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Georges R. Delamue

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# ICSID Arbitration Proceedings: Practical Aspects

Georges R. Delaume†

The caseload of the International Centre for Settlement of Investment Disputes (ICSID) has significantly and steadily increased in the last few years. In contrast with the lean years between the creation of ICSID<sup>1</sup> in 1966, and 1981, during which only nine disputes were submitted to ICSID arbitration, thirteen new proceedings have been instituted since 1982.<sup>2</sup> Two of these proceedings relate to conciliation and one to the annulment of an award.<sup>3</sup> At the time of this writing, ten proceedings are pending. Of the twelve proceedings that have been terminated, only five have resulted in awards; seven were either discontinued or amicably settled.<sup>4</sup>

Certain awards have been published,<sup>5</sup> and comments on

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† Senior Legal Adviser, International Centre for Settlement of Investment Disputes (ICSID), Washington, D.C. The views expressed in this Article are those of the author and do not necessarily represent those of ICSID.

1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, which created ICSID, came into force on October 14, 1966.

2. Current information on the status of ICSID cases is provided in *News from ICSID*, a semi-annual publication which began in early 1984. This free publication can be obtained on request addressed to: International Centre for Settlement of Investment Disputes, 1818 H Street, N.W., Washington, D.C. 20433, Telephone: (202) 477-4943. A new brochure entitled *ICSID cases: 1972-1984* that consolidates information on the cases will be issued soon as Document ICSID/16.

3. One conciliation case was settled amicably before the conciliation commission was constituted. The other proceeding is pending. The annulment proceeding is also pending. See *News from ICSID*, Winter 1985, at 2.

4. The high proportion of settlements is a characteristic feature of ICSID. The Revised Arbitration Rules are intended to facilitate the amicable settlement of investment disputes submitted to ICSID. See *infra* notes 46-48 and accompanying text.

5. See *AGIP S.P.A. v. People's Republic of the Congo*, 64 *RIVISTA DI DIRITTO INTERNAZIONALE* 863 (1981) (French original), 21 *I.L.M.* 726 (1982) (English translation), 8 *Y.B. COM. ARB.* 133 (ICCA) (1983) (English translation); *Société Ltd. Benvenuti & Bonfant srl. v. People's Republic of the Congo*, 21 *I.L.M.* 740 (1982), with a correction in 21 *I.L.M.* 1478 (1982) (English translation from the French original); *Amco-Asia v. Republic of Indonesia*, 23 *I.L.M.* 351 (1984); *Klöckner Industrie Anlagen GmbH v. United Repub-*

them as well as on other ICSID proceedings that have not been the object of full publication, have appeared.<sup>6</sup> Also, the Secretariat of ICSID, as part of its promotional activities, has released information available to it that is not confidential.<sup>7</sup>

As a result of these developments, a number of issues relating to the effective and potential use of ICSID can be identified. In addition to such basic issues of substance as those dealing with the basic requirements that must be satisfied before interested parties can make use of ICSID arbitration, issues of applicable law, those relating to the drafting of ICSID clauses, or the increasing reference to ICSID in bilateral investment treaties, which have been the object of an abundant literature,<sup>8</sup> the increasing number of ICSID proceedings makes it possible to consider in greater detail issues pertaining to the administration of ICSID proceedings and their outcome.

It is well known that the administration entrusted to the Secretariat and to arbitral tribunals, takes place in the context of self-contained international rules that are found in the ICSID Convention and in the Regulations and Rules adopted for its implementation. What is less known, however, is how these rules are applied by the Secretariat and arbitral tribunals in concrete cases submitted to ICSID. Thus, it is interesting to take stock of a number of issues that have arisen in the context of what may broadly be called the "internal" administration of ICSID pro-

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lic of Cameroon and Société Camerounaise des Engrais (SOCAME), reproduced in part in Paulsson, *The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North South Economic Development Agreements*, 1 J. INT'L ARB. 145 (1984). A summary of the legal rules applied in the *Amco-Asia* and the *Klöckner* cases also appear in NEWS FROM ICSID, Summer 1984, at 5-11.

6. Bernardini, *Le Prime Esperienze Arbitrali del Centro Internazionale per il Regolamento delle Controversie Relative ad Investimenti*, RIV. DIR. INT. PRIV. E. PROC. 1981, at 29; Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco) — Some Legal Problems*, 51 BRIT. Y. B. INT'L L. 123 (1980); Paulsson, *supra* note 5; Schmidt, *Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L.J. 90 (1976).

7. In addition to *News from ICSID*, the promotional activities of the Secretariat include, inter alia, the organization of, and participation in, colloquia and services, and the publication of articles in law and business journals. ICSID has also published *Model Clauses*, Document (ICSID/5/Rev. 1, July 7, 1981).

8. See generally the bibliography prepared by the Secretariat and issued as Document ICSID/13.

ceedings from the time of the institution of proceedings until the termination of these proceedings. These issues will be discussed in the first part of this Article.

These issues, however, or at least some of them cannot be considered in isolation. Because it is self-contained, the ICSID machinery has definite "external" consequences. Those concern the restraint that should be exercised or the assistance that should be given by the courts in Contracting States in the context of ICSID proceedings.

In this connection, it should be recalled that under article 26 of the ICSID Convention: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."<sup>9</sup> By submitting to ICSID arbitration the parties have, therefore, the assurance that action cannot be brought against them in a non- ICSID forum such as a national court,<sup>10</sup> and that the ICSID proceedings will be free from any form of interference or control by the courts of Contracting States. In other words, if a party to an ICSID arbitration agreement attempts to circumvent the exclusive character of its consent by bringing a claim in the courts of a Contracting State, the courts ought not to enter-

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9. Pursuant to the second sentence of article 26 of the Convention, the rule formulated in that provision is subject to one exception: as a condition of its consent to ICSID arbitration, a Contracting State may require the exhaustion of local administrative or judicial remedies.

So far, this exception has had little practical significance. None of the ICSID clauses known to the Secretariat require exhaustion of local remedies. Likewise, investment laws referring to ICSID as a means of settling investment disputes and the overwhelming majority of bilateral investment protection treaties, with the exception of those concluded by Romania, do not require exhaustion of local remedies. The Romanian treaties all provide that a consent to ICSID arbitration is limited to issues of compensation following preliminary adjudication by the Romanian courts. 2 G. DELAUME, *TRANSNATIONAL CONTRACTS*, §15.18 (Supp. 1982).

Israel is the only Contracting State which has made a declaration that it will require the exhaustion of local administrative or judicial remedies. See Document ICSID/8-C, at 1.

For a discussion of article 26, in a Latin American context, see Shihata, *ICSID and Latin America*, in *NEWS FROM ICSID*, Summer 1984, at 2.

