NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

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China Ratifies the ICSID Convention

On January 7, 1993, the People's Republic of China deposited its instrument of ratification of the ICSID Convention. In accordance with its Article 68(2), the Convention entered into force for China on February 6, 1993, bringing the total number of Contracting States to 107.

Article 25(4) of the Convention provides that any Contracting State may on or after ratifying the Convention notify ICSID of the class or classes of disputes which the State would or would not consider submitting to the jurisdiction of the Centre. On ratifying the Convention, China notified ICSID "that, pursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization."

Legal Framework for the Treatment of Foreign Investment

In April 1991, the Joint Ministerial Development Committee of the Boards of Governors of the World Bank and IMF requested a report on "an overall legal framework which would embody the essential legal principles so as to promote FDI [foreign direct investment]." As reported in the Summer 1992 issue of *News from ICSID*, preparation of the requested report was entrusted by the President of the World Bank to a working group chaired by the Vice President and General Counsel of the Bank and Secretary-General of ICSID, Mr. Ibrahim F.I. Shihata, and consisting also of the General Counsel of the International Finance Corporation, Mr. José E. Camacho, and the General Counsel of the Multilateral Investment Guarantee Agency, Mr. Luis Dodero. Mr. Daoud L. Khairallah, Deputy General Counsel of the International Finance Corporation, often participated on behalf of Mr. Camacho.

In a progress report submitted to the April 1992 meeting of the Development Committee, it was explained that the working group would be carrying out its task by developing a set of "Guidelines on the Treatment of Foreign Direct Investment." These Guidelines were to be based on trends identified in surveys of existing legal instruments and were also to incorporate policies that the World Bank Group institutions have been advocating in recent years. After extensive consultation, the Guidelines were submitted to the Development Committee. At its meeting on September 21, 1992, the Committee issued the Guidelines and called them to the attention of member countries.

The Guidelines were discussed by Mr. Shihata on April 7, 1993 at the Annual Session in New York of the U.N. Commission on Transnational Corporations. Mr. Shihata's remarks are reprinted at page 4 of this issue.

Twenty-Sixth Annual Meeting of the Administrative Council

The Administrative Council of ICSID held its Twenty-Sixth Annual Meeting in conjunction with the Annual Meetings of the Boards of Governors of the other World Bank Group organizations and the International Monetary Fund in Washington, D.C. on September 22–24, 1992.

At its Meeting, the Council considered a report of the Secretary-General on recent developments and approved the Centre's 1992 Annual Report and the budget for ICSID's 1993 financial year. The 1992 Annual Report as thus approved is available from the Centre on request.

Features:

Disputes Before the Centre

- **Amco v. Indonesia (Case ARB/81/1)**

November 13-16, 1992
The Committee meets in San Francisco and declares the proceeding closed in accordance with Arbitration Rule 38(1).

December 17, 1992
The Decision of the ad hoc Committee is rendered. The Decision rejects the parties' applications for annulment of the Award of June 5, 1990 and annuls the October 17, 1990 Decision on Supplemental Decisions and Rectification of the Award.

- **S.P.P. (Middle East) Ltd. v. Arab Republic of Egypt (Case ARB/84/3)**

September 11, 1992
The Committee meets with the parties in Paris on matters of procedure.

September 29, 1992
The Committee issues a procedural order on the request for stay of enforcement of the Award.

December 11, 1992
The parties inform the Centre and the Committee that they have settled the dispute and request the issuance of an Order taking note of the discontinuance of the proceeding under Arbitration Rule 43(1).

March 9, 1993
The Order of the Committee taking note of the discontinuance of the proceeding is notified to the parties.

- **Société d'Etudes de Travaux et de Gestion SETIMEG S.A. v. Republic of Gabon (Case ARB/87/1)**

November 5, 1992
The parties inform the Tribunal that they have settled the dispute and request it to issue an Order taking note of the discontinuance of the proceeding under Arbitration Rule 43(1).

January 21, 1993
The Order of the Tribunal taking note of the discontinuance of the proceeding is notified to the parties.

- **Manufacturers Hanover Trust Company v. Arab Republic of Egypt and the General Authority for Investment and Free Zones (Case ARB/89/1)**

March 29, 1993
The Claimant notifies the Centre of the formal termination of the related court proceedings in Egypt.

