

FROM
ICSID

International Centre for Settlement of Investment Disputes

Vol. 2, No. 2 Summer 1985



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Editorial

ICSID and the Promotion of Better Investment Climates

At a time when the volume of foreign investment in developing countries has significantly declined, ICSID should renew its efforts to secure an increasing flow of resources to developing countries under appropriate conditions. In this respect, ICSID shares a common purpose with The World Bank, the International Finance Corporation and the proposed Multilateral Investment Guarantee Agency.

Among other means used to further that objective, ICSID has collected and published for many years sets of investment legislation (*Investment Laws of the World*) and of bilateral investment treaties (*Investment Treaties*), thereby affording ready access to material of interest to investors and host countries alike.

Recently, ICSID has undertaken a systematic classification of the material included in *Investment Treaties*. Some member countries have requested ICSID to proceed with a comparative analysis of this material and to publish the results in the form of a *Handbook on Investment Treaties* that would be used by member countries in negotiating treaties. Preparations for this work are now under way.

In the field of investment legislation, ICSID intends to initiate another analysis of material. In view of the diversity of the material in question, this is a task which will require some time. It will also call for liaison with other institutions conducting research in this field.

In order to complement these efforts, ICSID has decided to launch a new publication entitled *ICSID Review - Foreign Investment Law Journal*.

News from ICSID has been well received by the public. It is hoped that the high standards that the new Journal is intended to achieve will contribute further to the dissemination of information relating to investments for the benefit of member countries and other interested parties.

Ibrahim F.I. Shihata
Secretary-General, ICSID

ICSID Review - Foreign Investment Law Journal

The Journal is intended to meet the need for a publication which collects under one cover material on the law and practice relating to foreign investments. It will provide a

forum for the examination by leading experts of current topics in such areas as domestic legislation and bilateral investment treaties, contractual trends regarding the negotiation and performance of investment agreements in the broadest sense, as well as the resolution of investment disputes.

In addition to articles, the Journal will contain comments on recent developments, notes on cases, including decisions of non-ICSID fora, documents such as investment laws and treaties, and book reviews. The Journal will also feature information on the Centre's activities which has hitherto been made available in this newsletter.

The Journal will primarily be published in English, although material in French will also be considered for inclusion. It will initially appear on a bi-annual basis. The first issue is scheduled for publication in early 1986. With the publication of the Journal, future issues of this newsletter will henceforth appear as a supplement to the Journal.

Disputes Before the Centre

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

March 18, 1985

An application for annulment of the November 20, 1984 arbitral award is submitted by the Respondent and registered by the Secretary-General.

April 19, 1985

The Secretary-General notifies the parties that the *ad hoc* Committee provided for under Article 52(3) of the Convention has been constituted. The Committee, appointed by the Chairman of the Administrative Council, consists of Mr. Florentino Feliciano (Filipino), Professor Andrea Giardina (Italian) and Professor Dr. Ignaz Seidl-Hohenveldern (Austrian).

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

January 10-11, 1985

The *ad hoc* Committee meets in Geneva.

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

November 27, 1984

Respondent files its Counter-Memorial.

January 3, 1985

Claimant files its Reply to Respondent's Counter-Memorial.

February 6, 1985

Respondent files its Rejoinder.

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

- March 5, 1985 The Centre receives a joint request from the parties, dated February 10, 1985, to take note of the discontinuance of the proceeding pursuant to Arbitration Rule 43(1).
- March 6, 1985 The Secretary-General renders an Order noting the discontinuance of the proceeding under Arbitration Rule 43(1).

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

- March 4, 1985 Claimant files a Supplemental Memorandum, dated February 28, 1985.
- March 25, 1985 The Tribunal meets in London.

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

- January 7, 1985 Receipt of Respondent's Counter-Memorial.
- March 8, 1985 Receipt of Claimant's Memorial on the counterclaim.

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

- October 22, 1984 Claimant files its Memorial.

- January 18, 1985 Respondent files its Counter-Memorial.
- April 15, 1985 Claimant files its Reply Memorial.

SPP (Middle East) v. the Arab Republic of Egypt (Case ARB/84/3)

- February 8, 1985 The Tribunal meets in The Hague with the parties for a preliminary procedural consultation.

Maritime International Nominees Establishment (MINE) v. the Republic of Guinea (Case ARB/84/4)

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

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

- February 7, 1985 The Conciliator files his Recommendation.

Asian Express International (S) PTE Ltd. v. Greater Colombo Economic Commission

- April 9, 1985 The Secretary-General finds that the dispute is "manifestly outside the jurisdiction of the Centre" and accordingly notifies the parties of his refusal to register the request. (ICSID Convention, Article 36(3)).

New Additions to the Panels of Conciliators and Arbitrators

Three Contracting States have recently made designations to the Panels of Conciliators and Arbitrators maintained by the Centre. These are as follows:

BANGLADESH—designations effective January 28, 1985:

Panels of Conciliators and of Arbitrators:

Mr. Justice Maksum-ul Hakim, Mr. Justice Ruhul Islam, Mr. Justice T.H.Khan, and Mr. A.R. Yusuf.

BELGIUM:

Panel of Conciliators—designations effective as of April 23, 1985:

Mr. A. Dequae (re-appointment), Compté J.-Ch. Snoy et d'Oppuers, and Mr. R. Vandeputte.

Panel of Arbitrators—designations effective as of February 5, 1985:

Baron C. de Strycker, and Mr. Franz de Voghel (re-appointment).

PHILIPPINES—designations effective April 9, 1985:

Panels of Conciliators and of Arbitrators:

Ms. Lilia R. Bautista (re-appointment), Mr. Efren I. Plana (re-appointment), and Mr. Gonzalo Santos; and Mr. Florentino Feliciano (re-appointment effective March 20, 1985).

A complete list of the Panel members is available at the Secretariat upon request (ICSID/10).

Legal Rules Applied by ICSID Tribunals

Company X v. State A.

Introduction (by Georges R. Delaume, Senior Legal Adviser, ICSID)

The Secretariat has been authorized by both parties to an

ICSID proceeding to publish excerpts from the decision on jurisdiction made by an arbitral tribunal. The decision must remain anonymous. It is nevertheless of direct interest to

the legal community and the draftsmen of ICSID clauses.

The decision reproduced below in an English translation deals with the issue of the nationality of a corporation incorporated (or having its *siège social*) in the host Contracting State, but under "foreign control".

It will be recalled that this issue arose in two other ICSID cases, which have been publicized.

The first case is *Holiday Inns et al v. Morocco* (Case ARB/72/1), on which see P. Lalive, "First World Bank Arbitration (Holiday Inns v. Morocco) - Some Legal Problems", 51 *British Yearbook of International Law* 123 (1980) and Rambaud, "Premiers Enseignements des Arbitrages du C.I.R.D.I.", 23 *Annuaire Français de Droit International* 1981, 471). As mentioned in an earlier issue of *News from ICSID* (Vol. 1, No. 2 (Summer 1984) p. 18), this case related to claims filed by a Swiss and a U.S. corporation on their own behalf and on behalf of subsidiaries incorporated in Morocco. Because there was no explicit agreement by Morocco to treat the local subsidiaries as being under "foreign control" for the purposes of Article 25(2)(b) of the ICSID Convention, the tribunal held that it had no jurisdiction in respect of the local subsidiaries. Nevertheless, the tribunal acknowledged that an implicit agreement might be acceptable if it were supported by the circumstances of the case.

