

NEWS

FROM

ICSID

International Centre for Settlement of Investment Disputes

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Tonga Signs the ICSID Convention

On May 1, 1989, the ICSID Convention was signed on behalf of Tonga by its Attorney General and Minister of Justice, the Hon. David Topou.

Tonga became the ninety-eighth country to have signed the Convention and the seventh member of the South Pacific Forum

to have done so, the others being Australia, Fiji, New Zealand, Papua New Guinea, Solomon Islands and Western Samoa. Of the latter countries, only Australia has yet to ratify the Convention.

Disputes before the Centre

- **Klöckner/Cameroon - Annulment (Case ARB/81/2)**
 December 2, 1988 Klöckner files its "Mémoire."
 January 18, 1989 Cameroon and SOCAME file their "Mémoire en Réponse."
 February 17, 1989 Klöckner files its "Mémoire en Réplique."
 March 6, 1989 Cameroon and SOCAME file their "Mémoire en Duplique."
 March 24 and May 12-13, 1989 The Committee meets with the parties in Paris.
 July 24, 1989 The Committee meets in The Hague.
- **Mobil Oil Corporation, Mobil Petroleum Company, Inc., Mobil Oil New Zealand Limited v. New Zealand Government (Case ARB/87/2)**
 February 11-15, 1989 The Tribunal meets in Melbourne.
 May 4, 1989 The Tribunal issues its Findings on Liability, Interpretation and Allied Issues.
 August 7, 1989 Mobil files a Request for Provisional Measures.
- **Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka (Case ARB/87/3)**
 April 17-20, 1989 The Tribunal meets with the parties in Washington, D.C.
 June 26-27, 1989 The Tribunal meets in Paris.
- **S.P.P. (Middle East) Ltd. v. Arab Republic of Egypt (Case ARB/84/3)**
 February 16, 1989 S.P.P. (ME) files its Memorial.
- **Maritime International Nominees Establishment (MINE) v. Republic of Guinea - Annulment (Case ARB/84/4)**
 May 13, 1989 and July 21-22, 1989 The Committee meets in Paris and The Hague.
- **Manufacturers Hanover Trust Company v. Arab Republic of Egypt and the General Authority for Investment and Free Zones (Case ARB/89/1)**
 June 15, 1989 The Secretary-General registers a request for the institution of arbitration proceedings.
- **Société d'Etudes de Travaux et de Gestion SETIMEG S.A. v. Republic of Gabon (Case ARB/87/1)**
 May 22, 1989 Setimeg files its Reply.

Since the publication of the last issue of *News from ICSID*, there have been no new developments to report in two further cases which are pending before the Centre: Amco v. Indonesia-Resubmission (Case ARB/81/1); and Colt Industries Operating Corp., Firearms Division v. Government of the Republic of Korea (Case ARB/84/2).

New Additions to the Panels of Conciliators and Arbitrators

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

AUSTRIA

Panel of Arbitrators - designation effective as of April 20, 1989:

Dr. Thomas Lachs (re-appointment).

CYPRUS

Panels of Conciliators and of Arbitrators - designations effective as of July 5, 1989:

Mr. Criton G. Tornaritis (re-appointment), Mr. Michael A. Triantafyllides (re-appointment).

FEDERAL REPUBLIC OF GERMANY

Panel of Conciliators - designation effective as of May 9, 1989:

Dr. Klaus Kuttner.

Panel of Arbitrators - designations effective as of February 24, 1989:

Dr. Ottoarndt Glossner (re-appointment), Dr. Theodor Heinsius (re-appointment), Dr. Gunther Jaenecke (re-appointment), Dr. jur. Rainer Faupel.

HUNGARY

Panel of Conciliators - designations effective as of April 19, 1989:

Dr. Endre Juhász, Dr. Tamás Bán, Mr. László Borbély, Dr. Lajos Vékás.

Panel of Arbitrators - designations effective as of April 19, 1989:

Dr. Ferenc Mádl, Dr. Janós Martonyi, Dr. István Kiss, Dr. Attila Harmathy.

INDONESIA

Panels of Conciliators and of Arbitrators - designations effective as of July 19, 1989:

Prof. Dr. Priyatna Abdurrasyid (re-appointment), Prof. Dr. Mochtar Kusuma-Atmadja, Prof. Dr. Komar Kantatmadja.

JAPAN

Panel of Conciliators - designation effective as of April 27, 1989:

Mr. Michiya Matsukawa (serving the remainder of the late Mr. Naokado Nishihara's term).

