OLGUÍN *v.* REPUBLIC OF PARAGUAY

(Case No. ARB/98/5)

Decision on Jurisdiction. 8 *August* 2000

Award. 26 *July* 2001

(*Arbitration Tribunal*: Oreamuno B., *President*;
Rezek and Mayora Alvarado, *Members*)

SUMMARY: *The facts*: — The Claimant referred to ICSID a dispute which arose from the Claimant's investment in a finance company in Paraguay. The Claimant alleged that a finance company, Mercantil SA de Finanzas, had defaulted on payment of investment bonds in relation to a food supply company in Paraguay, and that the Government should be regarded as a guarantor of the said investment. The Claimant invoked the provisions of the Convention between the Republic of Peru and the Republic of Paraguay on the Reciprocal Promotion and Protection of Investments of 31 January 1994.

Paraguay denied that it had consented to ICSID jurisdiction, that the operations conducted by the Claimant were investments within the meaning of the BIT, and that it had guaranteed any obligations of the finance company, and it relied on a written waiver by the Claimant of his right to institute any further proceedings, in return for which certain payments were made by the Paraguayan Central Bank.

As to the merits, in 1993 an official of the Central Bank wrote to the Claimant, referring to dealings conducted with the finance company, and cited rates of interest which the latter was prepared to pay to the Claimant on his deposits. The official forwarded a report of the Central Bank on the finance company and its position in Paraguay, and referred the Claimant to the General Manager of the finance company. One month later, the Claimant began to make capital transfers, in dollars, to the Republic of Paraguay. These transfers, which amounted to the sum of US $1,254,500.00, were converted into local currency and deposited with the finance company. Against the deposit of these sums, the Claimant was sent investment bonds which (with one exception) were issued in the name of the Claimant, and bore the seal of a clerk of the Central Bank. Subsequently a payment was made by the Bank in Paraguayan guaranis for each of the investment bonds (again with one exception). The funds were set aside to finance the installation in Paraguay of a factory for maize products, to be owned by a corporation named Super Snacks of Paraguay Inc. The Central Bank official who had previously communicated with the Claimant, together with the Claimant and others, concluded various formalities required for the incorporation of Super Snacks and the subscription of twelve shares in the corporation founded. The Government of Paraguay subsequently granted tax incentives to Super Snacks.

In December 1994, the Convention between the Republic of Peru and the Republic of Paraguay on the Reciprocal Promotion and Protection of Investments came into force. Seven months later, in the midst of an economic crisis in Paraguay, the finance company closed its operations and defaulted on the payment of the investment bonds. Paraguay promulgated a law regulating its financial institutions and a second law containing an amendment to the first, to the effect that its Central Bank would guarantee deposits up to a certain amount.

At its first meeting, the Tribunal set down a timetable for written submissions by the parties on the issues both of jurisdiction and merits, but confirmed that even if Paraguay's memorial was confined to the question of jurisdiction, this would not preclude its right to argue at a later stage on the merits of the claims.

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Held: — (1) By ratifying the 1994 Convention, Paraguay consented in writing to ICSID jurisdiction as provided for in Article 25(1) of the ICSID Convention (paras. 26–7).

(2) The Claimant was an "investor" within the meaning of both Conventions and had complied with the prerequisites in Article 8 of the 1994 Convention for invoking ICSID jurisdiction (para. 28).

(3) There was no evidence that the Claimant had irrevocably elected to sue in the courts of Paraguay (para. 30).

(4) Paraguay's other jurisdictional objections would be joined to the merits (paras. 28–9).

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Held: — (1) Even though the Claimant held both Peruvian and United States nationalities and was domiciled in the United States, he was entitled to treaty protection as he held a valid and effective Peruvian nationality (paras. 61–2).

(2) The Claimant's allegation that he should be reimbursed by Paraguay for the unpaid part of his investment, together with an adjustment for the devaluation of the guaraní and other ancillary payments, failed. The seal placed on the six investment bonds did not involve a guarantee of the substantive obligation by Paraguay. Although criticisms could be levelled at the Paraguayan officials whose task was to ensure the integrity of the financial system of that country, such conduct did not create liability on the part of Paraguay for payment on the bonds (paras. 63–5).

(3) Nothing in the 1994 Convention obliged the host State to guarantee payment of an investment in the event of bankruptcy; rather, that risk was assumed by the Claimant, an experienced businessman. Nor could a claim be brought under the treaty on the basis that the Claimant was induced to make his investment by reports of the Central Bank and the office of the Superintendent of Banks; the fact that information and assessments about investments were provided by a State did not dispense the investor from making due inquiries nor did it make the State a guarantor of the investment (paras. 72–6).