10. Note also that article 27 of the Convention provides that when an investor and a Contracting State have agreed to submit investment disputes to ICSID arbitration, the State whose national is party to the agreement may not espouse the cause of its national, give that national diplomatic protection, or bring an international claim in respect of the dispute.

tain the claim and should refer the parties to ICSID.<sup>11</sup>

Another external consequence of the ICSID machinery is the converse of the first one. Prevented from interfering with ICSID proceedings, the courts in the Contracting States are mandated to facilitate the recognition of ICSID awards. Subject to further discussion,<sup>12</sup> it can be stated in general terms that the recognition of ICSID awards is assured in all Contracting States and that the effectiveness of ICSID awards exceeds by far that of any other international award. These issues will be considered in the second part of this Article.

By way of a final preliminary remark, it should be noted that the ICSID Regulations and Rules have been revised recently. The original Regulations and Rules had been issued in January 1968. Except for minor amendments, they had remained unchanged. In the light of ICSID's experience and the increasing number of proceedings administered by it, it became apparent that changes could usefully be made to clarify the language of certain provisions and to introduce greater flexibility into the administration of proceedings. On September 26, 1984, the Administrative Council of ICSID adopted the Revised Regulations and Rules submitted by the Secretary-General.<sup>13</sup> The Regulations, which have an administrative character, came into force upon approval. Pursuant to article 44 of the ICSID Convention,<sup>14</sup> the Revised Arbitration Rules apply only prospectively. However, according to the same provision, nothing prevents the parties to a dispute submitted to ICSID under an

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11. See *infra* notes 68-88 and accompanying text.

12. See *infra* notes 91-92 and accompanying text.

13. The Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings [hereinafter cited as Institution Rules], Rules of Procedure for Arbitration Proceedings [hereinafter cited as Arbitration Rules], and the Rules of Procedure for Conciliation Proceedings [hereinafter cited as Conciliation Rules] are available as part of Document ICSID/15 (1985), on request addressed to the Secretariat.

14. Article 44 reads as follows:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Convention, *supra* note 1, art. 44.

earlier consent from agreeing to the application of the Revised Rules. To avoid confusion, all references to the Regulations and Rules should be read as referring to the 1984 revision, unless otherwise indicated.

## I. Internal Administration of ICSID Proceedings

### A. *Institution of the Proceeding; the "Screening Power" of the Secretary-General*

Proceedings are commenced by the filing of a request, which must not only be supported by documentation, but must also be sufficiently precise to show that the basic requirements of the Convention are satisfied.<sup>15</sup> Pursuant to article 25 of the Convention, ICSID arbitration is open to the parties to investment disputes provided that three basic conditions are fulfilled. First, the parties must have agreed to submit their dispute to ICSID arbitration.<sup>16</sup> Second, the dispute must be between a Contracting State (or one of its subdivisions or agencies)<sup>17</sup> and a "national" of another Contracting State.<sup>18</sup> Third, the dispute must be a legal dispute,<sup>19</sup> arising directly out of an investment.<sup>20</sup> In other

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15. Institution Rule 2, *supra* note 13.

16. Consent may be recorded in an arbitration clause or any other agreement (including an exchange of letters) in writing. Consent may also result from the acceptance by an investor of a unilateral offer made by a Contracting State either in its investment legislation or in a bilateral treaty with the Contracting State of which the investor is a national. See Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101, 104-08 (1984).

17. If the dispute involves a subdivision or agency of a Contracting State, that subdivision or agency must have been designated to ICSID by the State concerned and the consent of the entity involved must be approved by that State, unless it has notified ICSID that no such approval was required. Convention, *supra* note 1, art. 25(1), (3). See Delaume, *supra* note 16 at 109-111.

18. In practice, no dispute has involved natural persons. All proceedings have been instituted by, or against, corporations. For a discussion of problems arising in connection with the nationality of corporations, see *infra* text accompanying notes 27, 29, 50-51.

19. It is generally agreed that reference to the "legal" nature of a dispute limits the scope of ICSID arbitration to a review of the respective rights and obligations of the parties as set forth in an investment agreement, in light of the laws and regulations relevant to that agreement. Examples of "legal disputes" are those concerning non-performance, including causes of excuse based on *force majeure* or similar events, the violation of "stabilization" clauses, the interpretation of the agreement, including expropriation or nationalization, and related issues of compensation. In contrast, disputes regarding conflicts of interest between the parties, such as those involving the desirability of renegotiating the entire agreement or certain of its terms, would normally fall

words, the request must show that the dispute falls within the "jurisdiction" of ICSID,<sup>21</sup> that it is within the scope of the Convention.

Subject to meeting these conditions, the request does not have to be drafted in any particular fashion. In practice, the requests submitted to ICSID exhibit significant variations in regard to the manner in which they are presented, their length and the volume of the supporting documentation. In general terms, the requests are substantially documented. Upon receipt of the request, the Secretary-General sends an acknowledgement to the requesting party and, upon payment of a \$100 fee, transmits a copy of the request and of the accompanying documentation to the other party.<sup>22</sup>

It is at this point in time that the Secretary-General must exercise a unique prerogative, namely that of determining whether he should register the request or refuse registration. Under article 36(3) of the Convention, the Secretary-General is given the right to refuse registration if "he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre."

This "screening power" was vested in the Secretary-General:

With a view to avoiding the embarrassment to a party (par-

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outside the scope of the Convention. The Convention also does not apply to factual disputes, such as those concerning accounting or factfinding investigations. These disputes may, however, be submitted to the Additional Facility administered by ICSID. See Delaume, *supra* note 16, at 123-25. On September 26, 1984, the Administrative Council of ICSID decided to continue the Additional Facility indefinitely.

20. The term "investment" is not defined in the Convention. It includes not only equity investments of the traditional type, but new forms of association, including the supply of services, between investors and States contributing to the economic development of the State concerned. For examples of the type of investment disputes submitted to ICSID, see *infra* text accompanying note 53; Delaume, *supra* note 16, at 116-20; News FROM ICSID, Summer 1984, at 18-19.

21. Inasmuch as investment disputes are decided by arbitral tribunals and not by ICSID as an organization, the term "jurisdiction" is somewhat inaccurate. It was nevertheless chosen "as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings." Report of the Executive Directors of the International Bank for Reconstruction and Development, *reprinted in* 1 INVESTMENT LAWS OF THE WORLD (1965) [hereinafter cited as REPORT OF THE EXECUTIVE DIRECTORS].

22. Institution Rule 6, *supra* note 13.

ticularly 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 could 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.<sup>23</sup>

It should be noted that the Secretary-General exercises his screening power solely on the basis of the information supplied by the requesting party, without eliciting at the time the view of the other party.<sup>24</sup>

In practice, most of the requests submitted to ICSID have been sufficiently precise and documented to enable the Secretary-General to make the necessary determination quickly, sometimes the same day as receipt of the request or within a few days thereafter. On occasion, the Secretary-General has felt the need to obtain additional information from the requesting party, in order to ascertain for example, the reality of consent to ICSID arbitration or the nationality of corporations incorporated in the Contracting State party to the dispute but claiming to be nationals of another Contracting State for the purpose of the Convention.<sup>25</sup>

In order to appreciate the full significance of the Secretary-General's screening power, it should be noted that a refusal on his part to register a request would be an absolute bar to the use of ICSID facilities, because there is no appeal from such a decision.

