

NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

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Major Features:

- ICSID and Latin America
- Sao Paulo Seminar
- Legal Rules Applied by ICSID
Arbitral Tribunals
- ICSID and Multipartite Arbitration
- ICSID Clauses; Some Drafting
Problems

Editorial

ICSID and Latin America

The attitude of Latin American countries towards the international arbitration of investment disputes has been traditionally articulated in the Calvo doctrine. The implications of this doctrine are twofold:

First, diplomatic protection by a foreign state of one of its nationals is viewed as contrary to the sovereignty of the host State. Second, disputes with foreign investors should be settled in accordance with the law of the host State and by using local remedies. A review of certain basic features of the ICSID Convention illustrates that membership of ICSID should not necessarily be viewed as a violation of the Calvo doctrine.

ICSID and the Calvo Doctrine

Article 27 of the ICSID Convention expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals has consented with the host State to submit to ICSID arbitration. It is only in the event that the State party to the dispute, assuming that the award is against it, would fail to comply with the award, that diplomatic protection might be exercised.

Article 26 of the Convention provides that a Contracting State "may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention". The Model Clauses prepared by the ICSID Secretariat to assist investors and States in drafting ICSID arbitration clauses acknowledge this condition by suggesting the following language for possible insertion in an ICSID clause:

"Before [name of investor] institutes an arbitration proceeding in accordance with the provisions of this Agreement, [name of the investor] must exhaust [all local remedies] [the (following) (administrative/judicial) remedies] [, unless (name of the Host State) waives that requirement in writing]." (Model Clause XIV).

Whether this, or some similar language is adopted, it is clear that the stipulation ultimately agreed upon by the parties could be compatible with those in current use between Latin American countries and foreign investors. The condition regarding exhaustion of local remedies might also be set forth in a bilateral treaty between the Latin American country concerned and the countries of foreign investors. Another way to accomplish the same objective might result from a declaration made by a Contracting State at the time of signature or ratification of the Conven-

tion that it intends to avail itself of the provisions of Article 26 and will require, as a condition of its consent to ICSID arbitration, the exhaustion of its local remedies. It should be added, however, that among 90 Signatory States, only one has made such a declaration.

The current practice of Latin American countries to stipulate in investment agreements that their relationship with foreign investors will be governed by the law of the country concerned is also compatible with the ICSID Convention. Under Article 42 of the Convention, an arbitral tribunal must decide a dispute in accordance with the rules of law agreed by the parties, which can, therefore, be the law of the host State. In fact, most ICSID clauses in investment agreements communicated to the Secretariat provide for the applicability of the host State's law. This is true not only in Latin America, but in many Contracting States in other parts of the world. In case there was no agreement on this matter, the ICSID Convention explicitly stipulates that the law of the host State would then apply, complemented by such rules of international law as may be applicable (Article 42(1)).

The Use of ICSID by Latin American Countries

To date, two Latin American countries, namely *Paraguay* and *El Salvador*, are Contracting States. *Costa Rica* has signed but not yet ratified the Convention. Paraguay and El Salvador have, respectively, entered into bilateral treaties with France which provide for the settlement by ICSID of investment disputes between either Contracting Party and investors who are nationals of the other Party. Paraguay and Costa Rica have also, respectively, entered into similar treaties with the U.K.

Furthermore, *Brazil*, which is not yet a signatory to the Convention, has agreed, on the occasion of Euro-borrowings made by Brazilian public entities with the guarantee of Brazil, to submit potential disputes to *ad hoc* international arbitration governed, to the extent necessary, by the ICSID rules and to designate the Secretary-General as appointing authority in the event that a party fails to cooperate in the appointment of arbitrators. Neither the proceedings nor the awards, which might be rendered in this type of situation can be considered as ICSID proceedings or awards. Nevertheless, the Brazilian example shows sufficiently the confidence of the parties in the impartiality of the Secretariat of ICSID and the merits of the ICSID arbitration rules.

Points for Consideration

The following points may, thus, be borne in mind when a Latin American country wishes to consider a potential relationship with ICSID:

1. In regard to diplomatic protection, exhaustion of local remedies and issues of applicable law, the ICSID

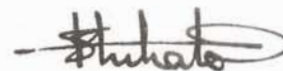
Convention pays due respect to the considerations which prompted Latin American countries to adopt the Calvo doctrine. The Convention even goes one step further. Because it is an international agreement, its provisions regarding diplomatic protection, local remedies and applicable law amount to treaty recognition by all members of principles some of which might otherwise be challenged in a relationship not covered by the Convention.

2. The fact that some Latin American countries have signed or ratified the Convention shows an awareness of the compatibility between the ICSID Convention and the time-honored attitude of these countries towards the settlement of investment disputes.

3. As countries seeking outside financial assistance for the development of their economy find it necessary to seek new ways of attracting foreign private capital, ICSID membership is one of the ways in which this can be accomplished by giving both investors and the host State means

for settling investment disputes under the auspices of a specialized international organization whose impartiality is assured.

4. ICSID should not be viewed only as a machinery for the settlement of particular disputes submitted to it. In fact, ICSID has been created and attempts to operate as a means of reaching a much broader objective. This objective is the improvement of the investment climate worldwide and in developing countries in particular. By promoting an atmosphere of mutual confidence between investors and States, ICSID can contribute to securing a stable and increasing flow of resources to developing countries under reasonable conditions.



Ibrahim F.I. Shihata
Secretary-General



Sao Paulo Seminar

Left to right: Mr. Ibrahim F.I. Shihata, Secretary-General, ICSID; Mr. Luis O. Baptista, Chairman, and Mr. Georges R. Delaume, Senior Legal Adviser, ICSID.

The Secretary-General and Mr. Delaume participated in a seminar on ICSID held in Sao Paulo, Brazil, on April 6, 1984, under the auspices of the Research Center of the Sao Paulo Bar Association.

The seminar had been organized with the assistance

of Mr. Peter Könz, Resident Representative of the United Nations in Brazil and of Mr. Luis O. Baptista (Baptista, Carvalho, Tess e Christino Netto).

The objective of the seminar was to review for the benefit of a group of Brazilian lawyers the significant

features of ICSID and to give the participants information regarding a number of practical issues arising in the context of proceedings.

The major theme was to represent to the participants the role of ICSID and its relevance to a country like Brazil, which is both a major recipient and a source of foreign investments.

The discussion which followed was useful and constructive. It led to a mutually beneficial exchange of views between the participants and the ICSID Secretariat which enabled the Secretariat to clarify specific aspects of ICSID while learning more about the particular issues of direct concern to the participants.

This is the first example of a new effort by the Secretariat to promote ICSID in countries which have not yet signed the Convention. The response given in Sao Paulo to this initiative is a definite encouragement to pursue this new type of activity further.

Disputes before the Centre

AMCO Asia et al v. the Republic of Indonesia (Case ARB/81/1)

March 19-23, 1984 Hearings held in Copenhagen.

Klöckner Industrie Anlagen GmbH et al v. the United Republic of Cameroon and Société Camerounaise des Engrais (SOCAME) S.A. (Case ARB/81/2) - Annulment Proceedings

February 28, 1984 The Chairman of the Administrative Council appoints, in accordance with Arbitration Rule 52(a), an *ad hoc* Committee consisting of Mr. Pierre Lalive (Swiss), Mr. Ahmed S. El-Kosheri (Egyptian) and Mr. Ignaz Seidl-Hohenveldern (Austrian), who accept their appointment.

May 8, 1984 The *ad hoc* Committee meets in Geneva.

May 23, 1984 A preliminary procedural consultation under Arbitration Rule 20 (applying *mutatis mutandis*), with the parties present, takes place in Geneva.