This solution was accepted in *Amco Asia v. Indonesia* (Case ARB/81/1) published in the *Journal du Droit International* 1984, 409 and in 23 *International Legal Materials* 351 (1984), and summarized in *News from ICSID* (Vol. 1, No. 2 (Summer 1984), pp. 5-7). In that case, the respondent relied on *Holiday Inns* to argue, *inter alia*, that the Indonesian company established by the applicant had not been expressly acknowledged by the parties as being under the "foreign control" of nationals of another Contracting State and that, therefore, the tribunal lacked jurisdiction. The tribunal disagreed and distinguished the *Holiday Inns* decision. It held that the circumstances were such that it was "crystal clear" that the respondent had agreed to treat the local company as a national of another Contracting State (namely the United States) for the purpose of the Convention.

In the same connection, the tribunal considered another argument made by the respondent, namely that the true "controller" of the local company was not the applicant but a Mr. X, a Dutch citizen, who himself controlled the applicant. This argument did not succeed. The tribunal reasoned that under the Convention, the concept of nationality is a "classical one", based on the place of incorporation or *siège social* of a company and that although an exception to this rule may be made when such a company is under foreign control, no such exception would exist for the purpose of determining who in effect "controlled" the "controller" of the company involved.

As will be seen from the following decision, the tribunal differed from the view expressed by the tribunal in *Amco Asia*. In that case, a company (X) had been incorporated in the host State (A) and was at the time of consent to ICSID

under the direct control of a corporation incorporated State which was not a member of ICSID (Z). It was shown, however, that (Z) was at the time fully controlled by nationals of Contracting States and that such "indirect" control was sufficient, in the circumstances of the case, to satisfy the nationality requirement of the ICSID Convention.

In view of these pronouncements, this may be the time to recall that much grief and expense could be avoided if the parties to ICSID clauses paid greater attention to matters of drafting and were careful enough to avail themselves of the provisions suggested in *ICSID Model Clauses* (Doc. ICSID/5/Rev.1 available on request) or to submit draft ICSID clauses for review by the Secretariat.

Excerpts from the Decision

"Regarding the claim that (Company x) does not meet the nationality requirements laid down in the Convention:

28. With respect to jurisdiction *ratione personae*, the Convention requires that if one of the parties is a Contracting State, the other must be a 'national of another Contracting State.' Under Article 25(2)(b) of the Convention, this means, when applied to a juridical person, a person

'which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.'

29. The Tribunal noted that the Convention does not define the term 'nationality,' with the consequence that each State is responsible for determining whether or not a company possesses its nationality. As a general rule, the criterion used for this purpose is either that of the corporate headquarters (*siège social*) or that of the place of incorporation. On the other hand, the nationality of the shareholders or the control exercised by foreigners, by reason of any circumstance other than that of their participation in the capital, is not normally a criterion for determining a company's nationality, it being understood that the legislator may call these criteria into play in exceptional cases. A 'juridical person which had the nationality of a Contracting State party to the dispute,' the term used in Article 25(2)(b) of the Convention, is thus a juridical person which, under the legal system of the State in question, has its headquarters (*siège social*) in the State or was set up in accordance with its company law (incorporation). Normally, such a juridical person would thus not be a 'national of another Contracting State' and would not therefore have the capacity to appear before the Centre. Nevertheless, Article 25(2)(b) allows such a jurid-

ical person to be party to the procedures established under the auspices of the Centre if the State in question agrees to treat it as being a national of another Contracting State because of foreign control. The Tribunal also noted that the status of 'national of another Contracting State' is required to be determined by reference to the date on which the parties consented to bring their dispute before the Centre.

30. It is an established fact that, under the laws of (State A), (Company x), a joint stock company with its headquarters in (city in State A), possesses the nationality of (State A), Contracting State party to the dispute submitted to the Centre. The wording of the arbitration clause (without prejudging the merit of the argument that the parties did not consent to submit the present dispute to ICSID), clearly demonstrates that the parties were aware of this fact and that they wished to give (Company x) the capacity to participate in any arbitration procedures covered by said clause. This wish was expressed as follows:

'The undersigned expressly agree that the arbitration shall be subject to the rules set forth in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States drawn up by the International Bank for Reconstruction and Development (IBRD). To this end, the Government agrees to regard as satisfied the nationality requirement provided by Article 25 of the IBRD Convention.'

31. The sense of the phrase the Tribunal put in bold face, although laconic, is nevertheless perfectly clear. By 'nationality requirement provided by Article 25,' the parties obviously did not mean that (Company x) had a nationality other than that of (State A), but rather that, notwithstanding its nationality (that of State A), it was accorded the status of 'national of another Contracting State' because of foreign control. Moreover, it does not appear that the provision contained in Title VI of the Establishment Agreement was drawn up specially for (Company x). There is an identical provision in Article 29 of an Establishment Agreement between (State A) and (Company y).

32. The Government's objection is based on two premises:

1. that the foreign control referred to in Article 25 must be exercised by nationals of Contracting States;

2. that since (Company z), sole shareholder of (Company x) at the time of signature of the Establishment Agreement, has the nationality of (State B), a State not party to the Convention, (Company x) does not therefore meet the requirements of Article 25.

The Tribunal is of the opinion that the structure and

purpose of the Convention are such that any foreign control serving as a basis for according 'foreign' status to a company established under local law must be exercised by nationals of Contracting States. It does not therefore dispute the Government's first premise.

34. Although it is an established fact that the company was set up under the laws of (State B), as established by document (...), (Company x) claims that (Company z) has its headquarters in (city in State C), which claim the Government rejects (...).

35. Although the Tribunal is inclined to agree with the Government on this point, it nevertheless believes, for the reasons set forth below, that it does not have to decide either on this point or on the possible consequences of such a decision on the nationality of (Company z). The nationality of this company, which in 1975 held all the subscribed capital stock of (Company x) would determine the nationality of the controlling foreign interests only if the Convention were to be interpreted as referring only to direct control. But the Tribunal cannot accept such an interpretation, which is contrary to the purpose of Article 25(2)(b) *in fine*. That object, it is hardly necessary to recall, is to reconcile (a) the desire of countries hosting foreign investments to see those investments effected through companies subject to local law and (b) their determination to accord those companies the capacity to be party to procedures under the auspices of the Centre.

36. We have a perfect example of this in the case of (Company x), a company under the laws of (State A), which has nevertheless been accorded the status of national of another Contracting State.

37. Just as the host country may prefer the legal form of national company to be chosen for the firm making the investment, it is obvious that the investors may decide, for reasons of their own, to invest their funds through intermediaries, while retaining the same degrees of control over the national company, which control they would have been able to exercise as direct shareholders of that company.

