

NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

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Winter 1996

Twenty-Ninth Annual Meeting of the Administrative Council

The Administrative Council of ICSID held its Twenty-Ninth Annual Meeting in conjunction with the Annual Meetings of the Boards of Governors of the other World Bank Group organizations and of the International Monetary Fund in Washington, D.C. on November 10–12, 1995.

At its Meeting, the Council approved the Centre's 1995 Annual Report and the budget for ICSID's 1996 financial year and considered a report of the Secretary-General on recent developments in ICSID. The Council also unanimously re-elected Ibrahim F.I. Shihata to serve a third six-year term as Secretary-General of ICSID.



James D. Wolfensohn, President of the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association and the Multilateral Investment Guarantee Agency and Chairman of the ICSID Administrative Council, addressing the 1995 Annual Meetings of the World Bank Group and International Monetary Fund.

Recent Signatures and Ratifications of the ICSID Convention

Since the publication of the Summer 1995 issue of *News from ICSID*, the ICSID Convention has been signed by three further countries, the Bahamas, Guatemala and Panama. They brought to 24 the number of signatories in the Latin American and Caribbean Region. In addition, Algeria, the Bahamas and Bahrain ratified the Convention. In total, there are now 139 signatories of the Convention and 125 Contracting States.

Institute for Transnational Arbitration's Seventh Annual Workshop on Transnational Commercial Arbitration

"The Arbitration of High-Tech Disputes"

Dallas, June 20, 1996

The Institute for Transnational Arbitration, a division of The Southwestern Legal Foundation, will be holding its Seventh Annual Workshop on Transnational Commercial Arbitration in Dallas, Texas on June 20, 1996. This Workshop will focus on the transnational arbitration of high-tech disputes. The program will include a discussion of recent developments in the World Intellectual Property Organization (WIPO) and will feature Francis Gurry, Director of the WIPO Arbitration Center. The morning session will begin with panel presentations on interim measures and their enforceability; confidentiality; and arbitration by high-tech means. The afternoon session will include seven scenes from a mock arbitration.

The Workshop will be opened by the Chairman of the ITA Advisory Board, Charles N. Brower, White & Case, Washington, D.C. The sessions will be co-chaired by David D. Caron, Boalt School of Law, University of California at Berkeley and by Jan Paulsson, Freshfields, Paris, France. Other speakers, presenters and moderators will include: Tom Arnold, Arnold, White & Durkee P.C., Houston, Texas; Stewart A. Baker, Steptoe & Johnson, Washington, D.C.; Robert Briner, Lenz &

Stahelin, Geneva, Switzerland; Bernardo M. Cremades, J. y B. Cremades y Asociados, Madrid, Spain; Donald F. Donovan, Debevoise & Plimpton, New York, New York; L. Yves Fortier, Ogilvy Renault, Montreal, Canada; George Friedman, American Arbitration Association, New York, New York; Christopher S. Gibson, Pillsbury, Madison & Sutro, San Francisco, California; Thomas J. Klitgaard, San Francisco, California; Edward J. Lynch, Exxon Corp., Irving, Texas; Nigel Rawding, Freshfields, London, England; Lucy F. Reed, KEDO, New York, New York; Deborah Enix-Ross, Price Waterhouse, New York, New York; Jeswald W. Salacuse, Fletcher School of Law & Diplomacy, Medford, Massachusetts; Eric A. Schwartz, ICC International Court of Arbitration, Paris, France; and Albert Jan van den Berg, Stibbe Simont Monahan Duhot, Amsterdam, The Netherlands.

For further information regarding the Workshop, contact: The Southwestern Legal Foundation, P.O. Box 830707, Richardson, Texas 75083-0707, tel. 214-699-9501, fax: 214-699-3870, or E-Mail: slf@airmail.net

Conference on the Resolution of Trade and Investment Disputes in Africa

Johannesburg, March 6-7, 1997

ICSID, the International Chamber of Commerce International Court of Arbitration, the London Court of International Arbitration, and the Association of Arbitrators (Southern Africa) will be jointly sponsoring a Conference on the Resolution of Trade and Investment Disputes in Africa. The Conference is scheduled to take place in Johannesburg on March 6-7, 1997. Further details on the Conference will appear in the Summer 1996 issue of *News from ICSID*.

Correction

At page 6 of the Summer 1995 issue of *News from ICSID*, I wrote that the August 1994 Investment Protocol of Mercosur appears to entitle covered investors to submit disputes with their host States to any form of ad hoc or institutional arbitration. I am grateful to Theresa Wetter, Senior Specialist, Trade Unit, Organization of American States, for pointing out that in this and other respects the Protocol in fact sets forth the most favorable treatment that the parties may accord to investors in subsequent investment treaties.

