

NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

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Spring 2000

New Signatures of the Convention

The ICSID Convention was signed on behalf of the Dominican Republic on March 20, 2000 by Roberto B. Saladín Selín, the Dominican Ambassador to the United States who formerly was the Governor of the Central Bank of the Dominican Republic. The following day, Bulgaria's former Prime Minister and its Ambassador to the United States, Philip Dimitrov, signed the Convention on behalf of his country.

The new signatures brought to 149 the number of signatories of the Convention. Of these, 131 have also ratified the Convention to become Contracting States. The signatories and Contracting States are listed in Document ICSID/3, available on ICSID's website (www.worldbank.org/icsid).

Confidentiality Revisited

By Margrete Stevens, Senior Counsel, ICSID

A paper delivered in the session on "Revisiting Confidentiality" at the Sixteenth ICSID/American Arbitration Association/ICC Court Colloquium on International Arbitration, held in New York City on October 29, 1999.

Confidentiality has long been held as one of the benefits of arbitration. My remarks will be about the relevant provisions under the ICSID system and I will explain how matters of confi-

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Southern Bluefin Tuna Case—Australia and New Zealand v. Japan

At the request of the parties and the tribunal, ICSID undertook earlier this year to administer the proceedings in this case. The dispute, which concerns the conservation of southern bluefin tuna, had been brought to arbitration pursuant to Article 286 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

The five-member tribunal, constituted in accordance with Annex VII of UNCLOS, consists of Stephen M. Schwebel, former President of the International Court of Justice; Florentino Feliciano, Member of the Appellate Body of the World Trade Organization; Sir Kenneth Keith, Judge of the Court of Appeal of New Zealand; Per Tresselt, Judge of the European Free Trade Area Court and former Ambassador of Norway to Russia; and Chusei Yamada, Professor of Law, Waseda University, and Chairman of the International Law Commission.

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Disputes Before the Centre

Since the publication of the last issue of *News from ICSID*, five further proceedings have been instituted, all of them ICSID Convention arbitration proceedings. These brought to 72 the total number of cases submitted to ICSID – 3 ICSID Convention conciliation cases, 62 ICSID Convention arbitration cases and 7 ICSID Additional Facility arbitration cases.

- **American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo (Case ARB/93/1) – Revision Proceeding**

February 9, 2000

Following a settlement agreed by the parties, the Claimant requests the discontinuance of the proceeding.

- **Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (Case ARB/96/1)**

February 17, 2000

The Tribunal renders its award.

April 7, 2000

The Secretary-General registers a request for rectification of the award.

- **Misima Mines Pty. Ltd. v. Independent State of Papua New Guinea (Case ARB/96/2)**

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

- **Metalclad Corporation v. United Mexican States (Case ARB(AF)/97/1)**

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

- **Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso (Case ARB/97/1)**

January 19, 2000

The Tribunal renders its award.

- **Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic (Case ARB/97/3)**

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

- **Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (Case ARB/97/4)**

March 21, 2000

The Claimant files its rejoinder on the Respondent's further and partial objections to jurisdiction.

- **Lanco International, Inc. v. Argentine Republic (Case ARB/97/6)**

May 1, 2000

The Tribunal conducts a visit of the place connected with the dispute, with the parties.

May 2-3, 2000

The Tribunal holds a hearing on the merits in Buenos Aires.

- **Emilio Agustín Maffezini v. Kingdom of Spain (Case ARB/97/7)**

January 25, 2000

The Tribunal renders its decision on jurisdiction.

March 21, 2000

The Claimant files its reply on the merits.

May 3, 2000

The Respondent submits its rejoinder on the merits.

- **Compagnie Française pour le Développement des Fibres Textiles v. Republic of Côte d'Ivoire (ARB/97/8)**
April 4, 2000
The Tribunal renders its award.

- **Joseph C. Lemire v. Ukraine (Case ARB(AF)/98/1)**
March 2, 2000
The Tribunal grants the Claimant's request for a suspension of the proceeding until June 1, 2000.
April 6, 2000
The Centre receives the parties' settlement agreement dated March 20, 2000.

- **Houston Industries Energy, Inc. and Others v. Argentine Republic (Case ARB/98/1)**
December 10, 1999
The Claimants file their reply on jurisdiction and on the merits.
February 1, 2000
The Respondent files its rejoinder on jurisdiction and on the merits.
February 4, 2000
The Claimants file a request for provisional measures.
February 16, 2000
The Respondent files its observations on the Claimants' request for provisional measures.
April 16, 2000
The Claimants file a request for the discontinuance of the proceeding.
April 27, 2000
The Tribunal requests the Respondent's observations on the Claimants' request for discontinuance of the proceeding.
May 19, 2000
The Respondent files its objections to the Claimants' request for discontinuance of the proceeding.