38. For the reasons set forth below, the Tribunal concludes that the control of (Company z) was exercised, at the date of signature of the Establishment Agreement, by nationals of Contracting States, mainly (State D).

39. (Company x) provided the Tribunal with a Statement from (Mme ...), a national of (State D), saying that in 1975 she held all the shares in (Company z) for the account of (M. ...), a national of (State D).

40. The Board of (Company x) also described circumstances which, in its opinion, explain the provision whereby

the shares in (Company z) were held by (Mme ...). Moreover, document (...), to which reference was made above, states that the Board of Directors of (Company z), listed in the Register since July 18, 1977, was composed of (M. ...), (M. ...) and (Mme ...). (Company x) provided the Tribunal with a statement dated June 5, 1984 from (M. ...), declaring that he was a national of (State C), and adding: 'in 1975, I was in office as President of joint stock Company z at the request of (Mme ...), a national of (State D), sole shareholder of (Company z).' The Tribunal does not know the nationality of (M. ...).

41. As noted above, the condition 'national of another Contracting State' has to be met on the date on which the parties consent to submit their dispute to the Centre. Modifications or changes made subsequent to that date are, therefore, irrelevant for determining whether this requirement is met. It is, however, noteworthy that according to ..., the shareholders of (Company x) and their respective nationalities on that date were as follows:

	Shares	Nationality
_____	593	State D
_____	1	State D
_____	1	State D
_____	1	State E
_____	1	State A
_____	1	State A
_____	1	State C
_____	1	
	600	

42. It is also important to note the minutes of appointment of the members of the Tribunal, which reads as follows:

'The parties decide to constitute the arbitral tribunal in the following manner:

(State A) approves the appointment by (Company x) of (...), (Company x) approves the appointment by (State A) of (...), and the parties agree to appoint ... as third arbitrator.'

In the case of a three-member tribunal, each party is required to approve the appointment of the other party's arbitrator only if two of the arbitrators, representing the majority of the Tribunal members, are nationals respectively of the State that is a Contracting Party to the dispute and of the State whose national is the other party to the dispute. Although the minutes do not refer explicitly to Article 39 of the Convention, we may deduce from their wording that the parties considered that the fact that two of the tribunal members were nationals of State A and State D meant that the requirement set forth in Article 39 of the Convention, appointment by agreement, was met."

ICSID and the Courts

Pursuant to Article 26 of the ICSID Convention, consent to arbitration under the auspices of ICSID is deemed to exclude any other remedy. This rule means that if a party to an ICSID arbitration clause attempted to bring action in a non-ICSID forum, such as a domestic court in a Contracting State, the court ought not to entertain the claim and should refer the parties to ICSID.

This rule of "judicial abstention" has been discussed in the context of *Maritime International Nominees Establishment v. the Republic of Guinea* (693 F. 2d 1094 (D.C. Cir. 1982), reprinted in 21 *International Legal Materials* 1335 (1982), as amended, 22 *International Legal Materials* 86 (1983), cert. denied 104 S. Ct. 71 (1983). See Delaume, "ICSID Arbitration and the Courts", 77 *American Journal of International Law* 784 (1983)).

The decision of the Court of Appeal of Rennes, France, which is reproduced below in English translation, is a clear application of the rule of abstention to a situation in which one of the parties to an ICSID clause sought the assistance of the French courts in attachment proceedings relating to the property of the other party. In no uncertain terms, the Court acknowledges that no such assistance could be provided since, under the Convention (Article 47), the only provisional measures available to the parties are those that can be recommended by an ICSID arbitral tribunal on its own initiative or at the parties' request.

In this connection, the ICSID rules differ from those of other arbitration institutions (whose own rules can never be completely disassociated from domestic law) according to which requests for interim measures of protection addressed to a judicial authority are not deemed incompatible with the arbitration agreement (see e.g., ICC Rules, Article 8(5); AAA Commercial Arbitration Rules, 46. Comp. UNCITRAL Rules, Article 26, para. 3). See also as to the compatibility of interim measures with the provisions of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, Delaume, *Transnational Contracts*, Chapter XIII, para. 13.14).

In contrast, in the case of ICSID, the exclusive character of consent to ICSID arbitration implies that the parties waive their right to seek provisional measures in any forum other than an ICSID forum, whether before or after the institution of the proceedings.

In the context of ICSID, the parties, if they wish to retain the option of seeking judicial assistance in respect of provisional measures, must do so by way of express agreement. This has been emphasized in the Revised Arbitration Rules adopted on September 26, 1984, by the Administrative Council of ICSID (Rule 39(5)) and in the *ICSID Model Clauses* (Doc. ICSID/5/Rev.1, para. 21 and Clause XVI). This type of provision is not infrequent in loan agreements between bankers and foreign sovereign borrowers and is found also in certain economic development agreements

other than loans (Delaume, *op. cit.*, Chapter XV, para. 15.18).

"Rennes Court of Appeal
October 26, 1984

The Court, in the case between:
The Revolutionary People's Republic of Guinea
and
La Société Guinéenne de Pêche
(SOGUIPECHE) v.
The Atlantic Triton Company

ruled as follows:

On July 6, 1984, the Revolutionary People's Republic of Guinea and SOGUIPECHE appealed against the order issued on April 6, by the presiding judge of the Quimper Commercial Court, which disallowed their request for release of the three fishing boats arrested at the request of the Norwegian company Atlantic Triton while undergoing repair in the Piriou yard at Concarneau, and were summoned on July 25 and 31 to appear at the hearing on September 14 so that a decision could be reached on the merits of their appeal.

The Public Attorney has pointed out that the management agreement signed between parties contained an arbitration clause providing that disputes should be referred for settlement to ICSID, set up by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, ratified by France, Guinea and Norway; that such tribunal has the power to recommend any provisional measures, and enjoys sole jurisdiction to the exclusion of that of national courts; the local judge should have either stayed the proceeding if the [ICSID arbitral] tribunal had not yet ruled on the matter, or, if that had been done, decided in the same manner as the tribunal; that this solution is consistent with the information in the section on provisional measures in the ICSID brochure [ICSID Model Clauses, Clause XVI]; he therefore concludes that the order should be set aside and that the attachment of the three ships be vacated.

AS REGARDS THE FACTS

The Minister of Fisheries of the Revolutionary People's Republic of Guinea, . . . designated as the shipowner, and the Norwegian company Atlantic Triton signed a management agreement on August 12, 1981 in which the State requested the company to undertake at the State's expense the conversion, equipping and operation of three vessels acquired with a view to establishing a fishing industry designed to meet the food needs of the urban population. The

agreement was to last two years and could be terminated with three months' advance notice. The document contained a clause committing both parties to refer disputes to ICSID for settlement on an equitable basis, while disputes not falling within the jurisdiction of ICSID were to be arbitrated by the International Chamber of Commerce.

