SUBMISSION TO ICSID IN BREACH OF THE CONVENTION:
DISPUTES IN INTERNATIONAL CIVIL ENGINEERING CONTRACTS

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ABSTRACT

The World Bank produces sample bidding documents for use by its member countries to prepare tender forms and contract conditions for Bank-financed civil engineering construction contracts. The contract conditions provide for arbitration of disputes and parties to a contract may choose to submit to the International Centre for Settlement of Investment Disputes (ICSID) which was established by members of the World Bank for the settlement of investment disputes between states and nationals of other states.

The objectives of the Thesis are to (i) examine the legality of generally submitting disputes in international civil engineering contracts to ICSID arbitration, (ii) provide an analysis of ICSID as an international arbitral institution and (iii) discuss the legal aspects of submission of disputes to ICSID arbitration in breach of the Convention that established ICSID.

Chapters One, Two and Three are devoted to describing the importance of civil engineering works to economic growth and arbitration as a method of resolution of disputes. An analysis is made of the fundamentals and complexity of the arbitral process and the interfacing between legal systems, national laws and international law in international arbitrations. Chapter Four traces the genesis of ICSID and Chapter Five examines critically the salient features of ICSID arbitration, which according to the Thesis are not all exclusive to ICSID arbitration.

Chapters Six and Seven analyse in depth ICSID jurisdiction *ratione personae* and *ratione materiae*. Chapter Eight argues that disputes in freestanding international civil engineering contracts are not investment disputes and that submission to ICSID is in breach of the Convention. Chapters Nine and Ten discuss the legitimate role of ICSID in developing rules of international economic law and conclude by recommending that ICSID should not detract from that role by becoming just another arbitral institution in the business of arbitration.
To my wife, Gianna,
as always
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PREFACE AND ACKNOWLEDGEMENTS

During my long years at the World Bank, I realized that what really distinguished the richer developed countries of the West from the developing countries of the third world are not the economic and monetary policies which the developed countries followed but the strength of the legal frameworks within which their economies functioned, the efficiency of the institutions that enacted, executed and enforced the laws and the reliability of their adjudicatory processes.

The international arbitral process not only enables the importation of Western legal and judicial values into the jurisprudence of developing states but it also provides the developing states the opportunities to participate in the development of rules of international economic law which will inevitably shape their political and economic futures. What started as a research into the resolution of disputes in international civil engineering contracts ended up as a study of a unique arbitral institution, the International Centre for Settlement of Investment Disputes (ICSID).

Recently, the World Bank Group undertook a study of the "Legal Framework for the Treatment of Foreign Investment". I hope that this study is only part of a wider task to bring all economic activities in a developing state within the umbrella of a legal framework that guarantees a free and competitive market without privilege or favor and to establish the links between economic development and civil and human rights.

My work would have been impossible without the advice and encouragement of Prof. J.E. Adams of Queen Mary and Westfield College, whose deep concerns for fairness and justice have made a profound impression on me. My thanks are also due to Mr. Antonio Parra, Senior Legal Adviser, ICSID, and his staff for their patience in answering awkward questions and for his interest in the outcome of my research. I must not forget Prof. B. Napier, Director of the Centre for Commercial Law Studies, for the opportunity and honor of studying at the Centre.
I must not fail to mention the administrative staff of the Centre for helping me to adjust to a life in the trenches, the accommodation office of the College for giving me accommodation close to the library and the staff of the college refectory for the cheerful service at breakfast every morning. Having walked the halls of power in the World Bank in Washington, my sojourn at Queen Mary and Westfield College was a humbling yet refreshing and happy experience.

It must have caused great pain to my wife who bore the pangs of separation and the desperation of running a household including three energetic and occasionally rebellious daughters without my reassuring presence. I owe them a lot.

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ABBREVIATIONS

A.A.A. American Arbitration Association
A.B.A.J. American Bar Association Journal
A.C. Appeal Cases (UK)
All E.R. All England Law Reports (UK)
Am. J. Comp. L. American Journal of Comparative Law
Am. J. Int'l L. American Journal of International Law
Am. U.J. Int'l L. & Pol'y American University Journal of International Law & Policy
Arb. Int'l Arbitration International
Australian Y.B. Int'l L. Australian Year Book of International Law
B.U. Int'l L.J. Boston University International Law Journal
Brit. Y.I.L. British Yearbook of International Law
Cambridge L.J. Cambridge Law Journal
Colum. J. Transnat'l L. Columbia Journal of Transnational Law
FIDIC Federation Internationale des Ingenieurs-Conseils
Harv. Int'l L.J. Harvard International Law Journal
ICE Institution of Civil Engineers
I.C.J. Rep. International Court of Justice Reports
I.C.J. Pleadings International Court of Justice Pleadings
ICSID Rev.-FILJ ICSID Review Financial Investment Law Journal
Indian J. Int'l L. Indian Journal of International Law
India L.Rep.Delhi Series Indian Law Reports Delhi Series
Ind. L.J. Indiana Law Journal
Int'l Bus. L. International Business Lawyer
Int'l & Comp. L.Q. International & Comparative Law Quarterly
Int'l Const. L. Rev. International Construction Law Review
I.L.M. International Legal Materials
Int'l L. Rep. International Law Reports
J. Bus. L. Journal of Business Law
J.C.I. Arb. Journal of the Chartered Institute of Arbitrators
J. Int'l Arb. Journal of International Arbitration
J. World Trade L. Journal of World Trade Law
K.B. King's Bench
Lloyd's Rep. Lloyd's Law Reports
L.Q. Rev. Law Quarterly Review
### TABLE OF CASES

#### National Courts

##### UNITED KINGDOM

- **Baron v Sunderland Corporation** [1966] 1 All E.R. 349.
- **Czarnikow v. Rolimpex** [1979] A.C. 351
- **Czarnikow & Co. Ltd. v. Roth, Schmidt & Co.** [1922] 2 K.B. 478.
- **Heyman and another v Darwins Ltd.** [1942] A.C. 356.

Northern Regional Health Authority v. Derek Crouch Construction Ltd. and Another [1984] 2 W.L.R. 676.


Pitchers Ltd. v. Plaza (Queensbury) Ltd. [1940] 1 All.E.R. 151.


Re Smith & Service and Nelson & Sons (1890) 5 Q.B.D. 545.

Scott v. Avery, (1856) 5 H.L. Cas. 811.


The Tuyuti [1984] 3 W.L.R. 231.


**BELGIUM**

FRANCE

The Arab republic of Egypt v. SPP Ltd., and SPP (Middle East) and SPP Ltd. (Hong Kong), Cour d'Appel de Paris.


Meniucci v. Mahieux 4 Y.B. Com. Arb. 190 (1979)


GERMANY


HONG KONG

Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd 1991, MP 2674 Hong Kong Sup Ct.

INDIA


THE NETHERLANDS

SWEDEN


SWITZERLAND


UNITED STATES


International Tribunals


Atlantic Triton Company Limited v. People’s Revolutionary Republic of Guinea (ICSID Case No. ARB/84/1).


The Canevaro Case, (Italy - Peru), The Hague Court of Arbitration, The Hague Court Reports 284 (1916).


Colt Industries Operating Corporation, Firearms Division v. Government of the Republic of Korea (ICSID Case No. ARB/84/2).


Dr, Ghaith R. Pharon v. Republic of Tunisia (ICSID Case No. ARB/86/1).


Flutie Claim (USA v. Venezuela) (1903).


Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab


Mobil Oil Corporation, Mobil Petroleum Company, Inc. and Mobil Oil New Zealand Limited v. New Zealand Government (ICSID Case No. ARB/87/2).


Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania) (Preliminary Objections), (1939) P.C.I.J. Series A/B No. 76.


SEEDITEX Engineering Beratungsgesellschaft fur die Textilindustrie m.b.h. Government of the Democratic Republic of Madagascar (Case No. CONC/82/1).

Societe Adriano SpA v. Government of Cote d'Ivoire (ICSID Case No. ARB/76/1).

Societe Commercial de Belgique (Socobel) Case (1939) P.C.I.J. Series C No. 87.


South-Eastern Greenland Case, P.C.I.J. Series A/B, No. 48 287.


Swiss Aluminium Limited (ALUSUISSE), Icelandic Aluminium Company Limited (ISAL) v. Government of Iceland (ICSID Case No. ARB/83/1).


Chapter One

INTRODUCTION

The World Bank produces sample bidding documents for use by its member countries to draft tender forms and conditions of contract for civil engineering construction contracts financed by the Bank. The conditions of contract recommended by the Bank were based on the so-called FIDIC\(^1\) conditions of contract which provide for settlement of disputes by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) in Paris.\(^2\) This has been generally interpreted as reference to proceedings administered by the ICC Court of Arbitration. The Bank, however, does not preclude the use of other private arbitral institutions.

In 1985 edition of the sample documents which was produced jointly by the World Bank and the Inter-American Bank, the two Banks suggested the use of the facilities of the International Centre for Settlement of Investment Disputes (ICSID), an agency of the World Bank Group, for arbitration of disputes in international civil engineering contracts as an alternative to the use of private arbitral institutions such as the ICC Court of Arbitration. The alternative provisions in the 1985 edition of the sample documents were in small print and no contract has been reported of provisions having been made for ICSID arbitration in an international civil engineering contract.

The most recent edition of the sample bidding documents which was issued in 1991 by the World Bank (the Inter-American Bank has withdrawn from the

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\(^1\) FIDIC is the acronym for Federation Internationale des Ingenieurs-Conseils. The latest edition of the conditions of contract was published in 1987.

\(^2\) Clause 67.3 of the FIDIC conditions.
joint production) has given prominence to the alternative provisions in the documents for ICSID arbitration. ICSID was created by a multilateral Convention to encourage foreign private investment in developing countries by providing an international method of settlement of disputes between foreign investors and the governments of countries hosting them. The fact that member states of the World Bank have shown no known interest in providing for the use of ICSID facilities in international civil engineering contracts financed out of World Bank loans and credits could suggest that the states are not certain if ICSID is the appropriate institution for arbitration of disputes arising out of such contracts.

The objectives of this Thesis are to (i) examine the legality of generally submitting disputes in international civil engineering contracts to ICSID arbitration, (ii) provide an analysis of ICSID as an international arbitral institution and (iii) discuss the legal aspects of submission of disputes to ICSID arbitration in breach of the Convention that established ICSID as a public international arbitral institution.

I. Civil Engineering Construction and Economic Growth

A commonly used measure of economic activity (production) in a country is the value of its gross domestic product which includes investment in the country’s infrastructure and means of production of goods and services, namely, its capital stock. A large growth of the gross domestic product does not in itself signify an improvement in welfare or success in economic development but it is an indicator of the amount of economic activity that prevails in a country and roughly demonstrates the benefits that can accrue to its people if proper

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economic and social policies are followed. A significant portion of domestic production is attributable to construction.⁴

Economic growth depends on construction and maintenance of the country’s infrastructure such as transport, telecommunications, water and energy supplies, schools and hospitals and the construction and maintenance of factories, offices, shops and service facilities which benefit directly from the country’s infrastructure. Infrastructure includes many large items of civil works - roads, railway lines, bridges, harbor and airport facilities, dams, power stations, electric power lines, waterways, irrigation canals, water supply and sewage systems and buildings to house government offices, schools and hospitals. The provision of good infrastructure facilities encourages human settlements and location of manufacturing and service industries and the transport and marketing of industrial and agricultural products for domestic consumption and exports to world markets. The construction of civil works is indispensable for economic growth on which depends the improvement of standards of living and the quality and expectancy of human life.

The volume of construction is a key indicator of a country’s economic and social well being. It reflects investor confidence, rising employment and standards of living and increased demand for housing. It is usual for the volume of construction to figure as an important factor in the monitoring of a country’s economy by government planners and policy makers.⁵ For example, the number of monthly housing starts in the US is regarded as a fairly reliable pointer to the

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⁴ Annual statistics on value of construction in countries of the world are published in the The Europa World Year Book, Economic Intelligence Country Reports and the World Bank Country Reports.

direction in which the country’s economy is moving and housing is said to account for about 32% of the total capital stock in the US. 6 

The assumption that construction in the developed countries would have levelled by now is belied by the fact that they continue to register a higher average proportion of their gross domestic product per year attributable to construction activity than developing countries. Modern road traffic demands new and higher standard roads, faster trains need new specialized rail lines, expanding industries need supporting structures and environmental considerations result in replacement of obsolete installations. Construction activity is one of the largest employers of labor in developed countries. In both developing and developed countries, the construction of civil works involve large capital outlays and the execution of contracts, worth large sums of money, by civil engineering contractors. In the developing countries, for the most part, these projects, particularly, the infrastructure projects, are carried out under contracts with state or state entities.

In the latter half of the seventies following the sudden and dramatic increase in oil prices, the oil producing countries of the middle east embarked on a massive program of construction which attracted international contractors from all over the world including some developing countries such as the Philippines, South Korea, Taiwan and the former Yugoslavia. By and large, however, most major civil works projects are undertaken by large international contractors from Western Europe, the USA and Japan. It is estimated that the middle eastern states belonging to the Oil Producing Community invested as much as about US$ 40 billion a year on construction projects since 1977. 7 Although construction declined in the late eighties, the aftermath of the Gulf war is bound to be a period of intense reconstruction and rehabilitation of the affected countries.

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including Iraq in the long run when sanctions have been lifted and Iraq resumes normal diplomatic relations with the western world.

II. International Civil Engineering Contracts

(a) State-Financed Projects

The emergence of most Asian and African countries from colonial rule immediately after the second world war resulted in ambitious plans by these countries to expand their infrastructure facilities and to invest in state owned manufacturing and other industries. While funding for these projects initially originated from the states themselves, over time they have become increasingly dependent on foreign private and public sources of finance and international and regional development institutions for assistance in the implementation of high priority construction projects. So much so that in some African countries almost all construction projects are financed by multilateral development Banks such as the World Bank, Asian Development Bank and African Development Bank and bilateral sources such as the British Overseas Development Administration, the US Development Aid Agency, the Japanese Overseas Aid and the Italian External Aid Agency to name some of these institutions. The state's own participation in the projects is usually limited to the estimated local costs of the projects and can be as low as 15% of the project costs.

The charters and rules of these organizations call for the giving of aid and loans to states or state entities or for channelling of funds through state or state entities. The states are, therefore, deeply involved either directly or indirectly in contracts with international contractors who undertake the large construction projects. Because of the technology involved some classes of projects are

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8 E.g. International Bank of Reconstruction and Development, Articles of Agreement, Article III.
exclusively the domain of foreign contractors, originating from the developed countries, who are encouraged to form joint ventures with local companies in bidding and executing these projects in order that technology transfer can be formally or informally transmitted to the local companies. In any event, a large amount of local labor and local staff are employed in the execution of these projects and result in their acquisition of skills and some know-how which are urgently needed to sustain economic development.

(b) Contractor-Financed Projects

The states themselves instead of applying for aid or borrowing moneys from development institutions to finance major civil works projects may invite contractors to construct a road or a bridge or a power station under conditions that they will be paid the contract sum by the states concerned usually in instalments over an extended period of time going beyond the project construction period. In effect, the contractors will secure financing for the project with or without guarantees provided by the home and/or host states. The contract sum will include the financing costs and interest over the period agreed between the contractor and the contract will provide for the host state to pay the entire contract sum. The contractor has no stake in the economic or financial success of the project other than its mere completion. He is paid regardless of the fact that the project may not generate any profits and the benefit to the state's economy may not be satisfactory.

Alternatively, the contractor and his financiers may agree to recoup the project costs and a satisfactory return out of revenues earned by owning and operating the facility for an agreed period of time before turning over the facility to the state concerned. The state may not wish to take over the facility and may have agreed for the ownership of the facility to vest in the contractor and his sponsors and to be operated as a business undertaking. In both these cases, the contractor and his sponsors would obviously have a stake in the successful
outcome of the project. They would have analysed the technical and financial viability of the project and would have weighed other factors such as the right of repatriation of capital and profits and the general investment climate in the host state and investment incentives offered by the host state.

The contractor may be a single foreign company or a joint venture of several companies including a major civil engineering contractor or a joint venture that includes local contractors and suppliers. The legal instruments employed in these projects, so-called Build-Operate-Transfer (BOT) projects or Build-Operate-Own (BOO) projects, may involve more than one agreement and may involve other state entities such as the public works department or the highway authority or the state electricity corporation. Thus, not only the state proper is involved but a state ministry or department or an autonomous state agency or even a state corporation incorporated under the local commercial code or company law may be involved and the agreements may cover matters other than the construction of the civil works such as state guarantees, tolls, electric power purchase, tariffs etc.

The difference between a normal contractor-financed project and a BOT or BOO project is that the contractor in the former case is only concerned with the ability of the host state to pay the contract sum while in the latter cases the contractor has a stake in the successful outcome of the project because he pays himself and his sponsors out of the profits he makes in operating the project facility whether it be a toll road, a power station or water supply or some other. It is a business undertaking.

The BOT/BOO transactions usually consist of a basic or protocol of agreement with a department of the host state and other agreements made contemporaneously or afterwards pursuant to the basic agreement. All the agreements including the contract for the construction of the civil works have an international character in that the single contractor or the dominant contractor
in a joint venture is from a state other than the state where the works are sited. Together with other agreements with the host state on loan guarantees, allocation of land, tariffs etc., the package of agreements and other legal instruments form a complex legal framework which in time yields a variety of scenarios for disputes.

Some international contractors especially those from the socialist countries could themselves be state owned. Many international contractors also have a multinational character in that they operate through subsidiaries incorporated in the states where the works are to be constructed. Nationals of those states or even those states themselves may have minority holdings in the subsidiaries. Some contractors could be foreign owned but incorporated in the state where they are working. Thus, international contractors may operate in a variety of legal forms and business formats:

(i) private contractor entirely foreign owned incorporated in a foreign state,
(ii) private contractor entirely or for the major part foreign owned incorporated in the state where it is engaged in civil works,
(iii) private contractor entirely foreign owned operating through a subsidiary incorporated in a state also entirely foreign owned,
(iv) private contractor entirely foreign owned operating through a subsidiary incorporated in another state with a minority local private or local state participation,
(v) state owned or state controlled foreign contractor,

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9 Between 1980 and 1992, the Turkish Ministry of Energy and Natural Resources entered into 12 agreements with foreign contractors to construct thermal and hydro electric power generating stations under BOT arrangements. Licenses were given to operate these stations for periods up to 99 years.
(vi) state owned or state controlled foreign contractor operating through a subsidiary incorporated locally with a minority local private or local state participation and

(vii) joint ventures with local contractors, private or state controlled or owned.

(c) Mixed International Civil Engineering Contracts

This Thesis deals only with legal aspects of contracts which have been described by Toope\(^{10}\) as mixed international contracts - that is, contracts between a state or state entity and a foreign private party. The description of mixed international contracts is used to distinguish such contracts from private international contracts between private parties of different nationalities resident in different jurisdictions and public international accords between state and state. The private party could be a natural or juridical person. As can be seen from the list of possible business formats described above, some foreign contractors may indeed be themselves owned or controlled by the states in which they are incorporated. For the purposes of this Thesis these contracts will also be included in the class of contracts called mixed international civil engineering contracts.

(d) International Civil Engineering Contract Forms

To the foreign contractor in any of the business formats listed above, the special risks associated with working in unfamiliar social, political and legal systems and those associated with the state’s exercise of its sovereign powers are matters of paramount concern. Therefore, in order to encourage the participation of foreign

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contractors in bids for civil works, the developed and developing states\textsuperscript{11} themselves and many professional bodies\textsuperscript{12} and international public and private organizations\textsuperscript{13} employ forms of contracts which are designed to reduce contractor risks through special contract conditions, for example, in matters relating to new taxes\textsuperscript{14}, exchange control\textsuperscript{15}, variations in prices of plant, materials and labor\textsuperscript{16} and fluctuations in currency exchange rates.\textsuperscript{17} Although these contract forms can be used between a private entity and a foreign contractor, almost exclusively the forms are designed for employment of foreign contractors by developing states or their state entities.

Although often described as an attempt to balance the risks as between a foreign contractor and the state party to the civil engineering contract, the contract forms, when closely scrutinized, are actually designed to eliminate contractor borne risks to the maximum extent possible including risks that can be quite normal in a domestic contractual relationship and other entrepreneurial activities. The contractor is virtually protected against all risks other than loss of anticipated profits due to his own incompetence in organizing and managing the works, buying materials and equipment and estimating the productivity of his labor and equipment. The risk of damage due to every foreseeable and unforeseeable contingency is either assumed or insured by or on behalf of the client (that is the host state in a mixed civil engineering contract) at the client's

\textsuperscript{11} E.g. Germany, Japan, Malaysia, South Africa.

\textsuperscript{12} E.g. The Institution of Civil Engineers, London.

\textsuperscript{13} E.g. Federation International Des Ingenieurs-Conseils (FIDIC), Lausanne, Switzerland, World Bank Group, Washington D.C., European Development Fund, Regional Development Banks.


\textsuperscript{15} Ibid., Clause 71.1.

\textsuperscript{16} Ibid., Clause 70.1.

\textsuperscript{17} Ibid., Clause 72.1.
cost. However, generally speaking, the objective is to protect the contractor from non-commercial risks.

It has to be pointed out that little or no use is made of these international contract forms in construction contracts between a developed state or an entity of that state and a private foreign contractor. Most developed states and their entities and local government agencies have their own civil engineering contract forms and public works construction contracts which are subject to the domestic law including the domestic arbitration law, regardless of the nationality of the contractor. There is no international flavor to the contracts other than the fact that the contractor might be foreign but the body of construction law that has evolved from these domestic contracts and its rules are often used in the international context too.

However, the fact remains that the development and application of the rules of international law in regard to international civil engineering contracts are predominantly the outcome of arbitration of disputes that arise out of or in connection with contracts between a developing state or state entity of that state and a foreign contractor usually originating from a developed state. The disputes obviously represent a clash of interests of developed and developing states and must inevitably lead to rules that could be different if developed states or their state entities had been involved as parties to a dispute in international civil engineering contracts under the same conditions.

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20 Some developed states prohibit the resort to arbitrations in public works contracts altogether. Article 2060 of the French Civil Procedure Code contains a general prohibition of arbitration of matters in which state agencies are involved. Article 1676 of the Belgian Code Judiciare
(e) Disputes in International Civil Engineering Contracts

Despite the best intentions and the neatest drafts of international contracts, by the very nature of civil engineering works, claims are common during construction and some lead to disputes between the state or state entity and foreign contractor. Claims can arise in an international civil engineering contract for a variety of reasons and can be grouped into several distinct categories: (i) relating to documentation, (ii) in connection with the execution of the works, (iii) concerning payment provisions, (iv) concerning time, (v) arising from default, determination, frustration etc. and (v) acts committed by the state in the exercise of its governing and sovereign powers.\(^\text{21}\)

Typical of contractor claims that give rise to disputes involve representations made in the tender conditions such as waiver of all taxes and duties, and errors in bills of quantities and formal agreement, extra works due to unforeseen subsoil conditions and physical obstructions, consequences of changes in design, poor workmanship and rejection of permanent works, disagreement over method of measurement and valuation of extras, delays in construction completion and government enacting legislation affecting the execution of the works etc. A contractor may also suffer damage as a result of faulty instructions from the Engineer.\(^\text{22}\) Anyway the question that will always arise is whether or not an event falls within the category of protected risks under the contract.

Contractor claims are far more common but the state may also have a claim that leads to a dispute with the Contractor, but the state has the advantage of being able to withhold payments or apply a lien on the contractor's assets or

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\(^\text{22}\) The Engineer is employed by the Client to supervise and certify the works carried out by a contractor. He is said to hold the balance between the interests of the contractor and the Client.
to block a contractor's repatriation of his profits which would inevitably lead to the contractor lodging a claim that leads to a dispute. The foreign contractor is, therefore, terribly interested in assuring himself (or herself) that a satisfactory system is in place to resolve disputes between him and the state party to the contract.

International civil engineering contracts provide for resolution of disputes other than by suing in a court of law because of the foreign contractor's legitimate fears of becoming embroiled in litigation in local courts and conducting proceedings possibly in a language different from his own and in accordance with procedures and rules of evidence strange to him. He will also be concerned with the length of time it takes to go to a final judgement through the local court system based often on his experience in his own courts of law back at home. He may in addition have real or imagined fears of biased courts favoring local nationals and the government of the day where the state is party to the contract.

The states regard arbitration as sustaining their sovereignty in not having to subject themselves to the courts of other states often without realising that the law of the place of arbitration may have mandatory provisions that must apply to all arbitrations within its territory; and, most arbitrations in international civil engineering contracts involving developing states are held in European cities from which the contractors mostly originate. There is, therefore, no complete balance in the satisfaction of perceived fears and the developing state, in the end, may have to subordinate itself to the laws of a developed state. However, this is no longer an issue in international law because it is now generally accepted that states do not have absolute immunity from the jurisdiction of the courts of other states.
III. Arbitration as an Alternative to Litigation

It is said that arbitration is the popular choice as compared to litigation in courts of law for the resolution of disputes in international commerce particularly in commodities trading, construction and shipping. Expertise, privacy, convenience, speed, low costs and flexibility are cited as the reasons for this but none of these is wholly true of arbitration. Much depends on the cooperation, in the conduct of the arbitration proceedings, of the parties in dispute. Usually, however, parties in adversarial mode can rarely agree on anything. In recent years attempts are being made in civil engineering contracts to provide for some form of amicable methods of settlement of disputes which because of their legally non-binding character will not be discussed in this Thesis.

Although many engineers, architects and other professionals act as arbitrators in construction disputes, an arbitrator need not have expertise in the subject of the dispute or, for that matter, in anything. The person or persons selected to arbitrate may be professional arbitrators or other professionals or simply trusted persons of the parties in dispute. They may or may not be trained in the law and sometimes may not be even be familiar with the subject matter of the dispute. However, most sole arbitrators tend to have a training in the law and some national arbitration laws require all arbitrators to be qualified in law. Exceptionally, a legal system such as the Sharia requires all arbitrators not only


24 In 1991, sixty percent of arbitral appointments by the Chartered Institute of Arbitrators in the construction sector were non-lawyers.

to be qualified in law but also to act impartially in exercising the arbitral functions and be morally upright.26

Privacy cannot be guaranteed because references to arbitration are now routinely published27 and if indeed one party takes the matter to court, the matter in dispute becomes public knowledge. Arbitrations are conducted in private and arbitral awards, as a rule, are not published without the consent of all the parties involved. At least one leading arbitral institution publishes all awards administered by it but with references to the actual names of the parties deleted. Usually, even though the details of the disputes and the evidence and arguments are not published, the dispute itself and the parties involved are common knowledge in the industry. The remedy is not clear if one of the parties decides to publish the award as it happened in the BP v. Libya case.28 Does it lead to a dispute referrable to arbitration or actionable in a court of law?

The justification for privacy in arbitration proceedings has never been clearly understood and it may be suggested that a demand for privacy in international transactions merely helps to cloak shady deals, sharp practices and adventures and is a device to protect the parties involved from the concerns of shareholders in the case of corporations and to keep the public ignorant of the state’s actions in the cases where a state or state entity is a party to a dispute. From an international public policy point of view and as a control generally of arbitration proceedings and of the conduct of arbitrators, it may be argued that

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27 The ICC publishes details of cases but without references to the actual parties where the parties do not consent to publication. It is possible also for one to get access to the archives of the Court of Arbitration of the International Chamber of Commerce. See J. Lew, Applicable Law in International Commercial Arbitration, Oceana, 1978, at p. xiii.

there should be maximum transparency particularly in international arbitration proceedings involving a state or state entity and a foreign legal or natural person. International Bankers are believed to dislike the privacy element in arbitral proceedings because it deprives them of the leverage they would otherwise have on their borrowers who fear publicity and the Bankers tend to turn to domestic courts to litigate their disputes.²⁹

Arbitrations can take a long time³⁰, be inefficient and be very expensive.³¹ While a case before the court of law at least in the common law system is normally heard in one continuous session until a decision is taken, arbitration hearings can be interrupted because of the busy schedules followed by many arbitrators in their own professions and arbitrations may stretch over a number of months or even years if one or more of the arbitrators die or resign or are otherwise incapacitated.³² Also an arbitrator has ample opportunities to delay proceedings. They can also be very expensive if a neutral venue is chosen away from the situs of the dispute and arbitrators, counsel and participants have to travel long distances and stay in five star hotels.

Although there is flexibility in the selection of the arbitral institution, location of the proceedings, substantive law, procedural rules and arbitrators,


³⁰ Arbitration of the AMCO case (ICSID Case No. ARB/81/1) was initiated in 1981. A final award could not be made and only recently was it finally settled. See below. Many arbitrations can also yield to serial litigation in courts in several countries as parties shop around for advantages.


³² In Holiday Inns S.A., Occidental Petroleum Corporation et al. v. Government of Morocco (ICSID Case No. ARB/72/1), arbitration proceedings were suspended for one year in 1976/77 due to the resignation of one arbitrator and the death of another.
once agreed upon can only be changed at the instance of both parties to a
dispute, which is not always easy. With the heavy institutionalization of
the arbitral process, there is a risk that much of the flexibility inherent in arbitration
may be at stake. Arbitral institutions exert considerable influence in the selection
and appointment of arbitrators. In construction disputes parties are allowed to
challenge the nominations made by each other thus eroding the right of a party
to nominate his own choice of arbitrator. Besides, reference to precedents is
constantly made in arbitrations and it would be unrealistic to pretend that they
do not influence decisions. That places arbitral tribunals increasingly in parity
with the courts.

Yet arbitration continues to be the number one method of dispute
resolution in international civil engineering contracts and in international
commerce. Altogether, the London arbitral tribunals including the London Court
of International Arbitration are said to conduct several thousand arbitrations
annually. In 1992, over 747 cases were supervised by the International Chamber
of Commerce Court of Arbitration (ICCA).

Many arbitral institutions exist around the world in Amsterdam, Beijing,
Bogota, Buenos Aires, Cairo, Cologne, Colombo, the Hague, Hamburg, Kuala
Lumpur, Lagos, Los Angeles, Madrid, Miami, Milano, Moscow, New Delhi, New
York, Ottawa, Paris, Rio di Janeiro, Roma, Rotterdam, Singapore, Sofia,
Stockholm, Vancouver, Vienna and many more. Most are private bodies
organized by local and international chambers of commerce. They prescribe rules
for the conduct of arbitration proceedings, some provide a variety of support

33 "One lawyer said, 'We always put our preferred arbitrator third on the list [out of five],
because they'll never give your first choice'" per Flood and Caiger, op. cit. note 31, p. 434.

34 The ICSID Tribunal in Liberian Eastern Timber Corporation (LETCO) v. the Government
of The Republic Of Liberia in referring to previous decisions in the Holiday Inns Case and
the AMCO Case said that "Though the Tribunal is not bound by precedents established by
other ICSID Tribunals, it is nonetheless instructive to consider their interpretations

services (rooms, offices, secretarial and communication services) and most have panels of arbitrators approved by them. Some administer arbitrations in any part of the world. Others also review the appointment of arbitration tribunals, the conduct of the proceedings and the awards. Arbitration can be said to be a form of privatization of the courts system and as enterprises, private arbitral institutions compete for business around the world.

Under the provisions of their national laws of arbitration and international conventions and multilateral and bilateral treaties, these institutions assure a degree of immunity from national courts and extend a promise of recognition and enforcement of their awards world wide. The popularity of arbitration in international transactions is actually based on the perception that litigation in local courts will tend to be biased in favor of their own nationals. Where a state is a party to international arbitration proceedings, arbitral bodies provide a neutral venue in a place outside that state and purport to exclude the application of the laws of another state. Furthermore, in mixed international arbitrations, the majority of the arbitrators would be nationals of other states. A little talked about advantage of arbitral proceedings is that one can have his own counsel to represent him in any part of the world whereas in court proceedings the employment of local counsel qualified to practice in the local bar will be obligatory.