KENYA

Panel of Conciliators - designation effective as of August 26, 1988:

Mr. Dan K. Ameyo.

SWITZERLAND

Panel of Conciliators - designation effective as of May 16, 1989:

Dr. Jens Drolshammer.

Panel of Arbitrators - designation effective as of May 16, 1989:

Prof. Claude Reymond.

Update on MIGA Ratifications

As of August 15, 1989, six additional countries had in the course of the year ratified the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA). The new ratifications are from Greece, Guyana, Ireland, Norway, Oman and Zaire. Fourteen industrial countries and forty developing countries have now ratified the MIGA Convention.

A further nineteen countries have signed but not yet ratified the Convention.

Membership in the New York Convention

On February 2, 7 and 10, 1989 respectively, Antigua and Barbuda, Algeria and Kenya acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Argentina ratified the Convention on March 14, 1989, while Lesotho acceded it on June 13, 1989. Lesotho's accession brought to 83 the number of States to have ratified/acceded to the New York Convention.

Seventh Joint ICSID/AAA/ICC Court Colloquium on International Arbitration New York City, October 6, 1989

ICSID, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) Court of Arbitration will this year be co-sponsoring the seventh in their series of annual colloquia on international arbitration. Hosted by the AAA, this colloquium will take place in New York City on October 6, 1989. After welcoming and introductory remarks by Robert Coulson, President, AAA, Alain Plantey, Chairman, ICC Court, and Ibrahim F.I. Shihata, Secretary-General, ICSID, the colloquium will examine the following three topics:

1. *How to Become an Active International Commercial Arbitrator*

Speakers: Gerald Aksen, Partner, Reid and Priest; Ahmed S. El-Kosheri, El-Kosheri & Rashed; Hans Smit, Fuld Professor of Law, Columbia Law School.

Discussants: Aron Broches, Past Secretary-General, ICSID, Counsel to Holtzmann, Wise & Shepard; Christine Lécuyer-Thieffry, Thieffry & Associés; Marc S. Palay, Partner, Jones, Day, Reavis and Pogue.

2. *New Legislation Impacting upon International Arbitration*

Speakers: Michael F. Hoellering, General Counsel, AAA; Georges R. Delaume, Past Senior Legal Adviser, ICSID, Counsel to Curtis Mallet-Prevost, Colt & Mosle; Stephen R. Bond, Secretary-General, ICC Court of Arbitration.

Discussants: James H. Carter, Jr., Sullivan & Cromwell; Andreas Lowenfeld, Professor, New York University School of Law; Samia Rashed, Professor of Private International Law, Cairo University.

3. *Streamlining the Administration of Major Arbitration Cases*

Speakers: Steven J. Stein, Proskauer Rose Goetz & Mendelsohn; Charles N. Brower, Partner, White & Case; William E. Jackson, Partner, Milbank, Tweed, Hadley & McCloy.

Discussants: William L.D. Barrett, Partner, Hollyer, Jones, Brady, Smith, Troxell, Barrett & Chira; George J. Grumbach, Jr., Partner, Cleary, Gottlieb, Steen and Hamilton; John A. Westberg, Partner, Westberg & Johnson.

After each set of formal presentations and discussions, the floor will be open to questions from participants in the colloquium.

For further information on the colloquium, contact:

American Arbitration Association
Department of Education & Training
140 West Fifty-first Street
New York, N.Y. 10020
Tel.: (212) 484-3233
Fax : (212) 765-4874

ITA Transnational Commercial Arbitration Workshop

The Institute for Transnational Arbitration (ITA), which was founded in 1986 to promote the use of arbitration as a means to settle transnational investment and commercial disputes and to encourage wider adherence to arbitration treaties, sponsored the first in a projected series of Transnational Arbitration Workshops during June 22-23, 1989. Held in Dallas, Texas, the workshop was designed to assist parties in effectively drafting arbitration clauses and conducting arbitration proceedings. The workshop focused on such topics as whether to select institutional or ad hoc arbitration; special matters for inclusion in arbitration clauses; handling the question of the judicial review; determining the

appropriate rules of procedure; conducting discovery and presenting evidence; and standards of conduct of counsel and arbitrators. Speakers and commentators at the workshop included 17 senior practitioners and arbitration specialists.