- **Victor Pey Casado and President Allende Foundation v. Republic of Chile (Case ARB/98/2)**
January 3, 2000
The Respondent files its reply on jurisdiction.
February 10, 2000
The Claimants file their rejoinder on jurisdiction.
May 3-5, 2000
The Tribunal holds a hearing on jurisdiction in Washington, D.C.

- **International Trust Company of Liberia v. Republic of Liberia (Case ARB/98/3)**

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

- **Wena Hotels Limited v. Arab Republic of Egypt (Case ARB/98/4)**
April 25-29, 2000
The Tribunal holds a hearing on the merits in Paris.
May 30, 2000
The parties file their post-hearing submissions.

- **Eudoro A. Olgúin v. Republic of Paraguay (Case ARB/98/5)**
December 21, 1999
The Respondent files its reply on jurisdiction.
February 2, 2000
The Claimant files its rejoinder on jurisdiction.

- **Compagnie Minière Internationale Or S.A. v. Republic of Peru (Case ARB/98/6)**

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

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Disputes Before the Centre

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- **Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo (Case ARB/98/7)**

February 29, 2000

The Tribunal meets in Paris for deliberations on the objections to jurisdiction.

- **Waste Management, Inc. v. United Mexican States (Case ARB(AF)/98/2)**

January 31, 2000

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

June 2, 2000

The Tribunal renders its award declining jurisdiction.

- **The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Case ARB(AF)/98/3)**

February 18, 2000

The Respondent files its objections to jurisdiction.

May 26, 2000

The Claimants file their counter-memorial on objections to jurisdiction.

- **Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited (Case ARB/98/8)**

May 22, 2000

The Tribunal issues its decision on preliminary issues.

- **Alex Genin and others v. Republic of Estonia (Case ARB/99/2)**

January 8, 2000

The Tribunal holds a hearing on jurisdiction in London. The Tribunal decides to join

the Respondent's objection to jurisdiction to the merits of the dispute.

March 23, 2000

The Claimants file their memorial on the merits.

- **Philippe Gruslin v. Malaysia (Case ARB/99/3)**

December 27, 1999

The Claimant files his counter-memorial on the objections to jurisdiction.

March 9, 2000

The Respondent files its reply on the objections to jurisdiction.

March 29, 2000

The Claimant files his rejoinder on the objections to jurisdiction.

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

January 18, 2000

The Tribunal is constituted. Its members are: Konstantinos D. Kerameus (Greek), President; David A. Gantz (U.S.); and Jorge Covarrubias Bravo (Mexican).

March 10, 2000

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

April 3, 2000

The Tribunal issues a procedural order concerning the place of arbitration.

May 3, 2000

The Tribunal issues a procedural order concerning a request for provisional measures and the schedule of the proceeding.

- **Empresa Nacional de Electricidad S.A. v. Argentine Republic (Case No. ARB/99/4)**

December 13, 1999

The Tribunal is constituted. Its members are: Rodrigo Oreamuno (Costa Rican), President; Enrique Elías (Peruvian); and Hector Gros Espiell (Uruguayan).

February 10, 2000

The Tribunal holds its first session in Washington, D.C. The parties request a suspension of the proceedings until May 10, 2000.

May 9, 2000

The parties request a new suspension of the proceedings until August 10, 2000.

- **Alimenta S.A. v. Republic of The Gambia (Case No. ARB/99/5)**

December 17, 1999

The Tribunal is constituted. Its members are: Charles N. Brower (U.S.), President; Samuel K.B. Asante (Ghanaian); and Kenneth S. Rokison (British).

February 24, 2000

The Tribunal holds its first session with the parties in London.

May 1, 2000

The Claimant files its Memorial on the merits.

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

January 12, 2000

The Tribunal is constituted. Its members are: Ninian Stephen (Australian), President; James Crawford (Australian); and Stephen M. Schwebel (U.S.).

April 20, 2000

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

May 12, 2000

Respondent files its submission on confidentiality, place of proceeding and bifurcation.

June 2, 2000

Claimant files its submission on confidentiality, place of proceeding and bifurcation.

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

January 28, 2000

The Tribunal is constituted. Its members are: Karl-Heinz Böckstiegel (German), President; Piero Bernardini (Italian); and Don Wallace, Jr. (U.S.).

February 24, 2000

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

March 25, 2000

The Respondent files its memorial on the objections to jurisdiction.

April 26, 2000

The Claimant files its counter-memorial on the objections to jurisdiction.

May 14, 2000

The Respondent files its reply on the objections to jurisdiction.

May 30, 2000

The Claimant files its rejoinder on the objections to jurisdiction.

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

December 10, 1999

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

- **Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. República de Honduras (Case No. ARB/99/8)**

December 8, 1999

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

January 18, 2000

The Tribunal is constituted. Its members are: Roberto Andino (Honduran), President; German Flores (Honduran); and Carlos Roberto Castillo (Honduran).

February 3, 2000

The Tribunal holds its first session with the parties in Tegucigalpa. *(continued on next page)*

Disputes Before the Centre

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February 9, 2000

The Claimants file their memorial.