Société Ouest Africaine des Bétons Industriels (SOABI) v. the State of Senegal (Case ARB/82/1)

May 17, 1984 The Tribunal meets in Paris.

Swiss Aluminium Limited (ALUSUISSE) and Icelandic Aluminium Company Limited (ISAL) v. the Government of Iceland (Case ARB/83/1)

No new developments since the publication of the last News from ICSID.

The Liberian Eastern Timber Corporation (LETCO) v. the Government of the Republic of Liberia (Case ARB/83/2)

February 16, 1984 Mr. Frank Church (American) resigns as arbitrator.

March 1, 1984 Claimant appoints Mr. Jorge Goncalves Pereira (Portuguese) as arbitrator, replacing Mr. Church.

May 21, 1984 A preliminary procedural consultation takes place with the Claimant appearing. Claimant requests, pursuant to Arbitration Rule 42, that the Tribunal deal with the questions submitted to it and render an award. Pursuant to Arbitration Rule 42(2), the Tribunal decides to grant to the Government of Liberia a period of grace of 30 days, expiring on the close of business of June 22, 1984, to file a pleading.

Atlantic Triton Company Limited v. the Republic of Guinea (Case ARB/84/1)

No new developments since the publication of the last News from ICSID.

Colt Industries Operating Corp., Firearms Division v. the Government of the Republic of Korea (Case ARB/84/2)

No new developments since the publication of the last News from ICSID.

Maritime International Nominees Establishment (MINE) v. the Republic of Guinea

May 8, 1984 The Secretary-General acknowledges receipt of a request for the institution of arbitration proceedings by MINE.

Tesoro Petroleum Corporation v. the Government of Trinidad and Tobago (Case CONC/83/1)

March 9, 1984 The Conciliator (The Rt. Hon. Lord Wilberforce) holds a preliminary procedural consultation, with the parties present, in London.

Legal Rules Applied by ICSID Arbitral Tribunals

Two awards rendered by ICSID arbitral tribunals have appeared recently in various legal periodicals. The release of these awards is attributable in each case to the initiative of counsel for one of the parties.

AMCO Asia et al. v. the Republic of Indonesia (Case ARB/81/1), an award on jurisdiction dated September 25, 1983, is published in 23 International Legal Materials 351 (1984); **Klöckner et al. v. United Republic of Cameroon and Société Camerounaise des Engrais (SOCAME) S.A. (Case ARB/81/2)**, an award dated October 21, 1983, is published in the *Journal du Droit International*, p. 409, 1984.

Inasmuch as this material is now in the public domain, it appears useful to identify and summarize the legal principles applied by the tribunal relating to the interpretation and the implementation of the ICSID Convention.

AMCO Asia et al. v. the Republic of Indonesia (Case ARB/81/1), Award on Jurisdiction dated September 25, 1983.

This award deals, *inter alia*, with two issues regarding the implementation of the ICSID Convention, namely those concerning: (i) consent to ICSID arbitration; and (ii) the nationality of the investor.

The arbitration clause on the basis of which the dispute was submitted to ICSID arbitration was contained in an application submitted in 1968 by the applicant, a United States corporation, to the Indonesian Investment Board, for the establishment of a "foreign business" incorporated in Indonesia, (hereinafter **A**)

Article IX of that application provided that:

"If at a later date there is a disagreement and dispute between the BUSINESS and the GOVERNMENT, this disagreement will be put before the International Center [sic] for Settlement of Investment Disputes, in which body the government of the Republic of Indonesia and the United States of America are Members. All the decisions made by the Convention mentioned above will bind the sides which are in disagreement and dispute." (As translated from the Indonesian text of the application.)

The application was subsequently approved. **A** was consequently established.

In 1972, the applicant requested the respondent to authorize the transfer of part of the shares of **A** held by applicant to a Hong Kong company (hereinafter **B**). The government replied that it had no objection to the transfer.

In 1981, the applicant, **A** and **B** submitted to the Secretary-General of ICSID a request for the institution of arbitration proceedings against the respondent.

Consent

The respondent argued, *inter alia*, in its pleading that consent to ICSID arbitration by a State should be construed restrictively since it constituted a limitation to the State's sovereignty.

The tribunal held that an agreement to arbitrate:

"... is not to be construed restrictively, nor as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of internal law and to international law."

The applicant

To deny the tribunal's jurisdiction over the applicant, the respondent contended that the application, and the ICSID clause in it, did not designate the applicant as a possible party to an ICSID arbitration and did not constitute "express consent in writing" to the ICSID machinery.

The tribunal rejected this contention. To support its conclusion, the tribunal recalled the basic features of the ICSID Convention:

"... ICSID arbitration is a method of settlement which corresponds to the interests, not only of investors, but of the Contracting States as well, provided that by their adhesion to the Convention they have shown that they considered this method as being effectively in their interest, being it also understood that they keep full freedom to implement it or not, in respect of each particular investment agreement. As to the investors, it goes without saying that they have practically in all cases interest to submit to this international arbitration any and all disputes with the host-state relating to the investment. Thus, the Convention is aimed to protect, to the same extent and with the same vigour, the investor and the host-state, not forgetting that to protect investments is to protect the general interest of development and of developing countries.

Accordingly, while a consent in writing to ICSID arbitration is indispensable, since it is required by article 25(1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices to establish that its interpretation in good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID tribunal to have jurisdiction over them."

Applying these considerations to the circumstances of the case, the tribunal decided that the requirements of the Convention were satisfied:

"The foreign investor was the applicant; (A) was but an instrumentality through which the applicant was to realize the investment.

Now the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if (the applicant) would be refused the benefit of the clause? Moreover, the tribunal did find that (A) had this benefit, because of the foreign control under which it is placed: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one?

No doubt (the applicant) has understood the clause in this way. But (the respondent) could not reasonably have understood it otherwise, nor reasonably have imagined that the clause would not grant protection to the investor himself, that is to say to (the applicant). It is here that one should keep in mind the Indonesian legislation and literature: they show that (the respondent) considered that protection of investors through international arbitration was needed in the interest of its country, so that arbitration clauses to which it was going to subscribe were to be interpreted, for this reason too, as extending necessarily their benefit to the foreign investor. On their side, the investors were entitled to consider that Indonesia would not offer a 'restrictive' interpretation of the arbitration clauses.

To conclude, there is a written consent to ICSID arbitration in the investment agreement (article IX of the Application and its acceptance by the respondent). The formal requirement of article 25(1) of the Convention is thus fulfilled and what is left, is to interpret said written consent.

Such interpretation will lead the Tribunal to decide that the arbitration clause may be invoked by (the applicant), over which it has, accordingly, jurisdiction."

B

In order to deny the tribunal's jurisdiction over B, the respondent argued that the ICSID clause in the investment application made no mention at all of B. It also argued that the "non-objection" letter authorizing the transfer of shares in A from the applicant to B did not constitute an express consent to ICSID arbitration with regard to B. The tribunal disagreed:

"The transfer thus approved was made by (the applicant) to (B). Now, according to the conclusion the tribunal has reached in respect of (the applicant), it has jurisdiction over this company; in other words, (the applicant) has the right to invoke this tribunal's jurisdiction over it. (The applicant) has this right in its capacity as the foreign investor who made the Application containing the arbitration

clause, agreed upon by (the respondent); and it is in that capacity that (the applicant) was authorized by (the respondent) to establish (A) and became the shareholder of the same.

Accordingly, the right acquired by (the applicant) to invoke the arbitration clause is attached to its investment, represented by its shares in (A) and may be transferred with those shares. To be sure, for such a transfer to be effective, the government of the host-country must approve it, which approval has as its consequence that said government agrees to the transferee acquiring all rights attached to the shares, including the right to arbitrate, unless this latter right would be expressly excluded in the approval decision.