- **Vacuum Salt Products Ltd. v. Government of the Republic of Ghana (Case ARB/92/1)**

October 15, 1992
The Tribunal is constituted. Its members are: Sir Robert Jennings (British), President, appointed by the two party-appointed arbitrators; Mr. Charles N. Brower (U.S.), appointed by the Claimant; and Dr. Kamal Hossain (Bangladeshi), appointed by the Respondent.

October 22, 1992
The Claimant submits a request for provisional measures.

November 27, 1992
The Respondent submits its observations on the request for provisional measures and raises objections to jurisdiction.

December 1–3, 1993
The Tribunal meets with the parties in The Hague and issues two procedural orders.

December 24, 1992
The Claimant files observations on jurisdiction.

January 7, 1993
The Respondent files observations on jurisdiction.

February 1–March 12, 1993
The parties file supplementary observations on jurisdiction and other issues.

- **Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation (Case ARB/92/2)**

November 3, 1992
The Secretary-General registers a request for the institution of arbitration proceedings.

February 16, 1993
The Tribunal is constituted. Its members are: Mr. Keith Highet (U.S.), President, appointed by the two party-appointed arbitrators; Mr. Edward C. Chiasson (Canadian), appointed by the Claimant; and Prof. Ian Brownlie (British), appointed by the Respondent.

- **American Manufacturing & Trading Corporation (Zaire), Inc. v. Republic of Zaire (Case ARB/93/1)**

February 2, 1993
The Secretary-General registers a request for the institution of arbitration proceedings.

Recent Designations to the ICSID Panels of Conciliators and of Arbitrators

CHAIRMAN'S LIST

Panel of Arbitrators—designation effective October 4, 1992:

Mr. Aron Broches (re-appointment).

DENMARK

Panels of Conciliators and of Arbitrators—designations effective September 1, 1992:

Messrs. Frank Poulsen, Per Magid, Isi Foighel (reappointments) and Mr. Peer Lorenzen.

ECUADOR

Panel of Conciliators—designations effective August 26, 1992:

Dr. Fabian Corral Burbano, Dr. Francisco Diaz Garaicoa, Dr. Galo Leoro Franco (reappointments) and Dr. Juan Paez Teran.

Panel of Arbitrators—designations effective August 26, 1992:

Dr. Julio Corral Borrero, Dr. Alejandro Ponce Martinez, Dr. Alfonso Trujillo Bustamente (reappointments) and Dr. Patricio Peña Romero.

SINGAPORE

Panels of Conciliators and of Arbitrators—designations effective October 1, 1992:

Mrs. Sook Yee Tan (re-appointment) and Judge Warren Khoo.

SRI LANKA

Panel of Arbitrators—designations effective January 4, 1993:

Hon. Justice Asoka de Z. Gunawardana and Mr. Balakumara Mahadeva.

A complete list of members of the Panels is contained in Document ICSID/10.

ICSID Concludes Agreements with Australia's Commercial Disputes Centre and Centre for International Commercial Arbitration

Under the ICSID Convention, ICSID conciliation and arbitration proceedings need not be held at the Centre's headquarters in Washington, D.C. In practice, the proceedings may be held at any other place agreed by the parties. Article 63(a) of the ICSID Convention facilitates advance stipulations for such other venues when the place chosen is the seat of another appropriate institution with which ICSID has concluded arrangements for the purpose.

ICSID has recently entered into arrangements of this type with the Australian Commercial Disputes Centre, based in Sydney, and the Australian Centre for International Commercial Arbitration, based in Melbourne.

ICSID had previously concluded similar arrangements with the Permanent Court of Arbitration at The Hague and with the Asian African Legal Consultative Committee's Regional Centres for Commercial Arbitration at Cairo and Kuala Lumpur.

References to ICSID in the North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) was signed on December 17, 1992 by the Prime Minister of Canada and the Presidents of Mexico and the United States. According to its Article 2203, the NAFTA will enter into force on January 1, 1994, on an exchange of written notifications certifying the completion of ratification procedures.

References to ICSID appear in the provisions on the "Settlement of Disputes Between a Party and an Investor of Another Party" in the Investment Chapter of the NAFTA. These provisions are described in the remarks on "ICSID and New Trends in International Dispute Settlement" reprinted at page 7 of this issue.

