ARTICLES

The Experience of the International Centre for Settlement of Investment Disputes

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I. INTRODUCTION

The International Centre for Settlement of Investment Disputes (the Centre or ICSID) is a public international organization established by a multilateral treaty, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention or ICSID Convention).[1] As of November 30, 1999, 131 countries had signed and rati-

[1] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, 575 U.N.T.S. 159, 4 ILM 532 (1965) (ICSID Convention), is reprinted, together with the Report of the World Bank Executive Directors on the ICSID Convention, in Doc. ICSID/2. The ICSID Convention is also reprinted with the Regulations and Rules adopted pursuant to it (Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (ICSID Institution Rules), Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) and Rules of Procedure for Conciliation Proceedings (ICSID Conciliation Rules)) in ICSID Basic Documents, Doc. ICSID/15 (Jan. 1985), available on the website of the Centre at <www.worldbank.org/icsid>. A detailed commentary on the Convention by Christoph Schreuer is being published in installments in ICSID Review—Foreign Investment Law Journal. The most recent installment, covering Articles 36-40 and 56-58, appears in this issue at p. 421.

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fied the Convention to become Contracting States,[2] also occasionally referred to in this paper as member countries of ICSID. In accordance with the provisions of the Convention, the Centre provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The World Bank prepared the Convention and opened it for signature in the belief that the availability of such facilities could promote a larger flow of private international investment into countries wishing to attract it.[3]

In 1978, the Administrative Council of ICSID adopted a set of Additional Facility Rules authorizing the Secretariat of the Centre to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention.[4] These notably include conciliation and arbitration proceedings for the settlement of investment disputes between parties one of which is not a Convention Contracting State or a national of a Contracting State.[5] Under the Additional Facility Rules, the Secretariat of the Centre may also administer conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction has features that distinguish it from an ordinary commercial transaction.[6]

A further activity of ICSID in the field of the settlement of disputes is based on acceptances by the Secretary-General of ICSID to act as the appointing authority of arbitrators in ad hoc (that is, non-institutional) arbitration proceedings. This has in particular been done in the context of arrangements providing for arbitration under the 1976 Arbitration Rules of

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[2] *See* Contracting States and Other Signatories of the Convention, Doc. ICSID/3. The other data provided in this paper were also current as of the end of November 1999.

[3] *See* Report of the World Bank Executive Directors on the ICSID Convention, *supra* note 1, para. 13.

[4] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID Additional Facility Rules). The ICSID Additional Facility Rules, together with the Additional Facility Administrative and Financial Rules, the Additional Facility Conciliation Rules, the Additional Facility Arbitration Rules and the Additional Facility Fact-Finding Rules, are published in ICSID, Additional Facility, Doc. ICSID/11 (June 1979).

[5] ICSID Additional Facility Rules, *supra* note 4, art. 2(a).

[6] *Id.* arts. 2(b) and 4(3).

the United Nations Commission on International Trade Law (UNCITRAL), which are specially designed for ad hoc proceedings.[7]

Since the establishment of ICSID, only three conciliation proceedings have been held under the auspices of the Centre.[8] However, 64 arbitration cases have in the meantime been submitted to ICSID.[9] All but seven of these arbitration cases were brought under the ICSID Convention (as opposed to the Additional Facility Rules). Parts II-VII of this paper examine the experience of ICSID with the arbitration cases brought under the ICSID Convention. Part II deals with the clauses recording the consent of the parties to submit their dispute to such arbitration. The emphasis in this section is on the clauses in investment laws and treaties that have recently transformed the size and nature of ICSID's caseload. Part III discusses the experience of the Centre with the institution of proceedings and the selection of arbitrators. Parties to the proceedings and the types of claims involved are described in part IV. Objections to jurisdiction and requests for provisional measures have frequently been made in arbitration proceedings under the ICSID Convention. They are discussed in part V. A number of procedural issues that have proved to be of particular interest to parties to proceedings are examined in part VI. The duration and costs of the proceedings are also discussed in part VI. Part VII is devoted to the experience in regard to applicable law, awards (including compliance with awards) and post-award remedies. Although there have so far been relatively few arbitration proceedings under the ICSID Additional Facility Rules, they are certainly not unimportant and, moreover, are now growing in number. They are described in part VIII of this paper. Also in recent years, the Secretary-General of the Centre has been accumulating experience in acting as the appointing authority of ad hoc arbitrators. This experience is the subject of part IX.

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[7] UNCITRAL Arbitration Rules, U.N. GAOR 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (1976), U.N. Sales No. E.93.V.6 (1977), reprinted in 15 ILM 702 (1976); 2 Y.B. Com. Arb. 161 (1977). For references on arbitration under the UNCITRAL Rules, see Ziadé, References on the UNCITRAL Arbitration and Conciliation Rules, 5 ICSID Rev.—FILJ 363 (1990).

[8] SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H v. Republic of Madagascar, ICSID Case No. CONC/82/1; Tesoro Petroleum Corporation v. Trinidad and Tobago, ICSID Case No. CONC/83/1; SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Republic of Madagascar, ICSID Case No. CONC/94/1. Other institutions that offer both conciliation and arbitration procedures report a similarly small proportion of conciliation cases. *See, e.g.*, Schwartz, International Conciliation and the ICC, 10 ICSID Rev.—FILJ 98, 99 (1995).

[9] *See* ICSID Cases, Doc. ICSID/16.

In addition to summarizing the overall experience of the Centre, the conclusion of the paper, part X, discusses some challenges that ICSID may face in the coming years.

II. CONSENT TO THE JURISDICTION OF THE CENTRE

The jurisdiction of the Centre, or in other terms the scope of the ICSID Convention, is elaborated upon in Article 25(1) of the Convention. It defines the jurisdiction of the Centre as extending to "any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." The consent of the parties has been described as the "cornerstone" of the jurisdiction of the Centre as thus defined.[10] The Convention nevertheless gives the parties much freedom as to the timing and modalities of their consent.

Thus, as the Executive Directors of the World Bank explained in their 1965 Report on the ICSID Convention,

> [c]onsent of the parties must exist when the Centre is seized . . . but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen.[11]

In practice, in only two cases has jurisdiction been founded on consents given by both parties with regard to a particular, existing dispute.[12] In the majority of the cases submitted to the Centre, the consent of the parties has instead been recorded in an arbitration clause included in an investment agreement referring to future disputes arising out of that agreement.

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[10] *See* Report of the World Bank Executive Directors on the ICSID Convention, *supra* note 1, para. 23.

[11] *Id.* para. 24.

[12] Swiss Aluminium Ltd. and Icelandic Aluminium Company Ltd. v. Iceland, ICSID Case No. ARB/83/1; Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica, ICSID Case No. ARB/96/1.

The Convention does not require that the consent of both parties be expressed in a single instrument such as an investment agreement. In their Report on the ICSID Convention, the Executive Directors of the World Bank suggested, as an alternative to consents expressed in single instruments, that "a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing."[13] Since the ICSID Convention came into force in 1966, many countries have followed this suggestion and included in their investment promotion laws, and more significantly in their myriad investment promotion treaties, provisions setting forth their consent to submit to arbitration under the ICSID Convention disputes with foreign investors covered by the laws and treaties concerned.[14] About 20 investment laws contain such provisions, as do a great many bilateral investment treaties, or BITs. There are now almost 1,000 BITs with provisions setting forth the consent of each State party to submit disputes with investors that qualify as nationals of the other State party to arbitration under the ICSID Convention. Comparable provisions may also be found in four multilateral treaties dealing with investment. In the order of the dates of their conclusion, these multilateral treaties are the North American Free Trade Agreement, or NAFTA;[15] the Colonia Investment Protocol of the Common Market of the Southern Cone, or Mercosur;[16] the Cartagena Free Trade

[13] *See* Report of the World Bank Executive Directors on the ICSID Convention, *supra* note 1, para. 24.

[14] The texts of many of these laws and treaties are published or forthcoming in ICSID, Investment Laws of the World (looseleaf, 1973-) and in ICSID, Investment Treaties (looseleaf, 1983-), respectively. For comprehensive listings of bilateral investment treaties (BITs) by chronological and country order, together with a bibliography on BITs, see ICSID, Bilateral Investment Treaties 1959-1996, Doc. ICSID/17. *See also generally* R. Dolzer & M. Stevens, Bilateral Investment Treaties (1995).

[15] The North American Free Trade Agreement (NAFTA), Dec. 17, 1992, is intended to liberalize trade as well as to promote and protect investment flows among the parties to the treaty (Canada, Mexico and the United States). The principal provisions related to investment are contained in Chapter Eleven of the NAFTA. The NAFTA is reprinted at 32 ILM 289 (1993). For an analysis of the provisions of Chapter Eleven of the NAFTA, see Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, 27 Int'l Law. 727 (1993).

[16] The Common Market of the Southern Cone or Mercosur is the customs union established by Argentina, Brazil, Paraguay and Uruguay under the Treaty of Asunción of March 26, 1991. The text of that treaty is reprinted at 30 ILM 1041 (1991). Following the conclusion of the Treaty of Asunción, the parties concluded two protocols on investment: Protocol on the Reciprocal Promotion and Protection of Investments in Mercosur (Colonia Investment

Agreement;[17] and the Energy Charter Treaty.[18] A foreign investor covered by such a provision in an investment law, BIT or multilateral treaty may generally give its own consent to arbitration after the dispute has arisen, and on that basis resort to arbitration against the State concerned. The investor may therefore have recourse to arbitration despite the absence of an earlier arbitration agreement or indeed any other contractual relationship between the parties. One commentator has coined the phrase "arbitration without privity" to describe this phenomenon.[19]

Several of the investment laws with such provisions, most of the BITs, and all of the multilateral treaties were made during the 1990s. The resulting, relatively sudden, proliferation of general consents on the part of States to arbitration under the ICSID Convention has been mirrored in the recent development of the caseload of the Centre. Thus, up until the mid-1980s, just 20 cases had been submitted to ICSID.[20] Jurisdiction was in these cases generally founded on consents recorded in the traditional manner—by a clause in an investment agreement or similar instrument. In the years since, another 18 such cases have been submitted to ICSID. However, also since the mid-1980s, more than 20 further disputes have been submitted to arbitration under the ICSID Convention by investors relying, for the host State's consent, on provisions in an investment law or treaty of the State. As could be expected from the immense number of treaties with such provisions, all but a few of these cases were brought to the Centre on the basis of treaty, rather than legislative, consents. And in most of these cases, the proceedings were instituted in just the last two years. As a result, the majority of the cases now pending before the Centre are cases of "arbitration without privity." At their present rate of growth, such cases

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Protocol, Jan. 17, 1994, Mercosur/CMC/Doc. No. 11/93 and Protocol for the Promotion and Protection of Investments Made by Coutries That Do Not Belong to Mercosur (Buenos Aires Investment Protocol) Aug. 5, 1994, reprinted in Sao Paulo Gazeta Mercantil, Aug. 8, 1994, at 7. The first protocol covers investments made by nationals of the member countries of Mercosur, while the second governs the treatment of investments made by nationals of non-member countries.

[17] Free Trade Agreement among Colombia, Mexico and Venezuela (Cartagena Free Trade Agreement), June 13, 1994.

[18] The Energy Charter Treaty, Dec. 17, 1994, sets forth energy sector trade liberalization and investment promotion and protection obligations of the parties. Fifty countries and the European Communities have signed this treaty, which is reprinted in 10 ICSID Rev.—FILJ 258 (1995). *See generally* The Energy Charter Treaty: An East-West Gateway for Investment and Trade (T. Wälde ed., 1996).

[19] Paulsson, Arbitration Without Privity, 10 ICSID Rev.—FILJ 232 (1995).

[20] *See* ICSID Cases, *supra* note 9.

will soon also become the largest group of cases received by ICSID since its establishment, surpassing in number the more traditional type of case brought to the Centre on the basis of an arbitration clause in an investment agreement between the parties.

Since 1968, the Secretariat of the Centre has published model clauses to which parties may refer in fashioning clauses of investment agreements providing for the submission of disputes to arbitration under the ICSID Convention.[21] Secretariat staff lawyers are also available to review and comment on drafts of such arbitration clauses. Nevertheless, the cases abound with examples of clauses that have been inadequately prepared or have proved to be downright faulty. Such clauses have commonly failed to dispose in advance of such questions as the number of arbitrators and the method of their appointment, with the result that the subsequent proceedings have been delayed by the time necessary to resolve those questions.[22] In a number of cases, deficiencies in the clauses have invited objections to jurisdiction; in two proceedings, the clauses were found by the arbitral tribunals to have failed to confer jurisdiction on the Centre. Consents to arbitration under the ICSID Convention in investment laws and treaties have not been exempt from such shortcomings. In several of the cases submitted to ICSID on the basis of arbitration provisions in laws and treaties, the tribunals have had to grapple with jurisdictional issues that could, in hindsight, have been avoided by greater precision in the drafting of the provisions concerned. As explained in the next part of this paper, registration of a request for arbitration must, if the dispute is found by the Secretary-General of ICSID to be manifestly outside the jurisdiction of the Centre, be refused, with the consequence that the case will not reach an ICSID arbitral tribunal at all. As also explained in the next part of the paper, in some instances, consents fashioned without careful regard to the other jurisdictional limitations of ICSID (as to the nature of the dispute and the parties involved) have yielded this result. On the other hand, the cases also furnish illustrations of consents reflecting full awareness of the special features, and in particular of the limits, of arbitration under the

[21] *See* ICSID Model Clauses, Doc. ICSID/5.

[22] In cases of absence of agreement on the number of arbitrators and the method of their appointment, a party may invoke the formula provided for in Article 37(2)(b) of the ICSID Convention (according to which the tribunal will consist of three arbitrators, one appointed by each party and the third, presiding, arbitrator appointed by agreement of the parties), but only after at least 60 days have elapsed from the registration of the request for arbitration. *See* ICSID Arbitration Rules, *supra* note 1, rule 2(3).

ICSID Convention. It is not a coincidence that the proceedings based on such consents have been among the most trouble-free, efficient ones to be conducted under the auspices of ICSID.

III. THE INSTITUTION OF PROCEEDINGS AND THE SELECTION OF ARBITRATORS

A. The Institution of Proceedings

Article 36 of the ICSID Convention outlines a procedure to be followed by parties wishing to institute arbitration proceedings under the Convention. According to Article 36(1) of the Convention, such a party should address a written request for arbitration to the Secretary-General of ICSID, who in turn must send a copy of the request to the other party. Article 36(2) of the Convention provides that the request should contain information regarding the issues in dispute, the identity of the parties and their consent to arbitration. The Secretary-General is required by Article 36(3) of the Convention to register the request "unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre." A decision of the Secretary-General to refuse registration of a request is not subject to any appeal. It is worth emphasizing, however, how closely the Convention circumscribes this power of Secretary-General to "screen" requests: it is to be exercised only where "the information contained in the request" discloses a "manifest" lack of jurisdiction. The Report of the Executive Directors of the World Bank on the ICSID Convention explains that the Secretary-General was given this limited power to screen requests "with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention."[23]

The drafters of the Convention had considered giving the Secretary-General a more substantive screening power and making the exercise of

[23] Report of the World Bank Executive Directors on the ICSID Convention, *supra* note 1, para. 20.

that power subject to review by a special committee. Those possibilities were rejected out of a concern that the power of the Secretary-General would take the character of a jurisdictional authority and out of a desire to avoid a proliferation of ICSID committees or bodies.[24]

Nevertheless, about fifteen of the requests for arbitration that have over the years been addressed to the Secretary-General have not been registered. In some of these cases, the requesting parties could not invoke any consent at all to arbitration on the part of their opponents. In one case, there was consent to arbitration on the part of both parties but it could not be construed as a consent to arbitration under the ICSID Convention. In another case, the dispute could not be qualified as a legal one on the basis of the information contained in the request. In yet another case, the home State of the investor concerned was not an ICSID Contracting State.

An increasingly common problem faced in the review of requests for arbitration is of a mismatch between the scope of the consent to arbitration and the scope of the ICSID Convention. This problem has arisen in connection with requests that invoke consents in BITs to arbitration under the ICSID Convention. The many BITs containing such consents are typically extremely broad in scope. For example, BITs commonly define protected "investments" as comprising every kind of asset of covered investors, including all forms of property and any contractual rights of such investors.[25] While the scope of the ICSID Convention is limited to disputes arising out of investments, the Convention does not define the term "investment." The Report of the Executive Directors of the World Bank on the ICSID Convention explains that the drafters of the Convention decided not to attempt to define the term "given the essential requirement of consent by the parties."[26] Parties thus have considerable freedom to determine for themselves whether, for the purposes of the ICSID Convention, their dispute arises out of an investment. That freedom is not,

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[24] *See* ICSID, 2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents Concerning the Origin and Formulation of the Convention 774-75 (1970) (History of the ICSID Convention). It should be borne in mind that the ultimate decision of an arbitral tribunal on jurisdiction will not be prejudged by the registration of the request for arbitration by the Secretary-General. *See infra* pt. V(A).

