

# NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

Vol. 1, No. 1 Winter 1984



## Editorial

Some 18 years have passed since the creation of ICSID as an international organization concerned with the settlement of investment disputes between States and foreign investors. Still, little seems to be known to date in governmental and business circles alike, let alone the public at large, about ICSID's mandate and activities. This lack of information has kept resort to ICSID at a modest level in spite of its wide membership (85 States at present). **News from ICSID** will attempt to fill this gap by systematically providing basic data on the role which ICSID is playing and is able to play in the fulfillment of its ultimate objective of improving the investment climate, globally, and in developing countries, in particular.

*For developing countries*, ICSID provides certain major advantages: Once an investor agrees to submit a dispute with the host country to ICSID's arbitration, the government of that investor is barred from exercising its diplomatic protection until the award is given and the respondent state fails to comply with it. In addition, ICSID's conciliation and arbitration are relatively cost effective and not time-consuming. They are also undertaken under the auspices of an inter-governmental organization whose Secretariat is closely related to The World Bank, the premier development institution. The mere membership of ICSID, it should be noted, does not itself entail acceptance by the member state of the jurisdiction of ICSID's facilities.

*For the investors' home countries*, the availability of conflict resolution through ICSID's facilities helps in the depoliticization of investment disputes and provides their investors with the assurance of a fair hearing before highly qualified conciliators or arbitrators freely chosen by the parties to the dispute or selected from lists provided by the member governments themselves or from the short list prepared by ICSID's Chairman.

*Investors* should take comfort not only in the ready availability of this low-cost international mechanism for the settlement of potential disputes with their host governments, but also in the fact that by accepting resort to ICSID, the host country waives the requirement of the exhaustion of local remedies (unless it specifically provides otherwise). The



A. W. Clausen, Chairman, Administrative Council, President, World Bank



Ibrahim F.I. Shihata, new Secretary-General of ICSID, Vice President and General Counsel of the World Bank.

recognition of ICSID's awards is also ensured in all member countries.

With these advantages in mind, **News from ICSID** will periodically provide the information required by those who may need ICSID's services and will occasionally provide the Secretariat's views on ICSID's role in international conflict resolution, and, more generally, in the promotion of a healthy investment environment.

Ibrahim F.I. Shihata  
Secretary-General

## Membership

On August 4, 1983, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States was signed on behalf of Portugal by the Ambassador of Portugal in Washington, D.C. Portugal became the 89th State to sign the Convention. Other States that have signed, but not yet ratified the Convention, are Australia, Costa Rica, ~~El Salvador~~ and Ethiopia.

Barbados deposited its instrument of ratification at the seat of the Centre on November 1, 1983, while El Salvador did so on March 6, 1984. According to its Article 68(2), the Convention entered into force for Barbados on December 1, 1983, and for El Salvador it will enter into force on April 5, 1984. The number of Contracting States now stands at 85.

## Exclusion of Territories

Pursuant to Article 70 of the Convention, the United Kingdom of Great Britain and Northern Ireland, on depositing its instrument of ratification on December 19, 1966, excluded from its coverage, *inter alia*, the Isle of Man. By a notification received on November 17, 1983, the United Kingdom extended the application of the Convention to the Isle of Man as of November 1, 1983.

## Disputes Before the Centre

**Compliance with ICSID awards.** In the Spring of 1983, the Centre learned from Société Ltd. Benvenuti & Bonfant srl. that the Government of the People's Republic of the Congo had fully complied with the ICSID award rendered in a dispute between them. This information has now been confirmed in writing by a letter addressed by the Société to the Centre on August 4, 1983.

**New disputes.** Since the July 1983 Newsletter, the Secretary-General has registered one conciliation and three arbitration cases.

**Disputes pending before the Centre.** Of these disputes, the first five are Arbitration Proceedings. The last mentioned, Tesoro Petroleum Corporation v. The Government of Trinidad and Tobago, is a Conciliation Proceeding.

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

September 25, 1983 Tribunal issues Award on Jurisdiction.

December 19-23, 1983 Tribunal meets in Washington in the presence of the Parties.

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

July 18-23, 1983 Tribunal meets in Paris in the presence of the Parties.