36 Under the rules of the London Court of International Arbitration, the parties may nominate arbitrators but only the Court itself can appoint them. The Court may reject the parties' nominees. The parties, therefore, do not have complete freedom in the appointment of arbitrators.

37 This is the rule despite the fact that the best site for an arbitration of a dispute arising out of a civil engineering contract is the place of execution of the civil works. "The neutrality of the forum is, however, far less important than its suitability for the parties and the subject matter of the contract." per The Hon. Mr. Justice Kerr, op. cit. note 23, at p. 175.

38 Singapore had a strict rule against foreign lawyers practising there including participation in arbitration proceedings. The Singapore Legal Profession (Amendment No. 2) Act 1991 was enacted to allow "any person acting as an advocate and solicitor " in an arbitration in Singapore where the applicable law to the dispute is not Singaporean Law.
Thus, a deliberate effort is made in the whole arbitration process at international level to project an image of impartiality and freedom from intervention by state courts. However, the most powerful attraction to arbitration generally may well be that it leads to an award that is claimed to be binding and final and enforceable in the country of arbitration and other countries particularly those which have acceded to international conventions such as the New York Convention. Arbitral institutions and their rules are designed to provide neutral venues, avoid local court intervention and give an award or decision that is final, not subject to an appellate process and will be recognized and enforced in many countries. However, the absolute denial of the right of access to national courts is most probably unconstitutional in all states.

Chapter Two

THE FUNDAMENTALS OF THE ARBITRAL PROCESS

As described in the above chapter, the provision most favored for resolution of disputes in international civil engineering contracts calls for a reference by either party to the contract to arbitration under an agreement contained in the civil engineering contract itself. The contract usually provides for arbitration in respect of disputes that might arise in the future out of or in connection with the contract or the execution of the works at the instance of either party to the contract. However, mutuality is not necessarily a condition for an international arbitration agreement to be valid and agreements to arbitrate future disputes are not enforceable in some Latin American and Moslem countries.

I. Mutuality

(a) Mutuality in the Domestic Context

The question of mutuality has been discussed mostly in the domestic context. It was first raised in Baron v Sunderland Corporation where the English Court

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1 E.g. FIDIC Conditions of Contract, Clause 67.1: "......If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter of the dispute......".

2 [1966] 1 All E.R. 349.
of Appeal held that the plaintiff's agreement for employment under the corporation did not constitute an agreement to refer disputes to arbitration for the reason, inter alia, that there was a want of mutuality and rejected a lower court order that an action brought by the plaintiff against the corporation in respect of a claim for additional remuneration should be stayed. The order by the lower court had been made under s. 4 of the Arbitration Act 1950 on the ground that there was a valid submission to arbitration by the corporation. Davies, LJ held that:

"It is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration; and it is an essential ingredient in that either party may in the event of a dispute arising refer it in the provided manner to arbitration..............There is complete lack of mutuality in this matter."^3

Later, however, in Pittalis and others v Sherefettin^4, it was held by the same court that Baron v Sunderland Corporation was a special case in that there was no provision in the instrument in that case that could be interpreted as a specific agreement between the plaintiff and the Corporation to refer any dispute to arbitration. Fox, LJ went on to say that he did not think that an arbitration clause must give bilateral rights of reference to arbitration. All that is necessary is an enforceable contract that gives rights of reference "whether unilateral or bilateral."^5

The Pittalis case involved a 21-year lease which provided for arbitration at the instance of the lessee if the lessee did not agree with the landlord's assessment of the increase in annual rent and the dispute rose when the annual rent was increased from Pounds 800 per annum to Pounds 6,000 per annum. Pittalis also is an a-typical case because the dispute by its nature can arise only during the term of the contract and is in connection with the annual rent increase

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^3 Ibid., 351.


^5 Ibid., 232.
which is a matter of consequence only to one party to the contract, namely, the lessee because the burden of disputing an increase in the rent rested with the lessee.

The Pittalis case did not go into the question as to whether an arbitration clause in a contract is a severable agreement independent of the main contract and lived on after the termination of the main agreement because that was not an issue but in two earlier House of Lords cases it was held to be so by Lord Diplock. Looking at it literally, for an arbitration clause to be considered to be fully autonomous and as an agreement apart from and independent of the main contract, the arbitration agreement had to be valid and enforceable under its own steam and that, in English law and in jurisdictions influenced by English law, it cannot be so without consideration, a quid pro quo. For example, a separate arbitration agreement could be signed after the main contract has been executed in which case there is no consideration if the right or obligation to arbitrate is not mutual. That means that both parties should have the obligation of reference to arbitration if arbitration proceedings were to take place after the termination of the main agreement.

6 "The arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself." See Lord Diplock in Bremer Vulkan Schifffabrik v South Indian Shipping Corp Ltd [1981] AC 909 at 980. Words to the same effect that an arbitration clause represents an agreement severable from and collateral to the main contract were restated by Lord Diplock in Paal Wilson & Co. A/S v Partenreederei Hannah Blumenthal, [1983] 1 Lloyd's Rep. 103 at 117.

7 "In an arbitration agreement the consideration for the promise [to arbitrate] of each party is the promise [to arbitrate] of the other." per Chawla, J in Union of India v. Bharat Engineering Corporation [1977] Indian L.R. Delhi Series Vol. 2, 57 at 65. In Fisheries Jurisdiction (UK v. Iceland) Case, the International Court of Justice pointed to the fact that "the compromissory clause had a bilateral character, each of the parties being entitled to invoke the Court's jurisdiction" to reject Iceland's contention that the compromissory clause was the price paid for the recognition of the 12-mile fisheries limit by UK and that by such recognition there was failure of consideration relieving Iceland of its commitment to the compromissory clause calling for reference to the International Court of Justice. See 1973 I.C.J. Reports 15.
A different approach was taken in the Indian case of Union of India v Bharat Engineering Corpn.\(^8\) to justify an arbitration clause giving to a contractor a unilateral right to arbitration. The judgement of Chawala, J of the High Court of Delhi held that an arbitration agreement had to be "mutual". However, he went on to say that "the [arbitration] clause gave rise to a valid option, and when it was exercised it resulted in an arbitration agreement that was fully mutual, because thereafter either party could now make the reference."\(^9\) The use of the word option suggests that the contractor had a choice between going to court or demanding a reference to arbitration instead.

In that case, the contract was between the Railway Administration and Bharat Engineering Corporation, contractor, for the construction of earthworks for some bridges on the rail line between Pathankot and Joginder Nagar. A clause in the contract provided that "In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract or the respective rights and liabilities of the parties, on any matter in question, dispute or difference on any account........ ........the Contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration....". That is the contractor may go for arbitration. No such right was available to the employer, the other party to the contract. The employer must take his claims to the court. The reference to arbitration was a privilege or right accorded only to

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\(^9\) "The holder of the option is under no obligation to exercise it but if he does, a bilateral contract of sale between him and the owner will come into existence." per Cheshire, Fifoot and Furmston, Law of Contract (12th. Edition), Butterworths, London at p. 149. In the Indian case, by exercising the option to arbitrate a bilateral agreement to arbitrate comes into existence and the arbitration must take place.
the Contractor. In other words, it is an option given to the Contractor as part of a package of promises made by the employer in return for his undertaking to carry out the civil works. Therefore, as part and parcel of the civil works contract, the unilateral arbitration clause is quite valid as also per the ruling of Fox, L.J. in the later Pittalis case.

The Railway Administration was not pleased with the progress of the works and after issuing various notices rescinded the contract and awarded the work to another company at the risk and cost of the original contractor. Pursuant to the unilateral arbitration clause in the contract, the contractor moved to refer to arbitration under section 20 of the Indian Arbitration Act 1940. The disputes and differences for which the arbitration was sought were listed in an annex to the contractor's claim. The Railway Administration counterclaimed an even larger sum than that claimed by the contractor alleging huge losses due to the contractor's failure to complete the works. The Railway Administration's petition was dismissed with costs by the court of first instance. The sole argument was that the Railways Administration cannot invoke the arbitration clause. On appeal, Chawala, J held that when the contractor exercises the option it becomes an agreement to arbitrate, the employer having given his consent in advance to such a course of action before the dispute arose.

The learned Judge was quite clear that the Indian Arbitration Act 1940 did not apply to unilateral arbitration clauses. According to him the unilateral arbitration clause as it stood was not an arbitration agreement and that it amounted to an agreement to agree in the future in the event the party entitled to refer to arbitration did make the reference and was, therefore, a contract not known to law. He pointed out that none of the provisions in the Indian

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10 Actually, in the contract forms used in domestic contracts for civil works in India, it would be unusual for the Government to take steps to sue the contractor or to refer a matter in dispute for arbitration. Advances are not given to the contractor and overpayment is not possible except by mistake. It is the contractor who usually brings a claim and the Government does not agree whereupon the contractor is the party who will take appropriate steps to realise his claim. A unilateral right to arbitration in these circumstances is quite sufficient.
Arbitration Act visualized an agreement which only gave one party the right to invoke arbitration.

But, the suggestion that the option to arbitrate when it was exercised became an agreement that is fully mutual may be misleading because the agreement, if any, is only in respect of the particular claim in dispute for which the contractor demands arbitration and besides, if the contractor, having filed a request for arbitration does not go on with the submission of pleadings and take the appropriate steps it still does not give the right, in theory, to the employer to make reference to arbitration on the same and other matters. The question of mutuality, however, is not relevant. The question is whether an arbitration clause giving unilateral rights is valid and enforceable.\textsuperscript{11} It is clear that such a clause can be valid in at least two circumstances: first, where the arbitration clause is a condition of a wider contract that is subsisting and second, where the clause governs a dispute of such a nature that it is of consequence to only one party to the contract and the right is given to him to refer to arbitration. In both these circumstances, however, specific performance may be obtainable only if the applicable law governing the arbitration proceedings allows it.

Want of mutuality is generally an issue where a party to a contract seeks specific performance of the contract because an English court will not grant specific performance to one party where it could not do so to the other. In any case, specific performance is also not enforceable where monetary compensation would be adequate. In \textit{Re Smith & Service and Nelson & Sons}\textsuperscript{12}, the Court of Appeal held that where an agreement to refer disputes to arbitration provides for reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed and one of the parties refuses to appoint an arbitrator, the Court has no power to order him to do so. This was a case under

\textsuperscript{11} Anthony Walton and Vitoria Mary, \textit{Russell on the Law of Arbitration}, Stevens & Sons, 1982 p 40. See also the interesting discussion that follows pp. 40-43.

\textsuperscript{12} (1890) 25 Q.B.D. 545.
the Arbitration Act, 1889 which did not confer powers on the courts to order a defaulting party to appoint an arbitrator. In his judgement Lord Esher M.R. remarked that "there was no power in [common] law or equity by which one party could be ordered to appoint an arbitrator."\(^\text{13}\)

The power of a court to appoint an arbitrator by a party to an arbitration agreement can only be invested by statute and subsequent legislation has given the English courts such a power\(^\text{14}\). The power will apply to all applications for court orders to assist in arbitration proceedings. But unless the statute is clear, it can be argued that such orders can be made against one party only if similar orders can be made against the other. That is, there must be mutuality and in its absence the court cannot act except under a statutory provision.

(b) The Constitutionality/Legality of Unilateral Arbitration Clauses

The subject of mutuality would take a different complexion if the reference to arbitration is looked upon as an obligation and equivalent to a surrender by a party of his constitutional right of access to the courts of law. In English law, it has always been the rule that an agreement between parties to exclude the jurisdiction of the courts over questions of law is "to that extent contrary to public policy and void"\(^\text{15}\). In *Scott v. Avery*,\(^\text{16}\) the House of Lords had decided that the institution of legal proceedings may be made by agreement conditional upon a prior submission to arbitration but that access to the courts on a question of law cannot be denied simply by an agreement.

\(^\text{13}\) Ibid., p 549.

\(^\text{14}\) English Arbitration Act 1950, s 10.


\(^\text{16}\) (1856) 5 H.L. Cas 811.
Although this rule has been eroded, in the case of non-domestic arbitration agreements, by provisions in the Arbitration Act 1979\textsuperscript{17} to allow parties to exclude the right to appeal to the High Court, the right to appeal on a question of law by parties to a domestic arbitration agreement has been preserved by the requirement that the exclusion agreement to be valid should have been made after the commencement of the arbitration. That means a party is given an opportunity to review his consent if he is not satisfied with the conduct of the arbitration and can retract his agreement not to refer to the courts on a question of law.

The rule was originally grounded on public policy but forced by the exigencies of commercial transactions and more recently by the fear that lucrative arbitration business, especially international work, could be lost to foreign countries such as France and Switzerland and countries of the Pacific rim, by successive arbitration acts\textsuperscript{18}, the UK Parliament has severely curtailed the right of access to courts in civil matters arising in arbitration proceedings. However, looking at the original basis of the right of access to courts to resolve questions of law as a natural and constitutional right one might argue that an agreement preventing only one of the parties from resorting to an English court of law may be held to fall outside the application of Arbitration Act 1979 because that would place parties to an agreement in an unequal position before the law in the event of a disagreement. If restrictions on the access to the courts are to be accepted they must apply equally to all parties. Most importantly, if a government department is involved it would be in violation of the Diceyan concept of the rule of law\textsuperscript{19} if the department can have access to the courts in a dispute with a

\textsuperscript{17} The Arbitration Act 1979, ss 3 and 4.


\textsuperscript{19} "It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals;..." per A.V. Dicey, \textit{An Introduction to the Study of the Law of the Constitution} (10th. edition), Macmillan, London, 1959.
private party but the private party cannot and must refer the dispute to arbitration.

Although the Parliament is supreme and can in a new arbitration act validate arbitration agreements between adult persons of sound mind and juristic persons to deny one of them access to the High Court to resolve questions of law yet the unwritten constitutional right "to sue and be sued [civil matters], to prosecute and be prosecuted [criminal matters], for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status, or political influence" dictates that any limitation on this right cannot be unilateral.\(^{20}\) The right of equality before the law is entrenched in the constitutions of most countries of the world.\(^{21}\) It cannot therefore be categorically affirmed that a contract including an arbitration clause obligating only one of the parties to arbitration and lacking in mutuality will be enforceable in all jurisdictions.

(c) **Mutuality in International Arbitration Agreements**

Therefore, in an international context, it is submitted that mutuality can become an issue unless under the law governing the arbitration proceedings unilateral rights to refer to arbitration are valid and enforceable and the law can be interpreted as not in conflict with the constitution of the state. For example, it can be said that, by the fact that the English Arbitration Act 1950 defines a valid

\(^{20}\) Sir Ivor Jennings, *Law and the Constitution*, University of London Press, 1959 at p. 50. A provision to this effect also exists in the Greek Constitution, Article 20(1) which states "everyone has a right to dispensation of justice by the Courts, and entitled to present and develop before them his views for his rights and interests, as it is by law enacted". Article 36 of the Turkish Constitution declares the "Everyone has the right of litigation as plaintiff or defendant before the courts through lawful means and procedure."

arbitration agreement simply as "a written agreement to submit present or future differences to arbitration" without reference to parties and there is no stipulation as to mutualities, means that the provisions of the Act apply to agreements which give the right to only one party to refer to arbitration.

On the other hand, the provisions in the French Code of Civil Procedure applying to French arbitrations govern arbitration agreements "by which [all] the parties to a contract undertake to submit to arbitration the disputes which may arise [between them] with respect to that contract." The French Code may well be said not to apply to agreements to confer arbitration rights to one of the parties only because both parties must undertake not to go to a court of law for resolution of disputes between them but to request arbitration instead. Although there is no authority to support this view, the same may be said to apply in the Netherlands where the Netherlands Arbitration Act 1986 applies to parties generally and not to one of the parties to an arbitration agreement. The Spanish Law 36/1988 of 5 December 1988 lays down that "The arbitration agreement must express the unequivocal will of the [both] parties to submit the resolution of all litigious issues ............to the decision of one or more arbitrators....".

The Swiss Private International Law Act 1987 which regulates the conduct of international arbitrations in Switzerland follows the English Arbitration Act 1950 in that there is no reference to parties and therefore the provisions apply to unilateral agreements too. The UNCITRAL Model Law in contrast by defining that an "Arbitration agreement’ is an agreement by the [both] parties to

22 The English Arbitration Act 1950, s 32.
23 French Code of Civil Procedure Art. 1442.
24 The Netherlands Code of Civil Procedure Art. 1020.
submit to arbitration all or certain disputes.... also signifies that the right to refer to arbitration must be conferred on all parties to an arbitration agreement.

The preponderant position among national laws and the UNCITRAL Model law suggests that mutuality must exist for these laws to apply to the conduct of arbitration proceedings. The absence of mutuality could force the party with the unilateral right to refer to arbitration to rely on the general law of the land to enforce specific performance of the arbitration clause or on the rule decided in Union of India v Bharat Engineering Corp. by Chawala, J that the unilateral right to arbitrate is an option which when exercised becomes an arbitration agreement to be governed by the national law. But an option granted under a contract can only be exercised during the existence of the contract and therefore, an option to arbitrate will disappear with the invalidation, termination, nullification or suspension of a contract.

Therefore, it is submitted that an arbitration clause which provides for reference to arbitration only at the option of one party to the dispute cannot be regarded as an arbitration agreement distinct from a mere term of the contract and cannot be regarded as severable from the main contract to exist as an independent autonomous agreement and survive the demise of the main contract. The right to refer to arbitration would be lost at the same time except where the law applicable to the arbitration proceedings deems otherwise. However, all domestic and international civil engineering contract forms provide for both parties to a construction contract to refer disputes to arbitration.

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27 UNCITRAL Model Law, Chapter II Article 7.

28 The UNCITRAL Model Law is increasingly being incorporated into the national laws of countries. Notable examples are Australia and Canada and several states of the United States of America. Other countries, among developing countries, which have adopted the Model Law are Bulgaria, Cyprus, Hong Kong and Nigeria.
II. Doctrine of Severability

(a) The Independence of an Arbitration Clause

Nonetheless, the doctrine of severability of an arbitration clause from the contract to form a separate and independent contract to arbitrate can be said to be the backbone of the modern international arbitration process. It gives arbitrators the powers to decide separately on the existence and validity of the arbitration provisions and the existence, validity, termination or suspension of the main contract itself and to rule on their own jurisdiction so that, even if the main contract were void ab initio or no longer subsisted, arbitration proceedings can continue to a final award under the arbitration clause. Without this power, international arbitration agreements can be thwarted by actions in domestic courts challenging the validity of arbitration clauses which will inevitably lead to a review of the whole contract and throw the entire international arbitration process into disarray.

The argument is that, where the main contract calls for reference to arbitration of any dispute or difference under or in connection with the main contract, meaning also a dispute or difference that is not necessarily contractual but alleged to be connected with the main contract, it signifies that the reference to arbitration includes questions of jurisdiction and existence and validity of the main contract as well as existence and validity of the agreement to arbitrate. Had the parties addressed themselves to the issue of the autonomy of the arbitration clause at the time they entered into the main contract they would have agreed

29 A relatively recent affirmation of the doctrine of severability was made in the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry in arbitration proceedings in respect of a dispute between a Bulgarian enterprise and an English enterprise over payment of industrial vehicles sold to the English enterprise under a contract which the latter claimed had been terminated before the arbitration was initiated. The Court of Arbitration held that "The fact that the contract was terminated cannot render inoperative the arbitration agreement [clause] concluded between the parties ....". Yearbook Commercial Arbitration Vol. IV, 1979 p.190. See also Judgement of the Paris Court of Appeal on December 13 1985 in Meniucci-c-Mahieux.
that to enable the resolution of all differences and disputes through the arbitral process it will be necessary to regard the arbitration clause as constituting a separate autonomous agreement independent of the main contract.\textsuperscript{30}

That was not obvious in a domestic transaction in 1942 in \textit{Heyman and another v Darwins Ltd.}\textsuperscript{31} Lord Macmillan in the House of Lords held that where the main contract perished, the arbitration agreement perished with it. "If there has never been a contract at all, there has never been as part of it an agreement to arbitrate."\textsuperscript{32} Furthermore, if the dispute was whether there was a binding contract between the parties or if there was a claim to vitiate the contract on such grounds as "fraud, duress and essential error", then such disputes cannot be covered by an arbitration clause. Those are matters for the courts to determine. It was clear to Lord Macmillan that the main contract containing the arbitration agreement must have existed at a point in time for the arbitration agreement to survive the demise of the main contract.

But, where the parties agree that there is a binding contract which provided for termination under certain specific conditions, the arbitrator is not prevented from determining if that event has occurred leading to termination of the contract. It also meant that if the arbitration agreement existed for a time when the main contract was subsisting and before circumstances arose resulting in the invalidation or termination of the main contract, the arbitration agreement did not end with the main contract but had a life of its own.\textsuperscript{33} But, the fact that events had taken place to render performance of the contract impossible will not bring either the contract or the arbitration agreement to an end unless both

\begin{itemize}
  \item \textsuperscript{31} [1942] A.C. 356.
  \item \textsuperscript{32} Ibid., p. 371.
  \item \textsuperscript{33} Obviously, a notional assumption because how can one assume that one term of the contract, namely, the arbitration clause, can survive the main contract to the exclusion of all other terms.
\end{itemize}
parties have agreed that the contract should be ended and be treated as never having existed at all in which case the arbitration agreement ended too.

In any event, frustration of the contract by the unilateral act of a party may be sufficient to frustrate performance of the object of the contract and may even give powers to the other party to terminate the contract. In a civil engineering contract, there are provisions for the Employer to terminate the contract under certain defined circumstances such as the default of the contractor, occurrence of a force majeure event or appearance of a special risk and the termination takes place under specified terms usually regarding obligations and liabilities under the contract and payment for works already carried out.\(^{34}\) The contractor also would have the right to terminate for certain defaults on the part of the employer relating usually to failure to make payments on time and capacity to effect payments.\(^{35}\) If a dispute arises over payments and cannot be settled amicably, the dispute would be referred to arbitration on the assumption that the arbitration agreement is an autonomous independent agreement and that it survives the termination of the main contract. One approach would be to treat the main contract as yielding to an amended contract of much reduced scope which subsists to the extent any of the obligations under the contract including the resolution of disputes by arbitration can be performed and the contract wound up.\(^{36}\)

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34 e.g. FIDIC Conditions of Contract Clauses 63 and 65. Compare with ICE Conditions of Contract Clauses 63, 64 and 65 which use the term ‘determination’ instead of ‘termination’ of the contract.

35 e.g. FIDIC Conditions of Contract, Clauses 40.3 and 69 and ICE Conditions of Contract, Clause 40(2).

36 A statutory backing for arbitration clauses to withstand frustration is provided for in section 6(2) of the Australian New South Wales Frustrated Acts 1978 which exempts from discharge any ‘obligation that is according to the proper construction of the contract, to survive the frustration’. Under this class of obligations fall limitation clauses, arbitration clauses and restrictive covenants in employment contracts. See Andrew Stewart, The South Australian Frustrated Contracts Act (1992) J. Cont. L. 220 at 223.
(b) The Termination of a Contract

In other words, a contract can only be wound up, meaning come to an end completely, after all payments and damages have been settled. Otherwise, a party to a contract containing an arbitration clause can bypass the agreement implicit in the contract to arbitrate differences and disputes by acting in a manner to frustrate performance of the contract. The test, therefore, is whether both parties have expressly or impliedly agreed to the termination of the contract in which case the arbitration agreement also collapses unless the termination is expressly or impliedly conditional upon the arbitration agreement continuing to operate.

The presumption that an arbitration clause in a contract continues to have a life of its own \textit{ipso facto} after the termination of a contract is a needless prescription to maintain the viability of the arbitral process. In as much as the right to resort to courts cannot be extinguished by the collapse of a contract, a contract containing an arbitration clause cannot also end before settlement of outstanding obligations including payments of debts through arbitration. Therefore, the less fictional approach is to argue that the main contract which includes the arbitration clause continues to exist until both parties have expressly or impliedly agreed to its termination or a court or tribunal has determined so.\footnote{Under French Code of Civil Procedure, Art. 1184, parties to a contract are not allowed to assume a breach of contract without a court declaration. Prof. M.P. Furmston thinks that this is not appropriate for international contracts where reference is made to arbitral tribunals to resolve disputes. See Breach of Contract, \textit{40 Am. J. Comp. L.} 671 (1992) at p. 673.} Mere events should not terminate a contract without the agreement of both parties to the contract and a contract should be capable of being wound up and be treated as terminated or at an end when a declaration to that effect has been made by a court or arbitral tribunal or the parties agree which will usually be after the resolution of all differences and disputes through amicable or other means including arbitration or through inaction amounting to an implied agreement to terminate.
The failure to distinguish between termination of performance and termination of contract and the treatment of a termination of performance of the objective of a contract as synonymous with the contract no longer being in existence could be a serious error of language.\(^{38}\) Performance in a strict sense includes making all the necessary payments under the contract and logically cannot be separated from physical performance under the contract. Actually, monetary payments or the equivalent of monetary payments where the contract does not entail actual payments but the exchange of performance of certain acts are as much conditions of contract as the physical performance of a contract. Looking at a contract in this manner suggests that termination of a contract can never be a unilateral act and that either it requires agreement between the parties to a contract or the order of a court or tribunal.

Although the difference between the legal and procedural consequences of having the power to unilaterally terminate a contract and of having to go to a court or arbitral tribunal to terminate a contract may be slight because the innocent party may still have to go to court or other tribunal for damages, the psychological effect on the defaulting party can be great in that the defaulting party will know that, in the latter case, the innocent party will go to court or other tribunal to terminate the contract and, therefore, the defaulting party will be discouraged from simply waiting in the hope that the innocent party will not do so. The defaulting party will be encouraged to seek an agreement with the innocent party as to compensation before the latter goes to court or other tribunal.

However, there is good sense in the argument that where a party to a contract containing an arbitration clause has refused to perform his part of the contract and in effect frustrated the contract, he should not rely on the survival of the arbitration clause to request a stay of court action for damages by the

injured party. The injured party should be allowed to elect between going for arbitration or taking action in a court of law.

The alternative is to treat an arbitration clause in a contract as conferring on the parties to the contract a vested right to recover any debt through arbitration in lieu of litigation. The arbitration clause merely expresses the equivalent of the unexpressed right, one would normally have, to litigate for recovery of debt in any transaction including a contractual one for example unliquidated damages for breach of contract\(^\text{39}\) and damages for commission of a tort. Once the right is vested it cannot be taken away by failure of the main contract.

(c) The Pure Doctrine of Severability

The pure doctrine of severability does not exist in most domestic situations although in international situations the applicable rules, domestic and international, authorize arbitrators to have jurisdiction over their own competence meaning jurisdiction over questions of existence and validity of the main agreement itself as well as the existence and validity of the arbitration agreement and questions of the scope of the jurisdiction of the arbitral tribunal. This has been embodied in Article 16 (1) of the UNICTRAL Model Law on International Commercial Arbitration Article which reads as follows:

"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause".

By providing, under Article 16 (3), for any party to appeal to a court for a final decision, the courts are enabled to intervene without putting a stop to the arbitration proceedings which may continue and make an award. Of course, if the court finds that both the principal agreement and the arbitration agreement are invalid, any award by the arbitral tribunal will have no effect and would have been a waste of time.\(^{40}\) It is generally accepted that any challenge to the existence of a contract can only be adjudicated by a court of law.

In *Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd.*,\(^{41}\) the Supreme Court of Hong Kong held that a dispute over the formation of a contract and the existence of an arbitration clause is a proper matter for an arbitral tribunal to consider but that any decision of the tribunal is subject to the "immediate and final review" by a court under Article 16 (3) of the UNICTRAL Law and that the question of illegality of a contract is not arbitrable. The UNICTRAL Law has been incorporated into the Hong Kong arbitration law.\(^{42}\)

III. Doctrine of Competence de la Competence

(a) The Assumption of the Doctrine

The doctrine of severability enables the arbitral tribunal to be appointed on the presumption of the existence of a severable autonomous arbitration agreement and the doctrine of competence de la competence then enables the determination whether there exists, in fact and law, an arbitration agreement to be enforced and

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\(^{40}\) In *The Arab Republic of Egypt v. SPP Ltd., and SPP (Middle East) Ltd. (Hong Kong)*, 23 I.L.M. 1048 (1984), 26 I.L.M. 1004 (1987) and 13 Y.B. Com. Arb. 113 (1988), the French Cour de Cassation affirmed the decision of the Cour d'Appel of Paris to set aside an ICC award for lack of an arbitration agreement binding the Egyptian Republic.

\(^{41}\) 1991, MP 2674 Hong Kong Sup. Ct.

\(^{42}\) The Hong Kong Arbitration (Amendment)(No. 2) Ordinance 1989.
if it exists, then both doctrines combine to enable the arbitral tribunal to determine the scope of its jurisdiction and continue the arbitration proceedings and make an award not only when the main contract is null and void ab initio but also when it has been breached or frustrated and terminated or has been performed. It is obvious that the two doctrines without statutory support have no rational basis and may be characterized as the products of a general philosophy in international arbitrations towards party autonomy and minimum judicial intervention but they work.

The power of the arbitral tribunal to determine its own competence, the doctrine of competence de la competence, is said to have been accepted as axiomatic in international law in theory and practice, in law and in fact. But, since the the conduct of arbitration proceedings, involving private parties and mixed private and state parties, must necessarily be subject to the laws of some state as the lex forum the actual position can be different and mandatory provisions of the state law of arbitration may rule otherwise. Even if the arbitration rules of the arbitral bodies in many countries may call for the arbitrators to decide on their jurisdiction fewer national arbitration laws specifically empower the arbitral tribunal to determine the validity of the arbitration agreement and scope of its jurisdiction.

Among the developed countries, Canada is unique in the adoption by some of its state jurisdictions of UNICTRAL Model Law as the law governing international commercial arbitrations. Art. 16(1) of the Model Law stipulates that the arbitral tribunal is the determining authority of questions relating to its own jurisdiction. But the final ruling on jurisdiction is made by the courts. In

43 Schwebel, op. cit. note 30, at p. 10.

44 It may even be suggested that the law of arbitration of the state whose law is the applicable law to the main contract may also govern arbitration proceedings in another state. See National Thermal Power Corp. v. The Singer Co. & Ors., Civil Appeal 1978 of 1992, India S.C. where the Indian Supreme Court held that the Indian Arbitration Act 1940 governed an arbitration award made in London in respect of a dispute between an Indian State Corporation and a foreign contractor governed by Indian law. But, see commentary by Jan Paulsson condemning the Indian Court decision in Int'l Arb. Rep. Vol. 7 No. 6, June 1992.
Germany, there is no specific provision to authorize arbitrators to determine their own jurisdiction and an arbitral award may be set aside on an application to the court if the award is not based on a valid arbitration agreement. In France the arbitral tribunal has power to rule on its own competence. The authority of the arbitral tribunal to rule on its own competence has been recognized in practice but there is no such authority under Italy's Code of Civil Procedure.

On the other hand, Japanese courts have consistently upheld the separability of the arbitration agreement and the power of the arbitral tribunal to determine its own competence in specific provisions in its law. In the Netherlands, the law is similar to that in Japan and provides for the separability of the arbitration agreement and the power of the arbitral tribunal to decide on its own jurisdiction. Switzerland has similar provisions in its law governing arbitrations there but an appeal to the courts of law to set aside the award may be made on the ground that the arbitral tribunal had erroneously assumed jurisdiction. The laws of arbitration of most countries allow appeals to the courts to set aside an award if the arbitrator exceeds his authority.

(b) Statutory Limits on the Doctrine

The English Arbitration Acts do not contain specific provisions giving powers to the arbitral tribunal to determine its own competence and the separability of the arbitration agreement in English law is based on court decisions. There is an implied power, however, for the arbitral tribunal to rule on a challenge to its

45 German Code of Civil Procedure, Section 1041.
46 Art. 1466 of the Code of Civil Procedure: If, before the arbitrator, one of the parties challenges the adjudicatory power (pouvoir juridictionnel) of the arbitrator in principle or in extent, the latter is competent to decide on the validity or limits of his own appointment.
jurisdiction but it is subject to a review by the courts. The English Arbitration Acts set roughly the powers of the arbitrators to determine their competence by describing the situations where the courts will not interfere. Although a party may bring an action in a court in relation to a matter in dispute, the defendant party may apply to the court for an order staying the court proceedings to enable the arbitration to take place and the court will make the order and thus not interfere if there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement. The onus is on the plaintiff to show why the arbitration should not take place.