[25] *See, e.g.*, Agreement on the Promotion and Reciprocal Protection of Investments, July 20, 1995, Greece-Latvia, art. 1; Agreement on the Promotion and Protection of Investments, Sept. 22, 1994, Italy-Kazakhstan, art. 1; Agreement for the Promotion and Protection of Investments, Mar. 11, 1997, Croatia-United Kingdom, art. 1.

[26] Report of the World Bank Executive Directors on the ICSID Convention, *supra* note 1, para. 27.

however, unlimited; it is not so extensive as to permit parties to submit to arbitration under the ICSID Convention disputes that clearly do not relate to investments. A simple sale of goods is often cited as an example of a transaction that clearly is not an investment.[27] The Secretariat recently received a request for arbitration under the ICSID Convention in respect of a dispute arising out of a sale of goods transaction. The Secretary-General found that the transaction manifestly could not be considered as an investment. Registration of the request was therefore refused. This was done despite the fact that the request had been made on the basis of a BIT providing for arbitration under the Convention in respect of disputes arising out of investments which, as defined in the BIT, could be understood as including sale of goods transactions. Many BITs, to take another example, purport to extend the benefits of the treaties to investors who are natural persons with the nationality of the host State so long as they also have the nationality of the other State party to the treaty.[28] Article 25(2)(a) of the ICSID Convention, however, categorically excludes from the jurisdiction of the Centre disputes between a State and natural persons with the nationality of that State, irrespective of whatever other nationality the individual may have. In view of this, the Secretariat of the Centre lately had to inform an aggrieved individual with the nationality of both parties to the BIT concerned that he would, despite the terms of the BIT, be unable to resort to arbitration under the ICSID Convention.

In most instances of unregistrable requests for arbitration, the requesting parties have, after being informed by the Secretariat of the Centre of an impending refusal of registration, decided to withdraw the request in order to avoid such a refusal. As a result, the Secretary-General has on relatively few occasions had to issue formal refusals of registration. It is also important to note that parties have always been encouraged, before lodging requests for arbitration, to consult with the Secretariat as to the requirements for such requests. Through such consultation, parties

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[27] *See, e.g.*, ICSID Model Clauses, Doc. ICSID/5, para. 7. Even the Additional Facility Rules, which are available for cases that do not arise directly out of investments, provide against their use in connection with ordinary commercial transactions. *See* text following *infra* note 134.

[28] *See, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Sept. 23, 1992, Armenia–U.S., art. I(i)(c); Agreement on the Reciprocal Promotion and Protection of Investments, Oct. 28, 1993, France-Trinidad & Tobago, art. 1(2); Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Aug. 9, 1996, Germany-Lao PDR, art. 1(3).

have often realized that they would be unable to meet those requirements and would be best served by not lodging the request at all.

B. The Selection of Arbitrators

When a request for arbitration does meet all the requirements, the Secretary-General must register it and, in accordance with Article 36(3) of the Convention, "forthwith notify" the parties of the registration. In accordance with the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), the notice of registration will invite the parties to proceed, "as soon as possible," to constitute an arbitral tribunal.[29] Article 37(2)(a) of the Convention provides that the tribunal will consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties may agree. If the parties do not agree on the number of arbitrators and the method of their appointment, the tribunal will, in accordance with Article 37(2)(b) of the Convention, consist of three arbitrators, one appointed by each party and a presiding arbitrator appointed by agreement of the parties. In three cases, the parties have agreed to refer their dispute to a sole arbitrator appointed by agreement of the parties.[30] In all of the other proceedings in which arbitral tribunals have been constituted, the tribunals have consisted of three arbitrators; and in most of these proceedings, the initially-applicable method for the constitution of the tribunals has been the one set forth in Article 37(2)(b) of the Convention, either as a result of party agreement on the matter or, more often, as a result of the direct application of Article 37(2)(b) in the absence of agreement of the parties.

In accordance with Article 12 of the Convention, ICSID maintains a Panel of Arbitrators consisting of "qualified persons . . . willing to serve thereon."[31] The qualifications required of Panel members are set out in Article 14(1) of the Convention. According to Article 14(1), Panel members "shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or in finance who may be relied upon to exercise independent judgment." As explained later in this

[29] ICSID Institution Rules, *supra* note 1, rule 7.

[30] Philippe Gruslin v. Malaysia, ICSID Case No. ARB/94/1; Misima Mines Pty. Ltd. v. Papua New Guinea, ICSID Case No. ARB/96/2; Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3.

[31] In accordance with Article 12 of the ICSID Convention, the Centre also maintains a Panel of Conciliators.

paper, arbitral tribunals constituted under the ICSID Convention are ordinarily required to decide the disputes before them in accordance with rules of law. Article 14(1) of the Convention thus also emphasizes the "particular importance" of "[c]ompetence in the field of law" in the case of persons on the Panel of Arbitrators. In accordance with the Convention,[32] the Panel is composed of designees of ICSID member countries and of the Chairman of the Administrative Council of ICSID (the President of the World Bank serves ex officio as Chairman of the Administrative Council). Each member country may designate up to four persons to the Panel. The Chairman of the Administrative Council may designate up to ten persons to the Panel. The designees of a member country may but need not be its nationals. The Chairman's designees must each have a different nationality. All designees serve for renewable periods of six years. At present, there are some 280 persons serving on the Panel of Arbitrators.[33] As may be surmised from a comparison of this number with the number of Contracting States (131), about half of the member countries have made no or only partial use of their right to make designations to the Panel.

Article 38 of the Convention provides that if a tribunal has not been constituted within 90 days after registration of the request for arbitration, or such other period as the parties may agree, the Chairman of the Administrative Council shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Parties are free to appoint arbitrators from outside the Panel of Arbitrators so long as their appointees have the qualities of integrity, competence and reliability for exercising independent judgment required of Panel members by Article 14(1) of the Convention.[34] Appointees of the Chairman of the Administrative Council under Article 38 of the Convention, by contrast, must be drawn from the Panel of Arbitrators.[35] Obviously, the appointing authority function of the Chairman under Article 38 of the Convention, which is in practice performed on the recommendation of the Secretary-General, is made more difficult than it should be by the fact that so many Contracting States have failed to make designations to

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[32] In connection with this and the next five sentences of the text, see ICSID Convention, *supra* note 1, arts. 13 and 15.

[33] *See* Members of the Panels of Conciliators and of Arbitrators, Doc. ICSID/10.

[34] In practice, however, parties often appoint as arbitrators members of the Panel of Arbitrators. Thus, in the ICSID Convention arbitration proceedings currently pending before the Centre, one-third of the party-appointed arbitrators are members of the Panel of Arbitrators.

[35] *See* ICSID Convention, *supra* note 1, art. 40(1).

the Panel of Arbitrators. This has been a problem particularly in ICSID Convention cases involving Spanish-speaking countries and their nationals. Most of these cases naturally have Spanish as a procedural language, and in most of them the Chairman of the Administrative Council has been called upon to appoint arbitrators under Article 38 of the Convention. Yet until recently, only the Chairman of the Administrative Council and one ICSID member country, Ecuador, had designated persons with fluent Spanish to the Panel of Arbitrators. Fortunately, six further Latin American members and Spain have recently designated nationals to the Panel of Arbitrators. However, another six Latin American members have still not made any designations to the Panel and thus relatively few suitable candidates are available for appointments by the Chairman in Spanish-language proceedings. It should be emphasized in this connection that the Chairman of the Administrative Council may not appoint as arbitrators persons with the nationality of either the State party to the dispute or of the home State of the foreign national involved.[36] In the typical case, where the tribunal is to consist of three arbitrators, including one appointed by each party, one party may appoint an arbitrator of either of those nationalities, but only with the consent of the party.[37] As intended by this arrangement, arbitral tribunals constituted under the ICSID Convention have only exceptionally included as members such co-nationals of the parties.

Altogether, 52 arbitral tribunals have been constituted in proceedings instituted pursuant to the Convention. Over 100 individuals have been appointed as arbitrators in such proceedings, several of them more than once. They have included nationals of 44 different countries, including 25

[36] *See id.* art. 38 (second sentence).

[37] Article 39 of the ICSID Convention requires that nationals of the State party to the dispute or of the home State of the other party not form the majority of a tribunal, unless every arbitrator has been appointed by agreement of the parties. In the normal case, where the tribunal is to consist of three arbitrators, the party acting first could, consistently with Article 39 of the Convention, appoint a co-national as arbitrator and block a similar appointment by the other party since Article 39 only addresses cases of tribunals with a majority of co-nationals of the parties. To ensure the fair application of Article 39 of the Convention, Rule 1(3) of the ICSID Arbitration Rules provides that unless each member of the tribunal is appointed by agreement of the parties, nationals of the State party to the dispute or of the home State of the other party may be appointed by a party only if appointment by the other party of the same number of arbitrators of either of those nationalities would not result in a majority of arbitrators of those nationalities. Parties may by agreement relax the further restriction in Rule 1(3) of the ICSID Arbitration Rules (*cf.* Article 44 of the ICSID Convention). The reference in the text is to such an agreement, allowing the appointment by one party of a co-national to a three-member tribunal. This has been done in two ICSID Convention arbitration proceedings to date.

developing countries. Approximately three-fourths of the individuals concerned, however, have been nationals of industrial countries. On the other hand, these often have been appointed by developing country parties. The largest contingents of arbitrators have been American, British, French and Swiss, each with about a dozen different persons. Virtually without exception, the arbitrators, whether from developing or industrial countries, have been lawyers, often very senior lawyers. They have included members of the International Court of Justice; prominent law professors and private practitioners; past supreme court judges; and former chief governmental legal officials. In over half of the cases in which tribunals have been constituted, the presiding arbitrator has been appointed by the Chairman of the Administrative Council of ICSID in the absence of agreement of the parties on this appointment. About a quarter of the presiding arbitrators appointed by the Chairman have been nationals of developing countries. Parties have seldom failed to make their own appointments of arbitrators and so the Chairman has only occasionally been called upon to appoint more than one member of a tribunal. It will be recalled that all appointments of arbitrators by the Chairman pursuant to Article 38 of the Convention must be made after consultation with the parties as far as possible. As a result of such consultation, most of the appointments of the Chairman have been made with the express concurrence of the parties. A party cannot, however, veto a particular appointment by the Chairman. Obviously unreasonable objections by a party are unlikely to affect such an appointment. The fact remains that none of Chairman's appointments to date has been made over a party's objections to the appointee.

After an arbitral tribunal has been constituted, an arbitrator might die or become incapacitated or resign or be disqualified. In such cases, the resulting vacancy will generally be filled by the same method by which the predecessor arbitrator was appointed.[38] Article 56(3) of the Convention, however, provides that if a party-appointed arbitrator resigns without the consent of the tribunal, the successor arbitrator will instead be appointed by the Chairman of the Administrative Council. The purpose of this provision is to discourage collusive resignations of arbitrators.[39] Under Article 57 of the Convention, the disqualification of an arbitrator may be proposed by a party on the ground that the arbitrator was ineligible to be

[38] *See* ICSID Convention, *supra* note 1, art. 56(1). *See also* ICSID Arbitration Rules, *supra* note 1, rule 7.

[39] *See* Note D to Arbitration Rule 9, ICSID Regulations and Rules, Doc. ICSID/4/Rev. 1 (May 1975), at 84.

appointed to the tribunal because, for example, the arbitrator was a co-national of a party that it appointed without the consent of the other party.[40] A party may under Article 57 of the Convention also propose the disqualification of an arbitrator "on account of any fact indicating a manifest lack of the qualities" of integrity, competence and reliability for exercising independent judgment required by Article 14(1) of the Convention. Article 58 of the Convention provides that the decision on any proposal to disqualify an arbitrator will be taken by the other members of the tribunal unless they are equally divided, in which case the decision will be taken by the Chairman of the Administrative Council.

Over the years, four persons have died while serving as arbitrators and thirteen have resigned. In all of these cases, a successor arbitrator was soon appointed and the proceeding resumed from the point that it had reached at the time of the death or resignation.[41] Most of the resignations have been due to ill-health and have been readily accepted by the other members of the tribunals concerned. In one case,[42] however, an arbitrator resigned after being made a director of one of the corporate claimants that had appointed the arbitrator. The other members of the tribunal declined to consent to the resignation, with the consequence that the successor arbitrator was appointed by the Chairman of the Administrative Council rather than by the claimants.

There have been only three cases in which a party has proposed the disqualification of an arbitrator. In each of these cases, the proposal was made by a party in respect of the arbitrator appointed by the other party. In the first case,[43] the proposal referred to facts that were said by the proposing party to indicate a manifest lack of reliability for exercising independent judgment. In the second case,[44] the proposal alleged that the arbitrator concerned was ineligible for appointment to the tribunal because, although he was the naturalized citizen of a third country, he also retained

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[40] *See supra* note 37 and accompanying text.

[41] Following the filling of a vacancy on a tribunal, the new arbitrator may require that the oral procedure be recommenced if it had already been started. *See* ICSID Arbitration Rules, *supra* note 1, rule 12. As indicated in the text, in the few cases of arbitrators being replaced after the commencement of oral procedures, the new arbitrators did not find it necessary to require the recommencement of those procedures.

[42] Holiday Inns S.A. and others v. Morocco, ICSID Case No. ARB/72/1.

[43] Amco Asia Corporation and others v. Indonesia, ICSID Case No. ARB/81/1 (first arbitration proceeding). *See* Tupman, Challenge and Disqualification of Arbitrators in International Commercial Arbitration, 38 Int'l & Comp. L.Q. 26, 43-45 (1989).

[44] Victor Pey Casado and President Allende Foundation v. Chile, ICSID Case No. ARB/98/2.

his original nationality, which was that of the State party to the dispute. In the third case,[45] the proposal contended that the arbitrator involved was ineligible for appointment to the tribunal because he shared with the claimant, a natural person, the latter's second nationality. In the first case, the other arbitrators rejected the disqualification proposal, noting that the facts invoked did not indicate "even a non-manifest lack" of reliability for exercising independent judgment. In the second and third cases, the arbitrators concerned resigned from the tribunal before the disqualification proposal could be decided by the other tribunal members; replacement arbitrators were then appointed by the parties that had appointed the original arbitrators.

IV. PARTIES TO PROCEEDINGS AND TYPES OF CLAIMS

A. Parties to Proceedings

Almost 40 States have been parties to the 57 arbitration proceedings that have thus far been instituted under the ICSID Convention. The States have been from all regions of the world. By major groupings of countries, the proceedings have involved sub-Saharan African States in 21 cases; Latin American or Caribbean States in 15; Asian or Pacific States in 9; European States in 6; and Arab States in 6. The States that have been parties to more than one proceeding are Argentina, with five; Egypt, with four; the Republic of Congo and Jamaica, with three each; and Albania, Democratic Republic of Congo, Côte d'Ivoire, Guinea, Liberia and Malaysia, each of which has so far been a party to two proceedings. Under the Convention, a constituent subdivision (such as a province) or an agency of a State may be a party to a proceeding instead of, or in addition to, the State itself. In such cases, the subdivision or agency must have been designated to ICSID by the State concerned and the consent to arbitration of the subdivision or agency must have been approved by the State (unless the State has notified ICSID that no such approval is required).[46] Only a few Contracting States have made such arrangements for participation in ICSID Convention proceedings of constituent subdivisions or agencies.[47] This has been reflected in the caseload of the Centre: in no case

[45] Eudoro A. Olguín v. Paraguay, ICSID Case No. ARB/98/5.

[46] *See* ICSID Convention, *supra* note 1, art. 25(1) and (3).

[47] *See* Contracting States and Measures Taken by Them for the Purpose of the Convention, Doc. ICSID/8.

has a constituent subdivision been a party to the proceeding and just four proceedings have had an agency of the State as a party.

Investors parties to arbitration proceedings under the ICSID Convention have included nationals of almost 20 different countries. Certain of the industrial country nationalities have been heavily represented. Thus, out of the 80 investors[48] that have been parties to the proceedings, over 30 have been nationals of the United States. Ten of the investors have been Belgian; seven French; six British; five Swiss; four Greek; and three Italian. The remaining investors have been approximately equally divided between nationals of other industrial (mostly European) countries and nationals of developing countries. Thirteen of the investors have been natural persons.

Article 25(2)(b) of the ICSID provides an exception to the rule that the jurisdiction of the Centre does not extend to disputes between a State and its own nationals. Under Article 25(2)(b), a juridical person that has the nationality of a State owing to its incorporation there will nevertheless be eligible to participate in arbitration proceedings against the State if, "because of foreign control," the parties have agreed to treat the juridical person as a national of another ICSID Contracting State for the purposes of the Convention. Eleven of the investors parties to arbitration proceedings under the ICSID Convention have been locally-incorporated companies deemed to be foreign under this provision of the Convention. The remaining 56 corporate investors that have been parties to the proceedings have been treated as nationals of other ICSID Contracting States because of their incorporation there.[49] Almost all of these investors have been privately owned. The Convention does not, however, require this. A company that is partly or wholly owned by an ICSID Contracting State may qualify as one of its nationals, eligible to resort to arbitration under the ICSID Convention in respect of disputes with another ICSID Contracting State, if the company is not acting as an agent of the State or

[48] The number of investors exceeds the number of cases because in about a fifth of the cases there have been multiple claimant investors.

