

NEWS

FROM

ICSID

International Centre for Settlement of Investment Disputes

Vol. 2, No. 1 Winter 1985



Major Features:

- ICSID in 1984
- Revised Regulations and Rules
- Continuation of the Additional Facility
- The World Bank hosts a Second ICSID, AAA, ICC Symposium
- ICSID and Bilateral Investment Treaties

Editorial

ICSID in 1984

This issue of *News from ICSID* marks the first anniversary of this publication. It provides an occasion to review briefly some of the important developments which have taken place during the year.

1. *ICSID membership* has been enhanced by the accession of three new members: El Salvador, Portugal and St. Lucia. It is interesting to note that two of these new members are from the Latin American and Caribbean region, where we feel that ICSID has a great potential role to play. This has brought the total membership of ICSID to 87 states. There are three other countries, Australia, Costa Rica and Ethiopia, which signed the Convention and are now in the process of its ratification.

2. *Four new cases* were submitted to ICSID arbitration. This brings the *total number of ICSID proceedings to 18 arbitration proceedings and 2 conciliation proceedings*. In addition, the year also witnessed the first request to annul an award rendered by an ICSID tribunal. The increase in the requests for arbitration and conciliation submitted to ICSID since last year is in fact unprecedented. It represents almost 30% of all requests received since ICSID's establishment in 1966.

3. *New initiatives have been taken by the Secretariat to promote ICSID and its facilities*. These have included the holding of seminars and participation in conferences in Brazil, Canada, Italy and Switzerland and the United States. Contracting States were encouraged to submit names for the panels of arbitrators and conciliators and several states have responded. New names were also added to the Chairman's list.

4. *A detailed analysis has been initiated by the Secretariat of the bilateral investment treaties entered into by ICSID's members*. The results of such analysis, which should be of universal interest, will be published in due course. An outline of treaty provisions referring to ICSID appears in this issue. The Secretariat plans to expand this work in the future to cover as well the analysis of the investment laws of ICSID's developing members.

5. Also during the year, *a comprehensive review was made of ICSID's Regulations and Rules*, with a view to streamlining and simplifying them, and to introducing a new "pre-hearing conference" intended to expedite the proceedings. The major features of the revised Regulations and Rules, which were adopted by the Administrative Council at the September 26, 1984 meeting are summarized in this issue.

6. Finally, as detailed in this issue, the Administrative Council decided to continue the *Additional Facility* for an indefinite period.

As *News from ICSID* enters its second year, it reflects a growing role of ICSID's facilities in the promotion of greater understanding and cooperation between foreign investors and their host governments.

Ibrahim F.I. Shihata
Secretary-General, ICSID

DISPUTES BEFORE THE CENTRE

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

July-Oct. 1984

The Tribunal meets on several occasions in Paris for final deliberations and drafting of the award.

November 20, 1984

The Tribunal renders an award on the merits.

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

Sept. 24-25, 1984

The *ad hoc* Committee meets in Geneva in the presence of the parties.

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

July 17-18, 1984

The Tribunal meets in Paris in the presence of the parties.

July 19, 1984

The Tribunal issues its decision to reject Defendant's objection to the jurisdiction of the Centre *ratione personae*, and to join to the merits the question of whether there was consent to submit the dispute to ICSID arbitration.

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

No new developments since the publication of the last Newsletter.

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

June 26, 1984

No pleading having been filed by the Government of Liberia, the Tribunal resumes consideration of the dispute.

October 24, 1984

An interim award on jurisdiction is rendered.

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

August 1, 1984

The Tribunal is constituted. Its members are: Professor Pieter Sanders (Netherlands), President, appointed by both parties; Mr. Jean-François Prat (French), appointed by Claimant; and Dr. A.J. van den Berg (Netherlands), appointed by Respondent.

August 23, 1984

Preliminary consultation between the President of the Tribunal and the parties in Paris.

August 27, 1984

Pursuant to Arbitration Rule 39(1), Respondent files request for provisional measures, dated August 20, 1984.

October 26, 1984

The Court of Appeal of Rennes, France, vacates the attachment of Guinean vessels on the ground that consent to ICSID arbitration is exclusive of any other remedy (Article 26 of the ICSID Convention) and that the Tribunal has sole jurisdiction to recommend provisional measures.

December 18, 1984

The Tribunal renders an interim award on the requests relating to provisional measures.

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

August 15, 1984

The Tribunal is constituted. Its members are: Mr. Kenneth Rat-tray (Jamaican), President, appointed by both parties; Mr. Ian E. McPherson (Canadian), appointed by Claimant; and Mr. Eduardo Jiménez de Aréchaga (Uruguayan), appointed by Respondent.

September 24, 1984

Preliminary procedural consultation between the Tribunal and the parties in Washington, D.C.

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

August 28, 1984

The Secretary-General registers a request for the institution of arbitration proceedings, without prejudice to the question whether the condition relating to consent is satisfied.

December 18, 1984

The Tribunal is constituted. Its members are: Dr. Eduardo Jime-

nez de Arechaga (Uruguayan), President, appointed by both parties; Robert F. Pietrowski, Jr., Esq. (U.S.), appointed by Claimant; and Mr. Mohamed Amin Elabassy El Mahdi (Egyptian), appointed by Respondent.

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

September 18, 1984

The Secretary-General registers a request for the institution of arbitration proceedings, without prejudice to the question whether the condition of nationality is satisfied.

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

November 6, 1984

A request for arbitration is received by the Centre.

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

July 23, 1984

The Conciliator meets with the parties in Washington, D.C., and decides to join Respondent's objection to the jurisdiction of the Centre to the merits of the dispute.

New Additions to the Panels of Conciliators and Arbitrators

The following Governments have made designations to the Panels of Conciliators and of Arbitrators:

BELGIUM—designations effective as of September 25, 1984:

Panel of Conciliators:

Prof. F. Rogiers (re-appointment).

Panel of Arbitrators:

M. Robert P. Henrion (re-appointment), and Baron Jean Van Houtte (re-appointment).

FIJI—designations effective as of August 21, 1984:

Panel of Conciliators:

Mr. Laisenia Qarase (to serve remainder of Mr. Mose Qionibaravi's term).

Panel of Arbitrators:

Mr. J.S. Thomson (to serve the remainder of Mr. Leys' term).

PAKISTAN—designation effective as of April 24, 1984

Panel of Arbitrators:

Justice Gul Muhammad Khan (to serve the remainder of Mr. Inayat Elahi Khan's term).

ROMANIA—designations effective as of August 6, 1984:

Panel of Conciliators:

Mr. Adrian Duta, Mr. Nicolae Duta (re-appointment), Mr. Tudor Gradea, and Mrs. Doina Protopopescu

Panel of Arbitrators:

Mr. Dumitru Andrei, Mr. Ioan Manole, Mr. Ilariu Mrejeru, and Mr. Teofil Pop (formerly on the Panel of Conciliators).

SIERRA LEONE—designations effective as of June 19, 1984:

Panel of Conciliators:

Mr. A. Awooner-Renner, Mr. C.O.E. Cole, Mr. A.B. Gooding, and Mr. F. Tuboku-Metzger.

Panel of Arbitrators:

Dr. H.M. Joko-Smart, Mr. A.L.O. Metzger, Mr. N.D. Tejan-Cole, and Ms. Frances Wright.

YUGOSLAVIA—designations effective as of March 28, 1984.

Panels of Conciliators and of Arbitrators:

Prof. Dr. Ksente Bogoev (re-appointment), Prof. Dr.

Stojan Cigoj (re-appointment), Prof. Dr. Aleksander Goldstajn (re-appointment), and Prof. Dr. Vladimir Jovanovic (re-appointment).