A. R. Parra

Disputes Before the Centre

- **American Manufacturing & Trading, Inc. v. Republic of Zaire (Case ARB/93/1)**
November 24, 1995
 The Tribunal meets in Geneva.

- **SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Government of Madagascar (Case CONC/94/1)**
December 21, 1995 and February 14, 1996
 The Conciliation Commission meets in Brussels.

- **Philippe Gruslin v. Government of Malaysia (Case ARB/94/1)**
February 8, 1996
 The parties inform the Sole Arbitrator that an amicable settlement has been reached and ask him to take note of the discontinuance of the proceeding, pursuant to Arbitration Rule 43(1).

- **Tradex Hellas S.A. v. Republic of Albania (Case ARB/94/2)**
January 3, 1996
 The Tribunal is constituted. Its members are: Professor Karl-Heinz Böckstiegel (German), President, Mr. Fred F. Fielding (U.S.) and Professor Andrea Giardina (Italian).

- **Leaf Tobacco A. Michaelides S.A. and Greek Albanian Leaf Tobacco & Co. S.A. v. Republic of Albania (Case ARB/95/1)**
 Since the publication of the last issue of *News from ICSID*, there have been no developments to report in this case.

- **Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis (Case ARB/95/2)**
November 14, 1995
 The Secretary-General registers a request for the institution of arbitration proceedings.
February 16, 1996
 The Tribunal is constituted. Its members are: Mr. Woodbine A. Davis (Barbadian), President, Mr. Arthur Maynard (Barbadian) and Mr. Rex McKay (Guyanese).
March 13, 1996
 The Tribunal holds its first session with the parties in Barbados.

- **Antoine Goetz and others v. Republic of Burundi (Case ARB/95/3)**
December 18, 1995
 The Secretary-General registers a request for the institution of arbitration proceedings.

- **Compañía del Desarrollo de Santa Elena S.A. v. Government of Costa Rica (Case ARB/96/1)**
March 22, 1996
 The Secretary-General registers a request for the institution of arbitration proceedings.

New Designations to the ICSID Panels of Conciliators and of Arbitrators

INDONESIA

Panels of Conciliators and of Arbitrators

Designations effective as of October 27, 1995: Mr. Mardjono Reksodiputro, Dr. Albert Hasibuan and Professor Sudargo Gautama.

CYPRUS

Panels of Conciliators and of Arbitrators

Designations effective as of January 3, 1996: H.E. Ambassador Andreas Jacovides (re-appointment), Messrs. Alecos Markides, Georgios Pikis and Theofilos Theofilou.

BARBADOS

Panels of Conciliators and of Arbitrators

Designations effective as of February 27, 1996: Messrs. Woodbine Davis, Trevor Carmichael, Ken Hewitt (re-appointments) and Mr. Edward Bushell.

MALAYSIA

Panels of Conciliators and of Arbitrators

Designations effective as of February 14, 1996: Hon. Justice Dato' Faiza bin Tamby Chik, Hon. Justice Ian Chin Hong Chong and Hon. Justice Selventhiranathan Thia-grajah (re-appointment).

The Rights and Duties of ICSID Arbitrators

by A.R. Parra, Legal Adviser, ICSID

A paper submitted to the Twelfth Joint International Chamber of Commerce International Court of Arbitration/American Arbitration Association/ICSID Colloquium on International Arbitration held in Paris on November 17, 1995 on "The Status of the Arbitrator"

Introduction

The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is a public international organization established by a multilateral treaty, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). As of October 30, 1995, 123 countries had signed and ratified the Convention to become Contracting States. The Convention gives ICSID a simple organizational structure, consisting of an Administrative Council and a Secretariat. The Council is the Centre's governing body, responsible for, among other matters, the adoption of the Regulations and Rules of the Centre which comprise Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), Rules of Procedure for Conciliation Proceedings (Conciliation Rules) and Rules of Procedure for Arbitration Proceedings (Arbitration Rules). The Council is composed of one representative of each Contracting State and is chaired by the President of the World Bank *ex officio*. The Secretariat consists of a Secretary-General and a limited number of staff. The Secretary-General and staff carry out the day-to-day work of the Centre.

This includes work on the administration of a system created by the Convention for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. Article 25(1) of the Convention elaborates, in terms that refer to the "jurisdiction" of ICSID, on the scope of this system. According to Article 25(1), the jurisdiction of the Centre extends to "any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." The World Bank sponsored the Convention in the belief that the establishment of an institution designed to facilitate the settlement of disputes between States

and foreign investors could contribute to promoting an atmosphere of mutual confidence and thus to stimulating a larger flow of private international capital into countries wishing to attract it.

