdiction pour l'Etat défendeur de recourir à ses juridictions locales pour obtenir des « *anti-suit injunctions* » visant le demandeur.

Dans l'affaire SGS contre le Pakistan, le tribunal a recommandé la suspension d'un arbitrage local commencé par le Pakistan en application d'un contrat aux motifs que les demandes portées devant les arbitres locaux pouvaient être liées aux allégations du demandeur invoquées dans la procédure CIRDI. En l'espèce, les parties étaient identiques dans les deux procédures. Dans une autre affaire similaire, le demandeur a sollicité la suspension de procédures judiciaires entamées par une

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[5] CSOB c. Slovaquie, décision sur la compétence du 24 mai 1999, publiée en français in E. Gaillard, *La jurisprudence du CIRDI*, Ed. Pedone, Paris, 2004.

entité para-publique locale avec qui il avait conclu un contrat, contrat à l'origine des allégations dont le tribunal CIRDI avait à connaître. Il était demandé à ce que l'Etat, défendeur à l'arbitrage CIRDI, porte la recommandation à intervenir à l'attention des tribunaux judiciaires locaux. En l'espèce, le tribunal s'est refusé à cette recommandation, faute pour la mesure demandée de présenter un risque urgent de préjudice irréparable, la procédure judiciaire locale ne présentant pas de signe imminent de clôture. C'est là, soit dit en passant, réintroduire une condition d'urgence même dans ces circonstances particulières. Le tribunal a également relevé n'être qu'au stade de la compétence. Il semble surtout que la présence d'une tierce partie, non-partie à l'arbitrage CIRDI, posait particulièrement difficulté. Il s'agit d'une illustration supplémentaire et annexe des difficultés rencontrées actuellement dans les arbitrages mettant en jeu ce que certains qualifient de « *Contract /Treaty claims* ».

Conclusion

Les parties ne doivent pas perdre de vue que la tâche des tribunaux est d'autant plus délicate qu'il leur est difficile d'apprécier au stade de la compétence l'affaire dans son ensemble, et que le souci de ne pas préjuger du fond de l'affaire rend nombres de tribunaux hésitants. Ceci d'autant plus que leur pouvoir reste limité tout d'abord en raison de la nature même de la décision rendue par le tribunal, qui en vertu de la Convention n'est qu'une recommandation. Enfin, il est admis qu'un tribunal ne saurait s'immiscer dans la conduite par un Etat de ses procédures criminelles, administratives et civiles sur son propre territoire, comme l'a rappelé le tribunal dans l'affaire SGS contre le Pakistan. Ce sont sans doute là les raisons pour lesquelles, fin 2004, la majorité des décisions rendues par des tribunaux CIRDI ont rejeté la demande de mesures provisoires présentée ou n'ont procédé qu'à une recommandation partielle de celles-ci. Nonobstant ce bilan quelque peu mitigé, pour les parties requérantes tout du moins, l'effet des décisions sur les mesures provisoires n'est pas à négliger. Les tribunaux rappellent presque immanquablement dans leurs décisions les principes que sont le principe de non-aggravation ou de non-extension du différend et le principe de s'abstenir de tout acte qui pourrait préjuger les droits de l'autre partie à l'exécution de la sentence. Enfin, il n'est pas rare de voir certaines parties s'engager à accomplir une démarche ou le plus souvent de s'en abstenir, ce dont les tribunaux ne manquent pas de prendre acte par écrit dans leurs décisions.

Profile / Profil

Judge George H. Aldrich

NANCY AMOURY COMBS*

When Judge George H. Aldrich of the Iran-United States Claims Tribunal invited me to interview for the position of his Legal Adviser, I was delighted. The Tribunal, established as part of the agreement resolving the 1979 Iranian hostage crisis, had by that time already adjudicated hundreds of cases brought by American companies and nationals for losses sustained following the Iranian Revolution, and these cases had made a significant contribution to various subjects of international law, including those concerning dual nationality, expropriation, commercial law, and arbitral procedure. For my interview, I traveled to St. Michaels, Maryland to meet Judge Aldrich in his comfortable home on the Eastern Shore. Surrounded by impressive pictures painted by Judge Aldrich's wife, Rosemary, I asked various questions about the workings of the Tribunal and the unusual way in which law and diplomacy coalesce in the resolution of cases. Judge Aldrich answered all of my questions and described the Tribunal's many contributions, particularly to the *lex mercatoria.* By the end of the interview, I was quite keen to obtain the position, yet I nonetheless felt obliged to admit, "I, uh, don't really know very much about international law," to which Judge Aldrich responded: "That's okay. You don't really need to."

I have learned a great deal about international law in the years I have worked with Judge Aldrich, but he was right – I did not really need to – because Judge Aldrich himself knows so very much. Judge Aldrich arrived at the Tribunal at its inception in 1981. He is the only member of the Tribunal to have served in that capacity since the Tribunal's outset, and, in his twenty-four years at the Tribunal, he has participated in the resolution of perhaps 500 cases. As a result of his awe-inspiring memory and his substantial involvement in every aspect of the Tribunal's work – from the resolution of the cases to the drafting of the Tribunal's procedural rules to his longstanding service on the Tribunal's Committee on Administrative and Financial Questions – Judge Aldrich has become the well-established expert on everything related to the Tribunal. Judge Aldrich "wrote the book," as it were,

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both figuratively and literally – his 1996 book, *The Jurisprudence of the Iran-United States Claims Tribunal*,[1] has been described as "one of the truly essential books published in recent years"[2] and is an essential reference for any serious student of the Tribunal.

Judge Aldrich's influence at the Tribunal results not only from his impressive command of international law and his willingness to immerse himself in the messy facts of many of the Tribunals large inter-governmental cases but, as importantly, from his utter impartiality. The Tribunal is comprised of nine judges – three appointed by Iran, three appointed by the United States, and three "third-country" judges, appointed jointly by Iran and the United States or, if the States cannot agree, by an appointing authority. The Tribunal's Iranian judges passionately advance Iran's positions in virtually every Tribunal case. American judges have shown more independence, regularly finding for Iran and against the American positions, yet even amongst his American colleagues, Judge Aldrich stands out. In a number of early Tribunal cases, Judge Aldrich declined to join his American colleagues in dissenting against awards in favor of Iran, and, to this day, refuses to engage in the gamesmanship that can characterize the deliberations of arbitral bodies. Because he calls them as he sees them in a fair and objective way, Judge Aldrich has maintained enormous credibility with his third-country colleagues, and his views are treated with great respect. That respect is enhanced, additionally, by Judge Aldrich's impressive ability to forge agreement amongst opposing parties. Many is the time I have watched him tweak the language of an award in a way that seems insignificant but that has the effect of bringing dissenting judges into the majority. Judge Aldrich honed these skills during the distinguished career he pursued before he joined the Tribunal. Indeed, as influential as Judge Aldrich has proven to be at the Tribunal, some of his most significant contributions to international law occurred before his move to The Hague.