Such approval having been given in the instant case, it constitutes, together with (the applicant's) Request to transfer the shares, the agreement in writing to submit to ICSID arbitration the disputes with the transferee, requested by the Convention (article 25)."

Nationality

A

The respondent argued, *inter alia*, that A was an Indonesian company and had not been expressly acknowledged by the parties as being the national of another Contracting State for the purposes of Article 25(2)(b) of the Convention. It also argued that no formal or express indication was found in the arbitration clause as to the Contracting State in respect of which the parties would have agreed to treat A as one of its nationals, and this lack of precision made it impossible for the respondent to determine the nationality of the persons who controlled A. Turning to the lack of formal agreement as to the nationality of A, the tribunal distinguished the *Holiday Inns* award. The tribunal noted that Article 25(2)(b) does not require that the agreement of the parties be stated in formal fashion. The tribunal said:

"What is needed, for the final provision of article 25(2)(b) to be applicable, is, 1° that the juridical person, party to the dispute be legally a national of a Contracting State which is the other party and 2° that this juridical person being under foreign control, to the knowledge of the Contracting State, the parties agree to treat it as a foreign juridical person."

In the tribunal's view these two conditions were fulfilled because the application submitted by the applicant referred to the establishment of a "foreign business" and was, therefore, acknowledged as under "foreign control". By agreeing to the application, the respondent knew that A would be under foreign control. By approving the applica-

tion and the ICSID clause in it, it was "crystal clear" that the respondent "agreed to treat A as a national of another Contracting State, for the purpose of the Convention." In this connection the tribunal said also:

"To refer to the Holiday Inns award—in spite of the same not being a binding precedent in this case—here, this agreement is by no means implied; it is expressed, and clearly expressed, no formal or ritual clause being provided for in the Convention, nor needed in order for such an agreement to be binding on the parties."

The lack of specificity of the ICSID clause regarding the specific nationality of the foreign interests controlling A was also considered irrelevant in the circumstances of the case.

The tribunal noted that:

"... there is no provision in the Convention imposing a formal indication, in the arbitration clause itself, of the nationality of the foreign juridical or natural persons who control the juridical person having the nationality of the Contracting State, party to the dispute."

The tribunal found that in view of the facts, and in particular of the content of the application which referred to the applicant as a United States corporation, represented by its President, a United States citizen, and to the fact that A would be managed under the control of the applicant, the nationality of A had been clearly identified in a document approved by the respondent.

The Notion of "Foreign Control"

The tribunal dealt with an argument raised by the respondent that the true "controller" of A was not the applicant but a Mr. X, a Dutch citizen residing in Hong Kong, who himself controlled the applicant. This argument did not succeed:

"To take this argument into consideration, the Tribunal would have to admit first that for the purpose of article 25-2(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth, or xth degree.

Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting state party to the dispute, where said juridical persons are under foreign

control. But no exception to the classical concept is provided for when it comes to the nationality of the foreign controller, even supposing—which is not at all clearly stated in the Convention—that the fact that the controller is the national of one or another foreign State is to be taken into account."

Klöckner et al. v. United Republic of Cameroon and Société Camerounaise des Engrais (SOCAME) S.A. (Case ARB/81/2), Award dated October 21, 1983.

This award deals with a number of jurisdictional issues and with issues of applicable law. In order to set up in proper perspective the legal rules applied by the tribunal within the context of the ICSID Convention, it is necessary to summarize the contractual framework underlying the dispute.

The Contractual Framework

Basic Agreement

In 1971, the applicant, a German company, and the Government of Cameroon entered into a Basic Agreement (Protocole d'Accord), which provided for the creation of a Cameroonian company (owned 51% by the applicant and 49% by the Government and called SOCAME) whose purpose was the construction, management and exploitation of a fertilizer plant. Pursuant to the Agreement, the applicant undertook, *inter alia*, the following:

"Article 9 - Klöckner aura la responsabilité de la gestion technique et commerciale de la Société assurée par un contrat de management pendant 5 ans au moins à partir du démarrage avec une option de sa prolongation."

Article 22 of the Agreement provided for ICSID arbitration:

"Article 22 - Le règlement des litiges relatifs à la validité, à l'interprétation ou l'application des clauses du présent protocole sera fait d'accord parties et à défaut, conformément à la procédure d'arbitrage prévue par la Convention Internationale de règlement des différends relatifs aux investissements de la Banque Internationale pour la Reconstruction et le Développement (BIRD)."

Turnkey Contract

In 1972, the applicant and the Government concluded a turnkey contract (Contrat de livraison de l'usine d'engrais).

Article 17 of the contract provided that it could be assigned to SOCAME after its creation and that SOCAME would succeed to all the rights and obligations of the Government. However, the same provision specified that the assignment would not free the Government from its obligations to the applicant and that the Government guaranteed payment of amounts due to the applicant in the event that SOCAME would not pay.

Article 18 of the contract contained an arbitration clause identical to that stipulated in the Basic Agreement.

In 1973, the Government assigned the contract to SOCAME.

Establishment Convention

In 1973, following the establishment of SOCAME, the Government and SOCAME concluded an Establishment Convention (Convention d'établissement). The Convention (Article 19) referred to the Basic Agreement, the Turnkey Contract and the Management Contract (then not yet concluded) and provided that these agreements were to be deemed to be incorporated into the Convention.

Article 21 contained the same arbitration clause as that found in the Basic Agreement. In this connection, it is important to note that: (i) at that time SOCAME was under "foreign control", i.e. that of the applicant; and (ii) the convention did not refer expressly to that fact and to Article 25(2)(b) of the Convention.

Another important factor is that in 1978, following the applicant's refusal to contribute to an increase in SOCAME's capital, it lost "control" of SOCAME.

Management Contract (Contrat de management)

That contract was annexed to the Establishment Convention. However, it was not signed until April 7, 1977.

The Contract referred specifically to the Turnkey Contract and to the Establishment Convention. It spelled out the obligations of the applicant regarding the management of the plant, training of local personnel, technical assistance and related matters.

The Contract contained the following arbitration clause:

"8. Tous différends découlant du présent contrat seront tranchés définitivement suivant le Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale par un ou plusieurs arbitres nommés conformément à ce Règlement. La Cour d'Arbitrage aura son siège à Berne et appliquera le droit matériel suisse."

In 1981, the applicant submitted to ICSID a request for arbitration against the Government of Cameroon and SOCAME.

Jurisdictional Issues

Subject Matter Jurisdiction

The jurisdictional issues raised in the pleading may be summarized as follows:

(a) The Turnkey Contract

The parties did not dispute that the tribunal had jurisdiction under Article 18 of the Turnkey Contract.

(b) The Basic Agreement

Relying on Article 22 of the Basic Agreement, the Government of Cameroon invoked ICSID jurisdiction also in regard to the dispute under the Agreement. The applicant admitted that ICSID has jurisdiction in respect of the Basic Agreement.

That statement was differently construed by the majority and the minority of the tribunal in regard to the relationship between the Basic Agreement and the Management Contract.

(c) The Management Contract

The Management Contract (Article 8) provided for the submission of disputes to ICC arbitration. The applicant argued, therefore, that the tribunal had no jurisdiction over this type of dispute.

The tribunal agreed with this contention, but while the minority considered that this was the end of the matter, the majority held that the Management Contract was part and parcel of the overall relationship between the parties and was in effect an agreement concluded for the implementation of the Basic Agreement. Since the Basic Agreement (Article 9) provided that the applicant was responsible for the technical and commercial management of SOCAME, the majority was of the opinion that the tribunal had jurisdiction over the dispute regarding the alleged failure of the applicant to perform, as manager of the project, under the Basic Agreement. In this respect, the majority said:

"Le demandeur accepte donc que la clause CIRDI, contenue dans le Protocole d'Accord, s'applique à tous les engagements des deux parties établis dans ce Protocole, y compris l'engagement pris par le demandeur à l'Article 9, selon lequel Klöckner 'aura la responsabilité de la gestion technique et commerciale de la Société assurée par un Contrat de Management'.