The World Bank Group's New "Guidelines on the Treatment of Foreign Direct Investment"

by Ibrahim F.I. Shihata, Vice President and General Counsel, World Bank, and Secretay-General, ICSID

a paper presented at the Annual Session of the U.N. Commission on Transnational Corporations held in New York on April 5–15, 1993

Thank you for giving me this opportunity to brief the Commission on Transnational Corporations on the World Bank Group's new Guidelines on the Treatment of Foreign Direct Investment. Before describing the Guidelines themselves, I would like to discuss why and how the Guidelines were drawn up and their relationship to the efforts of the U.N. to develop a code of conduct for transnational corporations.

The work on what became the Guidelines was requested in April 1991 by the Development Committee which is a joint Ministerial Committee of the Boards of Governors of the World Bank and the International Monetary Fund in which all members are represented (a few individually and many through constituencies). The promotion of foreign direct investment or FDI through the adoption of universally acceptable standards for the treatment of such investment by their host States then seemed to be particularly timely, in view of the growing importance of FDI to a large number of developing countries and former socialist countries. Previous attempts had of course been made in multilateral fora to create a set of such universal standards but the Guidelines are the product of the first such exercise to have been successfully completed in a global, intergovernmental forum.

In the words of the April 1991 request of the Development Committee, our task was to provide "an overall legal framework" embodying "the essential principles so as to promote FDI." The wording of this request did not hide the dilemma which was to face those who attempted to answer it. On the one hand a legal framework was required, but the essential principles of such a framework should be such as to serve the objective of promoting FDI. An attempt by the World Bank simply to codify generally agreed principles of customary international law in this area in the form of a draft convention to be opened for signature by interested countries would have hardly served the objective of this exercise. While States may be perfectly prepared to provide for certain standards in the treatment of foreign investment in their domestic legislation, or in bilateral or even regional treaties, they show great reluctance to accept the codification of the same or similar standards in universal conventions. An attempt to seek consensus on an appropriate, legally binding framework in an organization of universal membership, if it worked at all, would most likely have encouraged "lowest common denominator," minimalist solutions, which, of course, would have been incompatible with the objective mentioned in the Development Committee's request.

We therefore decided instead to prepare a set of guidelines setting forth standards which should aim not only at being broadly acceptable but also desirable from the viewpoint of attracting foreign investment. To achieve these qualities, the Guidelines were based, on the one hand, on general trends distilled from detailed surveys of treaties, laws, arbitral awards and other existing legal instruments and, on the other hand, on the practices and policies identified by the World Bank Group as being conducive to the evolution of an attractive investment environment. In this sense, the Guidelines do not claim to be merely codifying accepted rules of international law but aim also at progressively developing such rules. Their drafting attempts however to distinguish between what could be considered as generally acceptable standards of legal treatment and what are clearly recommendations of desirable practices. The prior preparation of comprehensive surveys of existing instruments and of general trends based on them has, as intended, greatly facilitated both the drafting of the Guidelines and their subsequent acceptance.

These approaches were developed in a small working group consisting of the three General Counsel of the World Bank, IFC and MIGA. I had the honor to serve as chairman of that group and, more importantly, to write the first draft of the Guidelines, a task in which I benefitted from the above-mentioned surveys and from the services of the ICSID Secretariat.

Following their preparation, the draft Guidelines were extensively discussed with colleagues at the different World Bank Group institutions, with other international organizations and with business groups and international law associations and were also subject to lively discussion in two successive meetings of our Executive Directors in May and July 1992. Some developed country governments also sent detailed comments. In light of these discussions and comments a number of changes were introduced into the Guidelines which may have tilted them further in favor of attracting foreign investment but also resulted in the addition of provisions regarding measures to be taken by the home States of the investors. The Guidelines were then issued by the Development Committee at its September 1992 meeting, without dissent or abstention by any member. In so

doing, the Committee "called [the Guidelines] to the attention of member countries" and noted that they should "serve as an important step in the progressive development of international practice in this area."

Among the organizations that we consulted in preparing the Guidelines the U.N., in particular the staff engaged in the work on the code of conduct on transnational corporations, was in the forefront. From the outset, we carefully avoided including in the Guidelines rules of good conduct on the part of foreign investors. This ensured that we would not be duplicating the work of UNCTC. It was also hoped that, by tackling the controversial "treatment" matters, the Guidelines could ease the way for the issuance by the U.N. of the code of conduct on TNCs which we knew was virtually complete in draft form. On the other hand, the Guidelines do not ignore the importance of questions related to the conduct of investors. To the contrary, the entire Guidelines are stated as applying only to "investments established and operating at all times as bona fide private foreign investments, in full conformity with the laws and regulations of the host State." In addition, another provision of the Guidelines emphasizes the role of states in preventing and controlling corrupt business practices.