February 28, 2000

The Respondent submits a communication on the merits and raising objections to jurisdiction.

March 13, 2000

The Claimants file observations on the objections to jurisdiction.

April 19, 2000

The Tribunal joins the objections to jurisdiction to the merits of the dispute.

April 27, 2000

The Claimants file their reply.

May 15, 2000

The Tribunal grants a grace period for the filing of the rejoinder.

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

January 7, 2000

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

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

January 11, 2000

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

June 5, 2000

The Tribunal is constituted. Its members are: Sompong Sucharitkul (Thai), President; Andrew J. Rogers (Australian); and David Suratgar (British).

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

March 1, 2000

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

New Designations to the ICSID Panels of Conciliators and of Arbitrators

In accordance with Articles 3 and 12 to 16 of the ICSID Convention, the Centre maintains a Panel of Conciliators and a Panel of Arbitrators. Each party to the Convention may designate to each Panel up to four persons who may but need not be its nationals. The following designations to the Panels have recently been made by Cameroon, Colombia and Denmark. These new designations brought the number of Panel members to 467.

Cameroon

Panel of Conciliators

Designations effective May 17, 2000: Henri Njoh Manga, Ubald Mendouga, Jose Ngouah Mouri and Victor Essomba Tsongui.

Panel of Arbitrators

Designations effective May 17, 2000: Justine Ngounou, Lucy Ayuck Nkogho, Roger-Gabriel Nlep and Ahmadou Oumarou.

Colombia

Panel of Conciliators

Designations effective February 16, 2000: Luis Ignacio Betancur Correa, Ligia Helena Borrero Restrepo, Gustavo Tobón Londoño and Luis Fernando Uribe Restrepo.

Panel of Arbitrators

Designations effective February 16, 2000: Carlos Gustavo Arrieta Padilla, Barry H. Garfinkel, Enrique Gómez-Pinzón and Sara Ordóñez Noriega.

Denmark

Panels of Conciliators and of Arbitrators

Designation effective January 28, 2000: Jørgen Grønberg, Peer Lorenzen (re-appointment); Per Magid (re-appointment) and Sven Ziegler.

Heribert Golsong

1927–2000

Heribert Golsong passed away in Brussels on April 2, 2000.

Dr. Golsong was Vice President and General Counsel of the World Bank from 1979 to 1982 and, from 1980 to 1983, Secretary-General of ICSID.

He was born in Oberhausen, Germany and received a doctorate in law from the University of Bonn. He also studied at the Universities of Cologne and Würzburg, at the College of Europe and at the Hague Academy of International Law.

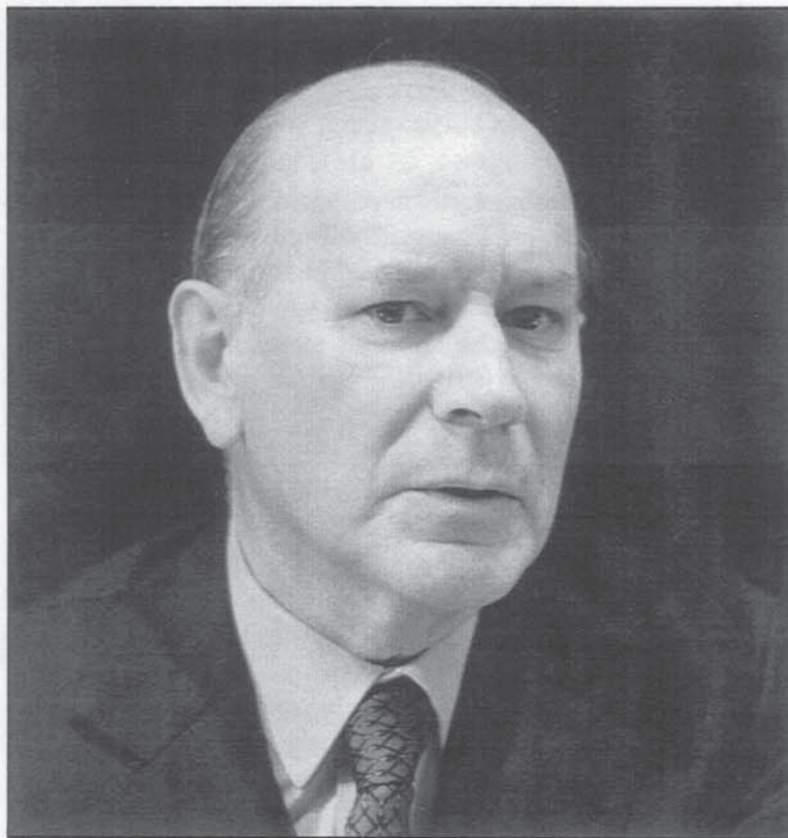
Before joining the World Bank and ICSID, Dr. Golsong had served as Secretary to the European Commission on Human Rights (1954-1957), Deputy Registrar (1960-1963) and Registrar (1963-1968) of the European Court of Human Rights, Director of Legal Affairs at the Council of Europe (1964-1977) and Director of Human Rights at the Council of Europe (1977-1979).

