

NEWS

FROM

ICSID

International Centre for Settlement of Investment Disputes

Vol. 8, No. 1 Winter 1991



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- Eighth Joint ICSID/AAA/ICC International Court of Arbitration Colloquium on International Arbitration

Chile Becomes the 100th Signatory of the ICSID Convention

On January 25, 1991, the ICSID Convention was signed on behalf of Chile by its Ambassador to the United States, His Excellency Patricio Silva. Chile's signature brought the total number of signatory States to 100, thirteen of which belong to the Latin America and Caribbean region. In addition to Chile,

the Latin American and Caribbean signatories include Barbados, Belize, Costa Rica, Ecuador, El Salvador, Guyana, Haiti, Honduras, Jamaica, Paraguay, St. Lucia and Trinidad and Tobago.



Chile's signature of the ICSID Convention: seated from left to right are Mr. Ibrahim F.I. Shihata, Vice President and General Counsel of the World Bank and Secretary-General of ICSID, His Excellency Ambassador Patricio Silva, and Mr. Timothy T. Thahane, Vice President and Secretary of the World Bank; standing is Mrs. Estela T. Sanidad, Operations Analyst, Secretary's Department, World Bank.

ICSID Implementation Bill Passed in Australia

The ICSID Implementation Bill 1990, enabling Australia to ratify the ICSID Convention, was passed by the Federal Parliament of Australia on December 6, 1990. Welcoming the passage of the Bill, Australia's Attorney-General, the Hon. Michael Duffy MP, said that implementation of the Convention

would not only "further enhance Australia's claims as a center for international arbitration, but Australian investors abroad will be able to have recourse to a respected, convenient and well known method of dispute settlement."

Notification of Germany to the Centre

On October 3, 1990, Germany notified the Centre "that, through the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States have united to form one sovereign State, which as a single member of the International Centre for Settlement of Investment Disputes remains bound by the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. As from the date of unification, the Federal Republic of Germany will act in the International Centre for Settlement of Investment Disputes under the designation of 'Germany'."

Twenty-Fourth Annual Meeting of the Administrative Council

The Administrative Council of ICSID held its twenty-fourth Annual Meeting in conjunction with the Annual Meeting of the Board of Governors of the World Bank in Washington, D.C. on September 25-27, 1990. The Council considered a report by the Secretary-General on developments in ICSID over the preceding year and approved the Centre's 1990 annual report and the budget for ICSID's 1991 financial year.

Disputes Before the Centre

Amco v. Indonesia (Case ARB/81/1)

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| October 17, 1990 | The Decision on Supplemental Decisions and Rectification of the Award of June 5, 1990 is rendered. |
| October 18, 1990 | The Secretary-General registers applications submitted by the parties for annulment of the Award of June 5, 1990. |
| January 30, 1991 | The Secretary-General informs the parties that the ad hoc Committee, provided for under Article 52(3) of the Convention, has been constituted. Its members are: Prof. Arghyrios A. Fatouros (Greek), |

February 6, 1991

Prof. Dietrich Schindler (Swiss) and Prof. Sompong Sucharitkul (Thai).

The ad hoc Committee elects Prof. Sucharitkul as its President. The Committee issues an Initial Procedural Decision determining that enforcement of the Award is stayed provisionally until the Committee rules on Indonesia's request for stay of enforcement of the Award. The Committee also adopts a Procedural Order inviting the parties to submit their observations on procedural matters and on Indonesia's request for stay of enforcement.

February 20, 1991

The Acting Secretary-General registers an application submitted by Indonesia for annulment in respect of an issue covered in the Decision on Supplemental Decisions and Rectification of the Award.

February 28-
March 2, 1991

The Committee meets with the parties in Washington, D.C. The Committee issues an Interim Order on the request for stay of enforcement of the Award, a further Procedural Order and a Ruling on Allocation of Advance Payments.

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

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| December 3, 1990 | The Respondent files its Note and Documents in response to the Documents provided by Claimants' witnesses during the Paris meeting of September 1990. |
| February 11-13, 1991 | The Tribunal meets in London and issues a Procedural Order. |

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

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| November 19, 1990 | The parties inform the Centre that they have settled the dispute and request the Secretary-General to issue an order taking note of the discontinuance of the proceeding under Arbitration Rule 43(1). |
| November 20, 1990 | The Order of the Secretary-General taking note of the discontinuance of the proceeding is notified to the parties. |

Société d'Etudes de Travaux et de Gestion SETIMEG S.A. v. Republic of Gabon (Case ARB/87/1)
February 4, 1991 The Tribunal issues a Procedural Order lifting the suspension.

