NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

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Major features:

- Honduras and Turkey Ratify the ICSID Convention
- The International Chamber of Commerce Hosts a Sixth AAA/ICC/ICSID Colloquium. Remarks of the ICSID Secretary-General on the Selection of Arbitrators in ICSID Arbitration
- Recent Developments in MIGA

Honduras and Turkey Ratify the ICSID Convention

Honduras and Turkey deposited their instruments of ratification of the ICSID Convention on February 14, 1989 and March 3, 1989, respectively.

In accordance with its Article 68(2), the Convention will enter into force for each State thirty days after the deposit of the ratification instrument, i.e. on March 16, 1989 for Honduras and on April 2, 1989 for Turkey.

With these ratifications, the number of States to have ratified the Convention has reached 91. A further 6 States have signed, but not yet ratified, the Convention.

Disputes before the Centre

- **Amco v. Indonesia (Case ARB/81/1) - Resubmission**

October 17, 1988	Amco files its Reply.
November 15, 1988	Indonesia files its Rejoinder.

- **Klöckner/Cameroon (Case ARB/81/2) - Annulment**

October 7, 1988	Cameroon and SOCAME file their Memorial.

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

December 6, 1988	The Tribunal issues an Order granting a new stay of the arbitration until the decision of the US Court of Appeals for the Seventh Circuit in the Christianson v. Colt case.

- **S.P.P. (Middle East) v. the Arab Republic of Egypt (Case ARB/84/3)**

November 14, 1988	Egypt files an application for annulment of the Tribunal's Decision on Preliminary Objections to Jurisdiction of April 14, 1988.
December 9, 1988	The Acting Secretary-General declares that the Decision of April 14, 1988 rejecting objections to the Tribunal's jurisdiction is not an "award" as that term is used in Article 52 of the Convention and Arbitration Rule 50, and that, therefore, he does not have the power to register the application for its annulment.

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

August 1, 1988	MINE files its Counter-Memorial.
August 10, 1988	The Committee issues an Interim Order on Guinea's application for stay of enforcement of the Award, continuing the provisional stay for the time being.
August 18, 1988	Guinea files its Rebuttal to MINE's Counter- Memorial.
September 26, 1988	MINE files its Rejoinder.
October 28, 1988	The Committee meets in Washington, D.C. with the parties.

- **Dr. Ghaith R. Pharaon v. the Republic of Tunisia (Case ARB/86/1)**

September 21 and 23, 1988	The parties inform the Tribunal that an amicable settlement has been reached, and ask the Tribunal to take note of the discontinuance of the proceeding, pursuant to Rule 43(1) of the Arbitration Rules.
November 21, 1988	The Tribunal issues an Order in which it takes note of the discontinuance of the proceeding.

- **Société d'Etudes de Travaux et de Gestion SETIMEG S.A. v. the Republic of Gabon (Case ARB/87/1)**

September 19, 1988	Setimeg files its Memorial.
January 20, 1989	The Republic of Gabon files its Counter-Memorial.

- **Mobil Oil Corporation, Mobil Petroleum Company, Inc., Mobil Oil New Zealand Limited v. New Zealand Government (Case ARB/87/2)**

August 24, 1988	The Tribunal issues a Ruling on Venue.
October 31 - November 14, 1988	The first part of the hearing of the Tribunal with the parties is held in Washington, D.C.
November 28 - December 16, 1988	The second part of the hearing of the Tribunal with the parties is held in Auckland.

- **Asian Agricultural Products Ltd. v. the Democratic Socialist Republic of Sri Lanka (Case ARB/87/3)**

August 18, 1988	Claimant files its Reply.
October 20, 1988	Respondent files its Rejoinder.

- **Occidental of Pakistan Inc. v. the Islamic Republic of Pakistan (Case ARB/87/4)**

July 11, 1988	At the request of the parties, the Tribunal's first session is postponed to enable the parties to pursue settlement discussions.
January 11 and 12, 1989	Occidental requests a discontinuance of the proceeding on the grounds that the parties have reached a settlement and Pakistan agrees with this request.
January 27, 1989	The Tribunal adopts an Order taking note of the discontinuance of the proceeding pursuant to Arbitration Rule 44.

New Additions to the Panels of Conciliators and Arbitrators

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

FEDERAL REPUBLIC OF GERMANY-Designations effective as of November 15, 1988:
Panel of Conciliators:
Dr. Ernest G. Broeder (re-appointment), Dr. H. Giesecke (re-appointment), Dr. U.R. Siebel (re-appointment).