The next ITA Transnational Arbitration Workshop will be held on June 21-22, 1990. Based in Houston, Texas, ITA is a division of the Southwestern Legal Foundation. Further information on the Institute's workshops and other activities may be obtained from ITA, 1303 San Jacinto, Houston, Texas 77002, U.S.A. (tel. (713) 739-1928).

Recent Publications of and about ICSID

The Centre has recently issued several new publications. These include the Spring 1989 issue of the *ICSID Review - Foreign Investment Law Journal*. This issue features articles and comments on the draft United Nations Code of Conduct on Transnational Corporations, the regulation of foreign investment in Hungary, Soviet cooperatives, and on new investment legislation of the Central African Republic and Poland. Contributors to the issue include Samuel K.B. Asante, William G. Frenkel, Rolf Knieper, Maher S. Mahmassani and Istvan Pogany. (The *Review*, which appears semi-annually, is available on a subscription basis from the Johns Hopkins University Press, Journals Publishing Division, 701 W. 40th Street, Baltimore, Maryland 21211, U.S.A.)

Two new releases of the Centre's ten-volume collection of *Investment Laws of the World* (Releases 89/1 and 89/2) have also been published. They together contain the basic investment legislation of eleven countries: Bangladesh, Republic of Korea (update), Laos, Madagascar (update), Mozambique (update), Myanmar, Poland, Rwanda, Turkey, Vietnam and Yugoslavia. A new release of ICSID's three-volume collection of *Investment Treaties* is scheduled for publication in September 1989. (The *Investment Laws* and *Investment Treaties* collections may be purchased from Oceana Publications, 75 Main Street, Dobbs Ferry, New York 10522, U.S.A.)

In addition, the Centre has issued an expanded and updated edition of the *ICSID Bibliography* (Doc. ICSID/13). This brochure contains references to texts of the ICSID Convention and translations of the Convention into 15 different languages, to the various publications of ICSID, to well over 200 articles and books dealing with ICSID, and to published decisions rendered on ICSID cases. The brochure is available from the Centre on request.

Also available from the Centre on request is an updated (June 1989) edition of the list of *Contracting States and Measures Taken by Them for the Purpose of the Convention* (Doc. ICSID/8). This document lists the Contracting States and various actions they have taken pursuant to the Convention, namely exclusions of territories from the application of the Convention;

designations of constituent subdivisions and agencies competent to submit disputes to the Centre; notifications concerning classes of disputes considered suitable or unsuitable for submission to ICSID; designations of courts or other authorities competent for the recognition and enforcement of ICSID arbitral awards; and legislative measures taken by the States to make the provisions of the Convention effective in their territories.

Recent publications dealing with ICSID include:

Craig, William Laurence
Uses and Abuses of Appeal from Awards, 4 *Arbitration International* 174, 209-14 (1988).

Curtis, Christopher, T.
International Investment Disputes—*Res Judicata* Effect of Partially Annulled ICSID Award, 83 *American Journal of International Law* 106 (1989).

Gaillard, Emmanuel
Centre International pour le Règlement des Différends Relatifs aux Investissements: Chronique des Sentences arbitrales, 116 *Journal du Droit International* 141 (1989).

Graving, Richard J.
The International Commercial Arbitration Institutions: How Good a Job are They Doing?, 4 *American University Journal of International Law and Policy* 319, 360-66 (1989).

O'Neill, Philip D.
American Legal Developments in Commercial Arbitration Involving Foreign States and State Enterprises, 6 *Journal of International Arbitration* 117, 130-34 (1989).

Tupman, W. Michael
Challenge and Disqualification of Arbitrators in International Commercial Arbitration, 38 *International and Comparative Law Quarterly* 26, 43-45 (1989).

The ICSID Secretary-General as Appointing Authority in Ad Hoc Proceedings

The ICSID Convention provides for two types of proceedings administered by the Centre, conciliation and arbitration, for the settlement of investment disputes between States parties to the Convention (Contracting States) and nationals of other Contracting States. Under a set of "Additional Facility Rules" approved by the Administrative Council of ICSID in 1978, the Centre is also authorized to administer conciliation and arbitration proceedings between States and foreign nationals which fall outside the scope of the Convention, either because one of the parties is not a Contracting State or a national of one or because the dispute is not an investment dispute, provided that the dispute is not an ordinary commercial one and that at least one party is a Contracting State or a national of such a State. The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry "to examine and report on facts."