While Dr. Golsong was the World Bank's Vice President and General Counsel, the World Bank Administrative Tribunal was established. It has since decided some 230 disputes between the Bank and staff members.

During Dr. Golsong's tenure as Secretary-General of ICSID, the number of cases submitted to ICSID almost doubled. He took great interest in the growing spread of bilateral investment treaties that now are so central to ICSID's dispute-settlement activities. In this regard, Dr. Golsong also launched the Centre's multi-volume collection of such treaties (entitled *Investment Treaties*). Other ICSID publications introduced by Dr. Golsong included the Centre's first newsletter.

After leaving the World Bank and ICSID, Dr. Golsong entered private legal practice, spending over a decade with the law firm of Fulbright & Jaworski. Highlights of this part of Dr. Golsong's career included service as lead counsel for the claimant in the first ICSID arbitration brought under a bilateral investment treaty (*Asian Agricultural Products Limited v. Sri Lanka*) and as an arbitrator in the second ICSID arbitration of this kind (*American Manufacturing and Trading, Inc. v. Democratic Republic of the Congo*).

Dr. Golsong received an honorary doctorate from the University of Edinburgh and an honorary professorship at the University of Heidelberg. His other honors included orders of merit from Germany, Lichtenstein, Norway and Austria.



Heribert Golsong

*Secretary-General, International Centre for
Settlement of Investment Disputes, 1980–1983*

*Vice-President and General Counsel,
World Bank, 1979–1982*

Confidentiality Revisited

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Confidentiality have been dealt with by ICSID tribunals in recent proceedings. In my remarks, I will distinguish among the rules that specifically provide for the privacy of the actual proceedings, or hearings, before the tribunal and the rules that otherwise apply prior to and after the rendition of the award.

In regard to the privacy of the hearings, the ICSID Arbitration Rules make clear that unless the tribunal and the parties agree otherwise, the only persons who may attend the hearings are the parties, their representatives, witnesses and experts during their testimony, as well as officers of the tribunal. This rule is clear and also consistent with the rules of other arbitration institutions. A new development is presented by the provisions of Chapter 11 of the NAFTA which includes a right for non-disputing NAFTA parties to make submissions to a tribunal on a question of interpretation of the NAFTA agreement – on written notification to the disputing parties of its intention to do so.

The next question, confidentiality during the pendency of the proceeding, may be examined from three different angles: with respect to the parties; with respect to the tribunal members; and with respect to the ICSID Secretariat.

The rules that apply to the Secretariat may be contrasted to the rules that govern other forms of institutional arbitration. Thus, the ICSID system requires the Secretary-General of the Centre to maintain a register for each request for arbitration. Under ICSID's Administrative and Financial Regulations, the Secretary-General must enter into the register "all significant data concerning the institution, conduct and disposition" of the case. The Regulations make particular mention of the constitution and the membership of the tribunal and provide moreover that the registers shall be open for inspection by any person. The Regulations further call for the Secretary-General to publish

information about the operation of the Centre, including the registration of all requests for arbitration. Pursuant to these provisions, register entries for pending proceedings are published in the *ICSID Annual Report*, in the Centre's newsletter, *News from ICSID*, and on ICSID's website. The Regulations also provide that if both parties to a proceeding consent, the Secretary-General shall arrange for the publication of the minutes and other records of the hearing, in an appropriate form with a view to furthering the development of international law in relation to investment.

In regard to the arbitrators, it may be noted that unless the parties otherwise agree, the tribunal members must under the Arbitration Rules undertake to keep confidential all information coming to their knowledge as a result of their participation in the proceeding, as well as the contents of any award of the tribunal. The Arbitration Rules further underscore the confidential nature of the work of the tribunal members by stipulating that the deliberations of the tribunal are to take place in private and remain secret.

The above provisions outline the scope of the duty of confidentiality of the arbitrators and the ICSID Secretariat, but include no explicit provision in regard to the parties. It may at this point be useful to recall that our panel is charged with "revisiting confidentiality" and that one of the findings of the first visit was that while confidentiality is often mentioned as one of the supposed benefits of arbitration, the rule of confidentiality is generally not a very reliable one. Recently, the President of the London Court of International Arbitration, Yves Fortier, summed up the situation by declaring that "what is evident today is that, with respect to confidentiality in international commercial arbitrations, nothing should be taken for granted."