Such a provision in a national law of arbitration encourages a reluctant party to arbitration to try the courts first because the courts will proceed to hear the dispute unless the other party applies for a stay and then the court will continue with the hearings to decide on the matter of stay of court proceedings. This is illustrated by a series of cases that have come before the courts involving parties to an arbitration agreement where one party wishes to litigate instead of submitting to arbitration as agreed. The application for a stay of court proceedings will be refused if the defendant has taken any step in the action to defend. Case law does not disclose a consistent principle in the decisions by courts on applications to stay court proceedings and so much of the facts of the dispute are often brought before the court that one might ask why the court does not go further and try the issues. But the accessibility to the courts results in delay in commencing or continuing with arbitration proceedings and additional costs.

49 English Arbitration Act 1950 s.4(1).


51 Nathan, op. cit. above at p 289.
A later Act purported to exempt non-domestic agreements\(^52\) from this provision in the law by, in effect, laying down the situations where the courts will interfere, namely, where the arbitration agreement is claimed to be null and void, inoperative or incapable of being performed or there is no dispute to refer to arbitration.\(^53\) That means the court must order a stay of court proceedings in other cases. There is no doctrine of competence de la competence of the arbitral tribunal here because the courts will assume jurisdiction to determine the existence or validity of the arbitration agreement and in the exercise of this power it is bound to look at the whole contract of which the arbitration agreement is a part and under the rule in the House of Lords decision in Heyman v. Darwins Ltd. may decide that the arbitration agreement if any perishes with the main contract.

Nonetheless, the London Court of International Arbitration (LCIA) Rules provide for the arbitral tribunal to rule on its own jurisdiction including the existence and validity of the arbitration agreement and expressly lay down that an arbitration clause may not be invalidated by the mere fact that the main contract is null and void.\(^54\) Obviously, these rules as to competence of the arbitral tribunal and the severability of the arbitration agreement from the main contract cannot apply to LCIA arbitration proceedings held in England and Wales and a dissatisfied party may take the matter of existence and validity of the arbitration agreement.

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\(^52\) The English Arbitration Act 1979 does not define a non-domestic arbitration agreement. Section 3(7) of the Act defines a domestic agreement as as an "agreement which does not provide expressly or by implication, for arbitration in a state other than the United Kingdom and to which neither (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom, nor (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom is a party at the time the arbitration agreement is entered into". Therefore, non-domestic arbitration agreements are arbitration agreements to which Section 3(7) does not apply and refer to agreements where none of the parties has a connection with the United Kingdom.

\(^53\) The English Arbitration Act 1975 s 1(1).

agreement to court for a final decision or as a ground to vacate the arbitral award unless the parties have agreed to an exclusion agreement in the contract.55

However, the national laws of some countries specifically give the power to determine the existence and validity of the arbitration agreement to the arbitral tribunal and lay down that the arbitration agreement shall be severable from the main contract.56 Therefore, although the rules of some arbitral institutions spell out the scope of jurisdiction of the arbitral tribunals yet the source of their actual powers would be the national laws of arbitration of the countries where the arbitration proceedings are held or the applicable procedural law of arbitration. Under the French law the President of the Tribunal de Grande Instance through his powers to appoint the arbitrator or arbitrators can halt reference to arbitration by refusing to make the appointment if the arbitration clause is "manifestly null".57 The French court will also not authorize a reference to arbitration if the arbitration agreement is "manifestly null".58

IV. Conclusion

International arbitration agreements particularly in relation to civil engineering contracts invariably provide for arbitration of disputes at the instance of all parties to the contract. Unilateral right to arbitration of one party only to

55 The English Arbitration Act 1979, s 3. However, any agreement prohibiting or restricting access to the High Court or restricting the jurisdiction of that court or prohibiting or restricting the making of a reasoned award is not allowed. See, John Parry, Arbitration Principles and Practice, Collins, London.1983 at p 180.

56 e.g. The Swiss Private International Law Act 1987, Art. 178(3) and Art. 186. The Spanish Arbitration Act 1988, Arts.8 & 23. Also see the UNICTRAL Model Law on International Commercial Arbitration Art. 16. The Model Law has been adopted by some countries such as as their national law of arbitration - Australia, Bulgaria, Canada, Cyprus, Hong Kong and Nigeria.


58 Ibid., Art. 1458.
arbitration is unknown in international civil engineering contracts. Mutuality has, therefore, never been an issue. In the domestic context although the consensus is that mutuality is not a factor in the validity of an arbitration agreement yet case law cited to support this relates to cases where the matter of arbitration will be the concern of only one of the parties by virtue of the nature of the transaction, for example, a lease agreement. In the only case involving a civil engineering contract, namely the Indian case, the validity of the unilateral arbitration clause was grounded on a different base. The unilateral obligation to arbitrate would amount to a denial of access to the courts of law and may be unconstitutional in some jurisdictions including the United Kingdom especially where one of the parties is a state or state entity.

In the international context, many of the national laws regulating the conduct of international arbitration proceedings define an arbitration agreement as an agreement between parties to settle disputes between them by reference to arbitration. That is parties on both sides of an arbitration agreement would have the right and obligation to refer disputes to arbitration and it is submitted that agreements that provide for only one side to arbitrate and the other need not or cannot would be voidable and may be unconstitutional in many countries. This conclusion is based purely on an interpretation made on the face of the laws as written but admittedly there is no authority to support this because all arbitration agreements that have come up before arbitral tribunals concerned agreements that gave rights to both parties to arbitrate.

The invention of the doctrines of severability and competence de la compétence can be attributed to the great judges and arbitrators who used these concepts to make arbitration a viable adjudicatory process and an inexpensive alternative to litigation particularly in business and technical matters. With the incorporation of these concepts in modern arbitration statutes the argument over the logic of the concepts has all but disappeared. This Thesis, however, attempts to show that those assumptions became necessary because of an assumption made in the law of contract particularly of common law countries that a contract can
terminate before debt obligations are settled and, therefore, the arbitral clause has to be severed into a separate free standing agreement so as to settle these obligations.

The Thesis distinguishes between a termination of the performance of the objective of a contract and termination of a contract meaning extinction of all rights and obligations and suggests a new approach to termination of contracts as an event that does not happen until all debt obligations are settled by a court or an arbitral tribunal or by the parties themselves expressly or impliedly. By prescribing that a contract cannot come to an end except by a decision of a court or tribunal or by agreement between the parties express or implied in which case agreement would have been reached only on the settlement of all outstanding debts, the arbitration clause can remain within the contract and be extinguished with the main contract when the debts have been settled.
Chapter Three

INTERFACING BETWEEN LEGAL SYSTEMS, NATIONAL LAWS AND INTERNATIONAL LAW IN INTERNATIONAL ARBITRATIONS

I. Points of Contact

International arbitration proceedings are not held in outer space. Although they can be held in a spacecraft owned by a sovereign state or in a ship on the high seas or in an aircraft, usually they are conducted on terra firma within the borders of a sovereign state on territory over which the state has absolute control. They may also be held in offices on land ceded temporarily by the sovereign state to another sovereign state\(^1\) or owned by an international organization.\(^2\) With the cooperation of most sovereign states, international arbitration proceedings are conducted as a private and consensual activity behind closed doors but by the fact that they must be physically carried out on sovereign state territory involving parties and arbitrators originating from different states some points of contact with one or more states are unavoidable and the implications of their national laws are inevitable. This is particularly so if the arbitration award is to be binding and enforceable. Even if the points of contact are minimized the proceedings can be influenced by the cultures of arbitrators originating from different legal systems.

\(^1\) This would apply to an arbitration held in an embassy building.

\(^2\) E.g. where an arbitration is held in offices of the International Centre for Settlement of Investment Disputes located in the World Bank.
(a) **Sources of Strength of International Arbitrations**

The interaction of different legal systems, conflicting national laws and contentious rules of international law can make international commercial arbitration, in theory at least, a very complex and even unpredictable process. But, modern national arbitration laws and international arbitration practices have enabled arbitrations to be held for the most part without the negative intervention of domestic courts and arbitral awards are recognized and enforced with little more than an administrative exercise. However, the autonomy and privacy extended to arbitration proceedings are by no means uniform in all countries and attempts made to insulate international arbitration from the outside world have not been entirely successful. In the final analysis, it is a state law that gives the arbitration process autonomy and privacy and the arbitral award binding force.

In international civil engineering contracts some points of contact are more important than others. Arbitrations of disputes in these contracts, more often than not, are held in one of the European cities - Paris, The Hague, Geneva, London, Vienna. They are not just physical points of contact. The national laws including the arbitration law and public policy of the place, where the arbitration proceedings are held, provide the state’s protection to the participants and proceedings and several consequences are bound to follow in the form of obligations to that state. The standard contract forms also specify the procedural rules of an international arbitral institution and the governing law of the contract which, in the case of contracts between a state and a foreign contractor, is usually the law of that state where the civil works are to be constructed. The place of recognition and enforcement of the arbitral award is another important point of contact and how the law of that place looks at a particular arbitral award is critical for the satisfaction of the award.

The various choices made in the laws to govern the different aspects of the arbitral process may reflect diverse cultures and legal systems if for example the procedural law is French, the substantive law of the contract is English and the
law of the place of enforcement of the arbitral award is based on Sharia. Lastly, the cultures and legal systems, in the wider sense, of not only the physical points of contact but also of the origins of the arbitrators can have a profound and unpredictable influence on the outcome of arbitral proceedings. On major contracts three arbitrators will be involved and one can imagine one originating from a common law system, another from the civil law system and the third from the Islamic legal system. One might also witness engineers and architect arbitrators with highly technical cultures functioning as arbitrators.

(b) Law of the Place (State) of Arbitration (Lex Fori and Lex Loci Arbitri)

The point of contact with the most significance is the state where the arbitration proceedings are conducted and the arbitral award made. This springs from the fact that, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), recognition and enforcement of an arbitral award may be refused by a contracting state if it is shown that, inter alia, the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made." It means that, if parties to an international arbitration are to rely on the New York Convention for the recognition and enforcement of an arbitral award in a contracting state, they must choose carefully the state in which they intend to hold the arbitration proceedings. They must ensure that the award is not capable of being set aside

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3 Hereinafter called the New York Convention.

or suspended by the courts of that state on any ground including that of public policy.

In practice, it would mean that the parties to the arbitration proceedings and the arbitrators must ensure that the proceedings are conducted and the award is made in accordance with procedural and substantive laws and rules that are acceptable to courts of that state so that those courts may not set aside or suspend the award on the ground that the laws and rules chosen by the parties infringe certain provisions of the laws and public policy of the state. International arbitrations to result in binding awards enforceable under the New York Convention cannot, therefore, take place outside the legal framework of a state except in so far as the laws and the courts of the state permit. Exceptionally, a court might decide that the New York Convention did not require the attachment of an arbitral award to a national law as the Dutch Supreme Court did in Societe Europeenne D'Etudes et D'Enterprises (Paris) v. Federal Republic of Yugoslavia in 1973. The same court, however, reversed its decision two years later.

Interaction with state laws and public policy is, therefore, inevitable and it exists to varying degrees in all countries. It is the law of a state that gives an arbitral award its binding and enforceable character under the New York Convention. If that law says anything goes so be it but that law must say so. Domestic courts can take one of three stances in its countenance of arbitration proceedings within their jurisdiction depending on the law of the state including

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6 Contracting states which have also acceded to the European Convention on International Commercial Arbitration, which entered into force on 9 April 1969, have agreed to enforce all arbitral awards rendered in another contracting state other than those those awards which have been set aside on grounds specified in the European Convention. See Article IX(1) and (2) of the European Convention. Contracting states of the European Convention have accepted some limitations on the application of Article V(1)(e) of the New York Convention.

its arbitration law and procedural rules contained in the law and its public policy.\(^8\)

One, the courts can rule that the applicable law to the conduct of all arbitration proceedings within their jurisdictions should be the national arbitration law including procedural rules stipulated in the law itself.\(^9\) Two, the courts can rule that the parties to the arbitration or the arbitrators can choose the applicable law and procedural rules provided that mandatory provisions of the domestic law and procedural rules therein are complied with.\(^10\) Three, the courts can rule that the parties and the arbitrators can choose their own procedural law applicable to the proceedings including procedural rules without regard to the national arbitration law and procedural rules.\(^11\)

One of the two extreme positions is said by Toope\(^12\) to have been taken in 1983 by the English Court of Appeal in Bank Mellat v. Helliniki Techniki SA.\(^13\) The court rejected an appeal by an Iranian Bank (Bank Mellat) against a refusal by the High Court to make an order for security of costs under s 12(6)(a) of the English Arbitration Act 1950 against a Greek Company (Helliniki) in

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\(^{8}\) A distinction is made here between the basic procedural law corresponding to a national arbitration law which gives validity to the arbitral process in the country and procedural rules which may or may not be contained in part or whole in the basic law. The procedural rules regulate the day to day conduct of the arbitration proceedings similar to the rules of civil procedure in English Law.

\(^{9}\) In James Miller v. Whitworth Street Estates, [1970 1 All E.R. 796 (H.L.)] the House of Lords determined that arbitration is governed by the law of the place of proceedings. In an earlier case Tzortis & Sykias v. Monarch Lines, [1968] 1 Lloyds LR 337 (C.A.), the English Court of Appeal held that the selection of London as the site for arbitration proceedings implied that English substantive law applied to the assessment of contract damages.

\(^{10}\) E.g. The arbitration laws of Algeria, Antigua and babuda, Argentina, Brazil, the old Czecho-Slovakia, El Salvador, Greece, Guatemala, Honduras, India and Italy contain mandatory provisions on specific matters.

\(^{11}\) E.g. The French Code of Civil Procedure.


arbitration proceedings in London initiated by the Greek Company in the matter of a dispute arising out of a contract between the two parties governed by Iranian Law. The arbitration agreement called for arbitration under ICC Rules. Under the Act of 1950, which makes no distinction between domestic and international proceedings\(^{14}\), the High Court is given the same power to make such orders in arbitration proceedings held in England as in an action or matter in the High Court (s 12(6)(a)). That the order is a discretionary one is made explicit in RSC Order 23(1).

The court in the **Bank Mellat case** held that it would exercise the power to make such an order in international arbitration proceedings only in the event that there was a "more specific connection with England than the mere fact that the parties had agreed that any arbitration was to take place there."\(^{15}\) As a general rule, however, English courts in their discretion will decline to exercise their jurisdiction in international arbitrations, implying that they had jurisdiction under the Arbitration Act 1950 if they chose to act. Although Kerr LJ in his judgement said that "The fundamental principle under our rules of private international law, in the absence of any contractual provision to the contrary, the procedural (curial) law governing arbitrations is that of the forum of the arbitration" meaning that the parties can choose their procedural law, he goes on to say that "A particular feature of English law, however, is the relationship between the courts and arbitrations, which is well known to be considerably closer than in most civil law jurisdictions \.......... This involves a measure of control or

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\(^{14}\) The English Arbitration Act 1979 for the first time makes some special provisions in the case of arbitration agreements other than domestic arbitration agreements. Both domestic and international arbitrations are subsumed in the same law and it is not clear if there has been any change, since the passing of the 1979 Act, in the attitude of the English Courts in regard to security for costs in arbitration proceedings where both parties are foreign. See K/S A/S Bani and K/S A/S Havbulki v. Korea Shipbuilding and Engineering Corporation, [1987] 2 Lloyds Rep. 445, where the Court of Appeal held that orders for security were appropriate in that case which involved foreign parties. The rationale for the order for security for costs is discussed in J Kodwo Bentil, *Non-Domestic Commercial Arbitration and Security for Costs*, 134 Solic. J. 126 (1990).

\(^{15}\) [1983] 3 All E.R. 428 at p. 428.
supervision by the [our] courts over arbitrations ...."16 In plainer language, what Kerr LJ was saying is that you may go ahead and choose your own procedural law but if there is a reference to English courts on a procedural matter in respect of arbitration proceedings in England English law will govern meaning that the lex loci arbitri is the governing procedural law in international arbitrations.

The other extreme position was taken by the French Cour d'appel in 1980 General National Maritime Transport Co. v. Societe Gotaverken Arendel A.B.17 . The French court would not entertain an action to annul an arbitral award rendered by an ICC tribunal in Paris on the grounds that the award was made in accordance with procedural rules other than those provided by French law and the award had no connection with the French legal system because the parties were foreign.18 The court added that "no decisive argument may be drawn from said provisions [provisions of the New York Convention] in favor of accepting, subsidiarily, the mandatory application of the procedural law of the country (France) where arbitration took place"19. Meanwhile, Gotverken had sought recognition of the award from the Swedish Supreme Court which had concluded that the arbitration was not a French arbitration and refused to suspend the ICC award pending the outcome of the application to the French Courts for setting aside the award20.

16 Ibid., p. 431. Some limits have been placed on the control by English courts over international arbitrations by the Arbitration Act of 1979.


18 But see National Housing Corp. of Uganda v. Soleh Boneh International Ltd., et al., NJA 1989 p. 43 where the Swedish Supreme Court assumed jurisdiction under identical circumstances - two foreign parties engaged in ICC arbitral proceedings in Sweden governed by foreign law.


The arbitration involved a contract between a Libyan state entity (GNMT) and a Swedish shipbuilder (Gotaverken) for the construction of three oil tankers. The contract provided for ICC arbitration in Paris of any dispute under ICC arbitration rules. The Libyans refused to take delivery of the tankers because some ship components were of Israeli origin in violation of Libyan law and the specifications fell short of those agreed between the parties. A dispute arose and it was referred to ICC arbitration which went against the Libyans who then challenged the ICC award in French courts on the grounds, inter alia, that it was against French public policy to assist in the violation of Libyan law by compelling compliance with the arbitral award.

Both the French courts where the arbitration was held and the Swedish courts where recognition proceedings had been commenced agreed that the award was, in effect, detached from the French legal system. According to this approach, the lex loci arbitri (French Arbitration Law) is not the lex arbitri, which in this case would be the ICC arbitration rules (the law of the arbitral tribunal) and the binding effect of the award is invested by ICC rules themselves as constituting the lex arbitri and not the French law which is the lex loci arbitri.

Much has been read into the French and Swedish decisions in Gotaverken by some eminent proponents\(^21\) of the 'denationalization' and 'delocalization' of the international arbitral process. One, the validity of the arbitral process and binding effect of the award is governed by the lex arbitri (national arbitration law or the law of the arbitral tribunal\(^22\) agreed between the parties notwithstanding the lex fori (national arbitration law of the forum country). Two, the absence of designation of a national law as the lex arbitri signifies that the award is not


\(^22\) One has to distinguish here between rules that give legal effect to the arbitral process and mere procedural rules such as those concerning filing of claims, reception of replies and counter claims, rules of evidence, deadlines, number of witnesses etc. The arbitration rules of most arbitral bodies relate to the day to day conduct of the arbitration proceedings - mere procedural rules.
subject to the control of the courts of the country where the arbitration is held and, therefore, Article V(1)(e) and VI of the New York Convention will not apply to that country. Three, the award in such a case would be immediately binding and enforceable because there is no country of award to set aside the award. The ICC first launched the idea of an award that was completely independent of any national arbitration law but it was not supported by the New York Conference that was convened to draft the New York Convention which is said not to apply to an a-national award.

It has to be remembered, however, that if the parties had chosen any particular state law as the law to govern the arbitration proceedings, the courts of some states have held that they have competency under Article V(1)(e) of the New York Convention to set aside the award even though the arbitration proceedings were held in another state. In fact, German law regards any award governed by German Law as a German award regardless of the country of venue of the arbitration proceedings and empowers German courts to assume jurisdiction over applications to set aside such an award. The French and Indian Courts took a similar view in the dispute between the French Company, Saint-Gobain and the Fertilizer Corporation of India Ltd.

The fact remains that anything can be done behind closed doors provided the act is not prohibited by the law of the place. There is nothing to stop parties

23 Paulsson, opp. cit. note 21 at p. 372.
24 The Swedish Court held that by accepting to arbitrate under ICC rules the right to appeal to France had been waived.
conducting arbitration proceedings as they like but if they seek the assistance of
the courts they must interface properly with the national laws.

(e) **Law of the Place of Recognition and Enforcement**

Another point of contact of equal significance is the state where the award is
intended to be enforced. In *Joseph Muller A.G. (Switzerland) v. Bergesen (Norway)*, Muller had contracted with Bergesen three charter parties for the
transportation of chemicals from the United States to Europe. The charter parties
contained an arbitration clause which provided that:

"The arbitration shall take place in New York, New York, and shall be
governed by the Laws of the State of New York, and the award when made
by a majority of the arbitrators may be enforced in any court which shall have
jurisdiction, and shall be final and binding on the parties anywhere in the
world."  

Disputes arose during the performance of the charters and Bergesen
requested arbitration of its claims for demurrage and shifting and port expenses.
The arbitration award was rendered in favor of Bergesen who sought enforcement
of the award in Switzerland. Muller contended that the award had not become
binding in New York within the meaning of Article V(1)(e) of the New York
Convention because Bergesen had not applied for confirmation pursuant to
Section 7510 of the New York Civil Practice Law and Rules.

The Judge of a Court of First Instance in Zurich held that the award was
enforceable and so did the Court of Appeal there when Muller appealed. On his
final appeal to the Swiss Federal Supreme Court, the Court affirmed the
decisions of the lower courts on the grounds that under the New York
Convention, the award is immediately binding and that it was not necessary to

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obtain a declaration to that effect from the courts of the country where the arbitration took place. According to the Swiss courts, the binding character of an arbitral award derives firstly from any agreement between the parties to the effect that the award will be binding and subsidiarily from the law of the country of origin of the award. The Swiss courts also held that under the New York Convention it was not necessary for the winning party to have to apply for confirmation of the award from the competent authority of the country of origin of the award because that will be contrary to the aim of the Convention to abolish the need for a double exequatur. During the working sessions to draft the Convention, it was agreed that the winning party in an arbitration should not be compelled to seek recognition or certification of the binding character of the award from the country of origin to enable execution of the award in another state.

Article V(1)(d) of the New York Convention is said to give the parties to an arbitration the power to adopt their own "arbitral procedure" and that "the law of the country where arbitration took place" (lex loci arbitri) will only apply where the parties have failed to do so. This was interpreted by the Swiss Court as a basis to conclude that "even the mandatory rules of procedure of a State can also be declared inapplicable and they can be substituted with the parties' own rules". The parties "own rules" presumably can be the law of another state, not necessarily where the arbitration takes place. But Article V(1)(d) of the Convention does not give this power to the parties in direct terms and rules of procedure can be distinguished from the procedural law and there is the matter of mandatory provisions of the lex loci arbitri. However, the Court recognized that

30 The actual text of Article V(1)(d) reads as follows: 1. "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition is sought, proof that: (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement with the law of the country where the arbitration took place;.."
the parties may be bound by the principles of public policy of the State where the law of the State is not the applicable procedural law 31.

While the case was progressing through the Swiss courts system, Bergesen applied to the U.S. District Court in New York for confirmation of the award under the United States Arbitration Act 32 which provided a period up to three years for application for confirmation of foreign awards to which the New York Convention applied. Muller countered that the award was not a foreign award and did not qualify for recognition under the Convention and that the one year period for confirmation of domestic awards had expired. The District Court confirmed the award holding that the Convention applied to arbitration awards in the United States involving foreign interests. Muller's appeal to the United States Court of Appeal failed. The US courts are said to have given meaning to the second part of Article I of the New York Convention that the Convention "shall also apply to arbitral awards not considered as domestic awards in the State where their recognitition and enforcement are sought." The courts held that the confirmation of the award in US courts in respect of arbitral awards to which the Convention applies may be applied for within three years of the date of award instead of the one year limit for domestic awards.

The Court of Appeals discussed in extenso the applicability 33 of the New York Convention to this case although it can be argued that the Convention actually had no relevance here. It has to be pointed out that the US courts were applying their national law which incorporated references to the Convention for


32 First enacted on February 12, 1925, it was codified in July 1947. Amendments were made to the Code (Title 9) in 1954 and 1988. Chapter 2 was added on July 31, 1970 to incorporate provisions to give effect to the New York Convention which was acceded to by the United States on September 30, 1970. Under sections 9 and 207 of the Act, if parties to an arbitration have agreed that a judgement of the court shall be entered upon the award including those that would be classified as foreign awards they may apply to the appropriate court for confirmation of the award.

33 For an extract from the opinion of the Court of Appeal, see (1984) 9 Y.B. Com. A. 489.
the purposes of extending the period for confirming an arbitral award. The Convention itself does not require confirmation but the US law offers the convenience of confirmation of all arbitral awards made on US territory except that in the case of awards to which the Convention applies the period for confirmation is three years instead of one year. The Convention according to section 202 of the US law will not apply to relationships entirely between US citizens unless perhaps if the parties were resident abroad and the subject of their transactions was also situated abroad. The Convention will apply to other relationships because the award will then be a foreign award.\(^{34}\)

The Swiss decision and the earlier French decision in the Libyan case point to a reluctance on the part of the courts to interfere in international arbitration proceedings held within the territorial jurisdiction of the courts in some exceptional circumstances. The Libyan case involved two parties who were neither citizens nor residents of France and had no connection with France. They had chosen ICC from among other arbitral bodies presumably because of its reputation as a respected major arbitral institution. It is a French institution of economic value to France and must surely enjoy a lot of confidence among the French judiciary. The French courts might see any involvement in the work of ICC as a needless burden and as a factor that might discourage disputing parties from using ICC facilities. The Swiss courts probably felt that the request to overturn an arbitral award for a technical reason which was peculiar to the US was unjustified and, in any case, did not feel it necessary to review an award made under the supervision of a sophisticated legal system like the US. While the Swiss and the French courts acted properly at their own discretion in the absence of domestic legislation to cover specific aspects of international arbitrations, the US applied its arbitration law which had specific provisions to implement the New York Convention to confirm the award to Bergesen.

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\(^{34}\) The US Act also included special provisions to implement the Inter-American Convention on International Commercial Arbitration. See Chapter III of the Act which also deals with issues that might arise where a case falls within the ambiits of both Conventions.
(d) The Delocalization of International Arbitrations

The French and Swiss decisions reflect very disparate and atypical situations and it would be wrong to draw a conclusion that there is a general rule of international law that countries should not intervene in the conduct of international arbitration proceedings within their territories and that international arbitral awards can be detached from national laws or that there is merit in doing so.\(^{35}\) Unfortunately, international arbitrations can have different meanings to different countries\(^ {36}\) and few states would be prepared to recognize and enforce an arbitral award originating from a state if the award has been set aside there.\(^ {37}\) Although domestic courts, as a matter of practice, should not intervene in international arbitration proceedings, it would be comforting to know that states have in place arbitration laws to ensure that, within their territories, arbitral tribunals are properly constituted, the traditional rules of fairness and justice are observed in the conduct of the arbitration proceedings, and third party rights are protected.\(^ {38}\)


\(^{36}\) The English Arbitration Act 1979 does not mention the word "international" but it prescribes different rules to an arbitration agreement other than domestic arbitration agreements. Domestic arbitration agreements relate to agreements to which neither party is a national or resident of the United Kingdom (s. 3(7)). If one party is a national or resident of the United Kingdom, the arbitration agreement is, by inference, a domestic agreement. Under the French law, an "Arbitration is international if it implicates international commercial interests" (TITLE V Article 1492 of the French Civil Code). The Swiss International Law 1987 applies to every arbitration conducted in Switzerland where at least one of the parties is neither a domicile or habitual resident of Switzerland (Art. 176(1)). The US Arbitration Act provisions for enforcing the New York Convention apply to an arbitration agreement or award arising out of a relationship which is not entirely between US citizens unless that relationship involves property located abroad, envisages performance or enforcement abroad or has some reasonable relationship with one or more foreign states."(s. 201).

\(^{37}\) See Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, Oceana, 1990 at p. 272 for a cautionary note that the international enforceability of an award may be impaired if the award is set aside at the place of arbitration due to a violation of some mandatory rule of local law.

Besides, during arbitrations, arbitrators are dependent on the domestic law including domestic arbitration law to assist them, for example, in securing the help of the courts to issue binding orders for the production of documents, to compel the attendance of witnesses, to make conservatory and provisional orders etc.\(^{39}\) Arbitration is not a perfect institution. By its very nature (flexibility and party autonomy), arbitration is fraught with many risks especially in the matters of choice of arbitrators and conduct of proceedings. Without the availability of a court of law to check misconduct and serious violations of basic rights, there will be no hope for an aggrieved party to prevent abuse of the arbitral process. It is, therefore, highly questionable if delocalization of arbitrations will be to the advantage of the parties and whether such a phenomenon truly exists.\(^{40}\)

Even if the procedural law (arbitration law) of the state of the seat of arbitration gives power to the parties to choose their own procedural law and rules and ignore the local procedural law, the arbitration will be governed by the general law of the land by the mere fact that the parties and arbitrators are physically present in the territory of the state unless they all have some kind of immunity. There is no such immunity under international law. In as much as conflict of law rules universally regard real property and rights in real property as being subject to the lex loci situs arbitration awards relating to such property exclude the application of other laws. The New York Convention also provides that arbitration awards need not be recognized if the subject matter of the dispute or difference is not capable of settlement by arbitration under the law of the country where recognition or enforcement is sought or is contrary to its notions of public policy.\(^{41}\)

The desirability of an international rule of law against state intervention in international arbitration proceedings may stem from the fact that many

\(^{39}\) E.g. The English Arbitration Act, s 12(6).


\(^{41}\) New York Convention, Article V(2)(a) and (b).
arbitrations are now held in developing countries whose legal systems and judicial institutions do not inspire confidence among foreign parties. It is reported that between 1980 and 1988 a total of 148 of ICC arbitrations took place in developing countries in the Middle East, Asia/Far East, Africa and Latin America.\footnote{Craig, Park and Paulsson, Op. Cit. note 37, Appendix 1, Table 7.} Although as a percentage of the 1993 cases administered by ICC during this period, the number of such cases is small. In the majority of the cases the selection of a developing country may have been inevitable due to the circumstances of the case. On the other hand, some arbitrations are inappropriately held in developed countries because of the reputation of their arbitral institutions and the confidence of the parties in the legal and judicial systems there. A government staff member of a developing country was very frank in suggesting that the holding of arbitration proceedings in a European or US city gives them a break and a chance of good shopping.

It is argued that international arbitrations should be held in a neutral venue so that none of the parties is subject to the jurisdiction of the courts of the other parties. A neutral venue would not figure as a factor in the choice of the seat of arbitration if international arbitrations can be insulated from the legal and judicial institutions in the country. Admittedly, many countries have tried to do this by enacting special legislation to cover international arbitrations but the most effective way to achieve this is through a treaty such as the Washington Convention.

The French decision in the Libyan case has been superceded by French decree No. 81-500 of May 12, 1981 which now provides that where an arbitral award is rendered in an international arbitration in France, an appeal to French courts to set aside the award will lie in the following cases: (i) if the arbitrator decided in the absence of an arbitral agreement or in reliance on a void or
expired agreement, (ii) if the arbitral tribunal was improperly constituted or the sole arbitrator was improperly appointed, (iii) if the arbitrator decided without complying with the mission conferred upon him, (iv) where the adversary principle had not been complied with, and (v) if the recognition or execution is contrary to international public policy. The Swiss have followed by enacting the Act of 1987 which reflects substantially the position taken by the Swiss federal Court of Appeals in the Bergesen case and the trend in international arbitration is to keep the process as independent from the courts as it is possible but subject to certain fundamental rules being observed.