In contrast, registration of a request has no bearing upon the right of the respondent to raise objections to the jurisdiction of an arbitral tribunal once it is constituted. In other words, registration is only one of a two-stage process, and in the second

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23. REPORT OF THE EXECUTIVE DIRECTORS *supra* note 21, at ¶ 20.

24. As to the practice of the International Chamber of Commerce, compare W.L. CRAIG, W. PARK & J. PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* ¶ 11.02 (1984). According to these authors, when the issue of consent to ICC arbitration is considered by the ICC Court of Arbitration, the court, before deciding the matter, always elicits a response from the defendant. *Id.*

25. Under article 25(2)(b) of the Convention, a locally incorporated corporation may be regarded as a national of another Contracting State when the parties have agreed that it should be so treated "because of foreign control." For examples, see Delaume, *supra* note 16, at 111-16.



stage the arbitral tribunal remains free to rule on its own "competence,"<sup>26</sup> including the question of whether the basic requirements of the Convention are satisfied. An example is found in the *Holiday Inns*<sup>27</sup> case, which was the first case submitted to ICSID. The claimants, a Swiss company and a United States corporation, and the Government of Morocco had entered into arrangements for the construction and operation of hotels in Morocco, through subsidiaries of the claimants incorporated in Morocco. A dispute arose and the claimants submitted to ICSID a request for arbitration not only in their own name, but also on behalf of their subsidiaries. The request was registered and an arbitral tribunal was constituted. Morocco objected to the jurisdiction of the tribunal. It argued, inter alia, that the arbitration clause did not expressly state that the Moroccan subsidiaries were to be treated as foreign entities because they were under the "foreign control" of the parent companies,<sup>28</sup> and that the nationality requirement set forth in the Convention was, therefore, not satisfied. This argument succeeded. The tribunal held that, although it had jurisdiction in regard to the parent companies, the subsidiaries were not entitled to participate in the proceedings.

Similar objections, though limited in number and unsuccessful, have been made in other proceedings, which with the exception of the decision of the tribunal in *Amco-Asia v. Republic of Indonesia*<sup>29</sup> have not been the object of publication.

In view of the respective consequences of the Secretary-General's decision to register or refuse to register a request, it is clear that the Secretary-General must exercise his screening power with caution. This has been the ICSID tradition. In cases that raise some doubts as to whether the basic requirements of the Convention are fully satisfied but that are not "manifestly" outside the jurisdiction of ICSID, the Secretary-General has felt compelled to register the request and to leave the ultimate resolution of the issue to the arbitral tribunal. However, it is noteworthy that in circumstances such as these, the Secretary-Gen-

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26. See *infra* notes 54-56, 78-88 and accompanying text.

27. See Lalive, *supra* note 6.

28. See *supra* note 25.

29. 23 I.L.M. 351 (1984).

eral indicated at the time of registration of the request that, even though he was not in a position to make a final ruling on certain issues, such as those concerning the existence of consent,<sup>30</sup> or the effective nationality of the claimant,<sup>31</sup> he was nevertheless aware that these issues might be the object of further consideration by the arbitral tribunal.

## B. *Constitution of the Arbitral Tribunal*

Issues regarding the constitution of ICSID arbitral tribunals illustrate both the flexibility of the ICSID rules and the effectiveness of the ICSID machinery.

In order to account for the many situations that may surround arbitration proceedings, most of the provisions of the Convention regarding the number of arbitrators and the method for their appointment are permissive and apply only in the absence of specific agreement between the parties. The only mandatory provisions found in the Convention are those according to which: (i) an arbitral tribunal composed of more than a sole arbitrator must include an uneven number of arbitrators<sup>32</sup> and (ii) the majority of the arbitrators must be nationals of a State other than the Contracting State party to the dispute or the Contracting State whose national is a party to the dispute.<sup>33</sup>

In selecting arbitrators, the parties are free to choose persons whose names appear on the Panel of Arbitrators maintained by ICSID<sup>34</sup> or from outside the Panel. In practice both

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30. See, e.g., SPP (Middle East) Ltd. v. Arab Republic of Egypt Case ARB/84/3, NEWS FROM ICSID, Winter 1985, at 3.

31. See, e.g., Maritime Int'l Nominees Establishment (MINE) v. Republic of Guinea, Case ARB/84/4, NEWS FROM ICSID, Winter 1985, at 3.

32. Convention, *supra* note 1, art. 37(2).

33. Convention, *supra* note 1, art. 39. If both parties insist upon appointing one of their nationals as arbitrators, the effect of this provision would be to increase the number of arbitrators (for example, to five) so that the majority of arbitrators would be nationals of third countries. However, a different solution might be reached if each and every member of the tribunal were appointed by agreement of the parties. This has happened in the case of Société Ouest Africaine des Betons Industriels (SOABI) v. the State of Sénégal, Case ARB/82/1, in which one arbitrator had the nationality of the claimant (Belgian), another arbitrator was a national of the respondent State, and the President of the tribunal was a national of a third country (The Netherlands).

34. Under article 13(1) of the Convention, each Contracting State may designate up to four persons to the Panel of Arbitrators. Convention, *supra* note 1, art. 13. Out of 87 Contracting States, 52 States have made these designations.

options have been used by the parties to ICSID proceedings.

Anticipating the possibility that one of the parties refuses to cooperate in the appointment of arbitrators or that the parties cannot reach agreement on the constitution of the tribunal within a stated period of time, the Convention provides that 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.<sup>35</sup> In practice, the Chairman has acted as appointing authority in the majority of ICSID proceedings either at the time of the constitution of tribunals,<sup>36</sup> or during the proceedings, following the death or resignation of arbitrators.<sup>37</sup> Unlike the parties, the freedom of choice of the Chairman is limited in the sense that he must appoint persons whose names appear on the Panel of Arbitrators.

In this connection, it should be noted that, in making the necessary appointments, the Chairman always endeavors to consult with the parties and that in most cases the parties have cooperated with the Chairman. In this respect, ICSID's practice contrasts favorably with that of the other arbitration institutions.<sup>38</sup>

Another fact to be noted is that the Chairman has been able to use his power of appointment to solve the difficult problem of multipartite arbitration. This was the case in regard to three parallel proceedings brought by foreign investors against Jamaica. These proceedings involved identical, though separate, disputes concerning the imposition by Jamaica of new taxes, contrary to the respective agreements between Jamaica and each

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Under article 13(2), the Chairman of the Administrative Council may appoint up to ten persons to the Panel. Convention, *supra* note 1, art. 13. Nine persons have been appointed by the Chairman.