In the absence of an explicit provision on confidentiality, two ICSID tribunals have recently been called upon to decide whether there exists an implied duty of confidentiality as between the parties to a proceeding. Because both of these

decisions make reference to an earlier ruling of an ICSID tribunal on the matter, I will briefly refer to that decision which was rendered in 1983 by the first tribunal in the case *AMCO and others v. Indonesia*. In that case, the controlling shareholder of the claimants had provided a newspaper with information on the claim, and according to the respondent, “recounted a one-sided version of the claimants’ story in tones designed to be detrimental to international perceptions of the climate for foreign investment in Indonesia.” Indonesia therefore asked the tribunal to recommend as a provisional measure that the claimants refrain from “presenting their case selectively outside the proceeding.” It was argued by Indonesia that the publication of information about the dispute had been “incompatible with the spirit of confidentiality which imbued the international proceedings.” The claimants replied that their disclosure had not caused any harm to Indonesia and argued that the ICSID Rules did not “prohibit individual parties from discussing the case and the status of the arbitration publicly or otherwise.” The tribunal agreed that it was right to say that the Convention and the Rules did not prevent the parties from revealing their case, but stated that “both parties should refrain, in their own interest, from doing anything that could aggravate or exacerbate the dispute.”

In the first of the two more recent cases, the respondent complained of a telephone communication made by the CEO of the claimant in the case which allegedly “was intended to provide information to shareholders, investment analysts, and other members of the public who were interested in the Claimant’s activities.” The CEO had allegedly described the formal procedural steps in the proceeding and also discussed the possibility of a settlement and its terms. The respondent asked the tribunal to issue an order declaring that the proceedings were confidential and that breach of such order would permit it to request the tribunal to enforce sanctions.

In its decision, the tribunal first noted that in order to succeed in a request for provisional measures a requesting party had “to demonstrate

that the measures [were] urgently required in order to protect its rights from an injury that could not be made good by the subsequent payment of damages.” The tribunal found that nothing in the respondent’s request showed “that its rights [had] suffered prejudice, let alone serious or irreversible damage.”

Having denied the request for interim relief, the tribunal then turned to the question of whether there exists a general principle of confidentiality that would prohibit public discussion of the arbitration by either party. The tribunal confirmed that neither the treaty under which the proceeding was brought nor the ICSID Rules contained an express restriction on the freedom of the parties in this respect. The tribunal said further that although one of the frequently cited reasons for seeking recourse to arbitration was to avoid publicity, “unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration.” The tribunal also acknowledged, as had been pointed out by the claimant, that a public company traded on a public stock exchange could, under domestic law, be “under a positive duty to provide certain information about its activities to its shareholders, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value.”

Having said that, the tribunal nevertheless recommended that, to ensure the orderly unfolding of the proceeding, both parties limit public discussion of the case to a minimum subject only to any obligation of disclosure imposed by law by which either might be bound.

In the second recent decision, the respondent requested that all filings in the case, including the minutes, be treated as available to the public. The claimant opposed the request stating that the ICSID Rules, and the rules of the treaty under which the proceeding was brought, contained disclosure limitations. The tribunal rejected the request as far as the request had sought to create a situation that would allow the tribunal or the Secretariat to make all filings in

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Confidentiality Revisited

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the case available to the public. However, the tribunal did not accept the claimant's position that each party was under a general duty of confidentiality in regard to the proceeding. In particular, in regard to an arbitration to which a government was a party, the tribunal said it could not be assumed, in the absence of an explicit provision, that the Convention or the Rules and Regulations imposed a general obligation on the parties that would operate to prevent a government (or the other party) from discussing the case in public "thereby depriving the public of knowledge and information concerning government and public affairs." Having said that, the tribunal nonetheless endorsed the decision of the earlier tribunal, by recommending that "the parties limit public discussion of the case to what is necessary." The tribunal, in a further decision on the matter, clarified that this and the earlier decision of the tribunal were not intended "to affect or qualify, or could affect or qualify, any state-imposed obligation of disclosure by which any Party to this arbitration may be bound."

As concerns confidentiality after the rendition of the award, it has already been noted that the tribunal members are bound to keep confidential the contents of the award unless the parties agree otherwise. In regard to the Centre, Article 48(5) of the Convention provides that the award may not be published by ICSID without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the tribunal. It may be noted that in most of the recent ICSID cases, the parties have given the Centre their consent to publish awards. As is the case during the pendency of the proceeding, there is no explicit provision under the ICSID system that requires the parties to keep awards confidential. In many cases, one of the parties has made the award public while in a few the award has remained confidential. In a recent case, the parties entered into a settlement agreement, which they re-

quested the tribunal to embody in an award. Interestingly, one of the terms of the settlement agreement calls for the Centre to publish the award.

I mentioned to begin with that confidentiality had long been held as one of the benefits of arbitration and, undoubtedly, has promoted the usefulness of this form of dispute settlement of private commercial disputes. However, the second of the aforementioned recent tribunal decisions makes clear that different considerations may have to be taken into account when recourse to arbitration is sought to settle disputes affecting public interest. In this connection it may be recalled that one of the criticisms raised against the now abandoned Multilateral Agreement on Investment in regard to the investor-State arbitration provisions, was that this form of dispute settlement was not transparent. In fact, NGOs widely called for full access to proceedings.