In some important sectors such as international banking, arbitration is not universally adopted as a suitable method of resolution of disputes and it is not unusual to resolve loan disputes by bringing actions in domestic courts. Part of the confidence in domestic courts arises from the fact that loan disputes involve mainly questions of law and even in arbitrations, particularly in domestic arbitrations, questions of law are sometimes required by national laws to be referred to the courts for resolution. Besides, the big Banks have their principal places of business or registered offices located in the developed countries and they see the courts of those countries as providing a predictable forum to resolve disputes and they welcome the openness of court proceedings to the secrecy with which arbitration proceedings can be cloaked.

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43 In the Pyramids Case, Arab Republic of Egypt v. Southern Pacific Properties Ltd. (SPP) and Southern Pacific Properties (Middle East), the French Court of Appeal in Paris set aside an ICC award on the ground that the Egyptian State was not a party to the arbitration agreement between the investor and the Egyptian General Organization for Tourism and Hotels. The case had no connection with France. See 23 I.L.M. 1048 (1984).

44 French Decree No. 81-500, Art. 1502.

45 For a defence of arbitration as an appropriate method of resolution of disputes in international banking, see Georges R. Delaume, ICSID and the Transnational Community, 1 ICSID Rev.-FILJ 237 (1986).
II. The Coming Together of Diverse Cultures and Legal Systems

The arbitral forum is unique in that it can bring together more often involuntarily than voluntarily people and forces originating from diverse cultures and legal systems. Foreign elements can occur in an English court but much of the alien character can be tempered by a compelling English cultural environment and the common law. There is strict choice of law rules but their interpretation and impact can be reined in by the common law judge so as not to disturb the Englishness of the whole proceedings before him (or her). The common law judge, if he must, will not hesitate to introduce a new rule of law, he will carefully sift through precedents and for him the reasonableness of a decision is more important than adhering to an overall principle of justice. He will be in full charge of his court and the proceedings therein and there is never any question of him referring to the Parliament or to a constitutional court for interpretation of a statute. He can be a legislator, an executive and a judge at the same time.

By contrast, there is a sharp division of powers in a state governed by the civil law system. The civil law judge will, of course, be not bound by precedents. He regards himself as being given the task of dealing only with the persons and matters before him in any given case; he may dismiss the case if there is no rule of applicable law because he is forbidden to make law but he may do justice by applying a general principle of law. He is required to refer to the legislature or to a special constitutional court to interpret provisions of the code that are not clear to him but on the other hand he will be influenced by the overriding principles of civilized Christian nations and rules of natural justice. He is the administrator and guardian of the law which is to be made by the people through the legislature. He is trained to subordinate individual liberties to the common public good and he has powers to interfere with relations voluntarily

46 In French Courts reference is made to precedents from the Cour de Cassation. The binding character of precedents will depend on the wording of the judgement. Article 5 of the French Civil Code, however, prohibits a judge from making general rulings in his judgments.
entered into between parties if he thinks that circumstances have changed. Both the common law and civil law systems are rooted in the concept of law and justice based on Christian beliefs and thought but the judges themselves are not bound by Christian dogma.

The Islamic judge can bring yet another dimension to the arbitral process. He derives inspiration and guidance from the Quaran and the scriptual texts of Islam and his application of legal rules will be deeply religious as is the legal system in which he is largely immersed. Therefore, his philosophy and his technique in the arbitral process could be influenced by Islamic sense of justice which he will superimpose on whatever rules of law he must apply in a particular case, for example, in the reception of evidence. He might look at rules of law derived from other legal systems as subordinate to the mandatory tenets originating from the Islamic scriptual texts, namely, Quaran and the Sunna because they are fundamental values to him. For a paper entitled "Who is Afraid of Sharia?" on Islamic Law and International Commercial Arbitration with special reference to international civil engineering contracts and authored by the present writer see Appendix One.

There are other legal systems but none of such contemporary significance as the above three legal systems. The socialist legal system is no longer a credible force in the arbitral process but by the fact that arbitrators need not be trained in the law signifies that other professional cultures can influence arbitral processes and decisions. Many arbitrators are drawn from other professions such as engineering and architecture and they can consciously or unconsciously apply their own professional philosophies and techniques in arbitral proceedings. Their own training in their professions may reflect no legal culture at all least of all the culture of any particular legal system.47 One might conclude that a sole

47 The fact that engineers generally are not found in leadership roles in public life in the UK may be attributed to the training they receive in their schools and universities. At O levels their studies could be limited to English, mathematics, physics, chemistry and another science subject or applied mathematics. At A levels they study mathematics, physics and chemistry. In the universities all one needs to know to become a civil, structural or mechanical engineer
arbitrator should be trained in the law. The fact that disputes in international civil engineering contracts are usually referred to a tribunal of three arbitrators means that the legal systems closer to each other in purpose such as the common law and civil law systems can decide the process and outcome of arbitral proceedings.  

III. The Role of International Law in International Arbitrations

International law can affect international arbitrations in mainly two ways. First, the rules of international law can be expressly chosen by the parties to the dispute as the applicable law in regard to the substantive issues of the contract or other legal relationship in lieu of a national law or other systems of law akin to international law such as the lex mercatoria and the general principles of law common to all nations. Second, the rules of international law can be used in conjunction with a national law if the parties so wish in which case there is authority to suggest that the rules of international law prevail where there is a

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are the Newton's three laws of motion. Only in recent years has professional bodies like the Institution of Civil Engineers begun to be aware of the significance of broader education and training in the social sciences and the law as important to engineers but the reforms have to begin at the school level. In their practice as engineers they are supervised by other engineers with like schooling. It is horrible to contemplate how powerful a role they play in arbitration but despite the shortcomings of a bad system some of them become very good arbitrators.

48 The laws of the European Community and their administration by the Commission, Court of Justice and the national courts illustrate the coming together of the common law and civil law systems. The judges of the European Court of Justice have all the markings of common law judges but, on the other hand, the profusion of European Commission regulations demonstrate the continuing dominance of civil law thinking, more germanic than French, to legislate for every conceivable situation or sets of circumstances in order to restrain the judge from legislating for the Community. Besides, the Commission itself has powers to adjudicate and apply penalties. "Judicial service [in the civil law countries] is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative." per John Henry Merryman, The Civil Law Tradition, Stanford University Press, 1969, at p. 39. To see how the civil law and common law systems work together in the European Court of Justice, see Lord Slynn of Hadley, What is a European Community Law Judge ?, 52 Cambridge L.J. 234 (1993).
conflict. Sometimes, the applicable law is literally a hotchpotch of national, international and other rules of law.50

Some foreign private claimants against states have argued that their relationships should be governed by rules of law governing relationship between states and that the governing law should be the agreement itself.51 This is supported by some eminent scholars in the field of international arbitration. It has also been suggested that there is an international law of contract and that agreements to exploit natural resources involving states and foreign corporations should be brought into the public international law arena.52

Article 38 of the Statute of the International Court of Justice lists the sources of international law for application in disputes submitted to that court53 and they are applied also by international arbitral tribunals54 in disputes between states and private parties. The primary source of law, however, would be

50 In BP Exploration Company (Libya) Limited v. Government of the Libyan Republic, Clause 28 of the Concession Agreement provided for the settlement of disputes by arbitration and stipulated that the Concession "shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals." See (1979) 53 Int'l L. Rep. 297 at 298.
51 Ibid.
52 "It has been the object of this article to establish that 'international contract law' is a myth founded upon unsound juristic premises." See, M. Sornarajah, The Myth of International Contract Law, 15 J. World Trade L. 187 (1981)
53 Article 38 (1): The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
the contract or agreements made by the parties themselves subject to the mandatory norms of international law, the jus cogens, that is if the parties have agreed that the applicable law should be the rules of international law. The law regulating the arbitral process will be the law chosen by the parties and the mandatory rules of the law of arbitration of the place of arbitration. Thus, some degree of interfacing between national laws and rules of international law is unavoidable.

The second role of international law would be those rules that compel the parties to proceed with the dispute resolution process they have agreed to and for the losing party to comply with the outcome of the arbitral proceedings, namely, the arbitral award. And if the losing party is a state then if the state does not comply with the award, it risks the intervention of the state of which the private party is a national or has a close connection recognized by international law as justifying the state to exercise its right of diplomatic protection.

The applicable law in a mixed international civil engineering contract is usually the law of the state party to the contract although there is a body of opinion supporting the application of international law. Therefore, where the applicable law is a national law, international law will operate only in the event the state party to the contract breaches the terms of the contract and refuses to pay appropriate compensation to the foreign contractor. International law would sanction the intervention of the home state of the contractor. Rules of international law will provide the necessary pressures to compel parties from different states including state parties who have agreed in their contracts to settle disputes by reference to arbitration to do so and to comply with the outcome of the arbitration proceedings.  

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55 That states should refrain from aggressive actions against other states goes back to the Peace Conference of Paris in 1919 and subsequent establishment of the League of Nations. Articles 11-15 of the Covenant of the League of Nations required member states to refrain from aggression until an attempt had been made first for pacific settlement of disputes.
IV. Harmonization of Arbitration Laws and Procedural Rules

(a) Sources of Weakness of International Arbitrations

The weakness in the international arbitral process is the diversity of national arbitration laws and procedural rules. Some states have special provisions for international arbitrations held on their territories others do not.\textsuperscript{56} Most have provisions for enforcement of foreign awards some do not.\textsuperscript{57} A few have mandatory provisions in their arbitration laws which must apply to all arbitrations on their territories even where the agreed procedural law is different from that of the place of arbitration.\textsuperscript{58} A very few states require judicial confirmation of arbitral awards before they can be recognized as binding.\textsuperscript{59} Most have signed and ratified various international conventions governing the recognition of arbitration agreements and recognition and enforcement of arbitral awards. Some states have entered into bilateral arrangements with other states to resolve commercial disputes by arbitration.\textsuperscript{60} The courts of two states can disagree in their decisions on identical cases before them.\textsuperscript{61} Almost all states have provisions in their arbitration laws to sue in or allow appeals to local courts on the question of the validity of arbitration agreements and to set aside awards if the proceedings have not been conducted properly, for example, the arbitrators have misconducted

\textsuperscript{56} E.g. Canada, China, Colombia, Djibouti, France, Switzerland, England have special provisions. Argentina, Australia, Belgium, Bolivia, Brazil, Chile, Costa Rica, Cuba, Germany, Greece, Guatemala, Honduras, India do not.

\textsuperscript{57} Argentina, Australia, Belgium, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Cuba, Germany, Greece, Honduras, India, Italy, Japan, Korea, Mexico, The Netherlands, England, Switzerland have special provisions.

\textsuperscript{58} E.g. The old Czecho-Slovakia, El Salvador, Greece, Guatemala, Honduras, India.

\textsuperscript{59} E.g. Brazil, Czecho-Slovakia, El Salvador, Italy.

\textsuperscript{60} E.g. Algeria/France, US/China, Russia and several states, UK/Sri Lanka.

\textsuperscript{61} The Netherlands District Court of Amsterdam allowed leave to enforce an ICC award against the Egyptian Government in the Pyramids Case whereas the French Court of Appeal in Paris on the same day set aside the same ICC award. See note 43 above.
themselves, there has been no due process and the arbitrators have manifestly exceeded their powers.

In international arbitration proceedings, many countries could be involved - country where the arbitration agreement was entered into, site of the performance of the main contract, seat of the arbitral tribunal, site of the arbitration proceedings, countries of choice of procedural and substantive laws, site of recognition and enforcement of award. It means that the efficacy of the arbitral process depends on the extent to which national arbitral laws and procedural rules are uniform in their scope and application or there is acceptance of a rule of international law that parties to an international arbitration can detach themselves from the effects of all laws other than the arbitration law and procedural laws of their choosing. Although many among the international arbitral fraternity favor the detachment of international arbitrations from the national laws of the state where the arbitral proceedings are held, the realistic assumption is that there is no such rule of international law and the adoption of uniform national arbitration law and procedural rules would seem to be a hopeful option.

Some countries like, France and Switzerland, have attempted to detach themselves completely from international arbitration proceedings conducted within their territories but as we have seen their definition of what constitutes an international arbitration proceeding can be very different. But detachment is only assured if it is provided for in the national law which must say so. One cannot escape from a consideration of the national arbitration law and invariably no law guarantees that the host state will not intervene in international arbitral proceedings. If not questions of law, there are questions of domestic public policy62 and even international public policy as determined by the state courts.

62 E.g. Section 31 of the Italian Codice Civile Procedure provides that "......in no event will the laws and acts of a foreign state, the by-laws and the acts of any institutional body and private arrangements have any effect on the territory of the State, when they conflict with public policy or bonos mores."
concerned and questions of interpretation according to the rules of the local legal system.

(b) The Work of the United Nations

The confluence of diverse legal systems and laws and social and economic cultures would normally make it difficult to predict how arbitrators will act in any particular case and how the local courts will react to attempted litigation in the same matter and to appeals to set aside arbitral awards. The UN sponsored New York Convention has been reasonably effective in ensuring that arbitration agreements are sustained by the courts and court proceedings are stayed and there is reasonable certainty under the convention that an arbitral award will be recognized and enforced in a contracting state if the award is recognized in the country of origin. Most countries have incorporated the convention in their national laws although the convention would still apply as between contracting states to the convention. For the New York Convention to be effective universally, however, the courts in the various states must interpret and apply its provisions uniformly and predictably and that will depend on the extent to which there is harmony among the national arbitration laws.

Recognizing the value of harmony generally in national laws that govern international trade, the UN, in 1966, set up the United Nations Commission on International Trade Law (UNCITRAL) to encourage the harmonization and unification of international trade law. UNCITRAL undertook several studies in the field of international commercial dispute resolution and, in 1976, formulated

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63 The arbitral tribunal refused to accept jurisdiction in a case involving an Argentinian who alleged that he was responsible for the winning of a tender by a British Company to construct a power station. He claimed that he had intervened corruptly with the government several years earlier on behalf of the company in a previous unsuccessful attempt to secure a contract in Argentina. See J. Lew, Applicable Law in International Commercial Arbitration, Oceana, 1978, at p. 553. It is difficult to guess how a court would have decided if the Argentinian had been successful and the British Company appealed to a court in Germany or Italy to annul the award on grounds of international public policy.
the UNCITRAL Arbitration Rules. They were intended to be an example for arbitral institutions to follow and for use in ad hoc arbitrations. Although private arbitral institutions around the world maintain their own procedural rules some are now willing to administer arbitral proceedings under UNCITRAL Rules also.\textsuperscript{64} The Iran-US Claims Tribunal applied UNCITRAL Arbitration Rules in its deliberations.

In 1985, the UN went further and adopted a General Assembly Resolution recommending to member states the Model Law of International Arbitration also drafted by UNCITRAL for the purpose of its enactment as their national law of arbitration in respect of international arbitrations. Although only a minority of states, developed states among them, has enacted legislation incorporating the Model Law,\textsuperscript{65} many states have been influenced by the Model Law in the reform of their own arbitration laws. The fact that the Model Law is not a convention has made it convenient for states to adopt the Model Law without being committed to every detail of the UNCITRAL document. More importantly, such an approach to international comity also provides each state with the flexibility needed to cope with and solve current issues in international arbitration without having to convene all the member states of the UN in order to agree on a formal multilateral Convention.

\section*{V. Conclusion}

Although many legal systems, national laws, rules of international law and national and international policy considerations can affect arbitration proceedings, as has been pointed out, the points of contact of practical significance are the

\textsuperscript{64} E.g. Swedish Chamber of Commerce Arbitration Court, The International Chamber of Commerce Court of Arbitration, London Court of International Arbitration.

laws of the state in which or under which the arbitration proceedings are conducted, the laws of the state or states where the recognition and enforcement of arbitral awards are sought and the legal systems from which the arbitrators originate.

States active in international commercial arbitration have tended to lead the rest of the world in supporting the idea of arbitration proceedings that are insulated completely from the law of the place of arbitration and some practitioners even suggest that arbitration can be detached from the laws of all states and be governed entirely by the agreements between the parties themselves in respect of not only procedural matters but also substantive ones. However, policy considerations such as the need to ensure that arbitration proceedings are held in accordance with rules of natural justice and arbitrators do not misconduct themselves and practical considerations such as the need to aid arbitration proceedings in various ways have resulted in the inevitable provisions in national laws to intervene in matters transacted within their territories. It is not only the values themselves which are the impelling reasons for some measure of control by the courts but the very concept of independent states and national sovereignty demand that a state cannot afford to abdicate its control over what happens within its territories.

Arbitrators can originate from and be trained in diverse legal systems. In a tribunal of three arbitrators, one can originate from the common law system, another from the civil law system and the umpire from the Islamic legal system. Their approach to the conduct of the proceedings, the interpretation of the events that led to dispute and the application of rules of law will not be identical or even uniform and these factors can eventually affect the outcome of the proceedings.

Many arbitral institutions with the support of the states where they are located have developed a framework for the conduct of arbitrations that makes the process, if not insulated from the diversities of the laws and the cultures of the participants, efficacious in all but the most unique circumstances. The
outcome of the control exercised by leading arbitral institutions through their powers to appoint arbitrators and influence effected through so-called national committees of siting and supervision and the heavy institutionalization of the arbitral process is a levelling up of the attitudes of participants in international arbitrations and the acceptance within the international arbitration fraternity only those that are perceived to conform to norms of the developed nations of the world.

Rightly or wrongly, the upshot is the little contribution made by jurists from the developing states in the development of rules of international law particularly those governing economic development. The conflicts inherent in the aspirations of developing and developed states and the overwhelming power and influence of the developed states politically as well as economically have led to the encouragement of partnerships between developing states and foreign corporations in trade and exploitation of natural resources but, unfortunately, when disputes crop up the partnerships tend to unravel and conflicts of interests reappear with even greater intensity.

Increased trade in goods and services is the key to economic development and the launching of the Common Market in Europe in 1956 was directed at achieving this objective. Trade benefits both parties to an international transaction because for economic growth there has to be access to technology and investment and an international legal framework will be needed not so much to regulate trade as to facilitate the expansion of trade. A feature of the framework should be mechanisms and institutions to resolve disputes arising out of or in connection with the trade relations -sales of goods and services, loans and investments.

A civil engineering contract benefits both the economy of the home country of the foreign contractor and the host country where a contractor is employed to construct a dam or a road or a bridge or a chemical plant or other project of economic priority to the host country. However, the contractor’s
The immediate objective is to make the maximum profit by being efficient and cutting down his costs.

Most arbitral institutions were established to provide a dispute resolution service so that business can go on unhindered but they have developed into business undertakings in their own right and as business undertakings they try to provide an ever more efficient service at a price. The economic development of the states of origin of the parties to the dispute is too remote a consideration for the institutions themselves and disputes are settled according to the law or ex aequo et bono, if the parties so agree, and the dice is cast so to speak and it may fall toward the interests of one party or another and indirectly toward the economic interests of one state or another.

However, one international arbitral institution is primarily concerned with economic development and was established to provide a dispute resolution service to encourage foreign nationals to invest in developing countries by structuring the institution in such a way as to insulate the arbitral process from any state influence and to assure enforcement with minimum administrative effort. The institution is the International Centre for Settlement of Investment Disputes between States and Nationals of Other States. The expansion of its services to resolve disputes in international civil engineering contracts is the subject of this Thesis.
Chapter Four

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

1. The ICSID Convention

ICSID is an international organization which was established in 1966 under a convention (popularly called the Washington Convention)\(^1\) sponsored by the World Bank\(^2\) which has its headquarters in Washington. As of June 1, 1993, the Convention has been signed by 121 states and ratified by 107 states, the latest being the Peoples Republic of China. Both developed and developing states are parties to the Convention. The Washington Convention was the result of a four-year effort to draft an international legislative framework acceptable to both capital exporting and capital importing states to establish an arbitral institution to resolve disputes between investors and host states.

(a) The World Bank as a Mediator

The idea of a separate agency to handle requests to the World Bank to act as an intermediary in the settlement of disputes involving member states of the World

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1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It was opened for signature on March 18, 1965 and came into force on October 14, 1966 following the deposit of the twentieth instrument of ratification.

2 The World Bank originally referred to the International Bank for Reconstruction and Development (IBRD), established in 1945, following the so-called Bretton Woods agreement which also set up the International Monetary Fund. The Fund is not part of the World Bank Group. The World Bank Group now consists, in addition to the IBRD, the International Finance Corporation created in 1956, the International Development Association created in 1960 (IDA), ICSID established in 1966 and the Multilateral Insurance Guarantee Agency set up in 1987. Only IBRD is a Specialized Agency of the United Nations.
Bank originated in 1961\(^3\) from the then President of the World Bank, Mr. Eugene Black, following requests for the President to mediate in disputes between member states over a variety of matters including investments made by nationals of member states in other member states. The first dispute occurred between UK and Iran over the nationalization of the Anglo-Iranian Oil Corporation in 1951. Mediations by the Bank failed because the Iranian government felt, inter alia, that the Bank was acting as the agent for the UK.\(^4\) Later that year the Bank began getting involved in the dispute between India and Pakistan over the division and development of the waters from the Indus River.\(^5\) It began soon after the division of the sub-continent into the two independent nations in 1948 and was finally settled in 1960. Actually, the initiative to mediate between the two states was taken by the Bank after consultations with its two major shareholders at that time, namely, the US and Britain.\(^6\)

The Bank's role in the Anglo-Iranian dispute was the idea of the Pakistani ambassador to the United States who arranged for a meeting with the then Prime Minister of Iran, Dr. Mohammed Mossadeq, who was visiting the United States to attend the UN Security Council meeting discussing a British resolution for peaceful settlement of the dispute before it launched military action. Under a plan by the Bank, the Bank would try to arrange for the provision of funds to meet Iran's budgetary requirements until income from resumed oil exports


\(^5\) For an account of the Bank's efforts see, Mason and Asher, op. cit. note above.

\(^6\) .....I should be most happy to recommend that the Bank lend its good offices in such directions as might be considered appropriate by the two governments, make available qualified members of its staff........." Mr. Black's letter of September 8, 1951 to the Prime Ministers of India and Pakistan. See Mason and Asher, op. cit. note 4 at p. 612.
became available. There was a question raised within the Bank as to whether the Bank was within its powers to engage in the operations which were different from its standard operations, that of participation in the financing of high priority reconstruction and development projects.\(^7\)

The involvement in the Indo-Pakistan dispute, however, arose directly out of the Bank's interest in financing the development of the Indus Valley - a quite legitimate operation under the Bank's Articles of Agreement. The Indo-Pakistan Indus Waters Treaty was signed on September 19, 1960 after nearly 12 years of negotiations in which the Bank played a central and indefatigable role. The Bank was interested in both the Anglo-Iranian and Indo-Pakistan cases because it saw its mandate to finance development operations as including mediation between the countries, affected by Bank operations, whose agreement would be a prerequisite for the Bank's regular operations in the country or countries. In other words, the disputes were linked to the Bank's standard operations. A number of projects in the Indus Valley were later financed by the Bank in both India and Pakistan.

In 1958, new developments took place and, for the first time, both parties to a dispute requested Mr. Black, the President of the World Bank, to act as a mediator in arranging compensation for undertakings and individuals affected by the expropriation of the Suez Canal Company by Egypt. Also in the same year, in his personal capacity, the President of the Bank acted as conciliator to settle disputes between the City of Tokyo and holders of its bonds. He assisted as conciliator in settling private claims following the nationalization of the Tunisian electric power utilities in 1968 and in the settlement of disputes arising out of the nationalization of foreign mining interests in Zaire in 1965. Although the President was prepared to lend the offices of the Bank particularly in giving

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\(^7\) Article 1 of the Articles of Agreement of the International Bank for Reconstruction and Development. The then Asst. General Counsel of the Bank, Aaron Broches, who later was responsible for the launching of ICSID, interpreted the provisions in Article 1 as wide enough to justify the Bank's employment of its resources in mediation of the dispute between Britain and Iran.
technical advice to resolve disputes between foreign investors and states, he was not prepared for either the Bank or himself to act as arbitrator who makes a binding decision.

Pressure mounted for the Bank to play a regular and effective role in settling disputes as an instrument in the development process but it was evident that the Bank would be stretching its mandate to do so and would be seriously diverted from its fundamental role of giving loans and guarantees for the financing of projects of high economic priority in the less developed states.\(^8\) Equally, there were concerns that the expansion of the Bank’s functions to settle disputes between member states in relation to private investor-interests may be counter-productive in that a member state may fear that non-compliance with a decision by the Bank in respect of a dispute might jeopardize its prospects of securing loans and affect its overall relationship with the Bank.\(^9\) Member states of the Bank may be reluctant to approach the Bank for any purpose in case the Banker also becomes the judge. The two roles had to be separated.

It has been suggested that the governments and investors turned to the Bank for mediation of disputes because of the "lack of any other specific machinery for conciliation and arbitration which was regarded as adequate by investors and governments alike".\(^{10}\) That may not be true generally as most contracts between foreign nationals and states provide for settlement of disputes occurring in the future usually by arbitration. Actually, the Bank’s early involvement in dispute settlement originated from crisis situations threatening the

\(^8\) Article III Section 1 (a) of the Bank’s Article of Agreement: The resources and the facilities of the Bank shall be used exclusively for the benefit of members with equitable consideration to projects of for development and projects for reconstruction alike. Section 1(b) refers to the conditions and terms of loans for such restoration and reconstruction. The rest of Article III talks of loans and guarantees.


\(^{10}\) Ibid. at p. 101.
state of peace following the second world war and not from premeditated requests by parties for the Bank to intervene. Much of the Bank's work was not so much conducting a hearing of both sides as employing its staff to prepare highly technical reports.

A member state would agree to Bank intervention if another member state threatened aggressive action as in the case of the Anglo-Iranian dispute or a member state entitled under rules of international law to take diplomatic protection is reluctant to do so without first trying a peaceful settlement though an international organization or there is a prospect of war if an international organization does not intervene as in the case of the Indo-Pakistan dispute over the Indus waters. In the cases involving a private investor, member states approached the Bank not the private investor. These cases are all a-typical but they illustrate: (i) the classes of disputes that were intended to come within the jurisdiction of ICSID and (ii) that ICSID was set up to prevent member states exercising diplomatic protection which usually meant use of force.

The Bank had no clear policy towards the settlement of disputes between member states and between member states and private entities but was drawn into them as a result of its day to day contact with member states and many of the disputes touched the Bank's own lending operations in a country. The Bank's role in the settlement of disputes has been rationalized more recently by Bank lawyers. Bank staff is constantly required to assess the standing and credibility of a member state because that was critical to the state's ability to attract foreign capital and to service Bank loans. The credibility of the Bank in the world money markets where the Bank borrows would also suffer if the Bank was seen to continue lending to a country which was reneging on its international obligations giving rise to disputes which were not settled satisfactorily.

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In retrospect, therefore, the Bank's role in the settlement of disputes may be said to fall into three categories: (i) where the Bank seeks to encourage member parties to settle their disputes using outside help by arbitration or other means including appointment of umpires or arbitrators, (ii) where the Bank offers its good offices and undertakes to provide technical assistance to resolve disputes and (iii) where the Bank President personally undertakes to act as conciliator or mediator but never as arbitrator.

(b) ICSID

Work began on the convention to establish ICSID in 1961. A preliminary draft was prepared by Bank staff followed by discussions at four regional consultative meetings consisting of legal experts from countries in the regions of Africa, Asia, Europe and Latin America and reviewed by a special legal committee in Washington. A systematic and complete presentation of all working papers and documents has been made in the History of the Convention in Four Volumes published by ICSID in 1970. The final draft of the convention was formulated by the Executive Directors of the World Bank and presented to the Board of Governors for approval in 1965. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was approved by the Board of Governors on March 18, 1965 and came into force on October 14, 1966.

ICSID has its headquarters in the World Bank complex but is an independent international agency. Although the Convention was the product of a consensus of member states of the World Bank, other states (member or not) can accede to the Convention.¹² The objective of the Convention is not to sell an arbitration facility in competition with other arbitral institutions but to

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¹² ICSID Convention Art. 67 provides for non-member states who are parties to the Statute of the International Court of Justice to sign the Convention at the invitation of the ICSID Administrative Council by two thirds of its members. Only Switzerland has availed itself of this opportunity and has signed and ratified the Convention.
encourage private investment in the economic development of developing countries originating from the developed countries by providing a facility to resolve disputes between a state and a foreign investor as far removed as possible from the political power and judicial control of the state concerned.

ICSID is an international judicial institution similar to the International Court of Justice and the Permanent Court of International Arbitration in the Hague with obvious important differences. ICSID does not have a permanent court and arbitral tribunals are convened as requested by a contracting state or national of another contracting state. ICSID is essentially an administering body. Both the Hague institutions only hear disputes between states themselves or between states and private parties through the intervention of states. ICSID is the first truly international institution which administers tribunals with judicial powers to allow a private party to bring the equivalent of an action against a state.

13 However, no such distinction is made in the Convention between developed and developing countries. The Convention Preamble speaks of disputes "between Contracting States and Nationals of other Contracting States". One ICSID Case between a developed state and a foreign national is Mobil Oil Corporation, Mobil Petroleum Company Inc. and Mobil Oil New Zealand Ltd. v. New Zealand Government (ICSID Case No. ARB/87/2).

14 The International Court of Justice was established by the United Nations as its principal judicial organ (UN Charter, Art. 7) as a successor to the Permanent Court of International Justice established under the auspices of the League of Nations. ICSID, however, is not an agency of the UN and is an institution independent of the UN.

15 Established by the Hague Conventions for the Pacific Settlement of Disputes of 1899 and 1907.

16 In 1962, the Bureau of the Permanent Court of Arbitration drafted model Rules of Arbitration and Conciliation for the settlement of international disputes between a state and a private party in order to make the Bureau's services and offices available to private parties. An arbitration of a dispute between Sudan and Turriff Construction (Sudan) took place under these conditions. They do not affect the Court's role under the Hague Conventions as an adjudicatory body over disputes between states only. See Schwarzenberger, International Law Vol. IV, Stevens, London, 1986 at p. 125.

17 The European Communities Court of Justice and the European Court of Human Rights are two regional judicial institutions which have extended locus standi to private parties. At the former, private parties can bring actions against the Council of Ministers and the European Commission and at the latter, private parties can bring actions even against their own governments.
II. Organization and Management of ICSID

ICSID prescribes its own rules for the conduct of conciliation and arbitration proceedings, provides the offices and services needed to administer the proceedings in Washington or elsewhere in the world and maintains a panel of arbitrators and conciliators but parties to a dispute may choose their own arbitrators from outside this panel. It is governed by an Administrative Council, whose Chairman is the President of the World Bank, and has a secretariat consisting of a Secretary-General\textsuperscript{18}, a Senior Counsel, five assistants and a small secretarial staff. While there are limitations on the type of disputes that can be submitted to arbitrations administered by ICSID, some other arbitral institutions such as the ICC and the Stockholm Chamber of Commerce (SCC)\textsuperscript{19} may be willing to administer arbitrations under rules other than their own. Thus a distinction has to be made between a submission to ICSID arbitration and a submission for arbitration under ICSID rules. This Thesis deals only with the former.

