NEWS FROM ICSID

International Centre for Settlement of Investment Disputes

Vol. 19, No. 2 Winter 2002

New Amendments of the Regulations and Rules of the International Centre for Settlement of Investment Disputes

By Antonio R. Parra, Deputy Secretary-General, ICSID

The fifth in the Shihata Distinguished Lectures Series of the Forum for International Economic Development, given at the British Institute of International and Comparative Law, London, November 20, 2002

It is indeed a privilege to have been invited to give this fifth in the series of lectures you have established to honor the memory of Ibrahim F.I. Shihata.

As you will have been told, the topic of my lecture today is "New Amendments of the Regulations and Rules of the International Centre for Settlement of Investment Disputes." I have chosen this topic not merely because of its timeliness but because these amendments represent a continuation of the process of change and improvement begun by Dr. Shihata in his first year as Secretary-General of the Centre and fostered by him throughout his long tenure of that position.

I want to start by providing you with a brief description of the Centre and of its various

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Membership News

Since the publication of the Spring 2002 issue of *News from ICSID*, three more countries have signed the ICSID Convention. These are the Democratic Republic of Timor-Leste (formerly Democratic Republic of East Timor), which signed the ICSID Convention on July 23, 2002 and deposited its instrument of ratification on the same date. Similarly, Brunei Darussalam signed, and also ratified, the ICSID Convention on September 16, 2002. In accordance with its Article 68(2), the Convention entered into force for each State thirty days after the deposit of the ratification instrument, i.e., on August 22, 2002 for the Democratic Republic of Timor-Leste and on October 16, 2002 for Brunei Darussalam. The third country to sign the ICSID Convention in the period was the Federal Republic of Yugoslavia, which signed on July 31, 2002.

In addition, St. Vincent and the Grenadines, which became a signatory State on August 7, 2001, deposited its instrument of ratification of the ICSID Convention on December 16, 2002.

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Disputes Before the Centre

Since July 2002, the Centre has registered eleven new arbitration proceedings. These added to the total of forty-six proceedings which have been pending or have been concluded during the period. One of the new arbitration proceedings was an Additional Facility Rules case brought to ICSID under the NAFTA Investment Chapter. Another new proceeding involved an investment contract between the parties concerned, and two additional proceedings were brought to ICSID under foreign investment laws. The remaining seven proceedings were initiated under the investor-to-State dispute-settlement provisions of bilateral investment treaties. With these new proceedings, ICSID has, by the end of December 2002, registered a total of 114 cases.

Several arbitration proceedings have been concluded in the period. One of them was discontinued by the respective tribunal for lack of payment of the required advances. Awards were rendered in three Additional Facility Rules proceedings concerning NAFTA Chapter Eleven claims. In two of these cases, the claims were dismissed in their entirety. In the third case, the award upheld part of the claims. Also during the period, the *ad hoc* Committee in an ICSID pending annulment proceeding rendered its final decision. Shortly thereafter, the Centre registered a request for supplementary decision and rectification of the decision on annulment.

Recent developments in the disputes currently pending before the Centre are set out below.

- **Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Case No. ARB/97/3) — Annulment Proceeding**

July 3, 2002

The *ad hoc* Committee renders its decision.

August 23, 2002

The Secretary-General registers a request for supplementary decision and rectification of the decision on annulment, pursuant to Arbitration Rule 49, and on the same day notifies the parties of the registration.

November 4, 2002

The Applicants submit their observations on the Argentine Republic's request for supplementary decision and rectification of the decision on annulment.

December 6, 2002

The Argentine Republic submits its reply to the observations of the Applicants.

- **Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (Case No. ARB/97/4)**

October 1, 2002

The Tribunal holds an organizational meeting with the parties in Washington, D.C.

November 8-12, 2002

The Tribunal holds a hearing on the merits with the parties in Prague.

- **Víctor Pey Casado and President Allende Foundation v. Republic of Chile (Case No. ARB/98/2)**

July 9, 2002

The Tribunal issues a procedural order fixing the time limits for the filing of pleadings and scheduling a hearing on the merits.

August 20, 2002

The Tribunal issues a procedural order fixing new time limits for the filing of pleadings.

September 16, 2002

The Claimants file their memorial on competence and the merits.

December 12, 2002

The Tribunal issues a procedural order modifying the time limits for the filing of pleadings and rescheduling the hearing on the merits.

- **International Trust Company of Liberia v. Republic of Liberia (Case No. ARB/98/3)**

July 22, 2002
The Tribunal issues an order taking note of the discontinuance of the proceeding.

- **The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Case No. ARB(AF)/98/3)**

June 27, 2002
Canada makes its second NAFTA Article 1128 submission.

July 19, 2002
The parties file their responses to the Article 1128 submissions of Canada and Mexico on matters of jurisdiction and competence.