FRANCE-Designation effective as of December 7, 1988:
Panels of Conciliators and of Arbitrators:
Mr. Gilbert Guillaume.

LUXEMBOURG-Designations effective as of September 30, 1988:
Panels of Conciliators and of Arbitrators:
Dr. jur. Ernest Arendt (re-appointment), Mr. Alex Bonn (re-appointment), Mr. François Goerens (re-appointment), Mr. Fernand Zurn (re-appointment).

UNITED STATES OF AMERICA-Designations effective as of November 3, 1988:
Panel of Conciliators:
Mr. Richard A. Hauser, Mr. Cecil J. Olmstead, Mr. Douglas A. Riggs, Mr. Michael Stephan Shaw.
Panel of Arbitrators:
Mr. Fred F. Fielding, Mr. Robert Michael Kimmitt, Mr. Franz-Martin Oppenheimer, Mr. Robert F. Pietrowski, Jr.

The International Chamber of Commerce Hosts a Sixth AAA/ICC/ICSID Colloquium

For the sixth consecutive year, the American Arbitration Association, the Court of Arbitration of the International Chamber of Commerce and ICSID organized a Joint Colloquium on International Arbitration. Hosted by the ICC Court at its headquarters in Paris on October 27, 1988, the event gathered over 160 participants including judges, lawyers and businessmen from over 36 countries to discuss a controversial topic: the independence of arbitrators throughout the arbitral process.

Experts from diverse cultural and legal backgrounds as well as representatives of the sponsoring institutions shared their experience in examining the problem of independence and impartiality of arbitrators in an increasingly international context. How should arbitrators be selected?, How is their independence and impartiality verified and controlled prior to their appointment and throughout the proceedings?, What is the scope of their obligation of disclosure?, What is the competent authority to decide on the challenge? and what standards should be applied in deciding the challenge? These were only some of the questions that speakers and panelists discussed in depth.

The next colloquium will take place in the Fall of 1989 and will be hosted by the AAA.

A general view of the sixth ICC/ICSID/AAA colloquium, Paris, October 27, 1988.

Remarks of the ICSID Secretary-General

At the Sixth Joint Colloquium, the Secretary-General of ICSID, Mr. Ibrahim F.I. Shihata, delivered the following remarks on ***"The Experience of ICSID in the Selection of Arbitrators":***

"The ICSID system of arbitration is a specialized system for the settlement of legal disputes arising out of an investment between a member State and a national of another member State. It is distinguished from other arbitration systems in many important respects. Nevertheless, it maintains the basic principle of the autonomy of the parties in the constitution of the tribunal which is characteristic of all arbitration systems.

Under the ICSID Convention and Arbitration Rules, the parties may agree to have recourse to a sole arbitrator or any uneven number of arbitrators chosen in any manner the parties decide. Pursuant to Article 37(2)(b) of the Convention, if parties have not agreed otherwise, the tribunal will consist of one arbitrator appointed by each party and a third, presiding, arbitrator appointed by agreement of the parties. However, if parties fail to cooperate in the selection process and cannot succeed in constituting the tribunal within certain time limits, the Chairman of ICSID's Administrative Council will, under Article 38 of the Convention, make the missing appointment or appointments at the request of either party, but only after consulting both parties as far as possible. When he thus acts as appointing

authority, the Chairman must make his selection from the Panel of Arbitrators of ICSID, a list of potential arbitrators comprising up to 4 designees of each of ICSID's member governments and up to 10 designees of the Chairman. Parties may likewise select arbitrators from among the Panel members. Yet unlike the Chairman, they may also choose arbitrators from outside the Panel.

The large measure of freedom that parties have in constituting a tribunal is, however, limited by certain conditions designed to assure that disputes submitted to ICSID arbitration will be decided by persons who possess basic qualities of integrity, technical competence, and independence. Without such guarantees, it seems doubtful that the ICSID system could have attained the wide acceptance it enjoys, given the system's insulation from the control of national courts.

Attributes Required of ICSID Arbitrators

Article 14(1) of the ICSID Convention provides that those designated to the Panel of Arbitrators must be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment," the latter condition assuming both freedom from the parties and impartiality. Article 14(1) in fact embodies a general statement of the standards of integrity, competence and ability to exercise independent judgment that any ICSID arbitrator — including party- appointed ones — should meet. While parties may, and frequently do, select arbitrators from outside the Panel, Article 40(1) of the Convention provides that they can only do so if their appointees have the qualities required of Panel members.