Although ICSID was intended to be an agency independent of the World Bank, in practice, there is considerable overlap in the administration of the two institutions. The President of the Bank is the ex officio Chairman of the ICSID Administrative Council\textsuperscript{20} whose membership is drawn from the governors of the Bank or their alternates.\textsuperscript{21} The Secretary-General of ICSID is also the Vice President and General Counsel of the World Bank and ICSID staff is interchangeable with Bank staff. So much so that there is a strong belief that non-

\begin{itemize}
  \item[18] The Vice President and Chief Counsel of the World Bank also acts in the capacity of the Secretary General of ICSID.
  \item[19] For example, both ICC and SCC accept requests for arbitrations under the United Nations Commission on International Trade Law (UNCITRAL) Rules.
  \item[20] ICSID Convention Art. 5.
  \item[21] Ibid., Art. 4(2).
\end{itemize}
compliance with an ICSID arbitral award by a member state may result in that state being unable to obtain loans and credits from the Bank.\textsuperscript{22} It has also been said that ICSID represents a system which balances the interests of the investors who are from the developed countries and the host states which are usually the developing countries because each member state has one representative on the Administrative Council and has one vote.\textsuperscript{23} But, in important matters such as adoption of the procedural rules for the institution and conduct of arbitration proceedings, two thirds of the members must vote in favor of any measure to pass thus effectively enabling the developed countries to decide which measures should pass.\textsuperscript{24}

III. Conclusion

The origin of ICSID can be traced to the many requests by member states of the World Bank for the President of the Bank to intervene in the settlement of disputes between member states in respect of community interests and between a member state and nationals of another member state in matters relating to expropriation or nationalization of mining and other concessions. On the one hand, the World Bank did not see the settlement of disputes as a legitimate function of the Bank and on the other, many states were concerned that the involvement of the President of the Bank in the settlement of disputes might affect their relations with the Bank as borrowers. Consequently, the President and staff of the World Bank began to explore the feasibility of creating a multilateral institution for the sole purpose of handling disputes between developing states and nationals of developed states who were members of the World Bank.


\textsuperscript{23} Shihata, op. cit. note 9 at p. 102.

\textsuperscript{24} ICSID Convention, Art. 6(1).
ICSID was born out of an extensive consultative process which included regional meetings of experts held in four continents, Asia, Africa, Latin America and Europe. The process began in 1961 and ended in 1965 with the adoption of a multilateral convention for the establishment of ICSID as an arbitral institution, about 20 years after the creation of the World Bank. Although it relieved much of the pressure on the President and staff of the Bank to be involved in disputes and the first objective was achieved, ICSID has become very much an integral part of the World Bank and submission of disputes to ICSID arbitration carries with it the real risk of the relations with the Bank of a member state involved in an ICSID arbitration being affected.
Chapter Five

SALIENT CHARACTERISTICS OF THE ICSID CONVENTION

I. Renunciation of the Right of Diplomatic Protection

It is claimed that the advantage, in an ICSID arbitration, for a state party to a civil engineering contract is that the country of nationality of the private contractor will not intervene on behalf of the contractor in disputes arising out of or in connection with the contract if both that state and the country of nationality of the contractor are parties to the ICSID Convention unless, of course, the state does not comply with any award pursuant to an ICSID arbitration.¹ In other words, the state to which the contractor belongs as a national has, under the special circumstances of an ICSID arbitration, renounced its right under rules of international law to extend diplomatic protection to its nationals conducting business in another state at any time during the course of arbitration proceedings.

Diplomatic protection is the right of a state to make a claim against another state on behalf of an individual, corporation or association which has suffered damage or injury in that state resulting from actions or omissions on the part of that state.² The argument is that an individual or corporation has no standing in international law and, therefore, any offence against the person or entity is presumed to be against the state of nationality.³ Nationality is usually the test to

¹ ICSID Convention Art. 27 (1).
² The earliest record of such a claim was in regard to debts owed to British merchants by citizens or residents of the United States. They were settled by a commission of five members chosen by both states under the Jay Treaty of November 19, 1794.
be applied in determining the state's right under international law to extend diplomatic protection. In the case of a corporation or other business entity, the nationality of those in control and exceptionally substantial interest of the state concerned may matter. ⁴ Diplomatic protection can range from exchanges of messages to international claims to the most undiplomatic pressures and aggressive actions including war. The existence of a customary international rule supporting diplomatic protection was confirmed by Article 3(1)(b) of the Vienna Convention on Diplomatic Relations 1961. ⁵

(a) The Origins of the Right of Diplomatic Protection

A history of abuse surrounds the right of diplomatic protection of its nationals by a state. The more powerful states would resort to aggression and occupation of the offending state. The defence of the interests and rights of their citizens became an excuse to further territorial claims. ⁶ The origins of state intervention to further the interests of their nationals could be traced to the colonization era. ⁷ The colonization of many former colonies of European states actually began with the despatch of forces by these states to protect their trading stations and entities abroad. There was a neat explanation for this - the colonized territories

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⁴ The Nottebohm Case, I.C.J. Rep. (1955) 22. But, see The Barcelona Traction, Light and Power Company Limited (Second Application), I.C.J. Rep. (1970) 4 at 37 where it was held that "there is no rule of international law which expressly confers such a right [diplomatic protection] on the shareholders' national state."

⁵ The functions of a diplomatic mission consist inter alia in: (a) ................... ; (b) protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law; (c) ..............."

⁶ In the early decades of relations between Mexico and the United States, the latter harbored territorial ambitions in Mexico, and often the support of claims for injury to American citizens was employed to further such territorial designs." See A.H. Feller, The Mexican Claims Commission 1923-1934, Macmillan, New York, 1935 at p. 2.

⁷ That period was an era of adventure and exploitation" per George Schwarzenberger, International Law Vol I, Stevens, London, 1957, quoting the words of the Permanent Court of International Justice. But see Legal Status of Eastern Greenland, (1933) P.C.I.J. A/B 53, p. 47 where it reads "That period was an era of adventure and exploration".
were not international subjects. Some territories had rudimentary societies but others even though developed and organized were weak and divided among themselves. Many of the occupations by European states were made in competition with other European states with whom they fought bitter struggles. When the occupied territories eventually regained independence and authority, coercive measures continued to be employed by the powerful states to promote the expansion of their trading and commercial interests.

Attempts were made by some newly independent states in which foreign companies operated to require the companies to give an undertaking that they would not appeal to their home states for protection in the event of disputes with the host states. It was common for Central and South American states to require foreign companies under contract with those states to agree to a condition in their contracts that they would not appeal to their own governments for assistance in respect of any matter arising out of the contracts but would rely on local courts and administrative institutions to resolve disputes.

An extreme example is the clause in the American Dredging Company Case (1926)\(^8\) which required in effect that the contractor shall be regarded "as Mexicans in all matters" and that "They [the contractor] are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted ...."\(^9\) The case came before the United States-Mexican General Claims Commission\(^10\) in 1926 and involved a United States Company which had a contract with the Government of Mexico to carry out dredging works at the port of Alina Cruz. Following breaches of the contract by Mexico a claim for losses and damages was lodged with the Commission.

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\(^8\) United States v. Mexico, 4 U.N.R.I.A.A. 26 (1926).

\(^9\) Ibid.

\(^10\) Set up under the General Claims Convention of September 8, 1923.
The Commissioners held that while the complainants cannot relinquish all rights of protection by their government, the principle did not apply in every case and set of circumstances and that, in this particular case and circumstances, the contractor was bound by the commitments he had made in his contract with the Government of Mexico and that the Commission did not have jurisdiction over the matter. It was held that in the prevailing conditions of "the increase in civilization, intercourse, and interdependence as between nations", a person should have some freedom to determine the extent of his ties to the country of his nationality. He cannot after securing a contract by promising not to seek the assistance of his government renge on it at his convenience.

Also known as Calvo Clauses, their effectiveness in relieving the home state of a contractor of its right to protect its nationals abroad has been the subject of controversy and debate because the right of diplomatic protection is the right of the state and not that of its nationals and, therefore, cannot be waived by the nationals concerned. In the modern context, it is quite valid to assume that a state would have an automatic right despite a Calvo Clause, or for that matter even an ICSID Clause, to intervene on behalf of its nationals where personal injuries or personal safety issues arise out of contractual or other transactions in another state but that where injury to property and pecuniary damage to its nationals are concerned the home state will only act if its own interests are injured as a result of the breach of contract or where the state is in breach of the international minimum standard of conduct required of all

11 Named after the Argentinian Jurist, Carlos Calvo (1824-1906). The clause was intended to limit or exclude the right of a foreigner or foreign corporation to appeal to their home state for protection in matters arising out of a contract with another state.

12 See Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania) (Preliminary Objections), (1939) P.C.I.J. Ser A/B, No. 76. In Societe Commercial de Belgique (Socobel) Case, (1939) P.C.I.J. Ser C, No. 87, the Permanent Court held that a state bringing an international claim on behalf of one of its nationals is under no obligation to pay any reparation received by the state to the injured national.

13 If in the North American Dredging Case, it had involved, say, an oil concession instead of a civil engineering contract, it is possible that the Commission would have assumed jurisdiction on the ground that the US had a legitimate strategic interest in protecting its sources of energy.
civilized nations. However, legitimate actions under modern rules of international law exclude the threat or use of force.

What the **North American Dredging Case** lays down is that provided that there are adequate provisions in a civil engineering contract for settlement of disputes locally whether it be arbitration or litigation the foreign contractor cannot seek the protection of his home state before the local remedies are exhausted and that the home state would have a right to intervene only if the adjudicatory process has not been fair and just and there is no compliance with the court judgement or arbitral award by the state party to the contract. The international contractor will have no right of diplomatic protection of his home state if the dispute with the host state is to be settled by international arbitration administered by a private arbitral body such as the ICC.

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14 "Generally speaking the older and economically "developed" states follow the international minimum standard approach [towards aliens] while the newer and "developing" states favour national treatment [the same treatment as applied to nationals]" per D.J. Harris: *Cases and Materials on International Law* (Second Edition), Sweet & Maxwell, London, at p. 20.


16 Also see *The Panevezys-Saldutiskis Railway Case*, P.C.I.J., ser. A/B, No. 76 (1939). The Estonian Government claim that the Esimene Company had proprietary and concessionary rights in the railway was rejected by the court on the ground that local remedies will have to be exhausted before raising the matter at public international law level.
(b) Is the Right of Diplomatic Protection Unique to ICSID?

Therefore, it is submitted that the ICSID Convention by its express provision in Article 27 (1) that "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted to arbitration under this Convention unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute" says no more than what is expected under rules of international law in arbitrations outside the ICSID Convention. Article 27 (1) merely repeats what is already a rule of international law, namely, the exhaustion of the remedies under the municipal law or arbitral process before an aggrieved contractor can seek the protection of his home state.

Article 27 (1) would apply to a contracting state where a company or other juridical person is incorporated because the company or person is a national of that state. Where, however, a company is incorporated in one state but with the majority of shareholders from another state, the latter state would not be precluded by the provisions of Article 27 (1) from pursuing an international claim in another forum or another mode even though the company has been recognized as a foreign national for purposes of eligibility for ICSID arbitration by the state of incorporation and ICSID proceedings are pending. That the state of nationality of the majority of the shareholders of a company incorporated elsewhere has jus standi before the International Court of Justice was decided by that court in the Barcelona Traction Case, unlike ICSID, even where the state where the company is operating does not regard the company as a foreign national. Article 27 thus leads to the curious theoretical situation, though highly unlikely, where a company incorporated locally has the majority of shareholders from a foreign state and the latter state claims that the company is not its national and that

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17 See Chapter Six note 46 below.
Article 27 (1), therefore, does not apply and the state invokes the right of diplomatic protection even though ICSID proceedings are pending.

There may not be a real distinction in practice between an ICSID arbitration and a private institutional or even an \textit{ad hoc} arbitration because the state of nationality of the private claimant will not intervene even though the parties themselves in private arbitrations cannot by their agreement deprive that state from its right of interposition.\textsuperscript{18} It has to be noted that, under Article 27 (2), the home state of a contractor would retain the right to continue "informal diplomatic exchanges" which means that the home state is not precluded from continuing with all kinds of pressures, short of public intervention, on the host state to reach a settlement including complaints to the World Bank through the representatives of the home state.\textsuperscript{19} In any event, such pressures will apply equally where there are provisions for arbitration of disputes by private arbitral bodies such as the ICC.

Although in international law a state's right of diplomatic protection of its nationals is regarded as a common right of all states, the right has real meaning only to the developed and militarily strong states who have the resources and the incentives to exercise the right. Despite the express condition that states who have consented to ICSID arbitration should renounce their right of diplomatic protection, by the fact that ICSID is directly or indirectly, through its association with the World Bank, controlled by the developed states, ICSID is perceived as an instrument for developed countries as a group to apply the equivalent of diplomatic protection of their nationals who invest or operate in the developing states. In other words, ICSID and indeed other arbitral bodies located in the developed states are seen as a surrogate for diplomatic intervention in the affairs


\textsuperscript{19} One of the difficult and time consuming tasks of World Bank staff is to answer questions by Executive Directors of the World Bank representing states of nationality of contractors and consultants on alleged malpractices by developing countries on procurement matters including treatment of disputes between contractors and consultants and host states.
of the developing states and that whereas in the past developed states pursued separately their own routes to protect their interests they now achieve the same aims through an international institutional framework which includes ICSID.

Unfortunately, recent observations on the role of ICSID have suggested that the strength of ICSID lies in the deterrent effect supplied by its links with the World Bank which is controlled by the developed states and have not helped to allay this perception of ICSID. All developed states have programs for helping the economic development of the poorer states in Africa, Asia and Latin America by channelling funds into their economies through bilateral and multilateral official development institutions to finance the foreign exchange costs of needed goods and services including construction of civil works. Suppliers, contractors and technical assistance personnel from the developed countries are involved in the development process so much so that one writer has suggested that a state's right of diplomatic protection "does not exclude actions, short of a threat or use of force in order to promote conditions of economic and social progress and development."
II. Effectiveness of ICSID Awards

(a) Recognition and Enforcement

In the end, what matters most is the effectiveness of an arbitral award as measured by the binding character of the award and the ease with which the award can be enforced by the beneficiary of the award. An ICSID arbitral tribunal award is binding on all state parties to the convention including the state involved in the arbitration. 24 States shall recognize and enforce ICSID arbitral awards as if they are final judgements of their own courts of law on a certificate from the Secretary-General of ICSID. 25 There are important distinctions from the recognition and enforcement of arbitral awards under the New York Convention which provides for enforcement of arbitration awards in a state other than the state where the arbitral award is made. 26

For a party to seek recognition and enforcement under the New York Convention, it would have to apply to a local court with a copy of the arbitral award and the arbitration agreement. 27 Unlike ICSID awards, an opposing party may object to the application on the grounds that the arbitration agreement is not valid, there has been a violation of due process, the arbitrator has exceeded his authority, there is irregularity in the composition of the arbitral tribunal and in arbitral procedure and that the award has been set aside in the country of origin or under the law of which the award was made. 28 Moreover, a court may refuse

24 ICSID Convention, Art. 53.
25 Ibid., Art. 54.
26 New York Convention, Art. 1(1).
27 Ibid., Art. IV.
28 Ibid., Art. V(1).
enforcement on the ground that the subject matter is not a proper matter to be arbitrated under its law and on grounds of public policy. 29

There is no ground for refusal of an ICSID award not even on grounds of public policy by a national court of a state that has acceded to the ICSID Convention. 30 Although many states have acceded to both conventions, it would be inconceivable that a state or private party would seek to enforce an ICSID award under the New York Convention. 31 However, a party may have to rely on the New York Convention to enforce an ICSID arbitral award in a state that is not a party to the ICSID Convention but is a party to the New York Convention. 32

It has to be noted that an award by a private arbitral institution derives its strength or weakness from a national law of arbitration which governs all arbitrations in a particular state. National laws provide for varying degrees of autonomy for international arbitrations, meaning arbitrations where there are strong international elements or no domestic element at all. Thus, in many cases there is a degree of control by local courts and since the New York Convention does not apply to the country where the arbitration takes place, application would have to be made to the courts in that country under its national law for purposes of recognition and enforcement there. More importantly, there is confusion over the applicability of the New York Convention where the awards have no links with a national law - so-called "a-national awards", typically, where the local courts ignore them.

29 Ibid., Art. V(2).

30 ICSID Convention, Art. 54(1).

31 Albert Jan van den Berg, Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions, 2 ICSID Rev.-FILJ 439 (1987) at p. 440: "......, no sensible claimant would rely on the New York Convention, since an award rendered pursuant to the ICSID Convention is enforceable within the Contracting States with no resistance to the enforcement possible."

32 Notable examples of countries which are parties to the New York Convention but not to the ICSID Convention are Argentina, Canada, Chile and India.
(b) Execution of ICSID Awards and Sovereign Immunity

ICSID arbitrations are conducted in accordance with the ICSID Convention and rules and regulations of ICSID which exclude the application of the national laws of arbitration and are, therefore, fairly well insulated from the national law of arbitration and are enforceable in all states which are parties to the ICSID Convention. However, the execution of an ICSID award in a state is governed by the laws relating to execution of court judgements in that state as would be the case in other arbitral awards and the provisions for recognition and enforcement shall not be interpreted "as derogating from the law in force in any Contracting State relating to the immunity of that State or of any foreign State from execution." Thus, a state against which steps are taken in another state to execute an award may invoke its rights to immunity from execution under the laws of the other state in order to prevent attachment of its properties and moneys located there. In LETCO, LETCO had won an award against the Government of Liberia in an ICSID arbitration and had obtained an enforcement order ex parte from a New York judge who had issued a Writ of Execution to the US Marshall in the Southern District of New York. On an application to the Southern District Court to vacate the order, the Court allowed the motion to vacate the execution order because of Liberia’s immunity from execution under the US Foreign Sovereign Immunities Act but not the judgement order.

A distinction had been drawn earlier in 1981 by the French Court of Appeal between enforcement and execution in a case involving a dispute between an Italian Company, Benvenuti and Bonfant and the Government of the

33 ICSID Convention, Art. 54(3).
34 Ibid., Art. 55.
Congo. Both parties were involved in the promotion of a mineral water bottling company including the manufacture of plastic bottles. Their contract provided for ICSID arbitration of disputes. Benvenuti had won an ICSID award and was attempting to have it recognized and enforced in France. The Court of First Instance in Paris declared the award enforceable but ordered that no executory measures should be taken without the court's prior approval. On an appeal to the Court of Appeal in Paris to strike out the reservation of the lower court, the Court of Appeal allowed the appeal on the grounds that the enforcement order is not the same as an executory measure which was a separate act that came after first securing the enforcement order and that the lower court exceeded its competence in interfering with the executory measures which concerned questions of immunity.

This distinction between a judgement or enforcement order and an order for execution obviously matters only where measures are taken against a state party but not a private party and will apply also to enforcement of awards under the New York Convention regardless of the fact that express references are not made in that convention to state immunities and enforcement of arbitral awards.

III. Exclusion of Jurisdiction of Local Courts

(a) General

The effectiveness of ICSID arbitration is heightened by a provision in the ICSID Convention that consenting parties shall, unless they have agreed otherwise, be

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deemed to have excluded any other remedy\textsuperscript{37} such as, for example, recourse to local courts. This would be particularly favorable to a foreign contractor who cannot be compelled to exhaust local administrative or judicial remedies before resorting to arbitration unless he has agreed to it in advance before the dispute has arisen. Although many national arbitration laws give powers to national courts to refuse to hear a matter which has been referred to arbitration, the courts still have discretion to varying degrees in each state in deciding to intervene or not to intervene in non-ICSID arbitrations and, very often, the merits of the matter would be heard by the courts before a decision is taken not to intervene.\textsuperscript{38}

Some states have adopted the UNCITRAL Model Law which limits court intervention to certain specified purposes generally to assist in the conduct of the arbitration proceedings. The competent court is entrusted with the task of making interim orders to protect property,\textsuperscript{39} ensuring the appointment of the arbitrators,\textsuperscript{40} dealing with unsuccessful challenges to an arbitrator or an arbitrator’s failure or impossibility to act,\textsuperscript{41} hearing appeals against the arbitral tribunal’s jurisdiction in a matter\textsuperscript{42} and hearing applications to set aside an arbitral award on a limited number of grounds that are repugnant to any adjudicatory process.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{37} ICSID Convention, Art. 26: 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. A Contracting State may require exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.
\item \textsuperscript{38} For example, it is a fundamental rule in English law that it is against public policy for anyone to attempt to exclude the jurisdiction of English courts. However, since the United Kingdom has acceded to the ICSID Convention its international commitment under the Convention will override its municipal rules of law. In any case, the English Arbitration (International Investments) Act 1966 has made the Convention part of English municipal law.
\item \textsuperscript{39} UNCITRAL Model Law, Art. 9.
\item \textsuperscript{40} Ibid., Art. 11(3) and (4).
\item \textsuperscript{41} Ibid., Arts. 13 and 14.
\item \textsuperscript{42} Ibid., Art. 16(3).
\item \textsuperscript{43} Ibid., Art. 34.
\end{itemize}
In some instances the courts will hear appeals to set aside non-ICSID arbitral awards and will have powers to remit an award back to the arbitral tribunal for reconsideration or to vary an award. In some countries judicial review can be excluded by agreement between the parties under certain conditions usually where the parties are foreign. However, the courts of the states which have acceded to the ICSID Convention cannot intervene before or during arbitral proceedings under the Convention and will not hear appeals from arbitral awards where the states have agreed with private contractors to unconditional reference to ICSID arbitration. This is based on an interpretation given by courts of Article 26 of the ICSID Convention which provides that "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."

(b) Provisional and Conservatory Measures

In any case, parties may have to apply to the courts for the issue of orders for provisional and conservatory measures. Many states reserve such powers to courts of law only. Others give parallel powers to arbitral tribunals to make orders as necessary. In yet others, courts will only act if the parties do not comply with the orders of the arbitral tribunal. Recognizing this, the ICC Rules

44 E.g. The English Arbitration Act 1950 Section 23(2).
45 Ibid., Section 22.
46 The English Arbitration Act 1979 Section 1(2).
48 E.g. Italy, Germany, Austria, Finland, Denmark, Australia, India, Japan, New Zealand, Sri Lanka, Libya.
49 E.g. England, Hong Kong, India, Malaysia.
50 Swiss Private International Law Act 1987, Article 183 2(1).
allow the parties to apply to a competent judicial authority to make orders for "interim or conservatory measures" normally before the ICC Court sends the case files to the ICC tribunal. In *Mine v. Republic of Guinea* both the Belgian and Swiss Courts held that, where matters have been referred to ICSID arbitration, the national courts cannot intervene even in respect of orders for provisional and conservatory measures. Only the arbitrators have powers to do so.

In that case, there was an agreement between the Government of Guinea and Maritime International Nominees Establishment (MINE) with head office in Liechtenstein and offices in Brussels and Geneva to set up a joint venture company in Guinea called the Societe Guineene de Transports Maitimes (SOTRAMAR) to operate ships to carry bauxite to buyers in Europe. The Guinean Government undertook to supply two boats but never did. Other things also went wrong and the parties were plunged into several disputes. Although the agreement provided for ICSID arbitration, MINE filed a petition to the US District Court of Columbia to compel arbitration before the American Arbitration Association (AAA). The petition was granted and the arbitration took place without the participation of the government and resulted in an award of over $25 million to MINE who went on to have the award confirmed by the US District Court. Guinea's motion to dismiss for lack of jurisdiction was turned down by the District Court but was allowed on appeal to the US Court of Appeals. MINE then filed its request for arbitration with ICSID.

During the ICSID proceedings, MINE was shopping around Europe to enforce the American award and succeeded in the attachment of goods belonging to Guinea in the hands of third parties in Brussels. Guinea sought to have the

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51 ICC Rules of Arbitration and Conciliation (1988) Article 8(5). This article states in a roundabout way that the arbitrators do not have the powers to issue provisional and conservatory measures. In ICC arbitration proceedings in Geneva, the arbitrators held that "pour ces mesures la juridiction arbitrale comme telle est exclue". See Journal du Droit International Vol 113 (1986) at p 1140.

attachments lifted by the competent Belgian Court which held that the term 'remedy' in Article 26 of the ICSID Convention included attachment measures and directed the lifting of the attachment of the goods in Brussels. MINE in the meantime had secured attachment of goods belonging to Guinea in Geneva. Guinea's appeal to the Swiss Federal Tribunal against the attachment order was rejected upon which Guinea prevailed on the ICSID tribunal to order MINE to dissolve all provisional measures in litigation in national courts. MINE applied to the Swiss court to enforce the American award. The Swiss Federal Tribunal held that MINE was in violation of Article 26 of the ICSID Convention and that intervention of national courts was excluded by the ICSID Convention and refused to hear the application of MINE. The exclusive nature of ICSID arbitration was confirmed by both the Belgian and Swiss courts.

Although the decisions of the Swiss and Belgian Courts are significant, the autonomy of ICSID in the making of provisional and conservatory measures may have been exaggerated because interim orders by an ICSID tribunal cannot be enforced without the assistance of the national courts. For example, it is a court of law that issues a writ of execution or attachment on goods and if it is a matter of urgency there is authority to suggest that the courts are in a better position to deal with emergencies.

In People's Revolutionary Republic of Guinea v. Atlantic Triton Company Limited, the Government of Guinea had signed a contract with a Norwegian Company for the management of the conversion, equipping and operation of three fishing vessels. The contract provided for ICSID arbitration of disputes. Six months of fishing showed poor results and a report by the UN Field Agricultural Organization (FAO) disclosed that the vessels were unsuitable for fishing in tropical waters, that the Norwegian nets used were not suitable, that the vessels had not been well maintained and a general overhaul was necessary. Attempts to solve the problems failed and Atlantic Triton cancelled the agreement and

requested certain payments including the cost of repairworks in Norway. While the vessels were undergoing overhaul in Quimper, France, Atlantic Triton obtained an order from the Quimper Commercial Court to attach the three vessels as security for its claim. On appeal to the Court of Appeal of Rennes, the attachment decision was rescinded on the ground that the ICSID tribunal had the powers to issue such orders and pointed out that there was no urgency in the case as the ships were to be in the repair yard for six months suggesting that if there was an emergency the court would have acted.

The founders of the ICSID Convention must have realised this because, under Article 47 of the Convention, an ICSID tribunal may only 'recommend' provisional measures not order them. The tribunal may do so even at its own initiative proprio motu and ICSID Arbitration Rules permit parties to apply to the courts for orders for provisional measures provided they have consented to this in the arbitration agreement. Injury following any failure to comply with the recommendations of an ICSID tribunal will obviously be taken into account in allocating fault and assessing damages. An earlier draft of Article 47 called for a penalty in the event a party failed to comply with an interim order but it was not accepted.

In that sense, ICSID is not unique and even a private arbitral tribunal may recommend interim measures and parties must comply or risk being found culpable and face damages on that account. It does not take into account, however, the not so infrequent circumstances where the consequences to one of the parties to a dispute can be catastrophic and urgent and one party may use

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54 Article 41 of the Statute of the International Court of Justice uses the term 'indicate' in the same context suggesting that the softer term in the ICSID Convention was adopted as a diplomatic gesture in order not to offend the sensibilities of member states of the World Bank.

55 *In the South-Eastern Greenland case*, P.C.I.J. Series A/B, No. 48 pp.287-289, the Permanent Court of International Justice considered making an interim order proprio motu.

56 ICSID Rules of Arbitration, Rule 39(5).

57 History of the Convention Vol 1 at p. 206. There is no evidence of debate on this point.
that as a threat to make the other party submit to his claims and, therefore, resort to the courts of law in such instances becomes inevitable even in ICSID arbitrations because the arbitral tribunal cannot be easily convened in an emergency to deal with an application for a conservatory measure. Besides, the incapacity to enforce interim orders, the real weakness in the arbitral tribunal issuing interim orders is its lack of competence to issue orders to third parties because arbitration is a contractual matter between parties who have consented to arbitration.

The powers assumed by an arbitral tribunal to issue interim orders are particularly useful in international civil engineering contracts where, for example, a contractor may attempt to remove his plant from the site and ship it outside the jurisdiction of the state, a contractor may disobey instructions from the resident engineer, the state may appropriate the contractor's equipment and may wish to continue the works either using its own forces or by hiring another contractor. The contractor may refuse to take steps to protect the permanent works. Injunctions and orders for preservation and protective measures may be inevitable where the dispute is overly acrimonious. In choosing the venue for arbitration in an international civil engineering contract, the parties may be well advised to consider as a factor the effectiveness of the venue when it comes to the making and enforcement of interim measures.

IV. Annulment of ICSID Awards

(a) Judicial Safeguards in the Arbitral Process

Although it is commonly said that an arbitration award is binding on the parties to the dispute, there is no finality in the award because national courts usually have powers to refuse recognition and enforcement of arbitral awards or to hear appeals to set aside arbitral awards, albeit, on narrow grounds. However, judicial
review as a rule does not extend to any review of the merits of the case in annulment proceedings as well as *exequatur* proceedings.\(^5^8\) That most states regard this as a necessary power to be exercised by national courts is accepted in the New York Convention which provides for non-recognition of arbitral awards by national courts under certain conditions. The provisions offer protection against a miscarriage of justice and are designed to encourage disputing parties and arbitrators not to act in violation of mandatory provisions of national laws relating to the conduct of arbitration proceedings and the recognition and enforcement of arbitral awards.\(^5^9\) There is a general acceptance among states that there must be some kind of judicial review of the work of an arbitral tribunal be it institutional or *ad hoc*, national or international.

It is hardly surprising, therefore, that the ICSID Convention also provides for an internal review of the award under certain limited conditions which are similar to those generally accepted by most states and the New York Convention. Either party to a dispute may file an application for annulment of an ICSID Tribunal award on specific grounds allowed by the ICSID Convention: (i) the arbitral tribunal was not properly constituted, (ii) the tribunal has "manifestly exceeded its powers", (iii) a member of the tribunal was corrupt, (iv) a serious departure had been made from a fundamental rule of procedure or (v) the award does not give the reasons on which it is based.\(^6^0\) The application is made to the Secretary-General who shall pass it on to the Chairman of the Administrative Council of the Centre. The Chairman shall 'forthwith' appoint a three member *ad hoc* committee selected from the Panel of Arbitrators maintained by ICSID to decide on the request for annulment.\(^6^1\) There is no scrutiny by the Secretary-

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59 The New York Convention, Article V.

60 ICSID Convention, Art. 52(1).

61 Ibid., Art. 52(3).
General or the Chairman. The appointment of the ad hoc committee and consideration of the request are mandatory and automatic.

(b) Annulment of ICSID Awards

An application for annulment would be the equivalent of an appeal to a national court to set aside the award except that, in ICSID arbitrations, either party can request that the dispute be submitted to a new tribunal for a further hearing. The use of the word 'appeal' may not be appropriate because the request to annul is not made to a higher tribunal but is purely an internal matter for the Centre. Although the process of review by the ad hoc committee has been variously described, it has the same effect as the setting aside of an arbitral award by national appellate courts under national law. The merit in a normal appellate process in a court of law is that an appeal can usually only be made by leave of the court which scrutinizes the application before approval to proceed with the appeal. In ICSID proceedings, the ad hoc committee is automatically convened to hear requests for annulment.

Following the annulment of ICSID awards in Klockner v. Cameroon and Amco-Asia v. Indonesia, the conclusion is that requests for annulment may become more frequent and that ICSID arbitrations may consist of at least two hearings - one by the arbitral tribunal and the other by the ad hoc committee appointed by the Chairman of the Administrative Council. If the ad hoc committee annuls the award, a third hearing by a second arbitral tribunal is on

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62 E.g. English Arbitration Act 1979, Section 1(3)(b) and (6)(a).

63 Decision of the ad hoc committee, 1 ICSID Rev.-FIIJ 89 (1986).

64 Decision of the ad hoc committee, 25 ILM 1439 (1986).

the cards in which case, theoretically speaking, the process can be repeated until an ad hoc committee upholds a tribunal award. The original arbitration hearing of AMCO Asia was requested in 1981 and concluded on November 20, 1984 and a request was made on March 18, 1985 for annulment proceeding which ended in annulment on May 18, 1986. Request for resubmission of the dispute to fresh arbitration was registered on June 24, 1987 and an award was rendered on October 17, 1990. A second annulment request was registered on October 18, 1990. Fortunately, at the end of 1992, the parties decided to settle rather than go on but it took 11 years and 4 hearings for the parties to tire.

The AMCO Case is particularly worrisome because the ad hoc committee appointed by the President of the Administrative Council of ICSID annulled the tribunal's award based on a review of the facts of the case contrary to a trend in international arbitration not to permit judicial review of arbitral awards on their merits. The ad hoc committee disagreed with the tribunal on the amount claimed to have been invested by AMCO and its associates in a hotel venture in Indonesia, which was estimated by the ad hoc committee to be US $983,992 compared to the tribunal's determination of US $2,472,490, a shortfall in investment amount which justified the revocation of the license granted to AMCO to operate a hotel in Indonesia.⁶⁶ Annulment proceedings were initiated in the Pyramids Case⁶⁷ in September 1992 but the parties quickly settled in December probably fearing a long haul as in AMCO.