To give you a complete, but necessarily brief picture, let me now describe the Guidelines as a whole. The document consists of five main guidelines, the details of which are formulated in a normative form or, occasionally, in the form of policy advice, depending on their substance and the degree to which they may be reconcilable with general principles of contemporary international law.

The *first guideline* defines the *scope of coverage* in very broad terms and emphasizes that the intention is not to give foreign investors a privileged treatment, but rather to establish a favorable legal treatment for all investors and to accord a different treatment to foreign investors only where this is reasonably justified by the circumstances (such as in the requirement related to the free transfer of profits and compensation).

The *second guideline* deals with the question of the *admission* or entry of foreign investments into host States. It reflects a liberal and progressive approach adopted by the Guidelines as a whole and calls upon States to encourage and facilitate foreign investments. This guideline acknowledges the fact that all governments can and do impose restrictions on the admission of such investments. At the same time, however, it cautions against overregulation and recommends a policy of open admission. In particular, the guideline discourages approaches based on "screening," where all or most proposed investments are subjected to scrutiny and/or licensing. It suggests instead that States follow open admission, possibly subject to a limited restricted or "negative" list, an approach employed in some recent bilateral investment treaties and national investment codes. The guideline further states that any restrictions on the admission of foreign investments (such as those based on national security considerations) be exceptional, clearly defined and sparingly applied. In keeping with its emphasis on openness, the second guideline concludes with a recommendation that each State publish and regularly update easily accessible information about its rules and policies on foreign investments.

The *third guideline* covers both the general standards of treatment to be accorded to foreign investors by their host States and particular aspects of such treatment, notably the transfer of investment capital, returns and other sums. As for *general standards of treatment*, the guideline, in common with bilateral and multilateral investment treaties, calls for national treatment of foreign investors provided it is fair and equitable; for full protection and security to be accorded to their persons and property rights; and for nondiscrimination among foreign investors on the basis of their nationality. Specific matters dealt with in these respects include the prompt issuance of any authorizations required for the operation of the investment and the need for labor flexibility, especially the freedom to employ top managers irrespective of their nationality. With respect to currency *transfers*, the third guideline suggests that States permit transfers not only of investment capital and returns but also of such other sums as expatriate salary savings and amounts required to service debt or meet other investment obligations. The guideline recognizes that foreign exchange shortages may, in exceptional situations, compel States to defer transfers. In so doing, however, the guideline states that any such delays will be as short as possible and will not exceed five years and that normal interest be applied to the deferred payments. This pragmatic approach has been found by certain investors to be more useful than an absolute dogma which cannot uniformly be honored in practice in all cases.

The *fourth guideline* deals with *expropriation*. It provides that States may not expropriate foreign investments except in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality, and against the payment of appropriate compensation. While there is general agreement on these principles, the issue of what constitutes appropriate compensation has proved in the past to be the source of much controversy. The fourth guideline tackles this issue in a way that is both innovative and practical. In brief, the guideline, as a general principle, equates appropriate compensation to compensation that is adequate, effective and prompt. As you know, this is the general standard originally enunciated in the U.S. Hull doctrine and defended by the U.S. and other industrial governments but disputed by many others. However, going beyond the general standard, the guideline offers practical details for the implementation of these requirements in which serious attempts were made to ensure fairness, not only to investors, but also to their host countries. The guideline highlights in detail several different valuation methodologies under which the adequacy of compensation may be objectively and properly determined depending on whether the expropriated property was a going concern with a proven record of profitability, an enterprise which was not a going concern or other assets. It also provides guidance on the "effectiveness" of compensation for expropriation and provides that payment of such compensation will be deemed to be prompt if paid without delay. To the extent that objective circumstances of established foreign exchange stringencies make immediate, full payment impractical, the guideline again allows payment over a period not to exceed five years and requires that market related interest payable in a convertible currency apply to the deferred payments. In case of comprehensive nondiscriminatory nationalizations effected in the process of large scale social reforms under exceptional circumstances of revolution, war and similar exigencies, compensation, according to the guideline, would be determined through negotiation and, failing this, through international arbitration. Through its provision of detailed objective standards, many of them gleaned from international case law, the guideline may assist in dispelling much of the remaining controversy that has surrounded the issue of compensation and could therefore contribute to the avoidance of future disputes.