- **Marvin Roy Feldman Karpa v. United Mexican States (Case No. ARB(AF)/99/1)**

September 26, 2002
The Tribunal declares the proceeding closed under Article 45(1) of the Additional Facility Rules.

December 16, 2002
The Tribunal renders its award.

- **Mondev International Ltd. v. United States of America (Case No. ARB(AF)/99/2)**

October 11, 2002
The Tribunal renders its award.

- **Patrick Mitchell v. Democratic Republic of the Congo (Case No. ARB/99/7)**

July 11, 2002
The Tribunal issues a procedural order joining the objection to jurisdiction to the merits and fixing a schedule for the filing of additional pleadings.

October 11, 2002
The Claimant files his additional observations.

- **Zhinvali Development Ltd. v. Republic of Georgia (Case No. ARB/00/1)**

December 12, 2002
The Tribunal declares the proceeding closed pursuant to Rule 38(1) of the ICSID Arbitration Rules.

- **Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (Case No. ARB/00/4)**

July 11, 2002
The Claimants file their reply on the merits.

October 16, 2002
The Respondent files its rejoinder.

- **Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (Case No. ARB/00/5)**

August 5, 2002
The Claimant files its reply on the merits.

September 30, 2002
The Respondent files its rejoinder on the merits.

October 28–November 1, 2002
The Tribunal holds a hearing on the merits in Washington, D.C.

- **Consortium R.F.C.C. v. Kingdom of Morocco (Case No. ARB/00/6)**

October 7, 2002
The Claimant files its reply on the merits.

December 6, 2002
The Respondent files its rejoinder.

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Disputes Before the Centre

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- **World Duty Free Company Limited v. Republic of Kenya (Case No. ARB/00/7)**

  July 2, 2002
  The Tribunal holds a procedural hearing at The Hague. The Tribunal issues a procedural order joining the preliminary objections to the merits.

  December 5, 2002
  The Claimant files its memorial.

- **Ridgepointe Overseas Developments, Ltd. v. Democratic Republic of the Congo and Générale des Carrières et des Mines (Case No. ARB/00/8)**

  There have been no new developments to report in this case since the publication of the last issue of *News from ICSID*.

- **ADF Group Inc. v. United States of America (Case No. ARB(AF)/00/1)**

  January 9, 2003
  The Tribunal renders its award.

- **Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2)**

  August 1, 2002
  The parties file their post-hearing briefs.

- **Waste Management, Inc. v. United Mexican States (Case No. ARB(AF)/00/3)**

  August 12, 2002
  The Respondent files a request for interpretation and rectification of the Tribunal's decision of June 26, 2002 on Mexico's preliminary objection concerning the previous proceeding.

  December 6, 2002
  The Respondent files its counter-memorial.

- **Generation Ukraine Inc. v. Ukraine (Case No. ARB/00/9)**

  July 12, 2002
  The Respondent files its rejoinder.

  November 27, 2002
  The parties file their witness statements and expert reports.

- **Antoine Goetz & others v. Republic of Burundi (Case No. ARB/01/2)**

  September 23, 2002
  The Tribunal holds its first session with the parties in Paris.

- **Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (Case No. ARB/01/3)**

  August 1, 2002
  The Claimants file their memorial on the merits.

- **Société d'Exploitation des Mines d'Or de Sadiola S.A. v. Republic of Mali (Case No. ARB/01/5)**

  September 5, 2002
  The Tribunal holds a hearing on the merits in Paris.

  December 9, 2002
  The Tribunal declares the proceeding closed pursuant to Rule 38(1) of the ICSID Arbitration Rules.

- **AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan (Case No. ARB/01/6)**

July 31, 2002
The Respondent files its objections to jurisdiction.

August 2, 2002
The Claimants file their observations on the Respondent's objections to jurisdiction.

August 8, 2002
The Respondent files its reply to the Claimants' observations on jurisdiction.

August 19, 2002
The Respondent files its counter-memorial.

August 28-31, 2002
The Tribunal holds a hearing on jurisdiction and merits in London.

- **MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile (Case No. ARB/01/7)**

October 2, 2002
The Claimants file their memorial.

October 18, 2002
The proceeding is suspended following the resignation of the Tribunal.

- **CMS Gas Transmission Company v. Argentine Republic (Case No. ARB/01/8)**

July 5, 2002
The Claimant files its memorial.

October 16, 2002
The Respondent files its memorial on jurisdiction.

December 16, 2002
The Claimant files its counter-memorial on jurisdiction.

- **Booker plc v. Co-operative Republic of Guyana (Case No. ARB/01/9)**

July 26, 2002
The Respondent files its memorial on merit and jurisdiction.

October 30, 2002
The Claimant files its first memorial.