[49] In Amco v. Indonesia, the first tribunal observed that the "concept of nationality" of a juridical person in the ICSID Convention was the "classical one, based on the law under which the juridical person has been incorporated and the place of the social seat." Decision on jurisdiction, Sept. 25, 1983, 23 ILM 351, 362 (1984); 1 ICSID Rep. 389, 396 (1993). This may not, however, exhaust the possibilities. The principal drafter of the ICSID Convention believed that the nationality of a juridical person could in general (and not just for the purposes of the exception in Article 25(2)(b) of the Convention) also be based on the control of the juridical person. *See* A. Broches, the Convention on the Settlement of Investment Disputes, in Selected Essays of Aron Broches: World Bank, ICSID and Other Subjects of Public and Private International Law 188, 205-07 (1995).

discharging an essentially governmental function.[50] Thus, investors in three proceedings[51] to date have been enterprises substantially owned, directly or indirectly, by their home States.

Arbitration under the ICSID Convention has not just been a mechanism employed by industrial country investors to make claims against developing States. One case[52] involved a developing State as claimant against a foreign investor from an industrial country. In a second case,[53] the proceeding was instituted by an agency of a developing country against a company controlled by investors from another developing country. In three further cases,[54] developing States were respondents in proceedings instituted by nationals of other developing States. In another two cases,[55] industrial countries were respondents in proceedings instituted by nationals of other industrial countries. And in a further case,[56] a national of a developing country resorted to arbitration against an industrial country.

Reference was made earlier in this paper to the proliferation since the mid-1980s of investment treaties providing for recourse to arbitration under the ICSID Convention. In the same period, there has been an extraordinary—50 percent—increase in the number of ICSID Convention Contracting States. These two phenomena are of course closely connected with each other. Particularly impressive has been the increase in the number of ICSID members in Latin America, from two at the beginning of the period to thirteen today. This stands in contrast to the position taken by Latin American countries at the Annual Meeting of the Board of Governors of the World Bank in Tokyo in 1964, when those countries voted as

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[50] *See* Broches, Arbitration Under the ICSID Convention, in Selected Essays, *supra* note 49, at 433.

[51] Ceskoslovenska obchodni banka, a.s. v. Slovak Republic, ICSID Case No. ARB/97/4; Compagnie Française pour le Développement des Fibres Textiles v. Côte d'Ivoire, ICSID Case No. ARB/97/8; Compagnie Minière Internationale Or S.A. v. Peru, ICSID Case No. ARB/98/6.

[52] Gabon v. Société Serete S.A., ICSID Case No. ARB/76/1.

[53] Tanzania Electric Supply Company Ltd. v. Independent Power Tanzania Ltd., ICSID Case No. ARB/98/8.

[54] Gaith R. Pharaon v. Tunisia, ICSID Case No. ARB/86/1; Eudoro A. Olguín v. Paraguay, ICSID Case No. ARB/98/5; Empresa National de Electricidad S.A. v. Argentina, ICSID Case No. ARB/99/4.

[55] Swiss Aluminium Ltd. and Icelandic Aluminium Company v. Iceland, ICSID Case No. ARB/83/1; Mobil Oil Corporation and others v. New Zealand, ICSID Case No. ARB/87/2.

[56] Emilio Agustín Maffezini v. Spain, ICSID Case No. ARB/97/7.

a group against the resolution of the Board of Governors requesting the Executive Directors of the Bank to proceed with the preparation of the ICSID Convention.[57] The change reflects the widespread abandonment in Latin America, during the 1980s in particular, of the Calvo Doctrine (calling for the resolution of disputes with foreign investors by local courts only).[58] Almost half of the Convention proceedings pending before the Centre at present involve Latin American States or investors (or, in two cases, both) as parties. As indicated earlier, Argentina, the birthplace of Calvo, has found itself in the forefront of this movement, with five proceedings as the State party to the dispute (and a further proceeding as the home State of the investor). All but one of the proceedings involving Latin American parties have been brought to the Centre on the basis of the provisions on the settlement of investment disputes in BITs concluded by the countries concerned. Equally striking has been the addition since 1989 of Eastern European and former Soviet Union countries to the list of ICSID Contracting States. Nineteen such countries are now ICSID members. There have already been four ICSID Convention arbitration proceedings[59] involving such countries, all of them initiated in reliance on consents to such arbitration in investment laws or treaties of the countries involved.

B. Types of Claims

As pointed out in part II of this paper, the Convention restricts the jurisdiction of ICSID to disputes arising out of investments but does not define the term "investment." The constituent convention of another of the organizations belonging to the World Bank Group, the Multilateral Investment Guarantee Agency (the Agency or MIGA),[60] does however provide some specific classifications of investment. They are mentioned here not because there is any necessary link between MIGA's activities and

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[57] *See* 2 History of the ICSID Convention, *supra* note 24, at 606.

[58] On the Calvo Doctrine, see generally D. Shea, The Calvo Clause (1955).

[59] Tradex Hellas S.A. v. Albania, Case No. ARB/94/2; Leaf Tobacco A. Michaelides S.A. and others v. Albania, Case No. ARB/95/1; Ceskoslovenska obchodni banka, a.s. v. Slovak Republic, Case No. ARB/97/4; Alex Genin and others v. Estonia, Case No. ARB/99/2.

[60] Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985 (MIGA Convention), reprinted in 24 ILM 1605 (1985); 1 ICSID Rev.—FILJ 147 (1986).

those of ICSID but because the MIGA classifications may conveniently be used to describe the transactions involved in the cases submitted to arbitration under the ICSID Convention. According to the Convention Establishing MIGA, investments initially eligible for insurance from the Agency will include equity interests and such forms of non-equity direct investment as may be determined by the Board of Directors of MIGA.[61] In the Operational Regulations adopted by MIGA's Board, those forms of non-equity direct investment are determined to comprise various forms of contractual arrangements, such as production-sharing, turnkey and service contracts, and licensing and franchising agreements, which may be assimilated to direct investment in being medium or long term and in substantially depending for repayment on the fortunes of the investment project.[62] The Convention Establishing MIGA also provides that eligibility may be extended to other medium- and long-term investments, including loans related to an investment covered or to be covered by the Agency.[63] In the ICSID Convention arbitration cases that have been registered to date, the investments underlying the claims could all have been fitted under one of the above described rubrics of MIGA. Thus, in somewhat fewer than half of the cases, the investments have been equity interests, such as shareholdings in companies or interests in joint ventures. Somewhat more than half of the cases have concerned non-equity direct investments, including natural resource concession agreements and projects for the construction and operation of major production and service facilities in the host country. In two of the cases, the investments could have been placed in the category of medium- and long-term loans. In terms of their sectoral distribution, the investments involved in the cases have been varied. They have included investments in the agriculture, banking, energy, health, industrial, mining and tourism sectors.

In most of the cases submitted to arbitration under the ICSID Convention, the claim has been for monetary damages. In a few cases, however, the principal remedy sought has been a declaration as to the rights of the investor (with respect, for example, to taxation by the host country). Moreover, even where only monetary damages are sought, the request for

[61] *See id.* art. 12.

[62] *See* Operational Regulations of the Multilateral Investment Guarantee Agency, as amended through June 13, 1996, para. 1.05.

[63] *See* MIGA Convention, *supra* note 60, art. 12(b).

arbitration need not quantify the claim.[64] About a third of the requests have accordingly omitted to do this. As a result, it is not possible to state precisely the total value of the claims that have been submitted to arbitration under the ICSID Convention. The total amount would appear to be some U.S. $5 billion. This yields an average amount in dispute per case of around U.S. $90 million. In some cases, of course, the amount in dispute has been much lower and in others far higher. In the ICSID Convention arbitration proceedings that are now pending before the Centre, the amounts in dispute are in the U.S. $2-15 million range in four cases; in the U.S. $20-70 million range in seven cases; and over U.S. $300 million in four cases.

The majority of the claims submitted to arbitration under the ICSID Convention have concerned disputes over the performance of an investment agreement between the State and the foreign investor concerned. In such cases, the claimants have alleged breaches of specific provisions of the agreement or its unjustified repudiation. It will be recalled, however, that many of the cases that have been submitted to ICSID Convention arbitration in recent years have been brought to the Centre on the basis of consents to such arbitration in an investment law or treaty of the State concerned—that is, in circumstances not requiring a pre-existing arbitration agreement or indeed other contractual relationship between the parties. Only four of these cases have concerned an investment agreement between the State and the foreign national. In the rest of these cases, in which there was no such agreement between the parties, the claims have concerned such events as the revocation of investment incentives, civil strife in the host State and alleged expropriations by it. In these cases submitted to ICSID in reliance on an investment law or treaty, the claimants have alleged violations of the broad undertakings typically contained in such laws and treaties. The breadth of such undertakings is worth emphasizing. They include undertakings against direct or indirect expropriations or measures having equivalent effect that are not accompanied by prompt, adequate and effective compensation; undertakings against

[64] In most systems of arbitration for the settlement of international business disputes, it is necessary that the claim be quantified at the outset because administrative charges and arbitrator fees based on the amount in dispute must be paid by the parties in full in advance. *See, e.g.,* ICC Rules of Arbitration, *infra* note 150, app. III. In the case of arbitration under the ICSID Convention, this is not necessary because administrative charges are limited to out-of-pocket expenditures of the Centre, arbitrators fees are calculated on a per diem basis, and the charges and fees are paid as they are incurred from periodic advances of the parties as the proceeding progresses. *See further infra* pt. VI(D).

discrimination on the basis of nationality; promises of full protection and security; and guarantees of fair and equitable treatment.[65]

Article 46 of the ICSID Convention makes it clear that an arbitral tribunal will, unless the parties otherwise agree, have the authority to determine any counter-claims of a party "arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties." There have been counter-claims in seven ICSID Convention arbitration proceedings, most of them instituted before 1985. As mentioned several times earlier in this paper, proceedings instituted on the basis of consents in investment treaties in particular have since 1985 come to dominate the caseload of ICSID. The possibility of counter-claims by the State party may be limited in such proceedings. In such cases, it might be argued, there would be mutual consent of the parties to arbitration only to the extent of the overlap between the general consent or "offer" of the State to arbitrate in the investment treaty and the investor's particular consent taking advantage of that offer. There would normally be no reason for the consent of the investor to be broader than is necessary to enable the investor's grievance against the State to be submitted to arbitration under the Convention. Other grievances, such as that of the State against the investor, would then fall outside the scope of the consent of the two parties and could not be placed before the arbitral tribunal. If a counter-claim of the State is closely connected with the dispute of the investor, it may be assumed that the counter-claim will fall within the scope of the mutual consent of the parties and thus be admissible. In any event, as one writer[66] has pointed out, clarification of this difficult issue will probably have to await actual examples.

V. OBJECTIONS TO JURISDICTION AND REQUESTS FOR PROVISIONAL MEASURES

A. Objections to Jurisdiction

Article 41(1) of the ICSID Convention proclaims that an arbitral tribunal "shall be the judge of its own competence." Article 41(2) of the

[65] *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, July 16, 1993, Egypt-Greece, arts. 2 and 4; Agreement on the Promotion and Reciprocal Protection of Investments, Nov. 9, 1995, Slovenia-Switzerland, arts. 4 and 6; Agreement for the Promotion and Protection of Investments, Jan. 18, 1996, Chile-United Kingdom, arts. 2 and 4.

[66] Alvarez, Arbitration under the North American Free Trade Agreement, in Arbitration in Latin America (Kluwer, forthcoming in 2000).

Convention adds that the tribunal must address any objection by a party that the dispute is not within the jurisdiction of Centre, or for other reasons is not within the competence of the tribunal. On the formal raising of an objection to jurisdiction over the dispute, the proceeding on the merits will be suspended.[67] The parties will then be invited to file observations on the objection. If the tribunal so decides, there may follow oral procedures on the objection. The tribunal may deal with the objection as a preliminary question or join it to the merits. If the tribunal overrules the objection or joins it to the merits, the proceeding will of course resume. If on the other hand the tribunal upholds the objection, it must render an award to that effect. The decision of the tribunal, whether it be to overrule or to uphold the objection to jurisdiction, will not be prejudged by the registration of the request for arbitration by the Secretary-General of ICSID. As already emphasized, such registration only indicates that the information provided by the requesting party to the Secretary-General did not disclose to him a manifest lack of jurisdiction.[68]

Parties have raised objections to jurisdiction relating to the dispute in close to half of the cases submitted to arbitration under the ICSID Convention. In 15 of those cases, the tribunals ruled on the objections (in the other cases, such a ruling either has yet to be made or was obviated by the discontinuance of the proceeding). In almost all of these 15 cases, the tribunals were able to deal with the objections as preliminary questions, rather than in conjunction with the merits of the disputes. Jurisdiction was upheld in 11 of these 15 cases and declined in 4. In the majority of the cases, the objections were either that there was no consent at all to arbitration on the part of the respondent or, more often, that the consent of the respondent invoked by the claimant did not cover the dispute at hand. In several of the cases brought to ICSID on the basis of consents to arbitration in investment agreements, the objections were that one of the parties to the agreement was ineligible to resort to arbitration under the ICSID Convention or lacked the authority to do so. Objections of this kind were upheld in three of the four cases[69] in which tribunals declined jurisdiction over the disputes. In each of the cases

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[67] On this and the next four sentences of the text, see ICSID Arbitration Rules, *supra* note 1, rule 41.

[68] *See supra* pt. III(A).

[69] Vacuum Salt Products Ltd. v. Ghana, ICSID Case No. ARB/92/1, Scimitar Exploration Ltd. v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation, ICSID Case No. ARB/92/2; and Cable Television of Nevis, Ltd. and others v. Federation of St. Kitts and Nevis, ICSID Case No. ARB/95/2.

where jurisdiction was declined, the tribunals made it clear that the jurisdictional deficiency was hardly manifest from the request for arbitration which therefore had been correctly registered by the Secretary-General.

In addition to having to address any objections to jurisdiction raised by a party, arbitral tribunals constituted under the ICSID Convention may on their own initiative consider whether the disputes before them are within the jurisdiction of ICSID and their own competence.[70] Such tribunals have a special responsibility to do this if one of the parties fails to appear or to present its case in the proceeding. In the event of such a failure by a party, the other party may request the tribunal to deal with the questions submitted to it and to render an award.[71] Article 45(1) of the Convention, however, provides that the failure of a party to appear or present its case "shall not be deemed an admission of the other party's assertions." The tribunal must therefore independently determine whether those assertions, including of course the assertions regarding jurisdiction, are well founded. There have to date been only five arbitration proceedings under the ICSID Convention in which a party, the State party in each case, failed throughout all or most of the proceeding to appear and present its case. In all of these cases, the tribunals upheld their jurisdiction after considering all possible jurisdictional deficiencies and satisfying themselves that there were none. In three of these cases[72] the parties then agreed on a settlement of the dispute and a discontinuance of the proceeding. In the two other cases, the tribunals proceeded to render awards on the merits against the States concerned.[73]

B. Requests for Provisional Measures

The experience of ICSID in regard to provisional measures has stimulated much discussion over the years. The experience has centered on two provisions of the ICSID Convention. The first provision is that of Article 26 of the Convention. It has been related to the role of national courts in

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[70] *See* ICSID Arbitration Rules, *supra* note 1, rule 41(2).

[71] *See* ICSID Convention, *supra* note 1, art. 45(2).

[72] *See* Alcoa Minerals of Jamaica, Inc. v. Jamaica, ICSID Case No. ARB/74/2; Kaiser Bauxite Company v. Jamaica, ICSID Case No. ARB/74/3; and Reynolds Jamaica Mines Ltd. and Reynolds Metals Company v. Jamaica, ICSID Case No. ARB/74/4.

[73] *See* Liberian Eastern Timber Corporation v. Liberia, ICSID Case No. ARB/83/2, Award of Mar. 31, 1986 and Rectification of June 10, 1986, 2 ICSID Rep. 346 (1994); American Manufacturing & Trading, Inc. v. Democratic Republic of Congo, ICSID Case No. ARB/93/1, Award of Feb. 21, 1997, 36 ILM 1534 (1997).

this area. According to Article 26, consent to arbitration under the Convention excludes recourse to any other remedy unless the parties have agreed otherwise. The second provision is that of Article 47 of Convention. It authorizes tribunals to recommend any provisional measures required to preserve the respective rights of either party.

The exclusion of other remedies in Article 26 of the Convention clearly precludes parties with unqualified consents to arbitration under the Convention from bringing the substance of their disputes to national courts. Before the Arbitration Rules of ICSID were amended to deal with the question in 1984, there was considerable debate as to whether Article 26 equally prevented parties from seeking court-ordered provisional measures, in particular conservatory attachments which an arbitral tribunal, even after one were formed, would be unable to order. Some writers[74] argued that Article 26 did not have this effect. To bar recourse to court-ordered conservatory measures in particular would, they contended, undermine the efficacy of ICSID Convention arbitration. Other writers[75] took the view that Article 26 clearly precluded recourse to any other remedy, whether provisional or otherwise. Such absolute exclusivity of the arbitral remedy would, they argued, be consistent with the self-contained nature of arbitration under the ICSID Convention. The debate referred in part to several national court decisions in the 1980s concerning conservatory attachments obtained by parties in ICSID Convention cases. The leading decision was for some time a decision rendered in 1984 by the Court of Appeal of Rennes in a case involving Atlantic Triton, a Norwegian company, against the Republic of Guinea.[76] Atlantic Triton in that case obtained from the Quimper Commercial Court an attachment of Guinean assets in order to secure the claim of Atlantic Triton. In its decision, the Court of Appeal of Rennes vacated the attachment as having been granted in violation of Article 26 of the Convention. Two years later, however, in 1986, the Court of Cassation of France quashed the decision of the Rennes Court of Appeal.[77] The Court of Cassation took the view that Article 26

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[74] *See, e.g.*, Gaillard, Note, 114 Journal du droit international 127, 128 (1987).