As investment disputes may nevertheless arise, the *fifth and final guideline* is devoted to *dispute settlement* procedures. It emphasizes the desirability of negotiated settlements and provides that failing such amicable settlements, disputes will be resolved through national courts or through such agreed mechanisms as conciliation and binding arbitration. The remainder of this brief guideline is devoted to arbitration. In this respect, the guideline emphasizes the importance of the independence and impartiality of arbitrators. It also encourages recourse to ICSID, which, as you know, is the international arbitration and conciliation facility established under the auspices of the World Bank as an independent institution specialized in the resolution of disputes between States and foreign investors.

The adopted standards have been issued by the Development Committee and may thus be considered as standards which members from both developed and developing countries deem to constitute an appropriate general framework for the treatment of foreign investment in all countries in normal circumstances. Countries interested in attracting foreign investment which do not follow such standards may thus seriously consider following them and see what else should be done in light of the circumstances of each country. It is no secret that the U.S. Government and some business associations had reservations on earlier drafts of the Guidelines. But the Guidelines were issued in their final form without reservations by any member. Following their adoption, the Guidelines have been praised by such business organizations as the International Chamber of Commerce which found their issuance to be "a positive development in the field of international investment." The major value of the Guidelines is that they provide standards which countries may find appropriate to follow in the absence of applicable treaties. In keeping with their intended purpose, the Guidelines have recently been consulted by several countries in considering the enactment of new investment legislation and the conclusion of new investment treaties.

I understand that the Commission on Transnational Corporations is now considering, as an alternative to a code of conduct, the possibility of developing guidelines to set standards of corporate behavior. I hope that the work that I have described will be useful to you in further considering this possibility.

The Guidelines, background surveys and reports to the Development Committee have been published in two volumes by the World Bank and reprinted, with updatings of several of the surveys, in the Fall 1992 issue of ICSID Review—Foreign Investment Law Journal.

ICSID and New Trends in International Dispute Settlement

by Antonio R. Parra, Legal Adviser, ICSID

remarks presented in a panel discussion of "New Trends in International Dispute Settlement" at the 87th Annual Meeting of the American Society of International Law held in Washington D.C. on March 31–April 3, 1993.

The program for this panel discussion asks whether there is a trend towards granting private parties greater opportunities to participate in international procedures for the settlement of disputes with governments. From the vantage point of ICSID, it certainly seems that the answer to this question should be "yes." Before explaining why I think this is so, let me quickly review what ICSID is and what it does in the field of the settlement of disputes.

ICSID is one of the five international organizations that make up the World Bank Group. Like the other organizations in the Group, ICSID is established by a multilateral treaty. In ICSID's case, this is the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, commonly called the "ICSID Convention" or the "Washington Convention." To date, 107 countries have signed and ratified the ICSID Convention to become Contracting States.

In accordance with the provisions of the Convention, ICSID provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. ICSID does not itself conciliate or arbitrate such disputes. This is the task of conciliation commissions and arbitral tribunals which are constituted for each dispute, normally through appointments by the parties. The ICSID Secretariat assists in the initiation and conduct of conciliation and arbitration proceedings, performing a variety of administrative functions in this respect.

Recourse to conciliation and arbitration under the ICSID Convention is entirely voluntary. No Contracting State or national of such a State is obliged to resort to such conciliation or arbitration without having consented to do so. However, once the parties have consented, they are bound to carry out their undertaking and, in the case of arbitration, to abide by the award. Moreover, all Contracting States, whether or not parties to the dispute, are required to recognize awards rendered pursuant to the Convention as binding and to enforce the pecuniary obligations imposed thereby. Such awards are not subject to any appeal or to any other remedy except those which, like the remedy of annulment, are provided for in the Convention itself.

Besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has since 1978 had a set of "Additional Facility" Rules under which the ICSID Secretariat is authorized to administer certain proceedings between States and nationals of other States which fall outside the scope of the Convention. These include conciliation and arbitration proceedings for the settlement of investment disputes where one of the parties is not a Contracting State or a national of such a State, as well as conciliation and arbitration proceedings for the settlement of disputes that do not arise out of an investment, provided that the underlying transaction is not an "ordinary commercial" one and at least one of the parties is a Contracting State or a national of a Contracting State.