The arbitration system of the ICSID Convention is largely self-contained, governed by the provisions of the Convention and of the Regulations and Rules adopted by the Administrative Council. Consent of the parties to arbitration under the Convention is by its Article 26 deemed to exclude recourse to any other remedy. Such a consent by a Contracting State and a national of another Contracting State also has the effect, under Article 27 of the Convention, of suspending any right of the latter State to exercise diplomatic protection, or bring an international claim, in respect of the dispute concerned. Article 44 of the Convention makes it clear that the conduct of arbitration proceedings under the Convention is exempt from the application of the arbitration laws of Contracting States. According to Article 53 of the Convention, arbitral awards rendered thereunder are binding on the parties and not subject to any appeal or to any other remedy except certain remedies internal to the system of the Convention. Courts in Contracting States, for their part, have no power to review an ICSID award in any way. Instead, Article 54 of the Convention requires them, on simple presentation of a certified copy of the award, to enforce the pecuniary obligations that it imposes as if it were a final judgment of the courts concerned. Article 55 of the Convention provides that Article 54 does not derogate from the law of the enforcement forum on sovereign immunity from execution of an award. However, parties to arbitration proceedings under the Convention are obliged by Article 53 of the Convention to abide by and comply with the terms of any award rendered in such proceedings. A failure by a Contracting State to meet this obligation would expose the State to the possibility of proceedings against it in the International Court of Justice under Article 64 of the Convention.

As in the case of other aspects of the system, the rights and duties of ICSID arbitrators are

based on the provisions of the ICSID Convention, Regulations and Rules. Those rights and duties reflect assurances that the system of the Convention will function and do so effectively and impartially in the absence of outside control. Several of the most important rights and duties of ICSID arbitrators follow from the arrangements made for the constitution of arbitral tribunals under the Convention. Those arrangements should therefore be examined before the rights and duties are discussed.

The Constitution of ICSID Arbitral Tribunals

Under the Convention, ICSID maintains a Panel of Conciliators and a Panel of Arbitrators consisting of qualified persons who accept to serve thereon. Designations to the Panels are made by the Contracting States and by the Chairman of the Administrative Council of ICSID. A Contracting State may make up to four designations to each Panel, and the Chairman ten. The designees of a Contracting State may be of any nationality. The designees of the Chairman must each have a different nationality. According to Article 14(1) of the Convention, all designees to the Panels, whether designated by a Contracting State or by the Chairman, must be “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.” Panel members serve as such for renewable periods of six years. In accordance with Administrative and Financial Regulation 21, the Secretary-General maintains lists of the Panel members which currently comprise some four hundred names. The Secretary-General is required to transmit the lists from time to time to all Contracting States and on request to any State or person.

Article 36(1) of the ICSID Convention provides that a party wishing to institute arbitration proceedings should do so by means of a written request to that effect addressed to the Secretary-General. The request must contain information on the issues in dispute, the identity of the parties and their consent to arbitration. Unless the Secretary-General finds, on the basis of the information contained in the request, that the dispute is “manifestly outside the jurisdiction of the Centre,” he must register the request and notify the parties of such registration. In accordance with Rule 7 of the Institution Rules, the notice of registration will invite the parties to proceed, “as

soon as possible,” to constitute an arbitral tribunal to hear their dispute.

Article 37(2)(a) of the Convention provides that such a tribunal will consist of one or any uneven number of arbitrators appointed as the parties may agree. If the parties do not agree on the number of arbitrators and the method of their appointment, the tribunal will, in accordance with Article 37(2)(b) of the Convention, consist of three arbitrators, one appointed by each party and the third, who will be the president of the tribunal, appointed by agreement of the parties. In practice, almost all of the tribunals constituted to date have consisted of three arbitrators, either as a result of party agreement on the matter or because of the application of Article 37(2)(b) of the Convention. Article 38 of the Convention provides that, if the tribunal is not constituted in the applicable manner within ninety days after registration, or such other period as the parties may agree, then either of them may request the Chairman of the Administrative Council to appoint the arbitrator or arbitrators not yet appointed. The Chairman is required to comply with such a request within thirty days after its receipt. Before he does so, the Chairman must consult with both parties as far as possible. The Chairman has had to complete the constitution of the tribunal in about half of the arbitration cases registered to date, most often as a result of a failure of the parties to agree on the appointment of the presiding arbitrator.

In performing this function, the Chairman of the Administrative Council may not appoint nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute. Persons with the nationality of the State party or of the home State of the other party may otherwise be appointed to a tribunal. Article 39 of the Convention, however, requires that persons of those nationalities not form the majority of a tribunal, unless every arbitrator has been appointed by agreement of the parties. In the normal case, where the tribunal is to consist of three arbitrators, the party acting first could, consistently with Article 39 of the Convention, appoint a co-national as arbitrator and block a similar appointment by the other party since Article 39 only addresses cases of tribunals with a majority of co-nationals of the parties. To ensure the fair application of Article 39 of the Convention, Arbitration Rule 1(3) provides that unless each member of the tribunal is appointed by agreement of the parties, nationals of the State party to the dispute or of the home State of the other party may be appointed by a party

only if appointment by the other party of the same number of arbitrators of either of those nationalities would not result in a majority of arbitrators of those nationalities. To date, nationals of some thirty different countries have been appointed to tribunals under the Convention. As intended by the above-described provisions of the Convention and Arbitration Rules, however, the appointees have only exceptionally included co-nationals of the parties in the case at hand.