December 4, 2002
The Respondent files its reply to the Claimant's first memorial.

- **Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador) (Case No. ARB/01/10)**

September 20, 2002
The Tribunal holds a session with the parties in Quito.

October 3, 2002
The Respondent files its memorial on jurisdiction.

October 17, 2002
The Claimant files its counter-memorial on jurisdiction.

- **Noble Ventures, Inc. v. Republic of Romania (Case No. ARB/01/11)**

There have been no new developments to report in this case since the publication of the last issue of *News from ICSID*.

- **Azurix Corp. v. Argentine Republic (Case No. ARB/01/12)**

October 15, 2002
The Claimant files its memorial.

- **SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (Case No. ARB/01/13)**

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Disputes Before the Centre

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September 16, 2002
The Respondent files its objections to the Claimant's request for provisional measures.

September 23, 2002
The Tribunal holds a hearing on provisional measures in The Hague.

October 16, 2002
The Tribunal issues a procedural order regarding the request for provisional measures.

October 22, 2002
The Respondent files its memorial on jurisdiction.

November 22, 2002
The proceeding is suspended following the Claimant's proposal for the disqualification of an arbitrator.

December 10, 2002
The Claimant files its counter-memorial on jurisdiction.

December 11, 2002
The Respondent files its observations on the proposal for the disqualification of an arbitrator.

December 19, 2002
The Tribunal issues its decision on the proposal for the disqualification of an arbitrator. As a result of the Tribunal's decision, and in accordance with Article 9(6) of the Arbitration Rules the proceeding resumes.

- **F–W Oil Interests, Inc. v. Republic of Trinidad & Tobago (Case No. ARB/01/14)**

October 4, 2002
The Tribunal holds its first session with the parties in London.

- **Fireman's Fund Insurance Company v. United Mexican States (Case No. ARB (AF)/02/1)**

July 22, 2002
The Tribunal holds its first session with the parties in Washington, D.C.

October 22, 2002
The Respondent files its memorial on Preliminary Question of Jurisdiction.

December 20, 2002
The Claimant files its memorial on Preliminary Question of Jurisdiction.

- **LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (Case No. ARB/02/1)**

November 13, 2002
The Tribunal is constituted. Its members are: Tatiana B. de Maekelt (Venezuelan), President; Albert Jan van den Berg (Dutch); and Francisco Rezek (Brazilian).

December 19, 2002
The Tribunal holds its first session with the parties in Washington, D.C.

- **Aguas del Tunari S.A. v. Republic of Bolivia (Case No. ARB/02/3)**

July 5, 2002
The Tribunal is constituted. Its members are: David D. Caron (U.S.), President; Henri C. Alvarez (Canadian); and José Luis Alberro-Semerena (Mexican).

August 29, 2002
The Centre receives a petition to intervene in the proceeding. The petition is from La Coordinadora para la Defensa Del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, Semapa Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernández, Father Luis Sánchez and Congressman Jorge Alvarado.

August 30, 2002
The petition received on August 29, 2002 is transmitted to the Tribunal and to the parties.

November 15, 2002
The parties file their observations on the petition received on August 29, 2002.

December 9, 2002
The Tribunal holds its first session with the parties in Washington, D.C.

- **Lafarge v. Republic of Cameroon (Case No. ARB/02/4)**

  There have been no new developments to report in this case since the publication of the last issue of *News from ICSID*.

- **PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (Case No. ARB/02/5)**

  October 25, 2002
  The Tribunal is constituted. Its members are: Francisco Orrego Vicuña (Chilean), President; L. Yves Fortier (Canadian); and Gabrielle Kaufmann-Kohler (Swiss).

- **SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Case No. ARB/02/6)**

  November 5, 2002
  The Respondent files its memorial on jurisdiction.

  November 13, 2002
  The Tribunal holds its first session with the parties in Paris.

- **Hussein Nuaman Soufraki v. United Arab Emirates (Case No. ARB/02/7)**

  October 23, 2002
  The Tribunal is constituted. Its members are L. Yves Fortier (Canadian), President; Stephen M. Schwebel (U.S.); and Aktham El Kholy (Egyptian).

  December 20, 2002
  The Tribunal holds its first session with the parties in Washington, D.C.

- **Siemens A.G. v. Argentine Republic (Case No. ARB/02/8)**

  July 17, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

  December 19, 2002
  The Tribunal is constituted. Its members are: Andrés Rigo Sureda (Spanish), President; Charles N. Brower (U.S.); and Domingo Bello Janeiro (Spanish).