The company undertook the ship repair and conversion work in Norway from August to November 1981, sailed the vessels to Guinea, and operated them until September 1982.

The Government of Guinea requested technical assistance from the FAO to improve the poor results obtained by the national fishing company, SOGUIPECHE, during the first 6 months of operation. This study showed that the ships were unsuitable for fishing in Guinean waters, being too large, too expensive and too complicated; the Norwegian nets were unsuitable, and the ships had not been properly maintained, making a general overhaul necessary. FAO advised that overhaul of the two ships, Matakang and Soro, should be reorganized, that fuel should be subsidized, and that the third trawler, Kaloum, be sold and new fishing vessels acquired. These conclusions were confirmed in a report from the technical director of SOGUIPECHE on September 11, 1982 which referred to a large number of mechanical and electrical breakdowns that had immobilized the vessels for long periods and left them in poor condition, although they had been overhauled, except for careening.

The Government, acting on behalf of SOGUIPECHE, the shipowner, made arrangements in a contract dated January 14, 1984, pursuant to an agreement of February 26, 1983, for the Piriou facility to overhaul and convert the three ships. . . . In the light of the breakdowns and the evidence of the unsuitability of the ships for fishing in tropical waters, meetings took place between the Guinean Ministry of Fisheries and the Norwegian company at Bergen from September 17 through 21, 1982 regarding the performance of management agreement. The record of the meeting prepared on September 21, referred to the unsatisfactory technical performance of the vessels, particularly the 'Matakang', the technically unfortunate choice of equipment which resulted in very small catches and represented an economic disaster, to the lack of flexibility of the arrangements and to the difficult character of operating conditions. Austerity measures were taken; the Norwegian company acknowledged its responsibility for the defects in the conversion in the 'Matakang' but, alleging a difficult financial situation and the non-payment of management fees for the third quarter, undertook to

finance 40% of the rehabilitation plan. The parties agreed on the need for revision of the basic provisions of the management agreement.

In a letter of April 5, 1983, Atlantic Triton, in the light of the refusal of its partner to perform its financial obligations, cancelled the agreement with the Guinean Government with effect from June 30 and requested payment of the sum of US\$226,867 as owing to the Mjellem and Karlsen yards, and of US\$334,444 as administrative expenses for the period October 1, 1982 through June 30, 1983. The Government protested about a considerable overrun in relation to the estimate for converting the ships. Having received no reply to its cancellation of the contract, Atlantic Triton obtained an order from the President of the Quimper Commercial Court dated October 12, authorizing the attachment of the three ships as security for a claim estimated at US\$571,311, plus a sum of US\$150,000 for expenses in penalty interest, provided that an appeal was lodged on the merits of the matter within three months. The company then informed ICSID that the ships had been attached by the bailiff and that the attachment order had been notified on October 19 and 21 to the Piriou yard and the Guinean Embassy respectively. The Government of Guinea and SO-GUIPECHE moved to vacate the attachment and requested compensation of F 150,000 for abuse of process. The motion was dismissed by order of April 6 last, which was appealed.

In the meantime a request for arbitration under the auspices of ICSID was submitted on January 9, 1984 by the Norwegian company. Notice of registration of the request was dispatched on the 19th of that month, and the tribunal was constituted on August 1 (Article 6 of the ICSID Arbitration Rules).

On August 20 the Republic of Guinea requested the ICSID tribunal to order the immediate suspension of the provisional measures authorized by the President of the Quimper Court. A ruling was requested before September 14, the date of the hearing before this court. It was alleged that the company had violated ICSID Rules which forbid that a request for provisional measures be submitted to a national jurisdiction.

The appellants put forward the following grounds in support of their appeal: immunity from execution ... and the Convention of Washington of 1965.

On the first ground

The State of Guinea did not waive its immunity from execution by adding a claim for compensation for wrongful attachment to its demand for the release of the ships attached.

The ships, whose owner's identity is contested, had become the property of SOGUIPECHE as a result of the 'acts of Guineazation' dated June 7, 1983 and communicated by Ms. Tessier, counsel for the appellants, on December 19 of the same year. Furthermore, they had become part of the company's assets from its establishment on January 6, 1982; in a telex of June 3, 1983 to Atlantic Triton the company indicated its desire to sell the ships' equipment; the company has both a separate legal identity from that of the State of Guinea and its own assets, and engages in commercial activity governed by the laws and customs of commerce (cf. decree of January 6, 1982, particularly Article 10). Therefore the argument regarding immunity from execution is without foundation.

On the third ground

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States established under the auspices of the International Bank for Reconstruction and Development (IBRD) on May 18, 1964 [should read March 18, 1965], which came into effect on October 14, 1966 and was ratified by a large number of states, including France, Norway and Guinea, set up an International Centre for Settlement of Investment Disputes (ICSID) which includes conciliation and arbitration machinery (in this case a tribunal).

Article 26 provides that the consent to arbitration shall 'unless otherwise stated' be deemed consent to such arbitration to the exclusion of any other remedy, although 'a Contracting State' may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.' Article 47 provides that 'except as the parties otherwise agree, the tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.'

The rules applicable to ICSID's arbitration proceedings, which is an official document drawn up by the Administrative Council of the Centre pursuant to Article 6 of the Convention, provide, in Rule 39 entitled 'provisional measures', that at any time during the proceeding a party may request that provisional measures for the preservation of its rights may be 'recommended' by the tribunal, which shall give priority to the request.

The tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. In cases of urgency the tribunal may take decisions by cor-

respondence among its members; the President may also call special meetings of the tribunal.

The ICSID rules specify that unless otherwise agreed by the parties, consent to arbitration by ICSID is exclusive of any other remedy, and therefore the parties cannot apply to local administrative or judicial authorities to obtain provisional measures, but must have recourse only to the arbitration tribunal.

The purpose of the Convention was to set up a machinery that would be widely accepted for conciliation and arbitration purposes, to which the Contracting States and the nationals of other Contracting States can submit disputes on matters of private international investments, rather than to local jurisdictions.

As this rule regarding arbitration makes the purpose of the Convention clear, it follows that the arbitration tribunal has the general and exclusive power to rule not only on the merits of the dispute but also on all provisional measures. The terms used, such as 'remedy' (Article 26 of the Convention) have a general application that dispels any possible ambiguity. ... If local jurisdictions had the power to consider requests for provisional measures, this would restrict the competence of the tribunal and would entail the serious risk of decisions being taken that would complicate the task of the arbitrators, who in this case must reach equitable decisions. Under international law it is agreed that the parties must refrain from any steps that might have prejudicial effects on the enforcement of a future decision [of an

international tribunal] and, in general terms, must not engage in any activities that could aggravate or extend the scope of dispute.

From the start of the dispute bringing into effect the clause providing consent to ICSID arbitration, the parties to the agreement are compelled to have recourse to such arbitration.

In the light of these observations the President of the Commercial Court had no jurisdiction to grant the request for an order of attachment regarding three ships belonging to SOGUIPECHE.