On a soutenu au sein du Tribunal arbitral que la clause CCI contenue dans l'Article 8 du Contrat de Management aurait eu l'effet de soustraire de la compétence de ce Tribunal les différends résultant de l'engagement de l'Article 9, pour les placer sous la compétence d'un tribunal arbitral à organiser éventuellement par la Chambre de Commerce Internationale et soumis au droit suisse. Le Tribunal ne peut pas partager ce point de vue d'après lequel une compétence CIRDI aurait existé depuis la date du Protocole, le 4 décembre 1971, mais aurait disparue par une sorte de dérogation implicite le 7 avril 1977, date de la signature du Contrat de Management. Sans doute, il peut y avoir des différends émanant exclusivement du Contrat de Management - par exemple, concernant le paiement des compensations prévues dans ce contrat - et naturellement de tels différends échapperaient à la compétence de ce Tribunal et seraient soumis à la clause CCI. L'Article 8 du Contrat de Management établit la compétence de la CCI seulement pour 'tous différends découlant du présent contrat'. Mais les différends émanant de l'exécution, la non exécution ou l'exécution défailante de la gestion tech-

nique et commerciale de la SOCAME par Klöckner ont été soumis à cette clause, en vertu du jeu combiné des Articles 9 et 22 du Protocole d'Accord, qui établit la compétence du CIRDI pour le 'règlement des litiges relatifs à la validité, à l'interprétation ou l'application des clauses du présent protocole'.

Le Contrat de Management, destiné selon l'Article 9 du Protocole d'Accord à assurer la responsabilité de Klöckner pour la gestion technique et commerciale de la Société, ne saurait être interprété comme dérogeant implicitement, ni dans sa substance, ni en ce qui concerne ses garanties juridictionnelles, à un engagement fondamental du Protocole d'Accord. En effet, l'engagement de Klöckner d'assurer la gestion technique et commerciale de l'usine a été la condition essentielle de l'investissement, reconnue dans le Préambule du Protocole ainsi que dans les 'discussions qui ont précédé la rédaction de ce Protocole' auxquelles se réfère l'Article 4. Cette gestion technique et commerciale a été assurée de fait par Klöckner, qui a dirigé à lui tout seul la Société SOCAME, aussi bien avant qu'après la signature du Contrat de Management. Une preuve de ce fait résulte de la décision prise en décembre 1977, après la signature du Contrat de Management, d'arrêter l'usine. Cette décision a été adoptée par la direction, composée (avec une seule exception) d'expatriés proposés par Klöckner, sans que le dossier indique une autorisation préalable du, ou même une consultation avec le, Conseil d'Administration de la Société.

S'il restait le moindre doute au sujet de la compétence de ce Tribunal en ce qui concerne l'Article 9 du Protocole d'Accord il y a encore une considération décisive: le consentement exprimé à ce sujet par le demandeur dans son mémoire en réponse (p. 11). Dans ce document le demandeur a soutenu que le Contrat de Management, en lui-même, échappe à la compétence de ce Tribunal, ce qui est exact. Mais il a admis expressément la compétence du Tribunal 'en ce qui concerne le Protocole d'Accord' sans faire exception de son Article 9. C'est seulement au sein du Tribunal arbitral qu'on a soulevé l'objection selon laquelle le Contrat de Management aurait eu aussi l'effet d'exclure l'Article 9 du Protocole d'Accord de l'application de la clause CIRDI.

Mais la juridiction d'un Tribunal arbitral CIRDI, d'après la Convention, repose sur le consentement des parties, 'pierre angulaire de la compétence du Centre'. Une fois le Centre valablement saisi (tel qu'il l'a été dans cette affaire par une requête présentée par Klöckner), le consentement, quant à

l'étendue 'ratione materiae' de la compétence du Tribunal, peut être exprimé à tout moment, même dans les pièces de procédure produites devant le Tribunal ('forum prorogatum'). A ce sujet, le Rapport des Administrateurs de la Banque mondiale signale que 'la Convention ne contient aucune précision quant à la date à laquelle le consentement doit être donné' (par. 24)."

(d) *The Establishment Convention*

The defendant argued that the tribunal had jurisdiction over disputes arising under the Establishment Convention in view of the ICSID arbitration clause set forth in Article 21 of the Convention.

The applicant objected that the tribunal had no jurisdiction because SOCAME, and not the applicant, was a party to the Convention. In other words, the applicant had not "consented" to submit to ICSID's jurisdiction in this respect.

This argument failed for reasons which will be considered in the next section.

Jurisdiction over the Parties

(a) *Jurisdiction over the Applicant and its Affiliates*

The original request had been submitted not only by the applicant, but also by its Dutch and Belgian subsidiaries.

At the first hearing of the tribunal counsel for Cameroon argued that since Article 25(1) of the Convention refers to a "national" of another Contracting State, multipartite participation in the proceedings seemed excluded. The President of the tribunal informed the parties that the tribunal had considered this issue, but from another viewpoint, namely the question whether the applicant had authority to represent its two affiliates.

The tribunal and the parties agreed that the applicant could act on behalf of its affiliates if it obtained proper powers from them and supplied the tribunal with evidence of such powers.

(b) *Jurisdiction over SOCAME*

(i) *SOCAME as assignee of the Turnkey Contract*

The applicant argued that SOCAME should be joined in the proceedings as the successor in interest or assignee of the Government under the Turnkey Contract. The Government of Cameroon objected in a letter of December 7, 1981, that:

"1. Le Gouvernement Camerounais ne saurait accepter l'extension de la compétence du Centre à une société de droit privé sur la base d'une clause compromissoire souscrite à une époque où ladite société se trouvait 'sous contrôle étranger', alors que de surcroît elle n'a jamais fait l'objet de la désignation formelle prévue par l'article 25(1) de la Convention du 18 mars 1965."

Nevertheless, the Government of Cameroon acknowledged that since the situation had changed after the appli-

cant lost control over SOCAME, it was willing, solely for the purposes of the proceeding, to consider SOCAME as a Cameroonian agency and to designate it as such under Article 25(1) of the Convention:

"Toutefois, la situation de la SOCAME ayant changé à la suite de l'acquisition par des intérêts camerounais de la majorité de son capital social, l'obstacle ci-dessus rappelé a disparu et le Gouvernement camerounais est désormais disposé à faire la désignation prévue par l'article 25(1) et à accepter la participation de la SOCAME à l'arbitrage." (Id. loc.)

In this connection, two points should be noted: (i) the designation took place *after* the institution of the proceedings (registration of the request took place on April 26, 1981) and the constitution of the tribunal (October 26, 1981); (ii) while maintaining that Cameroon and SOCAME were different legal entities, they both agreed to appoint the same arbitrator.

The tribunal noted the "agreement" of the parties concerning its jurisdiction over SOCAME in its Procedural Order No. 2 of July 16, 1982.

(ii) *SOCAME as a Party to the Establishment Convention*

The applicant argued that: (i) it was not a party to the Convention and had not "consented" to the ICSID arbitration clause in it; and (ii) SOCAME was a Cameroonian company and did not satisfy the diversity requirement of the Convention.