While the range of proceedings that ICSID may administer is thus broad, there are of course cases which cannot be brought under either the Convention or the Additional Facility Rules — for example, arbitration and conciliation proceedings between parties neither of which is a Contracting State or a national of one and proceedings between States or State entities. Particularly in such cases, parties to existing or potential disputes have on a number of occasions sought the assistance of the Centre in arranging for ad hoc (i.e., non-institutional) conciliation or arbitration, usually by having the Secretary-General of ICSID undertake to appoint some or all of the conciliators or arbitrators in certain defined contingencies. (For ICSID Convention and Additional Facility conciliation and arbitration proceedings, this function of appointing authority is assigned to the Chairman of the ICSID Administrative Council, who in practice selects his appointees on the recommendation of the Secretary-General.) In several instances, the Secretary-General has also been asked by parties to appoint ad hoc experts to assist them in resolving such questions as the determination of prices under contractual arrangements between the parties.

Although the Secretary-General has often undertaken to make such appointments, he is not obliged to do so. There are no formal ICSID rules directly dealing with circumstances under which the Secretary-General might be prepared to accept such assignments and the procedures that should be followed by parties seeking his assistance. Some practices have, however, developed in this connection. A brief description of these practices may be of interest, especially as requests for this type of assistance have become more common in recent years.

An important first step that has been taken by those wishing to

entrust such a task to the Secretary-General is to obtain his consent before the task is actually to be performed, and usually before any agreement incorporating the assignment is concluded; without such advance consent the Secretary-General will be under no obligation to collaborate in ad hoc proceedings. The Secretary-General, it should be noted, has only consented in cases where his designation as appointing authority was to be made by agreement of all the parties concerned or by a person to whom they had by mutual agreement delegated the selection of an appointing authority.

For agreements containing such assignments, parties have been advised to ensure that the relevant provision clearly designates the Secretary-General as the appointing authority, not ICSID itself. Parties have also been encouraged to avoid imposing such constraints as strict time limits on the exercise of the Secretary-General's ad hoc functions and unambiguously to cover such matters as the number of persons to be appointed and the circumstances under which the appointments are to be made. An example of a designation to which the Secretary-General has recently agreed is set out in a contract for the supply of certain services and equipment. The provision refers to the Secretary-General as the appointing authority of ad hoc arbitrators under the Arbitration Rules of the U.N. Commission on International Trade Law, and reads as follows:

"The appointing authority shall be the Secretary General of ICSID. Arbitration shall be conducted in the English language before a panel of three arbitrators. Owner on the one hand, and the Contractor on the other hand, shall each select one arbitrator within 60 days after either party shall give the other notice of commencement of arbitration proceedings and, within such 60 day period each party shall notify the other party in writing of the identity of the arbitrator so selected. Should either party not appoint its arbitrator in this period, the other party may so notify the appointing authority and request that the appointing authority appoint such arbitrator. The arbitrators as hereinabove selected shall select in consultation with the parties the third arbitrator who shall act as president of the arbitral panel. If the arbitrators do not agree on the selection of a president of the arbitral panel within 60 days from the date of appointment of the second of the two arbitrators, then upon written request of either party, the president of the arbitral panel shall be selected by the appointing authority."

To ensure that he will be able to perform the requested functions, the Secretary-General has invariably asked to have an

opportunity, before agreeing to such an assignment, to review the provision on the basis of which he is to act. Parties have normally chosen to submit the provision to him in draft form, in order to avoid the possibility of having to make changes after it has been concluded.

In practice, all of the arrangements under which successive Secretaries-General have agreed to act as appointing authority have been international ones involving at least one State or other public entity. These have included arrangements for the resolution of certain disputes between States and agencies of other States, between constituent subdivisions of different States, as well as between States and foreign private parties. The cases have also all concerned transactions in the economic or financial fields, such as agreements relating to investment insurance programs, developmental projects and international loans. It may be assumed that the Secretary-General will be likely to extend his assistance for cases which resemble ICSID proceedings in the above-mentioned ways and can be seen as furthering the broad developmental objectives of ICSID and the other organizations in the World Bank Group. From the few instances in which the Secretary-General has been called upon to make actual appointments under the various arrangements conferring these functions upon him, it may also be expected that, unless the parties' agreement requires otherwise, the Secretary-General will in making his selections avoid appointing as arbitrators nationals of any of the parties involved and seek to ensure that his

appointees have the qualities required of arbitrators and conciliators appointed under the ICSID Convention, namely that they be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."