35. Under article 38 of the Convention, that period normally expires 90 days after notice of the registration of the request has been dispatched by the Secretary-General. Convention, *supra* note 1, art. 38. However, parties may agree, and have in several instances, agreed to prolong that period.

36. This has occurred in nine arbitration proceedings.

37. This has occurred in three arbitration proceedings.

38. Under the ICC Rules, appointments are made by the ICC Court of Arbitration upon recommendations from national committees. See W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 24, at ¶ 12.03. See also de Hancock, *The ICC Court of Arbitration*, 1 J. INT'L L. 21, 29 (1984).

of the claimants. In each case, the claimants appointed the same person as arbitrator. When Jamaica failed to appoint an arbitrator, the claimants requested the Chairman to appoint, for each proceeding, two arbitrators and to designate one of them as President of each tribunal. The Chairman selected for this purpose the same two persons to serve on each tribunal. The three arbitrators considered each dispute and held, in respect of each of them, that the dispute was within their competence. The disputes were subsequently amicably settled.<sup>39</sup>

Whether appointed by the parties or the Chairman, an arbitrator must inform ICSID of any possible conflict of interest or of any other facts that might have a bearing on his independence.<sup>40</sup>

### C. *The Proceedings*

#### 1. *Procedural Rules*

As already noted, the rules applicable to ICSID proceedings are truly international rules. This consideration explains why the ICSID rules are somewhat more detailed than those of other arbitration institutions operating to a variable extent in the context of municipal law.

The ICSID rules apply, except to the extent that the parties otherwise agree. Such an agreement may be included in the instrument recording the parties' consent to ICSID arbitration, or may be concluded subsequently either before or after the institution of proceedings. In order to ascertain as early as possible after the constitution of the tribunal the views of the parties concerning questions of procedures, the rules wisely provide for a preliminary procedural consultation between the President of the tribunal and the parties.<sup>41</sup>

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39. *Alcoa Minerals of Jamaica/Kaiser Bauxite Company/Reynolds Jamaica Mines and Reynolds Metals Company v. Jamaica*, Cases ARB/74/2, 3 and 4. See also *News FROM ICSID*, Summer 1984, at 13-14.

40. Arbitration Rule 6, *supra* note 13.

41. According to Arbitration Rule 20, the President shall, in particular, seek the views of the parties on the following matters:

(a) the number of members of the Tribunal required to constitute a quorum at its sittings;

(b) the language or languages to be used in the proceedings;

(c) the number and sequence of the pleadings and the time limits within

## 2. *The Seat of Arbitration*

Because the ICSID rules are self-contained, the place of arbitration does not have the significance in the context of ICSID proceedings that it has in the case of both ad hoc and institutional arbitration subject to domestic law. For the purposes of ICSID, the place of arbitration is legally immaterial and its determination is merely one of convenience.

Under article 62 of the Convention, the seat of arbitration is normally situated in Washington, D.C., where ICSID has its headquarters. However, pursuant to article 63 of the Convention the parties may agree that the proceedings take place in another location. Two situations must be distinguished. The parties are free to decide that the proceedings may be held at the seat of the Permanent Court of Arbitration, in The Hague, or at the seat of any other institution with which ICSID may make appropriate arrangements.<sup>42</sup> The parties may also choose any other location, subject to obtaining the approval of the arbitral tribunal and after consultation with the Secretary-General.<sup>43</sup> In practice, the location of the ICSID proceedings has been about equally distributed between Washington, D.C. and European cities.

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which they are to be filed;

(d) the number of copies desired by each party of instruments filed by the other;

(e) dispensing with the written or the oral procedure;

(f) the manner in which the cost of the proceedings is to be apportioned; and

(g) The manner in which the record of the hearings shall be kept.

Arbitration Rule 20, *supra* note 13.

42. This type of arrangement has been concluded with the Asian-African Legal Consultative Committee, the Regional Centre for Commercial Arbitration (in Kuala Lumpur) and the Regional Centre for Commercial Arbitration (in Cairo). See 22 I.L.M. 522-24 (1984).

43. On occasion, the parties to ICSID clauses provide in the clause itself that the seat of arbitration shall be located in a certain city (such as London, Paris or Geneva, or a city in the territory of the Contracting State party to the clause). This type of provision could not be enforced as such, but is likely to be given consideration by arbitral tribunals at the time of the preliminary procedural consultation. Arbitration Rule 20(2), *supra* note 13.

### 3. *The Duration of the Proceedings; a New Initiative; The Prehearing Conference*

Statistics regarding the average duration of arbitral proceedings have little value because of the many factors that may differentiate one proceeding from another. In this respect, ICSID arbitration does not differ from other forms of arbitration.<sup>44</sup>

In the case of ICSID, however, a consideration of fundamental importance must be taken into account. ICSID's role is not limited to offering a specialized machinery for dispute resolution. The ultimate purpose of ICSID is to promote a climate of mutual confidence between States and investors that is conducive to an increasing flow of capital to developing countries. In the event of a dispute, the objective of ICSID is to restore that climate to all extent possible and to bring the parties together with a view to encouraging amicable settlements. The fact that more than half of the ICSID proceedings that have been closed resulted in this type of settlement,<sup>45</sup> shows that ICSID has been successful in the pursuit of this objective.

With a view to increasing the effectiveness of ICSID, the ICSID Arbitration Rules now offer a new procedure in the form of a "prehearing conference," which may be called by the Secretary-General or the President of an arbitral tribunal. The purpose of such a conference is to expedite the proceedings by permitting early identification of undisputed facts, thereby limiting the proceeding to the real areas of contention.<sup>46</sup>

In a similar spirit, the Rules also give the parties the right to request the convening of a prehearing conference between the tribunal and the parties in the hope that it will give their authorized representatives the opportunity to reach an amicable

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44. See, e.g., W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 24 at ¶ 1.07 (regarding ICC arbitration).

For what it is worth, the average duration of ICSID proceedings is two and a half years.

45. See *supra* note 4.

46. Arbitration Rule 21(1) reads as follows:

At the request of the Secretary-General or at the discretion of the President of the Tribunal, a prehearing conference between the Tribunal and the parties may be held to arrange for the exchange of information and the stipulation of uncontested facts in order to expedite the proceedings.

Arbitration Rule 21, *supra* note 13.

settlement.<sup>47</sup> Such a settlement could take the form of an agreement between the parties or could be recorded in an award in accordance with the rules.<sup>48</sup>

#### 4. *Jurisdictional Issues*

Registration of a request does not prevent the parties from raising jurisdictional objections at an early stage of the proceedings.<sup>49</sup> This was the case in *Holiday Inns*,<sup>50</sup> and in other cases, such as *Amco-Asia v. Indonesia*<sup>51</sup> and *Klöckner Industrie Anlagen GmbH v. United Republic of Cameroon and Société Camerounaise des Engrais (SOCAME)*,<sup>52</sup> as well as in other cases that have not been published.