July 23, 1983 The President of the Tribunal, in accordance with Arbitration Rule 38(1), declares the proceeding closed.

October 21, 1983 Tribunal renders Award. Attached to the Award is a dissenting opinion of one of the arbitrators.

February 16, 1984 The Secretary-General registers an application for annulment of the award under Article 52(1)(b)(d) and (e) of the Convention.

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

December 2, 1983 The Chairman of the Administrative Council appoints Mr. Aron Broches (Netherlands) as arbitrator and President of the Tribunal, in replacement of Professor Rudolf Bindschedler (Swiss) who has resigned.

January 21, 1984 Preliminary consultation between the Tribunal and the Parties in The Hague.

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

October 3, 1983

Claimants inform the Centre of agreement between the parties to suspend proceedings pursuant to Arbitration Rule 45.

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

November 15, 1983

The Tribunal is constituted. Its members are: Dr. Bernardo M. Cremades (Spanish), President appointed by the Chairman of the Administrative Council; Mr. Frank Church (U.S.), appointed by the Claimant; and Mr. D.A. Redfern (British), appointed by the Respondent.

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

January 19, 1984

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

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

February 21, 1984

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

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

August 26, 1983

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

January 6, 1984

Lord Wilberforce (British) accepts his appointment as sole conciliator selected by agreement of the parties.

## New Additions to Panel of Arbitrators

On February 1, 1984, the Secretariat received a notification from the Government of the Arab Republic of Egypt designating Dr. Ahmed Esmat Abdel Meguid; Mr. Mahmoud Fahmy; Dr. Mahmoud Samir El Sharkawy; and Dr. Ahmed El Kosheri to serve on the Panel of Arbitrators for a six-year term.

## Publications

In its last Newsletter, the Centre announced the forthcoming publication of two separate booklets, containing the Regulations and Rules for Conciliation Proceedings and Arbitration Proceedings, respectively, with relevant excerpts from the Administrative and Financial Regulations and from the Institution Rules, as contained in ICSID/4/Rev. 1, excluding the Notes. Both booklets are now available (in English only) and can be obtained free of charge from the Centre.

Since the last newsletter, several articles concerning ICSID have been published. They are listed below.

Delaume, Georges R. "L'Arbitrage CIRDI et le Banquier," *Banque*, No. 430, juillet-août 1983, 889-895.

———. "The ICSID and the Banker," *International Financial Law Review*, 9-13 (October 1983).

———. "ICSID Arbitration and the Courts," *77 American Journal of International Law* 784-803 (1983).

———. "Le CIRDI et l'Immunité des Etats," *Revue de l'Arbitrage* 143-161 (1983).

Kemby, Katherine H. Note, "Jurisdiction—Sovereign Immunity—U.S. Courts May not Assert Jurisdiction over Disputes Involving Agreements to Arbitrate under the Auspices of the International Centre for the Settlement of Investment Disputes if the Foreign Sovereign Immunities Act Bars Jurisdiction," *24 Virginia Journal of International Law* 217-233 (1983).

Ott, Regula. *Die Beilegung von Investitionstreitigkeiten durch Schiedsgerichte, Die Praxis von ICSID*, 265 pages (1983) (English summary, pp. 253-265).

## World Bank Hosts an ICSID, AAA, ICC Symposium

The Centre, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) co-sponsored an International Arbitration conference on the subject of resolving Commercial and Investment Disputes. The World Bank hosted the Conference, which took place on November 18, 1983, in Washington, D.C.

The morning session began with speeches summarizing the major features of each of the sponsoring institutions, their experience in the field of international arbitration, their contribution to the settlement of transnational disputes and their plans to meet new challenges. The speakers were: (i) for the Centre, Dr. Ibrahim F.I. Shihata, Secretary-General; (ii) for the ICC, Mr. John R. Stevenson, Vice-President of the ICC Court of Arbitration; and (iii) for the AAA, Mr. Robert Coulson, President of the AAA. Mr. Michel Gaudet, President of the ICC Court of Arbitration, was able to attend the Conference and to contribute additional remarks on the experience of the ICC.

