

NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

Vol. 15, No. 1

Winter 1998

Fourteenth ICSID/American Arbitration Association/ICC International Court of Arbitration Colloquium on International Arbitration, Washington, D.C., November 21, 1997

ICSID, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) International Court of Arbitration co-sponsored the fourteenth in their series of joint colloquia on international arbitration on November 21, 1997 in the Lewis Preston Auditorium at the headquarters of the World Bank in Washington, D.C. The colloquium addressed the topic of "Institutional Arbitration: Uniformity and Diversity."

Ibrahim F.I. Shihata, ICSID's Secretary-General, welcomed the nearly 200 participants to the colloquium. There followed presentations on recent institutional developments by William K. Slate II, the President of the AAA, and by Robert Briner, Chairman of the International Chamber of Commerce Court of Arbitration. Mr. Shihata reported on recent institutional developments in ICSID. His remarks are reprinted in this issue of *News from ICSID*. The remainder of the morning was devoted to discussions of the initiation of arbitration proceedings and the constitution of arbitral tribunals. The afternoon session addressed the administration of arbitration proceedings and the finality and enforceability of arbitral awards. Papers presented at the colloquium will be published in the Spring 1998 issue of the *ICSID Review—Foreign Investment Law Journal*.

Yemen Signs the ICSID Convention

On October 28, 1997, the ICSID Convention was signed on behalf of Yemen by its ambassador to the United States, Abdulwahab Al-Hajjir. With this signature, the number of signatories of the Convention reached 143. Yemen also became the fifteenth Arab country to sign the Convention, the others being Algeria, Bahrain, Comoros, Egypt, Jordan, Kuwait, Mauritania, Morocco, Oman, Saudi Arabia, Somalia, Sudan, Tunisia and the United Arab Emirates.

Conference on Energy Matters and Disputes, Hurghada, Egypt, May 20-21, 1998

The Cairo Regional Centre for International Commercial Arbitration and the World Bank will be co-sponsoring the Second International Conference on "Energy Matters and Disputes" on May

(continued on page 7)

Inside ...

Disputes before the Centre	2
Recent Developments in ICSID	4

Disputes Before the Centre

- **Tradex Hellas S.A. v. Republic of Albania (Case ARB/94/2)**

December 30, 1997
The Respondent files its counter-memorial.

January 29, 1998
The Claimant files its reply.

March 4, 1998
The Respondent files its rejoinder.
- **Antoine Goetz and others v. Republic of Burundi (Case ARB/95/3)**

December 1, 1997
The Tribunal meets with the parties in Paris.
- **Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (Case ARB/96/1)**

January 15, 1998
The Claimant files its memorial.
- **Misima Mines Pty. Ltd. v. Independent State of Papua New Guinea (Case ARB/96/2)**

October 14-16, 1997
The Sole Arbitrator meets with the parties in Port Moresby.

November 20, 1997
The Sole Arbitrator issues his Decision on Liability.
- **Fedax N.V. v. Republic of Venezuela (Case ARB/96/3)**

October 15, 1997
Fedax N.V. submits its reply to the counter-memorial.

November 12, 1997
The Republic of Venezuela submits its response to Fedax N.V.'s reply.

January 13, 1998
The Tribunal declares the proceeding closed.

March 9, 1998
The Tribunal renders its Award.
- **Metalclad Corporation v. United Mexican States (Case ARB(AF)/97/1)**

October 14, 1997
The Claimant files its memorial.

February 17, 1998
The Respondent files its counter-memorial.
- **Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v. Burkina Faso (Case ARB/97/1)**

October 29, 1997
The Tribunal meets with the parties in Geneva.

January 28, 1998
The Respondent files its counter-memorial.

March 20, 1998
The Claimant files its reply to the counter-memorial.
- **Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic (Case ARB/97/3)**

December 1, 1997
The Tribunal is constituted. Its members are: Judge Francisco Rezek (Brazilian), President; Professor Thomas Buergenthal (U.S.); and Mr. Peter D. Trooboff (U.S.).

January 8, 1998
The Argentine Republic files objections to jurisdiction.