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

Designation of Competent Authority

Since the issue of the last *News from ICSID*, the following Contracting States have, pursuant to Article 54(2) of ICSID Convention, designated the authority indicated below as competent for the recognition and enforcement of ICSID arbitral awards:

BARBADOS	—The Registrar of the Supreme Court of Barbados
ST. LUCIA	—The Supreme Court of St. Lucia

A complete list of the designation of courts and other authorities for the recognition and enforcement of arbitral awards, including other measures taken by Contracting States for the purpose of the Convention, is available upon request (ICSID/8).

Revised Regulations and Rules



On September 26, 1984, ICSID's Administrative Council approved revisions to the Centre's Regulations and Rules which, pursuant to Article 6(1)(a)-(c) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention), comprise:

1. Administrative and Financial Regulations;
2. Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules);
3. Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and
4. Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

The Regulations and Rules were originally adopted by the Administrative Council on September 25, 1967, with

effect from January 1, 1968. Subsequent modifications were confined to the Administrative and Financial Regulations, and most of these concerned the amounts of fees paid to conciliators and arbitrators. The recent significant increase in the number of proceedings administered by ICSID, and the experience it had accumulated since 1967, revealed a need for a more extensive review of the Regulations and Rules. The revisions resulting from this review, while not introducing dramatic changes in these documents, seek to streamline the Regulations and Rules and inject into them a greater degree of flexibility. This article examines the main features of these revisions.

Fees

Regulation 13(1) of the original Administrative and Financial Regulations set forth the maximum fees for conciliators, arbitrators and *ad hoc* Committee members. These could be periodically adjusted by the Secretary-General, with the approval of the Chairman of the Administrative Council, to take into account monetary and cost of living changes. Pursuant to this provision, the level of fees was increased on three occasions to its present level of SDR 600. Each of these changes required a formal amendment of

Regulation 13(1). The corresponding provision of the revised Administrative and Financial Regulations no longer mentions specific figures. Instead, the amounts of fees are determined by the Secretary-General with the approval of the Chairman. As under the original Regulation, these may be periodically adjusted in the light of monetary and cost of living changes. The result is to do away with the need for formal modification of the Regulations each time a change in fees is necessary. The current figure set by the Secretary-General, which for the time being remains SDR 600, is set forth in a separate schedule of costs distributed with the Regulations and Rules.

The original Regulations also laid down the fees for lodging requests with the Centre, and these varied according to the type of request. Thus, \$100 was payable by a party wishing to institute a conciliation or arbitration proceeding, while \$50 was payable if the request was for a supplementary decision to or the rectification, interpretation, revision or annulment of an arbitral award. A fee of \$50 was also payable to the Centre if the request was for the resubmission of a dispute to a new Tribunal after annulment of an arbitral award. Revised Administrative and Financial Regulation 16 has unified these registration fees. The applicable fee is likewise under the revised Regulation determined from time to time by the Secretary-General. The fee, \$100 at present, is set forth in the schedule of costs mentioned above.

Advance Payments

Each party to proceedings was under the original Regulations required to make quarterly advance payments to the Centre to cover the Centre's estimated expenses in connection with the proceedings during the subsequent quarter. This arrangement applied to annulment as well as to other proceedings. To reflect the Centre's practice as it has developed over time, such payments may, under the revised Regulations, be requested in respect of a three to six month period. More importantly, revised Regulation 14(3)(e) provides that the party requesting annulment of an award shall be solely responsible for making the advance payments to cover the costs of the proceedings, subject to the ultimate apportionment of costs by the *ad hoc* Committee constituted to consider the request for annulment. The rationale for this change is twofold. First, it is intended to prevent frivolous annulment applications exposing the party in whose favor an award has been rendered to unnecessary additional expense. A second, and practical, consideration is the fact that the party in favor of whom the original award was rendered might not co-operate in financing the costs of a procedure which, at worst, could be detrimental to its interests or, at best, would cause it additional cost simply to confirm an existing award.

Records of Hearings

Certain requirements of the original Regulations and Rules had proved to be too rigid in their application. For

example, Conciliation Rule 29 and Arbitration Rule 37 provided in detail for the keeping by the Secretary-General of minutes of all hearings. These provisions resembled an analogous rule of the 1946 Rules of Court of the ICJ, but had no counterpart in the UNCITRAL Arbitration Rules or in the rules of several commercial arbitration institutions. The Centre's experience showed, moreover, that in some cases the parties might require verbatim transcripts of the hearings or make other arrangements suitable to their needs. The original Rules relating to minutes have therefore been deleted. Instead, an addition to Rule 20 of both the Conciliation and Arbitration Rules permits the parties to agree on the manner in which the record of the hearing should be kept as part of the procedural framework agreed upon by them during the preliminary procedural consultation.

Secretary

Under the original provisions of Administrative and Financial Regulation 25, the presence of the Secretary of each Commission, Tribunal and Committee was required at all hearings. Cases arose, however, where the parties wished to dispense with the presence of the Secretary in order to save costs. In such circumstances, there seemed to be no reason to impose upon the parties the presence of the Secretary. The requirement that the Secretary attend all hearings has therefore been deleted from Regulation 25.

Pre-Hearing Conference

The speedy conclusion of proceedings is promoted by a new procedure offered under the revised Regulations and Rules. This procedure consists of a "pre-hearing conference," which may be employed to accelerate the process of fact-finding or to facilitate early amicable settlements between parties to arbitration proceedings. It is worth noting in this regard that, among the disputes submitted to the Centre which have so far been resolved, most have been discontinued or amicably settled. The pre-hearing conferences will, it is hoped, further encourage such settlements. The new procedure is set forth in Rule 21 of the revised Arbitration Rules, which reads as follows:

Pre-Hearing Conference

1. *At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.*
2. *At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.*

Fact finding under paragraph (1) of the above Rule will limit the proceeding to the consideration of disputed facts and

legal issues. The requirement of paragraph (2) that the parties be represented by persons authorized to act on their behalf is intended to enable such representatives to hear the case as presented by each side, in the hope that this may help them reach an amicable settlement as is increasingly done in commercial arbitration under the so-called "minitrial" procedure. Such a settlement can be recorded in the form of an award in accordance with Arbitration Rule 43 as well as in the form of a binding agreement between the parties.

Simplification and Clarification of Language

The review of the Regulations and Rules provided, in addition, an occasion for simplifying the language of some provisions and updating or clarifying others. Some of the changes of this type have already been mentioned. Other examples, at random, include the simplification of the wording of Arbitration Rule 49, relating to supplementary decisions on, or the rectification of, awards; the reflection of current practice in the requirement under revised Arbitration Rule 6(2) that arbitrators include in their declarations made thereunder a statement of any past or present relationship they may have with the parties; and a clarification of Arbitration Rule 46 to make it explicit that the time limits for preparing an award also apply to any individual or dissenting opinion.

Perhaps the most noteworthy clarification, however, concerns provisional measures sought by parties to arbitration proceedings. It will be recalled that under Article 26 of the Convention, consent of the parties to ICSID arbitration is exclusive of any other remedy unless otherwise stated. Recent instances of actions brought in domestic courts in disregard of an ICSID arbitration clause have renewed attention to this basic feature of the Convention. The Convention prevents parties who have not expressly agreed otherwise from seeking provisional measures other than those that may be recommended by the Tribunal under Article 47 of the Convention and Arbitration Rule 39. If the parties wish to retain the option of seeking provisional measures from domestic courts, they must do so by making express provision to that effect in the instrument recording

their consent to arbitration. A new paragraph added to Arbitration Rule 39 further clarifies this in the following terms:

Nothing in this Rule shall prevent the parties, provided they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests.