Judge Aldrich was born in St. Louis, Missouri, and, after receiving his Bachelor of Arts degree from DePauw University in Indiana, he attended Harvard Law School, where he obtained his LL.B degree in 1957 and an LL.M degree in international law in 1958. His interest in international law stemmed, he believes, from his own experiences. "[G]rowing up during the Second World War and the years in which the post-war world was formed," Judge Aldrich has written, "it seemed natural that my

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1 George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996).

2 Vaughan Lowe, "Book Review", 56 *Cambridge L. J.* 201, 202 (1997).

goals looked toward the new world order of the United Nations and the promotion of international law as a means to make a Third World War less likely."[3]

During the early years of his career, Judge Aldrich held various positions in the United States Department of Defense and Department of State, and by 1973, he served as Principal Deputy Legal Adviser of the Department of State. During the 1960s and early 1970s, much of Judge Aldrich's work focused on the Far East and, in particular, he became an expert on the laws of war. In 1961, at the age of twenty-nine, Judge Aldrich was sent to Geneva to participate in the International Conference on Laos, and in 1965 and 1969, he attended the International Conferences of the Red Cross to promote resolutions calling on the North Vietnamese to treat American military personnel in accordance with the Fourth Geneva Convention of 1949 on Prisoners of War. He also made an inspection trip to South Vietnam in 1967 to determine whether the South Vietnamese prisoner-of-war camps complied with the Convention. From 1963 to 1965, Judge Aldrich resided in Paris, and, while serving as Legal Adviser to the United States Mission and Ambassador Thomas Finletter, he was involved in negotiations for the creation of a multilateral nuclear force.

In the Fall of 1972, Judge Aldrich began participating in what must be considered one of the most fascinating negotiations of his illustrious career when he was called upon to work with then-United States National Security Advisor Henry Kissinger in negotiating a peace agreement with North Vietnam. A draft of the Paris Peace Agreement that was ultimately signed in January 1973 was nearly complete in October 1972, when Judge Aldrich became involved in the negotiations, but, recognizing the severe defects and limitations of the Agreement, Judge Aldrich, along with Ambassador William Sullivan, set out to draft protocols to the Agreement that would supply necessary details. Consequently, during several tense weeks in December 1972 and January 1973, Judge Aldrich and Ambassador Sullivan negotiated three important Protocols – one concerning the return of prisoners of war, the second concerning the cease-fire in South Vietnam and the Two-Party and Four-Party Joint Military Commissions provided for in the Agreement, and the third concerning the International Commission of Control and Supervision. These Protocols greatly enhanced and enlarged the Agreement: two-thirds of the provisions ultimately agreed upon were contained in these Protocols.

After the signing of the Agreement and Protocols on 27 January 1973, Judge Aldrich continued to participate in arduous negotiations with the North Vietnamese, this time to encourage their compliance with Agreement. From April

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[3] George H. Aldrich, *Notes from the Vietnam Peace Negotiations* (forthcoming).

through June 1973, Judge Aldrich and Ambassador Sullivan assisted Dr. Kissinger in negotiating a Joint Communiqué and several Understandings regarding the January 1973 Agreement. The negotiations were intense, difficult, and did not in the end produce the sought-after compliance. During dinners at the Aldrich residence, I have many times been treated to compelling stories about the Vietnam negotiations, so I was particularly pleased when, in the Fall of 2004, Judge Aldrich completed a book manuscript, entitled Notes from the Vietnam Peace Negotiations, which describes these negotiations and includes long passages from the detailed notes he took at the various negotiation sessions. As these notes have only recently been declassified, they provide new and welcome insights into that soul-wrenching period of American history.

Judge Aldrich's most enduring legacy may well be his contribution to the drafting and negotiating of Protocols I and II to the 1949 Geneva Conventions on the Laws of War. By the mid-1970s, it was well-recognized that the laws of war needed to reflect better the changing nature of conflicts and the conduct of hostilities. Consequently, in 1974, Switzerland convened a Conference to negotiate two Protocols to the 1949 Geneva Conventions, the first to address the laws applicable during international armed conflicts, and the second to address the laws applicable during non-international armed conflicts. Judge Aldrich served as Head of the United States Delegation to the Conference, and he was entrusted with unusual control over the American negotiating posture. He had gained the trust of the United States Defense Department during the time he was employed there in the early 1960s and, because he was viewed as Dr. Kissinger's lawyer, few were willing to challenge the position papers he drafted, figuring that he would prevail in any event. During the early days of the Conference in 1974 and 1975, Judge Aldrich spent most of his time concerned with political matters. The most important of these were the Communist effort to seat the Vietcong delegation, an effort that ultimately proved unsuccessful, and the efforts of a number of States to extend the scope of Protocol I to apply to armed conflicts between States and national liberation movements. The American delegation opposed the language extending the scope of Protocol I and, although it failed to exclude the language, it rendered it largely academic by requiring liberation movements to comply with the law (which the delegation rightly assumed would be nearly impossible) and by including language that virtually ensured that no State would acknowledge that its armed conflict was one covered by the provision.

Harvard law professor and later International Court of Justice Judge, Richard R. Baxter, initially served as Rapporteur to the Third Committee of the Conference, which addressed the rules governing combat and the protection of civilians and, when he returned to Harvard in 1975, Judge Aldrich was elected to succeed him as

Rapporteur. It was an almost inconceivable decision to select an American Ambassador for such a post at any international conference, and it reflected appreciation for Judge Aldrich's significant contributions. As Rapporteurs, Professor Baxter and Judge Aldrich were primarily responsible for drafting and negotiating articles 35 through 60 of Protocol I and articles 13 through 17 of Protocol II, which address the methods and means of warfare and the treatment of civilians and prisoners of war. Protocol I in particular added much of value to the law and helped bring international humanitarian law up to date. Its significance is reflected in a recent decision of the Eritrea-Ethiopia Claims Commission, on which Judge Aldrich serves, which held that most of the provisions of Protocol I now constitute expressions of customary international law.