The interesting thing is that, in all the cases so far, objections to the jurisdiction of arbitral tribunals have been based on issues relating to the reality of consent to ICSID arbitration or on the ground that the nationality requirement set forth in article 25(2)(b) of the Convention in regard to corporations was not satisfied. No objection has been made on the ground that the transaction out of which the dispute arose was not an "investment" for the purposes of the Convention, even though the transaction involved did not always call for a capital contribution and took the form of a supply of services or a transfer of technology.<sup>53</sup> Under these circumstances, it seems that the parties to ICSID proceedings subscribe to the view that the notion of investment, in the context of the Convention, includes the most modern forms of association between investors and host States.

The arbitral tribunal is also free to consider on its own initi-

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47. Arbitration Rule 21(2) reads as follows:

At the request of the parties, a prehearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

Arbitration Rule 21, *supra* note 13.

48. Arbitration Rule 43, *supra* note 13. See *Guadalupe Gas Prods. Corp. v. Federal Military Gov't of Nig.*, Case ARB/78/1.

49. Arbitration Rule 41(1) provides that these objections "shall be made as early as possible." Arbitration Rule 41(1), *supra* note 13.

50. See *supra* note 6 and text accompanying notes 27-28.

51. See NEWS FROM ICSID, Summer 1984, at 5-7.

52. *Id.* at 7-11.

53. Delaume, *supra* note 16, at 116-19.

ative and at any stage of the proceedings "whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre or within its own competence."<sup>54</sup> This was done in the proceedings concerning disputes between foreign investors and Jamaica,<sup>55</sup> and in the recent unpublished decision of an ICSID tribunal.

In this connection, a question of terminology ought to be clarified. Article 41(1) of the ICSID Convention provides that: "The Tribunal shall be judge of its own competence." The meaning of the word "competence" is twofold. It implies first that the Tribunal must be satisfied that the dispute is within the "jurisdiction" of ICSID, that the basic requirements of the Convention are satisfied. It also means that the Tribunal is empowered to consider issues dealing with its "competence," such as those that might concern the constitution of the Tribunal or the issue of *lis pendens*, if it is alleged that the dispute falls within the competence of another tribunal. In practice, ICSID tribunals have experienced no difficulty in making this distinction and in segregating issues of "jurisdiction" from those relating to their "competence" in the narrow sense of that term.<sup>56</sup>

### 5. *The Award*

The provisions of the Convention concerning the form and content of the award are straightforward.<sup>57</sup> The award must: (i) be rendered by a majority of the members of the tribunal; (ii) be in writing and signed by the members who voted for it; (iii) deal with every question submitted to the tribunal; and (iv) state the reasons on which it was based. Any member may attach an individual opinion to the award.

The award is final and binding upon the parties. Remedies against the award are limited to revision, on the ground of newly

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54. Arbitration Rule 41(2), *supra* note 13. See also Rule 42(4), *supra* note 13, relating to the situation in which a party defaults.

55. See Schmidt, *supra* note 6, at 96-103.

56. As to jurisdictional issues, see *supra* notes 19-21, 24 and accompanying text. Regarding issues of competence, see *infra* notes 78-88 and accompanying text.

57. Convention, *supra* note 1, art. 48; Arbitration Rule 47, *supra* note 13. When the award is rendered, the Secretary-General dispatches certified copies to the parties. The date of dispatch is the date of the award. Convention, *supra* note 1, art. 49(1); Arbitration Rule 48, *supra* note 13.



discovered facts "of such a nature as decisively to affect the award,"<sup>58</sup> and annulment, on specific and limited grounds.<sup>59</sup> Consistent with the self-contained character of the ICSID machinery, those remedies must be exercised under the auspices of ICSID and within the framework of the Convention. In other words, and in contrast with awards within the scope of other international arbitration conventions,<sup>60</sup> ICSID awards are not open to attack on any ground (not even on the ground of public policy) in the courts of Contracting States.

At the time of writing, an annulment proceeding (the first in the history of ICSID) is pending. It concerns the award rendered in *Klöckner Industrie Anlagen GmbH v. United Republic of Cameroon and Société Camerounaise des Engrais (SOCAME)*.<sup>61</sup> No more can be said on this subject at this time.

## 6. Costs

ICSID attempts to reduce the costs of proceedings to a minimum. Although costs necessarily vary from case to case,<sup>62</sup> IC-

58. Convention, *supra* note 1, art. 51.

59. Convention, *supra* note 1, art. 52. The grounds for annulment are:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

*Id.*

60. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38; European Convention on International Commercial Arbitration, Apr. 21, 1961, art. IX, 484 U.N.T.S. 364 Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, art. V, OEA/Ser. A/20 (SEPF), reprinted in 14 I.L.M. 336 (1975).

61. 2 NEWS FROM ICSID, Winter 1985, at 2.

62. In this connection, it may be useful to quote from an author particularly familiar with certain ICSID proceedings:

In the three arbitration proceedings with which we are concerned, the total amount of fees and expenses for judges equalled about 5% of the amount of the decision in the "Benvenuti & Bonfant" case and around 1% in the "AGIP" case. In view of the criterion for calculation indicated in the foregoing, the difference is to be ascribed to the greater duration and complexity of the first-named dispute, in the course of which the court of arbitration among other things had to have recourse to an audit.

In the "Gardella" case, on the other hand, the cost of the proceeding proved to be of the order of 5% of the value of the claim advanced by the plaintiff.

SID arbitration is usually less expensive than arbitration conducted under the auspices of other institutions. The reason for this is not only that ICSID receives support from the World Bank and benefits from the use of its facilities and services, but also because ICSID makes a deliberate attempt to relate expenses incurred by the parties to work effectively performed in relation to individual proceedings. Thus, unlike arbitration institutions that require at the outset the deposit of funds calculated to cover full administrative charges,<sup>63</sup> ICSID's practice is to request advance payments from the parties from time to time to cover estimated expenditures for periods of three to six months.<sup>64</sup> The amount of these advances is normally divided equally between the parties. However, in an annulment proceeding under the Revised Regulations, the applicant is solely responsible for the payment of advances.<sup>65</sup>

Always with a view toward economy, the fees of arbitrators are set at a stated amount per each day of work.<sup>66</sup>

ICSID also performs a number of services free of charge. This is the case in regard to services supplied by the Secretariat prior to the constitution of the Tribunal or those relating to the appointment of arbitrators by the Chairman of the Administrative Council.<sup>67</sup>

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Translated from Bernardini, *supra* note 6, at 39.