- **Champion Trading and others v. Arab Republic of Egypt (Case No. ARB/02/9)**

  August 8, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

- **IBM World Trade Corp. v. Republic of Ecuador (Case No. ARB/02/10)**

  September 6, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

- **Enrho St Limited v. Republic of Kazakhstan (Case No. ARB/02/11)**

  September 6, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

- **JacobsGibb Limited v. The Hashemite Kingdom of Jordan (Case No. ARB/02/12)**

  September 17, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

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- **Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan (Case No. ARB/02/13)**

  November 7, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

- **CDC Group plc v. Republic of the Seychelles (Case No. ARB/02/14)**

  November 7, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

  December 19, 2002
  The Tribunal is constituted. The Sole Arbitrator is Anthony Mason (Australian).

- **Ahmonseto, Inc. and others v. Arab Republic of Egypt (Case No. ARB/02/15)**

  November 18, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

- **Sempra Energy International v. Argentine Republic (Case No. ARB/02/16)**

  December 6, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

- **AES Corporation v. Argentine Republic (Case No. ARB/02/17)**

  December 19, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

- **Tokios Tokeles v. Ukraine (Case No. ARB/02/18)**

  December 20, 2002
  The Secretary-General registers a request for institution of arbitration proceedings.

New Designations to the ICSID Panels of Conciliators and of Arbitrators

In accordance with Articles 3 and 12 to 16 of the ICSID Convention, the Centre maintains a Panel of Conciliators and a Panel of Arbitrators. Each party to the Convention may designate to each Panel up to four persons who may but need not be its nationals. The following designations to the Panels have recently been made by Austria, Bulgaria, Sri Lanka, the United States and Venezuela.

Austria

Panels of Conciliators and of Arbitrators

Designations effective November 26, 2002: Werner Melis, J. Hanns Pichler, August Reinisch and Christoph Schreuer.

Bulgaria

Panels of Conciliators and of Arbitrators

Designations effective July 24, 2002: Silvi Chernev, Alexander Katzarski and Nikolay Natov.

Sri Lanka

Panels of Conciliators and of Arbitrators

Designations effective October 7, 2002: C.W. Pinto and Tyronne Weerackody.

United States of America

Panel of Conciliators

Designations effective September 9, 2002: H. Douglas Barclay, Oscar M. Garibaldi, Steven M. Lucas and Charles E. Roh, Jr.

Panel of Arbitrators

Designations effective September 9, 2002: Fred Fisher Fielding, O. Thomas Johnson, Daniel M. Price and Davis R. Robinson.

Venezuela

Panel of Conciliators

Designation effective August 9, 2002: Alexis José Crespo Daza.

New Amendments

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Regulations and Rules. I will then review their first major amendments, made at the initiative of Dr. Shihata. With that background, I will turn to the new amendments, which were approved at the end of September.

I.

The International Centre for Settlement of Investment Disputes, or ICSID as it is more familiarly known, is one of the five international organizations that make up the World Bank Group. The four others are the World Bank itself or, as it less familiarly known, the International Bank for Reconstruction and Development; the International Finance Corporation; the International Development Association; and the Multilateral Investment Guarantee Agency.

Like the other organizations in the Group, ICSID is established by a multilateral treaty. In the case of the Centre, this is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which we usually call the ICSID Convention and which is often also called the Washington Convention. To date, 136 countries have signed and ratified the Convention to become Contracting States. Under the Convention, ICSID provides facilities for the conciliation and arbitration of investment disputes between Contracting States and individuals and companies that qualify as nationals of other Contracting States.

The Convention gives ICSID a simple organizational structure, consisting of an Administrative Council and a Secretariat. The Administrative Council, which meets once annually, is the governing body of the Centre. It is composed of one representative of each Contracting State. These normally are the Governors of the World Bank, who in turn usually are the finance ministers, of the countries concerned. The Secretariat, which is headed by a Secretary-General elected by the Administrative Council, is responsible for the day-to-day work of ICSID, including in particular its administration of conciliation and arbitration proceedings under the Convention.

In addition to electing the Secretary-General of the Centre, the Administrative Council adopts the Regulations and Rules of ICSID. There are four sets of Regulations and Rules provided for in the Convention. These are:

(i) the Administrative and Financial Regulations which, in addition to dealing with such matters as meetings of the Administrative Council, regulate the details of the Centre's administration of conciliation and arbitration proceedings;
(ii) the Institution Rules, which set out procedures for the initiation of conciliation and arbitration proceedings under the ICSID Convention;
(iii) the Arbitration Rules, which set forth procedures for the conduct of the various phases of the arbitration proceedings, including the constitution of the arbitral tribunal, the presentation by the parties of their case, and the preparation of the arbitral award; and
(iv) the Conciliation Rules, which set forth similar procedures for the conduct of the conciliation proceedings.