During 1977 through 1981, Judge Aldrich served as Ambassador and Deputy Special Representative to the President for the United Nations Law of the Sea Conference. Virtually all of his work during that Conference concerned issues involving the exploitation of deep sea beds, issues which proved very difficult to negotiate. At the time, experts in the United States Government and elsewhere were convinced that vast wealth in the form of manganese nodules was to be found on the deep ocean floor, particularly in the Pacific. A few years later, it became clear that recovery of those nodules is not likely to be economically feasible for some time, but, unaware of the impracticability of the endeavor at the time, the United States pressed for provisions in the treaty that would ensure that American companies would be able to secure exclusive rights to mine sites on financially beneficial terms and conditions. These positions were not well-received, so Judge Aldrich sought to simplify the American negotiating posture by eliminating many of the specific guarantees that American companies and the American government desired, in favor of deferring them to a preparatory commission that would function after the Convention was concluded and before it had the requisite ratifications to bring it into force. In advancing this position, Judge Aldrich hoped to prevent a failure to reach an agreement while leaving the difficult commercial and mining battles to another day and to another, more technical, less prominent body.

President Reagan's election put an end to Judge Aldrich's efforts. The new Administration decided to take the position at the Conference that the deep sea beds would have to be freely available to all who could exploit them. Knowing that Judge Aldrich would not and could not credibly press such a position, Judge Aldrich was told – less than forty-eight hours before the resumption of the Conference – that he and a large proportion of his delegation would be replaced. After his removal, Judge Aldrich was moved to a bleak "transition office" where he waited for several anxious months for his next assignment. That assignment turned out to be a welcome but short-lived appointment to the International Law Commission

(ILC). Soon after, he was appointed to be an American judge on the Iran-United States Claims Tribunal, an affiliation that necessitated his withdrawal from the ILC but that, as noted above, has lasted twenty-four years and counting.

Although Judge Aldrich did serve between 1989 and 1997 as Professor of International Humanitarian Law at Leiden University, for most of his years on the Iran-United States Claims Tribunal, he has not been actively involved in his legal specialty – international humanitarian law. The peace treaty that ended the brutal two-year war between Eritrea and Ethiopia, however, provided him the opportunity once again to contribute to the development of the laws of war. In 2001, Judge Aldrich was appointed by Ethiopia to be a Commissioner on the Eritrea-Ethiopia Claims Commission, a judicial body established to decide claims for losses related to the war that resulted from violations of international humanitarian law. Judge Aldrich is joined by four other Commissioners, one of whom serves as the Commission's President. To date, the Commission has issued six awards addressing questions of liability relating to prisoners of war, to the treatment of civilians in the territory of the other Party, and to the conduct of hostilities on the war's central front. April 2005 will see the Commission convene a lengthy hearing to address various diplomatic and economic claims, claims arising from actions on the Eastern and Western Fronts, as well as claims based on the *jus ad bellum*, that is, claims alleging unlawful resort to the use of force.

In the awards issued thus far, the Commission has contributed to the development of international humanitarian law by holding, among other things, that most of the provisions of the 1949 Geneva Conventions and Protocol I thereto have become expressions of customary international law, but that the same cannot be said of the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. The Commission held that, because these latter three treaties have been only recently concluded and the practice of States has been so varied and episodic, the Commission could not conclude that any of the treaties constituted an expression of customary international law applicable during the armed conflict between the Parties. This most recent opportunity to develop international humanitarian law has been rewarding for Judge Aldrich, but it comes at a time of great uncertainty regarding the role and influence of international humanitarian law. Although the abuses that took place – often against American soldiers – during the Vietnam War, amongst other conflicts, only underscore the compelling need for commitment to the kind of measured, carefully drafted rules

of warfare that Judge Aldrich has spent a career developing, these historical lessons appear lost on the current American administration, a fact that is deeply troubling to Judge Aldrich.

After I was asked to profile Judge Aldrich, I read several Profiles appearing in past volumes of *Forum*. These Profiles concern eminent personages in international law whose contributions to the field have been significant and many. Judge Aldrich is quite at home in this distinguished group, and I have followed the formula of Profiles, as it were, by focusing on his many accomplishments and contributions to international law. Were it not for space constraints, much more could be said, in addition, about his more personal qualities and in particular the warmth and generosity he shows to all who have had the good fortune to know him. When I leave The Hague in June 2005 to begin teaching law in the United States, I will take with me fond memories of my association with a kind and caring man, as well as tremendous respect for the work he has done to imbue the most brutal of legal fields with the dictates of humanity.

Work in Progress / Travaux en cours

Regional Economic Integration and Dispute Settlement Outside Europe: a Comparative Analysis

JULIA LEHMANN*

Much has been written about the changes the international community has undergone since the end of the Cold War. Of these, globalisation is only one aspect, intensified regionalism is another. This regionalism is often referred to as "New Regionalism" and manifests itself, *inter alia*, in revived or newly founded economic integration schemes. The classification as "new" is justified in so far as there was a "natural" re-orientation towards neighbouring countries after the economic (and ideological) support of super powers in many areas of the world had faded. "New", too, are the economic policies pursued compared to those of regional economic cooperation during the 1970s and 1980s. The old policies aimed, broadly speaking, at regional self-sufficiency and import substitution. The new schemes focus on regional integration as part of efforts to integrate into the (semi-)liberalised world market. This is partly demonstrated by the fact that most of these organisations have sought or are seeking the status granted as a regional organisation under Art. XXIV of GATT.

Parallel to this development of regional integration runs the increased institutionalisation of dispute settlement in public international law over the past ten to fifteen years – be it the WTO panels and its Appellate Body, the creation of special-purpose criminal tribunals paving the way for the International Criminal Court, or new mechanisms for dispute settlement in the field of human rights or international environmental law. This trend toward institutionalising dispute resolution has also found its way into regional economic organisations.