THEREFORE THE COURT

Grants the appeal lodged by the Revolutionary People's Republic of Guinea and the SOGUIPECHE company;

Quashes the order made by the President of the Quimper Commercial Court of April 6, 1984;

Directs the company to apply to the appropriate jurisdiction;

Orders the Atlantic Triton Company to pay all the costs..."

Note: The translation of this decision first appeared in 24 International Legal Materials 340 (1985) and is reproduced with permission.

Membership

On January 30, 1985, the ICSID Convention was signed at the seat of the Centre on behalf of the Republic of Haiti by its Ambassador in Washington, D.C., Mr. Adrien Raymond. Haiti became the 91st State to sign the Convention, which has been ratified by 87 States.



Signature of the ICSID Convention by Haiti. From left to right: seated: Mr. Guillermo A. Rivera, Alternate Executive Director, The World Bank; Mr. Ibrahim F.I. Shihata, Secretary General, ICSID; His Excellency Adrien Raymond, Ambassador of Haiti to the United States; Mr. Timothy T. Thabane, Vice President and Secretary, The World Bank; standing: Ms. Ginette Moise-Luabeya, ICSID; Mr. Georges R. Delaume, Senior Legal Adviser, ICSID; Mr. Harold Joseph, First Secretary, Embassy of Haiti; Ms. Susumu Ono, Senior Loan Officer, The World Bank.

Recent Publications on ICSID

Niggemann, F., "The ICSID Klöckner v. Cameroon Award: The Dissenting Opinion", 1 *Journal of International Arbitration* 331-348 (1984).

Paulsson, J., "Les Obligations des Partenaires dans un Accord de Développement Economique: La Sentence Arbitrale Cameroun c/ Klöckner", *Revue de l'Arbitrage* 1984, 19-63.

Sinagra, A., *L'Arbitrato Commerciale Internazionale nel Sistema del CIRDI ed i Suoi Recenti Sviluppi*, pp. 1-125 (1984).

Yahiel, E.B. and Cranston, R.M., "Arbitration and Dispute Resolution in the International Construction Industry", 2 *International Construction Law Review*, Part 3, Vol. 2, pp. 231-257 (1985).

The Secretariat has recently published a new brochure (ICSID/16) entitled *ICSID Cases 1972-1984*, which gives information, in regard to each case, on the nature of the dispute, its outcome and the publications in which the case was reported or discussed. The same brochure also contains data regarding the constitution of ICSID arbitral tribunals and conciliation commissions, their composition and the place of hearings. This brochure is available on request.

The Screening Power of the ICSID Secretary-General

Introduction

Articles 28 and 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) give the ICSID Secretary-General the power to screen requests for conciliation and arbitration in order to prevent proceedings in disputes that are "manifestly outside the jurisdiction of the Centre." This issue of *News from ICSID* reports the first, and so far the only, occasion on which the Secretary-General has withheld registration of a request pursuant to these provisions. An examination of the nature, scope and practical aspects of the Secretary-General's screening power is therefore timely.

Other Institutions

It may first be noted that the rules of many other arbitration institutions also contain provisions giving their administrative or supervisory organs the power to review requests in order to make certain that the institutions' machinery will not unnecessarily be set in motion. These provisions protect the institutions as well as the parties. In addition to avoiding unnecessary expense and effort by all

concerned, they help to ensure that only bona fide use be made of the institutions' facilities. The approach often followed is to require claimants to furnish evidence, before an arbitration can proceed, of the consent on which the institution's jurisdiction is based. For example, in order to initiate arbitration proceedings under the 1973 Rules of the Netherlands Arbitration Institute, a party must produce written evidence "to show that the parties have agreed to arbitration under the rules of the N.A.I." (Article 4(2) of the Rules). The 1977 Conciliation and Arbitration Rules of the Zurich Chamber of Commerce provide another example. According to Article 16 of those Rules, "[i]f at the moment of applying to the court of arbitration there is no arbitration agreement in force" and both parties do not subsequently consent in writing to adjudication by the court, "the Secretary's Office of the Chamber of Commerce shall notify the parties, informing them that arbitration procedure cannot take place."

In a number of instances, a procedure is introduced giving the respondent an opportunity to reply to the request before the case is referred to an arbitral tribunal. Under Article 4 of the 1975 ICC Arbitration Rules, a respondent has the right to file an answer to the request, a copy of which will have previously been sent to the respondent by the Secretariat of the ICC Court of Arbitration. A copy of the answer will in turn be transmitted for information to the claimant. If the respondent contravenes jurisdiction, the Court will only permit the arbitration to proceed if it is satisfied, after a review of the documents, of the *prima facie* existence of an agreement to arbitrate specifying the ICC (Article 8(3) of the Rules). Even if the respondent does not reply, the Court will refuse the request if there is no evidence of such an agreement. In such a case, the claimant will be informed that the arbitration cannot proceed (Article 7). However, where the respondent answers without challenging jurisdiction, the Court will permit the arbitration to proceed even if previously there was clearly no agreement to arbitrate, the answer being treated as giving rise to a subsequent agreement to arbitrate (W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* 22 (1984)). This apparently could not happen under the procedure of another important arbitration institution, the Arbitration Institute of the Stockholm Chamber of Commerce. The Institute's Rules provide for an initial screening of the request for arbitration before it is communicated to the respondent. Rule 9 prescribes that the Institute's Board shall dismiss the case if at this stage "it is obvious that the Institute lacks jurisdiction." Only "if jurisdiction is assumed," will the request be communicated to the respondent, who will be invited to submit a reply to the Institute. The reply, which may "raise any objection concerning the validity or applicability of the arbitration agreement," is communicated by the Institute to the claimant who may comment on such objections. Under Rule 10, the Institute may ask a

party to amplify any of the above submissions. If the party refuses to comply with such a request, the Institute may stay the procedure. Once the exchange of submissions has been concluded, the Institute's Board will, under Rule 11, make a further *prima facie* finding on jurisdiction. If it has then become "obvious that jurisdiction is lacking," the case will not be referred to an arbitral tribunal.

The 1978 Rules of Court of the International Court of Justice contain a provision similar to those outlined above. Article 38(5) of the Rules provides that when proceedings are instituted by means of an application and "the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State" by the Registrar of the Court. The Registrar will not however enter the case in the General List, and no action will be taken in the proceedings "unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case." Under the Rules of Court previously in force, which were more supportive of the so-called *forum prorogatum*, such an application would by contrast have been treated in the initial phases as any other application (S. Rosenne, *Procedure in the International Court* 92 (1983)).

Drafting History of Articles 28 and 36 of the Convention

A brief summary of the drafting history of Articles 28 and 36 of the Convention will help to clarify the purpose of the powers thereby conferred on the ICSID Secretary-General. Several drafts of the Convention were prepared in the process of its formulation. These included a Preliminary Draft dated October 15, 1963 and a First Draft dated September 11, 1964. The former served as a working paper for four regional consultative meetings of legal experts convened by the President of The World Bank between December 1963 and May 1964. The latter Draft, which was prepared in the light of the discussions in the consultative meetings, formed the basis of the work of the Legal Committee on Settlement of Investment Disputes. This Committee, comprising representatives of sixty-one governments, met in Washington during November and December of 1964 to help the Executive Directors of The World Bank to finalize the text of the Convention. A further Revised Draft dated December 11, 1964, incorporating the Committee's conclusions, was subsequently submitted to the Executive Directors for their consideration (ICSID, *1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States - Documents Concerning the Origin and Formulation of the Convention* ("History") 6-10 (1970)).