(4) The claim that loss of an investment arising from a bankruptcy involved conduct tantamount to an expropriation of the investment by the State lacked any foundation (paras. 83–4).

(5) Having regard to deficiencies in the conduct of Paraguayan officials and the fact that the Claimant had been successful in upholding the Tribunal's jurisdiction, each party would bear its own costs and half the costs and expenses of the Tribunal (para. 85).

The texts of the decisions are set out as follows:

DECISION ON JURISDICTION (8 AUGUST 2000)

(Translation)

I. Introduction

1. On 27 October 1997, the International Centre for the Settlement of Investment Disputes (ICSID or the Centre) received from Mr Eudoro Armando Olguín, a national

of the Republic of Peru (Peru), a Request for Arbitration against the Republic of Paraguay (Paraguay). The Request related to a dispute which arose from treatment which Mr Olguín allegedly received from the Paraguayan authorities, relating to his investment in a company for the manufacture and distribution of food products in Paraguay. In his Request, the Claimant invoked the provisions of the Convention between the Republic of Peru and the Republic of Paraguay on the Reciprocal Promotion and Protection of Investments ("the Convention" or "the CPI").

2. On receiving the Request for Arbitration, the Centre, in accordance with Rules 5(1)(a) and 5(1)(b) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt of the Request and informed the applicant that it would not be possible to take any other action with respect to this until it had received payment of the lodging fee prescribed by Regulation 16 of the ICSID Administrative and Financial Regulations. In addition, the Centre requested Mr Olguín to provide: (i) complementary information relating to the parties to the dispute; (ii) more detailed information on the consent of Paraguay to submit the dispute that was the subject of his Request to arbitration in accordance with the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), including information on the date of his Request for the settlement of his dispute with Paraguay; and (iii) specific information on the questions which constituted the subject-matter of the dispute. The Claimant replied to these questions by means of a letter dated 15 December 1997.

3. The Claimant having paid the appropriate lodging fee, on 5 January 1998, the Centre transmitted to the Republic of Paraguay and to the Paraguayan Embassy in Washington, DC a copy of the Request for Arbitration, of the complementary documentation provided by the Claimant, and of the correspondence which had taken place up until that time.

4. On 11 February 1998, the Centre asked Mr Olguín to provide additional information relating to the alleged existence of judicial cases in Paraguay, or in any other country, relating to the dispute which was the subject of the Request for Arbitration. It also requested from him more information on the origin of the alleged obligation of the Republic of Paraguay to guarantee certain deeds of investment belonging to the Claimant, as well as on the precise terms of the said obligation. The Claimant replied to ICSID's request on 17 April 1998.

5. In a letter dated 21 May 1998, the Republic of Paraguay informed the Centre that it contested the Request for Arbitration presented by Mr Olguín, on the following grounds: (i) it denied that the operations conducted by the Claimant were investments; (ii) it denied knowledge of the existence of obligations of guarantee attributed by the Claimant to Paraguay; (iii) it affirmed the existence of a payment made by the Central Bank of Paraguay to Mr Olguín after the facts in dispute; (iv) the written waiver by the Claimant to his right to institute any further action against the Paraguayan authorities based on these facts; (v) the inapplicability of the dispute settlement mechanisms contemplated by the CPI, given that Mr Olguín had chosen the jurisdictional route, thereby waiving international arbitration; (vi) the non-existence of a dispute between Paraguay and Mr Olguín; (vii) the previous lack of consent of the parties to submit the dispute to arbitration before

ICSID. The Claimant responded in detail to that letter by a communication dated 17 June 1998.

6. On 26 August 1998, the Acting Secretary-General of the Centre registered the Request, pursuant to Article 36(3) of the ICSID Convention and, in accordance with Institution Rule 7, he notified the parties that the Request had been registered and invited them to establish an Arbitral Tribunal as soon as possible.

7. On 29 October 1998, after more than 60 days had elapsed from the date of registration of the Request, the Claimant informed the Secretary-General of the Centre that it had opted for the formula envisaged in Article 37(2)(b) of the ICSID Convention for the constitution of the Tribunal. Consequently, the Tribunal was established with three arbitrators, one appointed by Mr Olguín, another by the Republic of Paraguay and a third, who would preside over the Tribunal, would be appointed by common agreement of the parties. In the same communication, the Claimant appointed as arbitrator for the present case, Professor Dale Beck Furnish, a national of the United States of America.