I will from now on refer to these as the ICSID Regulations and Rules. This is to distinguish them from another set of rules adopted by the Administrative Council, the Additional Facility Rules. Under the Additional Facility Rules, the Secretariat of ICSID is authorized to administer certain types of proceedings between States and foreign nationals that fall outside the scope of the ICSID Convention. These include fact-finding proceedings as well as conciliation and arbitration proceedings for the settlement of

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investment disputes where either the State party to the dispute or the home State of the foreign national concerned is not an ICSID Convention Contracting State. The Additional Facility Rules comprise the Additional Facility Rules proper and four schedules to these rules:

(i) the Additional Facility Administrative and Financial Rules, an abbreviated version of the ICSID Administrative and Financial Regulations;
(ii) the Additional Facility Conciliation Rules, the Additional Facility's counterpart of the ICSID Conciliation Rules;
(iii) the Additional Facility Arbitration Rules, the Additional Facility's counterpart of the ICSID Arbitration Rules; and
(iv) the Additional Facility Fact-Finding Rules.

The Administrative Council adopted definitive texts of the ICSID Regulations and Rules in 1967, the year after the ICSID Convention came into force. The Additional Facility Rules were adopted in 1978, on a trial basis for an initial period of five years. The ICSID Regulations and Rules remained basically unchanged until 1984. Surprising as it may seem in hindsight, the Secretariat recommended the termination of the Additional Facility at the end the initial five-year period in 1983. Fortunately, the Council did not accept that recommendation and decided instead to postpone its decision on whether or not to continue the Additional Facility until the following year.

II.

In the following year, 1984, the Administrative Council approved amendments of the ICSID Regulations and Rules proposed by the newly-elected Secretary-General, Dr. Shihata. The amendments made three main substantive changes, all of them to the ICSID Arbitration Rules. The first was to allow for pre-hearing conferences that could be held by the parties to stipulate uncontested facts or to discuss an amicable settlement of the dispute. The second change made it clear that interim measures of protection could only be sought from national courts if the parties had so agreed. The third main change dispensed ICSID from seeking the consent of the parties for its publication of excerpts from the legal holdings of an award, while continuing, in keeping with Article 48(5) of the Convention, to require such consent for the publication of the full text of the award.

Simplicity and flexibility were qualities prized by Dr. Shihata. A large number of additional amendments approved in 1984 were meant to make the ICSID Regulations and Rules simpler and more flexible. Although these additional amendments were each individually perhaps less important, together they resulted in Regulations and Rules that were easier to understand and administer.

As for the Additional Facility, the Administrative Council agreed in 1984 with the recommendation of Dr. Shihata to continue it indefinitely, even though there had still been no case brought to the Centre under the Additional Facility Rules.

III.

There can, of course, be no recourse to conciliation or arbitration under the ICSID Convention in the absence of the prior written consent of both parties to the dispute. In many cases, the consent of parties will be recorded in a single instrument, as in the arbitration provisions of an investment contract between the parties. There are however other possibilities. In transmitting the ICSID Convention in 1965 to member countries of the World Bank for their signature and ratification, the Executive Directors of the Bank suggested, as an alternative to consents in a single instrument, that a State might, in an investment promotion law,

offer or consent to submit to arbitration under the ICSID Convention disputes with investors covered by the law, and a covered investor might subsequently give its own written acceptance of that general "offer" or consent. Following the entry into force of the ICSID Convention, some States followed this suggestion and included such general consents in their investment laws. Countries had also begun to conclude bilateral investment treaties and it started to become usual for these treaties also to include consents on the part of each State to submit to arbitration under the ICSID Convention disputes with investors from the other State.

Nevertheless, in the first 20 years of ICSID, there was only a slow trickle of cases, one or two a year, brought to the Centre, almost all on the basis of consents recorded in the traditional manner, in the arbitration provisions of an investment contract between the parties. It was coincidentally in 1984, the same year as that of the first extensive amendments of the ICSID Regulations and Rules, that ICSID registered the first arbitration case brought to it by an investor relying, for the consent of the host State, on a provision of the investment law of the State. Three years later, in 1987, the Centre registered the first case submitted to arbitration under the ICSID Convention on the basis of a similar provision in a bilateral investment treaty, or BIT.

From the late 1980s, and through the 1990s, the pace of BIT-making increased enormously. Another approximately 1,500 such treaties were concluded so that there are now over 2,000 involving some 170 countries. Also during the 1990s, several multilateral trade and investment treaties were concluded. The NAFTA and the Energy Charter Treaty are the best known of these multilateral treaties. They, and the overwhelming majority of the BITs, all have provisions setting forth the consent of each State to submit to arbitration under the ICSID Convention disputes with investors from the other State or States involved. In the NAFTA and the Energy Charter Treaty and many of the BITs, the provisions also set forth the consent of the State to arbitration under the Additional Facility Rules.