This argument failed. The tribunal held that:

"Si la compétence du Centre ne peut s'étendre, en principe, à 'une personne morale qui possède la nationalité de l'Etat contractant' (Art. 25, par. , litt. b de la Convention CIRDI), ce principe reçoit une importante exception dans le cas d'une personne morale constituée dans le pays hôte de l'investissement si:

'les parties sont convenues, aux fins de la présente Convention, de (la) considérer comme ressortissant d'un autre Etat contractant en raison du contrôle exercé sur elle par des intérêts étrangers'. (Art. 25, par. 2, litt. b. in fine)

En conséquence, comme l'explique clairement le Rapport des Administrateurs sur la Convention CIRDI 'une personne morale ayant la nationalité de l'Etat partie au différend peut être partie aux procédures établies sous les auspices du Centre si l'Etat en question accepte de la considérer comme ressortissante d'un autre Etat contractant en raison du contrôle exercée sur elle par des intérêts étrangers'. (par. 30) Cette acceptation 'confère à la personne morale une sorte de nationalité subsidiaire, fonctionnelle, aux seules fins juridictionnelles devant le Centre' (M. Amadio, 'Le Contentieux

International de l'Investissement Privé et la Convention de la Banque Mondiale du 18 mars 1965' p. 115).

La raison d'être de cette exception a été expliquée par M. Broches de la façon suivante: 'there was a compelling reason for this last provision. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country. If we admit... that this makes the company technically a national of the host country, it becomes readily apparent that there is need for an exception... If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention' (Broches, A., 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', 136 Recueil des Cours de l'Académie de Droit International, p. 358-9).

Au moment où, le 23 juin 1973, les parties à la Convention d'Etablissement ont consenti à soumettre leurs différends à l'arbitrage CIRDI la SOCAME était une société de droit camerounais mais soumise au contrôle majoritaire des intérêts étrangers. Cela résulte clairement de l'Article 2 du Protocole d'Accord du 4 décembre 1971 où l'on stipule que 'Klöckner et ses partenaires européens' devront souscrire le 51% du capital de la SOCAME.

La Convention CIRDI ne spécifie pas la manière par laquelle on peut exprimer l'accord des parties quant à l'existence des conditions donnant lieu à l'exception prévue à l'Article 25(2)(b) in fine. Dans la pratique, cet accord peut se manifester par la reconnaissance explicite du contrôle étranger, résultant de l'Article 2 du Protocole, conjointement avec la simple insertion de la clause CIRDI, tel qu'on l'a fait à l'Article 21 de la Convention d'Etablissement. Tel qu'il a été signalé en commentant la Convention, 'a consent clause may be simple, recording no more than an agreement to submit certain matters to conciliation and/or arbitration under the auspices of the Centre' (Szasz, 'A Practical Guide to the Convention on Settlement of Investment Disputes', 1 Cornell International Law Journal, p. 23).

L'insertion de la clause arbitrale CIRDI dans la Convention d'Etablissement, par elle-même, suppose et implique que les parties sont convenues de considérer la SOCAME, à l'époque, comme une société soumise au contrôle étranger et donc autorisée à mettre en marche l'arbitrage CIRDI. C'est une admission qui exclut complètement une interprétation différente de la volonté des parties. L'in-

sertion de cette clause dans la Convention d'Etablissement n'a de sens que si les parties sont convenues que, en raison du contrôle exercée à l'époque par des intérêts sur la SOCAME, cette Convention pouvait être soumise à la juridiction du CIRDI.

Il est vrai qu'en 1978 un changement s'est produit quand les intérêts étrangers ont perdu le contrôle de la Société, en refusant de participer à l'augmentation de capital décidée à l'époque. Les auteurs spécialisés sont divisés quant aux effets sur la clause de juridiction CIRDI d'un changement postérieur de nationalité ou du contrôle. D'un côté, M. Amerasinghe a soutenu que ce changement n'affecte pas la validité ni l'effet de la clause juridictionnelle car, à son avis, 'the ICSID Convention implies that the relevant time for the fulfillment of the nationality requirement is that date when the consent to jurisdiction is effective for both parties. It also means that any change in the nationality of the juridical person after that date is immaterial for purposes of ICSID's jurisdiction' (Amerasinghe, C.F., 'The International Centre for the Settlement of Investment Disputes and Development through the Multinational Corporation', 1976, 9 *Vanderbilt Journal of Transnational Law*, pp. 809-810.) Cette opinion s'appuie sur une phrase répétée à l'Article 25(2): 'à la date à laquelle les parties ont consenti'. De l'autre côté, M. Delaume semble être d'un avis contraire, car en examinant l'hypothèse d'un transfert du contrat d'investissement au cours de son exécution en faveur d'un tiers, il soutient que si le cessionnaire est le 'ressortissant de l'Etat partie à l'accord ou d'un Etat non contractant', alors la juridiction du Centre disparaîtrait. (Delaume, G., 'Le Centre International pour le Règlement des Différends Relatifs aux Investissements' (CIRDI), *Journal du Droit International*, 109, année 1982, no. 4, p. 797.)

Même si on accepte cette seconde opinion, il faut remarquer que la question qui se pose dans cette affaire n'est pas celle de savoir si le Tribunal a ou non juridiction 'ratione personae' vis-à-vis la SOCAME. Cette question, qui était celle de l'affaire *Holiday Inn c. Maroc* où elle a été décidée négativement, est ici résolue dans un sens affirmatif, vu la lettre du défendeur du 7 décembre 1981 adressée au Tribunal arbitral.

La question devant notre Tribunal est donc différente: Il s'agit de savoir s'il est compétent 'ratione materiae' pour se prononcer sur l'application et l'interprétation de la Convention d'Etablissement. Cette Convention, bien que formellement signée par le Gouvernement et la SOCAME, a été réellement négociée entre le Gouvernement et Klöckner,

ainsi qu'il résulte de l'annexe 40A à la réplique. En plus, il est indéniable qu'elle a été manifestement établie dans l'intérêt de Klöckner, à l'époque où cette compagnie était l'actionnaire majoritaire de la SOCAME. La Convention d'Etablissement reflétait le rapport contractuel entre un investisseur étranger, agissant par le biais d'une société locale, et le pays d'accueil de cet investissement étranger. Dans ces conditions, il serait inéquitable d'admettre que Klöckner ayant bénéficié de 1973 à 1978 de l'existence de la clause arbitrale CIRDI à l'appui des avantages et garanties juridiques, économiques, financières et fiscales octroyées par la Convention d'Etablissement, puisse être admis aujourd'hui à nier la compétence du CIRDI pour prendre en considération l'application de cette même Convention, au moins pendant la période 1973-1978, quand elle est invoquée par le Gouvernement qui a consenti à la clause arbitrale.

Les considérations qui précèdent mènent à conclure que le Tribunal arbitral est compétent pour se prononcer tant sur la demande principale que sur la demande reconventionnelle, en prenant en considération aussi cette Convention d'Etablissement qui constitue un tout inséparable avec le Protocole d'Accord et le Contrat de Livraison."

Applicable Law Issues

Referring to Article 42 of the Convention, the tribunal held that the applicable law was:

"... naturellement le droit civil et commercial applicable au Cameroun."

Having so decided, the tribunal was faced with an additional question. The Cameroonian legal system is not unified. As a result of Cameroon's colonial heritage, both British common law and French civil law continue to apply respectively in the anglophonic and francophonic parts of Cameroon. The tribunal had, therefore, to determine which system was to be applied.

Referring to Article 42, the tribunal noted that it should apply the law of Cameroon "including its rules on the conflict of laws". Considering that the contracts involved had been executed in Yaoundé and that the plant was located in the eastern part of Cameroon where SOCAME had its *siège social*, the tribunal concluded that, in accordance with Cameroon domestic conflicts rules, French substantive law was the applicable law.

Note

An application for annulment of this award was registered by the Secretary-General on February 16, 1984 (News from ICSID, Vol. I, No. 1, Winter 1984, p. 2). Further information on this proceeding appears above under the heading "Disputes before the Centre".