The Convention contains a second condition related to the topic of independence and impartiality that parties must observe in the selection of arbitrators. To reduce the possibility that an arbitral tribunal might be predisposed in favor of one party over the other, or might appear to have such a predisposition, Article 39 of the Convention provides that, unless each and every arbitrator is appointed by agreement of the parties, the majority of the tribunal members must be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute. When he acts as appointing authority under Article 38, the Chairman may further under no circumstances appoint a national or compatriot of the parties as arbitrator. However, Article 39 does not completely rule out the possibility of the parties appointing national arbitrators. In the absence of agreement between the parties on each appointment, a party might under Article 39 choose a national arbitrator or arbitrators so long as the majority of the tribunal will consist of non-nationals. But where, as in all ICSID arbitrations to date, the tribunal is to have three members, only the party who acts first in appointing a national as arbitrator can take advantage of this possibility, even though it is theoretically open to both. To avoid the unfair situations that might result, ICSID Arbitration Rule 1(3) precludes a party from appointing national arbitrators if an equal number of similar appointments by the other party would result in a majority of national arbitrators. There have been a few ICSID tribunals whose members included national arbitrators. These have been constituted in cases where Arbitration Rule 1(3) did not, by its terms, apply — because each arbitrator was appointed by agreement of the parties — or where, one party having appointed a national arbitrator, the other party decided to waive the requirement of Rule 1(3).

Arbitration Rule 1(4) contains a final relevant condition related to the selection of arbitrators. On the principle that no one should twice take part in an impartial investigation of the same dispute, this Rule provides that a person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may not be appointed as a member of the tribunal.

Neither the Convention nor the Rules provide other guidance as to what constitutes impartiality or the type of relationship between an arbitrator and a party to a dispute which would make it unlikely that he could exercise independent judgement. While the issue of nationality is certainly important, especially in disputes involving governments, other factors may be of equal or greater importance but are often more difficult to ascertain. This is particularly true in matters related to investment disputes where the views of an arbitrator may be influenced by seemingly remote factors such as his political beliefs, social convictions and philosophical orientation. Can an arbitrator's impartiality be questioned, for instance, on the basis of his earlier writings on the standard of compensation applicable in customary international law in case of nationalization of foreign investment? There is no doubt that one's views on this matter may, when applied to the facts of a given dispute, make it possible to predict an arbitrator's judgment. While questions of this type naturally loom large at the time of the selection of arbitrators, they have not been raised, however, as a basis for challenging arbitrators in any ICSID dispute.

Verification, Disclosure and Resignation

Arbitration Rule 6(2) requires each arbitrator to file, at an early stage of the proceeding, a declaration attesting to his impartiality and willingness to observe certain basic requirements. The declarations include an affirmation that the arbitrator knows of no reason why he should not serve on the tribunal; an undertaking to "judge fairly as between the parties, according to the applicable law;" and pledges not to accept any instruction or compensation in connection with the case except as authorized by the Convention and the Centre's Regulations and Rules. In their declarations, arbitrators are moreover required to disclose their past and present professional, business and other relationships (if any) with the parties (the standard format of these declarations is set out in Rule 6(2)). If an arbitrator fails to sign such a declaration by the end of the tribunal's first session he will be deemed to have resigned.

Although the duty of disclosure is not expressly made a con-

tinuing one in the ICSID Rules, arbitrators are expected to reveal any circumstance they may realize during the proceeding that could cast doubt on their independence and impartiality. Should it become apparent that they have a personal interest in the case, arbitrators are further expected to resign, as once happened when a tribunal member was, in the course of the proceeding, made a director of the party that had designated him to the tribunal.

This was an interesting case. The arbitrator concerned submitted his resignation subject to the condition that his replacement be chosen by the party which appointed him. In the ordinary course of events, a vacancy resulting from resignation of an arbitrator is under ICSID Arbitration Rule 11(1) filled by the same method by which his appointment was made. Article 56(3) of the Convention however requires consent by the tribunal in case of resignations of party-appointed arbitrators; and if such consent is denied, the successor arbitrator will instead be appointed by the Chairman of ICSID's Administrative Council from the Panel of Arbitrators. The tribunal in this particular case decided that the condition attached to the arbitrator's resignation was invalid and should be disregarded. In view of the circumstances surrounding the resignation, the tribunal further decided to withhold the consent required by Article 56(3), with the result that the successor arbitrator was appointed by the Chairman.