It may be argued that views favoring greater transparency in arbitral proceedings where a State is involved are not simply challenging traditional norms of arbitration, but promoting principles of transparency and accountability which in this past decade increasingly have been hailed as hallmarks of good governance. With this in mind, it could further be argued that where confidentiality is not a prerequisite for the resolution by arbitration of a dispute, it should not become the obstacle to the use of this form of dispute settlement with States and State entities.

A final point that I should like to make relates to the abundant proliferation of bilateral investment treaties. More than half of the disputes that are currently pending before ICSID have been brought to the Centre under such treaty arrangements. As arbitration has increasingly been relied upon for the resolution of disputes brought under these relatively uniform treaty arrangements, the publication of awards has become particularly significant in the furthering of the development of international law in relation to investments.

ICSID and Bilateral Investment Treaties

By Antonio R. Parra, Deputy Secretary-General, ICSID

Remarks presented in a panel discussion on "ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?" at the 94th Annual Meeting of the American Society of International Law held in Washington, D.C. on April 5-8, 2000.

As indicated by the program for this panel discussion, the development of the International Centre for Settlement of Investment Disputes, or ICSID, and the rise of bilateral investment treaties, or BITs, have been closely intertwined with each other.

In their book on *Bilateral Investment Treaties*, Rudolf Dolzer and my colleague Margrete Stevens identify as the first BIT the one concluded by Germany with Pakistan in 1959. It and most subsequent BITs set forth broad undertakings of each State party to give nationals and companies of the other State party non-discriminatory treatment; protection and security; prompt, adequate and effective compensation in the event of expropriation; and freedom from currency transfer restrictions.

By the end of the 1960s, 65 BITs had been concluded. In common with the treaties of friendship, commerce and navigation from which they drew inspiration, these early BITs had provisions on the arbitral settlement of disputes between the States parties, but lacked similar provisions on the settlement of disputes between a State party and nationals or companies of the other State party.

In 1961, however, the World Bank had begun to draw up what became the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. This work was completed in March of 1965, when the Executive Directors of the World Bank transmitted the Convention to member governments for their consideration with a view to signature and

ratification. The Convention, which came into force in October of 1966, provides a system for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The Convention also of course establishes ICSID as the institution to administer that system.

In their Report accompanying the ICSID Convention, the Executive Directors of the World Bank pointed out that, while written consent of the parties would be an essential condition for recourse to conciliation or arbitration under the Convention, there was no requirement that the consent of both parties be recorded in a single instrument, such as an investment contract between them. As an example of consents given in separate instruments, the Executive Directors suggested that "a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing."

After the ICSID Convention entered into force, references to it began to appear in investment promotion laws. References to the Convention also began to appear in BITs. At first, these references in BITs fell short of embodying advance general consents or "offer[s]" of the type envisaged by the Executive Directors in their Report accompanying the Convention. Several BITs concluded in 1967 and 1968 merely mentioned the possibility of each State concluding individual consent agreements with nationals of the other State.

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ICSID and BITs *(from previous page)*

In 1969, ICSID issued a set of "Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Bilateral Investment Treaties." These clauses included texts that States might use to record in BITs their consent to submit to the jurisdiction of ICSID disputes with nationals or companies of their treaty partners. The same year saw the conclusion of the first BITs incorporating such consents. According to research carried out by my colleague Milanka Kostadinova, these were the BITs that Italy made with Chad and Côte d'Ivoire in June and July of 1969. In the comprehensive terms that came to typify this aspect of European BITs in particular, they set forth the consent of each State party to submit to the jurisdiction of ICSID "[a]ny dispute" regarding an investment that might arise between the State and a national of the other State party to the BIT.

During the 1970s, another 86 BITs were signed. These included the first BITs entered into by Latin American countries and the first BITs made by Eastern European countries. In the course of the decade, blanket consents to arbitration under the ICSID Convention came to be a regular feature of BITs.

Let me mention two other developments of the 1970s that were important for the future development of BIT provisions on the settlement of investment disputes. These were the issuance in 1976 of the Arbitration Rules of the U.N. Commission on International Trade Law, or UNCITRAL; and the adoption in 1978 of the ICSID Additional Facility Rules. The UNCITRAL Arbitration Rules quickly became the world's leading set of ad hoc arbitration rules. Under the Additional Facility Rules, the ICSID Secretariat is authorized to administer certain categories of proceedings between States and foreign nationals that fall outside the scope of the ICSID Convention. These notably include arbitration

proceedings for the settlement of investment disputes where either the home or the host State of the investor concerned is not a party to the ICSID Convention.

The 1980s saw a dramatic increase in the level of BIT-making, with 211 such treaties being concluded in those years. Countries that had previously refrained from signing BITs, such as China and the United States, launched BIT programs. With more of them being made among developing and socialist countries, it became increasingly inappropriate to regard BITs as simply North-South instruments.