Lastly, the revised Arbitration Rules continue to provide that the Centre may not publish awards without the consent of the parties. In view of recent disclosures by others of information relating to past proceedings, however, it seemed desirable to permit the Secretariat, as an impartial observer, to identify the legal rules raised in proceedings which may shed light on the implementation of the Convention. Accordingly, revised Arbitration Rule 48(4) provides that the Centre may publish excerpts of the legal rules applied by Tribunals. At the same time, the Secretariat recognizes that even such limited publication must be done with great prudence.

The revised Regulations and Rules came into force on September 26, 1984. In accordance with Articles 33 and 44 of the Convention, the Conciliation and Arbitration Rules applicable to any particular proceeding are those in effect on the date on which the parties consented to conciliation or arbitration. The revised Conciliation and Arbitration Rules only apply, therefore, to consents given after September 26, 1984. However, nothing prevents the parties to a dispute submitted to the Centre pursuant to an earlier consent from agreeing, by mutual accord, to the application of the new Conciliation or Arbitration Rules.

ICSID's revised Regulations and Rules and the Secretariat's schedule of costs are available from the Secretariat upon request (ICSID/15).

Antonio R. Parra
Counsel, ICSID

Continuation of the Additional Facility

Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Convention), which created ICSID, the ICSID Secretariat administers proceedings concerning investment disputes between Contracting States and nationals of other Contracting States.

In 1978, the Administrative Council approved the creation of an "Additional Facility" intended to enable the Secretariat to administer proceedings relating to disputes not covered by the Convention because the State party to the dispute, or whose national is a party to the dispute, is not a Contracting State or because the dispute is not an

investment dispute or the type of proceeding involved concerns fact-finding only.

In approving the Additional Facility, the Administrative Council decided to review its operation after a five-year period. In 1983, it was decided to postpone that review for an additional year. Conscious of the fact that reference to the Additional Facility as a means of dispute settlement

now appears in a number of bilateral investment treaties concluded by certain of its member governments, the Administrative Council has approved at its last Annual Meeting the proposal of the Secretary-General to continue indefinitely the Additional Facility, thereby confirming that the Secretariat can be of assistance to parties interested in using such additional services.

The World Bank Hosts a Second ICSID, AAA, ICC Symposium



On November 2, 1984, a joint conference on Arbitration Laws and International Trade and Investments was held at the headquarters of The World Bank in Washington, D.C. Its purpose was to take into account recent treaty, statutory and judicial developments which contribute to increasing the effectiveness of international arbitration and to discuss, in the light of experience, new approaches towards drafting arbitration agreements, selecting the appropriate locale to arbitrate, choosing arbitrators and presenting evidence. The conference is the second in a series of conferences on the subject of International Arbitration initiated in November 1983 under the joint auspices of ICSID, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC).

The morning session began with introductory speeches by Mr. Ibrahim F.I. Shihata, Secretary-General of ICSID, Mr. Robert Coulson, President of the AAA and Mr. Michel Gaudet, Chairman of the ICC Court of Arbitration.

Three specific topics were discussed by panels composed each of a speaker and two discussants. Mr. Sheldon L. Berens, Chairman, Corporate Counsel Committee, AAA, acted as Moderator. The first topic related to "The Arbitration Agreement: Basic Requirements"; the speaker was Mr. Samir Saleh, Vice-Chairman, ICC Court of Arbitra-

tion, Attorney-at-Law, from Lebanon and the discussants were Messrs. Mark Feldman, of Donovan, Leisure, Newton and Irwin, (US), and Georges R. Delaume, Senior Legal Adviser, ICSID. The next subject concerned "The Law Applicable to the Substance of the Dispute"; it was introduced by the speaker, Mr. Yves Derains from France, Lawyer, Former Secretary General of the ICC Court of Arbitration. The discussants were Professors Andreas Lowenfeld, New York University School of Law, and Frederic-Edouard Klein, Law School of Basel, Switzerland. "Interim Measures of Protection" were next considered by the speaker Mr. Bernardo M. Cremades, Attorney, Madrid, Spain, and by the discussants, Messrs. Michael F. Hoellering, General Counsel, AAA and Sigvard Jarvin, General Counsel, ICC Court of Arbitration.

The afternoon session followed the same format as that of the morning session. Mr. Ahmed Sadek El Kosheri, Attorney, Cairo, Egypt, acted as Moderator. Mr. Jan Paulsson, Coudert Frères, Paris spoke about "The Taking of Evidence" and Messrs. Joseph D. Becker, of Fox, Glynn & Melamed, (US), and Steven J. Stein, of Proskauer Rose Goetz & Mendelsohn, (US), participated as discussants. The second topic was "Recognition and Enforcement of Arbitral Awards". Mr. Joseph McLaughlin, of Shearman

& Sterling, (US), was the speaker and Messrs. Giorgio Bernini, Professor, University of Bologna, Italy, and J. Stewart McClendon, World Arbitration Institute, (US), participated in the discussion. The final topic concerned "Methods of Unification of Arbitration Law" and was treated by the speaker, Professor Willem C. Vis, Pace University, School of Law, (US), and by the discussants, Professor Yozo Yokota, International Christian University, Tokyo, Japan, and Mr. Francis Shattuck, Jr., General Counsel, Middle East, Transportation, Sales & Supply, Mobil Oil Company.

The conference was attended by more than 100 participants from the legal profession, business community and governmental and international agencies.

In view of the interest shown by the participants, the three sponsoring institutions have reached the conclusion that this type of international gathering should become a permanent feature of their promotional activities. They have agreed that a third conference should be held in the fall of 1985. In order to reach other interested parties, that conference will be held in Paris, France, and hosted by the ICC.



Recent Publications on ICSID

DELAUME, Georges R.

ICSID Arbitration: Practical Considerations, 1 *Journal of International Arbitration* 101-125 (1984).

PAULSSON, Jan

The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North South Economic Development Agree-

ments, 1 *Journal of International Arbitration* 145-168 (1984).

Les obligations des partenaires dans un accord de développement économique: la sentence arbitrale Cameroun/-Klockner, *Revue de l'Arbitrage* 1984, pp. 19-63.

SHIHATA, Ibrahim F.I.

Le CIRDI et les pays en voie de développement, *Entwicklung Développement*, No. 18, octobre 1984, pp. 48-49.

Investment Promotion Treaties

Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, August 3, 1984

"ARTICLE VII

SETTLEMENT OF INVESTMENT DISPUTES BETWEEN ONE PARTY AND A NATIONAL OR COMPANY OF THE OTHER PARTY

1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by the competent foreign investment authorities; or (c) an alleged breach of any right confirmed or created by this Treaty with respect to an investment.

2. (a) Each Party hereby consents to submit investment disputes to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration.

(b) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes between the States and Nationals of other States ("Convention") and the Regulations and Rules of the Centre, or, if the Convention should, for any reason, be inapplicable, the Rules of the Additional Facility of the International Centre for the Settlement of Investment Disputes ("Additional Facility").

3. In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of such Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation. The parties to the dispute may, upon the initiative of either of them and as a part of their consultation and negotiation agree to rely upon non-binding, third party procedures, such as the fact-finding facility available under the rules of the Additional Facility. If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which the Parties to the dispute may have previously agreed.

4. (a) The national or company concerned may consent in writing to submit the dispute to the Centre or the Additional Facility for settlement by conciliation or binding arbitration.

(b) Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Centre or Additional Facility at any time after six months from the date upon which the dispute arose, provided,

(i) the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedures previously approved by the parties to the dispute; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute.

If the parties to the dispute disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the procedure desired by the national or company concerned shall be followed.

5. In any proceeding, judicial, arbitral or otherwise, concerning an investment dispute between a Party ("the first Party") and a national or company of the other Party ("the second Party"), the first Party shall not assert as a means of defense, that the national or company concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any third party whatsoever, including the second Party.