[75] *See, e.g.*, Friedland, ICSID and Court-Ordered Provisional Remedies: An Update, 4 Arb. Int'l 161-62 (1988). *See also* Friedland, Provisional Measures and ICSID Arbitration, 2 Arb. Int'l 335 (1986); Delaume, ICSID Arbitration and the Courts, 77 AJIL 784 (1983); Delaume, ICSID Arbitration Proceedings: Practical Aspects, 5 Pace L. Rev. 563-85 (1985).

[76] *See* Atlantic Triton Company v. Guinea, Decision of Oct. 26, 1984 of the Court of Appeal of Rennes, 24 ILM 341 (1985).

[77] *See* Decision of Nov. 18, 1986 of the Court of Cassation, 2 ICSID Rev.—FILJ 182 (1987).

of the Convention did not exclude resort to national courts for provisional measures designed to assure the execution of the eventual award. According to the Court of Cassation, such an exclusion could only result from the consent of the parties, either explicit or implicit in their adoption of arbitral rules incorporating the exclusion. As indicated earlier, the ICSID Arbitration Rules were amended in 1984, just before the Rennes Court of Appeal rendered its decision. As amended, the Rules included a new Rule 39(5) that did in effect specifically exclude court-ordered provisional measures if the parties had not agreed otherwise.[78] The Atlantic Triton case was governed by the pre-1984 Arbitration Rules of ICSID which lacked a provision comparable to Rule 39(5). It had been argued that Rule 39(5) was merely declaratory of the position obtaining from the start under Article 26 of the ICSID Convention.[79] In any event, for cases subject to the Arbitration Rules as amended in 1984, that is, for cases where the parties' consent to arbitration was given after the adoption of the revised Arbitration Rules, the controversy was laid to rest. It is now clear that recourse may not be had to courts for provisional measures unless the parties have stipulated otherwise in their consent to arbitration. In the case of ICSID Convention arbitration proceedings brought under BITs and multilateral treaties dealing with investment, this in practice means that court-ordered provisional measures will be available only if so provided in the BIT or multilateral treaty containing the consent of the State party to the dispute.[80]

As mentioned earlier, the provision of the ICSID Convention on arbitral provisional measures, Article 47, only authorizes the tribunal to "recommend" such measures. It has been said that provisional measures adopted by arbitrators under the Convention can therefore only have

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[78] According to ICSID Arbitration Rule 39(5), parties may "request any judicial or other authority to order provisional measures, prior to the institution of the [arbitration] proceeding, or during the proceeding, for the preservation of their respective rights and interests" but only if the parties "have so stipulated in the agreement recording their consent" to arbitration under the Convention. In the absence of such a stipulation, recourse to judicial or other authorities for the ordering of provisional measures is excluded.

[79] *See, e.g.*, Marchais, ICSID Tribunals and Provisional Measures—Introductory Note to Decisions of the Tribunals of Antwerp and Geneva in MINE v. Guinea, 1 ICSID Rev.—FILJ 372 (1986);

[80] For an example of an investment treaty that authorizes recourse to courts for provisional measures, see Treaty Concerning the Encouragement and Reciprocal Protection of Investment, July 1, 1995, Nicaragua-U.S., art. IX.

moral force.[81] However, parties would be ill-advised to disregard such measures; the tribunal will normally be able to take into account in its final award the effects of any non-compliance with its recommendations.[82] Indeed, in a number of cases, decisions of tribunals on provisional measures have included a reminder to the parties that any non-compliance will be taken into account in the final award.[83]

The authority that arbitral tribunals have under Article 47 is a broad one. They may recommend any measures they judge necessary to safeguard the rights of a party. Tribunals have been asked to exercise this authority to grant a variety of different types of measures by both claimants and respondents. The objects of the requests—which have not always been granted—have for example included the conservation of documentary evidence and alleged adverse press campaigns by a party's opponent.[84] One of the most noteworthy types of measures that tribunals have been asked to recommend under Article 47 of the Convention has been measures asserting their jurisdictional exclusivity under Article 26 of the Convention in respect of concurrent national court proceedings.[85] This is in fact the type of arbitral provisional measure that has most often been requested. Altogether, there have been seven cases in which tribunals have been asked to adopt this kind of measure, calling on a party to refrain from engaging in concurrent national court litigation in respect of the dispute or from pursuing the implementation of orders obtained in such litigation. In one such case, the tribunal contented itself with a general recommendation that the parties refrain from actions incompatible with the upholding of the investment agreement between them; in a second case, the request by the respondent for provisional measures was superseded by the quashing by a higher court

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[81] *See* Caron, Interim Measures of Protection: Iran-U.S. Claims Tribunal, 46 Zeitschrift für ausländisches öffentliches Recht and Völkerrecht 466, 478 (1986). For a different view, see Orrego Vicuña, The Binding Nature of Procedural Orders in International Arbitration, 10 ICC Bull. No. 1, 38, 43 (1999).

[82] *See* Note B to Arbitration Rule 39, ICSID Regulations and Rules, *supra* note 39, at 105.

[83] *See, e.g.*, Inter-Maritime Management S.A. v. Guinea, Geneva Tribunal of First Instance, Judgment of Mar. 13, 1986, 1 ICSID Rev. –FILJ 383, 386-87 (1986) (quoting the Dec. 4, 1985 recommendation of the arbitral tribunal on provisional measures in Maritime International Nominées Establishment v. Guinea, ICSID Case No. ARB/84/4).

[84] *See* Delaume, ICSID Tribunals and Provisional Measures—A Review of the Cases, 1 ICSID Rev.—FILJ 392 (1986).

[85] *See* Brower & Goodman, Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6 ICSID Rev.—FILJ 431, 457 (1991).

of the lower court order relied upon by the claimant; and in a third case, the request, directed at possible recourse by the respondent to local courts, was overtaken by an undertaking by the respondent to defer any such recourse. In three further such cases, the tribunals by contrast granted requests by parties for provisional measures asking their opponents to discontinue related concurrent court litigation. In two of these three further cases, parties complied with the measures; in the third, the measures were superseded by an overall settlement of the dispute.

Some of the cases in which arbitral provisional measures have been requested have also involved objections by parties to the tribunal's jurisdiction over the dispute. Yet tribunals have issued provisional measures before definitively ruling on such objections, without prejudice to the parties' rights to express in the rest of the proceeding their objections to jurisdiction on any other aspect of the dispute. In so doing, their decisions have conformed with what seems to be the well-settled position in international adjudication, that an international tribunal may decide on provisional measures prior to establishing its jurisdiction over the dispute if it appears that there is, prima facie, a basis for asserting such jurisdiction. Several writers[86] have suggested that the determination implicit in the Secretary-General's decision to register a request for arbitration, that the request does not show a manifest lack of jurisdiction, may provide to the arbitral tribunal a good starting point or even an assurance for the conclusion that there is sufficient jurisdiction for a decision on provisional measures. It would however appear that the determination by the Secretary-General, based only on the "the information contained in the request" and moreover not made by an arbitrator, should not exempt the tribunal from independently satisfying itself as to its authority to issue provisional measures.[87] This may be inferred from the Arbitration Rules of the Centre which provide an opportunity for the matter to be ventilated before the tribunal by requiring a tribunal, before it decides upon provisional measures, to give both parties the opportunity to present their observations.[88]

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[86] *See, e.g.*, Masood, Provisional Measures of Protection in Arbitration under the World Bank Convention, 1 Delhi L. Rev. 138, 145 (1972); Brower & Goodman, *supra* note 85, at 452-56.

[87] *See supra* pt. III(A).

[88] *See* ICSID Arbitration Rules, *supra* note 1, rule 39(4).

VI. THE CONDUCT OF PROCEEDINGS

The Arbitration Rules of ICSID regulate in detail the conduct of Convention arbitration proceedings following their institution. In addition to elaborating on the basic provisions of the Convention in this respect, the Arbitration Rules cover matters not specifically dealt with in the Convention. These include sessions and deliberations of the arbitral tribunal and written and oral procedures. Under the Arbitration Rules, a tribunal must ordinarily meet for its first session within 60 days after the constitution of the tribunal.[89] The first session will normally be devoted to preliminary procedural and organizational matters. The written phase of the proceeding will then take place. This will usually consist of the following written pleadings: a memorial by the claimant; a counter-memorial by the respondent; a reply by the claimant; and a rejoinder by the respondent. The written procedure will be followed by the oral procedure consisting of the hearing by the tribunal of the parties and their representatives and of any witnesses and experts. Separate written and oral procedures may be held on any objections to jurisdiction or requests for provisional measures. Once the parties have finished presenting their case, the tribunal will declare the proceeding closed. It will then have a maximum of 90 days within which to draw up and sign its award. Of course, not every proceeding has fully followed this pattern. In particular, many of the proceedings have, as explained in the next part of this paper, been discontinued at an early stage. In addition, there have among the cases often been differences of approach to procedural issues as a result of such obvious factors as the disposition of the parties to cooperate with each other. As indicated in several examples below, such cooperation has in some areas generally been forthcoming and parties have made use of their power under Article 44 of the Convention to depart from provisions of the Arbitration Rules to meet the needs of the particular case. Judging from the questions that the Secretariat of ICSID regularly receives from parties at the outset of proceedings, there are several procedural matters that have been of special interest to parties. These matters have included the place of proceedings, the language or languages of the proceedings and the representation of the parties.

[89] In connection with this and the immediately following part of the text, see ICSID Arbitration Rules, *supra* note 1, rules 13-38.

A. Place of Proceedings

In accordance with Article 62 of the ICSID Convention, arbitration proceedings thereunder will, unless the parties otherwise agree, be held at the seat of the Centre, at the principal office of the World Bank in Washington, D.C. Article 63(a) of the Convention provides for the possibility of the conclusion by ICSID of special arrangements with "other appropriate insitution[s]" for the holding of proceedings at the seats of such institutions if parties so agree. The Centre has so far concluded arrangements of this kind with seven other arbitration institutions: the Permanent Court of Arbitration at The Hague; the two Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo and Kuala Lumpur; the Australian Centre for International Commercial Arbitration at Melbourne; the Australian Commercial Disputes Centre at Sydney; the Singapore International Arbitration Centre; and the Gulf Cooperation Council Commercial Arbitration Centre at Bahrain.[90] Under Article 63(b) of the Convention, proceedings may if the parties so agree be held at any other place approved by the tribunal after consultation with the Secretary-General of the Centre.

ICSID Convention arbitration proceedings are insulated by the Convention from the application of the arbitration laws of ICSID member countries. So long as it is in one of the many member countries, the place of proceedings will therefore have little more significance than that of the designated venue for meetings of the tribunal. In addition, although the Arbitration Rules provide that an arbitral tribunal shall meet at the designated place of proceedings,[91] parties have usually agreed that their tribunal may meet not only at that place but also elsewhere as may be convenient. The place of proceedings in almost half of the arbitration cases so far brought under the Convention has been the seat of ICSID. Often, this has been the result of express agreement of the parties on the matter and not just as a consequence of a lack of such agreement. The proceedings have thereby benefited further from the logistical support of the Secretariat of ICSID as well as the conference facilities of the World Bank. Another frequently selected place of proceedings has been Paris, where proceedings have with similar benefits been held at the European Office of the World Bank. An interesting approach that the parties have agreed upon in four

[90] For examples of the texts of such agreements, see ICSID Second Annual Report 1967/1968, at 19-20.

[91] *See* ICSID Arbitration Rules, *supra* note 1, rule 13(3).

cases (all but one of which are still pending) has been to have meetings alternatingly in the capital of the host State and the capital of the home State of the investor concerned.[92] Of the institutions with which ICSID has concluded arrangements under Article 63(a) of the Convention, the Permanent Court of Arbitration has hosted meetings in about a half dozen Convention proceedings and the Kuala Lumpur Regional Arbitration Centre has done so in one such proceeding. As indicated above, tribunals have commonly been authorized to meet away from the official place of proceedings as convenient. Such flexibility has repeatedly proved to contribute to efficiency and economy, particularly in relation to meetings of arbitrators for their private deliberations. Modern communications technology has also increasingly played a role in the holding of meetings of tribunals constituted under the ICSID Convention. In several cases recently, such tribunals have held sessions with the parties by telephone conference and staff of the Secretariat have in several other instances "attended" tribunal sessions by videolink.

B. Procedural Languages

In accordance with its Administrative and Financial Regulations, the Centre has three official languages. These are English, French and Spanish.[93] The parties to a proceeding may freely agree on the use of one or two of these languages in the proceeding.[94] The Arbitration Rules of the Centre provide that, if the parties do not agree on a procedural language, each of them may select one of the official languages for this purpose.[95] Up until 1996, all of the proceedings instituted under the Convention had been conducted in English or French or both. The majority of the cases still are conducted in one or both of these languages. However, reflecting the influx of cases with Latin American parties in particular, nine Convention proceedings instituted since 1996, including seven of the pending proceedings, have had Spanish as a procedural language. In two of the pending Convention cases, Spanish is the only procedural language. In four others, both English and Spanish are

[92] Mobil Oil Corporation and others v. New Zealand, ICSID Case No. ARB/87/2; Misima Mines Pty. Ltd. v. Papua New Guinea, ICSID Case No. ARB/96/2; Société d' Investigation de Recherche et d'Exploitation Minière v. Burkina Faso, ICSID Case No. ARB/97/1; Lanco International, Inc. v. Argentina, ICSID Case No. ARB/97/6.

[93] *See* ICSID Administrative and Financial Regulations, *supra* note 1, reg. 34(1).

[94] *See* ICSID Arbitration Rules, *supra* note 1, rule 22(1).

[95] *Id.*

procedural languages and a further pending proceeding is being conducted in French and Spanish. The Arbitration Rules provide that if two procedural languages are selected by the parties, the orders and the award of the tribunal should be rendered and the record of the proceeding kept in both procedural languages, both versions being equally authentic.[96] When this provision has been insisted upon in bilingual proceedings, the preparation of the instruments in two versions has obviously slowed the proceeding and increased its cost. In most of the recent ICSID Convention cases, however, parties have been prepared to agree to relax the rule and authorize the tribunal and the Secretariat of the Centre to use just one of the languages in the proceeding (or to alternate between the two languages).

C. Representation of the Parties

The Arbitration Rules make it clear that parties to arbitration proceedings under the ICSID Convention are free to decide on their representation in the proceeding.[97] There is no requirement in the Convention or Arbitration Rules that parties be represented by counsel or by counsel admitted to practice in a particular jurisdiction. Parties have, however, rarely tried to do without legal representation. In about a third of the cases, the State party has been represented by its own government lawyers, generally lawyers employed by the ministry of justice or State claims organization of the country concerned. More often, in about half of the cases, the State party has instead been represented by private lawyers belonging to law firms or, occasionally, university law faculties. In the remaining cases, the State party has assembled a team comprising both government and private lawyers. In a small number of the cases, corporate investors have been represented by in-house counsel. Such investors have far more frequently retained outside counsel to represent them. In the majority of the cases, therefore, the representatives of both parties to the proceeding have included independent private practitioners. These often have been distinguished arbitration specialists with previous service as counsel and arbitrators in ICSID and other arbitration fora. The great majority of the lawyers that have represented parties to the proceedings have been American. One consequence of this has been that distinctively American advocacy techniques have often marked the proceedings. The preponderance of U.S.

[96] *Id.* rule 22(2).

[97] *Id.* rule 18.

counsel is only partly explained by the fact that many of the investors parties to proceedings have also been American. Non-U.S. parties have often also decided to retain U.S. counsel. British, French and Swiss counsel have, however, represented parties to Convention proceedings on a substantial number of occasions. In addition, Latin American counsel have increasingly acted in the proceedings (as a result of the increase in the number of cases involving Latin American parties).

D. Duration and Costs

One of the distinctive features of arbitration proceedings under the ICSID Convention is the extensive administrative support that they receive from the Secretariat of the Centre. Such support is principally provided by the secretary that the Secretary-General appoints for each tribunal from the legal staff of the Secretariat.[98] The functions of the secretary of a tribunal include serving as the channel of communications between the parties and arbitrators, making the necessary arrangements for hearings, keeping minutes of hearings and preparing drafts of procedural orders.

Another important function carried out by the secretary is the administration of the system provided by the Administrative and Financial Regulations for the financing of the direct costs of arbitration proceedings under the Convention. These costs comprise the fees and expenses of the arbitrators and the out-of-pocket expenditures incurred by the Centre for the proceeding. The Regulations provide for the fees of arbitrators to be determined on a per diem basis, for each day of participation in meetings of the tribunal and for each eight-hour day of other work performed in connection with the proceeding.[99] The Schedule of Fees of the Centre[100] sets

[98] *See* ICSID Administrative and Financial Regulations, *supra* note 1, reg. 25.