Institution Rule 7 requires the Secretary-General, on registering a request for arbitration, to send to the parties, together with the notice of registration, the list of the members of the Panel of Arbitrators. Arbitrators may, however, be appointed from outside the Panel except in the case of appointments by the Chairman pursuant to Article 38 of the Convention. If arbitrators are appointed from outside the Panel, they must have the personal qualities required of Panel members by Article 14(1) of the Convention; that is, all arbitrators must be “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.” The Convention draws no distinction in this respect between party-appointed and other arbitrators. Despite the scope for the appointment of arbitrators from outside the Panel, most of the tribunals established over the last decade have included at least one Panel member. This is only partly the result of the frequency with which the Chairman of the Administrative Council has been called upon to appoint arbitrators; parties have often also chosen their own appointees from among Panel members.

All appointments of arbitrators must be notified to the Secretary-General who will seek an acceptance from the appointee. The prospective arbitrator will be deemed to have declined the appointment if such acceptance is not received by the Secretary-General within 15 days. However, this has never happened, if only because the Chairman and parties generally consult with prospective arbitrators as to their availability before actually appointing them. Once the Secretary-General has received acceptances from all of the arbitrators, he will so notify the parties. The tribunal will be deemed to be constituted and the proceeding to have begun on the date of this notification.

The Rights of ICSID Arbitrators

The rights of members of arbitral tribunals constituted under the ICSID Convention include two intended to protect their independence. These are rights to security of tenure and immunity from legal process. After a tribunal has been constituted, an arbitrator might die or, as discussed later in this paper, become incapacitated, resign or be disqualified. In such cases, the resulting vacancy will generally be filled by the same method by which the predecessor arbitrator was appointed. Article 56(1) of the ICSID Convention provides that, apart from such cases, the composition of a tribunal “shall remain unchanged” after the tribunal has been constituted and the proceeding has begun. Article 56(2) of the Convention adds that the service of an arbitrator appointed from the Panel of Arbitrators shall be unaffected by the fact that the arbitrator might have since ceased to be a member of the Panel. Panel membership is itself also secure; members of the Panel may be replaced only in the event of death, resignation or following the expiry of their terms on the Panel.

The jurisdictional immunity of ICSID arbitrators is accorded to them by Article 21(a) of the Convention. Under Article 21(a), the arbitrators have in all Contracting States “immunity from legal process with respect to acts performed by them in the exercise of their functions.” The Convention gives to ICSID arbitrators several further immunities and privileges meant to facilitate their unimpeded travel among Contracting States in connection with the arbitration proceedings. Under Article 21(b) of the Convention, arbitrators who are not local nationals “enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.” In Article 24(3) of the Convention, Contracting States also undertake to levy no tax in respect of the fees or expense allowances received by arbitrators in proceedings under the Convention “if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.”

In addition to their security of tenure and immunities and privileges, ICSID arbitrators are entitled to cooperation from the parties in the

conduct of the proceeding. This principle finds concrete expression in several provisions of the ICSID Convention and Arbitration Rules. Arbitration Rule 31 requires the parties to brief the tribunal properly by including in their written pleadings statements of the relevant facts, statements of law and their respective submissions. Under Article 43 of the Convention, a tribunal may call upon the parties to produce documents, witnesses and experts. Article 43 further authorizes a tribunal to visit any place connected with the dispute and to conduct enquiries there. Arbitration Rule 34 provides that the parties “shall cooperate” with the arbitrators in these respects. According to Arbitration Rule 33, each party must, in advance of hearings, provide the tribunal and the other party with precise information regarding the evidence which it intends to produce and that which it intends to request the tribunal to call for, together with an indication of the points to which such evidence will be directed. This requirement is meant not only to prevent surprise to the opposing party but also to facilitate the task of the tribunal in arranging the proper conduct of the hearings.