6. For the purpose of any proceedings initiated before the Centre or the Additional Facility in accordance with this Article, any company duly constituted under the applicable laws and regulations of either Party but that, before the occurrence of the event or events giving rise to the dispute, was owned or controlled by nationals or a company of the other Party shall be treated as a national or company of such other Party.

PROTOCOL

3. The provisions of Articles VII and VIII shall not apply to any dispute arising (a) under programs of the Export-Import Bank of the United States regarding export credit, guaranties, or insurance, or (b) under other official credit, guaranty, or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes."

Convention entre l'Union Economique Belgo-Luxembourgeoise et la République Rwandaise concernant l'Encouragement et la Protection Reciproques des Investissements, 2 novembre 1983

"ARTICLE 10

Référence au Centre International pour le Règlement des Différends relatifs aux Investissements

1. *Tout différend relatif aux investissements entre l'une des Parties contractantes et un investisseur de l'autre Partie contractante, sera, dans la mesure du possible, réglé à l'amiable entre les Parties à ce différend.*

2. *Tel différend est de la compétence des juridictions internes du pays où l'investissement aura été effectué.*

3. *Si tel différend entre un investisseur d'une Partie contractante et l'autre Partie contractante devait ne pas trouver de règlement satisfaisant après l'épuisement des voies de recours administratives et judiciaires, ouvertes par la législation de la Partie contractante sur le territoire de laquelle l'investissement a été réalisé, les Parties contractantes reconnaissent à chaque partie au différend le droit d'engager, devant le Centre International pour le Règlement des Différends relatifs aux Investissements, conformément à la Convention pour le Règlement des Différends relatifs aux Investissements entre Etats et R ressortissants d'autres Etats, ouverte à la signature à Washington, le 18 mars 1965, la procédure prévue par ladite Convention, en vue du règlement de ce différend par la conciliation ou l'arbitrage.*

A cette fin, chaque Partie contractante donne son consentement anticipé et irrévocable à ce que tout différend soit soumis au Centre.

4. *Toutefois, la condition mentionnée au paragraphe 3 du présent article, relative à l'épuisement des voies de recours administratives et judiciaires offertes par la législation de la Partie contractante sur le territoire de laquelle l'investissement a été réalisé, ne pourra plus être opposée par cette Partie à l'investisseur de l'autre Partie, après un délai de dix-huit mois à compter de la notification écrite, accompagnée d'un aide-mémoire suffisamment détaillé, par l'investisseur de l'une des Parties contractantes à l'autre Partie contractante.*

5. *Dès la date d'introduction d'une procédure de conciliation ou d'arbitrage après l'expiration du délai de dix-huit mois visé au paragraphe 4, chaque Partie au différend relatif à un investissement prendra toutes les mesures requises en vue de son désistement de l'instance judiciaire en cours devant les tribunaux du pays où l'investissement a été effectué.*

6. *Dans tous les cas, les règles applicables à la conciliation ou à l'arbitrage seront la loi nationale de l'Etat contractant partie au différend, y compris les règles relatives aux conflits de lois, les disposi-*

tions de la présente convention, ainsi que les principes de droit international régissant cette matière.

7. *Chacune des Parties contractantes s'engage à exécuter la décision qui sera rendue par le Centre International pour le Règlement des Différends relatifs aux Investissements."*

Agreement Between the Belgo-Luxemburg Economic Union and the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, April 5, 1982

"Art. 10

Reference to the International Centre for the Settlement of Investment Disputes

1. *Any investment dispute shall form the subject of a written notification, accompanied by a sufficiently detailed memorandum which will be submitted by one of the Parties to such investment dispute, to the other Party. Such dispute shall preferably be settled amicably by direct consultation between the Parties to the dispute or through pursuit of local, nonjudicial or administrative remedies. In the absence of such settlement the dispute shall be submitted to conciliation between the Contracting Parties to this agreement through diplomatic channels.*

2. *If any such dispute cannot be settled within six months of a written notification being submitted by one Party to the dispute to the other Party as provided for in Section 1 of this article, such dispute shall at the request of either party to the dispute be submitted to conciliation or arbitration by the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "The Center") under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on 18 March, 1965.*

3. *In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure, the national or company affected shall have the right to choose.*

4. *Each Contracting Party hereby irrevocably consents to submit to the Centre any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.*

5. *The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.*

6. Neither Contracting Party shall pursue through diplomatic channels any dispute referred to the Centre unless:

(a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre, or

(b) the other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal."

Agreement between the Government of the Socialist Republic of Romania and the Government of the Italian Republic Concerning the Reciprocal Promotion and Guarantee of Investments of Capital, January 14, 1977

"Article 4

Expropriation and Compensation

1. Investments of capital by investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures equivalent to nationalization or expropriation in the territory of the other Contracting Party, except in the public interest as announced by due process of law, and against compensation.

Said compensation shall amount to the real value of the expropriated capital on the date of the expropriation, shall be effectively realizable upon the act of transfer of ownership, shall be paid without delay, and shall be freely transferable without delay in a convertible currency.

At the request of the investor affected the amount of compensation shall be subject to review by the competent court in the country where the investment was made, by due process of law and in conformity with the principles set forth in the present Article.

If any dispute between the claims of an investor of one of the Contracting Parties and those of the other Contracting Party concerning the amount of compensation shall continue to exist notwithstanding exhaustion of the procedures and remedies provided in the legislation of the country where the capital was invested, the Parties shall be entitled within two months following exhaustion of such internal remedies to submit the dispute for conciliation or arbitration in conformity with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on March 18, 1965.

If the amount of compensation finally determined is higher or lower than the amount of compensation paid at the time of expropriation, the difference shall be paid or refunded without delay, and shall be

freely transferable without delay in a convertible currency.

In the event of a delay in the compensation payments referred to herein, the payee shall also be entitled to interest for the period of the delay."

Accord entre le Gouvernement du Royaume des Pays-Bas et le Gouvernement de la République Socialiste de Roumanie sur l'encouragement et la protection réciproques des investissements, 27 octobre 1983

"Article 5

1. Si un différend entre un investisseur et la Partie Contractante sur le territoire de laquelle l'investissement a été réalisé, au sujet du montant de l'indemnité, continue à exister après la décision finale du juge ou du tribunal ou de tout autre organe compétent national, selon l'Article 4, chacun d'eux a le droit de soumettre le différend, dans un délai de deux mois à partir de l'épuisement des recours légaux internes, au Centre institué en vertu de la Convention de Washington du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, pour conciliation ou arbitrage, conformément à la procédure prévue par la dite Convention.

A cet effet, chaque Partie Contractante donne son consentement par le présent Accord.

2. Toutefois, la condition visant à épuiser les voies internes de recours prévues par la législation de la Partie Contractante sur le territoire de laquelle l'investissement a été réalisé ne pourra plus être opposée par cette Partie Contractante à l'expiration d'un délai de deux années à compter de la date du premier acte de procédure contentieuse engagée aux fins du règlement du litige respectif par les tribunaux."

Agreement between the Government of the Socialist Republic of Romania and the Government of the Democratic Republic of the Sudan on the Mutual Promotion and Guarantee of Capital Investments, December 8, 1978

"ARTICLE 4

1. Capital investments carried out by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated or subjected to other measures having a similar effect but for public interest and against a compensation. Such compensation shall correspond to the value of the investment on the date of expropriation, it shall be effectively achievable and paid without delay. On the date of expropriation, a proper procedure shall be provided with the view to establish the amount and the method of payment of compensation. Upon

the request of the interested party, the amount of the compensation may be reassessed by the competent court in the country in which the investment has been carried out.