This paper aims to provide an overview of six of these new or revived regional economic organisations which have formed outside Europe – Mercosur, the Andean Community, the Caribbean Community, the Economic Community of West

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African States, the Common Market for Eastern and Southern Africa, and the East African Community. The case studies have been selected for their approach to regional integration: they all follow the "classic" path of integration from a free trade area, via a customs union to a common market and – potentially – to an economic and monetary union (unlike e. g. NAFTA or ASEAN which are for this reason not included in this study). This path is, of course, familiar to most readers from the history of European Integration. Unsurprisingly, the EC/EU has served as a role model for many of these integration efforts. Some regional associations have tried to copy the EU model (owing, perhaps, to intellectual and financial support provided by the EU for the setting up), while others have modified the institutional structure and legal system according to their needs or potential. The respective institutional and legal make-up of each organisation will be briefly described. Besides actual advancements made towards a common market, the following structural aspects appear particularly relevant for a comparative legal analysis of integration schemes: the respective composition of the organs (intergovernmental or supranational), their decision-making procedures (consensus or majority decisions), and the nature of the "community law" (direct application/effect or implementation into national law). Further attention will be paid to the various modes of dispute settlement (arbitration or compulsory settlement by community courts) and their different forms of proceedings (including the question of *locus standi* for private entities). While the formal features of supranational legislation, majority votes and binding and compulsory dispute settlement mechanisms are usually viewed as reflecting a high level of integration – since they require substantial transfer of sovereignty which states are often reluctant to do – the case studies reveal a different picture. To supplement the empirical description of the various non-European integration schemes and their dispute settlement mechanisms, conclusions and hypotheses will be drawn from a comparative analysis of them.

In 1991, Argentina, Brazil, Paraguay and Uruguay founded Mercosur (Mercado Común del Sur) which at the time was widely celebrated. The size of the combined national markets makes Mercosur one of the "heavyweights" of regional integration in the world. It is also, when viewed as a whole, the most developed region among the case studies discussed here. Although there have been setbacks on the path towards integration in recent years, Mercosur can still be called a successful endeavour. Its ultimate objective is the creation of a common market. So far, Mercosur can be classified as a free trade area and an as yet incomplete customs union. However, the introduction of a common currency (re-) appears frequently on the agenda. The institutional structure is notably and intentionally "modest", i.e. it relies on intergovernmental organs. Cooperation is thus invariably carried out by government

representatives of the member states according to the rule of: one state, one member, one vote. The founding Treaty of Asunción and subsequent protocols describe the organisational structure as transitional, intended to give the integration project a certain flexibility to permit adjusting to changing circumstances. This "modesty" in structure is mirrored in the legal system. The organs have no competence as to directly effective or applicable supranational legislation. Basically, the "community law", once agreed, has to be implemented into national law to become binding and effective. All decisions are taken by consensus. There is no provision for majority votes, not even on minor or purely administrative issues. In essence, thus, there is no possibility of actions or decisions taken against the will of one of the member states. The two smaller and economically weaker states, Paraguay and Uruguay, are privileged in so far as they are usually granted more time for implementing certain agreed economic policies or other measures, particularly in the realm of trade liberalisation.

Consequently, there is no compulsory settlement of disputes arising from the interpretation or application of "community law" either. Until very recently, the final stage of a several step procedure of dispute settlement was the establishment of an *ad hoc* arbitral tribunal. This can be requested only by member states, thus there is no direct *locus standi* for private parties (leaving aside the possibility of complaints to the Trade Commission). This means, in consequence, that the stakeholders of the common market, the enterprises and corporations, have no access to justice but must rely on their own member state to pursue their cause. While the dispute settlement mechanism took several years to be put into practice, it has now become a firm part of the integration process. The mechanism lacks specialised procedures such as, e.g., preliminary rulings in which national courts request an opinion on the interpretation of a certain Community norm and which are viewed as particularly furthering the integration process as they safeguard the uniform interpretation and application of Community law. However, the various tribunals have found a way of developing jurisprudence safeguarding the application of Mercosur law (even invoking the ECJ's *effet utile* doctrine). Yet, the consistency of this jurisprudence stands on fragile grounds, considering that there is no personal continuity. Arbitrators are chosen anew by the parties for each case. A decisive new element has been added to this dispute settlement mechanism by the Protocol of Olivos, which created a new Permanent Appeals Tribunal that was inaugurated in August 2004. Its main task is to review the arbitral awards of the *ad hoc* tribunals. In addition, it can also be called upon as the sole arbitral procedure, and, most remarkably, it can render "consultative opinions" requested by the highest national instances applying Mercosur law. Hence, there now exists a form of preliminary ruling, although, these consultative opinions are not binding.

The Andean Community differs from Mercosur in many aspects. It is one of the oldest integration schemes, going back to the founding Treaty of Cartagena in 1969 that established the Andean Pact. While it was originally viewed as a major step towards regional economic independence and strength, disillusionment followed in the 1970s and 1980s, the latter decade being generally viewed as "lost" for the whole of Latin America's development. Although progress has been made since, the present member states Bolivia, Columbia, Ecuador, Peru and Venezuela still remain, on average, less developed than Mercosur. A major reform of the organisation was initiated with the implementation of the Protocol of Trujillo of 1996 (which also renamed the organisation, in a more visionary vein, as the Andean Community). In comparison to Mercosur, the Andean Community is more institutionalised. Apart from its intergovernmental institutions, it has a supranational organ, the General Secretariat (the successor of the former Junta). Despite this slightly misleading name, it is a truly political organ, supervising, *inter alia*, the working and functioning of the integration as a whole. There is provision for majority decisions in one of the major organs (the Commission). From a legal perspective, the most notable aspect of the system is the organisation's competence of supranational legislation. The norms and rules agreed by the organs become binding and effective in and for the member states upon publication. While only sporadic use had been made of this competence in the beginning, and while community legislation had been ignored widely, recent years have seen an increased activity of legislation and adherence to it in various fields of cooperation. Noteworthy is the envisaged completion of the common market by the end of 2005, one major part of it being the free movement of persons to be established by the end of 2004. Peru and Bolivia, as the economically weakest members, receive a special treatment with regard to the implementation of the trade liberalisation schemes.

The Andean Community is the most advanced with regard to dispute settlement. Its own court of justice was created in 1979 and resembles, particularly in its different forms of proceedings, the ECJ (procedures for breach of community law by and against member states and community organs, procedures of nullification of a community act, preliminary rulings etc., including *locus standi* for private parties). Originally, the number of cases filed with the court remained few. Over the past years, however, the court has become remarkably more active. Especially the number of preliminary rulings has increased manifold. The court's active role has helped shaping a coherent and ever-deepening system of "community law".