The Centre provides extensive administrative support for proceedings under the Convention. The arbitrators share with the parties a right to such support. Pursuant to Administrative and Financial Regulations 24-28, the support includes acting as “the official channel of written communications between the arbitrators and the parties” and ensuring the appropriate distribution of copies of instruments and other documents introduced into the proceeding; preparing certified copies of the original text of any such instrument or document and of any order, decision or award made by the arbitrators; making or supervising arrangements for the holding of hearings at the seat of the Centre or elsewhere; and providing any “other assistance” needed for meetings of arbitral tribunals. Administrative and Financial Regulation 25 requires the Secretary-General to appoint a secretary for each arbitral tribunal. The appointee, who is invariably a member of the legal staff of the ICSID Secretariat, performs most of the above-mentioned tasks, as well as such “other functions” with respect to a proceeding as may be requested by the presiding arbitrator or directed by the Secretary-General. The other functions performed by the secretary typically include the preparation, in collaboration with the presiding arbitrator, of minutes of hearings and drafts of routine procedural orders.

Reference has already been made to the fees and expenses that ICSID arbitrators are entitled

to receive. Administrative and Financial Regulation 14(1) provides that arbitrators will receive a fee for each day of participation in meetings of the tribunal and a fee for the equivalent of each eight-hour day of other work performed in connection with the proceeding. The current Schedule of Fees of the Centre specifies 600 Special Drawing Rights, equal at present to about US\$900, as the amount of these fees. Under Administrative and Financial Regulation 14(1), arbitrators have the right, when travelling in connection with a proceeding, to a subsistence allowance based on the allowance established for the Executive Directors of the World Bank. Administrative and Financial Regulation 14(1) provides, in addition, for arbitrators to be reimbursed for their travel expenses on the same basis as the Executive Directors of the World Bank. Any other direct expenses that arbitrators reasonably incur in the proceeding are also reimbursable. The fees and expenses provided for in Administrative and Financial Regulation 14(1) are, strictly speaking, limits within which arbitrators can determine their fees and expenses in the absence of advance agreement on the matter between the tribunal and the parties. However, the fees and expenses provided for in the regulation have come generally to be regarded as standard rates which may be changed if the tribunal and the parties so agree in advance. The tribunal and the parties have in several instances agreed on fees higher than those specified in the Centre’s Schedule of Fees. In accordance with Administrative and Financial Regulation 14(2), fees and expenses are paid to arbitrators by the Centre from funds advanced to it by the parties. The parties are called upon by the Centre at intervals of three to six months to make such advances, normally in equal shares, of amounts estimated by the Centre to cover the fees and expenses of the arbitrators, and any out-of-pocket expenditures of the Centre, to be incurred in the next three to six months. At the end of the proceeding, the Centre returns to the parties any unexpended balances of the advances and accrued interest thereon. The administration of this system of financing proceedings is in each case another of the tasks carried out by the secretary of the tribunal.

The Duties of ICSID Arbitrators

ICSID arbitrators are appointed to make decisions. Most of what might be called their other duties relate to the manner in which they perform their basic decision-making one. The request for arbitration by which a proceeding is

instituted is, of course, a request for a decision on the merits of the dispute. Under the Convention and Arbitration Rules, a tribunal may also be called upon to decide a host of procedural matters, to recommend provisional measures, to rule on objections to jurisdiction and to decide on the ultimate apportionment of the cost of the proceeding.

Arbitration Rule 19 provides that the tribunal “shall make the orders required for the conduct of the proceeding.” Compared with most other sets of arbitration rules, those of the Centre are highly detailed. Article 44 of the Convention provides that if any question of procedure arises which is nevertheless not covered by the Convention or the Arbitration Rules, or any rules agreed by the parties, then the tribunal “shall decide the question.” Under Article 47 of the Convention, a tribunal may, unless the parties otherwise agree, recommend provisional measures to preserve the respective rights of either party. Arbitration Rule 39(2) requires the tribunal to “give priority” to the consideration of a request by a party for the recommendation of such measures. Article 41(1) of the Convention declares a tribunal to be the judge of its own competence. An objection that the dispute is not within the jurisdiction of the Centre, or for other reasons not within the competence of the tribunal, may be raised by a party or by the tribunal on its own initiative. Such an objection must be dealt with by the tribunal either as a preliminary question or in conjunction with the merits of the dispute. If, in either case, the tribunal finds that the dispute is outside the jurisdiction of the Centre or beyond its own competence, then it must bring the proceeding to an end with an award recording the finding. If, on the other hand, the tribunal is satisfied that the dispute is within the jurisdiction of the Centre and otherwise within the tribunal’s own competence, then it must proceed to render an award embodying a decision on the merits of the dispute. Unless the parties have authorized the tribunal to decide *ex aequo et bono*, it must make this decision in accordance with such rules of law as may have been agreed by the parties or, in the absence of such agreement, in accordance with the law of the State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. A tribunal may not avoid performing this duty on the ground of silence or obscurity of the applicable law. Unless the parties agree otherwise, the arbitrators will assess the expenses incurred by the parties in the proceeding, and decide how and by whom those expenses, the fees and ex-

penses of the arbitrators and the out-of-pocket expenditures of the Centre will be paid. In accordance with Article 61(2) of the Convention, the decision must be included in any award of the tribunal. Of course, arbitrators will be relieved of their decision-making duty if the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding. Arbitration Rule 21 provides that if the parties so request, a pre-hearing conference may be held between the tribunal and the parties “to consider the issues in dispute with a view to reaching an amicable settlement.” If the parties reach a settlement, whether or not as a result of such a pre-hearing conference, the tribunal may at the request of the parties record the settlement in the form of an award. Alternatively, the parties can require the tribunal simply to render an order taking note of the discontinuance of the proceeding.