In the event of a dispute arising between an investor and the Contracting Party in the territory of which the investment was carried out, concerning the amount of the compensation, continuing to exist after the final award of the national court, each of them is authorized to submit the dispute for conciliation and arbitration, according with the procedure provided by the Convention opened for signature at Washington on 18 March 1965, to the International Centre for Settlement of Investment Disputes."

ACCORD entre le Gouvernement de la République française et le Gouvernement de la République islamique du Pakistan sur l'encouragement et la protection réciproques des investissements, 1er juin 1983

"Article 8

1. Tout différend relatif aux investissements entre l'une des Parties contractantes et un national ou une société de l'autre Partie contractante est réglé à l'amiable entre les deux parties concernées.

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 est soumis à la demande de l'une ou l'autre de ces parties à l'arbitrage du Centre international pour le règlement des différends relatifs à l'investissement (C.I.R.D.I.) créé par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, signée à Washington le 18 mars 1965.

Article 9

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

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

Accord entre le Gouvernement de la République française et le Gouvernement de sa Majesté le Roi du Népal sur l'encouragement et la protection réciproques des investissements, 2 mai 1983 (similar to France/Guinée Equatoriale, March 3, 1983)

ARTICLE 8

En cas de différend relatif aux investissements entre l'une des Parties contractantes et un national ou une

société de l'autre Partie contractante, ce différend est autant que possible réglé à l'amiable entre les deux Parties concernées.

Si ce 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 est soumis à la demande de l'une ou l'autre de ces parties à l'arbitrage du Centre International pour le Règlement des Différends relatifs aux investissements entre Etats et ressortissants d'autres Etats signée à Washington le 18 mars 1965.

ARTICLE 9

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

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

ICSID and Bilateral Investment Treaties

In an increasing number of instances, bilateral treaties relating to the promotion and the protection of investments (BITs) make reference to ICSID facilities for the settlement of investment disputes between one contracting state and nationals of the other contracting state.

In this connection, it is interesting to note that out of 210 BITs collected by the Secretariat and published in a collection entitled *Investment Treaties*, 100 treaties refer to ICSID. Another interesting feature is that 87 of these treaties concern relations between developing and developed countries, and 11 involve relations among developing nations. In this last respect, it should be recalled also that the Model Bilateral Agreements on Promotion and Protection of Investments prepared by the Asian-African Legal Consultative Committee (23 *International Legal Materials* 237 (1984)) also contemplate that investment disputes might be submitted to arbitration under ICSID.

In view of these developments, it may be useful to review some of the major characteristics of treaties in existence or under active consideration.

Form and Scope of Consent to ICSID Facilities

A. Form of Consent

BITs referring to ICSID can be classified in four major categories:

1. Binding Commitment

Certain treaties contain an unconditional undertaking on the part of each contracting state to agree, upon any request from an investor who is a national of the other state, to submit investment disputes to ICSID conciliation/arbitration. The following examples are illustrative of this type of treaty:

—Treaty of July 7, 1968 between the Netherlands and Indonesia, Article 11 (*Investment Treaties, Vol. I, Year 1968, p. 13*).

"The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of March 18, 1965, any dispute that may arise in connection with the investment."

—Treaty of June 3, 1977, between Egypt and Yugoslavia, Article VIII (*Investment Treaties, Vol. II, Year 1977, p. 15*).

"Any dispute between a Contracting Party and nationals or economic organizations of the other Contracting Party concerning protection of investments against non-commercial risks, shall be submitted for settlement by the Contracting Parties to the International Centre for Settlement of Investment Disputes, if the national and the economic organisation in dispute so require."

—Treaty of June 19, 1980, between the United Kingdom and Bangladesh, Article 8(1) (*Investment Treaties, Vol. II, Year 1980, p. 71*).

"Each Contracting Party hereby consents to submit to the Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former."

—Treaty of September 8, 1975, between France and Singapore, Article 6 (*Investment Treaties, Vol. II, Year 1975, p. 49, at p. 64*),

"Les parties contractantes accordent le droit à tout investisseur de l'une ou l'autre Partie d'engager une procédure d'arbitrage devant le Centre international pour le règlement des différends en matière d'investissements, si un différend entre l'investisseur et la Partie contractante sur le territoire de laquelle l'investissement est effectué n'est pas réglé dans un délai de trois mois."

—Treaty of December 6, 1983, between the United States and Senegal, Article VII (*Investment Treaties, Vol. II, Year 1983*) (*Release 84-3, Issued December 1984*); (*News from ICSID, Vol. 1, No. 1* (Winter 1984), pp. 5–6).

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

(i) the dispute has not, for any reason, been submitted for settlement in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or other competent tribunals of the Party that is a party to the dispute.

If the national or company concerned consents in writing to the submission of the dispute to the Centre in the circumstances set forth above, either party to the dispute may institute proceedings before the Centre by addressing a request to this effect to the Secretariat of the Centre following the required procedures of Articles 28 and 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington March 18, 1965 ("the Convention"). If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention and the Regulations and Rules of the Centre."

These treaties present the original feature that the implementation of these clauses is left to the discretion of the investor, since it is entirely within the investor's power to take advantage or not of the host country's willingness to submit investment disputes to ICSID conciliation/arbitration. For example, the investor need not record initial acceptance of the host state's willingness to submit to

ICSID proceedings in an investment agreement. The investor may simply make an investment and wait until a dispute has arisen before recording his consent by submitting to the Secretary General of ICSID for registration a request for conciliation/arbitration. In other words, the treaty between the host state and the investor's state can be analyzed as a "stipulation pour autrui" or a third party beneficiary arrangement, the investor being in the position of a beneficiary whose ultimate acceptance of the understanding contained in the treaty closes the circle.

2. Agreement to consent

Some treaties simply provide that investment agreements concluded between a Contracting State and nationals of the other Contracting State shall, if the investor so requests, include a provision for the submission of disputes to ICSID. An example is the:

—Treaty of April 24, 1975 between France and Malaysia, Article 5 (*Investment Treaties, Vol. II, Year 1975, p. 9*).

"Les investissements effectués en vertu d'un accord spécial de l'une des Parties contractantes dans des entreprises appartenant à des nationaux ou sociétés de l'autre Partie, seront régis par les dispositions dudit accord spécial.

Si les investisseurs en font la demande, chacune des Parties contractantes consentira à insérer dans ledit accord spécial une disposition prévoyant le recours, en cas de différend, au Centre international de règlement des Différends relatifs aux investissements (CIRDI)."

This provision gives investors the assurance that investment disputes can be submitted to ICSID. As stated, however, it falls short of being an effective consent to ICSID conciliation/arbitration. Such consent can only result from a subsequent stipulation of an ICSID clause in the investment agreement, which would effectively bind both parties.

This conclusion is even more pertinent in regard to treaties which simply provide that investment agreements may make reference to ICSID arbitration, "if both parties agree," such as the following:

—Treaty of March 3, 1979, between Sweden and Malaysia, Article 6 (*Investment Treaties, Vol. II, Year 1979, p. 1*).

"In the event of a dispute arising between a national or a company of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party, it shall upon the agreement by both parties to the dispute be submitted for arbitration to the International Centre for Settlement of Investment Disputes established under the Washington Convention on the Settlement of Investment Disputes be-

tween States and Nationals of other States, dated March 18, 1965."

3. Willingness to consent

Other treaty provisions include a reference to the possibility that the parties consent to ICSID arbitration, with some requiring them to give "sympathetic consideration" to that possibility. Such is the case of certain treaties concluded by the Netherlands, such as the:

—Treaty of September 11, 1970 between the Netherlands and Kenya, Article XI (*Investment Treaties, Vol. I, Year 1970, p. 25*).

"The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give sympathetic consideration to a request on the part of such national to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment."