The next speakers, Messrs. Michael F. Hoellering, General Counsel of the AAA, and Heribert Golsong, Adviser, International Affairs, Arent & Fox, Washington, D.C., discussed specific issues relating to international arbitration, such as those concerning the drafting of arbitration clauses, the locale of arbitration, the selection and appointment of arbitrators, the costs of arbitration and procedural matters.

Following a lunch at which Professor Don Wallace, Director, International Law Institute, Georgetown University, was the guest speaker, the afternoon session took the form of a

panel presentation and discussion. Mr. Sheldon Berens, Vice-President and General Counsel, Continental Grain Company, acted as Moderator. The Panelists were Messrs. Gerald Aksent, Reid & Priest; Andreas Lowenfeld, Professor, New York University Law School; Pierre Lalive, Professor, Geneva Law School, Counsel, Lalive and Budin, President, Swiss Arbitration Association; Robert von Mehren, Debevoise & Plimpton; Georges R. Delaume, Senior Legal Adviser, World Bank. The topics covered: the enforcement of international arbitration agreements, the law applied by international arbitrators, the conduct of international proceedings in a foreign country (role of arbitrators and counsel; problems of proof and evidence), the enforcement of awards under conventions and U.S. law and the concept of immunity in arbitration.

Mr. Norman Hinerfeld, Chairman of the Executive Committee, Kayser-Roth Corporation, presented the summary and conclusion of the Conference.

This one-day event was well attended by close to 100 participants representing legal, business and governmental circles.

This Conference is the first attempt made by the three sponsoring institutions to promote further understanding of the arbitration process. Encouraged by positive response, these institutions are planning to hold future joint conferences focusing on specific topics of common interest. The next conference is scheduled for the Fall of 1984.

It is not intended to publish the minutes of this Conference. However, its work has been recorded on cassette, which can be obtained from Condyne/The Oceana Group Publishers, Dobbs Ferry, New York 10522.

## ICSID as Designating Authority for Non-ICSID Arbitration

**Model Clause.** Newsletter No. 83-2, July 1983, noted that in a number of cases the Secretary-General has accepted to act as designating authority in *ad hoc* arbitration arrangements. These arrangements exhibit variations. In order to bring some uniformity in the provisions concerning the role of the Secretary-General as designating authority, the following model clause has been prepared.

It assumes that the parties have agreed upon submitting disputes to a tribunal composed of three arbitrators. The clause could be adapted to situations in which the parties would wish to provide for the appointment of a sole arbitrator or for that of a tribunal including more than three arbitrators.

*If any of the arbitrators shall not have been appointed within [state the time limit], either party may request in writing the Secretary-General of the International Centre for Settlement of Investment Disputes to appoint the arbitrator or arbitrators not yet appointed [and to designate an arbitrator to be the president of*



*the arbitral tribunal]. The Secretary-General shall forthwith send a copy of that request to the other party.*

*The Secretary-General shall comply with the request within 30 days after its receipt [or such longer period as the parties may agree].*

*The Secretary-General shall promptly notify the parties of any appointment [or designation] made by him.*

*[Arbitrators appointed by the Secretary-General shall be chosen from a country other than those of which the parties are nationals].*

**Cases.** There have been two cases in the past seven months for which the Secretary-General has acted either as the designating or appointing authority.

1. Since the July Newsletter, the Secretary-General has acted as designating authority on the occasion of a dispute between a contractor, national of a Contracting State and the Government of another Contracting State.

2. In January 1984, the Secretary-General was informed that the Province of British Columbia and the City of Seattle intended to conclude an agreement affecting dams on the Skagit and Pend Oreille Rivers near the international boundary between Canada and the United States, and providing for the delivery by the Province to the City of hydroelectric power.

Final editorial changes are being made in the agreement as well as in a draft treaty between the United States and Canada which will formalize the agreement.

The agreement provides for the settlement of disputes by an arbitral tribunal composed of three arbitrators and designates the Secretary-General of ICSID as the appointing authority in the event that one party does not appoint an arbitrator or that the two arbitrators appointed by the parties cannot agree on the choice of the presiding arbitrator.

On January 20, 1984, the Secretary-General accepted to serve as appointing authority.