Mobil Oil New Zealand Limited, Mobil Oil Corporation, Mobil Petroleum Company, Inc., Mobil Oil New Zealand Limited v. New Zealand Government (Case ARB/87/2)
November 26, 1990 The Order of the Tribunal taking note of the discontinuance of the proceeding is notified to the parties.

Manufacturers Hanover Trust Company v. Arab Republic of Egypt and the General Authority for Investment and the Free Zones (Case ARB/89/1)
October 19, 1990 The General Authority for Investment and Free Zones files its written submission on jurisdiction.
October 22, 1990 Manufacturers Hanover Trust Company files its written submission on jurisdiction.
December 10-12, 1990 The Tribunal holds its third session at The Hague and issues two new Procedural Orders and two new Decisions on Recommendation of Provisional Measures.

Eighth Joint ICSID/AAA/ICC International Court of Arbitration Colloquium on International Arbitration Washington, D.C., November 11, 1991

ICSID, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) International Court of Arbitration will this year be co-sponsoring the eighth in their series of colloquia on international arbitration. Hosted by ICSID, the colloquium will take place at the headquarters of the World Bank in Washington, D.C. on November 11, 1991. The colloquium will examine the following two topics: How

to Draft an Arbitration Clause, and International Arbitration and Developing Countries. Further details on the colloquium will appear in the Summer 1991 issue of *News from ICSID*.

Seventeenth International Trade Law Conference of Australian Attorney General's Department

Since 1974, the Australian Attorney General's Department has sponsored annual International Trade Law Conferences drawing together representatives from industry, legal practice, business, government and universities from around Australia and often from around the world.

Speakers at the Conferences reflect a wide spectrum of specializations and include leading Australian and international authorities in their fields. Papers presented reflect the diverse and dynamic nature of international trade law, with special reference to major developments in trade law and to issues of particular relevance to Australia and the Asia-Pacific region. Each Conference traditionally offers a review of developments in international trade law presented by officers of the Attorney General's Department.

The seventeenth in the series of such Conferences was held in Canberra during August 31-September 2, 1990. Among the papers submitted to it was "A Guide for Users of the ICSID Convention" by Mr. Aron Broches, past Vice President and General Counsel of the World Bank and ICSID Secretary-General, and presently of counsel to Holtzmann, Wise & Shepherd, New York. An edited version of Mr. Broches' paper is reproduced at page 5 of this issue with the permission of the Commonwealth of Australia.

The next International Trade Law Conference, the eighteenth in the annual series, will be held in Canberra in October 1991. For details, contact the conference organizers at the International Trade Law Section, Business Affairs Division, Attorney General's Department, Robert Garran Offices, Barton, ACT 2600, Australia. The responsible officers are Messrs. Warrick Smith (telephone: (61)(6) 250-3381) and Ian Clarke (telephone: (61)(6) 250-6681). The fax number is (61)(6) 250-5929.

A Guide for Users of the ICSID Convention

by Aron Broches

Introduction

I am presenting this paper in anticipation of the ratification by Australia of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. My discussion of the Convention will therefore emphasize those of its aspects which are of particular relevance for potential participants in ICSID arbitration.

The Convention which is also known as the "ICSID Convention" or the "Washington Convention of 1965" entered into force 24 years ago. It established a specialized autonomous and self-contained conciliation and arbitration system* administered by the International Centre for Settlement of Investment Disputes or "ICSID," an international institution created by the Convention.

It will be useful to start out with a quick identification of some of the most important features of the Convention.

I have called the ICSID system a "specialized system." Its scope, which in the terminology of the Convention is called "the jurisdiction of the Centre," is limited, as already indicated by its title, to investment disputes between parties one of which must be a Contracting State or governmental entity and the other a non-governmental entity, national of another Contracting State. Furthermore, the jurisdiction of the Centre is subject to the overriding condition of consent (Art. 25(1)). In recognition of the sensitivity of governments on this score, the Preamble to the Convention records that "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration." While the jurisdiction of the Centre rests on consent of the parties, once the parties have given their consent neither party may unilaterally withdraw it (Art. 25(1)). Consent to arbitration under the Convention will, moreover, be deemed consent to the exclusion of any other remedy (Art. 26(1)). A party's refusal to cooperate will not prevent the constitution of an arbitral tribunal (Art. 38), which will be the judge of its own competence (Art. 41(1)). The Convention constitutes the *lex arbitri*: arbitration proceedings will be conducted in accordance with its provisions and, except as the parties otherwise agree, with the Centre's Arbitration Rules adopted by the Administrative Council (Arts. 6(c) and 44). Any question of procedure not answered by the foregoing will be decided by the Tribunal (Art. 44). Finally, the Tribunal may render an *ex parte* award against a recalcitrant party (Art. 45).