The Preliminary Draft contained no provision for the screening of requests for arbitration and conciliation. Under that Draft, proceedings could be instituted by means of an application addressed to the Secretary-General simply stating "that the other party has consented to the jurisdiction" of the Centre (2 *History* 208, 212). During the consul-

tative meetings, several delegations of developing countries expressed concern that this would permit a party to set the machinery in motion even if the other party's consent were defective or nonexistent. There was thus a danger that the facility could be used to embarrass the other party, particularly if it were a State, and expose it to pressure to consent to arbitration or conciliation (*id.*, at 262-263, 470). It was therefore proposed that a party coming to the Centre should submit to the Secretary-General evidence, rather than merely a statement, of the two parties' agreement to have recourse to arbitration or conciliation (*id.*, at 326-327, 508). While consent of the parties was to be the "cornerstone" of the Centre's jurisdiction, it was envisaged that the nature of the dispute and the identity of the parties would also be elements of the facility's jurisdiction. For the dispute to be within the Centre's jurisdiction, it would have to be an investment dispute of a legal character, and one of the parties would have to be a Contracting State and the other a national of another Contracting State (*id.*, at 202). The Secretary-General's screening of requests for evidence that the disputes involved fell within the Centre's jurisdiction would therefore also have to have regard to these two elements. Accordingly, the First Draft provided that a party wishing to institute proceedings should include in its request to that effect "information concerning the subject-matter of the dispute, the identity of the parties and their consent ... sufficient to establish *prima facie* that the dispute is within the jurisdiction" of the Centre (*id.*, at 624, 628). If the request were found to conform with these requirements, the Secretary-General would allow the arbitration or conciliation to proceed.

During the deliberations of the Legal Committee on Settlement of Investment Disputes, fears were voiced that the powers envisaged for the Secretary-General by these provisions could take the character of a jurisdictional authority. One delegate suggested that these fears stemmed from the positive manner in which the provisions were worded. A negative wording, he proposed, would better convey "the intention of giving the Secretary-General power for only a formal screening" (*id.*, at 774). The Revised Draft prepared in the light of these discussions contained provisions almost identical to those of Articles 28 and 36 of the Convention. These Articles provide that:

"1 Any Contracting State or any national of a Contracting State wishing to institute [arbitration/ conciliation] proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

2 The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to [arbitration/ conciliation] in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

3 The Secretary-General shall register the request

unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of the registration or refusal to register.

If the Secretary-General refuses registration, the case will not reach a Conciliation Commission or an Arbitral Tribunal.

Limitations on the Secretary-General's Screening Power

The Secretary-General cannot require a party wishing to institute proceedings to establish that the dispute is within the Centre's jurisdiction before the request is registered. The party need only provide information showing that the dispute is not "manifestly outside the jurisdiction of the Centre." If there is doubt, the Secretary-General must register the request. Similarly, a party coming to the Stockholm Institute need only show that jurisdiction is not "obviously" lacking, and a party wishing to institute ICC proceedings has only to satisfy the Court that there is a *prima facie* agreement to arbitrate. The narrow definition of the powers of the Secretary-General and other comparable authorities to filter applications to institute proceedings is meant to avoid encroachments on the role of tribunals to decide on jurisdiction after a proper hearing. On the other hand, as the Executive Directors of The World Bank noted in their March 18, 1966 Report on the Convention, registration of a request by the Secretary-General does not preclude a Commission or Tribunal from declining jurisdiction. In fact, this has happened once, with respect to four of the eight claimants in the *Holiday Inns and Others v. Government of Morocco* (ICSID Case No. ARB/72/1) arbitration, information on which has been published in 51 *British Yearbook of International Law* 123 (1980). Article 8(3) of the ICC Arbitration Rules similarly provides that a determination by the Court of Arbitration that there is a *prima facie* agreement to arbitrate is "without prejudice to the admissibility or merits" of a plea contesting jurisdiction. "In such a case any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself." However, if the screening of a request reveals that it should be rejected, the screening authority will in effect assume a role normally reserved to the tribunals. The dilemma in which this places the Secretary-General and authorities of other arbitration institutions having similar powers results in their exercising these powers with a high degree of caution. A combination of factors makes this especially true of the Secretary-General.

As mentioned above, the Secretary-General must reach his decision as to the registrability or otherwise of a request solely "on the basis of information contained in the request." Among other things, this means that any observations submitted to the Secretary-General by the respondent (to whom a copy of the request will be sent as soon as it is received with the prescribed lodging fee) cannot influence

the Secretary-General's decision. It will be recalled that by contrast the rules of several other arbitration institutions introduce a procedure to ensure that the respondent's views will be taken into account in deciding whether the arbitration should proceed. As also already mentioned, the Secretary-General's review must cover not only the issue of consent but also jurisdictional elements relating to the identity of the parties and the nature of the dispute. Moreover, in the other institutions, the decision on permitting the arbitration or conciliation to proceed is often that of a collegial body, while in ICSID the decision is that of a single officer of the institution. Finally, the Secretary-General's decision is not subject to any form of appeal or review. The possibility of providing for such appeal or review was debated at length by the Legal Committee on Settlement of Investment Disputes. It was proposed that a party dissatisfied with the Secretary-General's decision should have the right to have the decision reconsidered by the Centre's Administrative Council, or a committee of the Council, or an ad hoc committee similar to those constituted to consider applications to annul ICSID arbitral awards. These proposals, as well as one suggesting that the initial determination be made by a committee comprising the Chairman of the Council, the Secretary-General and the Deputy Secretary-General, were rejected by the Committee to avoid a proliferation of ICSID committees or bodies (2 *History* 769-775).