The award that the tribunal must otherwise make must be made in a timely fashion. Arbitration Rule 46 requires that the award be drawn up and signed within a maximum of ninety days after the parties have completed the presentation of the case and the arbitrators have declared the proceeding closed. The Convention and Arbitration Rules require that the award also be prepared with due care. According to Article 48(3) of the Convention, the award must deal with “every question” submitted to the tribunal and “state the reasons upon which it is based.” Pursuant to Arbitration Rule 47, the award must, in addition, affirm that the tribunal was properly constituted, summarize the proceeding, state the facts as found by the tribunal and contain the submissions of the parties as well as any decision of the arbitrators regarding the cost of the proceeding. Upon the request of a party made within forty-five days after the rendition of the award, a tribunal, in accordance with Article 49(2) of the Convention, may decide any question which it omitted to decide in its award “and shall rectify any clerical, arithmetical or similar error in the award.” Its decision will then become part of the award.

Under Article 48(1) of the Convention, a tribunal must make all of its decisions “by a majority of the votes of all its members.” In accordance with Arbitration Rule 16(1), an abstention is counted as a negative vote. An arbitrator who dissents from the majority with respect to an award need not sign the award and may instead attach to it a statement of his or her dissent. Decisions of a tribunal may generally be taken by correspondence among its members and, unless the parties otherwise agree, a sitting

of a tribunal requires the presence only of a majority of the arbitrators. However, each arbitrator has the duty to participate as far as possible in the decision-making and other work of the tribunal and to facilitate such participation by each other arbitrator. Thus Arbitration Rule 16(2) provides that decisions of a tribunal may be taken by correspondence among the arbitrators only if “all of them are consulted.” While a sitting of a tribunal may take place without one of its members, this is meant to be done only in cases of unavoidable or deliberate absences by an arbitrator. According to Arbitration Rule 15(1), the deliberations of a tribunal “shall take place in private and remain secret.” The secrecy is intended to strengthen the collective character of the tribunal and presupposes that normally all of the arbitrators will take part in the deliberations. Similarly, the fact that an arbitrator may attach to the award a statement of dissent assumes that the arbitrators must give each other an adequate opportunity to consider the award in draft form.

In general, before coming to their decisions, arbitrators must also give both parties an adequate opportunity to express themselves on the matter under consideration. The ICSID Convention and Arbitration Rules lay heavy stress, through frequent repetition, on this important obligation of arbitrators. Thus Arbitration Rule 20 provides that at the outset of a proceeding the tribunal through its president “shall endeavor to ascertain the views of the parties regarding questions of procedure” such as the number and sequence of the pleadings and the time limits within which they are to be filed. Arbitration Rule 13 provides that the tribunal should fix the dates of its sessions “after consultation with the parties as far as possible.” According to Arbitration Rule 39(4), a tribunal may only recommend provisional measures “after giving each party an opportunity of presenting its observations.” Arbitration Rule 41(3) requires that, upon the raising of an objection to jurisdiction regarding the dispute, the parties be allowed to “file observations on the objection.” In the normal case, where both parties participate in the proceeding, the tribunal may, as indicated earlier, only render its award after “the presentation of the case by the parties is completed.” Arbitration Rule 49(3) likewise provides that a tribunal may only decide on a request for a supplementary decision on, or rectification of, the award pursuant to Article 49(2) of the Convention after the parties have had an opportunity “to file observations on the request.” If a party fails to appear or to present its case, the other party may, pursuant to Article 45(2) of the

Convention, request the tribunal nevertheless to deal with the questions submitted to it and to render an award. According to Article 45(1) of the Convention, however, the failure of a party to appear or to present its case “shall not be deemed an admission of the other party’s assertions.” The tribunal must therefore on its own initiative “examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law.” Before doing so, however, the tribunal must “notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.”