Under such provisions, each Contracting State retains its freedom to decide, in the light of the circumstances, whether or not to have recourse to ICSID conciliation/arbitration or to some other form of settlement. The requirements of good faith suggest, however, that a party using this language may not dismiss resort to ICSID facilities without reason or arbitrarily give preference to other proceedings.

Specific mention should be made here of recent investment treaties concluded by the People's Republic of China (PRC).

On the occasion of the signing in Beijing in 1982 of the Investment Promotion Treaty between China and Sweden, the following understanding on dispute settlement was recorded by a letter from the Swedish Ambassador in Beijing to the Chinese Ministry for Economic Affairs and Trade with Other Countries:

"On the occasion of the signing of the agreement between the Government of the Kingdom of Sweden and the Government of the People's Republic of China on the mutual protection of investments, I have the honor to refer to the following understanding reached between our two delegations during the negotiations.

As the People's Republic of China has not acceded to the Washington Convention of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, the delegations found it impossible to include in the agreement any provision covering the settlement of disputes between a contracting State and an investor from the other contracting State. The delegations were, however, in agreement that, in the event that the

People's Republic of China should in future accede to the Washington Convention, the agreement will be supplemented by a supplementary agreement on a binding system for the settlement of disputes within the framework of the International Centre for Settlement of Investment Disputes.

The Swedish Government accepts this understanding, and I should be grateful to receive your assurance that this understanding can also be accepted by the Government of the People's Republic of China." (As reported in *ICSID Newsletter* 83-2 (July 1983), p. 6).

As of the time of writing, the PRC has not yet signed the ICSID Convention and no action has been taken pursuant to this understanding. Nevertheless, the Treaty of October 7, 1983 between the PRC and the Federal Republic of Germany (*Investment Treaties, Vol. II, Year 1983*); (*News from ICSID Vol. 1, No. 1, (Winter 1984)*), pp.4-5 refers to ICSID, however, only indirectly. A Protocol annexed to the treaty provides that disputes regarding compensation, following expropriation, may be referred to an *ad hoc* international tribunal and that the procedure shall be determined "under" the ICSID Convention (Protocol, paragraph 4). This reference to the Convention is, therefore, limited to procedural matters. In this respect, the situation is comparable to that which results by way of contractual provisions, in the case of arbitration clauses incorporating the ICSID rules by reference, such as the clauses found in loan documents between Brazil and foreign lenders (Shihata, "ICSID and Latin America", *News from ICSID, Vol. 1, No. 2 (Summer 1984)*, p. 2).

4. *Alternative consents; the respective use of ICSID, the Additional Facility and other means of Settlement*

Reference to the Additional Facility as a means of dispute settlement is now made in several BITs concluded by the United States and the United Kingdom. Several situations must be distinguished.

Sometimes, as in the case of the Treaty of October 27, 1982 between the United States and Panama (*Investment Treaties, Vol. II, Year 1982*, p. 86, Article VII), the Parties agree that in the event of an investment dispute between one of them and a national of the other Party, the parties to the dispute may agree, as part of a consultation or negotiation process aimed at the resolution of the dispute, to "rely upon non-binding, third party procedures, such as the fact-finding facility available under the Rules of the Additional Facility." If this process does not succeed, the dispute shall be submitted for settlement in accordance with the dispute-settlement procedures agreed to by the parties or the Additional Facility Rules. In this last respect, the treaty provides that:

"3. (a) *The national or company concerned may choose to consent in writing to the submission of the dispute to the Additional Facility for settlement,*

either by conciliation or binding arbitration, at any time after six months from the date upon which the dispute arose. Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Additional Facility, provided the dispute has not, for any reason, been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the parties to the dispute, and the national or company concerned has not brought the dispute before the courts of justice, administrative tribunals or agencies of competent jurisdiction of either Party.

(b) *Each Party hereby consents to the submission of an investment dispute to the Additional Facility for settlement by conciliation or binding arbitration.*

(c) *Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Regulations and Rules of the Additional Facility.*

(d) *Each Party shall provide for the enforcement within its territory of Additional Facility arbitral awards."*

Under the circumstances, this provision amounts to a binding commitment by each Party to consent to submit investment disputes for settlement by conciliation or arbitration under the Additional Facility. Such unilateral consent, once it is accepted by the investor concerned, authorizes either the State or the investor party to the dispute to institute proceedings under the Additional Facility.

This type of provision raises an interesting issue. Under Article 4(1) of the Additional Facility Rules: "Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General [of ICSID]." This requirement is intended to account for the fact that the Additional Facility has a limited scope and is not intended as an alternative to ICSID or to existing mechanisms for the settlement of commercial disputes. In order to comply with this requirement, the Secretary-General of ICSID addressed to both Signatory States the following letter:

"The text of the Treaty negotiated by the Republic of Panama and the United States of America concerning the treatment and protection of investment has been communicated to me.

"Having had the opportunity to review and consider the Treaty, I am pleased to communicate that the Additional Facility of ICSID stands ready to assist the Parties in the implementation of Article VII of that Treaty.

"This is to confirm that I consider that Article VII, paragraph 3(a) of the Treaty constitutes on the part of each Contracting State, consent to the use of the Additional Facility. In the light of the purposes of Article 4 of the Additional Facility Rules, this letter constitutes approval of the terms of the Treaty relevant to the use of the Additional Facility and that upon consent by the investor, as required by Article VII, paragraph 3(a) of the Treaty, this letter satisfies the requirement of Article 3(1)(c) of the Arbitration (Additional Facility) Rules and of Article 3(1)(d) of the Conciliation (Additional Facility) Rules.

"It is my understanding that consent of the investor to either arbitration or conciliation might be communicated either to the Secretariat of the Centre or to the Contracting State to the dispute.

"This approval is, of course, subject to all other applicable Rules of the Additional Facility."

Since Panama is not yet a party to the ICSID Convention, the treaty makes no reference to ICSID itself.

The situation is different in the case of BITs concluded by the United States with other States that are members of ICSID. An example is the treaty with Senegal of December 6, 1983 (*Investment Treaties, Vol. II, Year 1983*); (*News from ICSID, Vol. 1, No. 1 (Winter 1984)*, pp. 5-6). The provision referring to consent to ICSID conciliation/arbitration (quoted above, see section A(1)) follows other provisions regarding attempts at amicable settlement, including the possible use of the fact-finding facility of the Additional Facility. It is apparent from these provisions that the Contracting States endeavor to take advantage of all ICSID facilities with a view to facilitating amicable settlement or the ultimate resolution of the dispute by conciliation or binding arbitration under ICSID.

Certain BITs concluded by the United Kingdom also present interesting features. For example, Article 8 of the Treaty of January 18, 1983 with St. Lucia (*Investment Treaties, Vol. II, Year 1983 (Release 84-3, Issued December 1984)*); (*News from ICSID, Vol. 1, No. 1 (Winter 1984)*, p. 4) provides in substance that, if an investment dispute is not amicably settled within 3 months, the parties "may agree" to refer the dispute to ICSID or the Court of Arbitration of the International Chamber of Commerce, or to *ad hoc* international arbitration under the UNCITRAL Arbitration Rules. If the parties cannot agree on "an alternative procedure", they "shall be bound" to submit to arbitration under the UNCITRAL Rules.

In other words, insofar as ICSID is concerned (or for that matter the ICC), this provision falls within the category of clauses which express a willingness to consent to ICSID arbitration without more. Consent could only result from a subsequent agreement between the parties selecting ICSID as the "alternative procedure".

B. Scope of Consent

1. Categories of disputes covered by BITs

Certain treaties contain limitations upon the categories of disputes which may be submitted to ICSID.

For example, the treaties concluded by Romania provide that the only disputes which can be submitted to ICSID are those concerning the amount of compensation for expropriation that may still exist after a final decision on the subject has been rendered by a Romanian court, i.e. after exhaustion of local remedies (see para. B(2) *infra*).