A final activity of ICSID in the field of the settlement of disputes has consisted in the Secretary-General of ICSID undertaking to act as the appointing authority of arbitrators for ad hoc (i.e., non-institutional) arbitrations. This has in particular been done in the context of agreements providing for arbitration under the Arbitration Rules of the U.N. Commission on International Trade Law, or UNCITRAL, which are specially designed for ad hoc proceedings.

Arbitration under the ICSID Convention has so far been the most frequently employed of ICSID's dispute settlement facilities. Investment agreements between Contracting States and investors from other Contracting States commonly contain clauses recording the parties' consent to submit to such arbitration disputes that might arise out of the agreement. To help the drafters of these clauses, we have recently published a new edition of our booklet of *ICSID Model Clauses*. In addition to proposed texts for submissions to conciliation and arbitration under the ICSID Convention, the booklet contains model clauses for use in conjunction with the Additional Facility Rules and an example of a clause referring to the ICSID Secretary-General as appointing authority of ad hoc arbitrators.

Over the past decade, the number of ICSID Contracting States has grown by almost 30% to its present level of 107. A further 14 countries have to date signed the Convention; they can be expected also to ratify the Convention and add to the number of Contracting States. The countries that have become Contracting States in ICSID's current fiscal year alone include China and 7 republics of the former Soviet Union. Six of the countries that have signed but not yet ratified the Convention are in Central and South America; after they have all ratified, the number of Contracting States in that region will have doubled to 12.

The growth of ICSID membership has obviously significantly widened the scope for the conclusion of ICSID clauses. This trend, and the other recent developments that I will describe in a moment, have taken place in the context of a growing acceptability of arbitration generally as a means of resolving disputes between States and foreign private parties.

Thus clauses referring to arbitration under the UNCITRAL Rules are now also a common feature of transactions between States or State entities and foreign private parties, as are clauses referring to arbitration under the auspices of such private arbitration institutions as the ICC International Court of Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce. Various international bodies have taken steps to encourage recourse to arbitration as a means of resolving disputes between States and foreign private parties. The Permanent Court of Arbitration at The Hague is modernizing its special rules for such disputes. Reference can also be made in this connection to the new World Bank Group Guidelines on the Treatment of Foreign Direct Investment. These Guidelines were issued last September by the Joint Ministerial Development Committee of the Boards of Governors of the World Bank and IMF. The Guidelines provide standards for the treatment of foreign investments by their host States. Among other things, the Guidelines encourage recourse to "any ad hoc or institutional arbitration" for the resolution of conflicts between foreign investors and host States. As it is the organization specialized in handling such disputes, the Guidelines specifically mention ICSID in this context.

As I indicated before, the consent of both parties is an essential condition for recourse to arbitration under the ICSID Convention. However, the only formal requirement that the Convention lays down with respect to such consent is that it be in writing. In particular, the consent of the parties need not be contained in a single instrument, such as an investment agreement.

In their 1965 Report on the ICSID Convention, the Executive Directors of the World Bank suggested, as one alternative to consents in a single instrument, that "a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing." Since the ICSID Convention was opened for signature in 1965, some 20 countries have followed this suggestion and included in their investment legislation provisions containing such general "offers" or consents to submit disputes with foreign investors to ICSID arbitration. In their simplest form, such provisions typically provide that all disputes between the State and foreign investors over the interpretation or application of the investment law concerned shall, unless the disputing parties agree otherwise, be settled by arbitration under the ICSID Convention or, if the investor is not a national of a Contracting State, then by ICSID Additional Facility arbitration. As many countries revise their investment legislation, provisions of this type are becoming more common.