* This paper deals only with arbitration.

Awards are binding and not subject to any appeal or other remedy except those provided by the Convention (Art. 53), viz., interpretation, revision and annulment and these can be exercised only within the framework of the Convention (Arts. 50-52).

The self-contained nature of the Convention limits the role of national courts to recognition and enforcement of awards. Each Contracting State, whether or not it or any of its nationals have been parties to the proceedings, must recognize an ICSID award as binding and enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court of that State, and such on the simple presentation of a certified copy of the award (Art. 54). Execution of the award will be governed by the laws of the forum, including its provisions on State immunity from execution (Art. 55).

Jurisdiction

I now return to the question of jurisdiction. It is one that deserves the closest of attention of prospective claimants because of the propensity of reluctant respondents to raise jurisdictional challenges.

The jurisdictional requirement *ratione personae* is that one of the parties be a Contracting State "or any constituent subdivision or agency of a Contracting State *designated to the Centre by that State*" (emphasis added) and the other a national of another Contracting State. As regards the governmental party, there is the further provision that consent to arbitration given by a constituent subdivision or agency *requires the approval of the State* unless the State has notified the Centre that no such approval is required (Art. 25(3)).

With respect to the nationality requirement of the non-governmental party the Convention distinguishes between "natural" and "juridical" persons. As applied to the former, the nationality requirement, i.e., nationality of a Contracting State other than the Contracting State which is the party to the dispute, must be met both at the date of consent to arbitration and on the date when the request for arbitration was registered. However, the requirement is not met by a person who on either of those dates also had the nationality of the Contracting State party to the dispute (Art. 25(2)(a)). In the only ICSID arbitration proceeding instituted by a natural person (*Pharaon v. Tunisia* (ICSID Case No. ARB/86/1)) his nationality was not in issue.

In the case of a juridical person the nationality requirement need be met only at the time of consent. In addition, in recognition of the fact that many host countries require foreign in-

vestors to conduct their operations through a locally incorporated entity the definition of "national of another Contracting State" includes not only a juridical person existing under the laws of such a State but also a juridical person which has the nationality of the host State but "which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention" (Art. 25 (2)(b)).

This provision gave rise in two proceedings to jurisdictional challenges. In the first (*Amco Asia et al. v. Indonesia* (ARB/81/1)), the issue was whether in order for a local company to come within the definition it was necessary that the parties had expressly agreed to treat it as a national of another Contracting State or whether such an agreement could be derived from the context of the arbitration agreement. The Arbitral Tribunal ruled in favor of the latter interpretation.

In the second proceeding (*SOABI v. Senegal* (ARB/82/1)), the arbitration clause relied on by the locally incorporated claimant merely stated that the nationality requirement of the Convention was deemed to have been met. The respondent objected to jurisdiction *ratione personae* on the ground (1) that the State of which the parent company of claimant was a national was not a Contracting State and (2) that even if it were true as alleged by claimant that the parent was in turn controlled by natural persons who met the nationality requirement, this would not cure the defect since it was only the "immediate" parent whose nationality mattered. The Arbitral Tribunal, dealing with the issue as a preliminary question, unanimously rejected the objection, holding among other things *as to the facts* that the respondent had been aware of the ultimate control by nationals of another Contracting State and *as to the law* that there was no reason why in determining the issue of control an arbitral tribunal would be limited to direct control.

I was the President of the Tribunal in this case. I had addressed the nationality question as early as 1972 in my lectures on the Convention at the Hague Academy of International Law and had there stated my view that parties should be given the greatest possible latitude to agree on the meaning of nationality. I had coupled this with the statement that whenever a company is not incorporated under the laws of a Contracting State, it is clearly desirable to stipulate the nationality which that company is to have for purposes of Article 25(2)(b). I repeat that advice now in the light of experience.

I can be brief about the two conditions of jurisdiction *ratione materiae*, namely, that the dispute must be a legal dispute and that it must arise directly out of an investment. In the Report (reproduced in Doc. ICSID/2) with which the Executive Directors of the World Bank submitted the Convention to govern-

ments their comment on the term "a legal dispute" stated that "the dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation" (para. 26 of the Report).