63. See, e.g., W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 24, at ¶¶ 3.02-3.04 (regarding ICC arbitration).

64. Administrative and Financial Regulation 14(3)(a), *supra* note 13.

65. Administrative and Financial Regulation 14(3)(e), *supra* note 13. The rationale for this change is twofold. First, it is intended to deter frivolous annulment applications, which might expose the party in whose favor an award was rendered to unnecessary additional expense. Second, the party in favor of whom the award was rendered is unlikely to contribute to financing the costs of a procedure which, at worst, could be detrimental to its interests and, at best, cause it additional expense simply to confirm an existing award.

The ultimate apportionment of costs can be determined by the ad hoc committee constituted to review the request for annulment.

66. This amount is at present SDR 600 per day. The amount can be varied by the Secretary-General from time to time, with the approval of the Chairman of the Administrative Council, taking into account monetary fluctuations and changes in the cost of living. This should enable ICSID to take into account economic realities, while preserving the low costs of ICSID proceedings. See Administrative and Financial Regulation 14(1), *supra* note 13.

67. In the same connection, it should be noted that under the original provisions of Administrative and Financial Regulation 25, the presence of the secretary of each Com-

## II. The External Consequences of the ICSID Machinery: ICSID Arbitration and the Courts

### A. *Judicial Restraint*

#### 1. *The Rule of Judicial Abstention*

From the date of consent by the parties to ICSID arbitration until the rendering of an award, ICSID arbitration is insulated in all Contracting States against any form of judicial intervention.<sup>68</sup> The rationale for this rule of judicial abstention is twofold. The Convention gives investors direct access to an international forum and assures them that, once a Contracting State has consented to ICSID arbitration, the refusal or abstention of the State party to a dispute to participate in the proceedings cannot prevent the institution, conduct, and conclusion of the proceedings, or the recognition and enforcement of an ICSID award.

In exchange, the Convention protects Contracting States from other forms of foreign or international litigation. Because consent to ICSID arbitration is equally binding upon the investor as it is on the State party to the dispute, that State is assured that the investor cannot bring action in a non-ICSID jurisdiction, whether in the investor's own State or somewhere else. In other words, both parties must respect the exclusive character of ICSID remedies.

This rule is intended to maintain the careful balance between the interests of investors and those of Contracting States that is the paramount objective of the Convention. If a court in a Contracting State is seized of an action, which on its face should fall within ICSID remedies, the court, in order to achieve this objective, must stay the proceedings and refer the parties to ICSID to seek a jurisdictional ruling. Such a ruling may be made

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mission, Tribunal, and Committee was required at all hearings. Cases arose, however, in which the parties wished to dispense with the presence of the secretary in order to save costs. In these circumstances, there seemed to be no reason to impose upon the parties the presence of the secretary. The requirement that the secretary attend all hearings has therefore been deleted from Administrative and Financial Regulation 25, and his role with regard to each individual proceeding is left to the determination of the Secretary-General. See Administrative and Financial Regulation 25, *supra* note 13.

68. A Contracting State could, however, make its consent to ICSID arbitration subject to the exhaustion of local remedies. See *supra* note 9.

at the time of registration of the request by the Secretary-General or subsequently, when issues of jurisdiction are considered by an arbitral tribunal. Once ICSID makes its determination, either the case will remain within ICSID's exclusive arbitration process or, if ICSID finds that the case does not satisfy the requirements of the Convention, the case may be considered by the domestic court involved, assuming that it has an independent basis for entertaining jurisdiction over the parties or the subject matter of the dispute. In other words, if an action is brought in the courts of a Contracting State contrary to an alleged ICSID arbitration clause, the court in which action is brought is under an obligation to abstain from entertaining the action unless and until ICSID has determined that it has no jurisdiction. This rule of abstention is essential to the proper implementation of the Convention. If a court in a Contracting State failed to observe the rule, its own State might be exposed to international claims brought by the Contracting State party to the dispute or whose national is a party to the dispute.<sup>69</sup>

These are considerations that were brought to the attention of the U.S. Court of Appeals for the District of Columbia Circuit by the United States Government in *Maritime International Nominees Establishment v. Guinea*.<sup>70</sup> The court of appeals decided the case on another basis, namely the U.S. Foreign Sovereign Immunities Act (FSIA).<sup>71</sup> The court was of the opinion that, although consent to arbitration might constitute a waiver of immunity under the FSIA, no such waiver could be inferred from a consent to ICSID arbitration because American courts were "powerless to compel ICSID arbitration." Under the cir-

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69. Article 64 of the Convention provides that: "Any dispute between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by application of any party to such dispute, unless the States concerned agree to another method of settlement." Convention, *supra* note 1, art. 64. Because this rule of abstention is directly relevant to the "interpretation" or "application" of the Convention, failure by a domestic court to comply with the rule might expose its own state to the type of international claim that is referred to in article 64.

70. 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983), *reprinted in* 21 I.L.M. 1355 (as amended 22 I.L.M. 86 (1983)). See Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784 (1983) (gives a number of illustrations of situations in which the rule of abstention should be observed).

71. Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d) and 1602-1611).

cumstances, the court held that by consenting to ICSID arbitration, Guinea had not waived its immunity for the purpose of the FSIA and that the court should decline jurisdiction.

This decision reaches the right result, but is based on considerations found in the domestic law of the forum, the FSIA. It should have been based instead on grounds consistent with the purposes of the Convention and the exclusive character of ICSID arbitration. This is the solution that has recently prevailed in the French courts in attachment proceedings that now deserve consideration.

## 2. *Provisional Measures (Interim Measures of Protection)*

Under the Convention, the only provisional or interim measures of protection to which the parties may be entitled are those that can be recommended by an arbitral tribunal on its own initiative or upon the parties' request.<sup>72</sup> In other words, by consenting to ICSID arbitration, the parties waive their right to seek interim measures of protection, including attachment in domestic courts, *whether before or after* the institution of ICSID proceedings. In this respect, the ICSID rules differ from those of other arbitration institutions, according to which requests for interim measures addressed to a judicial authority are not deemed incompatible with the arbitration agreement.<sup>73</sup>

In the context of ICSID, if the parties wish to retain the option to seek judicial assistance with respect to provisional measures, they must do so by way of an express provision in the agreement recording their consent. Examples of such provisions are found primarily in financial agreements between bankers and foreign governmental borrowers,<sup>74</sup> and in the Model Clauses published by ICSID.<sup>75</sup>

72. Convention, *supra* note 1, art. 47; Arbitration Rule 39, *supra* note 13.

73. See, e.g., Rules for the ICC Court of Arbitration, ICC Publication No. 291, art. 8 (5) (1980); W.L. CRAIG, W. PARK & J. PAULSSON, *supra* note 24, at ¶¶ 27.01-.04; Commercial Arbitration Rules of the American Arbitration Association, Feb. 1, 1984, § 46; UNCITRAL Arbitration Rules, art. 26(3), UNCITRAL, Report of the Ninth Session, [1976] 7 Y.B. COMM'N INT'L TRADE L. 22, U.N. Doc. A/CN.9/SER.A/1976, reprinted in 2 Y.B. COM. ARB. 161 (ICCA 1977). See also 2 G. DELAUME, *supra* note 9, § 13.14.