The proliferation of investment treaties with these references to arbitration under the ICSID Convention and Additional Facility began after the mid-1990s to transform the caseload of ICSID. Since then, the previous annual rate of growth of the caseload has become the monthly rate; that is, we are now registering arbitration cases at the rate of one or two a month. The new cases include not only cases brought under the ICSID Convention but also the first ten initiated under the Additional Facility Rules. The trickle has become a flood, or so it seems to us in the Secretariat of ICSID.

IV.

With the rapidly-accumulating experience, Dr. Shihata agreed in 1999, his last full year as Secretary-General, that we should review the Regulations and Rules to see if there were improvements that could usefully be introduced at this stage.

There were several limits to the range of possibilities. The most elementary limit was that the ICSID Regulations and Rules had to remain consistent with the ICSID Convention. Amendments of the Convention were impracticable as these would, in accordance with Article 66 of the Convention, require the unanimous ratification of all 136 Contracting States. Although the Additional Facility Rules were not subject to this limit, it seemed advisable, as I will explain in a moment, to reduce rather than to increase, differences between them and the ICSID Regulations and Rules.

Another general limit was imposed by the vast network of investment treaties with ICSID clauses that has been created over the last decade in particular. I will spare you the technical details but amendments of the ICSID Regulations and Rules and the Additional

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Facility Rules would generally apply to proceedings instituted under them pursuant to a previously-made investment treaty after the effective date of the amendments. Yet it is fair to assume that these numerous treaties were made on the basis that the frameworks provided by the ICSID Regulations and Rules and Additional Facility Rules would not subsequently greatly be changed.

It was not until last year, after Dr. Shihata had passed away, that we were able to finish our review. The basic conclusion was that there were improvements that could feasibly be proposed.

The proposals that were developed included the clarification of several provisions of the ICSID Regulations and Rules and of the Additional Facility Rules that had proved to be confusing or unclear to parties. Those of you who have struggled to make sense of the provision of the ICSID Arbitration Rules regarding the nationality of arbitrators – Rule 1(3) – may be glad to hear that the proposals included a proposed re-draft of the rule.

A few others of the proposals were to reflect in the Regulations and Rules practices that had developed since the provisions were written. An example was a proposal to reflect, in the ICSID Institution Rules and in the Additional Facility Conciliation and Arbitration Rules, the practice – introduced after a case registered in 1992 made apparent the need for it – that companies requesting arbitration are always asked to furnish evidence that they have taken the necessary steps internally to authorize the request.

With the rising caseload, it had become apparent that certain further provisions needed to be made more flexible. This was particularly so of such provisions as those of Rules 4 and 9 of the ICSID Arbitration Rules, which imposed unnecessarily rigid deadlines regarding the appointment and disqualification of arbitrators. The proposals included amendments to introduce the needed flexibility.

The majority of the proposed amendments were, however, aimed at the Additional Facility Rules. They had not benefited from the amendments adopted in 1984 for the ICSID Regulations and Rules. In large part because of this, there were many differences of detail between the Additional Facility Rules on the one hand and the ICSID Regulations and Rules on the other hand. Most of these differences were unnecessary and needlessly complicated the task of the ICSID Secretariat in simultaneously administering proceedings under the Additional Facility Rules and the ICSID Regulations and Rules. The majority, as I said, of the proposed new amendments were to eliminate such unnecessary differences. Simplifications made to the ICSID Regulations and Rules in 1984 would thus also be made to the Additional Facility Rules. It was also proposed further to simplify the Additional Facility Rules by dropping the Additional Facility Administrative and Financial Rules and instead applying to Additional Facility proceedings the relevant provisions of the ICSID Administrative and Financial Regulations.

The proposed amendments were approved by the Administrative Council at its Annual Meeting in Washington, D.C. on September 29, 2002. The amendments will come into force on January 1, 2003. The amended rules will shortly be posted on our website. New booklets of the ICSID Regulations and Rules and of the Additional Facility Rules will also soon be published.

The amended ICSID Rules and Regulations and the Additional Facility Rules are now available in English, French and Spanish on ICSID's website at www.worldbank.org/icsid, and from the Centre on request.

The Changing Landscape of International Commercial Arbitration

By Robert Briner, Chairman, International Court of Arbitration of the International Chamber of Commerce

Address given in Sydney on October 29, 2002 at the program on "The Changing Landscape of International Commercial Arbitration" of the 75th Anniversary Congress of the Union internationale des avocats (UIA).

The topics to be discussed at this program today deal with international commercial arbitration rules, structure and organization. But are there other phenomena appearing on the road map of this changing landscape? In international commercial matters, the catchword "globalization" is ever present. Does it affect international arbitration?