New Additions to Panels of Arbitrators and Conciliators

The following Governments have made designations to the Panels of Conciliators and of Arbitrators:

GHANA—designations effective as of April 24, 1984:

Panel of Conciliators:

Mr. J.S. Addo, Mr. J. Arthur (re-appointment), The Hon. Mr. Justice S.M. Boison, and Mr. C.F. Hayfron-Benjamin.

Panel of Arbitrators:

Mr. G.E.K. Aikins, Dr. S.K.B. Asante (re-appointment), The Hon. Mr. Justice Osei Hwere, and Dr. Akilakpar Sawyer.

ISRAEL—designations effective as of March 7, 1984:

Panel of Conciliators:

Mr. Moshe Sanbar, Mr. Avraham Friedman, and Mr. Yehuda Gill.

Panel of Arbitrators:

Mr. Meir Gabay, Mr. David Sassoon, and Mr. Haim J. Zadok.

NETHERLANDS—designations effective as of March 14, 1984:

Panel of Conciliators:

Prof. Dr. P. Kuin (re-appointment), Prof. Dr. J.R.M. van den Brink, and Dr. J. Zijlstra.

Panel of Arbitrators:

Prof. Dr. P. Sanders (re-appointment), Mr. Y. Scholten, and Prof. Dr. J.C. Schultsz (re-appointment).

Panels of Conciliators and of Arbitrators:

Prof. Mr. P. Lieftinck (re-appointment).

Membership

On June 4, 1984, the ICSID Convention was signed at the seat of the Centre on behalf of St. Lucia by its Chargé d'Affaires at the Embassy in New York, Mr. Donatus Keith St. Aimée. The instrument of ratification was deposited on the same day. St. Lucia became the 90th State to sign the Convention and the 86th Contracting State. According to Article 68(2), the Convention enters into force for St.

Lucia on July 4, 1984.

Portugal deposited its instrument of ratification at the seat of the Centre on July 2, 1984, bringing the number of Contracting States to 87. The Convention, in accordance with Article 68(2) thereof, will enter into force for Portugal on August 1, 1984.



Signature of the ICSID Convention by St. Lucia. From left to right: seated: Mr. Ibrahim F.I. Shihata, Secretary-General, ICSID; Mr. Donatus Keith St. Aimée, Chargé d'Affaires, Embassy of St. Lucia; and Mr. George Reid, Alternate Executive Director, The World Bank, representing St.

Lucia; standing: Ms. Christina Hoedemaker, ICSID; Mr. Ossi Rahkonen, Assistant Secretary, Board Operations, Secretary's Department, The World Bank; and Mr. Georges R. Delaume, Senior Legal Adviser, ICSID.

SAUDI ARABIA—designations effective March 9, 1984:

Panels of Conciliators and of Arbitrators:

Dr. Abdulaziz M. Al-Dukheil, Mr. Abdul Aziz Rashed Ibrahim Al-Rashed, and Dr. Mahsoun B. Jalal.

YUGOSLAVIA—designations effective March 28, 1984:

Panels of Conciliators and of Arbitrators:

Prof. Dr. Ksente Bogoev (re-appointment), Prof. Dr. Stojan Cigoj (re-appointment), Prof. Dr. Aleksander Goldstajn (re-appointment), and Prof. Dr. Vladimir Jovanovic (re-appointment)

In accordance with the provisions of Article 13 of the Convention, the Chairman of the Administrative Council designated on February 14, 1984, Prof. Dr. Ignaz Seidl-Hohenveldern (Austrian), and on April 24, 1984, Mr. Heribert Golsong (German), to serve on the Panel of Arbitrators.

Publications

BROCHES, Aron

Settlement of Disputes Arising out of Investments in Developing Countries, 11 *International Business Lawyer* 206-210 (1984).

DELAUME, Georges R.

Arbitration with Governments: "Domestic" v. "International" Awards, 17 *The International Lawyer*, 687-698 (1983).

ICSID as Designating Authority for non-ICSID Arbitration

The agreement between the Province of British Columbia and the City of Seattle (News from ICSID, Vol I, No. 1, Winter 1984, p. 4) was executed on March 30, 1984. The treaty between the United States and Canada was signed on April 2, 1984. The Secretary-General of ICSID is designated as appointing authority.

ICSID Regulations and Rules

In the light of ICSID's experience, it has been felt that the time had come to revise the Regulations and Rules. On April 30, 1984, the Secretary-General addressed to the Administrative Council a Note on the subject together with the text of the proposed revised Regulations and Rules. The purpose of this revision is not to make dramatic changes in these documents. It is rather to simplify or clarify some of the relevant provisions and to introduce greater flexibility into the administration of proceedings.

This matter will be considered at the Annual Meeting of the Administrative Council next September.

Additional Facility

Reference to the Additional Facility as a means of dispute settlement is now made in bilateral treaties between the United States and: (i) Panama, and (ii) Senegal; and between the United Kingdom and (i) Belize, and (ii) St. Lucia.

On April 30, 1984, the Secretary-General addressed a Report to the Administrative Council in which he recommended that the Additional Facility be continued. This Report will be considered at the Annual Meeting of the Administrative Council next September.

ICSID and Multipartite Arbitration

Due to the complexities of contemporary transnational contracts, it may happen that disputes which involve different parties be the object of separate proceedings even though the issues involved bear a close connection to one another. This problem arises both in regard to commercial transactions, and to contractual arrangements relating to investments and the carrying out of large economic development projects.

It was unavoidable that the problem would arise in the context of ICSID arbitration. In some cases, the problem has been solved by means of appropriate arrangements concluded by the parties. Failing such arrangements, *ad hoc* solutions have to be considered. In this connection, reference may be made to three parallel proceedings instituted against Jamaica by Alcoa Minerals of Jamaica/Kaiser Bauxite Co./Reynolds Jamaica Mines Ltd. and Reynolds Metals Co. The proceedings were instituted pursuant to ICSID arbitration clauses stipulated in each individual

agreement between the claimants and Jamaica. The nature of the disputes was identical: it concerned the imposition of new taxes by Jamaica contrary to stabilization clauses in the agreements.

In this case, the claimants appointed the same person as arbitrator.

Jamaica having failed to appoint an arbitrator, the claimants requested the Chairman of ICSID's Administrative Council to appoint, for each proceeding, two arbitrators and to designate one of them as President of each tribunal. The Chairman made the necessary appointments and selected for the purpose the same two persons to serve on each tribunal.

On July 5-6, 1975, the three arbitrators considered each dispute and held in respect of each of them that the dispute fell within their "competence". The disputes were

subsequently settled amicably.

More recently, new situations have been submitted to ICSID. These include cases in which investment agreements, containing an ICSID arbitration clause, are intimately related to other arrangements, such as supply or sales contracts, which fall outside the scope of the ICSID Convention. In cases such as these, the Secretariat has suggested to the parties that they provide in the relevant arrangements for *ad hoc* arbitration incorporating, to the extent necessary, the ICSID rules and designating the Secretary-General as appointing authority. It is quite clear that awards rendered under such arrangements could not be considered as "ICSID's awards". Nevertheless, this contractual machinery may have considerable advantages in coordinating the ICSID and the non-ICSID proceedings, particularly if both are administered by the same arbitrators.



Meeting with the President of Italy

The President of Italy, His Excellency Sandro Pertini (left) receives Mr. Ibrahim F.I. Shihata, Secretary-General of ICSID/Vice-President and General Counsel of The World Bank (center) and Mr. Hugh Scott, Associate General Counsel of the Bank (right).