During the preparatory work on the Convention numerous definitions of "investment" were proposed and ultimately rejected. In the end, the effort to devise a generally acceptable comprehensive definition of the term "investment" was given up "given the essential requirement of consent by the Parties," in the words of the Executive Directors' Report (at para. 27). The parties thus have a large measure of discretion in deciding what constitutes an "investment" in a particular context. The question may arise, for example, in relation to projects for major construction or for training and technical assistance. In order to avoid uncertainty and controversy it is wise in such cases to stipulate in the arbitration clause or separate arbitration agreement that the transaction covered in the substantive agreement between the parties is an "investment" within the meaning of the Convention.

I have already mentioned the overriding condition of the consent of the parties, which the Executive Directors called in their Report "the cornerstone of the jurisdiction of the Centre" (para. 23 of the Report). Consent must be in writing and must have been given prior to the initiation of proceedings. In most cases consent to arbitration will be evidenced by an arbitration clause in the parties' substantive agreement, by a separate arbitration agreement, or by an exchange of instruments recording the respective consents of the parties.

There are, however, other possibilities. The consent of the governmental party may be embodied in the government's legislation, or in a bilateral investment treaty ("BIT") between the host State and the State of which the other party, the investor, is a national.

In the case of *SPP v. Arab Republic of Egypt* (ARB/84/3) the claimant founded the jurisdiction of the Centre on a provision of the Egyptian foreign investment law of 1974 (see 1989 *ICSID Annual Report* 7). After extended proceedings in which the respondent contested claimant's interpretation of the law, its objections to jurisdiction were defeated. In *AAPL v. Sri Lanka* (ARB/87/3) the claimant (a Hong Kong company) founded the jurisdiction of the Centre on the 1980 UK-Sri Lanka Treaty for the Promotion and Protection of Investments. While the parties disagreed about the interpretation of substantive provisions of the treaty, the jurisdiction of the Centre was not challenged.

Objections to jurisdiction must be raised no later than the time limit for the filing of the respondent's first pleading on the merits. When raised, the proceedings on the merits will be suspended. The Tribunal may decide to deal with the objection as a preliminary question or to join it to the merits of the dispute (Art. 41 of the Convention; ICSID Arbitration Rule 41). ICSID practice shows examples of both.

Preliminary Screening of Requests for Arbitration

In order to avoid the waste of time and effort involved in setting the machinery of the Centre in motion unnecessarily, the Convention establishes a preliminary screening process (Art. 36). A party wishing to institute arbitration proceedings must address a request to the Secretary-General in which it must furnish information regarding the issues in dispute, the identity of the parties and their consent to jurisdiction. The Secretary-General must register the request and thereby set the machinery of the Centre in motion unless he finds, on the basis of the information furnished by the applicant himself, that the dispute is manifestly outside the jurisdiction of the Centre. The Secretary-General's action is non-reviewable. In case of the slightest doubt he should therefore register the request and leave the decision as to jurisdiction to the arbitral tribunal which is to be constituted as soon as possible after the registration of the request.

Constitution of the Tribunal

The parties may agree that the Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators. They may also agree on the manner of their appointment. Failing agreement on these matters the Tribunal will consist of three arbitrators, one appointed by each party and the third, who will be the President, appointed by agreement of the parties. If the Tribunal has not been constituted within 90 days after notice of registration, either party may request the Chairman of the Administrative Council, who must act within 30 days, to appoint the arbitrator or arbitrators not yet appointed. The need to appoint two arbitrators arises when the respondent has failed to appoint an arbitrator.

There is a Panel of Arbitrators to which each Contracting State may designate four persons and the Chairman may designate 10 persons. When the Chairman is called upon to appoint arbitrators, he must appoint them from the Panel. Parties are free to appoint arbitrators also from outside the Panel. The Convention provides, however, that the majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is the other party to the dispute. As a practical matter, this means that in a three-member tribunal a party will normally be unable to appoint its own national (though this rule, set forth in Article 39 of the Convention, is subject to the proviso that it will not apply if each individual member of the Tribunal has been appointed by agreement of the parties).

Conduct of Proceedings

Arbitration proceedings will be conducted in accordance with relevant provisions of the Convention and, except as the parties otherwise agree, in accordance with the Arbitration Rules adopted by the Administrative Council in effect on the

date when the parties consented to arbitration. The Rules do not, of course, vary the provisions of the Convention and neither may the parties. There are, however, a number of Rules governing matters which are not dealt with by the Convention. In addition, some of the Rules provide themselves that they are subject to contrary agreement of the parties. Prospective parties to ICSID arbitration agreements should therefore carefully examine the Arbitration Rules. If any question of procedure arises which is not covered either by the Convention, by the Arbitration Rules or any rules agreed by the parties, the Tribunal will decide the question (Art. 44 of the Convention).