8. On 23 November 1998, Paraguay, in a letter signed by the Director of Legal Affairs of the Ministry of Foreign Relations of that Republic, Mr José A. Fernández, informed the Centre that it had decided to nominate the appointment of Mr Walter Villalba Zaldívar, a national of Paraguay, as an arbitrator for this case.

9. The Centre immediately informed the Republic of Paraguay that, pursuant to Article 39 of the ICSID Convention and Rule 1(3) of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules), in cases where the Arbitral Tribunal has been established with three arbitrators, the appointment as arbitrator by one of the parties of a national of that party's State, or of a State whose national is a party to the dispute, requires the consent of the other party. As the Claimant had not given such consent, Paraguay was prevented from appointing Mr Villalba Zaldívar as arbitrator. Consequently, on 25 November 1998, the Republic of Paraguay appointed Justice Francisco Rezek, a Brazilian national, as arbitrator for the present case.

10. The parties did not reach agreement in respect of the appointment of the third arbitrator who was to preside over the Tribunal. In those circumstances, with more than 90 days having elapsed from the date on which the parties had been notified of the registration of the Request for Arbitration, the Claimant, by a letter dated 12 January 1999, requested that the third arbitrator in the case and the President of the Tribunal be appointed by the Chairman of the Administrative Council of the Centre, pursuant to Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Arbitration.

11. After having consulted with the parties, the Chairman of ICSID's Administrative Council appointed Mr Rodrigo Oreamuno Blanco, a national of Costa Rica, as the President of the Arbitral Tribunal. On 12 February 1999, the Chief Legal Adviser, on behalf of the Centre's Secretary-General, and in accordance with Rule 6(1) of the Arbitration Rules, notified the parties that all the arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted from that date. On the same day, pursuant to Regulation 25 of ICSID's Administrative and Financial Regulations, the parties were informed that Mr Gonzalo Flores, Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

12. On 16 March 1999, the Centre received a communication from the Ministry of Foreign Relations of the Republic of Paraguay, addressed to ICSID's Secretary-General, in which Paraguay challenged the appointment of Professor Dale Beck Furnish, pursuant to Article 57 of the ICSID Convention. The challenge was based on the fact that, because the Claimant held United States nationality in addition to Peruvian nationality, pursuant to the above-mentioned Article 39 of the ICSID Convention and Arbitration Rule 1(3), the latter was prevented from nominating a United States national as arbitrator in the present case.

13. Pursuant to Arbitration Rule 9, the Secretary immediately transmitted the disqualification proposal to the other members of the Tribunal and to the Claimant. On 17 March 1999, Professor Furnish tendered his resignation as arbitrator in this case. Pursuant to Rule 8 of the Arbitration Rules, the Tribunal on 19 March 1999 accepted the resignation tendered by Professor Furnish and informed the parties thereof. Consequently, the proceedings were suspended for the Claimant to appoint a new arbitrator. On 22 March 1999 the Claimant appointed as arbitrator, to replace Professor Furnish, Dr Eduardo Mayora Alvarado, a national of Guatemala, who accepted the said appointment, pursuant to Arbitration Rule 5. The proceedings were resumed on 29 March 1999.

14. The first session of the Tribunal with the parties present was held, after consulting with them, on 16 April 1999, at the seat of ICSID, in Washington, DC. At that session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules.

15. In the course of this first session, the Republic of Paraguay expressed objections to the jurisdiction of the Centre and requested that these objections be resolved as a preliminary matter, prior to addressing the merits of the claims. The Claimant, for his part, requested that the Tribunal deal jointly with both the objections to jurisdiction of the Centre submitted by the Republic of Paraguay and the merits of the claims.

16. After hearing both parties, the Arbitral Tribunal set down the following timetable: the Claimant would present its memorial within 60 days of the date of the first session; within 60 days following receipt of the Claimant's memorial the respondent would present a counter-memorial containing its factual and legal arguments on the question of the Centre's jurisdiction and the merits.

17. It was also agreed that when this first stage of written submissions was completed, the Tribunal would determine the subsequent steps, leaving open the possibility of permitting or requiring the parties to make additional submissions and of fixing a date for a new hearing with the parties.

18. At the close of the first session, at the request of the Republic of Paraguay, the Tribunal confirmed that even if the memorial contained arguments relating only to the question of jurisdiction, this would not preclude the right of the Respondent to argue at a later stage on the merits of the claims.

19. In accordance with the timetable fixed by the Tribunal, the Claimant submitted his memorial to the Centre on 27 May 1999.