## Additional Facility

The subject of the Additional Facility was placed on the agenda of the Administrative Council at its 17th annual meeting held in Washington, D.C. on September 29, 1983. The Council resolved to continue the Additional Facility until its next annual meeting in 1984, when it will decide whether to continue it or to terminate it for the future.

## Investment Promotion Treaties

**Equatorial Guinea and France** (Agreement on the Reciprocal Encouragement and Protection of Investments, signed March 3, 1983; not yet ratified):

*Article 8. Tout différend relatif aux investissements entre l'une des Parties contractantes et un national ou*

*une société de l'autre Partie contractante est autant que possible réglé à l'amiable entre les deux parties concernées.*

*Si un tel différend n'a pas pu être réglé dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des parties au différend, il est soumis à la demande de l'une ou l'autre de ces parties à l'arbitrage du Centre International pour le Règlement des Différends relatifs aux Investissements (C.I.R.D.I.) créé par la Convention pour le règlement des différends relatifs aux investissements entre états et ressortissants d'autres Etats signée à Washington le 18 mars 1965.*

*Article 9. Si l'une des Parties contractantes, en vertu d'une garantie donnée pour un investissement réalisé sur le territoire de l'autre Partie, effectue des versements à l'un de ses nationaux ou à l'une de ses sociétés, elle est, de ce fait, subrogée dans les droits et actions de ce national ou de cette société.*

*Les dits versements n'affectent pas les droits du bénéficiaire de la garantie à recourir au C.I.R.D.I. ou à poursuivre les actions introduites devant lui jusqu'à l'aboutissement de la procédure.*

**Santa Lucia and United Kingdom** (Agreement for the Promotion and Protection of Investments, signed and entered into force on January 18, 1983):

*Article 8. Settlement of Disputes between an Investor and a Host State.*

*(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall after a period of three months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*

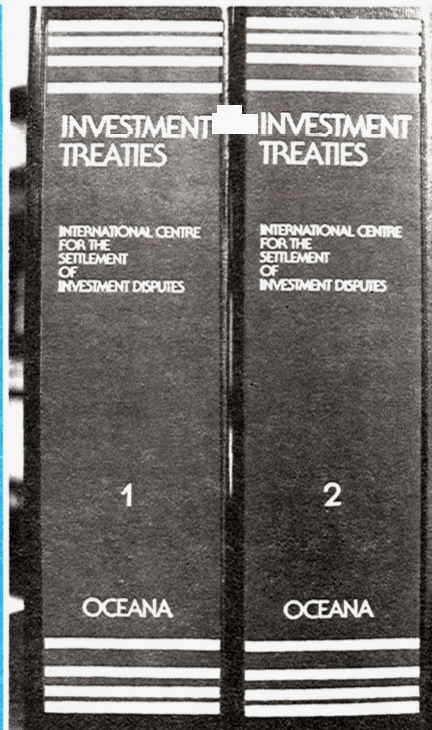
*(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:*

*(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, D.C. on 18 March, 1965, and the Additional Facility for the Administration of Conciliation, Arbitration and Fact Finding Proceedings);...*

**People's Republic of China and Federal Republic of Germany** (Agreement for the Promotion and Reciprocal Protection of Investments, signed October 7, 1983; not yet ratified). Article 4 of this Agreement provides that:

*(1) Investments of investors of one Contracting*

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Party shall enjoy protection and security in the territory of the other Contracting Party. Investments of investors of one Contracting Party may be expropriated in the territory of the other Contracting Party only if this is in the public interest, by process of law and against compensation. Compensation shall be made without undue delay and shall be effectively realisable and freely transferable.

(2) Investors of the one Contracting Party and joint companies in which investors of the one Contracting Party have holdings whose investments in the territory of the other Contracting Party sustain losses owing to war, other armed conflict, a state of national emergency or other similar events, shall not be discriminated against by the latter Contracting Party with regard to any measures taken in this connection.

(3) Investors of one Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party with regard to the eventualities laid down in this Article.

Paragraph 4 of a Protocol annexed to this Agreement reads as follows:

(a) "Expropriation" within the meaning of Article 4(1) includes nationalisation and other measures having effect equivalent to expropriation or nationalisation.