In addition, Article 6 of the Treaty of May 22, 1981 between Bangladesh and the Belgo-Luxemburg Economic Union (*Investment Treaties, Vol. II, Year 1981*, p. 63), Article 6, provides in general terms that "any investment dispute may be submitted to ICSID conciliation/arbitration," except matters relating to tax disputes.

Several treaties concluded by the United States, such as the Treaty of December 6, 1983 with Senegal (*Investment Treaties, Vol. II, Year 1983*); (*News from ICSID, Vol. 1, No. 1 (Winter 1984)*, pp. 5-6), Article VII, provide that:

"1. For purposes of this Article, an investment dispute is defined as a dispute involving

(a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party;

(b) the interpretation or application of any investment authorization granted by the competent authority of a Party to such a national or company; or

(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."

and that:

6. The provisions of this Article shall not apply to a dispute arising: (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States, or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes."

Other treaties show significant variations regarding their application in point of time. Some treaties specifically state that they apply to investments made before or after the signature or entry into force of the treaty (see, e.g. Austria/Romania, Art. 14, *Investment Treaties, Vol. II, Year 1976*, p. 65, or France/Pakistan, Art. 1(1), *Vol. II, Year 1983*, or United States/Egypt, Art. II(2)(b), *Vol. II, Year 1982*, p. 59). Other treaties limit the scope of their application to investments made after the date of signature or entry into force of the treaty (see, e.g. Belgo-Luxemburg Economic Union/Sri Lanka, Art. 2(2), *Vol. II, Year 1982 (Release 84-3, Issued December 1984)*, or Sweden/Malaysia, Art. 1(1), *Vol. II, Year 1979*, p. 1). In certain cases, treaties limit

their area of application to investments that have been specifically approved by the host State (see, e.g. Belgium/Indonesia, Art. 9, *Vol. I, Year 1970*, p. 1, or Netherlands/Egypt, Letter III, *Vol. II, Year 1976*, p. 77). A number of treaties contain no provision on the subject (see, e.g. Denmark/Romania, *Vol. II, Year 1980*, p. 105, or Switzerland/Sri Lanka, *Vol. II, Year 1981*, p. 79). This lack of specificity is troublesome since it may lead to divergent interpretations as to the categories of investments that fall within the scope of the treaty.

2. Conditions precedent to recourse to ICSID facilities

A number of treaties provide that as a preliminary step in the process of dispute settlement, the parties should endeavor to reach an amicable solution through negotiations and, in the case of most BITs concluded by the United States (see section A(4) above) the parties should use the fact-finding facility of the Additional Facility. It is only in the event that no settlement can be reached within a stated period of time (which varies usually from three months to one year); that the parties may submit the dispute to ICSID conciliation or arbitration.

Other treaties, such as those concluded by Romania, consistently provide for the prior exhaustion of local remedies as a condition precedent to the submission of disputes to ICSID conciliation/arbitration (as stated before limited to issues of compensation).

Sometimes, this condition is qualified by the requirement that, if recourse to local remedies does not lead to a solution within a stated period of time, the right to have access to ICSID is restored. An example is found in Article 10 of the Agreement of July 15, 1975 between France and Morocco (*Investment Treaties, Vol. II, Year 1975*, p. 33) according to which the condition regarding exhaustion of local remedies ceases to apply "two years after the date of the first seisin of courts".

Treaties concluded by the United Kingdom contain an ambiguous provision according to which recourse to ICSID is possible only when an

"agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise."

The expression "otherwise" may mean that exhaustion of local remedies is not always an absolute prerequisite to ICSID proceedings. Thus, a party may be able to contend that any contact between the parties would be enough to satisfy the test set forth in the treaty, (whether in the form of attempted negotiations, exchange of correspondence or even preliminary discussions). This is a provision whose implementation is, therefore, not free from interpretation.

Identifying the Parties

Identifying the Governmental Party

Article 25(1) of the ICSID Convention requires that one party to the dispute be a Contracting State or a constituent

subdivision or agency thereof and the other party be a national of another Contracting State.

The overwhelming majority of BITs refer, with regard to the governmental party, only to Contracting States. There is, therefore, no problem in identifying the State involved since it is one of the Parties to the treaty.

A few treaties have been found which make reference to agencies of one of the Contracting States as possible parties to disputes with nationals of the other Contracting State. The Treaty of July 23, 1969 between Ivory Coast and Italy (*Investment Treaties, Vol. I, Year 1969*, p. 31) Article 7, states as follows:

"Tout différend concernant les investissements, objet du présent Accord, qui s'élèverait entre un Etat Contractant (ou n'importe quelle Institution ou Organisation dépendantes ou contrôlées par le même Etat) et une personne physique ou morale, ayant la nationalité de l'autre Etat, sera réglé par la voie diplomatique."

Si un différend ne peut être réglé de cette façon il sera soumis à la juridiction du Centre international pour le règlement des différends relatifs aux investissements, conformément à la Convention internationale de Washington du 18 mars 1965."

Three U.S. BITs state that the treaty shall apply to the political subdivisions of the Parties; the United States/Egypt treaty, *Investment Treaties, Vol. II, Year 1982*, p. 59), refers to both political and administrative subdivisions.

These provisions, however, as interesting as they are, could not be readily implemented. There are two reasons for this result: an agency or a subdivision of a Contracting State can be a party to ICSID proceedings only if: (i) the agency or subdivision has been designated to ICSID by its own State (Article 25(1) of the Convention); and (ii) its consent to ICSID conciliation/arbitration must be specifically approved by the State in question, unless that State notifies ICSID that no such approval is necessary (Article 25(3) of the Convention). In order to give effect to the provision quoted above, these two requirements would have to be satisfied.

Identifying the Investor

According to the Convention, the investor must be a "national" of another Contracting State. This term applies to both natural and juridical persons.

Treaty provisions referring to natural persons simply state that such persons must be "citizens" or "nationals" of the State party to the treaty, according to its own law. Occasionally, the test for nationality is further defined. For example, the Treaty of May 10, 1976 between Romania and Egypt (*Investment Treaties, Vol. II, Year 1976*, p. 37), Protocol (5) referring to Article 8, provides that:

"Without prejudice to other procedures for determination of nationality, a citizen of a Contracting

Party is especially considered to be any person who possesses a national passport issued by the competent authorities of the Contracting Party involved."

In contrast, the provisions concerning juridical persons are far from uniform. For example, most but not all treaties determine the nationality of corporations on the basis of their "siège social" or place of incorporation. In this connection, it should be recalled that for the purposes of the Convention, it is usually assumed that the nationality of a corporation is also determined by these criteria. However, this rule is qualified by Article 25(2)(b) which allows the parties to an ICSID dispute to agree to treat a corporation incorporated in the host country as a national of another Contracting State because the corporation in question is "under foreign control". Thus, other treaties refer to the concept of control to define nationality. It is important to note, however, that while a "juridical person" is usually defined in either of the above two ways, with regard to the "foreign control" definition, each treaty uses different language.

An example of foreign control language may be found in the treaty between Japan and Egypt of January 28, 1977, (*Investment Treaties, Vol. II, Year 1977*, p. 1, Article XI) or in the treaty between the United States and Zaire of August 3, 1984, (6) Article VII (6) (*Release 84-3, Issued December, 1984*) which provides that corporations under the control of nationals or corporations of the other Contracting Party at the time of consent to ICSID conciliation/arbitration shall be deemed to be a national of the other Contracting Party.