The Caribbean Community (CARICOM) can also look back on a long history in the course of which the establishment of the Caribbean Free Trade Area (CARIFTA) in 1965 was a major step. While it suffered from similar setbacks as the Andean

Community, it has made considerable progress over the past decade. Today, it is in the process of establishing a real common market. Several protocols to the founding Treaty of Chaguaramas are gradually introducing the basic common market freedoms, beginning with the free movement of labour for certain professions. CARICOM has a merely intergovernmental institutional setup, with the exception of the secretariat, which, in contrast to that of the Andean Community, is a primarily administrative organ. There is no provision for supranational legislation, so the effect and effectiveness of "community law" depends entirely on the will of member states to implement it – something that has been found lacking in the past. There are provisions for majority decisions in various organs; these, however, are watered down by rather vague exceptions for "issues of major national concern."

Yet, CARICOM is undoubtedly unique with regard to its dispute settlement mechanisms. The soon to be inaugurated Caribbean Court of Justice will not only serve as a court for the regional organisation itself, but will predominantly function as a final court of appeal for all member states. At first sight this may appear quite spectacular with regard to the transfer of jurisdiction. One has to bear in mind, however, that many of the member states still use the British Privy Council as the final court of appeal, and that the small Eastern Caribbean states already have a common court of appeal in the form of the Eastern Caribbean Court. Notwithstanding this primary task, the new court will have substantial powers in the field of community law, roughly comparable to the ECJ, including preliminary rulings and *locus standi* for private parties.

Turning towards Africa, the most prominent example of regional economic integration is arguably the Economic Community of West African States (ECOWAS), founded in 1975, which is perhaps best known for its peacekeeping engagements in Sierra Leone and Liberia. The economic integration has not been very successful, due to the poor economic performance of almost all fifteen members, lack of infrastructure necessary to physical integration, and a rivalry between franco- and anglophone members. Also, the member states differ widely in size, population and economic power, with Nigeria being a clearly dominant player. The revised treaty of 1993 and subsequent protocols would provide for a complete common market with the ultimate aim of an economic and monetary union. This, however, has remained purely theoretical, especially since the major protocols have been ratified but not implemented into national law. The envisaged introduction of a common currency may prove a very difficult venture since many of the national currencies are not yet convertible (an exception is the Paris-backed Franc CFA in the francophone member countries). Such ambition is mirrored in institutional structure and legal system. The main organs can theoretically enact supranational

legislation and there are various organs for many fields of cooperation which can render majority decisions. Yet none of that has so far translated into real "material" integration; some organs have remained almost inert and supranational legislation has either not been used or has been blatantly ignored.

The ECOWAS Court of Justice has broad jurisdiction. It can hear disputes filed by the member states or the highest organ of the Community, the Authority, against another member state or another organ. Yet, private parties do not enjoy direct *locus standi*. Preliminary rulings are not provided for, however, considering the scarceness of "community law" as such, there does not appear an urgent necessity for such a procedure for the time being. Although the court has been inaugurated and the judges have been elected, it has not – at least according to the information available – rendered a single judgement to date.

The Common Market for Eastern and Southern Africa (COMESA), set up in 1994 and successor to the defunct Preferential Trade Area (PTA), suffers from overlapping membership and duplication of efforts with the Southern African Development Community (SADC). Compared to ECOWAS, its institutional and legal shape looks less ambitious, yet it bears the same lack of practical impact. The treaty itself provides for cooperation in almost all imaginable areas, but COMESA suffers generally from a low degree of intraregional trade and from a lack of transport and communication infrastructure connecting the member states. Its organisational structure is purely intergovernmental and there is no possibility of supranational legislation. Decisions are made by consensus and only in exceptional cases by majority. Considering the vast number of members, this renders the decision-making process even more cumbersome and time-consuming.

COMESA has its own court of justice, which commenced its work in 1998, but has decided only a few cases so far. The disputes underlying the cases were not typical examples usually arising in a regional economic community. None was concerned with trade issues even in a wider sense, rather they were disputes between the community and its employees or occasions when the jurisdiction of the court was already questionable.

The most promising case study in Africa to date is arguably the East African Community (EAC). It was (re-)founded by Kenya, Tanzania and Uganda in 2001 after a first attempt at regional cooperation failed finally in 1977. Having learned from this experience, the founders of the EAC set up a relatively lean organisational structure, yet with intergovernmental organs competent to act in various fields of cooperation. The General Secretariat is a hybrid between a purely administrative organ and a political one. The description of its powers in the treaty is rather

imprecise. This imprecision, however, might well give the Secretariat considerable power, depending on the role the Secretary-General intends to play himself. A Legislative Assembly consisting of directly elected members guarantees popular representation, which is unique insofar as the parliamentary organs of other case studies are composed of members of the national parliaments. The founding treaty is supplemented incrementally by various protocols governing different fields of cooperation. The parties signed a protocol in March 2004 that foresees the gradual establishment of a common market over a period of five years. Due to the low number of members, there is no provision for majority decisions by the executive organs, decisions are agreed by consensus. Community legislation shall be directly applicable for which the member states are bound to create the necessary national legal framework.

The organisation has established a community court that has already begun its work. The treaty provides for various forms of proceedings, including private claims against the community and preliminary rulings. Furthermore, the court can be used as an arbiter for disputes between private parties. The member states can theoretically enlarge the jurisdiction of the court to include human rights issues, but this does not appear likely to happen in the immediate future.

To draw generalised conclusions from a number of select case studies can result in a picture which portrays one case as more appropriate than another. Nevertheless, the above case studies appear to reveal certain interdependencies and connections between regional economic integration in the less developed world, and political and economic factors, as well as dispute settlement mechanisms and the success of it all.

First and foremost, the success of an integration project seems to depend on the economic well-being of the region, as illustrated by the two regions that are most successful and at the same time most prosperous, namely Mercosur and the Andean Community.

Secondly, the competence of an organisation to enact supranational legislation does not guarantee the success of an integration project as such. While the Andean Community took a relatively long time to make effective use of this competence, it has now become a potent tool to further integration. ECOWAS, in contrast, shares the same competence, but here it has not materialised into any promotion of integration.