(b) Should the expropriation, within the meaning of Article 4(1), not accord with, in the opinion of the investor, the law of the Contracting Party making the expropriation, the legality of the expropriation shall,

at the investor's request, be reviewed by the competent courts of the Contracting Party making the expropriation.

(c) "Compensation" within the meaning of Article 4(1) shall amount to the value of the investment expropriated immediately before the expropriation became public knowledge. The investor and the other Contracting Party shall carry out consultations to determine this value.

If agreement has not been reached within six months from the date consultations started, the level of compensation shall be reviewed at the investor's request either by the competent courts of the Contracting Party making the expropriation or by an international arbitral tribunal.

(d) The international arbitral tribunal mentioned in paragraph (c) shall be constituted for each individual case in the following way. Each side shall appoint one member, and those two members shall then select a national of a third State with whom both Contracting Parties have diplomatic relations. The members shall be appointed within two months, the chairman within three months, from the date on which one side informs the other that it wishes to submit the dispute to an arbitral tribunal.

If, within the periods specified in paragraph 1, the necessary appointments have not been made, either side may, in the absence of any other agreement, invite the President of the International Court of Arbitration at the Chamber of Commerce in Stockholm to make any necessary appointments.

The Court shall determine its own procedure under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965. Decision shall be by a majority of votes; the decision shall be final and binding; it shall be enforced under national law. The decision shall state the principles on which it is based; the grounds for the decision shall be given at the request of either side.

Each side shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by both sides.

(e) In those situations provided for in Article 4(2) it shall be ensured as far as possible that those activities connected with the investments can be continued.

**Senegal and the U.S.** (Treaty concerning the Reciprocal Encouragement of Investment, signed December 6, 1983; not yet ratified).

Article VII of the Treaty (Settlement of Investment Disputes between One Party and a National or Company of the Other



Party) provides that:

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 the competent authority of a Party to such a 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. They 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 it shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which the parties have previously agreed. In the case of 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 treaties and other international agreements regarding enforcement of arbitral awards to which such Party has subscribed.

3. (a) Each Party hereby consents to the submission of any dispute between such Party and a national or company of the other Party to the Centre for settlement by conciliation or binding arbitration if, at any time after six months from the date upon which the dispute arose:

(i) the dispute has not, for any reason, been submitted for settlement 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 other competent tribunals of the Party that is a party to the dispute.

If the national or company concerned consents in writing to the submission of the dispute to the Centre

in the circumstances set forth above, either party to the dispute may institute proceedings before the Centre by addressing a request to this effect to the Secretariat of the Centre following the required procedures of Articles 28 and 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington, March 18, 1965, ("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) 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.

4. A Party that is party to an investment dispute may not, at any stage of an arbitration or other dispute-settlement procedure, raise as a defense the fact that the national or company that is the other party to the dispute has received or will receive, pursuant to an insurance contract, indemnification for all or part of its damages.

5. For the purposes of this Article, a company that is constituted or created by virtue of the law in force in the jurisdiction of one of the Parties but that, before the dispute arose, 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 and the Courts

The first Newsletter referred to Maritime International Nominees Establishment (MINE) v. Republic of Guinea (505 F. Supp. 141 (D.D.C. 1981), reprinted 20 *International Legal Materials* 669 (1981), 693 F. 2d (D.C. Cir. 1982), reprinted in 21 *International Legal Materials* 135 (1982) and 22 *International Legal Materials* 86 (1983). A petition for a writ of certiorari has now been denied by the Supreme Court of the



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United States, 104 S. Ct. 71 (1983).

This case is discussed extensively in an article by Georges R. Delaume, entitled "ICSID Arbitration and the Courts," 77 *American Journal of International Law* 784 (1983). It is also the object of a Note by Ms. Kemby in 24 Va. J. Int'l L. 218 (1983).

This case raises an issue of crucial importance for the proper implementation of the Convention, namely that of the restraint that courts in Contracting States must observe in the event that a claim is brought before them in disregard of an ICSID arbitration clause.

In this connection, it should be recalled that under the Convention (Article 26), ICSID arbitration is exclusive of any other remedy. The rationale for this rule is twofold.