In this respect, a private arbitration may have an advantage over ICSID because of the fact that appeals can only be made to a competent court and to have to resort to litigation on a matter which the parties had previously taken a deliberate decision not to litigate and the publicity that it would entail would deter the losing party from appealing to a court of law unless he felt genuinely

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⁶⁶ 25 ILM 1439 (1986) at 1458.

⁶⁷ Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3).
outraged by the conduct or work of the arbitral tribunal. In any case, a national court would normally not review the merits of an arbitral award. At best, therefore, there is a degree of uncertainty in the course ICSID arbitrations will take in the years to come. The ICSID Convention has managed to isolate international arbitrations from the mandatory provisions of state laws and intervention by state courts but in the process it has contributed to creating a situation which, in some respects, could be worse than private arbitrations in a state locale.

V. Applicable law

(a) Substantive Law in ICSID Arbitrations

Properly drafted international civil engineering contracts will specify the state law according to which the contract document will be construed and interpreted. The law is usually that of the state party to the contract and would govern the substance of a dispute referred to arbitration. Where the parties have not specified the applicable law, the ICSID Convention provides for the application of the law of the state party to the contract and "such rules of international law as may be applicable." This has been interpreted to mean that rules of international law prevail over the applicable state law. A further innovation in ICSID arbitration is that even if the law is not clear or is silent on any matter, the arbitral tribunal will make a determination of the dispute. The ICSID arbitral

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68 FIDIC Conditions of Contract, Clause 5.1(b).
69 ICSID Convention, Art. 42(1).
71 ICSID Convention, Art. 42(2).
tribunal will not under any circumstance declare a non liquet and refuse to give a verdict.

Thus, there are several aspects, to the law applicable to substantive issues of a dispute in an ICSID arbitration, which do not exist normally in private institutional or ad hoc arbitration of a dispute in an international civil engineering contract.

First, if the contract does not specify a governing law a private arbitral tribunal will apply various tests to determine the governing law of the contract whereas an ICSID arbitral tribunal will simply apply the state law in conjunction with rules of international law. Second, if the contract does specify the law governing the contract, almost always the law of the state party to the contract, only the rules of that law will be applied by a private arbitral tribunal but in the case of an ICSID arbitration, the tribunal will fill any gaps in the state law to give a verdict under the provision in the ICSID Convention against a non liquet. Third, in ICSID arbitrations, the trend is that rules of international law will prevail over other systems of law whereas a private arbitral tribunal is forbidden from applying rules of international law unless the parties agree to this effect.

The AMCO Case makes it clear that where there is conflict between the state law applicable to the contract and the principles and rules of international law the latter will prevail. The ad hoc committee argued that, since (i) every Contracting State of the ICSID Convention must recognize the award and be prepared to enforce it,72 and (ii) the Contracting state of nationality of the investor has renounced its right of diplomatic protection, the only sensible supposition is that any award should not be "violative of applicable principles and rules of international law."73 Where the contract specifies the state law as the applicable law, the same arguments could be made to show that provisions of the

72 ICSID Convention, Art. 54(1).
state law in violation of the principles and rules of international law will not be upheld by an ICSID arbitral tribunal.

In its recommendations for drafting ICSID arbitration clauses, although the ICSID Convention permits without reservation the incorporation of state law as the applicable law to substantive issues, ICSID goes further and suggests that the arbitration clause should require that the state legal system be stabilized as at the date of signing of the agreement.\(^\text{74}\) This can close the possibility of any change in legislation in respect of unforeseen matters or matters which were regarded as too remote at the time of signing the agreement to have any effect or in respect of matters unimportant in themselves leading to differences and eventually disputes between the state and the foreign national. The state will be subject to the intolerable burden of having to make an impact assessment report on every agreement it has signed before initiating legislative reforms even if the changes in the law are in the interests of the economy, are necessary to meet emergencies or are an improvement on the old law even to the investor. The recommendation of ICSID is unusual because it goes beyond the common practice of incorporating stabilization clauses in agreements concluded by the state only in respect of certain discrete matters that are critical to the viability of the project.

That means state law will be applied by an ICSID tribunal only to the extent that a rule of state law is not repugnant to a rule of international law and if there is no rule of law applicable to any aspect of the dispute, the ICSID tribunal, unlike a private tribunal, will lay down its own rule of law applicable to the case. In effect, an ICSID arbitral tribunal has the potential to develop new rules of law if the rule applied in a particular case\(^\text{75}\) is generally accepted as law in subsequent arbitral decisions. ICSID tribunals may be claimed to enjoy a

\(^{74}\) Doc. ICSID/5/Rev.2 of February 1, 1993, Model Clauses, at p. 10.

\(^{75}\) Rules applied in ICSID arbitration proceedings are routinely published ICSID biannually in the News from ICSID.
judicial law making power which is not available to a private arbitral tribunal. In this respect, an ICSID tribunal may be said to have powers of judicial law making greater than that of the International Court of Justice which can only make new rules of equity and law to fill gaps in the existing law if the parties to a dispute agree to the court deciding a case *ex aequo et bono*.76

(b) Rule Against Non Liquet Verdict and Law Making Power

In view of the provision against a verdict of *non liquet* by ICSID, it could be argued that the power to decide a case *ex aequo et bono* is an unnecessary provision in the ICSID Convention because the *non liquet* provision can also be looked upon as a power given to ICSID to decide, in effect, a case *ex aequo et bono* whether the parties like it or not. In his discussion of aspects of the practice of the International Court of Justice, Justice T.O. Elias writes "It remains to say that the provision granting the Court the discretion to decide a case *ex aequo et bono* with the consent of both parties is a useful device for enabling the Court to apply principles of equity and fairness when none of the other four sources enumerated above is found to be inapplicable. It at least precludes the Court from pleading *non liquet* in any given case before it."77 Incidentally, the International Court of Justice has never been called upon to decide a case *ex aequo et bono*.

A distinction has been drawn by some writers between a decision *ex aequo et bono* and a decision pursuant to the rule against a tribunal pleading *non liquet*. Where an arbitral tribunal is to decide *ex aequo et bono*, the tribunal is instructed

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76 Statute of the International Court of Justice, Article 38.

to mitigate the strictness of a rule of law,\textsuperscript{78} which exists to be applied in a particular case, by taking a decision based not on that rule of law but instead on the tribunal's concepts of fairness and justice.\textsuperscript{79} In \textit{non liquet}, a rule of law to be applied does not exist but the tribunal is nonetheless called upon to make a decision which must of course necessarily be based also on the tribunal's concepts of fairness and justice. On the other hand, it may be said that even where the parties have agreed on a tribunal deciding \textit{ex aequo et bono} the tribunal can only exercise this power if a rule of law or equity recognized as law does not exist to be applied to the case before the tribunal\textsuperscript{80} in which event the prohibition under the Convention against the ICSID tribunal giving a verdict of \textit{non liquet} means deciding a case \textit{ex aequo et bono}.

\section*{VI. Conclusion}

Although the ICSID Convention provides specially for a Contracting State of the Convention to renounce its right of diplomatic protection of its national engaged in an arbitrable dispute with another Contracting State, it does not preclude the state from diplomatic exchanges to enable a settlement of the dispute. This means the Contracting State concerned can exert diplomatic pressures to expedite the settlement process and to keep itself informed of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{78} The power given to an arbitral tribunal to decide according to "an equitable rather than a strictly legal interpretation" is described as acting as amiable compositeurs by Redfern and Hunter in \textit{Law and Practice of International Commercial Arbitration}, Sweet & Maxwell, London, 1991 at p. 121. But see note below.
\item \textsuperscript{79} For examples of situations where the strictness of the law may be waived under an \textit{ex bono et aequo} procedure, see Mauro Rubino-Sammartano, \textit{Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law)}, 9 J. Int'l Arb. 5 (1992) at 9.
\item \textsuperscript{80} Orion Cia. Espanola de Segoros v. Belfort Maats, [1962] 2 Lloyds Rep. 257. Common law jurisdictions generally object to the ouster of the application of rules of law in an arbitration \textit{ex bono et aequo}. This is probably because of the highly developed equitable principles that are already part of the law. Those who advocate otherwise tend to mix amiable composition with \textit{ex aequo et bono}. See Carol Mulchay, \textit{Ex Aequo et Bono}, (1988) 54, JCI Arb. 2, 105.
\end{itemize}
\end{footnotesize}
progress being made. To this extent ICSID arbitrations cannot be distinguished from private arbitrations because it would be unthinkable for a state to intervene diplomatically pendente lite regardless of the arbitral institution. The value of the ICSID provisions in this regard is not exceptional.

There is no doubt that the binding character of an ICSID award is superior to that of a private arbitral award which can be challenged in national courts. An ICSID award cannot be challenged on any ground including that of public policy. The state court where the enforcement is sought must allow execution simply on the production of a certificate from the ICSID. On the other hand, an ICSID award can be challenged internally by an application for annulment and because of the fact that the application is virtually an automatic right, annulment proceedings are likely to be the order of things. Following the annulment of the arbitral awards in Klockner and AMCO cases and the submission to fresh arbitral tribunals, ICSID arbitrations are increasingly seen as consisting of at least two hearings - one by the arbitral tribunal and the other by the ad hoc committee appointed by the President of the ICSID Administrative Council to hear annulment proceedings. The worst nightmare occurred in AMCO when the arbitral award of the second tribunal was annulled and a third submission for arbitration was made. By contrast, although a non-ICSID award is open to limited review by many national courts, the process is not automatic and there is sufficient deterrence for a losing party to litigate in a national court.

With regards to the powers to make orders for provisional and conservatory measures, there is little to distinguish ICSID proceedings from proceedings of a private arbitral tribunal. Much of the flexibility enjoyed by the parties in the choice of the applicable law is severely curtailed in an ICSID arbitration because of (i) the trend towards application of rules of international law even where a conscious choice had been made by the parties to apply state law only and (ii) the provision against a non liquet decision which in effect gives powers to the ICSID tribunal to make an award ex aequo et bono even though the parties have not consented to it. The virtue, however, is that ICSID tribunals
have the power to make new rules of international law relevant to economic development as a result of its authority under the ICSID Convention to make an award even in the absence of an existing rule of law (the rule against giving a non liquet verdict), a power which is not enjoyed even by the International Court of Justice.
Chapter Six

PARTIES TO AN ICSID ARBITRATION

The ICSID Convention was intended to cover disputes between a contracting state and a national of another contracting state meaning that both the state party to the dispute and the state from which the other party to the dispute originates will have signed and ratified the Convention. Because the Convention comes into force thirty days after the deposit with the World Bank of the ratification instrument by a state, a request for arbitration by a state or against that state by a national of another state can only be made after the Convention has come into force in both states. In practice this is not likely to cause any problem because the dispute itself could have arisen at any time before or after the coming into force of the Convention provided that both parties to the dispute have agreed that it should be referred to arbitration administered by the Centre.

1 ICSID Convention, Art. 1(2).
2 Ibid., Article 68(2).
3 In Holiday Inns S.A./Occidental Petroleum Corporation v. Government of Morocco (ICSID Case No. ARB/72/1), Holidays Inn based in Glarus Switzerland consented to reference to ICSID arbitration of any dispute with the Government of Morocco on 5 December 1965 when Switzerland had not become a party to the ICSID Convention. Switzerland became a Contracting state on 14 June 1968 before the request for ICSID arbitration was made on 22 December 1971. Morocco itself became a party to the Convention on 10 June 1967 after its consent to ICSID arbitration.
The jurisdiction ratione personae of the Centre extends to any of the contracting state's constituent subdivisions or agencies which has been designated as such to the Centre by the state. Designation as its constituent subdivision or agency does not mean that a contracting state has approved arbitration by the Centre and the Centre will not accept a request for arbitration from a constituent subdivision or agency without specific approval by the contracting state concerned unless the state has indicated that its approval is not necessary. The majority of designations and approvals and related notifications are made ad hoc but some states have formally notified the Centre of their designated constituent subdivisions and state agencies and whether specific approval is not necessary.

Although not so specified in the Convention, designation and approval can be made before or after the dispute has arisen provided the parties have consented in writing to submit to the Centre. This means that, if the state has not designated a particular state body to the Centre as a constituent subdivision or agency before the dispute has arisen and the state does not do so afterwards, a request addressed by a national of a contracting state to the Centre for arbitration of a dispute between him and the constituent subdivision or agency

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4 ICSID Convention, Art. 25(1).
5 Ibid., Art. 25(3).
6 Under Regulation 20 of the Administrative and Financial Regulations of the Centre, the Secretary-General is required to maintain a list of contracting states indicating for each, inter alia, the date on which the Convention came into force in respect to the state, any designation of constituent subdivisions and agencies and any notification that no approval by the state is required for the consent by such an entity to submit to the jurisdiction of the Centre. ICSID material including these lists is also published in Georges R. Delaume, Transnational Contracts, Volume IV.
of another state may not be accepted by the Secretary-General on the ground that the dispute is "manifestly outside the jurisdiction of the Centre".  

On the other hand, a contracting state by filing a request on behalf of its constituent subdivision or agency may be interpreted as a designation to the Centre as required by the Convention but the request by the contracting state may still not be valid if the agency is a separate legal entity, is engaged in commercial activities and does not join in the request because the contracting state could be said to be not a party to the arbitration agreement. This would be the case where private parties are involved.

(a) Manifestations of the Modern State

A modern state manifests itself through a variety of bodies. There is the head of state, the core departments of the state such as the treasury, finance and foreign affairs which normally would represent the state itself. There are other departments of so-called cabinet rank such as defence, planning, home affairs, industry, transport, public works, communications, education, and health. There are then the lesser departments such as tourism, immigration. There are yet other organs of the state such as the parliament and the judiciary and local government institutions and the constituent states in a federal state and constituent subdivisions of those states. In a socialist state, it could even cover every imaginable group.


8 Progressive Casualty Insurance Co., et al. v. C.A.Reaseguradora Nacional de Venezuela, No. 91 Civ. 4580 (CSH), S.D. N.Y. U.S. District Judge Charles S. Haight Jr. held that the plaintiffs are not a party to the arbitration agreement containing the arbitration clause and are, therefore, not bound by it. See 7 Int'l L. Rep. 10 (1992) p. 3.

9 Actual grading of departments could vary from country to country.
Many state statutory corporations exist in many countries to provide essential services, such as the postal service, electricity and water supplies, telecommunications and yet others perform largely a trading, manufacturing and industrial function such as in aircraft manufacture, arms manufacture, banking, insurance and so on. Then, there is the Central Bank a variety of its own. Besides these, there also exist companies incorporated under the company laws with minority or majority stock holding by the state. Are all these or only some of the above eligible for recourse to the Centre?

For the purpose of the Convention there would only be two categories of eligible state parties to a dispute arbitrable under the auspices of the Centre: one, the contracting state and two, a party designated to the Centre by the state as a constituent subdivision or agency of the state. How is a state entity recognized as representing the contracting state itself rather than consisting of one of its constituent subdivisions or agencies?

Where a department of state such as, for example, the Ministry of Works in Uganda enters into a contract with a foreign contractor to construct a road on behalf of the government, there would be no problem because a dispute between the Ministry of Works and the contractor would be treated as a dispute between him and the Ugandan state and designation of the Ministry as a constituent subdivision or agency will not be necessary. Will the position be different if the Ministry has powers to enter into transactions with foreign companies on its own behalf and a dispute arises between the Ministry and the contractor?

The question of whether an entity is an alter ego or organ of a state and could be regarded as representing the state itself has arisen in a number of cases involving questions of state immunity from being sued in civil courts of other states. It is clear from these cases that a department of state would be regarded
as the personification of the state itself. However, a state entity which has a separate legal entity and is engaged in a commercial activity such as the Turkish Electricity Authority or the Sri Lankan Cement Corporation or the Societe Camerounaise des Engrais is an agency of the state and would have to be designated to the Centre and its consent to arbitrate approved by the state concerned to be able to enforce an arbitration agreement calling for arbitration at the Centre.

The rule regarding the the separate legal identity of state agencies was enunciated by Lord Denning, M.R. in Mellenger v New Brunswick Development and later applied by him also in Trendtex Trading Corporation v Central Bank of Nigeria when he said that it was difficult to:

"decide whether or not the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal identity. But on the whole, I do not think it should be."

The definition of a state in its broadest form is given in the United States Foreign Sovereign Immunities Act which provides as follows:

"A "foreign State" includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state .........."
An "agency or instrumentality of a foreign state means any entity (i) which is a separate legal person, corporate or otherwise, and (ii) which is an organ of a foreign State or political subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign State or political subdivision thereof, and (iii) which is neither a citizen of a state of the United States ... nor created under the laws of any third country."

The fact that in the ICSID Convention a constituent subdivision or agency has to be designated to the Centre means that the Convention distinguishes between the state proper and other manifestations of the state. The significance of this is that the constituent subdivision or agency or, worse still, the foreign investor will not be able to invoke the Centre's jurisdiction without state intervention.

(b) The Significance of State Identity

It is conceivable, however, that a foreign investor has entered into a contract with a state agency including provisions for ICSID arbitration and the contract has been frustrated by some measures of the state. The agency would then disclaim responsibility for the disruption of the contract on the ground that the disruption was due to reasons beyond its control. In Czarnikow v. Rolimpex\textsuperscript{14}, the Court of Appeal upheld the finding of fact by the arbitrators that the Polish state enterprise was not an organ of the state and was therefore not precluded from relying on the defence that its contractual obligations, in this case the sale of sugar to an English Company, had been frustrated by the Polish government's ban on export of sugar because of the poor beet crop. And, the foreign investor would normally not have a claim against the state itself. In practice this has not been a problem so far because in every case that has come before the Centre the state has been joined in the reference to arbitration as one of the parties to the dispute.

\textsuperscript{14} [1979] A.C. 351.
The state becomes a party to the arbitration in many ways besides pursuant to an ICSID arbitration clause in a direct contract between the state and the investor: one, by being party to a protocol of agreement with a foreign investor, which induces the foreign investor to enter into an agreement with the state or a state agency to undertake a project which might include setting up other entities; two, under an offer for arbitration by the Centre contained in a bilateral investment treaty with another state setting out broadly the conditions that will be available if its nationals were to invest in the state and invoked by the investor in a dispute and three, by making an offer in the investment laws for the arbitration by the Centre which is invoked by the foreign investor.

The state can also commit itself to ICSID arbitration of disputes arising in connection with an investment agreement between a foreign private company and a local private company in unique ways. For example when a foreign company makes an investment application containing an ICSID arbitration clause and the state grants the application which relates to a joint venture with a local private company, an ICSID tribunal held that it was a consent by the state to submit to ICSID arbitration.

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18 AMCO Asia Corporation, Pan American Development Limited and P.T. AMCO Indonesia v. Republic of Indonesia (ICSID Case No.ARB/81/1) Jurisdictional decision of September 25, 1983.
Acceptance by the foreign investor could be effected by the fact that he makes a request to the Centre for arbitration in regard to an investment agreement even with a private party where he has suffered damages through the acts of the state itself. The foreign investor will be claiming damages from the state for the breach of a bilateral treaty or its own investment laws, for example, the cancellation of a license. In this case, therefore, designation is not relevant because the foreign investor sues the state not for breach of an investment agreement per se with a private or public entity but for breach of an implied agreement between him and the state that in return for his investment in that state the state will maintain and observe provisions in its own legislation or bilateral treaty including provision for ICSID arbitration.

So, where even a private entity has been unable to fulfil conditions of an investment agreement with a foreign investor because of the actions of the state in contravening its own investment laws or bilateral treaty, the foreign investor can bypass the entity and take action directly against the state by requesting arbitration by the Centre.

Moreover, the fact that mere designation to the Centre is sufficient to enable an entity to submit to the Centre has made a mockery of the meaning of the terms constituent subdivision of a state and a state agency. Any entity in fact can be made a state agency even a private party or a company so long as it is designated to the Centre as a constituent subdivision or state agency. The Centre itself will not be concerned as to whether the entity has anything to do with the state.

Thus, in Klockner et al v. the Republic of Cameroon and SOCAME (Societe Camerounais des Engrais), Klockner had made a request to the Centre for arbitration of a dispute against SOCAME arising out of a turnkey

19 Ibid.

20 ICSID Case No. ARB/81/2.
contract for the construction of a fertilizer factory originally made with the Government which later assigned all rights and obligations to SOCAME, a Cameroonian company in which Klockner had a 51% share. The assignment by the Government was made in accordance with the original agreement with Klockner. The Government had also signed a contract with SOCAME, so-called establishment agreement, for Government guarantees and tax and other exemptions. This agreement provided for ICSID arbitration because SOCAME was regarded as being a foreign national. The fact of SOCAME being anything but a constituent subdivision of the state or state agency was conceded when a management contract concluded between Klockner and SOCAME provided for ICC arbitration of disputes between Klockner and SOCAME.

SOCAME failed in its venture and there was no evidence that Klockner had parted with some of its stock to become a minority stockholder at the time the request was made by Klockner for ICSID arbitration of a dispute arising out of the management contract. However, on the Government's acknowledgement that Klockner had become a minority shareholder and Government's designation of SOCAME as a constituent subdivision in the meaning of Article 25(1) of the ICSID Convention and its approval of SOCAME's participation, the arbitration proceeded. In fact, the Government also joined in the proceedings by invoking its protocol agreement with Klockner.

It would seem that there is no duty on the part of the Centre under the ICSID Convention to verify if indeed SOCAME is a constituent subdivision of the Republic of Cameroon or an agency. The tribunal was prepared to recognize SOCAME as a state entity without regard to the fact that Klockner had a major

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21 The first draft of the management contract between Klockner and SOCAME provided for ICSID arbitration despite the fact that Klockner had the major share in SOCAME. See Dennis Thompson, The Klockner v. Cameroon Appeal-A Note on Jurisdiction, 3 J. Int'l Arb. 93 (1986) at p. 94.

22 Also note decision of the Tribunal in the Holiday Inns case that "any party on whom rights and obligations under the [Basic] Agreement have devolved is entitled to the benefits and subject to the burdens of the arbitration clause."
share in SOCAME. The decision of the Centre to register a request for arbitration is based on the information provided in the request including identities of the parties. If the information is incorrect, the errors would be the subject of challenges at the pre-hearing conference or in the memorial, counter memorial, replies and rejoinders if any and eventual resolution by the arbitral tribunal. The Secretary-General himself (or herself) plays a passive role in the processing of requests for arbitration and illustrates a willingness on the part of ICSID to widen its jurisdiction provided the state is willing too. Having consented to ICSID arbitration the national of a state will not be in a position to challenge the appropriateness of the designation by another state of a constituent subdivision or state agency. Most of the cases which have been adjudicated by the Centre have involved the states themselves in addition to the state agency directly concerned.

In the above circumstances, the international civil engineering contractor, in order to benefit from arbitration administered by the Centre, should verify that the state with which the contractor has signed a contract to carry out civil works has signed and ratified the Convention. If the contract is with a constituent subdivision or state agency the contractor should also ensure that the state has designated the state entity as a constituent subdivision or state agency and has approved that entity's consent to ICSID arbitration. Equally important, the contractor should assure himself that he is a national of another contracting state or has been recognized as such by the state and state entity with which the contractor is under contract.

23 "The Tribunal considered that until the signing of the management contract, the management was regulated by article 9 of the protocol and it rejected the view that the ICSID jurisdiction ‘would have evaporated by a kind of implicit derogation on 7 April 1977’ when the management contract was finally signed. See Thompson, op. cit. note 21 at p. 96.

II. Nationality in ICSID Arbitration

(a) Nationality of Natural Persons

Natural persons are nationals of one or more states or are stateless. To be eligible for submission to the Centre a natural person should be a national of a contracting state other than the state party to the dispute. This means that the state party to the dispute can challenge the jurisdiction of the Centre if it can show either that the natural person is not a national of a contracting state or that he is a national of the state party to the dispute. From the unambiguous wording of the Convention, it is clear that no stateless person can invoke the jurisdiction of the Centre but on the other hand a national, of a contracting state, who has no effective link with the state of nationality or who is stateless de facto because his state has withdrawn its protection from him may be eligible.

By the same token, a natural person of dual nationality who is a national of the state party to the dispute will not be eligible to come under the jurisdiction of the Centre even though he may have no effective link with the state party to the dispute other than the transaction leading to the dispute because, for example, he has married and lived abroad for most of his life and has acquired his wife’s nationality and the center of his activities and affections are all elsewhere. A woman investor may have acquired involuntarily the nationality of the contracting state party to the dispute through marriage and lived with her

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25 ICSID Convention, Art.25(1) and (2)(a).

26 See Ruth Donner, The Regulation of Nationality in International Law, The Finnish Society of Sciences, Helsinki, 1983, p 46.: "...public international law now sets a standard for nationality laws, requiring a connecting link or bond between the individual and his State, without which his nationality may not be recognized in the international sphere."

27 Italian law no. 555 of 13 June 1912, Art. 10: "a married woman may not be of different nationality from her husband...... an alien who becomes the wife of an Italian citizen acquires Italian nationality". This law has been superceded by law no. 123 of 23 April 1983.
husband in a state other than her husband's nationality. The language of the Convention would suggest that the position will be the same even if he or she had tried to renounce the nationality of the state party to the dispute and has failed under that state's municipal law.

However, it can be argued that if the state had consented to ICSID arbitration of a dispute with a national of another contracting state knowing that the person is also a national of the state party to the dispute that state should be estopped from challenging his or her eligibility for arbitration under the Convention provided there is evidence to show that he has an effective and dominant link with another contracting state, particularly if he had done everything to renounce the nationality of the state party to the dispute.28

Nationality as a legal concept means the bond of an individual to a particular state and recognized as such internationally. The Harvard Research Draft on the Law of Nationality defined nationality as "the status of a [natural] person who is attached to the state by the tie of allegiance".29 A national not only enjoys the protection of the state concerned but the national also owes duties and obligations towards the state of which one is a national.30 For the purposes of The U.S. Nationality Act of 1940 (a) the term "national" means a person owing permanent allegiance to a state and (b) the term "national of the United States" means (1) a citizen of the United States, or a person who, though not a citizen of the United States owes permanent allegiance to the United States.

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28 See The Canevaro Case, Italy - Peru, Tribunal of the Hague Court of Arbitration 1912, The Hague Court Reports (1916), 284 where the tribunal ignored the claim by the Italian Government that Mr. Canavero, a Peruvian national, was an Italian national because he was born to an Italian father. Although the case related to the attempt by the Italian Government to exercise diplomatic protection on his behalf, it illustrates that different rules prevail in international law as opposed to municipal law for the determination of one's effective nationality.


It does not include an alien. So, allegiance on demand by the state is the defining character of nationality in the U.S.

The fact of allegiance obviously cannot be proved and, therefore, the best evidence of nationality for international purposes is the possession of a national passport or equivalent travel document or a certificate from an authorized government agency or foreign diplomatic or consular office to the effect that one is indeed a national of a particular state. Where such evidence is not available, for example, where the state under its rules is withholding a passport usually because the national has committed a serious crime or because of considerations of public interest, a judicial institution of another state called upon to ascertain his nationality would apply the municipal law of the country of purported nationality to decide if a person is a national of that state. It is conceivable, however, that the nationality of a state has been obtained by an act of fraud and the facts may have become known to the contracting state party to the dispute.

This raises the question whether an ICSID tribunal can be called upon to investigate the circumstances of the alleged nationality of an individual which is being challenged by the contracting state party to a dispute. In the Flutie cases\textsuperscript{31}, heard by the American - Venezuelan Mixed Claims Commission set up by the Protocol of February 17, 1903, Mr. and Mrs Flutie brought claims against Venezuela for loss of property and ill treatment suffered during the revolution in Venezuela in 1900. The Fluties claimed to be US citizens. The Commission held that as sole judge of its jurisdiction it must determine for itself the question of citizenship in each case and found that Mr. Flutie had not satisfied the 5-year residency requirement for US citizenship although he had been naturalized as a citizen by a US District court and that Mrs. Flutie's US citizenship which depended on the legality of her husband's also failed. A certificate of

naturalization was only prima facie evidence of nationality and can be disproved if it has been obtained fraudulently.32

In the earlier Medina’s case33, decided by the United States -Costa Rican Commission of 1860, the Umpire was quite clear that an act of naturalization "can only be that of an element of proof, subject to be examined by [an international commission] according to the principle locus regit actum, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter.....". International tribunals have claimed and exercised the right to determine for themselves the nationality of claimants.

In the Nottebohm Case, the International Court of Justice rejected Lichtenstein’s claim that Nottebohm is one of its nationals on the ground that the naturalization of Nottebohm had been "granted without regard to the concept of nationality adopted in international law".34 In that case Nottebohm, a German national, had been in Liechtenstein only a few months in 1939 for the specific purpose of securing Liechtenstein nationality whereas he had lived and worked in Guatemala from 1903 to 1943. Liechtenstein nationality had been obtained quite legitimately in accordance with the municipal law of Liechtenstein which provided for special dispensation of the normal residence period of three years in certain deserving cases and there was no evidence of fraud unlike in the Flutie Case.

It would, therefore, seem that, if there is a real challenge from a contracting state as to the nationality of a foreign investor, an ICSID arbitral tribunal will be bound to investigate the circumstances of the investor’s acquisition of the nationality of a contracting state in order to satisfy itself that

32 Dunward V. Sandifer, Evidence before International Tribunals, Footnote 77 at p. 220: "It is now settled that the validity of a naturalization certificate may properly be examined by an international tribunal......".

33 Briggs, op. cit. note 31 at p. 467.

the investor is a genuine national of a contracting state and that it has jurisdiction over him. However, if the facts were known to the state party to the dispute which nonetheless recognized the natural person as a national of another contracting state in agreeing to ICSID arbitration, it would probably be estopped from claiming that the Centre had no jurisdiction in the matter.

One wonders, therefore, whether the question of effective link between the national of a contracting state and the contracting state is really a non-starter in ICSID proceedings if it is assumed that a certificate of naturalization or the production of a passport is only prima facie proof of nationality and not conclusive as instruments to establish nationality in international proceedings.

British passports are issued to many living in former British colonies who do not have an absolute right of entry into Britain and are denied the right of permanent settlement there.\textsuperscript{35} They may have never visited Britain except perhaps as temporary visitors without a right to take up employment and many might have been born to parents who have themselves no links with Britain. Under these circumstances would their British citizenship be challenged in an ICSID proceeding if they are resident in a foreign country such as Brazil which is not a contracting state of the ICSID Convention?. A Brazilian national resident in Brazil could become an Italian citizen through marriage to an Italian citizen who has himself or herself never lived in Italy.\textsuperscript{36} Can he or she be treated as an Italian citizen for purposes of ICSID arbitration without the knowledge and consent of the state party to the dispute ?.

A draft of the Convention dated October 15, 1963\textsuperscript{37} included comments on the resolution of preliminary questions regarding nationality of a party to a

\textsuperscript{35} The British Immigration Act 1971.

\textsuperscript{36} Italian Citizenship Act 1983 provides for application to Italian embassies abroad for naturalization as Italian citizens through marriage to Italian citizens.

\textsuperscript{37} History of the Convention, Volume II Part I pp.184-235.
dispute. Article II Section 3(3) of that draft provided for certification of nationality, signed by or on behalf of the Minister of Foreign Affairs of the State whose nationality is claimed and issued for the purpose of the proceedings to be conclusive proof of the facts stated in the certificate. According to the comments it meant that an arbitral tribunal will only assume the task of ascertaining a party's nationality if the state whose nationality is claimed fails to issue a certificate as described above. In the final draft, however, the reference to certification by the state whose nationality is claimed was dropped without provision of an alternative procedure.