74. See generally 2 G. DELAUME, *supra* note 9, § 15.18.

75. Model Clause XVI reads as follows:

The consent to arbitration recorded in [identify the Basic Clause] shall not

In the absence of such an agreement, the exclusive character of ICSID arbitration requires the courts in Contracting States, consistent with the rule of abstention, to refuse judicial assistance to the party seeking provisional measures. *Republique Populaire Révolutionnaire de Guinée v. Société Atlantic Triton*,<sup>76</sup> a French decision, illustrates the rule. In that case, Atlantic Triton and Guinea had entered into a contract for the conversion of vessels into fishing vessels and for the training of crews. The contract provided for ICSID arbitration and Atlantic Triton submitted a request for the institution of arbitration proceedings to the Secretary-General. The request was registered on January 15, 1984,<sup>77</sup> and the ICSID arbitral tribunal was constituted on August 1, 1984.<sup>78</sup>

On October 12, 1983, *before* the submission of the request to ICSID, Atlantic Triton obtained an order of attachment from a French commercial court concerning three Guinean vessels under repair in a French port. The order was confirmed on April 6, 1984, *after* registration of the request by the Secretary-General. On appeal, the Court of Appeal vacated the attachment on the ground that, the arbitral tribunal had "general and exclusive competence to decide not only in regard to the merits, but also in respect of any provisional measures" and that consequently, the French courts had no jurisdiction in the matter. This, clearly, is the correct solution.

In this connection, reference should also be made to the *Holiday Inns*<sup>79</sup> case. It should be recalled that this case involved arrangements for the construction of hotels in Morocco by the Holiday Inns Group. Because of alleged acts of Morocco, H.I. Group stopped construction of two hotels. In 1972, *after* the registration of the request for ICSID arbitration, the Government of Morocco obtained orders from the Moroccan courts authoriz-

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preclude any party hereto from taking, or requesting any judicial or other authority to order, any provisional or conservatory measure, including attachment, prior to the institution of the proceeding or during the proceeding, for the preservation of its rights and interests.

76. Judgment of Oct. 26, 1984, Cour d'appel Rennes (unpublished decision). It will appear in English translation in a forthcoming issue of *International Legal Materials*.

77. NEWS FROM ICSID, Winter 1985, at 2.

78. *Id.* at 3.

79. See *supra* text accompanying notes 27-28.

ing it to take all necessary measures to have construction resumed and completed at H.I. costs. The courts also appointed a judicial administrator.

In the ICSID proceedings, the claimants argued that the unilateral action of the government was contrary not only to the terms of the Basic Agreement between them, but also to the exclusive character of ICSID arbitration. The government took the position that the Moroccan courts had exclusive jurisdiction regarding provisional measures and that such measures in effect "assured the protection of the interests of both parties *pendente lite*."

In a strongly worded decision, the arbitral tribunal reaffirmed the general principle that

[t]he Parties are under an obligation to abstain from all measures likely to prevent definitely the execution of their obligation.

The Tribunal therefore considers that it has jurisdiction to recommend provisional measures according to the terms of Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Parties still having the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspect of the dispute[.]<sup>80</sup>

and made a number of recommendations to the parties.<sup>81</sup>

This decision is interesting because it illustrates the point that the Tribunal rendered its decision prior to ascertaining its jurisdiction to deal with the merits. This is an issue which has confronted other international tribunals and is still the object of

80. Lalive, *supra* note 6, at 136 (quoting the decision of the arbitral tribunal).

81. "Both parties are invited to abstain from any measure incompatible with the upholding of the Contract and to make sure that the action already taken should not result in any consequences in the future which would go against such upholding." *Id.* at 137.

According to Lalive:

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

*Id.*

controversy.<sup>82</sup>

In the case of ICSID, unlike in that of other tribunals, the issue arises in a special context. Before it reaches an ICSID tribunal, the request must have been screened by the Secretary-General. Registration of a request constitutes, therefore, *prima facie* evidence that, in the opinion of the Secretary-General the dispute is not "manifestly" outside the jurisdiction of ICSID or, as that term is used in article 41(1) of the Convention, "the competence" of the tribunal. To be sure, the Tribunal is not bound by the Secretary-General's decision.<sup>83</sup> Nevertheless, that decision cannot but weigh in favor of the Tribunal's power to rule at an early stage of the proceedings on provisional measures, which incidentally, have not often been requested.<sup>84</sup>

### 3. *Lis pendens*

Another issue, which arose in the *Holiday Inns* case, also deserves attention. The Basic Agreement between Morocco and the H.I. Group provided that Morocco undertook to lend funds to the H.I. Group in the form of mortgage loans made by Moroccan financial institutions. Disbursement of these loans were stopped presumably on the government's instruction. The claimants included their grievances in regard to these loans in the dis-

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82. See, e.g., SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION* 170-80 (1965); Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 46 BRIT. Y.B. INT'L L. 259 (1975); V.S. MANI, *INTERNATIONAL ADJUDICATION* 276-318 (1980).

83. This point was made in another decision of the tribunal in the *Holiday Inns* case in which the Tribunal stated: "The registration of the Request by the Secretary-General shows and only shows that the Request was not in his view manifestly outside the jurisdiction of the Centre" and that such registration did "not of course preclude a finding by the Tribunal that the dispute is outside the jurisdiction of the Centre." Lalive, *supra* note 6, at 144 n.2 (quoting the decision of the arbitral tribunal).

For an interesting history of the ICSID Convention and a comparison with other international tribunals, see Masood, *Provisional Measures of Protection in Arbitration under the World Bank Convention*, 1 DELHI L. REV. 138 (1972).

84. One request was granted in the case of *AGIP v. Congo* in which the respondent had taken custody of corporate documents of the claimant and the tribunal recommended that the documents should be preserved, a complete list be sent to the tribunal and the plaintiff, and that these documents be produced to the tribunal at the request of the claimant. This decision is summarized by Bernardini, *supra* note 6, at 35.