As indicated earlier in this paper, ICSID arbitrators are entrusted with their decision-making duty on the basis that, as stated in Article 14(1) of the Convention, they are “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.” After they are appointed, arbitrators must ensure that they indeed have and will retain those qualities in the case before them. The obligation is reflected in a declaration that the arbitrators are required by Arbitration Rule 6(2) to sign before or at the first session of the tribunal. In the declaration, arbitrators confirm that they will “judge fairly as between the parties, according to the applicable law” and will “not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes and in the Regulations and Rules made pursuant thereto.” It will be recalled that under Administrative and Financial Regulation 14(2) arbitrators are paid their fees and expenses “by the Centre and not by or through either party to the proceeding.” In addition to their declaration under Arbitration Rule 6(2), ICSID arbitrators must, in submitting to the Centre each of their claims for fees and expenses, sign a statement certifying that the claims reflect the time and expenses incurred in the proceeding and that the arbitrators have not received and will not claim reimbursement from any other source. In their declaration pursuant to Arbitration Rule 6(2), arbitrators are also required to furnish details of any previous or subsisting “business, professional or other relationships” between them and the parties. The arbitrators must similarly disclose any such relationships that arise during the remainder of the proceeding. In their declaration under Arbitration Rule 6(2), arbitrators furthermore undertake to keep confidential “all in-

formation" coming to their knowledge as a result of their participation in the proceeding, "as well as the contents of any award" they may render. (The Centre is similarly prohibited by Article 48(5) of the Convention from publishing any award without the consent of the parties.) Arbitration Rule 6(2) provides that an arbitrator who fails to sign the prescribed declaration by the end of the first session of the tribunal shall be deemed to have resigned.

After accepting his or her appointment, an arbitrator might realize that he or she would be unable to perform the role of arbitrator. This would be the case if the arbitrator has come to have "business, professional or other relationships" with a party that would compromise the extent to which the arbitrator "may be relied upon to exercise independent judgment," or if the other activities of the arbitrator have come unduly to interfere with the work as arbitrator. As has twice been demonstrated in the experience of ICSID, the arbitrator must in such cases promptly resign. Likewise, if ill health has come to prevent the arbitrator from acting as such, the arbitrator should either declare himself or herself incapacitated or resign. There have in ICSID been three instances of resignations for this reason. A resigning arbitrator is required to submit the resignation to the other members of the tribunal and to the Secretary-General. Arbitration Rule 8(2) provides that if the resigning arbitrator was appointed by one of the parties, the other arbitrators must promptly consider the reasons for the resignation and decide whether they consent thereto. If the other arbitrators withhold their consent, the consequence is not of course that the resigning arbitrator must continue to serve, but rather that the replacement arbitrator will be appointed by the Chairman of the Administrative Council instead of by the party that made the original appointment. This is meant to lessen the possibility of a party inducing an arbitrator appointed by it to resign for obstructionist or similar reasons. There has to date been one instance of a party-appointed arbitrator resigning without the consent of the other arbitrators and of the replacement arbitrator having therefore been appointed by the Chairman of the Administrative Council.

If in a proceeding it becomes obvious that an arbitrator should not serve on the tribunal, and yet fails to resign, a party may propose the disqualification of the arbitrator. Article 57 of the Convention provides for such disqualification "on account of any fact indicating a manifest lack" of an arbitrator of the personal qualities

required by Article 14(1) of the Convention. A party may also propose the disqualification of an arbitrator on the ground that the arbitrator was ineligible for appointment to the tribunal (because of the arbitrator's nationality or, in the case of an appointee of the Chairman of the Administrative Council, lack of membership in the Panel of Arbitrators). Arbitration Rule 9(4) provides that a proposal to disqualify an arbitrator will be decided by the other members of the tribunal or, if they are evenly divided, by the Chairman of the Administrative Council. There has been one challenge of an arbitrator under these provisions of the Convention and Arbitration Rules. In that case, the challenge was based on an alleged manifest lack by the arbitrator of "reliability" for exercising independent judgment. The challenge was not sustained by the other members of the tribunal as there was, in their view, no fact indicating that the arbitrator had "even a non-manifest" lack of that quality.

The remedies provided by the Convention in respect of an arbitral award include the remedy of annulment of the award. Under Article 52 of the Convention, either party to a dispute may apply for such annulment on one or more of the following grounds: that the tribunal was improperly constituted; that it manifestly exceeded its powers; that one of its members was corrupt; that there was a serious departure from a fundamental rule of procedure; or that the award failed to state the reasons on which it was based. An application to annul an award is referred to a three-member ad hoc committee appointed from the Panel of Arbitrators by the Chairman of the Administrative Council. Such a committee has the power to annul an award in whole or in part on any of the stated grounds. If there is an annulment, either party may submit the dispute to a new tribunal. There have been requests for annulment in four cases. In two of the cases, there was repeated recourse to the remedy after submissions of the disputes to new tribunals. In the two other cases, the disputes were amicably settled by the parties, in one case after the decision of the ad hoc committee and in the other case before any such decision was rendered. In all, there have been five ad hoc committee decisions. The decisions resulted in one total annulment, three partial annulments and one complete rejection of the requests for annulment. In the first two cases of annulment, the ad hoc committees found that the arbitrators had manifestly exceeded their powers by failing to apply the applicable law; in the third case, the ad hoc committee decided that the arbitrators had failed to state reasons for their

ruling on compensation; and in the fourth case the arbitrators were found to have made a serious departure from a fundamental rule of procedure by deciding on an award rectification requested by one party without first giving the other party the opportunity to file observations on the request. While some of these annulment decisions have been criticized for extending the grounds for annulment beyond their intended scope, they together leave no doubt that ICSID arbitrators are held to high standards in the performance of their role.