Two matters of great importance are governed by the Convention itself, namely, the law to be applied to the merits of the dispute dealt with in Article 42 and *ex parte* proceedings governed by Article 45.

The first sentence of Article 42(1) reads: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties." This language firmly confers on the parties unlimited autonomy as to the applicable law. The parties are free to agree on "rules of law," as defined as they choose, national or international, or a combination of both, and either frozen as it stands at the time of the parties' agreement or as it exists at the time when the Tribunal is called upon to decide the dispute.

Article 42(1) then deals with the frequent case in which the parties' agreement is silent as to applicable law. In that case the Tribunal must apply "the law of the Contracting State party to the dispute and such rules of international law as may be applicable." The provision deserves a fuller treatment than is possible within the scope of the present paper. Stated briefly, it calls on the Tribunal to look first at the law of the host State and to test the result of its application against international law, which will be applied where the law of the host State, or action taken under that law, violates international law.

The Convention permits a Tribunal to decide a dispute *ex aequo et bono* if the parties so agree (Art. 42(3)). In only one ICSID arbitration proceeding (*Atlantic Triton v. Guinea* (ARB/84/1)) has *ex aequo et bono* decision-making power been invoked.

The second important provision concerns the consequences of a party's "failure to appear or to present his case." Such a failure "shall not be deemed an admission of the other party's assertions" but it will not frustrate the proceedings. In the case of default "at any stage of the proceedings," the other party "may request the Tribunal to deal with the questions submitted to it and to render an award." Before doing so the Tribunal must notify the defaulting party and grant that party a period of grace,

unless it is satisfied that it does not intend to cure the default. An example of the latter is furnished by the Bauxite cases, proceedings instituted by three bauxite producers against Jamaica (*Alcoa v. Jamaica* (ARB/74/2), *Kaiser v. Jamaica* (ARB/74/3) and *Reynolds v. Jamaica* (ARB/74/4)). Jamaica announced that it contested the jurisdiction of the Centre and that it would not participate in the proceedings.

Consistent with the provision that a defaulting party is not deemed to have admitted the assertions of the other party the Arbitration Rules require a Tribunal to examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, to decide whether the submissions are well founded in fact and in law. The Tribunal may to this end call on the party appearing to file observations, produce evidence or submit oral explanations (ICSID Arbitration Rule 42(4)).

In the Bauxite cases the identically composed Tribunals called on all parties to file memorials on the question of jurisdiction. Only the claimants did so. The Tribunals decided that the Centre had jurisdiction and that they were competent and fixed time-limits for pleadings on the merits. The Tribunals were careful to send Jamaica copies of all communications between them and the respective claimants. None of the cases proceeded to an award. After the several parties had reached amicable settlements the Kaiser and Reynolds cases were terminated at the request of the claimants, while Jamaica joined Alcoa in requesting discontinuance of the Alcoa proceedings.

Exclusivity of ICSID Remedy

I now revert to Article 26 of the Convention which as I noted provides that consent to arbitration under the Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. Thus, a claimant may not choose to proceed in a national court in lieu of arbitration, and a respondent may not proceed in a national court to contest the claimant's right to have recourse to arbitration. Nor may a respondent government contest the jurisdiction of the arbitral tribunal on the ground that the claimant has not exhausted its local remedies. The importance attached by governments to the local remedies exception is the reason why the Convention, even though it was not necessary to do so, states explicitly that a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention.

There have been two cases in ICSID's practice in which a party did not respect the exclusive character of ICSID jurisdiction.

The first involved a petition to a U.S. court by the private party, Maritime International Nominees Establishment (MINE), to an ICSID arbitration agreement with the Republic

of Guinea to compel arbitration instead before the American Arbitration Association. The petition was based on the provisions of the Federal Arbitration Act dealing with a party's failure to proceed under an arbitration agreement. The claimant alleged that Guinea had failed to cooperate with it to bring their dispute before the Centre. It made this statement, disregarding the fact that a party to an ICSID arbitration agreement does not need the cooperation of the other party in order to institute proceedings. Guinea did not appear either in the court proceeding or in the ensuing AAA arbitration ordered by the court. When the claimant returned to the court for an order confirming the AAA award, Guinea entered the proceedings filing a motion to dismiss. The court denied Guinea's motion. Guinea appealed and argued that the court below lacked subject matter jurisdiction because Guinea was immune under the Foreign Sovereign Immunities Act 1976 (FSIA) and, particularly, because the signing by both parties of the ICSID consent committed them to an ICSID arbitration and therefore deprived the court below of jurisdiction. The latter agreement was supported by the United States which filed a "Suggestion of interest" in order to present the views of the Executive Branch concerning the proper interpretation of the Convention. The United States submitted specifically that "a case brought in a United States court which arguably falls within ICSID's exclusive jurisdiction should be stayed to permit ICSID to resolve whether it has jurisdiction."