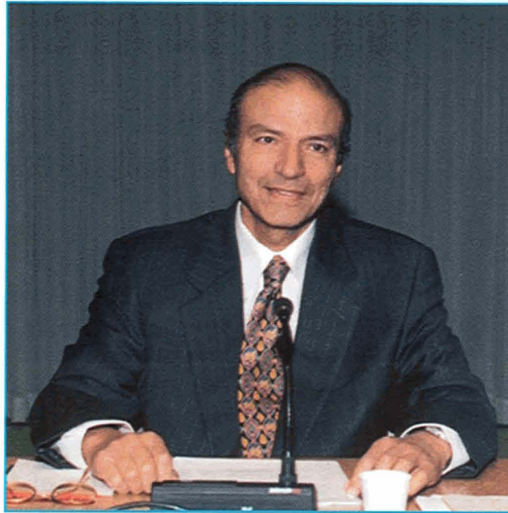
- January 20, 1998*
The Tribunal holds its first session.
- February 18, 1998*
The Tribunal meets with the parties in Washington, D.C.
- **Robert Azinian and others v. United Mexican States (Case ARB(AF)/97/2)**
September 26, 1997
The Tribunal holds its first session with the parties in Washington, D.C.
October 6, 1997
The Respondent files a motion for directions.
November 7, 1997
The Claimants file their reply to the Respondent's motion for directions.
December 2, 1997
The Respondent files its response to the Claimants' reply.
January 22, 1998
The Tribunal issues an interim decision on the Respondent's motion for directions.
January 29, 1998
The Claimants file their memorial.
 - **Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (Case ARB/97/4)**
October 6, 1997
The Tribunal holds its first session with the parties in Washington, D.C.
January 30, 1998
The Claimant files its memorial on jurisdiction.
 - **WRB Enterprises, Inc. and Grenada Private Power Limited v. Grenada (Case ARB/97/5)**
November 7, 1997
In the absence of agreement between the parties on the number of arbitrators and the method of their appointment, it is established that, in accordance with Article 37(2)(b) of the ICSID Convention, there will be three arbitrators, one appointed by each party and a third, presiding, arbitrator appointed by agreement of the parties.
 - **Lanco International, Inc. v. Argentine Republic (Case ARB/97/6)**
October 14, 1997
The Secretary-General registers a request for the institution of arbitration proceedings.
March 19, 1998
The Tribunal is constituted. Its members are: Mr. Bernardo M. Cremades (Spanish), President; Dr. Luiz Olavo Baptista (Brazilian); and Mr. Guillermo Aguilar Alvarez (Mexican).
 - **Emilio Agustín Maffezini v. Kingdom of Spain (Case ARB/97/7)**
October 30, 1997
The Secretary-General registers a request for the institution of arbitration proceedings.
March 16, 1998
The Respondent files objections to jurisdiction.
 - **Compagnie Française pour le Développement des Fibres Textiles v. Republic of Côte d'Ivoire (ARB/97/8)**
November 4, 1997
The Secretary-General registers a request for the institution of arbitration proceedings.
February 16, 1998
The Tribunal holds its first session with the parties in Paris.
March 19, 1998
The Tribunal meets with the parties in Paris.
 - **Joseph C. Lemire v. Ukraine (Case ARB(AF)/98/1)**
January 16, 1998
The Secretary-General registers a request for the institution of arbitration proceedings.
 - **Houston Industries Energy, Inc. and others v. Argentine Republic (Case ARB/98/1)**
February 25, 1998
The Secretary-General registers a request for the institution of arbitration proceedings.

Recent Developments in ICSID

By Ibrahim F.I. Shihata
Senior Vice President
and General Counsel, World Bank;
Secretary-General, ICSID

Remarks at the Fourteenth ICSID/American Arbitration Association/ICC International Court of Arbitration Colloquium on International Arbitration: "Institutional Arbitration: Uniformity and Diversity," Washington, D.C., November 21, 1997

ICSID, as most of you will know, was established by the 1965 Convention on the Settlement of Investment Disputes. There are today 129 Contracting States to the ICSID Convention. Under the Convention, ICSID provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.



Under its 1978 Additional Facility Rules, ICSID's Secretariat is authorized to administer certain kinds of conciliation and arbitration proceedings between States and foreign nationals that fall outside the scope of the ICSID Convention. These include proceedings concerning investment disputes where either the State party, or the State whose national is a party to the dispute, is not an ICSID Contracting State. They also include proceedings concerning legal disputes not characterized as investment disputes, provided they are not ordinary commercial disputes.