At the International Court of Arbitration of the International Chamber of Commerce (ICC) we have seen over the last five years a growth of 25 percent, from 452 cases in 1997 to 566 new cases in 2001, and we have seen the same growth in final awards from 169 to 212. But not only has the caseload increased, so have the number of players. In recent years, almost all Central and East European States have created ICC National Committees as have such diverse countries as the People's Republic of China and Mongolia. All these countries are changing their old arbitration monopolies and are introducing market economies, including in the field of dispute resolution services, as required by the global market. We have also witnessed the participation of parties from places previously rarely encountered, such as Sub-Saharan Africa or the former Soviet Republics of Georgia, Turkmenistan and Uzbekistan; from Vietnam, or, in this region, from Vanuatu and Fiji. These new players, although their presence might still be minor, have contributed to the change of the landscape of international commercial arbitration. How is their presence felt, and what have their experiences been?

As usual, on balance the experiences have been mixed. There is an increased awareness that the growth of their economies also depends on the confidence of the foreign partner – the investor, the licensor, the trading or the joint venture partner. The rule of law is the basis on which all commercial interchange has to be able to rely. The confidence of all parties in a reasonable, foreseeable method for resolving disputes in a fair fashion, based on rules of law, constitutes an essential cornerstone for the development of international trade and investment. All too often, however, there exists a gap between the realization of these targets and the daily practice. The road map and the roads existing in the landscape do not always coincide.

Many states and organizations are of the opinion that the creation of a local arbitration court will not only earn money, but will also resolve most problems. Such institutions can obviously play a useful, even important, role in spreading the culture of arbitration, especially in domestic disputes, in training arbitrators, and informing the judiciary about modern arbitration. They can also contribute, where necessary, to the modernization of arbitration laws, hopefully by adapting, with as few changes as possible, the UNCITRAL Model Law.

The way to a truly independent organization, not under the influence of the home state and its business interest, is however often long and difficult. It takes time for the foreign partner to acquire the necessary confidence in such an organization. I shall later say a few words regarding the sometimes disappointing practices of the local parties, especially the local state parties, regarding the cost of arbitration; but then this is, of course, one facet of a more general problem.

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The Changing Landscape

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These new players have little experience in applying the 1958 New York Convention, although most of the states are among the more than 130 countries, which by now have ratified this remarkably successful treaty. This ignorance not only affects the judiciary, but also, what is less often mentioned, large parts of the local bars. The local lawyers are called upon to enforce foreign awards in their hometown. They should raise the defense under Article II(3) of the New York Convention that the local judge, seized with a claim "should refer the parties to arbitration" when a written arbitration agreement exists. However, these lawyers are rarely encountered at conferences like ours.

How often are these lawyers and judges in their professional activities confronted with a problem involving international arbitration and the application of this treaty? To give them the necessary information and guidance is also part of our duties, not just to complain about the sometimes disappointing record with respect to treaty obligations. Hopefully the Internet will play an important role in disseminating such information and experience.

Let us now move to another facet of this changing landscape. This Congress, after all, is the annual event of the International Association of Lawyers, and it might therefore be interesting to have a look at the role lawyers play on the map of international arbitration.

Some twenty to thirty years ago, international commercial arbitration was a kind of hobby of some professors and a handful of lawyers interested in international matters. There existed few books on the subject and almost no periodicals. In the civil procedural tradition, the parties made brief presentations, the arbitrators identified the relevant issues and decided how to establish the facts needed to decide the case. In the common law world, many non-lawyer specialists were involved in deciding disputes by way of arbitration. Their findings on facts were achieved through the traditional adversary system, whereas questions of law, with the case stated procedure, were mainly outside their scope.

With the growth of international trade and commerce involving parties hitherto not exposed to dealing directly with a foreign party and the exposure to dispute resolution systems like the Iran-United States Claims Tribunal, suddenly involving some one thousand businesses from all over the United States in this strange foreign institution in The Hague, lawyers on a large scale began "discovering" arbitration as a service to supply to their clients – better even, as a profitable service to provide.

Now we find ourselves confronted with a situation which in some cases, fortunately still isolated, begins to throw discredit on the process itself. In arbitration, it is becoming more and more common to "leave no stone unturned." Parties, that is their lawyers, produce countless folders of material, innumerable written witness statements (usually drafted by the lawyers) and file requests for discovery and depositions. Cross-examination hearings no longer primarily serve to enable the witness to recount the facts but more and more to question his or her credibility. Hearings for directions are requested (or at least telephone conferences held) often involving a great number of senior and junior attorneys on both sides.

The advantages of arbitration are becoming less and less obvious in the eyes of the parties to the dispute. The problem is not just that it will often take too long to resolve the dispute, but that the costs involved are sometimes no longer reasonable compared to what is at stake in the dispute. It, however, has to be kept in mind that arbitration is not long or expensive because of the fee of arbitral institutions or the fees arbitrators are legitimately entitled to expect, but because of the expenses the parties have to assume for their management time, the disruption effect and, especially, the fees of their counsel.