It should in conclusion be pointed out that merely designating the Secretary-General as the appointing authority for ad hoc proceedings will not make the proceedings ICSID ones. The ICSID rules will not automatically be applicable to the ad hoc proceedings, though parties can, and sometimes do, also agree that the proceedings will *mutatis mutandis* be governed by ICSID rules. In addition, parties to ad hoc proceedings will not normally be able to use the administrative facilities of the Centre for the conduct of their proceedings; those facilities are for the most part only available for proceedings brought under the ICSID Convention or the Additional Facility Rules. And even if the Secretary-General undertakes to act as appointing authority in the context of an ad hoc proceeding, ICSID cannot assure, as it does for proceedings carried out under its own auspices, that the proceeding will not nevertheless be frustrated by possible non-cooperation of the parties or other reasons. More importantly, the awards of ad hoc arbitrators will not benefit from the ICSID Convention's provisions on recognition and enforcement, which only apply to awards rendered in proceedings held under the Convention (the provisions of the Convention thus do not apply to Additional Facility awards either).

Notification under Article 25(4) of the ICSID Convention

Article 25(4) of the ICSID Convention provides that any Contracting State may on or after ratifying the Convention "notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre... Such notification shall not constitute the consent required by" Article 25(1) of the Convention for the submission of actual cases to ICSID.

On ratifying the Convention on March 3, 1989, Turkey made the following notification under Article 25(4):

"I also have the honour to hereby notify, pursuant to Article 25(4) of the 'Convention on the Settlement of Investment

Disputes Between States and Nationals of Other States' concerning classes of disputes considered suitable or unsuitable for submission to the jurisdiction of the Centre that only the disputes arising directly out of investment activities which have obtained necessary permission, in conformity with the relevant legislation of the Republic of Turkey on foreign capital, and that have effectively started shall be subject to the jurisdiction of the Center. However, the disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the Turkish courts and therefore shall not be submitted to jurisdiction of the Center."

New Foreign Investment Legislation Referring to ICSID

The foreign investment laws of a number of countries refer to the possibility of settling disputes under ICSID's auspices. Some of these laws contain advance consents by the State concerned to ICSID arbitration and/or conciliation; others defer any such consents to individual ICSID clauses. The Central African Republic's new Investment Code contains a provision of the first type (referring to both the ICSID Convention and the ICSID Additional Facility), while Yugoslavia's recently enacted Law on Foreign Investment may be seen as containing a provision of the second type.

The Central African Code, which was adopted on May 9, 1988, provides in its Article 30 that:

“Les entreprises à majorité de capitaux étrangers ont le droit de demander à ce que leurs différends avec l'Etat soient réglés conformément à une procédure d'arbitrage ou de conciliation découlant:

- Soit des Accords et Traités relatifs à la protection des investissements conclus entre la République Centrafricaine et l'Etat dont la personne étrangère concernée est ressortissante;
- Soit une procédure de conciliation et d'arbitrage dont les parties sont convenues;
- Soit de la Convention du 18 Mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, établie sous l'égide de la Banque Internationale pour la Reconstruction et le Développement et ratifiée par la République Centrafricaine le 23 Février 1966;
- Soit, si la personne concernée ne remplit pas les conditions de nationalité stipulées à l'article 25 de la Convention sus-visée, conformément aux dispositions des Règle-

ments du Mécanisme supplémentaire approuvé par le Conseil d'Administration du Centre International pour le Règlement des Différends relatifs aux investissements (CIRDI).

Le consentement des parties à la compétence du CIRDI ou du Mécanisme supplémentaire, selon le cas, requis par les instruments les régissant, e[s]t constitué en ce qui concerne la République Centrafricaine par le présent article et en ce qui concerne la personne concernée est exprimée explicitement dans la demande d'arbitrage.”

The Yugoslavian Foreign Investment Law entered into force on January 8, 1989. An English translation of its provision on the settlement of disputes (Article 27) reads as follows:

“Any dispute arising between the investors shall be settled by a competent court of law in Yugoslavia, unless provisions have been made in the investment agreement for such disputes to be settled by the Arbitration at the Yugoslav Chamber of Economy, or some other domestic or foreign arbitration.

The disputes that may arise in the performance or interpretation of any concession agreement, or any document based thereon, shall be settled by a competent Yugoslav court, unless provisions have been made in the concession agreement for such disputes to be settled by arbitration tribunals set up under the conditions provided by the Convention on the Settlement of Investment Disputes Between the State and Nationals of Other States, or by other arbitration.”

The Central African Republic and Yugoslavia have been members of ICSID since 1966 and 1967 respectively.

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