It will be recalled that the Convention confers on arbitrators immunity from legal process in respect of their acts as arbitrators. Under Article 21 of the Convention, arbitrators will cease to enjoy this immunity if the Centre decides to waive the immunity. Administrative and Financial Regulation 32 provides that the immunity of an arbitrator may be waived either by the Chairman of the Administrative Council or by the Council itself. Neither the Convention nor the Regulations specify the circumstances under which the jurisdictional immunity of arbitrators should be waived. There is furthermore no practice in ICSID that could be referred to on this point since no such waiver has ever been sought. Instruments extending immunity from legal process to other international organizations and to persons associated with them often contain provisions to the effect that the persons' immunity is granted in the interests of the organization only; that it is not granted for the personal benefit of the individuals themselves; and that it should therefore be waived where the immunity would impede the course of justice and can be waived without prejudice to the interests of the organization. If the Chairman or the Council were called upon to waive the jurisdictional immunity of an arbitrator, they might well take the same or similar criteria into account. In cases of serious failures by arbitrators, such as corruption, the Chairman or Council would presumably be prepared to waive the immunity, particularly if the failure had previously been established by an ad hoc committee under Article 52 of the Convention.

Conclusion

The Convention provides that ICSID arbitral tribunals will consist of one or any uneven number of persons appointed as agreed by the parties. If a tribunal cannot be constituted in the agreed manner, the Chairman of the ICSID Administrative Council may be called upon to make the

necessary appointments. However they may be appointed, all ICSID arbitrators must be persons "of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment." Only exceptionally may the arbitrators be co-nationals of the parties involved.

To help the arbitrators to preserve their independence, the Convention gives them security of tenure and qualified immunity from legal process. The arbitrators also have the right to immunity from immigration and similar restrictions so that they can participate in the proceeding wherever it may be held. ICSID arbitrators are, in addition, entitled to cooperation from the parties and to receive administrative support from the Centre. They have the right to reimbursement of their expenses and to fees specified in the Centre's Schedule of Fees or agreed upon in advance between the tribunal and the parties.

In complying with their duty to decide the disputes submitted to them, the arbitrators must respect the limits of their competence and apply the applicable law. The arbitrators must cooperate with each other and treat the parties equally, giving each party the opportunity to express itself on requests made by the other party. The arbitrators must make their award in a timely and careful fashion. Throughout the proceeding, the arbitrators must safeguard their independence, disclosing any relationships with the parties and maintaining a high degree of financial probity. If they find themselves unable to meet these requirements, arbitrators should resign. The more egregious failings of arbitrators can be addressed through a proposal for disqualification, request for annulment or waiver of immunity. Together, the arrangements for the constitution of ICSID tribunals, the rights and duties of the arbitrators after the tribunals are constituted and the mechanisms available to enforce such duties provide formidable guarantees of the effectiveness and impartiality of arbitration under the Convention.

This and other papers presented at the Twelfth Joint ICC International Court of Arbitration/AAA/ICSID Colloquium are reprinted in a 1995 Special Supplement of the *ICC International Court of Arbitration Bulletin* entitled "The Status of the Arbitrator," ICC Publication No. 564.

New ICSID Publications

The Centre has recently completed the Fall 1995 issue of its *ICSID Review—Foreign Investment Law Journal*. The issue includes the following articles: "Towards an International Agreement on Foreign Direct Investment?," by A.A. Fatouros; "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules," by Emmanuel Gaillard; and "Arbitration Without Privity," by Jan Paulsson.

The issue also includes the English text of the December 17, 1994 Energy Charter Treaty and its annexes. Arthur T. von Mehren and Gilles Blanchi provide the issue's reviews of *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (Nagla Nassar) and *Les privatisations: Un défi stratégique, juridique et institutionnel* (Pierre Guislain) respectively.

The *ICSID Review—Foreign Investment Law Journal*, which appears twice yearly, is available on a subscription basis from the Johns Hopkins University Press, Journals Publishing Division, 2715 North Charles Street, Baltimore, Maryland 21218-4319, U.S.A. Annual sub-

scriptions rates (excluding postal charges) are US\$55 for persons with a mailing address in a member country of the Organisation for Economic Co-operation and Development and US\$27.50 for others.

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