[99] *See id.* reg. 14.

[100] ICSID Schedule of Fees (Apr. 5, 1999). For ICSID Convention proceedings, the fees set forth in the ICSID Schedule of Fees are, strictly speaking, limits within which arbitrators can determine their fees in the absence of advance agreement on the matter between the tribunal and the parties. *See* ICSID Convention, *supra* note 1, art. 60. In practice, in ICSID Convention proceedings, the fees set out in the Schedule of Fees have come generally to be regarded as automatically applicable rates which may be changed if the tribunal and the parties so agree in advance. This is reflected in the drafting of the introductory phrase of the relevant provision of the ICSID Administrative and Financial Regulations (*supra* note 1, reg. 14(1)). Arbitrator fees higher than those specified in the ICSID Schedule of Fees have been agreed upon between tribunals and parties in seven ICSID Convention proceedings to date. The Centre's Memorandum on the Fees and Expenses of ICSID Arbitrators, Apr. 1999, at para. 3, however, recommends that arbitrators not initiate requests for fees higher than those specified in the Schedule of Fees.

forth an amount of U.S. $1,100 for such per diem fees. The Regulations also entitle arbitrators to receive, on the basis of norms established for the Executive Directors of the World Bank, a subsistence allowance and travel expenses in connection with meetings of the tribunal concerned.[101] The out-of-pocket expenditures of the Centre typically include expenses for communications services and for the services of persons (such as interpreters, sound engineers and typists) especially engaged by the Centre for the proceeding. If the proceeding is held away from the seat of the Centre, such expenses may also include charges of the host of the proceeding and travel and subsistence expenses of the secretary.

The fees and expenses of arbitrators are paid to them by the Centre from funds advanced to it by the parties.[102] The parties to a proceeding are requested at intervals of three to six months to make such advances, generally in equal shares, of amounts estimated to cover the fees and expenses of the arbitrators, and any out-of-pocket expenditures of the Centre, to be incurred in the next three to six months. The estimates of and requests for the necessary amounts are made by the secretary, acting in this respect for the Secretary-General, after consultation with the president of the tribunal. Each request for advances will specify that the amounts are payable in U.S. dollars into a World Bank trust fund account with the Federal Reserve Bank of New York. The amounts must be paid in full within 30 days. A delay will elicit from the secretary one or more reminders followed, if full payment is still not forthcoming, by a notification informing both parties of the default and inviting either of them to make the required payment. Under the Administrative and Financial Regulations, the Secretary-General (or the secretary acting on his behalf) may move that the tribunal stay the proceeding at any time 15 days after the above-mentioned notification if, by the date of such motion, any part of the required payment remains outstanding. The Administrative and Financial Regulations provide that if a proceeding is stayed for non-payment for a consecutive period in excess of six months, then the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the tribunal discontinue the proceeding. Proceedings have occasionally been stayed for non-payment under this provision. The stays have usually been of short duration as they generally have resulted in prompt payment. There

[101] In connection with this and the next two sentences of the text, see ICSID Administrative and Financial Regulations, reg. 14(1).

[102] The references in this paragraph are also to the ICSID Administrative Financial Regulations, *supra* note 1, reg. 14(3).

has to date never been an instance of prolonged non-payment leading to a discontinuance of the proceeding. With the assistance of administrative staff of the Secretariat, the secretary processes for payment the claims of the arbitrators and claims for other expenditures incurred in the proceeding. On the conclusion of the proceeding, the secretary and administrative staff will draw up an accounting of the parties' advances. Once the accounting has been approved by the World Bank's Accounting Department, the secretary will present it to the parties and, at the same time, arrange for the return to them of any unexpended balances of the advances.[103]

In their 1965 Report on the ICSID Convention, the Executive Directors of the World Bank explained that they had decided that the Bank should, within reasonable limits, underwrite the basic overhead costs of the Centre.[104] In keeping with this decision, the Bank concluded with ICSID, shortly after the establishment of the Centre, a Memorandum of Administrative Arrangements, pursuant to which the Bank meets ICSID's administrative budget (U.S. $1.2 million in fiscal year 1999).[105] It is as a result of this support of the World Bank that ICSID has been able to limit its administrative charges in proceedings to reimbursement of its out-of-pocket expenditures for the proceeding. The World Bank has thus contributed to the containment of the costs of the resolution of investment disputes involving its member countries. In part because of this, the direct costs of ICSID Convention proceedings borne by the disputing parties have been low in comparison with those that can be incurred in commercial arbitrations.

Before considering the actual amounts involved, it should be recalled that in the "pay-as-you-go" system of arbitration under the ICSID Convention, direct costs are a function of the duration of the proceeding. It should also be borne in mind that well over a third of cases submitted to such arbitration, having only recently begun, are still pending and thus cannot be taken into account in an assessment of the overall duration and costs of the proceedings. The average duration of the almost 40 Conven-

[103] The Secretary will have previously also provided an accounting to the arbitrators following the closure of the proceeding. *See* ICSID Arbitration Rules, *supra* note 1, rule 28(2). The accounting provided at that stage to the arbitrators will not, however, represent a final accounting as there will then remain the preparation of the award (*cf.* ICSID Arbitration Rule 46) and hence additional arbitrator fees and expenses.

[104] *See* Report of the World Bank Executive Directors on the ICSID Convention, *supra* note 1, para. 17.

[105] *See* Memorandum on Administrative Arrangements between the World Bank and ICSID, reprinted in ICSID First Annual Report 1966/1967, at 15-16.

tion proceedings that have thus far been concluded is 29 months from the constitution of the tribunal to the rendition of the award or of the order for the discontinuance of the proceeding (in the cases that have been settled before an award).[106] Direct costs in the proceedings concluded in the last 15 years have averaged about U.S. $220,000.[107] This average of course conceals considerable variation from case to case. In one case that was amicably settled by the parties six months after the constitution of the tribunal, direct costs totaling just U.S. $3,000 were met from the interest that had in the meantime accrued on the advances of the parties (which allowed the Centre to return the advances to the parties in full). At the other end of the range, in a proceeding that lasted almost 90 months, with a prolonged jurisdictional phase as well as a phase on the merits, direct costs totaled over U.S. $760,000. Among the cases, direct costs have nevertheless typically been around U.S. $200,000. Although this is not an insubstantial amount, it is far below the totals that may be encountered in commercial arbitration, and in particular ad hoc or non-institutional commercial arbitration. Moreover, even at the higher end of the range, direct costs have often been considerably exceeded by the fees of counsel to each of the parties to the proceedings.

VII. APPLICABLE LAW, AWARDS AND POST-AWARD REMEDIES

A. Applicable Law

Under the ICSID Convention, parties have full autonomy to determine which rules of law the arbitrators should apply to the substance of the dispute. Article 42(1) of the Convention provides in its first sentence that a tribunal "shall decide a dispute in accordance with such rules of law as may be agreed by the parties." In the absence of such agreement of the parties, a tribunal must, according to the second sentence of Article 42(1),

[106] This average includes the cases in which there was recourse to the remedy of annulment (*see infra* note 120 and accompanying text). If these cases are excluded from the calculation, the average duration of the proceedings concluded to date drops to 22 months.

[107] This average again includes the cases in which there was recourse to the remedy of annulment (*see supra* note 106). Excluding those cases, the average of the direct costs incurred in the concluded proceedings is some U.S.$125,000. This and all of the dollar amounts mentioned in the text have been calculated without adjustments for inflation. In real terms, therefore, the amounts would be somewhat higher.

"apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." Article 42(3) of the Convention makes it clear that a tribunal may, if the parties so agree, also decide a dispute *ex aequo et bono*, that is, in accordance with considerations of equity and justice as opposed to strict rules of law.

In the cases that have been submitted to ICSID on the basis of arbitration clauses in investment agreements concluded between the parties, the clauses more often than not have addressed the question of applicable substantive law. Most of these clauses have provided for the application of the law of the host State concerned. Few, however, have done so in unqualified terms. In one case,[108] the clause, while referring to the law of the State party, also empowered the arbitrators to decide disputes *ex aequo et bono*. More commonly, the reference to the law of the host State has been coupled with a reference to international law, as in the second sentence of Article 42(1) of the Convention. That sentence has been interpreted by some as giving rules of international law a "dual role" in relation to the law of the State party to the dispute, "that is *complementary* (in case of a 'lacuna' in the law of the State), or *corrective* should the State's law not conform on all points to the principles of international law."[109] Parties have in several cases argued that the law of the State party conflicted with international law on specific points and that the tribunal should on those points therefore apply the latter law in preference to the former. Interestingly, in two of these cases it was the State party that thus argued against the exclusive application of its own law. Among the cases where the applicable law has comprised both the law of the State party and international law, either as a result of party agreement to this effect or, in the absence of agreement of the parties, as a result of the application of the second sentence of Article 42(1) of the Convention, arbitral tribunals have not been quick to find gaps in the law of the State party or inconsistencies between it and inter-

[108] *See* Atlantic Triton Company Ltd. v. Guinea, ICSID Case No. ARB/84/1, Award of April 21, 1986, 115 Journal du droit international 181, at paras. 1 and 9 (1988).

[109] Klöckner Industrie-Anlagen GmbH and others v. Cameroon, ICSID Case No. ARB/81/2, Ad Hoc Committee Decision of May 3, 1985, 1 ICSID Rev.—FILJ 89, 112 (1986) (emphasis in original). The French text of Article 42(1) of the ICSID Convention refers to "principles" of international law rather than to "rules" of such law as in the English and Spanish texts of the Convention. This explains why the former term is used in the French original of the ad hoc Committee Decision of May 3, 1985 and in its English translation quoted above.

national law. Arbitral tribunals have on only two occasions[110] decided to apply international law in such circumstances, in one case to fill a perceived gap in the law of the State concerned and in the other to correct what the tribunal had concluded was an inconsistency between the law of the State party and international law. In proceedings instituted under the ICSID Convention, arbitrators have nevertheless increasingly been required to decide disputes in accordance with international law. This is a result of the many new cases that have been brought to the Centre under the arbitration provisions of investment treaties. In such cases, tribunals have been called upon to decide the disputes in accordance with the international law rules of the treaties concerned as to the substantive treatment of covered investors. As mentioned earlier, those rules, guaranteeing investors against uncompensated expropriation and unfair or inequitable treatment for example, are generally expressed in the treaties in very broad terms. Tribunals have had the task of developing these broad rules by applying them to the facts of particular cases. Although this important work has only just begun, it has already resulted in several arbitral decisions[111] elucidating some of the rules of the "new international law of foreign investment"[112] embodied in the treaties.

B. Awards

It is often observed that the mere existence of binding arbitration arrangements can serve as a framework for or inducement to the negotiated settlement of disputes. This seems certainly to have been true of arrangements providing for arbitration under the ICSID Convention. Provisions providing for such arbitration have been included in numerous investment

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[110] *See* Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award of May 20, 1992, 8 ICSID Rev.—FILJ 328, 393 (1993); AGIP S.p.A. v. Republic of Congo, ICSID Case No. ARB/77/1, Award of Nov. 30, 1979, 1 ICSID Rep. 306, 323 (1993).

[111] *See, e.g.*, Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Award of June 27, 1990, 6 ICSID Rev.—FILJ 526, 545-47 (1991); 4 ICSID Rep. 246 (1997) (holding that the principle, embodied in the underlying investment treaty, that the host State should accord foreign investments "full protection and security," did not mean that the State guaranteed the physical protection and security of the investment, but rather that the State should exercise "due diligence" in seeking to assure that the investment would have such protection and security).

[112] The phrase is from Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 Int'l Law. 655, 675 (1990).

agreements and, as indicated before, in about 20 investment laws and about 1,000 investment treaties. Yet the number of cases brought to the Centre, though growing rapidly, has remained modest. Disputes have often also been settled amicably after the institution of proceedings. Some parties may even have instituted proceedings with the acceleration of a settlement in mind. One of the provisions added to the Arbitration Rules of ICSID when they were amended in 1984 was a provision intended further to encourage agreed settlements. Under the provision, a pre-hearing conference may be held between the tribunal and the parties, duly represented by their authorized representatives, to consider the issues in dispute with a view to reaching an amicable settlement.[113] In one case since, a settlement was agreed upon at such a conference. Many further cases have been settled early. Altogether, half of the concluded arbitration proceedings were as a result of such settlements discontinued before the rendition of an award. Moreover, in 3 of the 20 proceedings that gave rise to awards, the awards in fact merely embodied, at the request of the parties, the terms of a settlement agreement of the parties.[114] As explained earlier, in another 4 cases, the awards dismissed the claims for lack of jurisdiction. In one of those cases,[115] the award also rejected the claims on the merits, jurisdiction and the merits having been linked in that case. In the remaining proceedings that led to final awards, the awards have upheld one or more claims and required the respondent, the State party in each case, to pay a specified amount to the claimant. The amounts awarded have ranged from about U.S. $400,000 to about U.S. $30 million. In only two of these cases have the awards granted the claimants the amounts that they initially sought. More commonly, the amounts awarded have ranged from 5% to 20% of the amounts claimed. The overall total of the amounts awarded equals some 12% of the total of the amounts claimed in the cases concerned.[116]

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[113] *See* ICSID Arbitration Rules, *supra* note 1, rule 21.

[114] Guadelupe Gas Products Corporation v. Nigeria, ICSID Case No. ARB/78/1, Award rendered July 22, 1980; Antoine Goetz and others v. Burundi, ICSID Case No. ARB/95/3, Award rendered Feb. 10, 1999; WRB Enterprises and Grenada Private Power Ltd. v. Grenada, ICSID Case No. ARB/97/5, Award rendered Dec. 21, 1998. The ICSID Arbitration Rules, *supra* note 1, rule 43(2), specifically provide for the possibility of such awards recording settlement agreements of the parties.

[115] *See* Tradex Hellas S.A. v. Albania, ICSID Case No. ARB/94/2, Award of April 29, 1999, reproduced in 14 ICSID Rev.—FILJ 197 (1999).

[116] This is not dissimilar to the experience of such other international arbitral fora as the Iran-U.S. Claims Tribunal. *See* J. Westberg, International Transactions and Claims Involving Governmental Parties—Case Law of the Iran-United States Claims Tribunal 250-52 (1991).

This is not to suggest that the arbitrators have tended to set the amounts too low. It may instead suggest that the amounts claimed have tended to be exaggerated.

Article 61(2) of the Convention provides that, unless the parties otherwise agree, the tribunal will in its award determine how and by whom the expenses of the parties and the direct costs of the proceeding will be paid. In the cases of awards embodying settlement agreements of the parties, those agreements dealt with the question of the allocation of expenses and costs. In the absence of agreement of the parties concerned, all of the other awards have had to address this question. In five cases, the award required one party to pay for all of the direct costs of the proceeding and to bear not only its own legal and other expenses but also to pay some or all of the expenses of the other party. In one of those cases, it was the unsuccessful claimant investor that was required to shoulder all or most of the costs and expenses and in the other four it was the State party. In the rest of the cases, the awards required each party to bear its own expenses and to pay one half of the direct costs of the proceeding. The merits of each case and the behavior of the parties have clearly shaped the awards in this respect. It may be added that most of the awards that have been rendered to date have been unanimous awards of the tribunals concerned. In only four cases have arbitrators appended dissenting opinions to the awards.

C. Post-Award Remedies

Among the several features of arbitration under the ICSID Convention that distinguish it from other forms of arbitration, the most important perhaps are those regarding the finality and enforcement of awards. Article 53 of the Convention provides that an award rendered thereunder shall be binding on the parties and not subject to any appeal or to any other remedy except those provided for in the Convention itself. Four remedies are provided for in the Convention. The first is addition to or correction of the award.[117] It may briefly be called rectification. The three other remedies are interpretation, revision and annulment.

Rectification may be granted at the request of either party if the award omits to decide a question or contains a typographical, arithmetical or similar error. Interpretation of the award may be requested by either party if a dispute has arisen between the parties over the meaning or scope of the

[117] This and the remaining sentences of the paragraph of the text refer to the ICSID Convention, *supra* note 1, arts. 50-52.

award. Revision of the award may be requested by either party on the ground of discovery of some fact, unknown to the tribunal and the requesting party when the award was rendered, that would decisively affect the award. Annulment of the award may be requested by either party on one or more of the following grounds: that the tribunal was not properly constituted; that it manifestly exceeded its powers; that one of its members was corrupt; that there was a serious departure from a fundamental rule of procedure; or that the award failed to state the reasons on which it was based. A request for rectification will be addressed to the tribunal that rendered the award. A request for interpretation or revision will similarly be submitted to the tribunal that rendered the award unless that is no longer possible, in which case a new tribunal must be constituted to consider the request. A request for annulment will be submitted to a three-member ad hoc committee appointed from the Panel of Arbitrators of ICSID by the Chairman of the Administrative Council of the Centre. The committee will have the power to annul the award in whole or in part on any of the above-mentioned grounds. If there is an annulment, either party may submit the dispute to a new tribunal.