An impressive number of comparable provisions may now also be found in bilateral investment promotion and protection treaties, or BITs. States have lately been concluding such treaties at a remarkable rate. The number of BITs, which first started being signed in the late 1950s, has increased fourfold since 1980. According to data compiled by my colleagues Margrete Stevens and Ruvan de Alwis, almost 600 BITs have been concluded to date by 133 different countries. Three fourths of the approximately 450 BITs that we have obtained for ICSID's collection of *Investment Treaties* contain provisions specifically on the settlement of disputes between one State party to the treaty and investors from the other State party. The overwhelming majority of the BITs with such provisions refer to ICSID in this regard. Not all of these BITs contain consents to arbitration under the ICSID Convention. Some of the BITs envisage that the States "shall consent" in future to ICSID arbitration if so requested by an aggrieved investor; others simply provide that States and investors "may consent" to such arbitration; and yet others provide for the resolution of investment disputes by ad hoc arbitration on the basis of rules "similar" to those of ICSID or with the ICSID Secretary-General acting as an appointing authority of arbitrators. However, a large number of BITs—168 in all, according to our latest count—contain provisions setting forth binding consents by the States parties to arbitration under the ICSID Convention. Typically, such provisions stipulate that each State party to the BIT thereby consents to submit to arbitration under the ICSID Convention disputes arising out of investments made in its territory by nationals of the other State party. Some of the more recent BITs combine such consents with further consents to arbitration under the UNCITRAL Arbitration Rules and under the ICSID Additional Facility Rules, thus also opening up recourse to these other forms of arbitration if desired or appropriate. Another interesting feature of several of the more recent BITs is that they not only afford investors general access to ICSID arbitration but that they also specifically provide that an investor may resort to such arbitration in respect of a violation by the host State of a right "created or confirmed" for the investor by the BIT.

A number of these elements in modern BITs appear in the provisions on the "Settlement of Disputes Between a Party and an Investor of Another Party" in the Investment Chapter of the new North American Free Trade Agreement, or NAFTA. Under these provisions, the three NAFTA parties agree that an "investor of a Party" may submit to arbitration under either the ICSID Convention or the Additional Facility Rules or the UNCITRAL Arbitration Rules, a claim that another State party has violated certain obligations under the Investment Chapter thereby causing loss or damage to the investor or an enterprise owned or controlled by the investor.

Two of the NAFTA parties, Canada and Mexico, are in fact not yet ICSID Contracting States. Arbitration under the ICSID Convention however stands as an alternative that can be resorted to once either of those two countries join ICSID. Until then, ICSID Additional Facility arbitration or UNCITRAL arbitration would be available for disputes between U.S. investors and either Canada or Mexico or between the U.S. itself and investors from either of the two other countries. In respect of disputes between Canadian investors and Mexico, or between Mexican investors and Canada, only UNCITRAL arbitration would be available (because, as you will remember, ICSID Additional Facility arbitration is not available when neither the home State nor the host State of the investor is a Contracting State). Yet even there, the provisions envisage a role for ICSID, or more precisely for the Secretary-General of ICSID, who is to act as the appointing authority of arbitrators in respect of UNCITRAL and other investor-State arbitrations under the Investment Chapter.

One of the many interesting and innovative features of the NAFTA investor-State dispute settlement provisions is their provision that when two or more claims submitted to arbitration have a question of law or fact in common, the claims may "in the interests of fair and efficient resolution of the claims" be consolidated and determined by a 3-member arbitral tribunal operating under the UNCITRAL Rules. In contrast to his more typical appointing authority role in respect of other arbitrations under the dispute settlement provisions, according to which the Secretary-General will appoint arbitrators only if a tribunal cannot be constituted through appointments by the parties, in the "consolidation" cases the Secretary-General will himself directly appoint each member of the tribunal. The appointees of the Secretary-General in the "consolidation" cases are normally to be drawn from a roster, established by the NAFTA parties, of 45 potential arbitrators. The NAFTA provisions envisage that the Secretary-General will, if called upon to appoint the presiding arbitrator in the other types of arbitration under the provisions, also generally make the appointment from this roster. Appointing the members of the tribunals that will hear consolidated claims and presiding arbitrators in other cases from an established, limited roster of arbitrators is meant to contribute to continuity and uniformity in the application of the pertinent NAFTA provisions.

Jurisdiction in all of the cases brought to ICSID until about the mid-1980s was founded upon consents to arbitration recorded in the traditional manner, by a clause in a single instrument such as an investment contract. Since then, the Centre has registered cases where there was no such contract between the parties and where jurisdiction was instead based upon arbitration provisions in investment legislation of the State party. ICSID has also started to receive cases based upon the enormous number of consents to arbitration recorded in BITs. Indeed, of the two most recent ICSID arbitral awards, one concerned a case where jurisdiction was founded upon a legislative provision and the other a case where jurisdiction was based on a BIT. And a third case, our most recently-registered one, has also been brought under a BIT.