Quite to the contrary, one could argue, institutional "modesty" or restraint, combined with realistic aims and targets, can further the process of integration. Mercosur has been described above as one of the most successful endeavours, and it has a notably lean and intergovernmental structure and sets itself modest targets

to be achieved step by step. The hypothesis that more modest structures and goals lead – at least initially – to more effective integration is also supported by the example of the EAC, although it has only been in existence for a few years. The almost "inflated" organisational structures of ECOWAS and COMESA and their ambitious objectives have, by contrast, not helped to move integration forward.

Furthermore, intentionally privileging economically weaker member states can lead to a greater political will to participate and to adhere to legal obligations. This is clearly the case with Mercosur and the Andean Community. Complete economic liberalisation can, in contrast, disadvantage the weaker members and thus lead to a reduced will to oblige integration law. This is shown, again, especially by ECOWAS, where even such essential features of free trade as the abolition of customs duties on intraregional trade are widely ignored in practice, especially by the poorer members for whom customs duties are the biggest source of state revenue.

In addition, the (a-)symmetry of the economic weight of the member states influences the dispute settlement mechanism: the stronger the economic dominance of some members, the more ineffective become "binding" dispute settlement procedures, as stronger members resort to economic and/or political pressure to avoid adverse judgements. This effect explains why the ECOWAS Court of Justice has still not decided on any inter-state disputes: the rivalries between the franco- and anglophone countries are carried out through political bargaining, in which Nigeria frequently makes use of its economic weight.

The success of the dispute settlement mechanism is linked to the success of the integration project as a whole. Mercosur had a slow start with its dispute settlement mechanisms, but has made steady progress parallel to the integration project as a whole. The Andean Court was little used in the beginning (and, along with the organisation, came to a virtual standstill in the late 1970s and 1980s), but has recently seen a steep increase in activity accompanied by general reforms of the community. ECOWAS and COMESA, in contrast, have had little success with their general integration efforts and have seen little or no use of their community courts.

Furthermore, a functioning compulsory and binding dispute settlement mechanism can foster willingness to adhere to treaty obligations: states facing a "sentence" might be concerned with their reputation and thus obey their obligations. Yet, the mere existence of a compulsory and binding mechanism does not in itself guarantee effective dispute settlement, as exemplified by ECOWAS.

Finally, the success of the dispute settlement mechanism depends on the existence of a substantial corpus of "community law". The Andean Community Court became particularly active, especially with regard to its preliminary rulings, after many areas of cooperation saw substantial codification. There is no necessity for a

binding and compulsory dispute settlement mechanism if there is a low degree of legal codification of the various fields of cooperation. More informal methods of settlement have proved to be sufficient, especially since the nature of disputes likely to arise in such a setting fit more informal methods well. This has been the case in the early stages of Mercosur's development, where the need for a more formalised method has arisen only recently and was subsequently met.

From a purely legalistic and theoretical point of view, supranational organs and legislation, majority votes and a full-scale community court appear to be the apex of integration. However, such features should not be introduced "prematurely". The overall impression gained is that a restrained and careful approach to integration, paying due regard to sovereignty concerns and economic conditions, with institutions and the legal system gradually evolving according to potential and need, appears to be more promising than setting up a fully advanced supranational organisation at the outset of an integration project.

Conference Scene / Le tour des conférences

Le colloque du Mans de la Société française pour le droit international (4 et 5 juin 2004) : le sujet du « sujet »

YANN KERBRAT*

C'est dans une douce chaleur de printemps l'année dernière que s'est tenu à l'Université du Maine (Le Mans – France) le 38ème colloque annuel de la Société française pour le droit international. L'organisation en avait été confiée au Professeur Michel Cosnard qui lui imprima un rythme soutenu, mais, pianiste oblige !, bien tempéré. Le format était en effet inhabituel puisqu'au lieu des traditionnelles trois demi-journées réparties sur trois jours, le colloque s'est déroulé principalement sur une journée ; seules les conclusions ont été renvoyées au lendemain, à l'issue de l'assemblée générale de la Société. L'ambiance fut plus détendue qu'à l'accoutumée.

Le thème retenu était « 'le sujet' en droit international ». Mais autant que de ce dernier sujet – le sujet comme personne – on discuta beaucoup de la pertinence du thème : du sujet du sujet. La faute en incombait partiellement au titre du colloque et aux ambiguïtés de sa formulation. L'emploi du singulier pour désigner « le sujet », curieusement mis entre guillemets, eut pour effet, peut-être inconscient, de focaliser l'attention des participants sur un type de sujet : l'individu. Le choix de la préposition « en » – le sujet « *en* » droit international – au lieu de « de » ou « du » introduisait l'hypothèse d'une particularité de la notion de sujet en droit international. On ne la vérifia pas et on commença logiquement à remettre en cause l'objet du colloque.

La matinée fut consacrée à la présentation générale du thème. Sous la présidence du Professeur Stern (Université Paris I), le Professeur Cosnard fit l'introduction générale ; le Professeur Hélène Ruiz Fabri (Université Paris I) enchaîna avec une contribution sur les « catégories de sujets ».

Le premier adopta une approche prudente : il fit le choix de présenter les diverses théories portant sur le sujet plutôt que d'en proposer une lui-même. Cette démarche eut l'inconvénient de le conduire à envisager moins la notion de sujet de droit international elle-même, que les utilisations faites de celle-ci par les observateurs des rapports internationaux. Le résultat fut assez radical puisque, dénonçant les apories

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et les tautologies dans les présentations qui sont faites du sujet dans la doctrine, il parvint au constat que les critères retenus pour définir le cercle des sujets de droit international sont idéologiques. Ces critères ne viseraient, selon lui, qu'à justifier *a posteriori* la restriction aux Etats de la qualité de sujet de droit international ou, au contraire, son élargissement aux organisations internationales et/ou aux particuliers. Il n'y aurait donc aucun critère objectif, pas même celui, pourtant simple, de l'aptitude à être destinataire ou titulaire de droits et d'obligations. La suspicion commençait à peser sur le « sujet » en droit international. Elle fut confirmée par le Professeur Ruiz Fabri, qui montra, dans une stimulante communication, les impasses de la catégorisation *des* sujets. Partant de l'idée simple que la présence de plusieurs espèces suppose l'existence de caractères propres à chacune d'elles, elle parvint à la conclusion qu'il n'était possible d'en préciser aucun avec certitude. Les différences entre les Etats, les organisations internationales et les individus ne sont pas essentielles du point de vue de leur qualité de sujet. Et les indices qui témoignent de l'éclatement de chacune de ces catégories priment sur ceux qui tendent à en montrer l'unité. Pas d'espèce, pas de genre non plus : c'était en définitive le concept de sujet qui disparaissait … et dans son sillage, l'objet du colloque lui-même.