The meeting took place in the President's office on March 16, 1984 on the occasion of the annual meeting of the Board of the International Development Law Institute (IDLI) chaired by Mr. Shihata. The World Bank and ICSID cooperate with IDLI in providing training to lawyers of developing countries on issues related to development finance and the settlement of investment disputes.

Investment Promotion Treaties

United States and Costa Rica (Treaty concerning the Reciprocal Encouragement and Protection of Investments, not yet signed).

“ARTICLE VII
SETTLEMENT OF INVESTMENT
DISPUTES BETWEEN ONE PARTY AND
A NATIONAL OR COMPANY OF THE
OTHER PARTY

1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by its foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of such Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation. The parties may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to rely upon non-binding, third-party procedures, such as the fact-finding facility available under the Rules of the Additional Facility ('Additional Facility') of the International Centre for the Settlement of Investment Disputes ('Centre'). If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which they have previously agreed. With regard to expropriation by either Party, any dispute-settlement procedures specified in an investment agreement between such Party and such national or company shall remain binding and shall be enforceable in accordance with the terms of the investment agreement and relevant provisions of domestic laws of such Party and relevant international agreements to which such Party has subscribed.

3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the Centre (or the 'Additional Facility,' in the event that the Party concerned is not a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('Convention')) for settlement by con-

ciliation or binding arbitration, at any time after six months from the date upon which the dispute arose, provided:

(i) the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the parties to the dispute; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute.

Once the national or company concerned has so contended, either party to the dispute may institute proceedings before the Centre (or the 'Additional Facility', in the event that the Party concerned is not a party to the Convention). If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration.

(c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention and the Regulations and Rules of the Centre, or, if the Convention should, for any reason, be inapplicable, the Rules of the Additional Facility.

4. In any proceeding, judicial, arbitral or otherwise, concerning an investment dispute between it and a national or company of the other Party, a Party shall not assert, as a defense, counter-claim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any source whatsoever, including such other Party and its political subdivisions, agencies and instrumentalities.

5. For the purpose of any proceedings initiated before the Centre or the Additional Facility in accordance with this Article, any company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of either Party or a political subdivision thereof but that, before the occurrence of the event or events giving rise to the dispute, was owned or controlled by nationals or companies of the other Party, shall be treated as a national or company of such other Party.

6. The provisions of this Article shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ICSID Clauses; Some Drafting Problems

Clauses providing for ICSID conciliation/arbitration are found in: (i) investment agreements; (ii) national investment laws and (iii) bilateral investment treaties.

The following discussion will be limited to the first type of clauses because it is the one that can be best illustrated by concrete examples that arose in the context of ICSID proceedings and by ICSID clauses communicated to the Secretariat.

The other two types of clauses will be considered in a subsequent issue of News from ICSID.

Form and Scope of Consent to ICSID Conciliation/Arbitration

In most cases, consent is recorded in an express stipulation in the relevant investment agreement. It may, however, be established in other ways, e.g. in an exchange of correspondence or, as in the case of *AMCO Asia et al. v. Indonesia* (summarized above) in an application submitted by an investor, which is subsequently approved by the relevant authorities of the host State.

The scope of consent is within the discretion of the parties. They may refer all, or only certain categories of, disputes to ICSID. This is acknowledged in *Model Clauses IV and V*.

An example is found in a 1980 Agreement between the Tunisian Government, the Entreprise Tunisienne d'Activités Pétrolières (ETAP) and a group of unidentified foreign corporations (published in *Petroleum Legislation, North Africa*, Supp. 51, p. 14).

Article 13 of the Agreement reads:

"The parties agree that any dispute arising between them shall be finally settled by arbitration of the International Centre for the Settlement of Investment Disputes, created by the Convention of 18 March 1965 and ratified by the Tunisian Republic by Law 66/380 of 3 March 1966. The applicable law shall be the Tunisian law in force at the date of execution of the present Agreement. This provision does not apply to disputes arising between the Tunisian State and ETAP. It only concerns disputes

which may arise between the Tunisian State and the Companies: _____, and _____, or between the Tunisian State and one of them."

Another example is found in the Oil Code of Madagascar (as amended in 1982, Article 35, see Official Gazette of December 4, 1982) which provides for the exclusive jurisdiction of the Malagasy courts in respect of disputes arising under the Code but permits the submission to international (including ICSID) arbitration of disputes arising out of the performance of contractual undertakings.

Similarly, an agreement between Sudan and foreign investors provides that:

"ARTICLE XXIV SETTLEMENT OF DISPUTES

(a) Any dispute or difference arising between the Government and the Contractor in connection with, out of, or incidental to this Agreement or with respect to the interpretation, application or execution thereof shall in the first place be settled amicably. Failing such settlement it shall finally be settled by arbitration. In such event the Government and the Contractor hereby consent to submit such dispute or difference to the jurisdiction of the International Centre for the Settlement of Investment Disputes (hereinafter called 'the Centre') established under the Convention for the Settlement of Investment Disputes between States and Nationals of other States (hereinafter called 'the Convention') to be finally settled by arbitration pursuant to the Convention.

*(b) Notwithstanding the provisions of paragraph (a) above of this Article (24) or anything else in this Agreement to the contrary, any dispute or difference concerning the proper application or interpretation of Sudan laws, and regulations orders, decrees or procedures pursuant to such laws shall in no event be subject to arbitration. Such disputes or differences shall be resolved solely in accordance with the judicial and administrative procedures provided by the Sudanese law." (Production Sharing Agreement Dated 1 June 1980 Between Sudan and Burmah Oil Exploration Limited/Eastern Petroleum Company/Union Texas Trading Corporation, in *Petroleum Legislation, South & Central Africa*, Supp. 70).*

In practice, it may not always be easy to identify strict "statutory" disputes from those of a "contractual" nature.

Once the parties have agreed upon the type of disputes that they consider submitting to ICSID, it would appear advisable, as a drafting matter, to use what is known in arbitration parlance as a "broad" arbitration clause. It is well known that "narrow" or "specific" clauses that attempt to describe issues capable of arbitration may result in

excluding inadvertently from their scope matters which may give rise to disputes. *Model Clause I* supplies an example of a "broad" ICSID clause.

Unfortunately, an inventory of clauses known to the Secretariat shows that this example has not been followed in all cases.

In this connection, a matter of great practical significance has been raised in certain proceedings.

It is not rare, and indeed it is frequent, that investment agreements are concluded in stages over a more or less protracted period of time. In that case, several arrangements may be concluded, the sum of which constitutes the "agreement" between the parties. If for some reason an ICSID clause is stipulated in one agreement and the clause is not repeated, or expressly incorporated by reference, in the other agreements, it is not excluded that one of the parties may, at the time of a dispute, challenge the jurisdiction of an ICSID tribunal in regard to disputes concerning such other agreements.

Examples are found in: (i) *Holiday Inns et al. v. Morocco* (extensively discussed by Pierre Lalive, "The First 'World Bank' Arbitration (Holiday Inns v. Morocco—Some Legal Problems)", 51 *British Yearbook of International Law* 123 (1980)); (ii) *Klöckner et al. v. Cameroon* (summarized above); and (iii) a case which is *sub judice* before an ICSID tribunal.

The lesson for the careful draftsman is clear.

Under the Convention, consent once it is given cannot be unilaterally revoked. This principle has been acknowledged in the case of *Alcoa Minerals of Jamaica/Kaiser Bauxite Company/Reynolds Jamaica Mines and Reynolds Metals Company v. Jamaica*. In that case, agreements between mining companies and Jamaica provided for ICSID arbitration. Some years later, Jamaica notified ICSID that it intended to exclude from its consent disputes arising out of "an investment relating to mineral and other resources". It was held that this notification could not be given retrospective effect.