A third function of ICSID in the area of dispute settlement derives from my having accepted, in my capacity as Secretary-General of ICSID, to act as the appointing authority of arbitrators operating under the UNCITRAL Arbitration Rules or other rules for ad hoc arbitration.

There have recently been noteworthy developments in all three of these functions of the Centre.

Arbitration under the ICSID Convention has been the most frequently employed of ICSID's dispute settlement facilities. It shares with other

forms of arbitration the requirement of the mutual consent of the parties. Under the ICSID Convention, that consent must have been expressed in writing at the time of a request for arbitration. But the Convention does not require such mutual consent to be contained in a single instrument, such as an investment contract. This fact has been the basis of the most significant recent developments in ICSID arbitration.

As a background to these developments, the alternative to consents expressed in a single instrument was already foreseen in the 1965 Report of the World Bank Executive Directors accompanying the ICSID Convention. It was suggested there 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 investors might give their consents by accepting the offer in writing. Some 20 ICSID member countries have followed this suggestion by including in their investment legislation such general "offers" or consents to submit disputes with foreign investors to ICSID arbitration. These are typically consents for all disputes between the State and foreign investors over the interpretation or application of the investment law in question to be settled, except if the disputing parties otherwise agree, by arbitration under the ICSID Convention or, if the investor is not a national of a Contracting State, then by ICSID Additional Facility arbitration.

Beyond these provisions in national laws, a vastly greater number of comparable provisions may now be found in bilateral investment promo-

tion and protection treaties, or BITs. About 900 BITs contain provisions referring to ICSID. Most of these BITs are between ICSID Contracting States. They stipulate that each State thereby consents to submit to arbitration under the ICSID Convention disputes arising out of investments made in its territory by investors of the other State party.

Some BITs concluded by ICSID Contracting States with countries that at the time were not ICSID members contain consents to arbitration *both* under the ICSID Additional Facility Rules *and*, prospectively, to arbitration under the ICSID Convention. As the States parties to such treaties have been joining ICSID, their consents to ICSID Convention arbitration have become operative.

A further group of BITs, in order to allow investors greater options, have established a *triple* pattern, setting forth the States' consent to submit disputes with covered investors to arbitration under the ICSID Convention, the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules. This would make sense, for instance, where neither of the States concluding the BIT are at that time members of ICSID.

This very same pattern has been carried over into some of the new multilateral investment treaties. Consents to ICSID Convention, ICSID Additional Facility and UNCITRAL Rules arbitration are all found in the NAFTA; in the Colonia Investment Protocol of Mercosur; the Colombia-Mexico-Venezuela Free Trade Agreement; and the Energy Charter Treaty. The Energy Charter Treaty includes as a further alternative arbitration under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce. Some BITs also refer to this form of arbitration or to arbitration under the auspices of the ICC International Court of Arbitration.

Combined consents to ICSID Convention, ICSID Additional Facility and UNCITRAL Rules arbitration, as well as ICC arbitration, may also be included in the provisions on the arbitration of investment disputes in the Multilateral Agreement on Investment that is being negotiated within the OECD.

It is often remarked that investors covered under these provisions in investment laws and in bilateral and multilateral treaties no longer depend on a pre-existing contractual relationship to initiate arbitration proceedings with their host State. Host States that choose to be bound by such provisions are in effect extending an offer of arbitration to an indeterminate group of investors. One commentator has used the phrase "arbitration without privity" to describe this dramatic expansion of international arbitral jurisdiction through such provisions in laws and treaties.

As a result of these general consents in investment laws and treaties, there have been changes in the size and overall character of ICSID's caseload.

Until 1984, jurisdiction in all of the cases brought to ICSID was based on consents set forth in the traditional manner, by a clause in an investment agreement or similar contract. While this type of consent is of course still being invoked to bring new cases to ICSID, there have, since that time, been sixteen arbitration cases submitted to the Centre by investors who have made use of the State's consent in an investment law or in a treaty by giving their own written consent and by instituting a proceeding, sometimes in a single step. And this has been done notwithstanding the absence or the existence of a contractual relationship between the investor and the disputing State.