Obviously, the nationality of a natural person was not regarded as a critical issue and discussions in the committees set up to draft the Convention concentrated on questions of dual nationality issues relating to corporate investors. The nationality of natural persons will of course become less of an issue as more and more states sign and ratify the Convention but, at least for the present, there are many states which have not subscribed to the Convention and it is very much on the cards for a contracting state party to a dispute to argue that the individual investor obtained the nationality of a contracting state by fraudulent means and is, therefore, only a nominal national with no effective link with the contracting state whose nationality is claimed. It is unlikely that the Centre will refuse jurisdiction except where there is no certification by the competent authority in the state concerned as to the person's nationality.

Nonetheless, if a foreign investor is an individual it would be relatively simple to determine his or her nationality. But, where a corporate body or association of persons is involved, the question arises as to what test or tests to apply to determine the firm's nationality for the purpose of eligibility under the Convention.
(b) Nationality of a Juridical Person

It has to be remembered that there is no such thing as a company nationality equivalent to that of a natural person. Only exceptionally does the municipal law of a state provide for the concept of nationality in relation to a company.\textsuperscript{38} Company nationality is notionally fixed for a specific purpose and would depend on the law of the state or rules of the institution that makes the determination. Corporate bodies are not issued with passports indicating their nationality or with certificates of citizenship as in the case of natural persons. Even if they are issued with some documentation as to nationality, they often have to prove their nationality.

Different criteria can be applied in ascertaining a company's nationality depending on the purpose for which nationality is to be established. For example, a company may be of one nationality for fiscal purposes, another for application of labor laws, a third for eligibility for preferences in bidding for public projects, a fourth for deriving benefits from a treaty or convention and a fifth for access to ICSID arbitration. Different rules can apply in the realms of public international law and private international law. A company might have links with several states through joint ventures, subsidiaries, branches and agents located in those states. It may only have a nominal address in the state of formation or incorporation and may have its principal office and business elsewhere. A company's link with a state may not be territorial at all but it may have commercial and trade links through extensive advertising only. However, the presumption is that a company has the nationality of the state in which it was formed, meaning incorporated.

For example, in the United Kingdom (UK), any firm is considered a UK company if it takes all necessary steps to become incorporated there, to comply

\textsuperscript{38} Mexican Nationality Act 1934, Art. 5.
with its legal requirements and to be registered under the Companies Act.\textsuperscript{39} It does not matter if the majority of shareholders are not UK nationals and the firm has its head office abroad and exercises its main function outside the UK. Generally speaking, a company has a legal personality distinct from its members\textsuperscript{40} and it can be said by inference that the company has a nationality also distinct from its members.

A corporation, company, partnership, association or any entity that engages in business or other activities whether or not with limited liability and whether or not for pecuniary benefit, by whatever name they operate, in the final analysis, each one is comprised of and owned and managed by natural persons of one or more nationalities themselves. However, under the rule in \textit{Salomon v. Salomon}\textsuperscript{41}, under certain conditions, the body of natural persons can acquire a legal personality of its own distinct from that of each of the natural persons that goes to make up the body and be deemed to possess a nationality different from that of a majority of its members who can vary from day to day.

In many countries one or more additional conditions have to be satisfied in order that a company can be considered a national of those countries. In some countries, the company must have a functional connection with the country of incorporation. In France, a company must have its principal place of business or real seat (\textit{siege reel} or \textit{siege social}) there for it to be considered a French company. In most countries, for one purpose or another, the company wherever incorporated is regarded as having the nationality of the majority of its members for some purposes. Indeed, a company may be regarded as of one nationality for one purpose and as of a different nationality for another purpose.

\textsuperscript{39} But see \textit{Daimler Co. Ltd v. Continental Tyre & Rubber Co (Great Britain) Ltd} [1916] 2 A.C. 307 where the House of Lords held that although Continental was registered in the UK yet it was an enemy alien because all the members of the company with the exception of one were German.

\textsuperscript{40} This goes back a century. See \textit{Salomon v Salomon} [1897] A.C.22.

\textsuperscript{41} See note above.
For example, the World Bank will consider companies that are incorporated in a member country of the Bank as eligible for bidding for goods and services financed by the Bank\textsuperscript{42} but the nationality of the majority of the members of the company will determine if the company is eligible for preferential treatment or not.\textsuperscript{43} A company will have the following points of contact with particular states: state of incorporation, state where the principal office of the company is located, one or more states where the company conducts business through local offices, state from which the majority of the members of the company originates, state from which the majority of the companies management staff originates and they all can be different. A company, for example, can be incorporated in the US with a majority of shareholders from India, have its head office in Harare, Zimbabwe, with a majority of its management staff from the UK, and can be mining for gold in South Africa and Zambibia through local offices.

(a) The Reality of Foreign Nationality

The ICSID convention seems to leave the matter entirely in the hands of the state where a company is operating to determine if the company is a foreign or local national at least in cases where a company is locally incorporated but under foreign control.\textsuperscript{44} This provision in the Convention was inevitable if one considers that an objective of the setting up of the Centre was to enable resolution of disputes between a state and a national of another state without the intervention of the latter state.\textsuperscript{45} Such intervention would be the result if the

\textsuperscript{42} Guidelines Procurement under IBRD Loans and IDA Credits, World Bank, Washington, 1985 at p. 7.

\textsuperscript{43} Ibid., p. 37.

\textsuperscript{44} ICSID Convention, Article 25(2)(b).

\textsuperscript{45} Ibid., Article 27(1): "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this
locally incorporated company under foreign control were designated as a local national and fell outside the jurisdiction of the Centre. The incentive, therefore, is strong for a state party to a dispute to regard a locally incorporated company under foreign control as a foreign national for purposes of arbitration under the Convention. Equally, those foreign nationals in control of company would want to benefit from the advantages of an ICSID arbitration which was designed to promote foreign private investments in developing countries by providing an attractive forum for resolution of disputes.

The decision to treat the locally incorporated company as a foreign national should be made at the date on which the parties have consented to submit to ICSID arbitration. After this date the control of the company presumably can change hands without affecting its foreign status because there is no requirement that the company should continue to be under foreign control and the state party cannot withdraw its consent unilaterally. Thus, the company can be sold to local investors and cede control to them and probably still claim the right of arbitration under the Convention as a foreign national. The Secretary-General of the Centre must register a request for arbitration unless there is information contained in the request itself which leads him to believe that the locally incorporated company was not under foreign control at the time the parties consented to ICSID arbitration national and the dispute is, therefore, outside the jurisdiction of the Centre.

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46 In Barcelona Traction Light and Power Company Ltd. Case, I.C.J. Rep.1970, p.3, the International Court of Justice held as admissible a claim by the Belgian Government against the Spanish Government for damages suffered by a company subsidiary incorporated in Spain under Spanish law in which shares had changed hands several times before Belgian nationals acquired the preponderant block of shares. The company was a subsidiary of a Canadian company and the damages were caused by acts of the Spanish Government.

47 ICSID Convention Article 25(2)(b).

48 This is in contrast with the position of natural persons who must retain their foreign nationality on the date that a request for arbitration is registered with the Centre. See ICSID Convention, Article 25(2)(a).
In its request for ICSID arbitration of a dispute with a contracting state, a company is required by the Convention\textsuperscript{49} to supply information concerning the identity of the parties including itself. It will have to describe itself as a company incorporated in the contracting state party to the dispute in which case the Secretary-General must satisfy himself from other information supplied in the request, namely, the consent to ICSID arbitration that the locally incorporated company is regarded for the purposes of ICSID arbitration as a foreign national because of foreign control which may not be the case at the time the request is filed with the Secretary-General. It can also be argued that there is a presumption that the company is foreign controlled by the mere fact that there is consent by the contracting state to the jurisdiction of the Centre. This, because of the officially stated view that "Consent of the parties is the cornerstone"\textsuperscript{50} of ICSID arbitration. Nonetheless, as noted by the tribunal in Societe Ouest- Africaine des Betons (SOABI) v. The Republic of Senegal\textsuperscript{51}, in the case of a juridical person, the national of another contracting state must be decided by reference to the date on which the parties gave their consent to the jurisdiction of the Centre.\textsuperscript{52}

If the parties' consent to arbitration, which has to be filed with the request, has been made conditional upon the company continuing to be under foreign control and the Secretary-General concludes after examination of the face of the request that the company is no longer under foreign control, he must reject the request for arbitration because there is no valid consent. On the other hand, if there is nothing on the face of the request to suggest that the condition has not been fulfilled, more likely, he will register the request and set the arbitration in motion by taking steps to constitute the tribunal while the parties proceed to lodge their respective documents. Objection to the jurisdiction of the Centre is

\textsuperscript{49} ICSID Convention Art. 36(2).

\textsuperscript{50} Report of the Executive Directors on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States, para 23.

\textsuperscript{51} 17 Y.B. Com. Arb. (1992) 42.

\textsuperscript{52} Ibid., p. 47.
likely to be made in the counter memorial by the state party to the dispute. If the state party does not object it will mean that the parties have consented unconditionally to the jurisdiction of the Centre.

Even if the company is sold to nationals of a non-contracting state after the date the parties consented to ICSID arbitration and those nationals continue to operate through the locally incorporated company, the position cannot be different. The state party to the dispute cannot object to the eligibility of the company for ICSID arbitration on the ground that the Convention applies only to nationals of contracting states. In this event, the contracting state party to the dispute can be made to subject itself to the jurisdiction of the Centre without the benefit of the state of nationality of those in control of the company relinquishing its right to exercise diplomatic protection under the rule in Barcelona Traction Case and without the benefit of the various provisions in the Convention because the Convention is not applicable to a non-contracting state such as, for example, Brazil.

There is nothing in the Convention to suggest that the status of a company incorporated in a contracting state other than the contracting state party to the dispute but which is under the control of the nationals of the state party cannot be regarded as a national of the state of incorporation. It is, therefore, possible that in such a situation the foreign company even though owned by the nationals of the state party can bring a dispute before the Centre if that state has consented to ICSID arbitration. In any event it is also possible that a foreign company has been acquired by local interests after a contracting state has consented to ICSID arbitration of disputes between it and the company. Since the state cannot

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53 See note 46 above.

54 Georges R. Delaume: ICSID Arbitrations - Practical Considerations, I J. Int'l Arb. 101 (1984) pp. 111 and 112. "It is generally agreed that, within the framework of the ICSID Convention, the nationality of a corporation is determined on the basis of its siège social or place of incorporation. Consequently, a business association, incorporated in Contracting State A and investing in Contracting State B, is eligible to be a party to an ICSID clause and to avail itself of ICSID facilities if the need arises."
withdraw its consent unilaterally, the foreign company regardless of its actual ownership will be eligible for submission to ICSID arbitration. It may be in the state's own interest to concede the company's eligibility for ICSID arbitration in order to avoid the right of exercise of diplomatic protection by the state of incorporation and to benefit from the Convention provisions.

A juridical person can take many forms. There is the company incorporated in a particular state in which natural and or other juridical persons will own stock. Many categories of stock holders can be part of a registered company. Two or more companies can form joint venture companies with their own distinct personality and state of incorporation. There can be partnerships under the law and loose associations of natural and/or juridical persons and they can all be of different nationalities. Juristic persons can themselves be fully or partly state owned. Theoretically, the formats of companies and groups of natural and juristic persons can be multitudinous.

The essential point, as one can see from the above discussion, is that provided the nationality of a non-contracting state cannot be attributed to the juristic person and the parties have consented to ICSID arbitration, neither the supposed national of a contracting state and a contracting state party to a dispute can unilaterally withdraw from the consent. This, even if there is evidence to show that control of the juridical person has passed to nationals of a non-contracting state after the consent and the juristic person continues to be incorporated in the contracting state party to the dispute. It is submitted that the state party to the dispute cannot successfully challenge the jurisdiction of the Centre and the juristic person would have no right to withdraw if the contracting state decides to proceed with ICSID arbitration.

55 International law admits the right of the state of incorporation of a company to exercise diplomatic protection to prevent damage to property owned by such companies abroad and repatriation of assets in times of crisis. See Ignaz Seidl-Hohenveldern, Corporations in and under International Law at p. 8.
The crucial point in time is the time of consent when a contracting state would have agreed that a locally incorporated company will be treated as having a foreign nationality because of foreign control. The ultimate control of a company would lie with its stockholders whose nationality will therefore determine the company's nationality for the purpose of eligibility to ICSID arbitration. Theoretically, the stockholders can originate from different states and none of the nationalities may have an absolute majority of the stock. But so long as the majority of the stockholders belong to nationalities of Convention contracting states, the locally incorporated company can be brought within the jurisdiction of the Centre. It is not necessary to specify the foreign nationality attributed to the locally incorporated company. The ICSID Secretary-General is not required by the Convention to look beyond the information submitted to him in the request for arbitration. Challenges to jurisdiction *ratione personae* will be done before the tribunal and the tribunal itself will have to ignore all changes in the composition of the stockholders after the date of consent by the parties to the jurisdiction of the Centre. It has to be emphasised that consent alone is not sufficient to bring parties to ICSID arbitration. The consenting parties must consist of a contracting state and a natural person of the nationality of another contracting state or, in the case of a juridical person, a notional national of another contracting state at the date of consent.

Modern stockholding structures can be very complex and the ultimate control of a company may be far removed from the company to a second or third or further degrees. An ICSID Tribunal in the *SOABI case*56 held that the nationality of the ultimate control of the locally incorporated company would determine its nationality for ICSID purposes. Thus, where the only shareholder in SOABI, a company incorporated in Senegal, was a Panamanian Company (Panama is not a signatory to the ICSID Convention) which in turn was under the control of Belgian nationals was held by the Tribunal to be of Belgian nationality and eligible for ICSID arbitration because Belgium is a contracting state. That

nationality of a company in every case whether the company is incorporated in the contracting state party to the dispute or not should be based on ultimate control rather than the state of incorporation would seem to be the result if one accepts the comment by the SOABI Tribunal that the "Convention does not define the term 'nationality'." Therefore, a company incorporated in a contracting state and who is in a dispute with another contracting state may be found not to be within the jurisdiction of the Centre on the ground that the ultimate control of the company is in the hands of nationals of a non-contracting state removed to the nth degree.

Such a development would result in tribunals probing behind more than one veil of incorporation in the case both of companies incorporated in the contracting state party to the dispute and companies incorporated in other contracting states. Although it is an exciting prospect it would mean challenges to the jurisdiction of the Centre by contracting states who have consented to ICSID arbitration of disputes with companies incorporated in other contracting states and attempts to withdraw their consent unilaterally. This is absurd if one realizes that the company can pass into the hands of nationals of non-contracting states immediately after the date of consent and both parties would be bound by their consent once given and eligible for ICSID arbitration.

The fact that anything can happen with regard to the control of a company after the consent has been given makes it even more reasonable to accept the classical concept of a company nationality as that of the state of incorporation - analogous to the nationality by birth of a natural person. The only exception would be the case of a company under the control of foreign nationals incorporated in a contracting state party to the dispute. Because of the common

57 Ibid. But, see AMCO Case, Jurisdictional decision of September 25, 1983, 23 I.L.M. 351 (1984) at 362: "Indeed, the concept of nationality is there [in the Convention] a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat."
practice of foreign investors establishing local companies\textsuperscript{58} to conduct operations locally most of them will only come into a state if that state agreed to treat them as foreign nationals for ICSID purposes. Sometimes they are obliged to establish local companies under agreement with the host state itself.

Foreign companies under the control of local nationals would present even trickier problems especially if the fact of local control was not known to the state concerned when it consented to ICSID arbitration. A state challenge to the jurisdiction of the Centre on the ground of local control of the foreign company would be rejected by the tribunal if the question of the control of a company be limited only to locally incorporated companies pursuant to Article 25(2)(b) of the Convention. The burden is on the state to ascertain if it wants to agree to ICSID arbitration of a dispute between the state and a foreign company under the control of local nationals.

Although the Convention does not expressly define the nationality of a company, by the fact that a control test is to be applied under Article 25(2)(b) pointedly to a locally incorporated company only, the implication is that generally a company would be deemed to have the nationality of the state of incorporation. Once the contracting state party and the company incorporated in that state have agreed to treat the company as a national of another contracting state at the date of consent to ICSID jurisdiction that is the end of it and neither party would be able to withdraw its consent unilaterally even if circumstances change afterwards with regards to the actual control of the company. The challenge to the jurisdiction of the Centre by the Republic of Senegal in the \textit{SOABI} case was doomed to fail. The only way to attack jurisdiction is to show that the consent of the state to ICSID jurisdiction was obtained illegally which would be the case if facts were misrepresented to the state in order to obtain its recognition of the company as a foreign national.

\textsuperscript{58} This enables foreign companies to limit their liability within the host state to the amounts stipulated in the articles of incorporation of the local company.
However, an ICSID arbitral tribunal is bound to enquire as to the basis for treating a locally incorporated company as a foreign national because the tribunal is authorized by Article 25 of the Convention to exercise its jurisdiction only over a dispute between a contracting state and a national of another contracting state. In the SOABI case, SOABI was controlled by a company incorporated in a non-contracting state, namely, Panama and the tribunal would be automatically put to enquiry as to the Panamanian company's eligibility for ICSID arbitration even if Senegal had not raised the issue. Once the control test was to be applied, the approach that would reflect the spirit of the consent to ICSID arbitration and the original good will of the parties to the dispute would be to probe further to ascertain the ultimate control of the Panamanian company which turned out to be Belgian. Had Panama been a contracting state, it is doubtful if the tribunal would have probed further and Senegal would have been held to its consent to ICSID arbitration. An international tribunal would be careful to ensure that agreements that were entered into in good faith are not unilaterally broken on purely technical grounds.

In AMCO Asia Corporation et al. and the Republic of Indonesia\textsuperscript{59}, an ICSID tribunal held that once it was established that a locally incorporated company was under the control of a foreign company it was not in accord with the Convention "to take care of a control at the second, and possibly third, fourth, or xth. degree."\textsuperscript{60} The exception of course would be the SOABI case where the foreign company, the sole shareholder of the locally incorporated company, was incorporated in a non-contracting state in which case the tribunal was bound to look further so as to sustain the parties' consent to ICSID arbitration - \textit{ut res magis valeat quam pereat}. It is submitted, therefore, that where a foreign company incorporated in a contracting state is a party to a dispute with another contracting state and the company is controlled by nationals of the state party to


\textsuperscript{60} Ibid., at p. 362.
the dispute or nationals of a non-contracting state, it would be in line with the
Convention not to probe behind the veil of incorporation of the foreign company.
The veil would be penetrated only where the eligibility of a company
incorporated in the contracting state party to the dispute is in question and that
too to the nth degree if necessary to sustain the parties' consent to ICSID
arbitration.

III. Conclusion

The ICSID arbitration facility is only available in disputes between a
Contracting State (or a constituent subdivision or agency thereof) and a national
of another Contracting State. The designation to the Centre of a party as the
constituent subdivision or an agency of a Contracting State by the Contracting
State itself will be sufficient for a state agency to invoke the jurisdiction of an
ICSID tribunal. There is nothing to suggest that the designating state itself should
provide any evidence to the effect that the agency is part of the state apparatus.
It, therefore, means that a private party provided it is designated as an agent of
the state by a Contracting State would enjoy locus standi in an ICSID arbitration
and, in theory at least, ICSID tribunals would have competence to hear disputes
between private parties originating from different Contracting States provided the
parties agree to ICSID arbitration and one of the private parties is designated by
a Contracting State as its agent. The Klockner case illustrates how easy it would
be for a company to be regarded as a state agency.

The nationality of a natural person is relatively easier to establish than the
nationality of a juridical person although an assumption would be made that the
nationality of a company is the state of incorporation. The ICSID Convention
provides for a locally incorporated company to be considered as a foreign
national where the control of the company is in the hands of foreign nationals but
the nationality of those in ultimate control will determine if the company can
enjoy the jurisdiction of an ICSID tribunal under the rule in the SOABI case if the state of incorporation is a non-contracting state. On the other hand, under the rule in the earlier Amco case, where the company is incorporated in a contracting state, an ICSID tribunal will not probe behind the veil of incorporation to see if the ultimate control of the company is in the hands of nationals of a contracting state.

But since the critical moment in time when the question of nationality will be determined is the date of consent of the parties to submit to ICSID, changes in control of a foreign company or a local company under foreign control after that date will not affect the competence of the ICSID tribunal to hear the case. Indeed, control of the company may have passed to local nationals or nationals of a state that is not a party to the ICSID Convention. If a locally incorporated company is under the control of foreign nationals of a Contracting State, the ICSID tribunal will not probe further but if control is in the hands of nationals of a non-contracting state, it will probe further until it establishes that the ultimate control is in the hands of nationals of a Contracting State. As a result of the flexibility of the ICSID Convention, ICSID reception procedures and decisions of ICSID tribunals, one concludes that, provided the parties consent, any company locally or foreign incorporated can be structured or presented in such a way that it falls within ICSID jurisdiction either as a state agency or as a foreign national or exceptionally as both as in the case of Klockner.
Chapter Seven

ICSID ARBITRABLE DISPUTES

For ICSID to have jurisdiction ratione materiae over a dispute, not only should the dispute exist between a contracting state (or any constituent subdivision or agency) and a national of another contracting state but the dispute should be a legal dispute and arise out of an investment.¹

I. Legal Disputes

(a) Legal Disputes and Conflicts of Interests

During the meeting of the Board of Governors of the World Bank to adopt the Convention, the Executive Directors of the World Bank took pains to explain to the Board that the expression "legal dispute" was used to distinguish between conflict of rights and "mere" conflict of interests.² It is not easy to understand why it was so important to specify that the dispute has to be a legal dispute because provisions in the Convention empower a Tribunal set up under the Convention to decide a dispute solely in accordance with the rules of law as have been agreed between the parties.³ A party cannot be prevented from making any

¹ ICSID Convention, Art. 25(2)(b).
² Report of the Executive Directors, para 26. Georges R. Delaume in ICSID Arbitration: Practical Considerations, 1 J. Int'l Arb. (1984), p.101 at 117 distinguishes legal disputes from conflicts of interests "such as those involving the desirability of renegotiating entire agreement or certain of its terms". It is doubtful if a party would make such claims without invoking a legal rule.
³ ICSID Convention, Art. 42(1).
claim but his legal right to it can only be settled by the Tribunal after due process. If he does make a claim without a legal basis and the claim is an expression of mere interest his claim must be dismissed by the Tribunal under the terms of the Convention. As often is the case, many disputes involve claims some of which have a legal basis and others do not.

The practical problem with the requirement that the dispute should be a legal dispute is that the Secretary-General is forced to make a scrutiny of the claims to ensure that the dispute is within the jurisdiction of the Centre. That can be laborious and if he takes the task seriously, it can lead to disputes with contracting states. In any event, the standard of scrutiny required is not high because all he has to do is to see if the dispute is "manifestly outside the jurisdiction of the Centre" or not. Since the claims are bound to be couched in legal terms however gratuitous he can do no more than pass the request for arbitration because the competency to decide on jurisdictional issues at a realistic level lies with the tribunal and not with the Secretary-General. Therefore, the Centre advises parties to use a model clause in their investment agreements to the effect that "for purposes of Article 25(1) of the Convention" any dispute is a legal dispute. Presumably, this relieves the Secretary-General of the burden of a scrutiny.

There are, however, other provisions in the Convention that may encourage the parties to lodge claims which are not founded strictly on legal

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4 Ibid., Art. 36(3).

5 Ibid. Art. 41(1). In Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, the an ICSID tribunal examined the question of jurisdiction of subject matter proprio motu and held summarily that the case involved a legal dispute. That case concerned the violation of a contractual clause in a mining concession not to introduce new taxes and the Government of Jamaica refused to participate in the proceedings initiated by Alcoa. See 4 Y.B. Com. Arb. 206 (1979) p. 206 at. p. 207.


"The Parties hereto hereby agree that, for the purposes of Article 25(1) of the Convention, [the dispute] any dispute in relation to or arising out of this Agreement] is a legal dispute arising directly out of an investment."
grounds. For example, the Convention provides for a Tribunal to decide a dispute ex aequo et bono if the parties agree\(^7\) in which case considerations may be given to a balancing of the interests of the parties regardless of their strict legal bases. Moreover, an ICSID Tribunal is forbidden from bringing in a finding of non liquet "on the ground of silence or obscurity of the law".\(^8\) That means the tribunal has powers to invent a rule of law where it does not exist and that rule can be influenced by interests such as for example overwhelming public interest. All in all, the reference to "legal" might have been dropped without affecting the efficacy of the institution. In fact most commonly used arbitration clauses refer merely to disputes arising out of or in connection with an agreement without any adornment.

The first draft of the article on jurisdiction of the Centre\(^9\) prepared by the General Counsel of the World Bank referred simply to disputes but in his presentation to the first meeting of the Executive Directors' Committee charged with the task of supervising the drafting of the Convention the General Counsel suggested that it would be desirable to add a limitation to the effect that the dispute should be a legal dispute.\(^10\) He wished to ensure that the disputes submitted to the Centre are concerned with "legal rights, contractual rights or property rights, rather than political or commercial disputes".\(^11\) The Executive Directors who are nominees of the member states of the World Bank also agreed that the Centre should not be involved with political or commercial disputes.

\(^7\) ICSID Convention, Art. 42(3).
\(^8\) Ibid., Art. 42(2).
\(^9\) "The jurisdiction of the Center shall be limited to disputes between Contracting States and nationals of other Contracting States .......". History of the Convention, Vol. II Part I p. 33.
\(^11\) Ibid. The exclusion of commercial disputes from the operation of the convention is hard to understand because the UNCITRAL Model Law, which deals with disputes in connection with legal relationships, is expressly stated to be limited to commercial arbitration and the word 'commercial' is described in a footnote to Article 1 of the Model Law as including an investment.
It must have been hard even at that time to imagine that there were many commercial disputes that were not connected with legal rights and that political disputes were always extra legal but subsequent meetings of regional panels of legal experts in Africa, the Americas, Europe and Asia continued to hold the belief that legal rights and political, commercial or economic rights were somehow separable. Investment agreements by their nature are usually long term\textsuperscript{12}, concern natural resources of a vital concern to the state economy\textsuperscript{13} and are often adopted, without independent counselling at a stage of underdevelopment, by states with little sophistication in the formulation of sound economic and monetary policies. Consequently, the potential for disputes prompted by political and economic forces has been great.

More often than not the disputes although legal in origin and character because they are the outcome of solemnly agreed treaties and agreements are precipitated by political or economic or commercial factors. Conversely, there are few political, economic or commercial interests that cannot be framed in legal terms and be represented as giving rise to legal rights.\textsuperscript{14} Besides, from the point of view of a private investor there is no such thing as a legal dispute distinct from a commercial dispute. His own interests in conducting operations in a state other than the state of his nationality cannot be characterized as anything other than commercial in nature.


\textsuperscript{13} Oil, bauxite, timber, gold, copper etc.

\textsuperscript{14} Shabtai Rosenne, \textit{The Law and Practice of the International Court of Justice} at p. 94: "The Court has demonstrated that the distinction between legal and political disputes or between justiciable and non-justiciable disputes, which has given rise to so many theoretical difficulties in the history of international arbitration and in the development of an effective system for pacific settlement, has no validity as an abstract proposition in law, despite its real importance as a matter of practical politics."
(b) **Historical Context**

It was obviously a concession to a historical reluctance on the part of independent sovereign states to submit to an adjudicatory institution disputes which they regarded as non-justiciable because the disputes concerned their most vital interests, independence or national honor. The debate goes back to the time of the Hague Convention on the Pacific Settlement of International Disputes in 1907 which followed the mood of the Franco-British Arbitration Treaty of 1903 which provided for reference to an arbitral tribunal of differences of a legal nature. The Hague Convention did not attempt to define what was meant by legal disputes but reference to legal disputes became the pattern in the numerous bilateral peace treaties that were signed by the European powers inter se and in the Statute of the Permanent Court of International Justice, established in 1920 under the auspices of the League of Nations. It was agreed that the jurisdiction of the Court shall apply to legal disputes because when the Protocol for the Pacific Settlement of Disputes was considered by the Assembly of the League many states opted to seek recourse to the Council of the League rather than to the Court because of the reluctance of the states to submit themselves to an adjudicatory body in respect of matters that concerned political or commercial interests.

The General Counsel of the World Bank admitted that the reference to legal disputes in the Convention was based on similar reference in the Statute of the UN sponsored International Court of Justice which was borrowed from the earlier Permanent Court of International Justice. The reference to legal disputes was presumably to give member states the illusion that they could pursue political and commercial interests without ICSID intervention.

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15 Louis B. Sohn, *Exclusion of Political Disputes from Judicial Settlement*, 38 Am. J. Int'l L. (1944) 694. See also the 1903 treaty between the United Kingdom and France which limited the obligation to submit to arbitration.

16 The so-called Locarno Treaties of 1925.

17 History of the Convention, Volume II Part I at p.320.
Article 36 of the Statute of the International Court of Justice\(^\text{18}\) defines the jurisdiction of the court as applying to legal disputes concerning interpretation of a treaty, any question of international law, breach of an international obligation and nature or extent of any reparation. The article has been said to be wide enough to make any dispute justiciable by the Court, provided the parties have consented to submit to the Court in respect of any particular dispute, but whether the Court is competent to adjudicate the dispute is a matter for the Court alone to decide. The reference in the Statute to legal disputes was really not necessary because the Court is empowered by the Statute to decide disputes only in accordance with international law\(^\text{19}\) and the Court is, therefore, bound to reject any claim that cannot be supported by a rule of international law except where the parties agree to the Court deciding a case *ex aequo et bono*\(^\text{20}\). The political, economic or commercial complexion of the dispute itself is irrelevant to its justiciability but whether the dispute is capable of resolution by the Court is determined by the legal character of the dispute.

The feeling was very strong in the forties that any dispute at the international level tended to relate to political and diplomatic interests and that while a judicial institution may resolve the dispute against a party unable to prove a rule of law in its favor, as Kelsen\(^\text{21}\) put it, you might get rid of the case but not the dispute which will go on until a political or diplomatic solution is achieved. To elevate a dispute with a private party to an international level was even more abhorrent as it seemed to give the private party the status of an international person and, in fact, most disputes with private parties arise from consciously committed breaches of agreements not in ignorance of the law but in spite of the law because of political and other pressures usually in the domestic context. The

\(^{18}\) The Court was established in February 1946 as an organ of the United Nations.

\(^{19}\) Statute of the International Court of Justice, Art. 38(1).

\(^{20}\) Ibid., Art. 38(2).

\(^{21}\) H. Kelsen, *Compulsory Adjudication of International Disputes*, 37 Am. J. Int'l L. (1943) 397. See also note 24 below re Nicaragua v. United States of America.
price to pay for their independence and sovereignty and achieving their political, commercial or economic ends is to pay on an arbitral award that must inevitably go against the states concerned. It is highly unrealistic to assume that successive governments of a state will not review long term agreements with foreign investors, even if they have been fairly entered into by preceding governments, and leave the agreements undisturbed.

There was a time when nations, particularly from the West and Japan in pursuing their political, economic or commercial interests inevitably came into conflict with each other and those conflicts were initially resolved principally by force. The nations had no legal rights to many of the interests they pursued but the resolution of their conflicts of interests often led to the presumption of legal rights over land, resources and people. In an effort to consolidate their powers they began progressively to adopt diplomatic means of resolution of disputes short of outright war and the movement began for the pacific settlement of disputes. The interaction of the interests of state and state and state and a national of another state now takes place within an established legal order and all interests in the final analysis are governed by generally accepted international norms. In a sense, the harking back by the draftsmen of the ICSID Convention to a statute born in an era of power struggles among European nations and adopted in the wake of the second world war before the decolonization of large parts of the world would appear to be a concession to the sensitivities of those nations that

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22 To date, all but one request for ICSID arbitration of disputes have originated from private parties. In Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia (ICSID Case No. ARB/83/2), the Government did not bother to contest the proceedings after appointing its arbitrator. In S.A.R.L. Benvenuti & Bonfant v. Government of the People's Republic of the Congo (ICSID Case No. ARB/77/2), the Government dragged its feet and abandoned any contest. Many cases are settled before reaching the award stage. It is possible that many Governments use the ICSID arbitral process simply as a means of assessing the damages they have to pay, having determined that it would be futile to contest the legal claims of the private party.

still believe that they have the liberty to jettison the jurisdiction of international judicial bodies if their political or commercial interests warranted. 24

(c) Impure Legal Disputes

By trying to draw a distinction between legal and other disputes, assuming such a distinction can be made at all, the door may have been opened for contracting states to object to the jurisdiction of the Centre on the ground that the dispute is related to their political, commercial, economic or strategic interests. Fortunately, however, this is a very unlikely event because that will throw the dispute into the diplomatic arena a prospect that may not be welcome to the weaker developing states who will usually be the respondents in the cases tried by ICSID arbitral tribunals.