The appellate court upheld Guinea's arguments on sovereign immunity and reversed the decision below (693 F. 2d 1094 (D.C. Cir. 1982)). In view of its conclusion that Guinea was immune under the FSIA, the Court of Appeals chose, regrettably, not to reach the argument presented by Guinea and urged in the submission of the United States, namely, that ICSID's exclusive jurisdiction called for abstention by a U.S. court until ICSID had determined whether it had jurisdiction.

While in the case of *MINE v. Guinea* it was the private party which instituted judicial proceedings against the State party in respect of a dispute which the parties had agreed to submit to the jurisdiction of the Centre, in the second case (*Attorney General of New Zealand v. Mobil Oil New Zealand Ltd. et al.*) it was the Crown which sought to obtain an injunction from the New Zealand courts to restrain the companies of the Mobil Oil Group from proceeding with ICSID arbitration proceedings which they had instituted against New Zealand pursuant to an arbitration clause in an agreement between them. The Crown acted within weeks after the registration by the Secretary-General of the companies' request for arbitration. The companies promptly applied for a stay of the court proceeding on the basis of the 1979 Act under which New Zealand became a party to the Convention. Section 8 of that Act permits a court to stay legal proceedings instituted by a party to proceedings pursuant to the Convention against another party to the proceedings in respect of a matter to which the proceedings relate.

The circumstances of the case were unusual and a brief mention is necessary for a full appreciation of the High Court's judgment (dated July 1, 1987 and reproduced in 2 *ICSID Review—Foreign Investment Law Journal* 497 (1987)). In the framework of arrangements for the implementation in New Zealand of a project for the conversion of natural gas into synthetic gasoline, the parties entered in 1982 a Participation Agreement under which a Mobil subsidiary acquired rights of purchase (offtake rights) on preferential terms of synthetic gasoline resulting from the project. In 1986 New Zealand enacted the Commerce Act 1986, the object of which was to promote competition in markets within New Zealand and which among other things prohibited *with retroactive effect* contracts which would substantially lessen competition. Contending that the offtake rights provision contravened the Commerce Act, the Government informed Mobil Oil that it would no longer give effect to it. When the Mobil Group companies initiated ICSID arbitration proceedings, the Government contended that ICSID was without jurisdiction and, as already stated, sought to enjoin the claimants from proceedings with the ICSID arbitration.

The court went through a careful analysis of Section 8 and agreed with counsel for the companies that Article 41 of the Convention which declares that the Arbitral Tribunal is the judge of its own competence had a significant impact on the way one had to interpret Section 8. Having found that the proceedings before it were "undoubtedly in respect of the matter to which the reference relates" the court examined the argument raised by the Crown that the matter submitted to ICSID arbitration was not a dispute which the parties had agreed to refer to ICSID. It was argued in support that the impact of a subsequent and intervening enactment did not constitute a dispute under the Participation Agreement and that the dispute submitted was really a dispute as to the applicability of the Commerce Act 1986. The court disagreed: "... it cannot be contradicted that one party has refused to perform part of the Agreement. It says that it is constrained from doing so because of the injunction on Section 27 [of the 1986 Act]. How can that cease to be a dispute *under the Agreement*?" (Emphasis in original.)

The court stayed the proceedings until the Arbitral Tribunal had determined its jurisdiction. The Crown did not appeal and does not appear to have contested the Tribunal's jurisdiction in the proceedings before it. On May 4, 1989 the Tribunal issued its "Findings on Liability, Interpretation and Allied Issues." The parties have since requested the Tribunal to note the discontinuance of the arbitral proceedings.