20. On 2 August 1999 the Republic of Paraguay formally submitted its objection to the jurisdiction of ICSID, expounded the arguments on which such objection was

based and attached documents in support of these arguments. The following is a summary of those arguments:

(a) To be subject to the jurisdiction of ICSID, a State must expressly accept this jurisdiction since ". . . no contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration". (Preamble to the ICSID Convention).

(b) The fact that the Republic of Paraguay concluded with the Republic of Peru, on 31 January 1994, the "Convention on the Reciprocal Promotion and Protection of Investments" does not signify that Paraguay has given its consent to submit to the jurisdiction of ICSID, because:

  (a) Speculative financial investments are not protected by the CPI; and

  (b) To be protected by the CPI, the investments made must have been accepted in advance by the State in which they are made, which was not the case for those of Mr Olguín [; and]

  (c) Mr Olguín made a judicial claim before the courts of the Republic of Paraguay "with a view to recovering his financial speculation", which, pursuant to Article 8(3) of the CPI, prevents him from requesting arbitration before ICSID for the same purpose; and

  (d) In conformity with the domestic legislation of Paraguay, even if the Republic of Paraguay were liable to fulfil the obligations as sought by Mr Olguín, that liability would not be direct but only subsidiary, obliging the Claimant first to claim the fulfilment of these alleged obligations from the agents of the State involved in the actions which gave rise to this dispute, and only subsidiarily from the Republic of Paraguay.

21. On 31 August 1999, the Claimant referred in writing to the objections to the Centre's jurisdiction raised by the Republic of Paraguay, expounded the reasons why he thought that those objections should be dismissed, and submitted documents in support of his position. In essence, Mr Olguín's case was the following:

(a) The Republic of Paraguay, by concluding the Convention with the Republic of Peru, impliedly submitted to the jurisdiction of ICSID;

(b) The operations conducted by the Claimant constitute an investment under the ICSID Convention and the CPI; and

(c) Mr Olguín never submitted any judicial claim in Paraguay the fulfilment of the obligations to which the arbitration referred.

22. In its statement dated 18 December 1999, received by ICSID on the 21st of that month, the Republic of Paraguay formulated its Counter-Memorial to the reply given by Mr Olguín. The statement contained in the document of 2 August specified that Mr Olguín had lodged a "judicial claim for the purpose of recovering his financial speculation", indicating that what Mr Olguín had done was to request a declaratory judgment of bankruptcy and liquidation of a commercial corporation and it insisted in its argument that even in a case where the Republic of Paraguay was liable to fulfil the obligations sought by Mr Olguín, that liability would not be direct but only subsidiary, obliging the Claimant first to claim this alleged debt from the agents of the State who were involved in the actions that gave rise to the dispute

and "only where the latter could not comply" could the claim be made against the Republic of Paraguay.

23. On 2 February 2000, the Claimant submitted to ICSID his rejoinder on the question of jurisdiction. In it he expounded with greater precision and detail the reasons why he considered that the objection to the jurisdiction of the Centre should be dismissed and he cited abundant doctrine and jurisprudence in support of his case. In particular, the Claimant elaborates on the plea that no judicial proceedings had been brought by him against the Republic of Paraguay and he argues that the only existing proceeding is one of bankruptcy in which Mr Olguín was considered a creditor of the financial institution in question.

24. This case suffered several delays caused by the non-fulfilment on the part of the Republic of Paraguay of its obligation to make the payments set down in Regulation 14 of ICSID's Administrative and Financial Regulations, which the Secretary had requested from the parties in good time.

II. Considerations on the Objection to Jurisdiction

25. In resolving the question raised, the Arbitral Tribunal will not elaborate on the facts which have been accepted by the Parties, namely:

a) This Tribunal has the powers to resolve the question of its own competency and consequently, in this case, to rule on the objection raised as to ICSID's jurisdiction;
b) The Republic of Paraguay is a Contracting State to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and Mr Olguín is a national of another Contracting State (the Republic of Peru);
c) The Republics of Paraguay and Peru concluded the "Convention on the Reciprocal Promotion and Protection of Investments" (the "CPI") on 31 January 1994.