The Convention gives investors direct access to an international forum and assures them that, once a Contracting State has consented to ICSID arbitration, the refusal or abstention of the State party to a dispute to participate in the proceedings cannot prevent the institution, conduct and conclusion of the proceedings, and the recognition and enforcement of an ICSID award.

In exchange, the Convention protects Contracting States from other forms of foreign or international litigation. Because consent to ICSID arbitration is equally binding upon the investor as it is on the State party to the dispute, that State is assured that the investor cannot bring action in a non-ICSID jurisdiction, whether in the investor's own State or somewhere else. In other words, both parties must respect the exclusive character of ICSID remedies.

In order to give effect to this rule, which is intended to maintain the careful balance between the interests of investors and Contracting States that is the paramount objective of the Convention, courts in Contracting States, if they are seized of an action, which, on the face of the facts of the case, should fall within ICSID remedies, must stay the proceedings and refer the parties to ICSID to seek a jurisdictional ruling from ICSID. Such a ruling may be made at the time of registration of the request by the Secretary-General (Convention, Article 36(3) or subsequently by an ICSID tribunal, which is sole judge of its own competence (Convention, Article 41(1)). Once ICSID makes its determination, either the case will remain within ICSID exclusive arbitration procedure or, if ICSID finds that the case does not satisfy the requirements of the Convention, the case may be considered by the domestic court involved, assuming that it has an independent basis for entertaining jurisdiction over the parties or the subject matter of the dispute.

In other words, if an action is brought in the courts of a Contracting State contrary to an alleged ICSID arbitration clause, the court in which action is brought is under an obligation to abstain from entertaining the action unless and until ICSID has determined that it has no jurisdiction.

This rule of abstention is essential to the proper implementation of the Convention. If a court in a Contracting State failed to observe the rule, its own State might be exposed to international claims brought by the Contracting State party to the dispute or

whose national is a party to the dispute (Article 64 of the Convention).

These are considerations which were brought to the attention of the U.S. Court of Appeals for the District of Columbia Circuit by the United States Government.

The Court of Appeals decided the case on another basis, namely the U.S. Foreign Sovereign Immunities Act (FSIA). The Court was of the opinion that, although consent to arbitration might constitute a waiver of immunity under the FSIA, no such waiver could be inferred from a consent to ICSID arbitration because U.S. Courts were "powerless to compel ICSID arbitration." Under the circumstances, the Court held that by consenting to ICSID arbitration, Guinea had not waived its immunity for the purposes of the FSIA and that the Court should decline jurisdiction.

This decision reaches the right result, but is based on considerations found in the domestic law of the forum, i.e., the FSIA. It should have been based instead on grounds consistent with the purposes of the Convention and the exclusive character of ICSID arbitration.

For the future guidance of courts in Contracting States, it may be worth illustrating the type of situations in which they would observe the rule of abstention:

(a) *Consent to ICSID Arbitration.* Article 25 of the Convention merely states that consent must be "in writing"; it does not specify the type of instrument in which consent may be expressed.

In most cases, consent takes the form of an ICSID arbitration clause in an investment agreement. However, consent does not have to be recorded in a single instrument and can be expressed in an exchange of letters or other documents. Consent may also result from a unilateral offer by one of the parties subsequently accepted by the other party. Examples are found in domestic investment laws and in investment protection treaties concluded by Contracting States. In such cases, the State involved may agree in advance to submit investment disputes to ICSID arbitration, and "consent" becomes binding when the investor indicates that he also agrees to this method of settlement. The investor's acceptance of the offer may be recorded either at the time of the investment or subsequently, including at the limit, when the investor submits a request for arbitration to ICSID.

In view of these various alternatives and of the need to ensure consistent implementation of the Convention (and particularly in regard to investment laws and treaties, and uniform interpretation of their provisions, it is clear that only ICSID, and not domestic courts, can make the necessary determination.