Challenges

Under Article 57 of the Convention, a party may propose the disqualification of an arbitrator on account of any fact indicating a "manifest lack" of the qualities of integrity, competence and reliability for independent judgment required by Article 14(1) of the Convention. A party may also propose disqualification of an arbitrator on the grounds that he was ineligible for appointment because of the restrictions related to nationality or because the arbitrator should have been, but was not, selected from the Panel of Arbitrators. However, it is unlikely that a tribunal could in the first place be constituted in disregard of the latter restrictions. Although there is in the ICSID system no procedure comparable to that of the ICC for the confirmation of appointments by the administering institution as such, the ICSID Secretariat is expected to inform the parties of any violation of the clear-cut nationality requirements with a view to ensuring that the composition of the tribunal would be consistent with the Convention's requirements in this respect.

In accordance with Article 58 of the Convention, the decision on a party's disqualification proposal will normally be taken by the other members of the tribunal, rather than by the Centre. However, if the arbitrators are evenly divided on the disqualification proposal or the proposal relates to a majority of the artibrators or to a sole arbitrator, the Administrative Council Chairman will take the decision.

There has in practice been only one instance of a challenge by a party of an arbitrator under the above provisions. The party's proposal alleged that facts disclosed in the declaration of the arbitrator appointed by the adverse party indicated that he manifestly lacked one of the qualities required by Article 14(1). The proceeding, which in accordance with Arbitration Rule 9(6) had been suspended until a decision was reached on the proposal, resumed when the other tribunal members rejected the proposal, shortly after it had been made.

Under ICSID Arbitration Rule 9(1), a proposal to disqualify an arbitrator must be filed promptly after the proposing party first learns of the grounds for possible disqualification, and in any event before the tribunal declares the proceeding closed and starts to draw up its award.

However, if the party only learns of the potentially disqualifying circumstances when it is too late to make a disqualification proposal before closure of the proceeding, it will not necessarily be deprived of a remedy. In such a case, the party might seek annulment of the eventual award on the grounds of improper constitution of the tribunal. This is one of several grounds on which such annulment may be sought under Article 52 of the Convention. In accordance with that Article, applications to annul awards are referred for decision to 3-member ad hoc committees appointed by the Administrative Council Chairman from the Panel of Arbitrators. Article 52 of the Convention specifies a second possibly relevant grounds for annulment, namely "serious departure from a fundamental rule of procedure." One ad hoc committee has found that an "obvious lack of impartiality" on the part of arbitrators could constitute a serious breach of a fundamental rule of procedure and hence grounds for annulment. For extreme cases, corruption of an arbitrator is a third grounds for annulment. Fortunately, however, there have never been actual cases of annulment on any of the above-mentioned grounds.

In sum, the ICSID system provides a range of safeguards to ensure independence, impartiality and proper qualifications in ICSID arbitrators. Experience has shown that the various provisions of the ICSID Convention and Rules in this area have on the whole achieved the intended result."

The ICC has decided to publish in 1989 a book that will include all the material submitted to the Sixth Joint Colloquium (further information may be obtained from the General Counsel of the ICC Court, 38 Cours Albert 1er, 75008 Paris, France).

Other Conferences

On Thursday, October 20, 1988, the Italian Arbitration Association celebrated the thirtieth anniversary of its foundation. The celebration, which was held in Rome, opened with an address by H.E. Giulio Andreotti, the Minister of Foreign Affairs of Italy, on the role of arbitration in the contemporary world. Minister Andreotti's remarks were followed by addresses by a number of other speakers including the Secretary-General of ICSID, Mr. Ibrahim F.I. Shihata. In his address, Mr. Shihata highlighted the role that the Italian Arbitration Association has played in promoting the ICSID Convention, particularly in developing countries, and welcomed continued cooperation between the two institutions in the future.