La séance de l'après-midi, présidée par le Professeur Pierre-Marie Dupuy (Institut Universitaire Européen de Florence et Université Paris II), dissipa en partie ces interrogations sur l'opportunité du thème choisi. Non pas qu'on eût trouvé une définition satisfaisante du concept en cause, mais parce que la réflexion sur les sujets de droit international avait discrètement laissé place à des études sur leur capacité.

Si l'on met à part la communication de François Carrard, conseiller auprès du Président du Comité International Olympique, qui tourna au film promotionnel sur l'action du CIO dans sa lutte contre le dopage, le seul exposé portant directement sur le sujet fut celui de Jean-Luc Florent (conseiller juridique à la Mission française auprès des Nations Unies) à propos des destinataires non étatiques des résolutions du Conseil de sécurité des Nations Unies. M. Florent montra que, bien que les particuliers et les groupements non étatiques fussent de plus en plus souvent visés par les mesures prises par l'organe restreint de l'ONU (en attestent les sanctions décidées contre l'UNITA, les Talibans ou les membres du réseau Al-Qaïda), les Etats refusent délibérément d'en faire des « sujets » en ne les rendant pas débiteurs des obligations créées par le Conseil : seuls les Etats sont obligés par les décisions du Conseil à l'exclusion de toute autre personne.

Les deux autres communications de l'après-midi s'écartèrent du thème du colloque (strictement entendu), mais elles comptèrent parmi les plus intéressantes et les plus novatrices. L'une d'elles fut présentée par Jean Matringe, Professeur à l'Université du Maine, qui s'interrogea sur les effets juridiques internationaux des

engagements des personnes privées. Par une étude de la pratique dans des domaines variés de l'action normative, il démontra que, contrairement à une idée reçue, les personnes privées peuvent, par leurs propres engagements, créer des droits et obligations internationaux, choisir dans certains cas le droit applicable à leur situation et élire un mécanisme international de règlement des différends. L'un des aspects les plus originaux de son rapport consista à identifier et distinguer de deux modes d'engagements producteurs d'effets juridiques internationaux : les procédés contractuels et la voie unilatérale.

La seconde communication fut celle du Professeur Carlo Santulli (Université Bordeaux IV). Lumineuse, elle fera probablement date dans la théorie de la responsabilité et du contentieux car elle apporte une vision renouvelée d'une institution ancienne : celle de la protection diplomatique des particuliers. Entre cette protection, par laquelle l'Etat agit pour la défense de son propre droit et non pour celle du droit du sujet interne, et l'action d'un particulier devant une juridiction internationale, par laquelle celui-ci fait, cette fois, valoir directement son droit, l'orateur montra qu'il existait une tierce voie : l'action en représentation. Par cette dernière, l'Etat demande réparation de la violation, non pas de son droit, mais du droit du particulier pour le préjudice subi par ce dernier. La réparation due est distincte de celle obtenue par l'Etat dans le cadre de la protection diplomatique, de même, surtout, que les conditions de recevabilité de la réclamation : la règle de l'épuisement des voies de recours internes n'est pas pertinente pour l'action en représentation. La pratique arbitrale comportait déjà de nombreux exemples de cette forme d'action ; la Cour internationale de Justice l'aurait récemment consacrée dans ses arrêts *LaGrand*, du 27 juin 2001, et *Avena*, du 31 mars 2004.

Le lendemain, les conclusions du Professeur Cottereau (Université du Maine) vinrent clore, avec humour, les travaux de la Société. Rarement, de courte mémoire de « sociétaire », une telle liberté de ton s'était imposée. On s'en réjouit avec l'espoir de la retrouver l'an prochain.

"International Law in Europe: Between Tradition and Renewal" – The Inaugural Conference of the European Society of International Law

RIIKKA KOSKENMÄKI*

The Inaugural Conference of the recently established European Society of International Law (ESIL)[1] was held on 13-15 May 2004 in Florence in a troubling context: on the one hand, some international legal scholars consider that recent events, in particular the "War on terror" and the United States' "intervention" in Iraq, have "threatened the integrity and relevance of international law."[2] On the other hand, the drafting process of the Constitution of the European Union reminds us of how heterogeneous Europeans are in terms of values and culture at large. Why, then, to establish a "European" Society of International Law?

The theme of the opening session of the conference was, quite appropriately, the *raison d'être* of the new Society. For Judge Bruno Simma, one of ESIL's founders and its President, being European is more "a state of mind" than a geographical notion. A call for an inclusive Society that recognises no geographical frontiers had indeed attracted a number of non-Europeans, mostly from the developed world, to the event.[3] Coining the "European state of mind', identity, or intuition, shared by such a heterogeneous audience proved, however, a challenging exercise:

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1 The founding meeting of ESIL was held in May 2001 on the initiative of the editors of the European Journal of International Law (Philip Alston, Antonio Cassese, Pierre-Marie Dupuy, Bruno Simma, and Joseph Weiler) in conjunction with Hanspeter Neuhold. A group of twenty legal scholars from different parts of Europe participated in the meeting. ESIL was incorporated in The Hague in May 2004. See www.esil-sedi.org/english/about_founding.html.

2 *See, e.g.,* C. Chinkin, "Reconceiving Reality: A Ten-Year Prospective", 97 *ASIL Proc.* (2003) 55.

3 In his welcome address, Judge Simma told that approximately 20 % of the 350 conference participants were non-Europeans. *See also* a previous conference review, M. Goodwin and A. Kemmener, "A Sounding Brass, or a Tinkling Cymbal? Reflections on the Inaugural Conference of the European Society of International Law", 5(7) *German Law Journal* (2004) 850 at 851, fn. 6.