(b) *Nationality of the Investor.* Under Article 25 of the Convention, only disputes between a Contracting State (or under certain conditions, one of its subdivisions or agencies) and a "national" of another Contracting State may be submitted to ICSID arbitration. The term "national" applies to both physical and juridical persons. So far, the nationality of physical person has raised no difficulty. The situation may be otherwise in the case of juridical persons. It is generally agreed that for the purposes of the Convention, the nationality of a juridical person



is determined on the basis of its place of incorporation (*siège social*). An exception to this general rule is made in respect of corporations incorporated in the Contracting State party to a dispute, when the State in question agrees to treat such a corporation as a national of another Contracting State because it is under the "foreign control" of nationals of that State. Cases submitted to ICSID tribunals show that this determination is not always exempt from difficulty. That it should be made exclusively by ICSID is not questionable.

*MINE v. Guinea* offers a typical example of the reason why that determination cannot be surrendered to domestic courts. During the proceedings, MINE had raised a novel question. MINE is a Liechtenstein corporation. Liechtenstein is not a Contracting State. Therefore, the basic condition set forth in the Convention would have been lacking, were it not for the fact that in the ICSID arbitration clause the parties had agreed to treat MINE as a "Swiss" company, Switzerland being a Contracting State.

During the proceedings, MINE argued that this characterization was invalid because it applied not to a corporation incorporated in a Contracting State, but in a third country. Guinea countered that, consent being the paramount feature of the Convention, the parties to an ICSID clause were free to determine the nationality of the investor as they deemed appropriate in the light of the surrounding circumstances.

The question is a difficult one. To be sure, most of the discussions relating to the successive drafts of the Convention focused primarily on the case of corporations incorporated in the host State, yet under foreign control. Nevertheless, the history of the Convention shows that the discussions covered a much broader range of topics, and that the general feeling was that, since consent is the cornerstone of the Convention, each Contracting State, at the time it agreed to ICSID arbitration, should be free to determine to its satisfaction whether it was willing to treat a particular corporation as the "national" of another Contracting State, regardless of the place of incorporation of the entity involved.

Whether this issue will be submitted to ICSID in the context of possible proceedings between MINE and Guinea is unknown at this time. All that can be said is that the complexity of the issue and its significance for the interpretation and application of the Convention place the final determination clearly beyond the cognizance of domestic courts.

(c) *The notion of investment.* Neither the history of the Convention nor Article 25(1) of the Convention supplies a precise definition of "investment."

The Convention was drafted at a time when most investments took the form of direct investments in capital. Since then, new forms of association between States and foreign investors have appeared, such as profit-sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing arrangements and agreements for the transfer of know-how and of technology. ICSID arbitration clauses in current use refer to these modern types of transactions.

However, it must be acknowledged that, particularly in regard to transactions relating to the supply of services, the exact nature of the transaction is not always apparent at the outset. Marginal cases falling between investments proper and commercial ventures are not rare and may fit in either category.

For these reasons, the ICSID Secretariat has, over the years, consistently reminded the parties to ICSID clauses of the importance of stating in the instrument recording their consent that the particular transaction between them is an investment for the purposes of the Convention and of supplementing such a statement with a description of the salient features of the transaction, such as those concerning its nature, size and duration.

At the same time, the Secretariat has been careful to recall that the definition agreed by the parties is not binding on the Secretary-General or an ICSID tribunal, whose prerogatives at the time of registration of a request or of ruling upon the competence of the tribunal must remain unimpaired. This admonition is directly addressed to the parties. It should be equally relevant in the event of litigation in the courts of a Contracting State.

In final analysis, it must be emphasized that, under the Convention, the sole role assigned to domestic courts is one of support for, not interference with, the self-contained machinery provided for in the Convention. That role is limited to expediting the recognition and enforcement of ICSID arbitral awards, in accordance with the simple and effective procedure set forth in Article 54 of the Convention, i.e., upon simple submission to the relevant court of a copy of the award certified by the Secretary-General.

An illustration of the effectiveness of this procedure (the only one so far) is found in the judgment of the Court of Appeal of Paris of June 26, 1981, in the case of *S.A.R.L. Benvenuti & Bonfant v. Gouvernement de la République Populaire du Congo*, 107 *Journal du Droit International* 1981, 843, reproduced in English translation 20 *International Legal Materials* 878 (1981), which is also discussed in Mr. Delaume's article. As noted above under the heading "Disputes before the Centre," recognition of the award was followed by compliance with it.

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