Practice of the Secretary-General

Neither the Convention nor the Centre's Regulations and Rules require or even expressly permit the Secretary-General to offer a requesting party an opportunity to rectify deficiencies in the request before the decision on registration is taken. However, the Secretary-General will invariably consult with a party if the request does not conform to the requirements of the Convention and permit the request to be supplemented before the final decision on registration is taken. In making this decision, the Secretary-General will give the benefit of the doubt to the applicant, as indeed he has to under the Convention. For example, a number of jurisdictional questions were apparent from the outset in the *Holiday Inns* case. These included the fact that the agreement providing for recourse to the Centre was signed by a State which, at the time of signing, was not yet a Contracting State and by two "subsidiaries" of the principal claimants, one of which was then only in the process of formation and the second not in existence. Information published on other cases shows that the Secretary-General is often confronted with complex jurisdictional questions. Such questions include the reality of consent where it is recorded in one instrument which may be part of several interrelated agreements constituting, as a whole, the understanding between the parties. This was the case in *Holiday Inns* and in *Klöckner Industrie and Others v. United Republic of Cameroon and Another* (ICSID Case No. ARB/81/2;

1 *Journal of International Arbitration*, 145 and 331 (1984); *News from ICSID*, Vol. 1, No. 2 (Summer 1984), at 7-11). Two other cases, namely *Amco Asia and Others v. Government of Indonesia* (ICSID Case No. ARB/81/1; 23 *International Legal Materials* 351 (1984); *News from ICSID*, Vol. 1, No. 2 (Summer 1984), at 5-7) and the case of "Company X v. State A" discussed in this issue also provide examples of the type of questions which can arise in connection with the determination of the nationality of corporations parties to disputes submitted to the Centre. In all of these cases, the Secretary-General registered the requests, often shortly after they were received, because it was apparent that the disputes involved were not clearly outside the Centre's jurisdiction and should be referred to the tribunals. It is worth noting in this regard that the ICC Court of Arbitration exercises similar restraint. For example, ICC Case No. 4472 (111 *Journal du Droit International* 946 (1984)) referred to a contract providing for the settlement of disputes "according to the Arbitration and Conciliation Rules of the International Chamber of Commerce of Zurich." A dispute arose and one of the parties applied to the Zurich Chamber of Commerce. The latter, evidently finding that an arbitration could not take place under the Chamber's auspices,

transmitted the application to the ICC. The ICC Court of Arbitration interpreted the qualification "of Zurich" as indicating the place of arbitration desired by the parties, thus enabling it to find that there was a *prima facie* agreement to arbitrate specifying the ICC, and permitted the arbitration to proceed.

As mentioned in the introduction to this article, the Secretary-General has only once turned down a request to institute proceedings. It is believed that the Board of the Stockholm Institute has similarly only once dismissed a case because jurisdiction was obviously lacking. Likewise, it is reported that the ICC Court of Arbitration has rarely found that there was no *prima facie* jurisdiction. On the other hand, except for the *Holiday Inns* decision referred to above, no ICSID Tribunal or Commission has declined jurisdiction following registration. In ICSID at least, this record is in part due to the fact that parties often consult with the Secretary-General before submitting requests, thus allowing an informal screening to take place at that stage.

Antonio R. Parra
Counsel, World Bank

ICSID Assists IDLI in Organizing an Arbitration Course

The International Development Law Institute (IDLI) was established in 1983 as a non-profit, non-governmental international organization. It conducts practical training for developing country legal advisors and lawyers. IDLI has included in its 1985 training program a two-week course on

the subject of resolving international contract disputes. The course is scheduled to be given once in French and once in English. The French course took place in Rome between February 10-23, 1985.

At the request of IDLI, ICSID agreed to assist IDLI in



Included in this group picture are Professor Piero Bernardini (third row, second from left), Professor Pierre Lalive (third row, third from left) and Mr. Gilles Bianchi (fourth row, fourth from left) IDLI Program Legal Counsel who was the course manager.

the preparation of the program and in securing the participation of a faculty composed of leading experts in the field of transnational arbitration. Mr. Georges R. Delaume, Senior Legal Adviser, ICSID, acted as coordinator.

The curriculum included ten topics: a General Introduction (Professor René David), The Arbitration Agreement (Professor Berthold Goldman), The Conduct of the Proceedings (Professor Pierre Lalive), The Law Applicable to the Substance of the Dispute (Professor Ahmed S. El Koshery), The Viewpoint of the Private Investor (Professor Piero Bernardini), Special Proceedings, including technical expertise and the adaptation of contracts (Mr. Claude Duval); Sovereign Immunity (Mr. Georges R. Delaume), ICSID Conciliation/Arbitration (Mr. Georges R. Delaume), Recognition and Enforcement of Awards (Professor Giorgio Bernini) and Simulated Arbitration (Mr. Jan Paulsson). The emphasis was placed on the practical aspects of each topic as they may be encountered by government legal advisers.

The course was attended by twenty-six lawyers from

Burundi, Cameroon, Chad, Congo, Egypt, Gabon, I Coast, Madagascar, Morocco, Niger, Senegal, Togo, Tunisia and Zaire.

The English course will take place between December 1-16, 1985, also in Rome. It will include the following topics: The Options (Mr. Jan Paulsson), The Arbitration Agreement (Professor Pieter Sanders), The Law Applicable to the Substance of the Dispute (Professor Allan Philip), Recognition and Enforcement of the Award (Professor Giorgio Bernini), Sovereign Immunity (Mr. Eugene Theroux), Conduct of the Proceedings (Mr. Howard Holzman), ICSID Conciliation/Arbitration (Mr. Georges R. Delaume), The Third World Point of View (Mr. Jacques Al-Hakim), The Point of View of the Private Contracting Party (Professor Piero Bernini), and Settlement of Construction Contract Disputes (Mr. John Tackaberry).

Further information on this course and other IDLI programs can be obtained from Mr. L. Michael Hager, International Development Law Institute, 23 Via Paolo Frisi, 00197 Rome, Italy.

Investment Promotion Treaties

Agreement between the French Republic and the People's Republic of China for the Reciprocal Encouragement and Protection of Investments, May 30, 1984.

"Article 8

1. *Tout différend relatif aux investissements entre l'une des Parties contractantes et un investisseur de l'autre Partie contractante est autant que possible réglé à l'amiable entre les parties en litige.*

2. *Si un tel différend n'a pu être réglé dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des parties au différend, il pourra être réglé au choix de l'investisseur par l'une des procédures suivantes:*

a) *Par une requête de l'investisseur auprès des autorités administratives compétentes de la Partie contractante sur le territoire ou dans les zones maritimes de laquelle l'investissement est réalisé;*

b) *Par une action en justice de l'investisseur auprès des tribunaux compétents de la Partie contractante sur le territoire ou dans les zones maritimes de laquelle l'investissement est réalisé.*

3. *En ce qui concerne les différends portant sur le montant de l'indemnité à verser conformément aux dispositions de l'article 4, paragraphe 2, ils pourront être soumis aux procédures prévues aux paragraphes 1 et 2 ci-dessus.*

Si un tel différend n'a pas été réglé à la satisfaction des deux parties dans un délai d'un an à partir du moment où il a été soulevé par l'une ou l'autre des parties au différend, il sera soumis à la procédure d'arbitrage qui fait l'objet de l'annexe du présent Accord. Toutefois, cette disposition ne s'applique pas si l'investisseur a recours aux dispositions du paragraphe 2b ci-dessus, et que les autorités judiciaires ont définitivement statué dans le délai d'un an prévu à partir du moment où le différend a été soulevé par l'une ou l'autre des parties au différend."

