THE FIRST ‘WORLD BANK’ ARBITRATION
(HOLIDAY INNS v. MOROCCO)—SOME LEGAL
PROBLEMS*

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I. INTRODUCTION

On 13 January 1972 the International Centre for the Settlement of Investment Disputes (I.C.S.I.D.) in Washington registered2 the first request for arbitration ever to be submitted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of 18 March 1965 (sometimes called the Washington Convention or ‘World Bank Convention’).3 This registration, effected in accordance with Article 36 (3) of the Convention and Rule 6 (1) (a) of the Rules of Procedure for the institution of conciliation and arbitration proceedings (‘Institution Rules’) followed a request for arbitration, of 22 December 1971, submitted jointly as ‘requesting party’ by the Swiss corporation Holiday Inns S.A., Glarus, and the American corporation Occidental Petroleum Corporation (O.P.C.). According to the terms of the request, the two companies were acting ‘in their own name and in the name and on behalf of’ several other companies—a fact which, as will presently be shown, was to give rise to a number of difficulties, objections and decisions in the course of the arbitration proceedings.

About six years later, in the course of the summer of 1978, the parties (the Holiday Inns—Occidental Group and the Moroccan Government) reached an amicable settlement and the case was accordingly withdrawn by joint request.4 This outcome, let it be said in passing, far from reflecting

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2 Under the reference ARB/72/1.
etc., while the Moroccan measures ‘assured the protection of the interests of both parties pendente lite’. 1

The difficulty in which an arbitration tribunal, whether ad hoc or ‘institutional’, finds itself when called upon to decide this kind of controversy at the very beginning of arbitration proceedings will be readily appreciated. At such an early stage, when no evidence whatever has yet been adduced, nor any pleadings filed, the tribunal has little or no possibility of ascertaining the truth, but it has to make a quick, though cautious, decision. 2

The decision given on 2 July 1972 (i.e. immediately following the oral arguments of the parties) can be characterized briefly as a strong one on the legal principles involved while in concreto extremely prudent (some would even say timid). On the first aspect, the decision deserves to be cited in full:

The Parties were in agreement to recognize before the Tribunal that at the date of this Decision contractual relations remain in existence between them based on a series of commitments the foundation of which apparently is the Contract of December 5, 1966. It follows that the Parties are under an obligation to abstain from all measures likely to prevent definitely the execution of their obligations.

The Tribunal therefore considers that it has jurisdiction to recommend provisional measures according to the terms of Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Parties still having the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspect of the dispute. 3

Concretely, the Tribunal takes a middle-of-the-road attitude: it declines to recommend a series of measures suggested in the request, and is understandably reluctant to appear to pass judgment even indirectly, at that stage, before the ‘respective responsibilities of the Parties regarding the situation of the enterprise in Morocco’ have been established. Moreover—and this observation deserves notice—the Tribunal considers that:

To some extent these requests bear on injunctions which are beyond the framework of provisional measures which the Tribunal could consider.

The interpretation of this rather vague sentence must remain a matter of conjecture and one can only speculate on whether the Tribunal was careful, especially in the first arbitration under the I.C.S.I.D. system, not to assert its authority with regard to a sovereign State too much, or whether it considered that, by their general nature, certain types of provisional measures should as a rule not be recommended by international tribunals. On the other hand, and contrary to the defendants’ submissions, the Tribunal did not content itself with affirming its

1 See decision of the Arbitration Tribunal of 2 July 1972, p. 5.
2 While affording ample opportunity to the defendant to reply to the request for interim measures, the Tribunal refused to postpone its decision until after the defendant’s reply to the—future—claimants’ first memorial.
3 I.C.S.I.D. English translation from the French original.
jurisdiction; it did exercise it and considered it 'its duty to make . . . recommendations to the Parties'. The first one is of a general character:

1. Both Parties are invited to abstain from any measure incompatible with the upholding of the Contract and to make sure that the action already taken should not result in any consequences in the future which would go against such upholding.

A second recommendation, formulated in a carefully balanced manner, concerns the exchange of information by the parties regarding the management of the completed hotels and the completion of those hotels still to be constructed.¹ In a third and last recommendation, the Tribunal, taking special account of one of the claimants' complaints, recommended consultations 'in order to maintain in the hotels the character of the enterprise which is part of the international chain of Holiday Inns Hotels'.

From the facts summed up above, it should be apparent that the Tribunal took a wise and constructive decision, if somewhat vague and limited in scope. In the nature of things, its practical effects on the site were to depend on the goodwill of the parties, but the jurisdiction of the international Tribunal is strongly affirmed, as well as the general duties of all parties to an arbitration. Nothing is said or implied which could touch the merits of the litigation, but a discreet warning is clearly, if indirectly, given to both parties that the Tribunal could and would take notice of any disregard of its recommendations. In the circumstances, the claimants could hardly expect, and probably did not expect, more from the Tribunal. However, an additional, and perhaps more effective, measure could have been an invitation to both parties to report at regular intervals on their compliance with the recommendations of the Tribunal.

V. Questions of Jurisdiction

A. The Moroccan H.I. companies

Following Rule 2 of the I.C.S.I.D. 'Institution Rules', the request for arbitration registered by I.C.S.I.D. on 13 January 1972 had inter alia to 'designate precisely each party to the dispute' and to indicate 'its nationality on the date of consent'. It did, of course, also contain information indicating that there was 'between the parties, a legal dispute arising directly out of an investment'.

As stated above, the request noted in particular that Holiday Inns S.A. (of Glarus, Switzerland) and O.P.C. were acting both 'in their own name and in the name and on behalf of six other companies' (including the four so-called 'H.I.S.A. companies'). This broad and somewhat vague formula may well have been resorted to by the claimants in order to gain time for a further study of the complex nexus of contractual relationships

¹ The Arbitration Tribunal did not, and could hardly be expected to, invite the Government to stop constructing or operating the hotels, but tried to ensure that the interests of the enterprises would nevertheless be safeguarded.