I must deal with one more issue arising in practice on Article

26 of the Convention. Does the exclusive nature of ICSID jurisdiction extend to provisional measures? The issue arose in France. The claimant in *Atlantic Triton v. Guinea* had obtained an attachment on assets of a Guinean agency. Guinea's protests were rejected when the *Cour de Cassation* held in 1986 that the Convention did not preempt conservatory measures and that these could only be excluded by express consent of the parties or by implied consent resulting from the adoption of arbitration rules. The matter was not covered in the 1968 ICSID Arbitration Rules which applied to the *Atlantic Triton* arbitration. There had in 1984 been adopted a revised set of ICSID Arbitration Rules with a new Rule 39(5) stating in substance that parties may request provisional measures from a court "provided that they have so stipulated in the agreement recording their consent." However, the presumption that in the absence of such a stipulation provisional measures by a court are excluded is at variance with the almost universal recognition in the area of commercial arbitration that to seek measures from a court and for a court to grant them is not inconsistent with an arbitration agreement (as most recently and clearly expressed in Article 9 of the 1986 UNCITRAL Model Law on International Commercial Arbitration).

The Award

The award requires a majority of the votes of all the members of the Tribunal. Signature by the majority is sufficient, and there is no requirement that the award either notes the fact of a missing signature or states the reason. Any member of the Tribunal may attach an individual opinion to the award, whether dissenting or otherwise (Art. 48(1), (2), (4) of the Convention).

The award must state the reasons on which it is based. Failure to do so is a ground for annulment. The Convention also requires that the award deal with every question submitted to the Tribunal (Art. 48(3)). On the request of a party made within 45 days after the award was rendered the Tribunal may decide any question which it had omitted to decide in the award. Its decision will become part of the award (Art. 49(2)).

Article 48(5) of the Convention provides that the Centre may not publish the award without the consent of the parties, which in practice has not been forthcoming. The Convention imposes, on the other hand, no restriction on publication of awards by the parties and a number of awards have been so published. Others have come into the public domain as a result of their having been the subject of judicial enforcement proceedings. By virtue of Article 52(4) the provisions of Article 48(5) also apply to annulment decisions. The Centre has been authorized to publish two of the three decisions which had been rendered at the time of this writing, and the third was published elsewhere.

Post-Award Remedies

The Convention provides for three post-award remedies, interpretation, revision and annulment. They are the only remedies which can be invoked against awards and they must be exercised within the framework of the Convention, that is to say, excluding the intervention of national courts. For interpretation and revision I refer the reader to Articles 50 and 51 of the Convention.

Annulment is governed by Article 52. The limited grounds for annulment demonstrate its nature as an extraordinary remedy which does not permit a review of the merits of an award but is limited to the protection of the parties against procedural injustice and of the integrity of the arbitral process.

Within the framework of this presentation I cannot do more than list the grounds for annulment and offer brief comments on a few questions of interpretation arising in annulment proceedings:

- i) *Improper constitution of the tribunal*: This ground which needs no explanation has never been invoked.
- ii) *Manifest excess of power*: This ground has been invoked several times. It would typically arise when a Tribunal manifestly disregarded the limits of its competence and rendered an award *ultra petita*. Manifest disregard of the applicable law (as distinguished from an incorrect application of the law) has also been considered to constitute a manifest excess of jurisdiction.
- iii) *Corruption on the part of an arbitrator*: Has never been invoked.
- iv) *Serious departure from a fundamental rule of procedure*: The important words are the qualifiers "serious" and "fundamental." A minor procedural irregularity furnishes no ground for annulment. The departure must be serious and the rule of procedure must be fundamental, such as the requirement of equal treatment of the parties and of full opportunity for a party to present its case. This ground has been invoked several times.
- v) *Failure to state the reasons on which the award is based*: This ground has been invoked in all four annulment proceedings. Two issues of interpretation in particular have arisen in these proceedings, namely, what standards, if any, the reasons must meet and whether failure of the award to deal with every issue submitted to the Tribunal constitutes, or may constitute, failure to state reasons.

A request for annulment will be examined by an *ad hoc* Committee of three persons appointed by the Chairman of the Administrative Council. The Committee has the authority to annul the award in whole or in part (Art. 52(3) of the Convention). The question has arisen whether a Committee is required

to annul an award whenever it finds that a technical ground for annulment exists. The decision of the Committee in the *MINE v. Guinea* case (reproduced at 5 *ICSID Review—Foreign Investment Law Journal* 95 (1990)) gave a clear negative answer to the question.

If the award is annulled, the dispute will at the request of either party be submitted to a new Tribunal constituted in accordance with the relevant provisions of the Convention (Art. 52(6)). If the award had only been annulled in part, the new Tribunal may not reconsider any portion of the award which was not annulled. It constitutes *res judicata* (Arbitration Rule 55(3)).