The continuing growth in ICSID membership and the many and increasing number of these general consents in laws and treaties, covering most investment flows between large numbers of countries, are factors that, to use again the language of the program for this panel discussion, are creating tremendous opportunities for private parties to participate in the international procedures of ICSID for the settlement of disputes with governments. The investor-State dispute settlement provisions of the NAFTA represent an important continuation of this trend. As Professor Ahmed S. El-Kosheri has said, the treaty provisions in particular are opening "unlimited opportunities for rendering ICSID arbitration the 'natural judge' *(juge de droit commun)* in adjudicating investment disputes with the governmental authorities of the host State."

ICSID Model Clauses

The Centre has recently published a new edition of its booklet of *ICSID Model Clauses*.

In addition to proposed texts for submission to conciliation and arbitration under the ICSID Convention, the booklet contains the Centre's first model clauses for use in conjunction with the ICSID Additional Facility Rules and an example of a clause referring to the ICSID Secretary-General as appointing authority of ad hoc arbitrators.

The booklet, Document ICSID/5/Rev. 2, is available from the Centre on request.

Tenth Joint ICSID/AAA/ICC International Court of Arbitration Colloquium on International Arbitration Coral Gables, Florida October 26, 1993

ICSID, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) International Court of Arbitration will this year be co-sponsoring the tenth in their series of colloquia on international arbitration.

The tenth colloquium will be dedicated to the topics of "arbitrability" and "arbitration and Latin America." Hosted by the AAA, it will take place on October 26, 1993 in Coral Gables, Florida. Further details on the colloquium will appear in the next issue of *News from ICSID*.

Staff of the ICSID Secretariat, from left to right: Ruvan de Alwis, Marie L. Parent, Timothy Gottrich, Ginette Moïse-Luabeya, Antonio R. Parra, Margrete Stevens, Nagla Nassar, Nassib G. Ziadé.

Recent Publications on ICSID

Amerasinghe, C.F.
The Prawn Farm (AAPL) Arbitration, 4 *Sri Lanka Journal of International Law* 155 (June 1992).

Buckley, Ross P.
Now We have Come to ICSID Party: Are Its Awards Final and Enforceable?, 14 *Sydney Law Review*, No. 3, at 358 (1992).

Carias-Borjas, Sergia
Recognition and Enforcement of ICSID Awards: The Decision of the French *Cour de Cassation* in SOABI v. Senegal, 2 *The American Review of International Arbitration* 354 (1991).

Golsong, Heribert
Schwächung des Schiedsdispositifs bei Investitionsstreitigkeiten: Das ICSID-Annullierungsverfahren und seine mögliche Fortentwicklung, Festschrift für Walther J. Habscheid, April 6, 1989.

Migliorino, L.
Indennizzi per danni e investimenti stranieri in case di conflitti interni: il caso AAPL-Sri Lanka, 28 *Rivista di Diritto Internazionale Privato e Processuale* 497 (1992).

Muchlinski, P.T.
Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes, in *Control over Compliance with International Law* (W.E. Butler ed. 1991).

Perera, A. Rohan & Dias, Noel
Asian Agricultural Products Ltd. v. The Republic of Sri Lanka, 2 *The American Review of International Arbitration* 216 (1991).

Sturzenegger, Marc
ICSID Arbitration and Annulment for Failure to State Reasons—The Decision of the *Ad Hoc* Committee in Maritime International Nominees Establishment v. The Republic of Guinea, 9 *Journal of International Arbitration*, No. 4, at 173 (1992).

Vasciannie, Stephen C.
Bilateral Investment Treaties and Civil Strife: The AAPL/Sri Lanka Arbitration, 39 *Netherlands International Law Review* 332 (1992).

Investment Laws of the World and Investment Treaties

A new release of ICSID's *Investment Laws of the World* collection was issued in March 1993. It contains the texts of the basic investment legislation of Belize, Colombia, El Salvador, Ethiopia, Honduras, Malawi, Mauritania, Nicaragua, Philippines, Sudan, Syria and Zambia. This release brought to 97 the number of countries covered by the collection.

Thirty-five new bilateral investment treaties (BITs) have also been published in Release 92–4 of ICSID's collection of *Investment Treaties*. A substantial number of other BITs not previously published in the collection will be included in further releases to be issued over the coming year. With the new releases, the collection will contain some 450 treaties.

Investment Laws of the World (10 volumes) and *Investment Treaties* (4 volumes) may be purchased from Oceana Publications, Inc., 75 Main Street, Dobbs Ferry, New York 10522, U.S.A. Tel: (914) 693-8100, Fax: (914) 693-0402.

News from ICSID

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