Rectification has been requested in respect of two awards rendered pursuant to the ICSID Convention.[118] There has never been a request for interpretation. There has been a request for revision in only one case.[119] At the date of writing, the revision proceeding in that case is still pending. The remedy that has more commonly been invoked has been that of annulment. Altogether, requests for annulment have been made in respect of six awards,[120] leading to five decisions of ad hoc committees constituted to consider the requests (the annulment proceeding in respect of the sixth

[118] Amco Asia Corporation and others v. Indonesia, ICSID Case No. ARB/81/1, Award of June 5, 1990 and Decision on Supplemental Decisions and Rectification of Oct. 17, 1990, 1 ICSID Rep. 569 (1993): Liberian Eastern Timber Corporation v. Liberia, ICSID Case No. ARB/83/2, Award of Mar. 31 1986 and Rectification of June 10, 1986, 2 ICSID Rep. 346 (1994).

[119] American Manufacturing and Trading Inc. v. Democratic Republic of Congo, ICSID Case No. ARB/93/1.

[120] In respect of Amco Asia Corporation and others v. Indonesia, ICSID Case No. ARB/81/1, Award of Nov. 20, 1984, 1 ICSID Rep. 413 (1993) and Award of June 5, 1990, 1 ICSID Rep. 569 (1993); Klöckner Industrie-Anlagen GmbH and others v. Cameroon, ICSID Case No. ARB/81/2, Award of Oct. 21, 1983, 2 ICSID Rep. 9 (1994) and Award of Jan. 26, 1988 (unpublished); Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award of May 20, 1992, 8 ICSID Rev.—FILJ 328 (1993); and Maritime International Nominees Establishment v. Guinea, ICSID Case No. ARB/84/4, Award of Jan. 6, 1988, 4 ICSID Rep. 54 (1997).

award was discontinued following a settlement agreed by the parties).[121] The first ad hoc committee decision was to annul totally the award concerned; the second and third decisions were for partial annulments; the fourth decision completely rejected the annulment requests; and the fifth annulled only a decision for the rectification of the award. The principal grounds for annulment in the first two decisions were manifest excess of powers for failure to apply the applicable law. The partial annulment in the third case was for failure to state reasons in respect of the award's finding on damages. The annulment of the rectification decision by the fifth ad hoc committee was for breach of a fundamental rule of procedure (in not requesting the views of the parties before the making of the rectification decision). The first two ad hoc committee decisions in particular evoked much critical commentary.[122] The decisions were seen by many commentators as failing sufficiently to distinguish annulment from appeal. Those two decisions were followed by resubmissions of the disputes to new tribunals which rendered new awards. Requests for annulment were made in respect of the new awards. Those requests in turn led to the above-mentioned fourth and fifth ad hoc committee decisions. To some, these cases signaled a possible "breakdown" of the ICSID Convention's control mechanism of annulment, after which the process of arbitration under the Convention could become an endless series of awards and annulments.[123]

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[121] Amco Asia Corporation and others v. Indonesia, ICSID Case No. ARB/81/1, Decision of May 16, 1986, 1 ICSID Rep. 509 (1993); Klöckner Industrie-Anlagen GmbH and others v. Cameroon, ICSID Case No. ARB/81/2, Decision of May 3, 1985, 1 ICSID Rev.—FILJ 89 (1986); and Maritime International Nominees Establishment v. Guinea, ICSID Case No. ARB/84/4, Decision of Dec. 22, 1989, 5 ICSID Rev.—FILJ 95 (1990). Two other, as yet unpublished, ad hoc committee decisions were rendered on Dec. 17, 1992 and May 3, 1990 in regard to the second awards made in the Amco Asia and Klöckner cases respectively. The sixth award sought to be annulled was the award in the Southern Pacific Properties case. In that case, however, the parties settled the dispute before the rendition of any ad hoc committee decision. For discussions of these cases, see, e.g., Broches, Observations on the Finality of ICSID Awards, 6 ICSID Rev.—FILJ 321 (1991); Caron, Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal, 7 ICSID Rev.—FILJ 21 (1992); Craig, The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk, 8 ICSID Rev.—FILJ 264 (1993); Delaume, The Pyramids Stand—The Pharaohs Can Rest in Peace, 8 ICSID Rev.—FILJ 231 (1993); Feldman, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 ICSID Rev.—FILJ 66 (1987).

[122] *See, e.g.*, Gaillard, Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI): Chronique des sentences arbitrales, 114 Journal du droit international 135 (1987); Redfern, ICSID - Losing its Appeal?, 3 Arb. Int'l 98 (1987); Reisman, The Breakdown of the Control Mechanism in ICSID Arbitration, Duke L.J. 739 (1989).

[123] *See, e.g.*, W. M. Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair 86 (1992).

However, the third ad hoc committee decision, which was considered by most as having taken a more restrained approach towards the remedy of annulment, was welcomed as having put matters back "on track."[124] In any event, the worst fears regarding the remedy of annulment have not materialized. It has, as explained above, been resorted to in only four cases (twice in two of those). Since the remedy was first invoked, the caseload of the Centre has increased almost fourfold and a dozen awards have been rendered that have elicited no request for annulment. The remedy has not been used since 1992. It nevertheless continues to stand as an important guarantee of the fairness and integrity of arbitration under the ICSID Convention.

D. Enforcement of Awards

Article 54(1) of the Convention requires each Contracting State to recognize an award rendered pursuant to the Convention as binding and to enforce the pecuniary obligations imposed by the award as if it were a final judgment of the State's courts. Under Article 54(2) of the Convention, recognition and enforcement of the award may be obtained from the competent court of a Contracting State on simple presentation of a copy of the award certified by the Secretary-General of the Centre. Article 55 of the Convention makes it clear that Article 54 does not derogate from the law of the enforcement forum on sovereign immunity from execution of an award. These provisions of the Convention have been tested in three cases. In the first case, Benvenuti & Bonfant, an Italian company, obtained, from the Tribunal de Grand Instance of Paris, an order for the enforcement of the Convention award against the company's adversary, the Republic of Congo.[125] The Tribunal de Grand Instance made this order subject to the condition that there could without its prior authorization be no execution on assets located in France. The Court of Appeal of Paris struck down this condition.[126] In doing so, the Court of Appeal explained that Article 54 of

[124] Broches, Observations on the Finality of ICSID Awards, 6 ICSID Rev.—FILJ 321, 376 (1991).

[125] *See* S.A.R.L. Benvenuti & Bonfant v. Republic of the Congo, Decision of Jan. 13, 1981 of the Tribunal de Grand Instance, Paris, 108 Journal du droit international 365 (1981); 1982 Revue de l'arbitrage 206; English translation of French original in 65 I.L.R. 91 (1984); 1 ICSID Rep. 368 (1993).

[126] *See* Decision of June 26, 1981 of the Court of Appeal, Paris, 108 Journal du droit international 843 (1981); 1982 Revue de l'arbitrage 207; English translation of French original in 20 ILM 878 (1981); 1 ICSID Rep. 369 (1993).

the ICSID Convention provided for a "simplified" enforcement procedure, that enforcement was a step preliminary to execution, and that courts in Contracting States therefore could not at the enforcement phase delve into the execution phase, the second phase being the one in which there might be a question of sovereign immunity. The second case also illustrates this distinction between the two phases. The Convention award in that case had been rendered against Liberia and in favor of the Liberian Eastern Timber Corporation, a company controlled by French nationals. The award was on the company's application granted recognition and enforcement by an order of the U.S. District Court for the Southern District of New York. On the strength of that order, executions were issued on Liberian assets in New York. On Liberia's motion, the same District Court, having found those assets to be immune from execution under the 1976 U.S. Foreign Sovereign Immunities Act (FSIA), because they were sovereign rather than commercial assets, vacated the executions on those assets.[127] The company then obtained writs of attachment seizing bank accounts of the Embassy of Liberia in Washington, D.C. The U.S. District Court for the District of Columbia however quashed the writs on the grounds that the Embassy's bank accounts were immune from attachment because they enjoyed diplomatic immunity under the Vienna Convention on Diplomatic Relations, which the United States ratified in 1972, and also because the accounts were entitled to sovereign immunity under the FSIA, the funds in the accounts being essentially public in nature.[128] The award in the third case was rendered in favor of the Société Ouest Africaine des Bétons Industriels, a company controlled by Belgian nationals, in the ICSID Convention arbitration that the company had instituted against Senegal. The Tribunal de Grand Instance of Paris granted an enforcement order in respect of this award. The Paris Court of Appeal however reversed that order on the grounds that it had not been demonstrated that the award would "be enforced on assets assigned by Senegal to an economic and commercial activity, and that no objection could therefore be made for

[127] *See* Liberian Eastern Timber Corporation v. Liberia, Decision of Dec. 12, 1986 of the United States District Court, Southern District of New York, 650 F. Supp. 73 (1986); 2 ICSID Rev.—FILJ 188 (1987); 26 ILM 695 (1987); 2 ICSID Rep. 385 (1994).

[128] *See* Decision of Apr. 16, 1987 of the United States District Court, District of Columbia, 659 F. Supp. 606 (1987); 3 ICSID Rev.—FILJ 16 (1988); 2 ICSID Rep. 391 (1994).

immunity from enforcement."[129] In this decision, the Paris Court of Appeal confounded the two phases that the Court of Appeal had so clearly distinguished eight years earlier in the Benvenuti & Bonfant case. The French Court of Cassation corrected this, in a June 1991 decision which quashed the decision of the Paris Court of Appeal.[130] In its decision, the Court of Cassation pointed out, in terms reminiscent of those used by the Paris Court of Appeal in the Benvenuti & Bonfant case, that the ICSID Convention provided a "simplified" regime for the enforcement of awards and that enforcement did not in itself represent an act of execution in respect of which immunity from execution could be considered.

In any event, parties to arbitration proceedings under the ICSID Convention are obligated by its Article 53 to abide by and comply with the terms of any award rendered in such proceedings. Article 27(1) of the Convention provides that a Contracting State may not give diplomatic protection, or bring an international claim, in respect of a dispute that one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention. Article 27(1) of the Convention also provides that the first Contracting State may nevertheless give diplomatic protection or bring an international claim if the second State fails to honor its obligation under Article 53 to abide by and comply with the award. In such circumstances, the first State could under Article 64 of the Convention institute proceedings against the second before the International Court of Justice. By generally precluding the kinds of State-to-State confrontations that so often accompanied investment disputes in the past, the provision of Article 27(1) of the Convention has been an important factor in the "depoliticization"[131] of such disputes by the ICSID arbitral mechanism. Although Article 27(1) of the Convention allows State-to-State proceedings in the event of a failure to abide by and comply with an award, there appears never to have been such proceedings in respect of a case submitted to arbitration under the Convention.

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[129] *See* Société Ouest Africaine des Bétons Industriels v. Senegal, Decision of Dec. 5, 1989 of the Court of Appeal, Paris, 117 Journal du droit international 141 (1990); 1990 Revue de l'arbitrage 164; English translation of French original in 5 ICSID Rev.—FILJ 135 (1990); 29 ILM 1341 (1990); 2 ICSID Rep. 337 (1994).

[130] *See* Decision of June 11, 1991 of the Court of Cassation, France, 6 ICSID Rev.—FILJ 598 (1991); 118 Journal du droit international 1005 (1991); 1991 Revue de l'arbitrage 637; English translation of French original in 30 ILM 1169 (1991); 2 ICSID Rep. 341 (1994).

[131] The phrase is used in Shihata, Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA, 1 ICSID Rev.—FILJ 1 (1986), reprinted, with updating, in I. Shihata, The World Bank in a Changing World, Vol. 1, 309-40 (1991).

Certainly, there have never been proceedings before the International Court of Justice under Article 64 of the Convention. This does not, however, mean that all of the awards rendered under the Convention have been paid. In at least one case, the award has gone unpaid owing to civil strife in the country concerned. In several other instances, there have been delays on the part of States in complying with awards. In such cases, the Secretariat of the Centre, following complaints by the award creditors, has written to the countries concerned to remind them of their obligation under the Convention to honor the awards. In a further case, where the award required the investor to pay the legal expenses of the State and such payment was not forthcoming, the Secretariat took similar action to urge compliance with the award. In almost all of these cases, the payment obligations in the awards have eventually been discharged, either in accordance with the terms of the awards or in accordance with post-award settlement agreements of the parties.

VIII. ARBITRATION UNDER THE ADDITIONAL FACILITY RULES

It was explained in part I of this paper that, under the ICSID Additional Facility Rules, the Secretariat of the Centre is authorized to administer certain categories of proceedings between States and foreign nationals that fall outside the scope of the ICSID Convention. It was also mentioned in part I that these notably include conciliation and arbitration proceedings for the settlement of investment disputes between parties one of which is not an ICSID member country or a national of such a country, as well as conciliation and arbitration proceedings for the settlement of disputes that do not arise directly out of an investment, provided that at least one of the parties is an ICSID member country or a national of a member country. As adopted by the Administrative Council of ICSID in 1978, the Additional Facility Rules were intended primarily to be used in conjunction with individual agreements concluded by the parties in respect of existing or future disputes between them. The Additional Facility Rules subject agreements providing for recourse to conciliation or arbitration under those rules to the approval of the Secretary-General of ICSID in each case.[132] The purpose of requiring such approval was to guard against the use of the Additional Facility "as an alternative to the Convention" or "as a broad alternative to existing mechanisms for the settlement of

[132] *See* ICSID Additional Facility Rules, *supra* note 4, art. 4(1).

commercial disputes"[133] such as those furnished by the International Court of Arbitration of the International Chamber of Commerce. Thus, in the case of agreements providing for the conciliation or arbitration of investment disputes under the Additional Facility Rules because the host or home State of the investor is not an ICSID member country, the Secretary-General may only give his approval if the parties also consent to submit their dispute to conciliation or arbitration under the Convention, in lieu of the Additional Facility, if at the time of the institution of a proceeding the country that was not a member country has become one.[134] In the case of agreements providing for conciliation or arbitration under the Additional Facility Rules because the underlying transaction is not thought by the parties to be an investment, the Secretary-General may give his approval only if he is satisfied that the transaction "has features which distinguish it from an ordinary commercial transaction" (and also only if at least one of the parties is an ICSID member or a national of such a member). In addition, if the Secretary-General considers it likely that a conciliation commission or arbitral tribunal, as the case may be, would nevertheless regard the transaction as an investment, he may make his approval conditional on the parties consenting to submit any dispute in the first instance to conciliation or arbitration under the Convention. As might be expected, the Additional Facility Rules give the Secretary-General virtually no discretion to withhold registration of requests to institute conciliation or arbitration proceedings contemplated by conciliation or arbitration agreements previously approved by the Secretary-General. Under the Additional Facility Rules, the substantive "screening" by the Secretary-General is essentially done in connection with the request for approval of the conciliation or arbitration agreement. In accordance with the Additional Facility Rules, parties may make such requests for approval at any time prior to the institution of proceedings.[135] When the Additional Facility Rules were adopted, parties were nevertheless cautioned that, "[i]n order to avoid surprises and possible frustration of the conciliation or arbitration undertaking, it is advisable as a practical matter that such undertakings . . . be submitted for approval prior to being entered into."[136]

Since the adoption of the Additional Facility Rules, however, parties have only once submitted to the Secretary-General for his prior approval

[133] *Id.* Comment to art. 4, paras. (1) and (6).

[134] In connection with this and the next three sentences of the text, see *id.* art. 4.

[135] *Id.* art. 4(1).

[136] *Id.* Comment to art. 4, paras. (1) and (6).

an undertaking of this kind negotiated by the two parties. Contrary to the expectations of its designers, the Additional Facility has instead mainly been used in the context of the types of general consents to arbitration in investment laws and treaties described in part II of this paper. Although the number of ICSID member countries is large and continues to grow, 50 of the World Bank's 181 member countries have not become ICSID members. Taking account of this, the investment laws of some ICSID member countries contain provisions setting forth the consent of the State concerned to submit investment disputes with foreign investors to arbitration under the ICSID Convention or, if the investor is not a national of an ICSID member country, then to arbitration under the ICSID Additional Facility Rules.[137] Similarly, substantial numbers of BITs concluded between ICSID members and countries that are not members set forth the consent of each State to the submission of investment disputes with investors from the other State to arbitration under the Additional Facility Rules. Most of these treaties correctly also contain consents to arbitration under the ICSID Convention to cover the possibility of the non-ICSID member eventually becoming a member.[138] Some BITs between ICSID member countries[139] likewise contain consents both to arbitration under the Convention and arbitration under the ICSID Additional Facility Rules: the principal purpose here is to cover the possibility of one of the countries deciding to withdraw from ICSID membership during the life of the BIT. Attention was called in part II of this paper to four multilateral treaties setting forth the consent of each State party to the submission to arbitration under the ICSID Convention of investment disputes with nationals of the other States parties. The parties to each of these treaties—the NAFTA, the Colonia Investment Protocol of Mercosur, the Cartagena Free Trade Agreement and the Energy Charter Treaty—include countries that are not

[137] *See, e.g.*, Law No. 88.004 promulgating the Code on Investments in the Central African Republic, May 8, 1988 art. 30. For an analysis of this law, see Knieper, The New Investment Code of the Central African Republic: Profound Changes, 4 ICSID Rev.—FILJ 90 (1989).