Although it was anticipated for some time that a greater portion of future cases would be founded on the general consents to arbitration that I have referred to here, this development has meant that ICSID's caseload has increased significantly in the last two years, and in recent months has been increasing dramatically.

We now also see a changing landscape of issues raised in the cases before the Centre. In addition to concession agreements and expropriation, such issues have concerned civil strife, actions of political subdivisions, privatizations, loans and other financial arrangements, and the environment. Also, with consent given in such general terms under investment laws and treaties, jurisdictional

issues promise to be an important part of future developments in ICSID arbitration.

The flavor of ICSID's cases has changed as well. Whereas up until three years ago the only procedural language other than English used in ICSID proceedings had been French, at present almost half of our pending cases feature Spanish as a procedural language. This is a reflection of the entry of Latin American States and their investors into the group of participants in ICSID arbitration proceedings. We could perhaps await a greater participation in terms of the number of jurists from that region acting as arbitrators in ICSID cases. This could occur, for example, by way of designations by ICSID member countries to ICSID's Panels of Conciliators and of Arbitrators, as many countries have yet to exercise this right under the Convention.

The most recent cases to be brought to the Centre include the first ones to be brought under its Additional Facility Rules. These have concerned investment disputes where the disputing State is not an ICSID Contracting State. There is still potential, however, for Additional Facility Rules arbitration to be used in regard of disputes that do not arise out of an investment, provided they do not arise out of an ordinary commercial transaction. An example of such non-investment disputes could be one concerning liability for environmental injury, where the injured party is not part of the investment relation.

The first Additional Facility Rules proceedings are also the first investor-to-State proceedings ever to be brought under the provisions of a multilateral treaty, in this instance the NAFTA. A third investor-to-State proceeding under the NAFTA is being arbitrated under the UNCITRAL Arbitration Rules. In that proceeding I was called upon to act as appointing authority for the appointment of the presiding arbitrator. I believe our long experience in investor-to-State arbitration served us very well for such a task.

With such activities being performed by ICSID both within and beyond the realm of the ICSID Convention, and yet increasingly under the provisions of bilateral and now multilateral treaties, one might appreciate how in the functions of a single arbitral institution such as ICSID there may be diversity, but at the same time, one might say, unity.

New ICSID Publications

The Centre completed the Fall 1997 issue of *ICSID Review—Foreign Investment Law Journal*. The issue includes articles by A. Peter Mutharika on the investment climate in the Common Market for Eastern and Southern Africa (COMESA) Region and by Antonio R. Parra on provisions on the settlement of investment disputes in modern investment laws, bilateral investment treaties and multilateral instruments on investment. The issue also includes the third installment of a "Commentary on the ICSID Convention" by Christoph Schreuer.

The *ICSID Review—Foreign Investment Law Journal*, which appears twice yearly, is available on a subscription basis from the Johns Hopkins University Press, Journals Publishing Division, 2715 North Charles Street, Baltimore, Maryland 21218-4363, U.S.A. Annual subscription rates (excluding postal charges) are US\$60 for subscribers with mailing address in a member country of the Organisation for Economic Co-operation and Development and US\$30 for others.

Other recent publications of the Centre include two new releases (97-3) and (97-4) of ICSID's collection of *Investment Treaties*. Due to the substantial number of new treaties, Volume 7 of the treaties collection was issued in conjunction with release (97-3). A new release (97-2) of ICSID's *Investment Laws of the World* was issued in October 1997. The release contains texts of basic investment legislation of Côte d'Ivoire, Egypt, Georgia, Indonesia, Jordan, Korea, Latvia and Vietnam.

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

The Centre recently published *Bilateral Investment Treaties 1959-1996: Chronological and Country Data, and Bibliography*. The publication lists the signature and, where applicable, entry into force dates of nearly 1,150 bilateral investment treaties (BITs), in chronological and country order. The publication also contains references to over 120 articles and books dealing with BITs. The publication is available from the Centre on request.

New Designations to the ICSID Panels of Conciliators and of Arbitrators

Argentina

Panel of Conciliators

Designations effective as of October 2, 1997: Dr. Roberto T. Aleman, Dr. Horacio Bercun, Dr. Felix Peña and Dr. Eduardo Angel Perez.

Panel of Arbitrators

Designations effective as of October 2, 1997: Dr. Marcelo Carlos Avogadro, Dr. Héctor Masnatta, Dr. Ana Isabel Piaggi and Dr. Orlando R. Rebagliati.