In the proceedings relating to the dispute between Atlantic Triton and Guinea, the issue became moot following the revocation of the order of attachment by the Cour d'appel Rennes. See *supra* note 75 and accompanying text.



pute submitted to the ICSID arbitral tribunal. The government objected that the Moroccan courts had sole jurisdiction because the loans had been made to the Moroccan subsidiaries of the claimants (which as decided by the Tribunal were not eligible to be parties to ICSID proceedings)<sup>85</sup> by Moroccan institutions (and not by the government), and the loan contracts provided for the jurisdiction of the Moroccan courts. Also the government contended that, although the Basic Agreement provided that it "will lend" moneys to the H.I. Group this provision meant only that it would facilitate or cause loan contracts to be made and that, following the making of these contracts, its obligation was discharged. The Tribunal refused to accept this interpretation. It held also that the loans were a means to implement the Basic Agreement, an international contract, and had a subordinate character. Said the Tribunal:

It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.<sup>86</sup>

Under the circumstances, the Tribunal found it necessary to segregate issues that related directly to the investment from other "indirect or secondary aspects" of the loan contracts, which might concern the relations between the lenders and the borrowing companies. In the event that both the Tribunal and the local courts within the scope of their respective jurisdiction, would be faced with the same type of issues, the Tribunal made it clear that:

In such a hypothetical situation the Moroccan tribunals should refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the Tribunal had already decided them, the Moroccan tribunals should follow its opinion. Any other solution would, or might, put in issue the responsibility of the Moroccan State and would endanger the rule that interna-

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85. See *supra* text accompanying notes 27-28.

86. Lalive, *supra* note 6, at 139 (quoting the decision of the arbitral tribunal).

tional proceedings prevail over internal proceedings.<sup>87</sup>

A plea of *lis pendens* was also raised in the case of *Benvenuti Bonfant v. Congo*.<sup>88</sup> In that case, the respondent filed objections to the "competence" of the Tribunal on the ground that a suit was pending before a Congolese court. The plea did not succeed because the Tribunal found that there was no identity between the parties to the ICSID and the Congolese proceedings and that the subject matter of the two disputes was not the same.<sup>89</sup>

## B. Judicial Assistance

In view of the general literature dealing with the recognition and enforcement of ICSID arbitral awards<sup>90</sup> and of articles dealing with specific issues that arose in that context,<sup>91</sup> the type of assistance that domestic courts can be expected to give to the ICSID machinery can be summarized briefly.

### 1. Recognition of ICSID Awards

Article 54(1) of the Convention provides that each Contracting State shall recognize an ICSID award and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in the recognizing State.<sup>92</sup>

The procedure for the recognition and enforcement of ICSID awards is made as simple as possible. Under article 54(2) of the Convention any party to an ICSID award may obtain recognition and enforcement of the award by furnishing to the com-

87. *Id.* at 160.

88. 21 I.L.M. 740 (1982), with a correction in 21 I.L.M. 1478 (1984).

89. See ¶¶1.13-1.16 of the award, 21 I.L.M. 740, 744-45 (1982).

90. See the bibliography prepared by the Secretariat and issued as Document IC-SID/13.

91. Delaume, *supra* note 70, at 796-803; Giardina, *L'Execution des Sentences du Centre International pour le Règlement des différends Relatifs aux Investissements*, 1982 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ at 273.

92. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State. See, e.g., 22 U.S.C. § 1650a(a) (1982) (in regard to the United States). As to the problems which might arise under that provision, see Coll, *United States Enforcement of Arbitral Awards Against Sovereign States: Implications of the ICSID Convention*, 17 HARV. INT'L L.J. 401, 410-13 (1976).

petent court or other authority designated for the purpose by each Contracting State, a certified copy of the award. An illustration of the effectiveness of this procedure is found in a French decision giving recognition to the award rendered in the case of *Benvenuti & Bonfant v. Congo*,<sup>93</sup> in which the court said that:

[The] provisions [of the ICSID Convention] offer a simplified procedure for recognition and enforcement (*exequatur simplifié*) and restrict the function of the court designated for the purposes of the Convention by each Contracting State to ascertaining the authenticity of the award certified by the Secretary General of the International Centre for Settlement of Investment Disputes.

This decision is the only one rendered so far. Following recognition of the award, the Government of the Congo complied with it.<sup>94</sup>

## 2. *Enforcement of ICSID awards and sovereign immunity*

Once it is recognized, an ICSID award becomes an executory title. As such it could be enforced readily against an investor, if the investor refused to comply with the terms of the award. The situation might be different if the State party to the dispute refused to comply with the award. The reason is that the ICSID Convention does not derogate from the rules of immunity from execution that may prevail in each Contracting State.<sup>95</sup> Under the circumstances, it is possible that ICSID awards be capable of execution against the assets of the State (or of one of its "subdivisions" or "agencies") party to the dispute in certain Contracting States and not in other Contracting States.<sup>96</sup>

This is an issue that has been the subject of much scholarly discussion, but which in practice has not arisen, and is unlikely to arise. First, reliance by the State in question upon its immunity from execution would be contrary to its obligation under the Convention to comply with the award and it would expose

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93. Judgment of June 26, 1981, Cour d'appel, Paris, S.A.R.L. Benvenuti & Bonfant v. République Populaire du Congo, *Journal du Droit International* 1981, 843, reproduced in English translation in 20 I.L.M. 878 (1981).

94. NEWS FROM ICSID Winter 1984, at 2.

95. Convention, *supra* note 1, art. 55.

96. G. DELAUME, *supra* note 9, §§ 12.01-.06 (Supp. 1982).

that State to various sanctions set forth in the Convention.<sup>97</sup> Second, and possibly more important than considerations of a strictly legal nature, refusal by the State involved to comply with an ICSID award would deprive it of credibility in the international community.<sup>98</sup> This is not a risk that a State would be likely to assume lightly.

### III. Conclusion

This survey of some salient features of the ICSID machinery speaks well for the effectiveness of the institution. New initiatives, such as the pre-hearing conference now available under the Arbitration Rules should facilitate the process of dispute resolution and lead to an increasing number of amicable settlements, consistent with the ultimate objective of ICSID.

Another encouraging factor is the fact that, unlike in the case of well known international proceedings in which the State involved elected to default,<sup>99</sup> the history of ICSID shows a high degree of State participation in the proceedings. Although only one State has acted as claimant, the States against which proceedings have been instituted have often presented their own grievances in the form of counterclaims that insure them of having a full day in court. This consideration is of direct interest to the effectiveness of ICSID awards. To the extent that counterclaims have been successful, which has been the case in certain instances, the problem of the enforcement of ICSID awards has simply disappeared. In the other instances, in which awards were rendered against a State, the State's participation in the proceedings has certainly been a contributing factor to its willingness to comply with the award or to reach an ultimate settlement with the claimant.

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97. This includes the resumption of diplomatic protection, see *supra* note 10, and the right of the State whose national was party to the dispute to bring an international claim against the non-complying State. Convention, *supra* note 1, art. 64. See Delaume, *supra* note 90, at 801-02.

98. See, e.g., *Sapphire Int'l Petroleum Ltd. v. National Iranian Oil Co.*, award of March 15, 1963, 35 I.L.R. 136, 170; *Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic*, award of October 10, 1973, 53 I.L.R. 297, 311 (1979); *Libyan Am. Oil, Co. (LIAMCO) v. Libyan Arab Republic*, 20 I.L.M. 1, 78 (1981).

99. *Gabon v. Société Serete S.A.*, Case ARB/76/1.