[138] *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, Apr. 17, 1996, Canada-Romania, art. XIII(4); Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 11, 1995, Germany-South Africa, art. 11(2); Agreement for the Promotion and Protection of Investments, July 19, 1994, Brazil-United Kingdom, art. 7(2)(a).

[139] *See, e.g.*, Treaty Concerning the Encouragement and Protection of Investment, Aug. 27, 1993, Ecuador-United States, art. VI(3) and (4); Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Sept. 26, 1994, Trinidad and Tobago–United States, art. IX(3).

ICSID members. The four multilateral treaties concerned thus also contain consents to the submission of covered investment disputes to arbitration under the Additional Facility Rules.[140] In the case of the NAFTA, two of the three parties, Canada and Mexico, are not yet members of ICSID. Thus, under the NAFTA, Additional Facility Rules arbitration is available for claims by U.S. investors against Canada or Mexico and by Canadian or Mexican investors against the U.S. The consent to ICSID Convention arbitration in the NAFTA stands ready to be invoked once Canada or Mexico also becomes an ICSID member.

To date, seven investment disputes have been submitted to arbitration under the Additional Facility Rules, all of them within the last two years and all of them on the basis of consents in treaties of the States parties concerned. One of the Additional Facility Rules arbitration proceedings[141] has been brought against Ukraine, which, although it has signed the ICSID Convention, has not yet ratified it and thus has yet to become an ICSID member. The claimant in that case, an individual with U.S. nationality, instituted the proceeding in reliance on the consent to Additional Facility Rules arbitration in the Ukraine-U.S. BIT. The six other Additional Facility Rules proceedings have all been brought under the NAFTA. They comprise four proceedings brought by U.S. investors against Mexico[142] and two by Canadian investors against the U.S.[143] The case brought under the Ukraine-U.S. BIT concerns a radio broadcasting enterprise. Three of the NAFTA cases brought against Mexico concern waste disposal enterprises and the fourth a cigarette-exporting enterprise. One of the NAFTA cases against the U.S. concerns a funeral homes enterprise and the second a real estate development project. The claims in these Additional Facility proceedings under the NAFTA allege expropriation and discriminatory treatment on the part of the host States. In the cases against the U.S., the investors complain of denials of justice at the hands of state courts. The

[140] *See* NAFTA, *supra* note 15, art. 1120(1); Colonia Protocol, *supra* note 16, art. 9(4)(a); Cartagena Free Trade Agreement, *supra* note 17, art. 17-18(2)(b); Energy Charter Treaty, *supra* note 18, art. 26(4)(a)(ii).

[141] Joseph C. Lemire v. Ukraine, ICSID Case No. ARB(AF)/98/1.

[142] Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1; Robert Azinian and others v. Mexico, ICSID Case No. ARB(AF)/97/2; USA Waste Services, Inc. v. Mexico, ICSID Case No. ARB(AF)/98/2; Marvin Roy Feldman Karpa v. Mexico, ICSID Case No. ARB(AF)/99/1.

[143] The Loewen Group Inc. and Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3; Mondev International Ltd. v. United States, ICSID Case No. ARB(AF)/99/2.

total of the amounts in dispute in these Additional Facility proceedings exceeds U.S. $1 billion.

The unique procedure in the Additional Facility Rules, for the approval of arbitration undertakings by the Secretary-General of ICSID, has with only slight artificiality been made to fit the context provided by such treaties as the NAFTA. The consent of the aggrieved investor, together with that of the State in the NAFTA or other treaty, forming the arbitration agreement of the parties, the investors have in most of the cases sought and received the approval of the Secretary-General for the agreement in conjunction with the registration of their requests for the institution of proceedings.

Arbitration under the Additional Facility Rules is, however, still far from being fully tested. As the Additional Facility Rules themselves prominently emphasize, proceedings thereunder are not governed by the ICSID Convention.[144] In contrast to arbitration proceedings under the ICSID Convention therefore, Additional Facility arbitration proceedings are subject to the law and the control of the courts of the place of arbitration. Arbitration proceedings under the Additional Facility Rules must be held in a country that is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[145] This does not, however, guarantee the enforcement of awards rendered under the Additional Facility Rules as the New York Convention sets forth a number of grounds, including incompatibility of an award with the public policy of the enforcement forum, on which enforcement may be denied.[146] There has to date been no court involvement in Additional Facility proceedings. In one of these proceedings,[147] an award has only just been rendered, and the rest are still pending. A record of the relationship between Additional Facility arbitration and the courts thus has yet to be compiled.

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[144] *See* ICSID Additional Facility Rules, *supra* note 4, art. 3.

[145] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, reprinted in 7 ILM 1046 (1968) (New York Convention). The leading treatise on the New York Convention is A.J. van den Berg, The New York Arbitration Convention of 1958 (1981). For a bibliography on the New York Convention, see Ziadé, Selective Bibliography on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 4 ICSID Rev.—FILJ 434 (1989).

[146] *See* New York Convention, *supra* note 145, art. V.

[147] Robert Azinian and others v. Mexico, ICSID Case No. ARB(AF)/97/2, Award rendered Nov. 1, 1999. This award dismissed all of the claims of the claimants.

IX. THE ICSID SECRETARY-GENERAL AS THE APPOINTING AUTHORITY OF AD HOC ARBITRATORS

There are, of course, several categories of arbitration proceedings that cannot be held under either the ICSID Convention or the ICSID Additional Facility Rules. These include proceedings for the settlement of disputes between States or between constituent subdivisions or agencies of States; disputes to which international organizations are parties; and disputes between private parties. Numerous other institutions offer procedures for the settlement of such disputes. These include the International Court of Justice and the Permanent Court of Arbitration (PCA), for the settlement of disputes between States;[148] the PCA, for the settlement of disputes between international organizations and States;[149] and, for the settlement of disputes between private parties, as well as other categories of disputes, such general commercial arbitration fora as the International Court of Arbitration of the International Chamber of Commerce,[150] the Arbitration Institute of the Stockholm Chamber of Commerce[151] and the American Arbitration Association.[152] Ad hoc, or non-institutional, arbitration is an alternative for the resolution of disputes in these categories. Parties that have access to arbitration under the ICSID Convention or Additional Facility Rules may also prefer to provide for the settlement of their disputes by ad hoc arbitration.[153]

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[148] *See* Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, eff. Oct. 20, 1992, reprinted in PCA, Basic Documents: Conventions, Rules, Model Clauses and Guidelines 41 (1998); and in 9 ICSID Rev.—FILJ 241 (1994).

[149] *See* Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Involving International Organizations and States, eff. July 1, 1996. The PCA, like ICSID, also offers arbitration procedures for the settlement of disputes between States and private parties. *See* Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, eff. July 6, 1993, reprinted in PCA, Basic Documents, *supra* note 148, at 69.

[150] This form of arbitration is examined comprehensively in W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration (2nd ed., 1990) (3rd ed. forthcoming). *See also* ICC Rules of Arbitration, eff. Jan. 1, 1998, ICC Publication No. 581 (1997). For further references on this form of arbitration, see Ziadé, Selective Bibliography on the International Chamber of Commerce's Dispute Settlement Mechanisms, 5 ICSID Rev.—FILJ 186 (1990).

[151] *See* Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, eff. Apr. 1, 1999, available at <www.chamber.se/arbitration/english>.

[152] *See* American Arbitration Association International Rules, eff. Apr. 1, 1997, available at <www.adr.org>.

[153] The reasons for such a preference may include the greater ease with which ad hoc proceedings may be initiated and the possibly greater confidentiality of such proceedings.

In the context of arrangements providing for ad hoc arbitration, parties have often sought to enlist the collaboration of ICSID by entrusting its Secretary-General with the task of appointing arbitrators in defined contingencies. Examples are provided by the investment incentive agreements concluded between the United States and countries in which the U.S. investment insurance agency, the Overseas Private Investment Corporation, operates. These agreements provide for the settlement of disputes between the States parties by ad hoc arbitration, with the Secretary-General of ICSID as the authority who may be requested to appoint an arbitrator if either party fails to make such an appointment or if parties fail to agree on the appointment of the presiding arbitrator.[154] Similar provisions referring to the Secretary-General of ICSID as the appointing authority of ad hoc arbitrators are included in an agreement between the Province of British Columbia and the City of Seattle regarding a project for the delivery by the Province to the City of hydroelectric power.[155] The Convention Establishing MIGA, in its provisions on the settlement of disputes between the Agency and its member countries, likewise refers to the Secretary-General of ICSID as a possible appointing authority of ad hoc arbitrators.[156]

International trade and investment contracts between private parties, or between States or State agencies and private parties, also occasionally contain provisions for the settlement of disputes thereunder by ad hoc arbitration coupled with a designation of the Secretary-General of ICSID as the authority to appoint arbitrators that are not appointed by the otherwise prescribed method. Such provisions typically provide for arbitration under the UNCITRAL Arbitration Rules,[157] now the most widely used form of ad hoc arbitration for the resolution of disputes arising out of international trade and investment transactions. Under the UNCITRAL Arbitration Rules, an arbitral tribunal will, unless the parties have agreed to have a sole arbitrator, consist of three arbitrators—one appointed by each disputing party and the third, presiding, arbitrator appointed by agreement of the

[154] *See, e.g.*, Investment Incentive Agreement, Apr. 25, 1987, Bahrain–United States, art. 6(b)(i), reprinted in 2 ICSID Rev.—FILJ 531 (1987).

[155] *See* ICSID as Designating Authority for Non-ICSID Arbitration, 1 News from ICSID, No. 1, at 4 (1984).

[156] *See* MIGA Convention, *supra* note 60, ann. II, art. 4(b).

[157] *See supra* note 7.

two party-appointed arbitrators.[158] The UNCITRAL Arbitration Rules provide that if, within a stated time limit, a party does not appoint an arbitrator or the party-appointed arbitrators fail to agree on the appointment of a presiding arbitrator, then either party may call upon the designated appointing authority to make the necessary appointment. Under the UNCITRAL Arbitration Rules, a party may challenge an appointed arbitrator for lack of independence or impartiality. The UNCITRAL Arbitration Rules give to the designated appointing authority of arbitrators the responsibility of deciding on such challenges. If the appointing authority sustains the challenge, then a replacement arbitrator must be appointed, in general by the same method as used for the appointment of the original arbitrator.

There are also consents in numerous BITs to arbitation under the UNCITRAL Arbitration Rules, in respect of investment disputes between one State party and investors from the other State party. This is a common feature particularly of BITs concluded by countries that are not ICSID Contracting States.[159] About 300 BITs offer arbitration under the ICSID Convention and arbitration under the UNCITRAL Arbitration Rules as alternative means of settling covered investment disputes.[160] In around 200 of these BITs, arbitration under the ICSID Additional Facility Rules is also made available for the settlement of investment disputes.[161] This approach, of setting forth in the treaty consents to arbitration under the ICSID Convention, under the Additional Facility Rules and under the UNCITRAL Arbitration Rules, is followed in the provisions on the settlement of investment disputes of the NAFTA, of the Colonia Investment Protocol of Mercosur, of the Cartagena Free Trade Agreement and of the

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[158] In connection with this and the following four sentences of the text see UNCITRAL Rules, *supra* note 7, arts. 5-12.

[159] *See, e.g.*, Agreement for the Promotion and Protection of Investments, Feb. 19, 1996, Barbados-Cuba, art. 8(2)(b); Agreement on the Promotion and Reciprocal Protection of Investments, Apr. 19, 1995, Russian Federation-Sweden, art. 8(2); Agreement for the Promotion and Protection of Investments, Feb. 17, 1998, Myanmar-Philippines, art. IX (2)(b).

[160] *See, e.g.*, Agreement on the Promotion and Reciprocal Protection of Investments, Jan. 29, 1998, Costa Rica-Paraguay, art. X(2); Agreement on the Promotion and Reciprocal Protection of Investments, May 28, 1993, Belarus-Switzerland, art. 9; Agreement Concerning the Reciprocal Promotion and Protection of Investments, May 2, 1990, Turkey-Turkmenistan, art. VII(2).

[161] *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Jan. 11, 1995, Albania-United States, art. IX(3); Agreement on the Reciprocal Promotion and Protection of Investments, Nov. 28, 1995, Chile-Poland, art. 8(2).

Energy Charter Treaty.[162] In the context of such multilateral treaties, most of which have two or more parties that are not ICSID Contracting States, the approach just mentioned ensures that all investment disputes covered by the treaty can be accommodated by an arbitration procedure offered by the treaty. Thus, for example, under the NAFTA, investment disputes may be submitted to arbitration under the ICSID Additional Facility Rules if they involve claims by U.S. investors against Canada or Mexico or by Canadian or Mexican investors against the U.S. Disputes involving claims by Canadian investors against Mexico or Mexican investors against Canada, however, may not be submitted to Additional Facility Rules arbitration, which, it will be recalled, is unavailable if neither the home State nor the host State of the investor is an ICSID Contracting State. Under the NAFTA, such disputes may instead be submitted to arbitration under the UNCITRAL Arbitration Rules. The NAFTA and most other treaties that set forth the consent of the parties to the submission of covered investment disputes to arbitration under the ICSID Convention, ICSID Additional Facility Rules and UNCITRAL Arbitration Rules give access to arbitration under the UNCITRAL Arbitration Rules to all covered investors, not just those without access to one or the other of the ICSID forms of arbitration.

In some of the BITs that provide for the settlement of covered investment disputes by arbitration under the UNCITRAL Arbitration Rules, and in the NAFTA and Cartagena Free Trade Agreement, the provisions designate the Secretary-General of ICSID as the appointing authority of arbitrators under those rules.[163] In accordance with the provisions of the NAFTA, a party to an investment dispute may also call upon the Secretary-General of ICSID to establish a special three-member arbitral tribunal under the UNCITRAL Arbitration Rules to consider whether claims

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[162] *See* NAFTA, *supra* note 15, art. 1120(1); Colonia Protocol, *supra* note 16, art. 9; Cartagena Free Trade Agreement, *supra* note 17, art. 17-18; Energy Charter Treaty, *supra* note 18, art. 26 (4)(a) and (b). The Energy Charter Treaty adds, in art. 26(4)(c), arbitration under the Stockholm Chamber of Commerce Institute Rules to the list of available forms of arbitration. The draft Multilateral Agreement on Investment, *infra* note 185, similarly provided for the arbitral settlement of investment disputes by arbitration under the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or the Arbitration Rules of the International Chamber of Commerce.

[163] *See, e.g.*, Agreement Concerning the Encouragement and Reciprocal Promotion of Investments, Dec. 2, 1992, China-Vietnam, art. 8(5); Agreement for the Reciprocal Promotion and Protection of Investments, May 21, 1991, Kuwait-Romania, art. 10(5)(b). *See also* NAFTA, *supra* note 15, art. 1124; Cartagena Free Trade Agreement, *supra*, note 17, annex to art. 17-16, rule 4. Under the NAFTA and Cartagena Free Trade Agreement, the Secretary-General is in fact designated as appointing authority for all the mentioned forms of agreement.

submitted pursuant to the NAFTA to arbitration under ICSID Convention, Additional Facility Rules or UNCITRAL Rules "have a question of law or fact in common."[164] If such a special tribunal is satisfied that the claims do have a question of law or fact in common, the tribunal may, "in the interests of fair and efficient resolution of the claims," assume jurisdiction over and determine the claims together. Alternatively, the tribunal may assume jurisdiction over and determine some of the claims, or even just one of them, if the tribunal believes that this "would assist in the resolution of the others." In establishing such a "consolidation" tribunal, the Secretary-General of ICSID must appoint as the presiding arbitrator a person who is not a national of any of the NAFTA parties and, as the two co-arbitrators, a national of the State party to the dispute and a national of a home State of the investors concerned.

The Secretary-General of ICSID has acted as the appointing authority of ad hoc arbitrators on about a dozen occasions. The majority of the instances in which the Secretary-General has so acted have occurred in the last two years. In all of these more recent instances of the Secretary-General intervening as the designated appointing authority of ad hoc arbitrators, the proceedings were being conducted under the UNCITRAL Arbitration Rules. As may be guessed, the majority of these proceedings, in turn, were initiated in reliance on a consent of the State party in an investment treaty of the State. One of these proceedings was initiated by a national of India against Germany under the Germany-India BIT. In two UNCITRAL Arbitration Rules proceedings initiated under the NAFTA by U.S. investors against Canada,[165] the Secretary-General of ICSID appointed the presiding arbitrator at the request of a party after it and the other disputing party had failed to agree on the presiding arbitrator within the period prescribed by the NAFTA. In a third UNCITRAL Arbitration Rules proceeding initiated under the NAFTA by a U.S. investor against Canada[166] the Secretary-General was twice asked, as the designated appointing authority under the UNCITRAL Arbitration Rules, to decide upon a party's challenge of an arbitrator. The Secretary-General rejected the first challenge in that case. The second challenge was superseded by the resignation of the arbitrator concerned. The first of the UNCITRAL Arbitration Rules proceedings against Canada under the NAFTA concerned a

[164] NAFTA, *supra* note 15, art. 1126(2).