Bahrain

Panel of Arbitrators

Designation effective as of February 25, 1998: Mr. Jan Paulsson to serve the remainder of Mr. Mahmood Al-Kooheji's term.

Belgium

Panel of Conciliators

Designations effective as of February 25 and March 13, 1998 respectively: Professor F. Rogiers and Mr. Joseph Vuchelen.

Panel of Arbitrators

Designations effective as of February 25, 1998: Mr. Guy Schrans and Mr. Georges van Hecke (re-appointments).

Designations effective as of March 13, 1998: Mr. Jean Godeaux and Mr. Eddy Wymeersch.

Sri Lanka

Panels of Conciliators and of Arbitrators

Designation effective as of April 22, 1997: Dr. C.F. Amerasinghe.

Conference on Energy Matters and Disputes, Hurghada, Egypt, May 20-21, 1998

(continued from page 1)

20 and 21, 1998. The conference will take place at the Hilton Plaza Hotel in Hurghada, Egypt.

The conference will be organized in four modules. The topics to be discussed will include modern petroleum agreements with an emphasis on production-sharing contracts, practical aspects of settling petroleum disputes by arbitration, special issues pertaining to natural gas/LNG development, and issues of financing of energy infrastructure. In addition, the agenda includes two workshops and a plenary session.

For further information on this conference, contact the Cairo Regional Centre for International Commercial Arbitration, 1 Al-Saleh Ayoub Street, Zamalek, Cairo, Egypt, telephone 340-1333, 340-13335 or 340-1337, fax 340-1336.

Institute for Transnational Arbitration, Ninth Annual International Commercial Arbitration Workshop, Dallas, Texas, June 18, 1998

The Institute for Transnational Arbitration, a division of the Southwestern Legal Foundation, will be hosting its Ninth Annual International Commercial Arbitration Workshop on June 18, 1998, at the Westin Hotel, Galleria Dallas, Dallas, Texas, U.S.A.

The 1998 Workshop will address two principal topics. It will first focus on arbitrators, including the process by which they are selected, the grounds on which they may be challenged and their role in the transnational arbitral process. The Workshop will then examine arbitral procedures, including prehearing discovery, the presentation of evidence and the conduct of oral hearings.

For further details on this workshop, contact The Southwestern Legal Foundation, P.O. Box 830707, Richardson, Texas, U.S.A., telephone (972) 699-9501, fax (972) 699-3870.

Recent Publications on ICSID

Chukwumerije, Okezie, International Law and Article 42 of the ICSID Convention, 14 *Journal of International Arbitration* 79 (1997).

Escobar, Alejandro A., An Overview of the International Legal Framework Governing Investment, *American Society of International Law, Proceedings of the 91st Annual Meeting* 488 (1997).

_____, Three Aspects of ICSID's Administration of Arbitration Proceedings, 14 *News From ICSID* No. 2, at 4 (1997).

Gaillard, Emmanuel, Centre International pour le Règlement des Différends Relatifs aux Investissements: Chronique des sentences arbitrales, 124 *Journal du Droit International* 277 (1997).

Igbokwe, Virtus Chitoo, Developing Countries and the Law Applicable to International Arbitration, 14 *Journal of International Arbitration* 99, 114-16 (1997).

Mutharika, A. Peter, Creating an Attractive Investment Climate in the Common Market for Eastern and Southern Africa (COMESA) Region, 12 *ICSID Review—Foreign Investment Law Journal* 237, 276-77 (1997).

Nassar, Nagla, Internationalization of State Contracts: ICSID, The Last Citadel, 14 *Journal of International Arbitration* 183, 196-206 (1997).

Parra, Antonio R., Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, 12 *ICSID Review—Foreign Investment Law Journal* 287 (1997).

Schreuer, Christoph, Commentary on the ICSID Convention: Articles 25 (cont.), 26 and 27, 12 *ICSID Review—Foreign Investment Law Journal* 59 (1997).

_____, Commentary on the ICSID Convention: Articles 41, 42, 43 and 44, 12 *ICSID Review—Foreign Investment Law Journal* 365 (1997).

Shihata, Ibrahim F.I., Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank 47-52 (1997).

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.