During the 1980s, the number of parties to the ICSID Convention grew to 91 (the number is now 131). This of course still left many countries outside the fold of ICSID members and without access to arbitration under the Convention. In their BITs, the now *de rigueur* consents to arbitrate investment disputes obviously could not refer just to arbitration under the ICSID Convention. From about the mid-1980s, such countries began to enter into BITs referring to arbitration under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules, either alone or in combination with references to arbitration under the ICSID Convention. At around this same time, there also appeared the first of the relatively small number of BITs providing for the settlement of investment disputes by arbitration under the Rules of the International Chamber of Commerce or of the Stockholm Chamber of Commerce. References to alternatives to arbitration under the ICSID Convention also appeared in some BITs between parties to the Convention. Even in such BITs, there are good technical reasons for coupling a submission to arbitration under the ICSID Convention with one to an alternative form of arbitration. It is nonetheless likely that this development in BIT practices also owed something to concerns over the operation of the ICSID Convention's remedy of annulment, first invoked in 1984.

In the 1990s, there was a veritable explosion in the number of BITs. Our estimate, perhaps unduly conservative, is that some 960 BITs were signed from the beginning of 1990 through the end of 1998. The Secretariat of the U.N. Conference on Trade and Development counts over 1,300 BITs for the same period.

Altogether, depending on whose figures you care to use, some 1,400 to 1,800 BITs have been signed to date. The overwhelming majority of BITs contain consents on the part of the States to submit covered investment disputes to arbitration under the ICSID Convention. In BITs made by Western Hemisphere countries in particular, such consents are often combined with further consents to arbitration under the Additional Facility Rules and UNCITRAL Rules, thus also opening up recourse to those other forms of arbitration if desired or appropriate.

This pattern established by Western Hemisphere BITs is repeated in four multilateral treaties of the 1990s with provisions on investment. These are the North American Free Trade Agreement, or NAFTA; the Cartagena Free Trade Agreement; a Mercosur Investment Protocol; and the Energy Charter Treaty.

The example of the NAFTA above all has contributed to a growing sophistication and complexity of the investor-to-State dispute-settlement provisions of investment treaties. For example, the innovative NAFTA mechanism for the consolidation of concurrent investor-to-State proceedings raising similar issues, has been copied in some of the other newer investment treaties.

In retrospect, 1984 was a watershed year for ICSID. The Centre's Regulations and Rules were revised for the first time in 1984. As I've already mentioned, the annulment of an ICSID arbitral award was sought for the first time in 1984. And in 1984, ICSID registered the first case brought to it on the basis of a consent to arbitration in an investment law. Three years later, in 1987,

ICSID registered the first case brought to it on the basis of a comparable consent in a BIT. As in these types of cases there need be no pre-existing arbitration agreement, or indeed other contractual relationship, between the parties, they have received from Jan Paulsson the memorable sobriquet of cases of "arbitration without privity."

By the end of 1996, ICSID had registered a total of 9 cases of arbitration without privity. The floodgates then seemed to open: from 1997 to date, we have registered 25 further cases of arbitration without privity.

At present, there are 30 cases pending before the Centre, almost as many as had come to ICSID over its entire history up until 1995. The pending cases comprise 18 brought to us under BITs; 5 under the NAFTA; one under an investment law; and six of the more traditional type of case brought under the arbitration provisions of an investment contract. Of the BIT proceedings, one is being conducted under the Additional Facility Rules, as are all of the NAFTA proceedings before ICSID. The rest of the pending proceedings are ICSID Convention cases.

The pending cases include three brought against western industrial countries; another three brought against countries of the former Soviet Union; and an interestingly large number – 11 – involving Latin American parties. Three of the pending cases involve decisions of courts of the host State. Reflecting the times, several of the other cases concern privatization disputes while several further cases might be said to involve environmental disputes. Almost a third of the pending cases concern acts of political subdivisions of the host country. I think, though, that the most important single fact about the current caseload is that standard provisions, including in particular the substantive provisions, of investment treaties are simultaneously being put to an extensive test, in the 23 pending cases initiated under such treaties.

(continued on next page)

ICSID and BITs *(from previous page)*

I think that the next speakers will be telling you of some of the large issues raised by such cases. I hope that, in the question and answer period, I will be able to mention some of the special problems that they have raised for the ICSID Secretariat.

The panel discussion at the 94th Annual Meeting of the American Society of International Law on "ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?" was chaired by Charles N. Brower of White & Case, Washington, D.C. The other speakers were Daniel M. Price of Powell, Goldstein, Frazer & Murphy, Washington, D.C. and Robert G. Volterra of Freshfields, London.