Annexe

"4. En ce qui concerne l'article 8: la procédure d'arbitrage prévue au paragraphe 3 est la suivante:

a) *Le tribunal arbitral sera composé de trois arbitres. Chacune des deux Parties choisira un arbitre. Les deux arbitres désigneront d'un commun accord un troisième arbitre ayant une nationalité différente de celles des deux arbitres nommés par les parties et qui doit être un ressortissant d'un Etat qui entretient des relations diplomatiques avec chacune des Parties contractantes au présent Accord. Tous les membres du tribunal doivent être nommés dans un délai de trois mois à compter de la nomination du premier arbitre.*

b) Si l'une ou l'autre des Parties ne nomme pas son arbitre ou si les deux arbitres ne se mettent pas d'accord sur le choix du troisième arbitre dans les délais mentionnés au paragraphe précédent, l'une ou l'autre des parties demande alors au Président de la Chambre de Commerce de Stockholm de procéder aux nominations manquantes;

c) Le tribunal arbitral tiendra ses réunions dans un pays tiers choisi d'un commun accord entre les parties concernées ou à Stockholm si un tel choix n'est pas intervenu dans un délai de quarante-cinq jours à compter de la date de nomination du dernier membre du tribunal. Il statue à la majorité des voix.

L'arbitrage se fera conformément à la loi de la partie sur le territoire ou dans les zones maritimes de laquelle s'effectue l'investissement et conformément aux dispositions du présent Accord.

Sa procédure est réglée par le règlement d'arbitrage de la C.N.U.D.C.I. La sentence du tribunal sera motivée. Ses décisions seront obligatoires pour les deux parties. Il interprétera, le cas échéant, sa sentence à la demande de l'une ou l'autre partie.

Chacune des deux parties prend en charge les frais de l'arbitre nommé par elle et ses propres dépenses durant l'arbitrage. Les frais du président du tribunal et les autres dépenses sont répartis également entre les deux parties."

Exchange of Letters

"Dans le cas où les deux Parties contractantes seraient devenues parties à la Convention sur le règlement des différends relatifs aux investissements entre des Etats et ressortissants d'autres Etats, ouverte à la signature le 18 mars 1965, à Washington, elles entameront des négociations en vue de conclure un arrangement supplémentaire sur les catégories de différends susceptibles d'être soumis à la conciliation ou à l'arbitrage du C.I.R.D.I. et sur la façon de procéder à cette conciliation ou à cet arbitrage. Cet arrangement, en forme d'Echange de lettres, fera partie intégrante de l'Accord."

Agreement between the Belgo-Luxembourg Economic Union and the People's Republic of China for the Reciprocal Encouragement and Protection of Investments, June 4, 1984.

"ARTICLE 10

1. Tout différend relatif aux investissements fera l'objet d'une notification écrite, accompagnée d'un aide-mémoire suffisamment détaillé, par l'investisseur de l'une des Parties contractantes à l'autre Partie contractante.

Dans la mesure du possible, ce différend sera réglé, dans le respect des lois et règlements de la Partie contractante sur le territoire de laquelle l'investissement aura été réalisé.

2. Les différends visés au paragraphe premier du présent article sont de la compétence des juridictions internes du pays où l'investissement aura été réalisé.

3. Par dérogation au paragraphe 2 et à défaut de règlement à l'amiable dans un délai de six mois à compter de la date de notification écrite mentionnée au paragraphe premier du présent article, les différends relatifs au montant des indemnités dues en cas de mesures d'expropriation, de nationalisation ou de toute autre mesure similaire affectant les investissements, peuvent, au choix de l'investisseur:

a) soit, être soumis aux juridictions internes de la Partie contractante sur le territoire de laquelle l'investissement aura été effectué;

b) soit, être soumis directement, à l'exclusion de tout autre recours, à l'arbitrage international."

"PROTOCOL ARTICLE 6

1. Conformément au paragraphe 3 de l'article 10 de l'Accord, il est convenu que les différends relatifs au montant des indemnités dues en cas de mesures d'expropriation, de nationalisation ou de toute autre mesure similaire peuvent être soumis à un Tribunal arbitral.

2. Le Tribunal arbitral est constitué comme suit, pour chaque litige:

- Chacune des parties au litige désigne un arbitre;

- Les deux arbitres désignent, d'un commun accord, un troisième arbitre qui sera national d'un pays tiers avec lequel les Parties contractantes entretiennent des relations diplomatiques. Ce troisième arbitre sera Président du Tribunal arbitral;

- Les arbitres sont nommés au plus tard dans un délai de quatre mois suivant la notification écrite de la demande d'arbitrage par l'une des parties au litige à l'autre partie. Si le Tribunal arbitral n'est pas constitué à l'expiration des délais ci-dessus, chacune des parties au litige peut inviter le Président de l'Institut d'Arbitrage de la Chambre de Commerce de Stockholm à nommer l'arbitre ou les arbitres non désignés.

3. Le Tribunal arbitral fixe ses propres règles de procédure. Toutefois, selon le choix exprimé par l'investisseur dans sa demande d'arbitrage, le Tri-

bunal pourra fixer ses règles de procédure par référence au règlement d'arbitrage de l'Institut d'Arbitrage de la Chambre de Commerce de Stockholm ou à celui du Centre International pour le Règlement des Différends relatifs aux investissements, conformément à la Convention sur le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, ouverte à la signature à Washington le 18 mars 1965.

4. Les décisions du Tribunal arbitral seront prises à la majorité des voix. Elles sont définitives et obligatoires pour les parties au litige. Chaque Partie contractante s'engage à exécuter la décision en conformité de sa législation nationale.

5. Le Tribunal arbitral statue sur base de la loi

nationale de la Partie contractante, partie au litige, sur le territoire de laquelle l'investissement est situé, y compris les règles relatives aux conflits de lois, sur base des dispositions de l'Accord, sur base des termes de l'accord particulier qui serait intervenu au sujet de l'investissement, ainsi que sur base des principes de droit international généralement reconnus et adoptés par les Parties contractantes.

6. Chaque partie au litige supportera les frais liés à la désignation de son arbitre et à sa représentation devant le Tribunal arbitral. Les débours inhérents à la désignation du Président et les frais de fonctionnement du Tribunal seront supportés, à parts égales, par les parties au litige."

People's Republic of China and ICSID



In January 1985, the Secretary-General of ICSID discussed with senior Chinese officials in Beijing the possibility of China acceding to the ICSID Convention. Officials of the State Council and of the Ministries of Foreign Affairs, Finance, and Foreign Economic Relations and Trade reiterated China's outward-looking economic policy and indicated that they were studying the possibility of joining ICSID. The photograph shows Premier Zhao Ziyang of China with the Secretary-General on an earlier occasion.

A Date to Remember

As announced in the Winter 1985 issue of *News from ICSID*, a joint colloquium on international arbitration, co-sponsored by ICSID, the American Arbitration Association and the International Chamber of Commerce will be

held in Paris, France, on October 24, 1985. Further information on this colloquium can be obtained by writing to: Secretariat of the Chairman, ICC Court of Arbitration, 38, Cours Albert 1er, 75008 Paris, France.

NEWS FROM ICSID Please address all correspondence to: ICSID, 1818 H Street, N.W., Washington, D.C. 20433.