26. The conclusion by the Republic of Paraguay of the CPI constitutes the written consent required by Article 25(1) of the Convention which created ICSID. This statement has been strongly endorsed by scholarship and by many decisions given by ICSID Arbitral Tribunals. Amongst others, the following may be cited:

i) "Bilateral Investment Treaties" by Rudolf Dolzer and Magrete Stevens, published under the auspices of ICSID in 1995, pages 132 ff.[1]

[1] Citing the Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Doc. 2, of 18 March 1965, paragraphs 23 and 24:

> 23. The consent of the parties is the cornerstone of the Centre's jurisdiction. Consent to jurisdiction must be given in writing and once given cannot be unilaterally revoked (Article 25(1)).
>
> 24. The consent of the parties must exist when the request is made to the Centre (Articles 28(3) and 36(3)), but the Convention does not specify in any form the time at which the consent must be given. Consent may be given, for example, in the clauses of a contract of investment, which provides for the submission to the Centre of future disagreements which may arise from the contract, or in a settlement between the parties relating to a dispute which has already arisen. *Nor*

ii) The award rendered in the arbitration *Asian Agricultural Products Limited* v. *Democratic Socialist Republic of Sri Lanka* on 27 June 1990 (ICSID Case No. ARB/87/3);[2]

iii) The decision on jurisdiction handed down in the arbitration of *Tradex Hellas SA* v. *Republic of Albania*, on 24 December 1996 (ICSID Case No. ARB/94/2, especially paragraph D.1);[3]

iv) The award rendered in the arbitration of *American Manufacturing & Trading, Inc.* v. *Republic of Zaire*, on 21 February 1997 (ICSID Case No. ARB/93/1, especially paragraphs 5.20 and 5.23);[4]

v) The decision on jurisdiction handed down in the arbitration of *Ceskoslovenska Obchodni Banka, AS* v. *Slovak Republic*, 24 May 1999 (ICSID Case No. ARB/97/4, especially paragraphs 37 and 38).[5]

27. In this instant case, the consent of Paraguay is clearer since Article 8 of the CPI indicates clearly that when disputes arise between contracting parties, they should meet to resolve them, and if that is not possible within 6 months, the person making the investment may submit the dispute, inter alia, to international arbitration by the International Centre for Settlement of Investment Disputes.

28. This Tribunal has no doubt that the investments made by Mr Olguín in the Republic of Paraguay are included in those enumerated in Article 1 of the CPI. Moreover, there exists no rule in the CPI which requires investments made by a national of another Contracting State to be accepted or recognized by the State in which they are made. With regard to the possible flaws in Mr Olguín's investments, this is clearly a subject relating to the merits, which cannot be resolved at this stage of the proceedings.

29. Nor can this Arbitral Tribunal analyze at this stage of the arbitration the plea of the Republic of Paraguay to the effect that if any liability existed, it would not be direct but only secondary.

30. There is nothing in the file of the proceedings to demonstrate that Mr Olguín submitted a judicial claim against the Republic of Paraguay in order to collect payment in fulfilment of the latter's obligations, which he is seeking to collect in the present arbitration case. The application which he apparently made (proof of which is not conclusive) for a declaratory judgment of bankruptcy and liquidation of a commercial corporation, cannot have the same juridical effect as a claim against the Republic of Paraguay.

does the Convention require the consent of both parties to be recorded in the same document. Thus, a receiving State could propose in its legislation on the promotion of investments that disputes on certain classes of investments be submitted to the jurisdiction of the Centre, and the investor can give his consent by written acceptance of the offer. (Emphasis not in the original).

[2] *Asian Agricultural Products Limited* v. *Democratic Socialist Republic of Sri Lanka*, 27 June 1990, ICSID Case No. ARB/87/3, Award of 27 June 1990, *ICSID Reports*, Vol. 4, p. 246.

[3] *Tradex Hellas SA* v. *Republic of Albania*, ICSID Case No. ARB/94/2, Decision on jurisdiction of 24 December 1996, *ICSID Review—Foreign Investment Law Journal*, Vol. 14, 1999, p. 161 [5 *ICSID Reports* 43].

[4] *American Manufacturing & Trading, Inc.* v. *Republic of Zaire*, ICSID Case No. ARB/93/1, Award of 21 February 1997, *International Legal Materials*, Vol. 36, 1997, p. 1534 [5 *ICSID Reports* 11].

[5] *Ceskoslovenska Obchodni Banka, AS* v. *Slovak Republic*, ICSID Case No. ARB/97/4, Decision on jurisdiction of 24 May 1999, *ICSID Review—Foreign Investment Law Journal*, Vol. 14, 1999, p. 250 [5 *ICSID Reports* 330].

III. Decision

31. For the foregoing reasons the Arbitral Tribunal unanimously decides to dismiss the objection to the jurisdiction of the International Centre for the Settlement of Investment Disputes submitted by the Republic of Paraguay and declares that it is competent to proceed with this arbitration. Accordingly, the Tribunal has made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

[*Source*: Translated from the Spanish text at http://www.worldbank.org/icsid/cases/paraguay-decision.pdf by Mr Jonathan Goldberg.]