The Secretary-General also addressed the 1988 series of *Journées Jean Robert* organized by the Quebec National and International Commercial Arbitration Centre. The *Journées* consist of five one day study sessions held each year over a six month period. Each *Journée* covers a wide range of issues related to the arbitration process both on the national and the international levels. The ICSID Convention and the fact that Canada has not yet adhered to it was the first topic on the agenda of the fifth and last *Journée* of the 1988 series which was held on January 13, 1989. On this occasion the Secretary-General presented a paper reviewing the main features of the ICSID system and the potential advantages of ICSID membership to Canada and Canadians. In this connection, Mr. Shihata pointed out that recourse to ICSID arbitration and conciliation is entirely voluntary and member countries have no obligation to make use of the Centre's dispute settlement facilities. On the other hand, membership in ICSID would enable Canada, its designated subdivisions and agencies, as well as Canadian overseas investors, to avail themselves of those facilities if they so wished. Moreover, membership in ICSID is free since the World Bank meets the Centre's administrative cost in full. The system of the ICSID Convention, Mr. Shihata continued, provides for flexible yet effective arbitration procedures leading to awards that are not subject to judicial review in any of ICSID's member countries and that can readily be enforced in those countries. Although ICSID has an "Additional Facility" which is available for disputes involving non- member states, and might thus be used by Canada and Canadian nationals, awards rendered under this facility do not benefit from the provisions of the Convention, including those on recognition and enforcement. Recalling questions that had been raised in the past with respect to Canadian membership in ICSID, Mr. Shihata described the various mechanisms of the ICSID Convention that could be used to resolve constitutional issues that a federal state like Canada might face in joining ICSID. In his concluding remarks, Mr. Shihata observed that Canada and its provinces have recently shown increasing receptivity to international arbitration and that joining the Convention could be a logical next step for a country like Canada which is involved in substantial foreign investments both as a home and a host country.

Membership in the New York Convention

On October 25, 1988, the Government of Antigua and Barbuda succeeded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), while the Government of Dominica acceded to the New York Convention on October 28, 1988.

With the accession of Dominica, the number of states parties to the New York Convention has reached 79.

Investment Laws of the World

A new release of the ILW collection is scheduled to appear in March 1989. This release will include the basic investment legislation of Mozambique, Rwanda, Korea (update), Turkey, Madagascar (update) and Poland.

Recent Publications on ICSID

Baker, James C. and Yoder, Lois J.
ICSID Arbitration and the US Multinational Corporation, 5 *Journal of International Arbitration* 81-95 (1988)

Friedland, Paul D.
ICSID and Court-Ordered Provisional Remedies: An Update, 4 *Arbitration International* 161-65 (1988).

Marchais, Bertrand P.
Mesures provisoires et autonomie du système d'arbitrage C.I.R.D.I., 14 *Droit et Pratique du Commerce International* 275-304 (1988).

Schatz, Sylvia
The Effect of the Annulment Decisions in *Amco v. Indonesia* and *Klöckner v. Cameroon* on the Future of the International Centre for the Settlement of Investment Disputes, 3 *The American University Journal of International Law and Policy* 481-515 (1988).

MIGA Senior Staff Appointed; Standard Contract of Guarantee Approved

The Summer 1988 issue of *News from ICSID* reported that the Convention establishing the Multilateral Investment Guarantee Agency (MIGA) had entered into force and that Mr. Barber B. Conable, the President of the World Bank, had also been appointed to the presidency of MIGA while Mr. Yoshio Terasawa had assumed the position of Executive Vice President of the Agency.

Since then, the remaining members of MIGA's senior management team have been appointed. They are Mr. Leigh Hollywood, the Agency's Vice President for Guarantees; Mr. Ghassan El-Rifai, Vice President for Policy and Advisory Services; Mr. John Griffith, MIGA's Chief Financial and Administrative Officer; and Mr. Jurgen Voss, Deputy General Counsel of the Agency. Mr. Ibrahim Shihata, the Vice President and General Counsel of the World Bank and the Secretary-General of ICSID, was asked to supervise the legal work in MIGA until its General Counsel is appointed.

On January 25, 1989, the Agency's Board of Directors approved a standard contract and general conditions of guarantee for MIGA. With this approval, MIGA is now in a position to conclude individual investment guarantee contracts on the basis of the standard texts.

MIGA has continued to make a promising start in its first year of operation. Twenty-eight preliminary guarantee applications from investors in projects in 15 countries have now been registered. The Agency has also commenced its technical and advisory services activities and the Foreign Investment Advisory Service, previously administered by MIGA's sister institution, the International Finance Corporation (IFC), has now been reconstituted as a joint facility of MIGA and IFC.

Further information on MIGA's programs may be obtained by writing to the Agency at 1818 H Street, N.W., Washington, D.C. 20433.

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