[165] Ethyl Corporation v. Canada, 38 ILM 700 *et seq.*; Pope & Talbot, Inc. v. Canada.

[166] S.D. Myers Inc. v. Canada.

gasoline additive enterprise; the second and third proceedings relate to a lumber enterprise and a chemical waste disposal enterprise. The total of the amounts in dispute in these and the other UNCITRAL Arbitration Rules proceedings in which the Secretary-General has acted as the appointing authority of arbitrators in the last two years is some U.S. $1 billion.

Although the Secretary-General of ICSID has often undertaken to act as appointing authority of ad hoc arbitrators, he is not, without his consent, obliged to do so. It is thus advisable for parties wishing to entrust such a task to the Secretary-General to seek his consent in advance, preferably before the finalization of the provisions incorporating the assignment.[167] Parties may generally do this by submitting the provisions in draft form to the Secretary-General, together with a description of the agreement containing the provisions. The Secretary-General has often made his consent subject to the introduction in such provisions of changes—for example, to dispel any ambiguity as to the scope of the appointing authority assignment or the circumstances under which it would be performed. When the Secretary-General has accepted such an assignment, and has then in accordance with its terms been requested to make an appointment, he has endeavored to comply with the request within 30 days, the time limit for the performance of the appointing authority function of the ICSID Administrative Council Chairman in arbitration proceedings governed by the ICSID Convention.[168] The Secretary-General has, however, consistently asked parties to avoid imposing on him strict deadlines for the performance of this function. Ad hoc arbitrators appointed by the Secretary-General have not always been members of the ICSID Panel of Arbitrators (except in the proceedings brought under the NAFTA provisions, which, in the absence of the roster of presiding arbitrators envisaged by the NAFTA, require the Secretary-General to appoint such arbitrators from the ICSID Panel of Arbitrators[169]). It will be recalled that, in ICSID Convention arbitration proceedings, the appointing authority function of the Chairman of the Administrative Council may only be exercised "after consultation with the parties as far as possible."[170] This useful procedure, of consulting with the parties to the extent possible

[167] This point is emphasized in ICSID Model Clauses, *supra* note 21, at 20, and in The ICSID Secretary-General as Appointing Authority in Ad Hoc Proceedings, 6 News from ICSID, No. 2, at 6 (1989).

[168] *See* ICSID Arbitration Rules, *supra* note 1, rule 4(4).

[169] *See* NAFTA, *supra* note 15, art. 1124(3).

[170] ICSID Convention, *supra* note 1, art. 38.

before making an appointment, has also generally been employed by the Secretary-General when he has acted as the appointing authority of ad hoc arbitrators.

X. CONCLUSION

In the almost 35 years that have passed since ICSID was established, the Centre has compiled an impressive record of achievements. Close to 60 disputes relating to a variety of different kinds of investment, between States and investors from all regions of the world have been submitted to arbitration under the ICSID Convention. Another 7 investment disputes have been submitted to arbitration under the ICSID Additional Facility Rules and, in some 12 more cases, the Secretary-General of ICSID has acted as the appointing authority of ad hoc arbitrators. The existence and functioning of the various dispute-settlement facilities of ICSID have probably contributed to increased flows of international investment. Certainly, the facilities have inspired much confidence, as reflected in the many contractual, legislative and treaty submissions to ICSID Convention arbitration, to Additional Facility arbitration and to arbitration under the UNCITRAL Arbitration Rules with the Secretary-General of ICSID as the appointing authority of arbitrators. The value of the claims in the cases that have so far benefited from these facilities has totaled some U.S. $7 billion. Through the procedures offered under the ICSID Convention and Additional Facility, and the appointing authority function under the UNCITRAL Arbitration Rules, the Centre has been able to assist in the resolution of disputes of all member countries of the World Bank, not just the countries that are also members of ICSID.

The arbitration machinery of the Centre has proved not only to have been designed, but also to work, in a well-balanced way. The jurisdiction of the Centre has been extensively explored in the cases, as has the relationship between ICSID Convention arbitration and national courts. The ICSID arbitral machinery has proved to be relatively efficient, though not to operate as quickly and inexpensively as many would like. Awards and decisions made in cases submitted to arbitration under the ICSID Convention and Additional Facility Rules have contributed to the development of international law relating to investments. Numerous eminent arbitrators and counsel from developing as well as industrial countries have taken part in this process. After a period of some uncertainty following the first instances of annulment, there appears to be general confidence in the

appropriateness and proper functioning of the post-award remedies provided by the ICSID Convention. Most awards have ultimately been complied with voluntarily. No party has denied their binding quality. The majority of the concluded cases have ended with agreed settlements, rather than awards. The system has thus proved to contribute to the amicable resolution, as well as to the "depoliticization," of investment disputes.

A fact not previously mentioned here is that the Centre has long been involved in the collection, analysis and dissemination of information on foreign investment law. ICSID's publications in this field include multi-volume collections of *Investment Laws of the World*[171] and of *Investment Treaties*.[172] The collections, which are continuously updated by the staff of the ICSID Secretariat, comprise the basic investment laws of close to 100 countries and the texts of some 800 BITs. The Centre also publishes semi-annually the *ICSID Review—Foreign Investment Law Journal*,[173] the only journal devoted exclusively to this field of law. Together, these publications have made ICSID a leading source of information on foreign investment law. In part as a result of the knowledge acquired from these information activities, the staff of the ICSID Secretariat are regularly called upon to take part in the advisory operations of the World Bank Group on investment and arbitration law.[174]

There are areas in which more could be done. Greater use might be made of the conciliation procedures offered by the Centre. As indicated at the outset of this paper, there have only been three conciliation proceedings under the ICSID Convention. There have been no conciliation proceedings under the Additional Facility Rules. Yet in the three cases submitted to conciliation under the Convention, the disputes were ultimately amicably settled. One of the cases in particular also demonstrated that conciliation could work at far lower cost than is typical of arbitra-

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[171] ICSID, Investment Laws of the World (looseleaf, 1973-).

[172] ICSID, Investment Treaties (looseleaf, 1983-).

[173] The Centre has published this journal since 1986.

[174] Thus, in the past five years alone, staff of the ICSID Secretariat have participated in reviews of 24 draft investment laws and 9 draft arbitration laws. *See* ICSID Annual Reports 1995, at 8; 1996, at 9; 1997, at 10; 1998, at 12; 1999, at 15. Another highlight of the Secretariat's advisory activities in this period was its participation in meetings of the Expert Group convened by the Organisation for Economic Co-operation and Development to help develop the dispute-settlement provisions of the Multilateral Agreement on Investment (see *infra* note 185 and accompanying text). The Secretariat also took part in the work on the preparation of the World Bank Guidelines on the Treatment of Foreign Direct Investment, reprinted in 7 ICSID Rev.—FILJ 297 (1992).

tion.[175] In each of the conciliation cases to date, the consent agreements of the parties provided for recourse to arbitration under the ICSID Convention in the event that the conciliation effort failed. This kind of consent agreement, providing for conciliation followed if necessary by arbitration, may for obvious reasons be more readily acceptable to parties than bare consents to conciliation. In the *ICSID Model Clauses*, the Centre publishes examples of this kind of consent agreement.[176] In the context of arbitration proceedings under the ICSID Convention, the Secretary-General has on several occasions offered his good offices to promote an amicable settlement by the parties of their dispute. This further means of reaching such settlements may be formalized through an eventual amendment of the Arbitration Rules of the Centre.

Under the Additional Facility Rules, the Secretariat of ICSID is authorized to administer not only conciliation and arbitration proceedings but also fact-finding proceedings where any State and foreign national wish to institute an inquiry to examine and report on facts.[177] Additional Facility fact-finding is intended as a mechanism for preventing, rather than settling, disputes. Under the Additional Facility Fact-Finding Rules, the proceeding will end with a report that is "limited to findings of fact."[178] The report will have no binding character and must not even contain recommendations. Fact-finding can instead provide parties with impartial assessments of fact which, if accepted by them, may prevent differences of view on specific factual issues from escalating into legal disputes.[179] Consents to Additional Facility fact-finding appear, however, to be rare, perhaps due to a lack of knowledge about this service. In any event, there has never been an Additional Facility fact-finding proceeding. There may be scope for consent agreements referring to conciliation or arbitration (or both) under the ICSID Convention or Additional Facility Rules to provide, for the "pre-dispute" stage, for Additional Facility fact-finding. A possible text of such an agreement will be included in the next edition of the *ICSID Model Clauses*.

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[175] *See* Tesoro Petroleum Corporation v. Trinidad and Tobago, *supra* note 8. Direct costs incurred in that proceeding during its 22 months totaled just U.S.$11,000. For further details on this case, see Nurick & Schnably, The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago, 1 ICSID Rev.—FILJ 340 (1986).

[176] *See* ICSID Model Clauses, *supra* note 21, clauses 1 and 2.

[177] *See* ICSID Additional Facility Fact-Finding Rules, *supra* note 4, art. 1.

[178] *Id.* art. 16(4).

[179] *See* Introductory Notes, ICSID Additional Facility Rules, *supra* note 4, at note D.

As has been pointed out in this paper, arbitration under the Additional Facility Rules is starting to be used with some frequency for the resolution of investment disputes (where either the home or the host country of the investor is not a member of ICSID). It will be recalled that arbitration under the Additional Facility Rules is also available for the resolution of disputes between States and foreign nationals that do not arise directly out of investments (provided that the dispute does not concern an "ordinary commercial transaction" and at least one of the parties is an ICSID member or a national of a member). There have, however, been no arbitration proceedings under the Additional Facility Rules for the resolution of non-investment disputes. In part, this is because of the expansion of the concept of investment in the years that have passed since the Additional Facility Rules were formulated.[180] There may nevertheless remain room for the use of arbitration under the Additional Facility for the settlement of disputes between States and foreign nationals that do not arise out of investments and that at the same time do not concern ordinary commercial transactions. Such disputes might include certain categories of environmental disputes—for example, disputes relating to cross-border pollution—where the foreign national is not an investor in the State party to the dispute.

The experience of ICSID has already shown that its facilities for the resolution of investment disputes may be used for the settlement of environmental disputes arising out of foreign investment. Such disputes are likely to grow in number with the simultaneous rise of foreign direct investment in developing countries and the awareness of host countries of the environmental impact of such investment. This could also lead to an increase in the number of ICSID cases initiated by host countries.

One of the themes of this paper has been the change of the size and scope of the caseload of the Centre that has occurred as a result of the proliferation in the 1990s of BITs and multilateral treaties on investment with sweeping consents of States to arbitration under the auspices of ICSID. While the ICSID arbitral machinery has in many respects smoothly adapted without alteration to the new setting of arbitrations based on BITs and multilateral treaties, in respect of the screening and registration of requests for arbitration, and in some other areas, the shift may not have been so trouble-free. When the limited "screening power" of the Secretary-General was designed, it was in a world of predominantly contractual arbitration submissions that would less frequently raise juris-

[180] *See, e.g.*, C. Oman, New Forms of Investment in Developing Countries (1984).

dictional problems. Such problems are commonly encountered in requests for arbitration that rely on broad consents in investment treaties to arbitration under the ICSID Convention or under the Additional Facility Rules or both. In many of the treaties, the consents have been drawn up without sufficient regard to the limitations of these ICSID forms of arbitration. In addition, several of the advantages that stem from the flexibility of ICSID Convention arbitration in particular are in practice unavailable for proceedings under investment treaties, precisely because of the absence in such cases of an arbitration agreement freely negotiated between the two disputing parties.

A corollary of the breadth of the consents to arbitration in the investor-to-State dispute-settlement provisions of modern investment treaties is that the disputing parties will generally not be alone in having an interest in the issues submitted to arbitration under the treaties. These normally will include issues of interpretation of the substantive or procedural provisions of the treaties, in which each State party to the treaty, and not just the disputing one, will have an interest. This is recognized by the NAFTA. It requires the disputing State in an arbitration proceeding with an investor to notify the other States parties to the NAFTA of the submission of the claim to arbitration and to provide the other States with copies of all pleadings filed in the arbitration.[181] Under the NAFTA, the other States may, on written notice to the disputing parties, make submissions to the arbitral tribunal on questions of interpretation of the NAFTA. Moreover, through the Free Trade Commission established by the NAFTA, the States parties can issue interpretations of the NAFTA that will be binding on an arbitral tribunal constituted to decide a dispute between a State party and an investor of another such State. So far in one of the ICSID Additional Facility arbitration proceedings brought under the NAFTA, a State party other than the disputing one has exercised its right to make submissions to the arbitrators. In that and another Additional Facility proceeding brought under the NAFTA, the other States have also attended hearings as observers. These kinds of intervention may become more common among cases brought to ICSID under investment treaties. BITs and most of the multilateral treaties on investment do not have provisions like those of the NAFTA on such interventions in investor-to-State arbitration proceedings. In at least two of the ICSID Convention proceedings initiated under the investor-to-State dispute-settlement provisions of BITs, the respondent

[181] This and the next two sentences of the text refer to NAFTA, *supra* note 15, arts. 1127, 1128 and 1129.

State has nevertheless sought to settle an issue of interpretation of the BIT raised by the proceedings through agreement with the other State party to the BIT.[182]

Several non-governmental organizations (NGOs) have argued that members of the public should also be given the opportunity to intervene in investor-to-State arbitration proceedings under investment treaties.[183] The argument has been made with particular reference to the NAFTA cases. For the NGOs, some of these cases have raised the specter of measures regarding the environment, health and labor being regularly challenged in investor-to-State arbitral proceedings. Given the importance to the public of the issues at stake, the NGOs have argued that the process should be made fully "transparent"—that is, that written and oral phases of proceedings should be subject to the public scrutiny, while concerned NGOs and citizens at large should be able to make submissions on the issues to the arbitral tribunal.[184] Similar criticisms by NGOs helped put to an end in 1998 to the work that had been started in the Organisation for Economic Co-operation and Development (OECD) on a Multilateral Agreement on Investment (MAI) among OECD members and other countries (it had been envisaged that the MAI would contain provisions on the settlement of disputes between investors and States modeled in part after the corresponding provisions of the NAFTA).[185] Some have called for world investment rules instead to be formulated in the World Trade Organization (WTO).[186]

Countries have meanwhile continued to conclude numerous BITs containing the usual investor-to-State dispute-settlement provisions.[187] In 1998, negotiations were launched for the creation of a Free Trade Area of the Americas, which may result in the conclusion of a hemispheric treaty

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[182] In neither case, however, has such an agreement been reached.

[183] *See, e.g.*, International Institute for Sustainable Development, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment 56-57 (1999).

[184] *See, e.g., id.* at 59.

[185] *See* OECD Directorate for Financial Fiscal and Enterprise Affairs, Multilateral Agreement on Investment: The MAI Negotiating Text (as of Apr. 24, 1998), ch. V., <www.oecd.org/daf/cmis/mai/negtext.htm>. *See also* OECD Press Release of Dec. 3, 1998, <www.oecd.org/daf/cmis/mai/maindex.htm> (announcing the termination of the MAI negotiations).

[186] *See, e.g.*, International Investment Report to Ministers by the Secretary-General of the OECD to the OECD Council Meeting at Ministerial Level, held on May 26-27, 1999, at <www.oecd.org/daf/cmis/fdi/sgrep.htm>.

[187] Since the launching of the MAI initiative in 1995, some 400 BITs have been concluded.

similar to the NAFTA.[188] It seems likely, however, that such arrangements will in future have to some extent to take account of the demands for transparency, now often echoed by the press and by a number of governments. Through the public case registers maintained by the ICSID Secretary-General and the publications of the Centre, arbitration proceedings under the ICSID Convention and Additional Facility Rules are already publicized to an exceptional extent.[189] If proceedings are made more open—for example, to allow for public hearings—resort to arbitration under the ICSID Convention and Additional Facility Rules may become less attractive to the parties involved, especially to private parties that insist on confidentiality of the proceedings. In any event, more open proceedings could again transform the work of the Centre. They certainly would be more administratively burdensome for ICSID. Another possibility, if global investment rules end up being made in the WTO, is that disputes over compliance with those rules might be dealt with by the State-to-State procedures of the WTO, to the exclusion of mechanisms such as those of ICSID. So far though, there has been no sign of a slowdown in the rate of growth of ICSID's caseload. At this rate, the total number of disputes submitted to the Centre for resolution under the ICSID Convention or Additional Facility Rules will soon exceed 70, twice as many as the total reached just 5 years ago. A modest increase in the number of staff and a more extensive use of computer technology have helped the ICSID Secretariat to cope with the influx of new cases. Other ways of maintaining the efficiency of the Centre may be found in the course of its ongoing preparation of a set of possible amendments to ICSID's Regulations and Rules, which were last amended in 1984.

[188] Negotiations on an agreement for a Free Trade Area of the Americas began in April 1998, at the Second Summit of the Americas in Santiago de Chile, and are expected to be concluded by 2005. *See* Second Summit of the Americas: Santiago Declaration and Plan of Action, Apr. 19, 1998, 37 ILM 947, 965 (1998); *see also* Free Trade Area of the Americas, <www.ftaa.alca.org>.

[189] On the case registers, see ICSID Administrative and Financial Regulations, *supra* note 1, reg. 23.