Other variations of juridical person definitions may be found in two treaties concluded by the Netherlands and (i) Indonesia of July 7, 1968 (*Investment Treaties, Vol. I, Year 1968*, p. 13, Article 4); and (ii) Kenya of September 11, 1970 (*Investment Treaties, Vol. I, Year 1970*, p. 25, Article XIV) which refer the problem of definition to specific agreements to be concluded by each Contracting State with investors who are nationals of the other Contracting State, at the time of consent to ICSID conciliation/arbitration. This type of treaty does not change the substance of Article 25(2)(b) of the ICSID Convention, but serves as a reminder of the conditions that are required in order to bring a locally incorporated corporation within the scope of the Convention.

On occasion, the determination is left to the discretion of the two Contracting States. Thus, the treaty of May 5, 1980 between Finland and Egypt (*Investment Treaties, Vol. II, Year 1980*, p. 49), Article 1(3)) provides that:

"3. The term 'company' means:

- (a) in respect of Finland, any legal person with its seat in Finland or with an important Finnish interest,
- (b) in respect of Egypt, any legal person with its seat in Egypt or with an important Egyptian interest.

4. The meaning of the term 'important interest' is to be determined case by case by the representatives of the two Contracting States."

Treaties concluded by the United States such as the Treaty of September 29, 1982 with the Arab Republic of Egypt (*Investment Treaties, Vol. II, Year 1982*, p. 59, Article I(b)), though differently worded, accomplish ultimately the same flexible result. They provide that:

"(b) 'company of a Party' means a company duly incorporated, constituted, or otherwise duly organized under the applicable laws and regulations of a Party or a political or administrative subdivision thereof in which

(i) natural persons who are nationals of such Party, or

(ii) such Party or a political or administrative subdivision thereof or their agencies or instrumentalities have a substantial interest. Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty, if nationals of any third country own or control such company; provided that whenever one Party believes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall first consult with the other Party to seek a mutually satisfactory resolution of this matter."

In contrast, treaties concluded by the United Kingdom, such as the treaty with Bangladesh of June 26, 1980 (*Investment Treaties, Vol. II, Year 1980*, p. 71, Article 8), usually attempt to solve the problem by way of the following more specific definition.

"A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purpose of the Convention as a company of the other Contracting Party."

This criterion, even though it may be somewhat rudimentary, affords at least useful guidelines to identify the notion of "foreign control". In practice, the issue would limit itself to a question of proof of ownership. All that would be required to give effect to the definition would be to have the necessary evidence available at the time of submitting a request for conciliation/arbitration to the Secretary-General of ICSID. Such evidence would provide the Secretary-General with sufficient data on the basis of which he could determine whether the "foreign control" test set forth in the treaty is met so that he could register the request.

In order to bring this review of treaty practice to a close,

certain treaties concluded by countries of planned economies should be mentioned. Obviously, determination of the nationality of public entities which are more or less autonomous and which are specialized in various sectors of production of socialist countries is not problematic. In this situation, the only practical question is to determine which entities have authority to submit, in the capacity of investors, to ICSID conciliation/arbitration. This determination necessarily varies from country to country.

Thus, the Convention of April 11, 1979 between Gabon and Romania (*Investment Treaties, Vol. II, Year 1979*, p. 15, Article 2(3)) provides that the term "investors" means:

- "a) *Pour la République Gabonaise, toute personne physique ou morale bénéficiant de la nationalité Gabonaise conformément aux lois en vigueur;*
- b) *Pour la République Socialiste de Roumanie, des unités économiques roumaines ayant la personnalité juridique et qui, conformément à la loi, ont des attributions de commerce extérieur et de coopération économique avec l'étranger.*"

and an Agreement between Yugoslavia and Sweden of November 10, 1978, (*Investment Treaties, Vol. II, Year 1978*, p. 47, Article I) gives the following definition:

"the term 'company' shall mean:

- (a) *in respect of Sweden, any legal person with its seat in Sweden or any legal person with a predominating Swedish interest, located in another country;*
- (b) *in respect of Yugoslavia, any basic organizations of associated labour, work organizations or complex organizations of associated labour with their seat in Yugoslavia or any legal person with a predominating Yugoslav interest, located in another country.*"

Reference to the Notion of Investment

Most BITs contain extensive definitions of the term "investment". These definitions show that the parties to such treaties are fully aware of the fact that the contemporary notion of investment is no longer limited to investment in the form of capital contributions and now includes other forms of association between foreign investors and host States which contribute to the development of the host State's economy, including service contracts and transfers of technology.

Sometimes the relevant definition is cast in broad terms. Thus, the Agreement of December 8, 1978 between Romania and Sudan (*Investment Treaties, Vol. II, Year 1978, Article 2(a) (Release 84-3, Issued December 1984)*) provides that:

"'Capital investment' means the contribution to the achievement of an economic objective comprising all

goods, services and financial means of the participants to the investment."

More frequently, definitions take the form of a more or less comprehensive list of specific types of investment. While identifying categories of investment, these lists do not purport to be exhaustive and leave room for the possible extension of BITs to new forms of investment. Typical examples are the following:

BITs concluded by France, such as the Treaty of April 10, 1980 with Sri Lanka (*Investment Treaties, Vol. II, Year 1980*, p. 41, Article 1(a) and (b):

"Pour l'application de la présente Convention:

a) *Le terme 'investissement' désigne les avoirs de toute nature et, plus particulièrement mais non exclusivement:*

1. *Les biens meubles et immeubles ainsi que tous autres droits réels tels que hypothèques, privilèges ou cautionnements;*
2. *Les actions, titres et obligations dans des sociétés ou participations à la propriété de ces sociétés;*
3. *Les créances et droits à toutes prestations en vertu d'un contrat qui ont une valeur financière ou économique;*
4. *Les droits d'auteur, les droits de propriété industrielle (tels que brevets d'invention, licences, marques déposées, modèles industriels), les procédés techniques, les noms déposés et la clientèle;*
5. *Les concessions industrielles et commerciales accordées par la loi ou en vertu d'un contrat, notamment les concessions relatives à la prospection, la culture, l'extraction ou l'exploitation de richesses naturelles y compris celles qui se situent dans les zones maritimes relevant de la juridiction de l'une des parties.*

b) *Le terme 'revenus' désigne les sommes produites par un investissement, notamment mais non exclusivement, les bénéfices, intérêts, appréciation du capital, dividendes, redevances ou rémunérations."*

BITs concluded by the United Kingdom, such as the Treaty of February 25, 1982 with the Yemen Arab Republic (*Investment Treaties, Vol. II, Year 1982*, p. 1, Article 1(a):

"For the purposes of this Agreement

(a) 'investment' means every kind of asset and in particular, though not exclusively, includes:

- (i) *movable and immovable property and any other property rights such as mortgages, liens or pledges;*
- (ii) *shares, stock and debentures of companies or interests in the property of such companies;*

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights and goodwill;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

b) 'returns' means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties or fees."

BITs concluded by the United States, such as the Treaty of August 3, 1984 with Zaire (*Investment Treaties, Vol. II, Year 1984, Article I (Release 84-3, issued December 1984)*):

(c) 'investment' means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual and industrial property rights, including rights with respect to copyrights, patents,

trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill;

(v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;

(vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and

(vii) returns which are reinvested."

.....
 "(e) 'return' means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind."

Another interesting feature of these treaties is that they provide that any alteration of the form in which assets are invested shall not affect their character or classification as investment. This type of provision thus imports flexibility into the practical implementation of BITs and allows for contingencies that may not be foreseeable at the time of the initial investment. Finally, these provisions are often coupled with the further precision that the change in the form of investment must be consistent with the law of the host State.

Conclusion

This brief incursion into treaty law shows that there is room for importing greater uniformity into treaty provisions. This is a task to which the Asian-African Legal Consultative Committee has already devoted much time and effort. That the task should be carried forward is clear. For its part, the Secretariat of ICSID is presently consider-

ing means to contribute actively to the further harmonization of bilateral investment treaties.

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