In conclusion I shall deal briefly with binding force, recognition and enforcement of the award.

I recall that Article 53 provides that the award shall be binding on the parties and shall not be subject to any appeal. Compliance with the award is a treaty obligation for the Contracting State party to the dispute. Failure to discharge that obligation exposes the State to two possible sanctions on the part of the State whose national was the other party to the dispute. Article 27 of the Convention provides that no Contracting State shall give diplomatic protection or bring an international claim in respect of a dispute which one of its nationals and another Contracting State have consented to submit to arbitration, unless the other Contracting State shall have failed to comply with the award rendered in that dispute. In other words, the right of espousal revives. The second possible sanction would be to proceed against the recalcitrant State in the International Court of Justice which has compulsory jurisdiction in disputes between Contracting States concerning the application of the Convention (Art. 64 of the Convention).

While Article 53 affirms the binding force of the award on the international law level Article 54 affirms its external finality vis-à-vis national courts. The award is *res judicata* in each Contracting State, and each Contracting State, whether or not it or one of its nationals had been a party to the proceedings, must not only recognize the award but, in addition, enforce the pecuniary obligations imposed by it as if the award were a final judgment of a court by that State. The enforcement provisions of the Convention are, however, not intended to entitle an ICSID award to more favorable treatment as regards forcible execution than a final judgment of a court. The Convention states explicitly that its enforcement provisions are not to be construed as derogating from the law in force in any Contracting State relating to immunity from execution of that State or of any foreign State (Art. 55).

LawAsia Energy Section International Conference

The LawAsia Energy Section held a conference on New Directions in Energy Law and Policy in the Asia Pacific Region on October 3-5, 1990 in Melbourne, Australia. The conference included presentations by some thirty-five speakers on topics ranging from regional economic and energy prospects to the settlement of disputes. Mr. Ibrahim F.I. Shihata provided the opening addresses at both the first and last days of the conference, speaking first on the World Bank in the 1990s and then on International Arbitration Systems.

Tenth Inter-American Conference on International Commercial Arbitration

Organized by the Canadian Section of the Inter-American Commercial Arbitration Commission and the Canadian Arbitration, Conciliation and Amicable Composition Centre, the Tenth Inter-American Conference on International Commercial Arbitration was held in Ottawa, Canada on October 31 and November 1, 1990.

The conference, aimed at furthering the development of inter-American commercial arbitration, was attended by participants from fifteen countries. Opening and closing remarks at the conference were delivered by Professor Louis Kos Rabcewicz Zubkowski of the University of Ottawa; messages of support to the conference were made by H.E. the Rt. Hon. Ramon John Hnatyshyn, Governor General of Canada, and by H.E. Ambassador Joao Clemente Baena Soares, Secretary-General of the Organization of American States. The ICSID Convention and its relevance for countries of the Western Hemisphere were examined by Mr. Ibrahim F.I. Shihata. Topics addressed at the conference by other speakers included the impact in the Americas of the UNCITRAL Model Law on International Commercial Arbitration, the application of the New York and Panama arbitration Conventions and dispute settlement under the Canada-U.S. Free Trade Agreement.

ICSID Review - Foreign Investment Law Journal

The Fall 1990 issue (Volume 5, No. 2) of the *ICSID Review—Foreign Investment Law Journal* was published recently. The issue's articles include an analysis by Mr. Ibrahim F.I. Shihata of the role of the European Bank for Reconstruction and Development in the promotion and financing of investment in Central and Eastern Europe; an examination by Mr. Georges R. Delaume of the contractual waiver of sovereign immunity; and a discussion by Mr. John A. Westberg of the issue of compensation in some of the awards of the Iran-US Claims Tribunal. The issue also features a study by Mr. C.F. Amerasinghe of the local remedies rule and a discussion by Messrs. Jeremy Carver and Kamal Hossain of some of the issues that may arise in an arbitration opposing a State to a foreign investor. As with previous issues, the Fall 1990 issue also contains documents, a bibliography and book reviews.

The *ICSID Review—Foreign Investment Law Journal* is available on a subscription basis at \$50.00/year for those with mailing addresses in member countries of the Organisation for Economic Co-operation and Development and at \$25.00/year for all others. Orders should be mailed to:

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Recent Publications on ICSID

Audit, Bernard

Jurisprudence arbitrale et droit du développement, in *Contrats Internationaux et Pays en Développement* 115 (1989).

Berlin, Dominique

Les procédures de règlement des différends dans les contrats Nord-Sud, in *Contrats Internationaux et Pays en Développement* 65 (1989).

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