New ICSID Publications

The Centre has recently completed the Fall 1999 issue of *ICSID Review—Foreign Investment Law Journal*. The issue includes a review by Ibrahim F.I. Shihata and Antonio R. Parra of the experience of ICSID; discussions by Michael P. Porter on the Ethiopian investment legislation and by Reynaldo Pastor Bebin on the legislative framework for arbitration in Peru; and an examination by Ali Yesilirmak of the jurisdiction of ICSID over Turkish concession contracts. Other materials in the issue include the seventh installment of a "Commentary on the ICSID

Convention" by Christoph Schreuer, which covers Articles 36-40 and 56-58 of the Convention. Alfred Escher provides the issue's review of a contribution on ICSID by Karl-Heinz Böckstiegel in *Internationaler Rechtsverkehr* (Bülow et al. eds., 1998).

The issue also contains the full text in English of the award rendered on November 1, 1999 in *Robert Azinian and Others v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2), published with an introductory note by Alejandro A. Escobar. As explained in the introductory note, this is the first arbitral decision on the merits to be given under Chapter 11 of the North American Free Trade Agreement.

The *ICSID Review—Foreign Investment Law Journal*, which appears twice yearly, is available on a subscription basis from the Johns Hopkins University Press, Journals Publishing Division, 2715 North Charles Street, Baltimore, Maryland 21218-4363, U.S.A. Annual subscription rates (excluding postal charges) are US\$68 for subscribers with mailing address in a member country of the Organisation for Economic Cooperation and Development and US\$35 for others.

Other recent publications of the Centre include a new release (2000-1) of ICSID's collection of *Investment Laws of the World*, issued in March 2000. The release contains the texts of the basic investment legislation of Angola, Colombia, Peru, Portugal, Saudi Arabia and Venezuela. A new release for the *Investment Treaties* collection is scheduled for publication in June 2000.

Investment Laws of the World (ten volumes) and *Investment Treaties* (seven volumes) may be purchased from Oceana Publications, Inc., 75 Main Street, Dobbs Ferry, New York 10522, U.S.A., at US\$950 for the *Investment Laws of the World* collection and US\$550 for the *Investment Treaties* collection.

Southern Bluefin Tuna Case *(continued from page 1)*



The Tribunal is seated in the first row, with the agents of Australia, New Zealand and Japan. Counsel for the parties are standing in the second row.

A hearing on the objections to jurisdiction filed by Japan took place at the World Bank in Washington, D.C. on May 7-11, 2000. Verbatim transcripts of the hearing, as well as the principal pleadings of the parties, are available on ICSID's website at www.worldbank.org/icsid.

Appearing as agents and counsel for the parties were: Bill Campbell, First Assistant Secretary, Office of International Law, Attorney-General's Department, Canberra; Tim Caughley, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, Wellington; and Shotaro Yachi, Director-General of the Treaties Bureau, Ministry of Foreign Affairs, Tokyo.

Also appearing as counsel for Australia and New Zealand were James Crawford (Whewell Professor of International Law, University of

Cambridge), Bill Mansfield, Henry Burmester, Mark Jennings, Elana Geddis, Rebecca Irwin, and Andrew Serdy.

Also appearing as counsel for Japan were Nisuke Ando (Professor of International Law, Doshisha University and Professor Emeritus, Kyoto University), Sir Elihu Lauterpacht, Shabtai Rosenne (Member of the Israel Bar, Member of the Institute of International Law) and Vaughan Lowe (Chichele Professor of Public International Law, All Souls College, University of Oxford).

Antonio R. Parra, Deputy Secretary-General, ICSID, serves as a Secretary of the Tribunal. Alejandro A. Escobar, Senior Counsel, ICSID, and Margrete Stevens, Senior Counsel, ICSID, serve as Co-Secretaries.

Seventeenth Joint Colloquium on International Arbitration

Washington, D.C.
November 10, 2000

Since 1983, ICSID, the American Arbitration Association and the International Court of Arbitration of the International Chamber of Commerce have co-sponsored a series of annual colloquia on international arbitration. The seventeenth colloquium in this series will take place on Friday, November 10, 2000. The colloquium, hosted by ICSID, will be held at the headquarters of the World Bank Group in Washington, D.C.

Four topics will be examined at the colloquium: "Presenting Evidence in International Arbitration," "New Trends in Governing Law,"

"Arbitrating Mass Claims" and "Arbitrating Environmental Disputes."

Speakers at the colloquium will include Karl-Heinz Böckstiegel, Thomas Buergenthal, David D. Caron, Donald F. Donovan, L. Yves Fortier, Horacio A. Grigera Naón, Mojtaba Kazazi, Carolyn B. Lamm, Fali S. Nariman, Antonio R. Parra, Lucy F. Reed, Mark F. Rosenberg and Philippe J. Sands.

The final program and registration details for participants will be posted on the ICSID website (www.worldbank.org/icsid) in August 2000.

News from ICSID

is published twice yearly by the International Centre for Settlement of Investment Disputes. ICSID would be happy to receive comments from readers of *News from ICSID* about any matters appearing in these pages including the personal contributions of individual writers. Please address all correspondence to: ICSID, 1818 H Street, N.W., Washington, D.C. 20433, U.S.A.