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Iulia Motoc painted in her intervention an image of a humanist, sensitive and cosmopolitan European international lawyer that we would undoubtedly all like to be. Pierre-Marie Dupuy, another founder of the Society, identified the rule of law as the basis of all European societies and argued that "the language of law" united Europeans. Yves Mény, President of the European University Institute that supported the establishment of ESIL, considered that Europe could "help to democratise international law" as a multilateral force opposing American unilateralism. Professor Philip Alston, an Australian national and ESIL's Vice-President, advocated that Europe would need to produce a new, "truly European vision of international law", which would be "a shining example" and "followed by others." That vision would, according to Professor Georges Abi-Saab, be based on Greco-Roman and Kantian heritage and be "very different from the view of the Empire." Leaving no room for doubt, the distinction stood for the European-American rivalry – a recurrent theme at the conference in general, and at the heated keynote event entitled "International Law in the Shadow of Empire" with Alain Pellet and Michael Reisman in particular.

In the debate on the identification of the "European," more emphasis could, perhaps, have been placed on the role of history: its arguably continuous and influential presence in the "European vision of international law"[4] may well be the key to understanding the "European view". An excellent panel entitled "Europe and International Law's Colonial Past" was however held the following day. It discussed the significant role that colonialism played in the universalisation of European international law and how colonialism arguably continues to function through the apparently neutral and objective legal structures, reproducing itself in current legal discourse.[5]

A certain European triumphalism, reflected in several interventions during the conference, did not go unnoticed. While Joseph Weiler considered that the conference was, indeed, an occasion for satisfaction that "we Europeans have a better way" of governance, he warned against "copying American triumphalism." In his view, Europe could contribute importantly to reforming international governance structures on the basis of its multilateral and transparent decision-making processes, which could not, however, be simply transposed to the international level. In a

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[4] Cf. P. Allott, "International Law and the American Mind", 97 *ASIL Proc.* (2003) 129 at 131.

[5] *See, e.g.,* one of the panelists, A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century. International Law", 40(1) *Harvard In'l L.J.* (1999) 1-80.

keynote address on the conference theme – "International Law in Europe: Between Tradition and Renewal" – Martti Koskenniemi[6] noted that, while Europeans no longer hold the dominant power position as they did when they originated the discipline, Europeans still "speak the language of universal international law" for which they have always set "the criteria of excellence." For Koskenniemi, the fact that international law is a European language does not as such prevent it from expressing something universal. He warned, however, against "the universalism of the Empire," that is, considering one's own tradition as universal, "a mistake that Europeans have made often." According to Koskenniemi, only after internalising the critique that international law is often used as a "hegemonic technique" may the particular be able to transcend itself and become truly universal. To that end, the instrumentalist view, which conceives "law as civilisation against the barbarism of politics," must be rejected and a more modest formalist approach be adopted instead.

Further noteworthy interventions were made at the conference, which cannot, due to obvious restraints, be studied here.[7] The structure of the conference is however worth mentioning: it provided for two types of panels, "fora" and "agorae," each with a number of parallel sessions. They presented a wide range of themes and offered an impressive overview of the current international law scholarship in all parts of Europe and beyond. To that end, the speakers had been thoughtfully chosen, taking into account age, language, gender, and geographic balance.[8] While the nine fora consisted of invited, well-known scholars, those in the ten agorae sessions had been selected through a competitive process. Consequently, the agorae unconventionally combined newcomers with well-established legal scholars and were thus truly inclusive. Importantly, the agorae debates resulted at times in a fruitful encounter of those representing more traditional approaches and those predicting or advocating renewal. The conference organisers are to be commended for introducing the agora formula, which will hopefully be repeated at future ESIL events.

But, more than a conference, the event was a historical inauguration of the Society. The widespread interest in the Society led to an over-subscription to the event. Though unfortunate for those left out, this fact alone justifies the Society's establishment, as ESIL clearly meets a need for a European association mandated "to promote the study of international law and to contribute to the rule of law in

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6 M. Koskenniemi's speech is reproduced in 16(1) EJIL (2005) 113-124.

7 For discussion, *see* M. Goodwin and A. Kemmener, *supra* note 3.

8 Welcome address by Philip Alston, ESIL Vice-President.

international relations."[9] At the conference, Judge Bruno Simma emphasised that the bilingual[10] Society would not seek to substitute or to overlap with national or international scholarly associations, such as the International Law Association.[11] Instead, the Society would constitute "a new type of network" for international lawyers and "an umbrella organisation" for the national societies. Interestingly, during the conference, divergent views were expressed as to the Society's future relationship with its American counterpart, the American Society of International Law: while some saw it as an important dialogue partner,[12] others appeared to dismiss prospects for transatlantic exchanges in line with the European-American rivalry.[13] Setting the policy concerning those relations, both within and outside Europe, will constitute an important task and a challenge for the new Society.

Judge Simma stressed that it would now be for the ESIL members to imbue the established framework with life. However, the meeting of the Assembly of the Members, held during the conference, gave few indications of the activities that were to be undertaken before the next conference convenes in two years' time.[14] The few decisions made at the meeting concerned the election of a new Board,[15] with Judge Simma as the Society's President and Hélène Ruiz Fabri as Vice-President. While waiting for follow-up to the conference, one reminder of ESIL is the subscription to the European Journal of International Law, which is an important and attractive membership benefit. Thus, while all those involved in the establishment of ESIL and in the organisation of its highly stimulating Inaugural Conference are to be thanked and congratulated, plenty of work and challenges lie ahead in order to bring the Society truly to life.

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9 ESIL Constitution, available at www.esil-sedi.org/english/constitution.html.

10 The official working languages of the Society are English and French. *Ibid.*

11 *Ibid.*

12 Cf. intervention of Pierre-Marie Dupuy.

13 Cf. intervention of Christian Tomuschat.

14 *See*, however, the Society's project "Mapping international law in Europe" that aims to produce a database of European research institutions at www.esil-sedi.org/english/mapping.html.

15 The Board members are: Mariano Aznar Gomez, Andrea Bianchi, Pierre-Marie Dupuy, Francesco Francioni, Vera Gowland Debbas, Florian Hoffmann, Vaughan Lowe, Frédéric Mégret, Iulia Motoc, Boldizsar Nagy, Hanspeter Neuhold, Anne Peters, Jarna Petman, Nico Schrijver, Thomas Skouteris and Ieneta Ziemele. For criticism of the election procedure, *see* M. Goodwin and A. Kemmener, *supra* note 3 at 857.

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