An ancillary consequence of this principle is that there is no immediate need to provide, as it is sometimes done in the context of commercial arbitration, that an ICSID arbitration clause will remain in force notwithstanding the termination of the contractual relationship. Nevertheless, the draftsman may wish to address this issue directly, as in this example:

"If, at any time during the duration of this Contract or thereafter, there shall be any difference or dispute with respect to the construction, meaning or effect of this contract or arising out of this contract or concerning the rights and obligations hereunder... either party shall have the right to refer the difference or dispute to [ICSID conciliation/arbitration]." (Underlining supplied—See Liberia, Model Contract of March 1982 for Offshore and

Onshore Operations (Section XXXI(A) in *Petroleum Legislation, South & Central Africa*, Supp. 70.)

Identifying the Parties

Identifying the Governmental Party

The ICSID Secretariat keeps current a list of States which have signed the Convention and of the States which have ratified it. A simple look at that list, followed if desired by a call upon the Secretariat to make certain that no change has occurred since the list was last released, will ensure proper identification.

The situation is more complex when the governmental party is a "constituent subdivision" or an "agency" of a Contracting State. These terms are not defined by the Convention and their precise connotation is left to further precision in the light of the constitutional or administrative framework of each Contracting State.

To that end, the Convention (Article 25(1)) provides that each Contracting State is free to designate to ICSID the particular public entities which it considers eligible to become parties to ICSID clauses and proceedings.

Making certain that the proper designation has been made is not enough because the Convention imposes a second requirement regarding the consent of the relevant entity to ICSID arbitration. The Convention requires that such consent be specifically approved by the Contracting State having designated the entity in question, unless that State notifies ICSID that no such approval is necessary (Convention, Article 25(3)).

As a practical matter, it is clear that an investor dealing with a public entity of a Contracting State should ascertain at the outset that the conditions set forth in the Convention are satisfied. Otherwise, the investor might find, at the time of filing a request for arbitration, that the request is not capable of registration by the Secretary-General. *Model Clause VI* supplies a possible solution to the problem.

The majority of clauses known to the Secretariat shows that the parties are careful to specify that the conditions set forth by the Convention are satisfied.

Identifying the Investor

According to the ICSID Convention, the investor must be a "national" of another Contracting State. The term "national" applies to both natural and juridical persons. However, for the purpose of this discussion, there is no need to dwell on the nationality of individuals since all the clauses known to the Secretariat or having been the object of ICSID proceedings have involved corporations.

Within the framework of the ICSID Convention, the nationality of a corporation is determined on the basis of its *siège social* or place of incorporation.

This principle is qualified in the sense that a juridical person incorporated in the host State can still be regarded as

the national of another Contracting State if "because of foreign control", the parties have agreed that it should be treated as such for the purposes of the Convention (Article 25(2)(b)).

This is an issue which arose in the case of *Holiday Inns et al. v. Morocco*. There, a Swiss and a U.S. corporation filed claims against the Government of Morocco not only on their own behalf, but also on behalf of subsidiaries incorporated in Morocco. The tribunal held that it had jurisdiction and that the principal claimants were entitled to be parties to the proceedings, but that the local subsidiaries of the claimants were not entitled to participate in the proceedings.

The tribunal stated that an agreement regarding the foreign nationality of a locally incorporated company should normally be explicit. Nevertheless, the tribunal acknowledged that an implicit agreement might be acceptable if it were supported by the circumstances of the case.

This solution was accepted in *AMCO Asia v. Indonesia* (summarized above). In that case, the tribunal also held that for the purpose of determining the "foreign control" of a local company, one should consider exclusively the nationality of the foreign interests controlling the company to the exclusion of other interests having control over the controlling party (see above).

Under the circumstances, careful identification of the investor in the relevant provision should be a matter of great concern to the draftsman.

Model Clause VIII is intended to supply a possible solution to this question.

The majority of clauses known to the Secretariat are well drafted and specific. However, there is no way of knowing whether this remark can be generalized. In fact, none of the clauses concerning the above-mentioned proceedings were known to the Secretariat before the proceedings were instituted. The same observation applies to the case of *MINE v. Guinea*, which is discussed in *News from ICSID No. 1*, Winter 1984, pp. 6-8.

Reference to the Notion of Investment

The Convention does not define the term "investment". This lack of definition, which was deliberate, has enabled the Convention to accommodate both traditional types of investment in the form of capital contributions and new types of investment, including service contracts and transfers of technology.

Both the disputes submitted to ICSID and the ICSID clauses known to the Secretariat bear testimony to this remark.

As examples of disputes concerning traditional types of investment, one might mention disputes arising out of agreements relating to (i) the exploitation of natural resources, such as bauxite mining (*Alcoa/Kaiser/Reynolds v. Jamaica*), oil exploitation and exploration (*AGIP v. Congo*;

Tesoro v. Trinidad and Tobago), forestry exploitation (*LETCO v. Liberia*); (ii) industrial investments regarding the production of fibers for exports (*Gardella v. Ivory Coast*), or of plastic bottles for domestic consumption (*Benvenuti & Bonfant v. Congo*), liquefaction of natural gas (*Guadalupe v. Nigeria*), and the production of aluminum (*ALUSUISSE v. Iceland*); (iii) tourism development in the form of the construction of hotels (*Holiday Inns v. Morocco*; *AMCO Asia v. Indonesia*); (iv) urban development in the form of housing construction (*SOABI v. Senegal*).

Disputes relating to modern types of investments include those concerning the construction of a chemical plant on a turn-key basis, coupled with a management contract providing technical assistance for the operation of the plant (*Klöckner v. Cameroon*), a management contract for the operation of a cotton mill (*Seditex v. Madagascar*), a contract for the conversion of vessels into fishing vessels and the training of crews (*Atlantic Triton v. Guinea*), and technical and licensing agreements for the manufacturing of weapons (*Colt Industries v. Korea*). In the same category, one might also mention a dispute, which is the only one brought by a State against an investor, relating to the breach of a contract for the construction of a maternity ward (*Gabon v. Serete*).

In addition to these concrete cases, it should also be noted that ICSID clauses in the archives of ICSID refer not only to investments in the classical sense but also to arrangements involving transfers of technology and know-how in such fields as industrial, agricultural or tourism development and in matters of electronics and air transportation. These new types of cooperation between investors and states ought to be borne in mind. They bear testimony to the adaptability of the ICSID Convention to a new investment climate.

Nevertheless, in view of the novelty of certain types of investment, the parties would be well advised to follow the suggestion made in the Model Clauses (Section 2, para. 7) that "in order to eliminate any ambiguity [the parties should] state expressly in the instrument recording their consent that the particular transaction between them constitutes an investment for the purposes of the Convention", and that they supplement the provision with a description of the particular features of the investment, such as its nature, size and duration.

In this connection, the Secretariat has recommended that private companies involved in important public works in certain Contracting States or in systematic transfers of technology contributing to the economic development of such States pay particular attention to the problem of definition. In cases of this type, it is suggested that the parties stipulate expressly in their agreement that the transaction's object is an investment within the meaning of Article 25 of the Convention. Another alternative might be for the private party to secure a statement from the

Host State that it considers the transaction involved as an investment and that in the event of a dispute the State would raise no objection to the jurisdiction of an ICSID arbitral tribunal on the ground that the nature of the dispute would not relate to an investment within the meaning of the Convention.

Conclusion

It is in the interest not only of the Secretariat, but also of the users of ICSID, to obtain information from both

Contracting States and investors regarding the practical use of ICSID clauses in investment agreements. It is realized that the parties to ICSID clauses may not wish to identify precisely individual agreements. Yet, it would be useful to obtain the text of ICSID clauses, even without names, and to know the type of agreement to which they relate. The building up of such a collection might significantly contribute to a better knowledge of how the Convention is resorted to in practice.

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