We have to strive to avoid a further escalation of this process. We have to try to follow more generally the rules of the 1996 English Arbitration Act, Section 33(1)(b):

[The tribunal shall] adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

Parties are to be given a "reasonable" opportunity to present their case or their defense. Arbitrators are entitled to limit the volume of the material the parties are to present, and they can limit the time granted to the parties at the oral hearing, as the practice developed by the Iran-United States Claims Tribunal, which has been avidly copied, so well demonstrates. Active and decisive case management has now become one of the essential qualities of a good international arbitrator called upon to decide a complex case. Mediation, conciliation, mini-trial, etc. can play an important role, but they are rarely suited to the great majority of international commercial disputes.

These are a few glimpses at the changing landscape of international arbitration.

Let us work at welcoming the new players, so that they can feel at ease with the process; let us develop the new fields, inform judges, parties and their lawyers about the process; and let us try to reduce the negative tendencies. Let us see to it that arbitration does not become off-shore litigation. As the Governor-General said at the Opening Ceremony of this Congress, our challenge is to develop creative, simple, fair methods to resolve disputes.

Membership News

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The Convention entered into force for St. Vincent and the Grenadines on January 15, 2003.

With these new ratifications, the number of the ICSID Contracting States has reached 137. The number of the signatory States now stands at 153. An up-to-date list of the ICSID Contracting States and Other Signatories of the Convention is available on the ICSID website (*www.worldbank.org/icsid*) and from the Centre on request.

New ICSID Publications

The Spring 2002 issue of the *ICSID Review—Foreign Investment Law Journal* featured articles by Natalie G. Lichtenstein on the relationship between legal and economic policy reform in China's recent economic development; by J.C. Thomas reflecting on the standards of treatment referred to in Article 1105 of the NAFTA; and by Jennifer Corrin Care on levying provincial business license fees in the Solomon Islands. The issue also contained the texts of the Tribunal's award, and the individual concurring opinion of one of the arbitrators, rendered in a recently concluded ICSID case and the text, both in English and Spanish of a decision on the challenge to the President of the *ad hoc* Committee in an ICSID annulment proceeding. Two book reviews were also published. Voughan Lowe provided a review of Christoph H. Schreuer's *The ICSID Convention: A Commentary,* which was issued as an ICSID publication by the Cambridge University Press in 2001. The issue also contained a review by Timothy J. Feighery of the book of K.V.S.K. Nathan, *The ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes.* Cumulative indices of Volumes 1 through 16 (1986-2001) of the *ICSID Review* were also published in the issue.

The *ICSID Review—Foreign Investment Law Journal,* which appears twice yearly, is available on a subscription basis from the Johns Hopkins University Press, Journals Publishing Division, 2715 North Charles Street, Baltimore, Maryland 21218-4363, U.S.A. Annual subscription rates (excluding postal charges) are US$70 for subscribers with mailing address in a member country of the Organisation for Economic Co-operation and Development and US$35 for others.

Other recent publications of the Centre include a new release, issued in December 2002, of ICSID's collection of *Investment Treaties,* which contained texts of twenty bilateral in-

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New ICSID Publications

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vestment treaties concluded by some twenty-seven countries in the period 1994-2001. With this new release, the collection now contains texts of some 880 bilateral investment treaties.

A new release for the collection of *Investment Laws of the World* was also published in September 2002. The release contained the relevant foreign investment legislation of Brazil, El Salvador, Kazakhstan, Solomon Islands and the Federal Republic of Yugoslavia.

Investment Laws of the World (ten volumes) and *Investment Treaties* (seven volumes) may be purchased from Oceana Publications, Inc., 75 Main Street, Dobbs Ferry, New York 10522, U.S.A., at US$950 for the *Investment Laws of the World* collection and US$550 for the *Investment Treaties* collection.

The Centre also recently published two new booklets, the *ICSID Convention, Regulations and Rules* and the *Additional Facility Rules,* which contain the texts of the regulations and rules as amended effective January 1, 2003. The booklet, *ICSID Convention, Regulations and Rules* (formerly known as *ICSID Basic Documents*) was expanded to include the text of the 1965 Report of the IBRD's Executive Directors on the Convention. The booklets are published in English, French and Spanish, and are available from the Centre on request.

News from ICSID

is published twice yearly by the International Centre for Settlement of Investment Disputes. ICSID would be happy to receive comments from readers of *News from ICSID* about any matters appearing in these pages including personal contributions of individual writers. Please address all correspondence to: ICSID, 1818 H Street, N.W., Washington, D.C. 20433, U.S.A.

Recent Publications on ICSID

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