Nonetheless, it is conceivable that a legal dispute might arise from a contracting state taking steps to observe treaty or other international obligations, for example, to protect the ozone layer or to introduce domestic legislation to prevent pollution of water resources or to protect tribal people and damages are suffered by a foreign investor. The dispute will be the result of a breach of an undertaking by the state to freeze legislation to the extent that it will affect adversely the enterprise involved. 25 Although legal in character, the dispute would be preponderantly a dispute over "mere" interests as opposed to contractual or property rights and the state concerned may not be in a position not to breach the undertaking given to a foreign enterprise.

24 The unfavorable reaction of the U.S. Government to the preliminary judgements of the International Court of Justice in Nicaragua v. U.S. and the condemnation of the plenum or full Court as political after the Merits judgement. See "Contemporary Practice of the United States", Am. J.Int'l L. 79 (1985) p. 431: "The conflict in Central America, therefore, is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means - not through a judicial tribunal." The Court, of course, held that it had jurisdiction over the dispute.

25 UN General Assembly Resolution 3171 (XXVIII), Permanent Sovereignty over Natural resources, operative para. 7 (1973).
In the Pyramids case\[^{26}\] involving the Egyptian Government and a foreign company with offices in the Middle East and Hong Kong, agreement had been concluded in late 1974 between the two parties for the development of tourist areas at the Pyramids and Ras-El-Hekma sites. After construction works had started in 1977, there was opposition to the development of the Pyramid site from the Egyptian Peoples Assembly on environmental and archeological grounds. The Government declared the site an "area of public interest" and works were halted and cancelled the agreement in respect of the Pyramid site. Arbitration proceedings followed and it is surprising that the Government did not object to ICSID jurisdiction on the ground that it was a dispute of overwhelming environmental and political character and was, therefore, outside the mandate of ICSID.

If there is any justification for pointed reference to legal disputes, it is that an arbitral tribunal should be obliged to assess the dominating character of a dispute before assuming jurisdiction. That means the competence of an ICSID arbitral tribunal over a dispute will exist only where the dispute is not predominantly political, commercial or, in the modern context, environmental. This is bound to lead to controversy\[^{27}\] and more realistically, particularly because respondent states are likely to be the diplomatically weak developing states, an ICSID tribunal will assume jurisdiction over all disputes capable of resolution by the application of rules of law even if it means promulgating its own rule.\[^{28}\] That


\[^{27}\] As Judge Mosler of the International Court of Justice said "Since, despite all efforts, no recognised definition of what is 'political' as distinguished from 'legal' has emerged in the course of years, the attempt to find a case more or less predominantly political or legal would [itself] amount to a political choice; it would discredit the Court.....". See "Political and Justiciable Legal Disputes: revival of an old controversy" in Contemporary Problems in International Law: Essays in Honour of George Schwarzenberger edited by Bin Cheng and E.D.Brown (1988).

\[^{28}\] ICSID Convention Art. 42(2) enjoins an ICSID tribunal "not to bring in a finding of non liquet on the ground of silence or obscurity of the law." In practical terms, the only way a contracting state can limit the jurisdiction of ICSID is by providing for appropriate reservations in its consent to ICSID arbitration.
is, a legal dispute could be defined as a dispute capable of being resolved by the application of rules of law as agreed between the parties and rules of international law or exceptionally by inventing a rule of law. This would eschew the difficult, if not impossible, task of distinguishing between the sensitive political or other issues issues and legal issues. Normally, the Tribunal will determine its competence as a preliminary question pursuant to Article 41(2) of the ICSID Convention but it has the power to join the matter of competence to the merits of the dispute.

II. Investments

It has been repeatedly emphasized that the raison d'être of ICSID is to encourage the flow of foreign private capital into the development of the economies of the poor nations of the world. Although only states are signatories to the ICSID Convention, it is primarily addressed to the private investor who is assured that he could safely invest in a state other than the state of his nationality because ICSID provides a secure international method of settlement of disputes should they arise between him and the host state and both parties consent. ICSID is designed to protect investments by the foreign party which enters a state to invest as a result of inducements from the state provided directly under agreements with the state or state entity or indirectly under its investment laws and bilateral and multilateral treaties and conventions.

"Moreover, ICSID should not be solely regarded as a mechanism for the settlement of investment disputes. Its paramount objective is to promote a climate of mutual confidence between investors and States favorable to increasing the flow of resources to developing countries under reasonable conditions." Ibrahim Shihata, ICSID Secretary-General, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, 1 ICSID Rev.-FILJ (1986) 1 at p. 4.

ICSID Convention Preamble.
The state might share in the activity and participate in the investment which it sees as contributing to its economic development but to the foreign party, the transaction is a commercial or business activity in which he puts in his resources in money, materials or person to secure a satisfactory financial return. Although he may well be concerned with the condition of the state's economy in his decision to invest in the state, his role in the economic development of the state is a matter solely for the state to evaluate. The foreign investor is essentially concerned with the security of his investments and the Convention provides for resolution of 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.....".\(^{31}\) That means if there is no investment there is no arbitrable dispute.

(a) **Parties to an International Investment**

In an international investment activity, usually four parties are involved, namely, the investor including joint venture partners, the home state of the investor, the host state recipient and the guarantor. The guarantor can be the government of the home state, the government of the host state, an insurance or guarantee agency or a combination of the three.

The foreign investor is the least concerned about the definition of the term 'investment'. He is only concerned if his entry and efforts in a state other than his home state will result in monetary gains to him and him alone. Whatever form his efforts take, in his view, they would constitute an investment if they generate a satisfactory financial return to him or, in the case of a corporate entity, to its share holders and other holders of stocks, bonds, debentures and corporate securities, partners and associates. The foreign investor is not concerned of the

\(^{31}\) ICSID Convention, Art. 25(1).
form of his efforts and, provided he makes a profit, the efforts constitute an investment - a good investment.

The foreign investor is plainly results-oriented and his use of local and foreign resources will be motivated by a fundamental rule - minimum capital outlay, minimum production costs and maximum profit. If, therefore, he brings in foreign capital it will be based on a comparative analysis of the accessibility and cost of local and foreign capital and local and foreign production costs. Naturally, the foreign investor will also be concerned with his ability to repatriate his profits in a currency of his choice at stable or predictable exchange rates. The interest of the foreign investor in the economic development and growth of the host state is peripheral to his singular objective of running a profitable business. To the extent that political stability and economic environment of the host state are relevant he will monitor and even try to influence the trends but only in so far as the features of the political, social and economic systems aid or hinder his business. He will protect the host state's interests but if he must and can lawfully damage the state's interests to his benefit he will do so too. There is nothing philanthropic about a foreign investor's motives but much will depend on whether his commitment to the host state is long term or short term.

An obvious ground for his interest in the economic development and growth of the host state would be the magnitude of the capital outlays he has made out of his own resources in the original investment. The slighter the value, in his estimate, of the capital he has imported into the host state and the the smaller the liability he shoulders in his business, the less concerned he will be in the state's economic development and growth. Therefore, it is critical to a host state to ensure that the inflow of foreign capital of whatever nature is significant, particularly in the foreign investor's own estimate, and his own liability for the debts of his business is high enough to make him a genuine partner in the economic fortunes of the host state.
The home state is principally concerned about the benefits of international trade and commerce and investments abroad to its economy, economic development and growth and the government of the day must satisfy its constituency, namely, its own citizens engaged in economic activities at home and abroad. The rules of diplomacy and indeed most modern rules of international law are derived from the pursuit of these goals. This fundamental and basic approach to international relations apply to home state and host state alike with the obvious difference that the developed and richer states are in a position to impose their rules of international conduct on the developing and poorer states and those rules become rules of international law applicable to all states.

There is no real consensus in the development of rules of international law. The more powerful states have always determined what is good for everybody but, fortunately, as their own national governments became democratic and their national laws came to respect basic human and civil rights, their national democratic conduct was increasingly reflected in their international relations. Thus, a body of rules of international law has developed that is, by and large, reasonable, fair and just. However, in purely economic and commercial matters, it can be suggested that the richer and powerful states will place the interests of their own citizens above those of the poorer and weaker states and a home state will not hesitate to extend its protection to its citizen engaged in economic activity in another state notwithstanding that the citizen has not brought any funding of his own into the host state and notwithstanding that the citizen has no particular skill or know-how unobtainable there.

Many developed states have programs to assist in the development of the economies of the poorer states and the states at governmental level provide direct financial assistance in the form of grants and loans to implement high priority programs and projects. The developed states also encourage their citizens to invest their own funds in the developing states through bilateral arrangements which include mechanisms to resolve disputes that might arise between the investors and the host states. The arrangements are embodied in treaties which
provide a protective umbrella over the operations of the investor who might also have negotiated separate agreements with the host state. In this event, the investor would have recourse against the host state under the treaty as well as under his own agreement with the host state where the state unilaterally acts in breach of the contract between the investor and the state to the investor's detriment.\(^{32}\)

Except where the home states are directly involved because the activity of their nationals abroad is supported by export credits and guarantees the home states are not concerned as to the precise character of the investments and, even then, if indeed the investments will benefit the economies of the host states. The home state of an investor is usually only interested in seeing that the host state observes the conditions agreed to with the national of the home state and complies with terms of any treaty signed between the home and host states.

Where there is no specific agreement between the host state and foreign investor who may have entered the state either before a bilateral treaty came into existence or was not induced by the treaty provisions in his decision to enter the host state his success in benefitting from the treaty provisions will depend on whether his activity in the state falls within the class of investment activity covered by the treaty. Obviously, in such a case the home state would be interested in the definition of investment contained in the treaty but only for the purpose of enforcement of the treaty. Since investment treaties provide for reciprocal rights and duties which will apply to investors from either state in a bilateral arrangement the home state, in its role as a host state, would have an interest in ensuring that there is an adequate definition of the class or classes of activities that will constitute an investment under the treaty.

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\(^{32}\) See Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3) where Southern Pacific on its failure to obtain satisfaction under its own agreement with Egypt invoked the investment treaty made between the United Kingdom and Egypt.
However, the question of whether the responsibility for the adoption of a definition of investment appropriate for the purposes of submission of disputes arising out of or in connection with the investment to ICSID arbitration lies with the host state or not will be discussed in detail in the next chapter.

The host state is the most concerned that the resources available to it both foreign and local are deployed efficiently and all investments foreign and local yield maximum return to its economy and benefit the largest number of its population. Ideally, a free competitive market in goods and services would provide the necessary conditions for efficient allocation of resources and growth in international trade. Unfortunately, the state especially a poor developing state is afraid that competition from foreign investors will make it difficult for local industries to be launched and may destroy local industries that exist but the state lacks sufficient local capital in funds to undertake research and development for the expansion of the industries in which the state feels that it has a competitive advantage and to build and maintain basic infrastructure facilities.

Unsatisfactory economic policies, political instability, denial of basic human and civil rights, corruption, manipulation of bureaucratic and judicial institutions and appropriation and squandering of local resources not only scare away foreign capital but also push local capital into seeking ways of escaping abroad. To varying degrees this state of affairs exists in most developing states which then attempt to attract foreign capital by offering special conditions for their entry and to regulate all economic and financial activities. These special conditions usually offer opportunities for corruption, distort the market and are difficult to administer and worst of all it is unrealistic to expect that these conditions will remain unchallenged by succeeding regimes. Disputes between the host state and the foreign investor will inevitably crop up but they will be less odious and cause less damage if there had been a flow of adequate private foreign capital funds in the first instance.
(b) Ordinary Meaning of Investments

The significance of the flow of private capital for the economic development of the developing countries was recognized by the U. N. General Assembly in a Resolution passed on 11 December 1954.\textsuperscript{33} In that resolution the Assembly urged capital-exporting member countries to continue efforts to encourage the flow of private capital into "under-developed" countries by various measures including the negotiation of "appropriate treaties, agreements, or other arrangements".\textsuperscript{34} The Resolution deplored the inadequate flow of "private investment" and there is no doubt that the U.N. member countries in their references to flow of private capital and private investment were not contemplating anything other than the need for private funds to finance programs and projects of economic priority in the developing countries.

An analysis of national investment laws and the investment treaties executed between developing states and the major developed states of Europe indicates that the underlying objective of the treaties is to attract foreign capital into the developing state meaning the actual transfer of foreign exchange by foreign nationals. The terms and conditions of the treaties are designed to encourage direct investment of foreign capital for the purpose of establishing or developing a viable economic activity. There is a general acceptance in the laws and treaties that investments covered by these treaties mean investment of moneys by a foreign national who employs the funds usually to finance import of equipment and materials and needed personnel or to acquire shares in a company incorporated in the host country.\textsuperscript{35} Although in almost all cases the transfer of

\textsuperscript{33} United Nations General Assembly Resolution No. 824 (IX).

\textsuperscript{34} Ibid., Section 3.

\textsuperscript{35} An example of national legislation giving a detailed definition of what is generally accepted to be mean investments is the Namibian Act No. 27, 1990 which was enacted to make provision for the protection of foreign investment in Namibia. Section 5 (1) For the purposes of this Act, an investment is an eligible investment (a) if it is an investment or proposed investment, in Namibia by a foreign national of foreign assets of a value not less than the amount which the Minister may determine from time to time by notice in the Gazette for this
funds is accompanied or intended to be accompanied by a transfer of skills and technology, the treaties do not cover foreign nationals supplying goods and services under contracts per se with state or state entities or, for that matter, under contracts with local nationals.

The guarantor can be the home state of the investor\textsuperscript{36}, a multilateral investment guarantee agency\textsuperscript{37}, a private insurer\textsuperscript{38} or the host state itself\textsuperscript{39} or a combination of these. The guarantees offered by the government insurance agencies provide only against non-commercial risks and protect the investor from damage such as that caused by unilateral actions on the part of the state generally in respect of taxation matters, repatriation of profits, fluctuation of exchange rates and expropriation or nationalization measures. They do not cover business risks. Since the objective is to promote the economic development of the developing countries\textsuperscript{40} by encouraging private investment, the home state and the institutional insurers and, to a lesser extent, the private insurers will want to ensure that the proposed investment is secured by prospects of a satisfactory return to the investor as well as to the economy of the host state. The investment

\footnotesize{purpose; (b) where the investment is for the acquisition of shares of shares in a company incorporated in Namibia, the investment shall, notwithstanding that the value thereof is equal to or exceeds the amount determined under subsection (1)(a) qualify as an eligible investment only if (a) not less than ten percent of the share capital of the company is held or will, following the investment be held by the foreign national making the investment etc. etc.; Another example is Section 2 of the National Investment (Promotion and Protection) Act No. 10 of 1990 of the United Republic of Tanzania defines investment as meaning "a contribution of capital or foreign capital by an investor to a new enterprise or rehabilitation of an existing enterprise".}

\footnotesize{36 E.g. The Oversea Private Investment Corporation, a United States Government Agency.}

\footnotesize{37 E.g. The Inter-Arab Investment Guaranty Agency formed by the Arab States and the Multilateral Investment Guaranty Agency of the World Bank Group.}

\footnotesize{38 The premiums charged by private insurance companies are usually high.}

\footnotesize{39 The host state is sometimes asked to give a so-called Sovereign Guarantee which in the writer's opinion is no more effective than the guarantees given under the contract with the government department concerned.}

\footnotesize{40 Some countries such as Japan, however, allow the state insurance agency to insure investors in developing and developed countries alike.}
must be financially viable and yield a satisfactory economic return to the host state.

The guarantors, therefore, lay down investment criteria which would define the meaning of investment and include a requirement that the investment must involve the transfer of funds to the host state. However, some of the insurers also extend their guarantees to routine sales contracts for the supply of goods and services for which the suppliers have an undertaking to be paid by the developing countries in foreign exchange and there is no flow of funds into the developing countries. They may or may not be classed specifically as investments by the rules of the guarantor.  

The fact remains that investment is a misunderstood and misinterpreted term applying virtually to any kind of economic activity in a developing country by a national of another country particularly a national of a developed country. However, generally speaking private investments fall broadly into three categories: portfolio investments, direct investments and indirect investments. The first two categories comprise the classical forms of investment in a country by nationals of another country.

Portfolio investments consist of various forms of equity holdings such as stocks and shares in corporations, partnerships and other juridical bodies and partnership rights in joint ventures with investors in the host country and investments in equity type loans and guarantees. They may or may not give

41 The Italian Government Investment Guarantee Scheme administered by the Special Section for Export Credit Insurance applies to such contracts which are described in the law governing the scheme as a class of direct investment.

42 E.I. Nwogugu writes only of two categories of private investments in The Legal Problems of Foreign Investment in Developing Countries, Manchester University and Occana, 1965 at page 4. Many of the forms of indirect investments are of recent creation.

43 Equity type of investments are also sometimes described as direct investments (see OECD, Investing in Developing Countries, Fifth Revised Edition at p. 7) but because of the importance of the development of markets in stock, shares and other securities to the privatization of state enterprises in many developing economies, the present writer would
control of the activity or undertaking to the foreign investor but they give the promise or assurance of earnings over time. Direct investments involve control over the undertaking which may take the form of a branch or subsidiary operations or the establishment of a new company in the host country with or without local participation. There is some measure of agreement among various authorities on what constitutes a foreign direct investment. The International Monetary Fund defines a foreign direct investment as "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor’s purpose being to have an effective voice in the management of the enterprise."44

Indirect investments consist of a variety of innovative arrangements to transfer resources other than funding for programs and projects and undertakings. Many contracts are executed to supply equipment and materials, to construct civil works, to furnish technical assistance and managerial skills, to license patent, copyrights and other intellectual property rights and to establish marketing organizations. It may be difficult in some cases to distinguish between a sales contract and an investment agreement45 but broadly speaking contracts that provide for payments in part or whole depending on the progress and outcome of the investment project would qualify as investments. Thus, an investment need not necessarily be in monetary form but can also be in kind to which, however, it must be possible to attach a monetary value46 and the investor should have a financial stake in the project.

distinguish this type of investments from other direct investments.


45 For a definition of the concept of investment, see Charles Oman, New Forms of International Investment in Developing Countries, OECD, Paris, 1984 at p. 22.

The Convention itself does not define investment but it does recognize the role of private international investment in international cooperation for economic development. The Convention envisages its application in a matter of investment by a private entity in a state other than that of the state of origin of the private entity. A comment in an early travail préparatoire, however, points out that there are "no limitations as to the nature of the dispute" and goes on as follows:

"Although the Convention and the Center would be intended to be used primarily in connection with what are commonly referred to as 'investment disputes', there is no need to write a limitation to that effect into the Convention, since it is up to the parties to an undertaking to decide whether they want to bring it [dispute] within the terms of the Convention. Moreover, it is difficult to define the term 'investment dispute' with the precision required to avoid disagreements arising as to the applicability of the Convention to a given undertaking. And uncertainty on this score would tend to undermine the primary objective of Article II, namely to give confidence that undertakings to have recourse to conciliation or arbitration will be carried out."

The first draft of the Convention by the staff of the World Bank included a definition of investment as "any contribution of money or other asset of economic value for an indefinite period or, if the period is not defined, for not less than five years". An asset of economic value as distinct from money is intended obviously to cover assets which are not of a physical or monetary character - artisan skills, know-how, industrial and other intellectual property rights - in other words contribution of technology. The duration of the investment was eventually not considered as a relevant factor and attempts to define investment were abandoned in the final draft approved by the Executive Directors of the World Bank. But the fact that the word 'investment' was retained would mean that any clear proof that the dispute does not arise out of an investment would push the dispute outside the jurisdiction of the Centre despite any agreement between the parties. Throughout the 2136 pages of travaux préparatoires the representations made by Bank staff to the member countries as well as the comments by delegates of the member countries are conclusive as

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to what they all meant by investment - a flow of private moneys from one state to another state assumed to be a developing economy. The reference to technical know-how was regarded as accompanying the flow of private moneys not as an investment in itself.

In the Report presented by the Executive Directors to member governments, Bank staff argued that "given the essential requirement of consent" and the fact that a state can make known in advance the class or classes of disputes which the state would or would not submit to the jurisdiction of ICSID means that it was not necessary to define what is an investment. It was a matter for the individual contracting states to determine. A former Senior Legal Advisor to ICSID puts it that "it is within the sole discretion of each contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID". Nonetheless, an investment contract has characteristics distinct from that of normal contracts of a commercial nature such as sale of goods, construction contracts and turnkey projects. Besides, the thrust of the whole Convention as discussed throughout the long consultative process, documented in the travaux préparatoires and embodied in the Preamble is to the effect that the Convention was intended to encourage private international investment.

Although the recently established Multilateral Investment Guarantee Agency (MIGA) also does not include a definition of the term 'investment' in order to give itself flexibility in its operations and to take into account the development of new forms of international investments, "in principle, it could extend coverage to any transfer of assets, in monetary or non-monetary form, for

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49 Georges R. Delaume, ICSID Arbitration: Practical Considerations, 1 Journal of International Arbitration (1984), pp. 104-105. But, see ICSID Convention Art. 64 which provides for challenges by state parties on the interpretation or application of the Convention and see discussion below.
productive purposes, which is not specifically excluded." Initially, however, the eligible investments will consist of equity and other forms of direct investment.

(c) **Foreign Investments in Developed and Developing Countries**

For the most part foreign investors run private companies and businesses or acquire shares therein without the involvement of the host state either directly or indirectly through state entities. Foreign investment is most common in the developed countries with the USA registering the largest inflow of foreign capital in any year. State involvement in a foreign investment is rare in developed countries to whom the investors are attracted because of the countries' stable and predictable political, economic and regulatory systems. There are special provisions in the laws of the developed countries in respect of foreigners but they relate mostly to immigration matters. In other respects foreigners are generally treated in a non-discriminatory way by the law which, however, might contain some rules concerning their undertakings and limiting the ownership in shares in local companies. Foreign investments in these countries can also be regulated by bilateral and multilateral treaties which are aimed at providing freedom and security for foreign investment in private enterprises rather than special incentives to promote foreign investment such as fiscal advantages and state guarantees. Violations of treaty provisions are taken at state to state level essentially by diplomatic processes but disputes between the states can also be settled by negotiations, arbitration or adjudication by the International Court of Justice.

By contrast, major investments by foreign nationals in developing countries are made in some kind of partnership with or involvement by the state or a state entity under contractual arrangements providing for individually tailored fiscal incentives and stabilization clauses but many foreign businesses also come under the umbrella of bilateral and multilateral treaties and conventions and special

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foreign investment legislation. ICSID was established not only to resolve disputes arising out of or in connection with contractual arrangements with the state concerned but also those caused by the state’s infringement of the treaties, conventions and its investment laws. In the latter cases the state itself may have no association with the foreign investor. Although the exploitation of oil and mining resources by foreign investors in developing countries may inevitably continue in partnership with the state, many countries have embarked on a program of privatization of state owned enterprises and the World Bank Group has adopted a policy of encouraging the growth of the private sector. In the long term, the state is expected to be less and less involved in commercial and industrial activities and to rely more and more on treaties and investment legislation to attract foreign investors.

III. Conclusion

ICSID jurisdiction applies only to legal disputes. The founders of the ICSID Convention were careful to emphasize this although the fact that arbitral decisions must be founded on rules of law means that ICSID tribunals have competence to hear legal disputes only. Since most of the investment disputes giving rise to legal issues are precipitated by political, economic, strategic, environmental or some other extra legal considerations, there may be no such thing as a purely legal dispute except in routine contracts of a commercial character such as contracts of sale of goods and services. However, other provisions in the Convention such as the provision for an ICSID tribunal to decide ex aequo et bono, if the parties agree, may encourage parties to lodge

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51 Asian Agricultural Products limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/87/3). Sri Lanka was held to be in infringement of provisions regarding protection and security in a bilateral investment treaty between Sri Lanka and the United Kingdom.
claims that are not based on strictly legal grounds and considerations may be
given to balancing the interests of the parties regardless of their strict legal basis.

The emphasis on legal disputes may have a historical origin dating back
to the turbulent times before the establishment of the League of Nations. States
opted to seek recourse to the Council of the League rather than the Permanent
Court of International Justice because of the reluctance of states to submit to an
adjudicatory body in respect of matters that concerned political and commercial
interests and indeed questions of honor. Even today some states are sensitive to
submitting themselves to an international court as illustrated by the U.S.A v.
Nicaragua case.

Among the four parties involved in an international investment activity,
namely, the foreign investor including joint venture partners, the home state of
the investor, the host state recipient and the guarantor, the host state is the most
concerned about attracting foreign private capital. The statements made in the
travaux préparatoires without any doubt establishes that the state's understanding
is that ICSID will help the flow of private investment within the ordinary meaning
of investment as the flow of funds and skills in connection with an activity in
which the foreign national has a stake.

For this purpose the host state enters into bilateral or multilateral treaties
with capital exporting states or enacts legislation to encourage foreign nationals
to invest in the state or contracts with foreign nationals to share in the
exploitation of natural resources or join in agricultural, manufacturing or other
industrial activity. Financing provided by development Banks such as the World
Bank and aid agencies of developed countries for discrete contracts for the supply
of goods and services by foreign nationals are made under conditions, imposed
on the recipient state by the agencies concerned, which are quite independent of
incentive measures provided by the recipient state to investors generally.

The ordinary meaning of investment is best described by the International
Monetary Fund as foreign direct investment to share in an enterprise operating
in a state other than that of the investor whose purpose is to participate in the management of the enterprise. The investor has a long term interest and a stake in the outcome of the enterprise. The absence of a definition of investment in the ICSID Convention should not be interpreted as meaning that the contracting states intended anything other than the flow of private capital into their economies. Is a dispute between a state and a contractor arising out of a civil engineering contract an investment dispute? Is a contractor constructing a dam in Nigeria under a contract with the government which pays him for his work making an investment in Nigeria?

Looking at the contract from the civil engineering contractor’s point of view, he is essentially selling goods and services. For all he cares, the Contractor could be constructing the presidential palace or a road to no where or a prison or a monument to a hapless war. He is paid for his labor, materials, fuel and plant and he goes back home with his technicians, engineers and managers. The contractor has no stake in the success or future of the project. Under his contract he may have been required to train local counterpart staff but he is not responsible for the products of his training. More often, however, little technology is transferred consciously and deliberately but locally recruited labor can acquire needed artisan skills through working side by side with expatriate labor and under the supervision of the contractor’s staff. From the point of view of the state, the contract is an investment solely by the state for the country’s economic development. The contractor is merely a tool, the means of achieving the investment. He is not a party to the investment and any dispute between him and the state actually arises out of or in connection with an agreement or contract in which there is no mention of investment.
Chapter Eight

SUBMISSION TO ICSID IN BREACH OF THE CONVENTION

Submission to ICSID arbitration can take place pursuant to (i) contracts or contractual arrangements, between a state or state entity and a foreign national, which contain an arbitration clause providing specifically for ICSID arbitration, (ii) a bilateral or occasionally a multilateral investment treaty between states which provides for disputes between one state and an investor national of another state to be settled by reference to ICSID and (iii) provisions in domestic investment legislation for disputes between the state and a foreign investor to be settled by reference to ICSID arbitration. The treaty and the foreign investment law are said to give advance consent of the state to ICSID arbitration. Both the host state and the home state of the investor will of course have to be parties to the ICSID Convention. Disputes in (ii) and (iii) above arise out of breaches of terms of the investment treaty by the state party to the treaty who is hosting the investor1 and breaches of provisions of its own foreign investment legislation by the host state.2 It is possible for disputes to arise under a contract or out of breaches of a contract as well as out of non-compliance with provisions of a treaty and a foreign investment law and may give rise to more

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1 In Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka (ICSID Case No. ARB/87/3), AAPL, a Hong Kong Corporation, was approved by Sri Lanka to make an investment in the country in the form of participation in the equity capital of a local public company called Serendib Seafoods Ltd. The company’s main producing center was destroyed by security forces of Sri Lanka during an operation against rebels. AAPL claimed compensation for damages, as a result of the military action. The claim was made pursuant to terms of a Sri Lanka/UK Bilateral Investment Treaty which provided for ‘full protection and security’ and ICSID arbitration of disputes.

2 Southern Pacific Properties (Middle East) Ltd. and Southern Pacific Properties (Hong Kong) Ltd. v. The Arab Republic of Egypt (ICSID Case No. ARB/84/3). An ICSID tribunal upheld the claimants’ contention that Egypt had given advance consent to the Centre’s jurisdiction when it passed Law No. 43 in 1974 Concerning the Investment of Arab and Foreign Funds in the Free Zone which provided for ICSID arbitration. See 16 Y.B. Com. Arb. 16 (1991) at p. 28.
than one arbitral body including ICSID assuming jurisdiction and making awards.  

I. International Civil Engineering Contracts

This chapter examines whether or not the submission to ICSID arbitration of disputes in an international civil engineering contract between a foreign contractor and a developing state or state entity is a breach of the ICSID Convention. The analysis rendered in the preceding chapters raises questions as to whether the role of ICSID as envisaged in the ICSID Convention is that of a superior arbitral institution per se or that of an agent to promote "international private investment" in developing countries meaning foreign private investment by offering arbitral services attractive to investors from developed states and competent to deal with the complex legal frameworks within which foreign investors function. Since the World Bank Group of which ICSID is a component has already given its approval to ICSID arbitration provisions in international civil engineering contracts financed by the World Bank as an alternative to provisions for private arbitration proceedings, there is the question whether ICSID is in breach of the ICSID Convention by attempting to expand the competence of ICSID tribunals.

A typical international civil engineering contract financed by the World Bank Group and regional development banks such as, for example, the Inter American Development Bank, the Asian Development Bank and the African Development Bank would be awarded after bidding procedures approved by the

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4 ICSID Convention Preamble.
Banks. They would call for competition among contractors, who are usually prequalified under separate procedures, originating from member states. The contractual parties will consist of the state itself or a state department or a constituent subdivision of the state or a state corporation or other entity created under a statute or a state owned commercial enterprise on the one part and an international contractor on the other part. The international contractor may be a sole contractor or consist of one or more international and local contractors in some form of association but with joint and several liability under the contract. Essentially, however, in law the contract will consist of two parties and is usually referred to as the main contract to distinguish the contract from the agreements between the main contractor and his sub-contractors and suppliers for whom the main contractor is normally fully responsible.

The jurisdiction of ICSID tribunals over the parties will be governed by the same rules for all types of contracts and legal issues relating to ratione personae have already been discussed at length in the last chapter. Generally speaking, although ICSID has powers to look at questions of jurisdiction ratione personae proprio motu ICSID does not probe into the eligibility of the parties to come within the jurisdiction of an ICSID tribunal if the parties agree as to who they are and their status vis a vis ICSID proceedings and there are no challenges to the jurisdiction of the ICSID tribunal during the proceedings on grounds of ratione personae. However, if the respondent party fails to take part in the proceedings, an ICSID tribunal will have a duty to satisfy itself that the respondent is eligible for ICSID arbitration. In addition, the ICSID Secretary-General has powers to refuse a request for ICSID arbitration if the particulars in the request show that the dispute is manifestly outside the ICSID jurisdiction because one party is not a foreign national or the other party is not a state or state entity approved by the state.  

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6 ICSID Convention, Art. 36(3) and ICSID Arbitration Rule, Rule 2 relating to the particulars which have to be given in a request for ICSID arbitration.
In a civil engineering contract financed by the World Bank Group, the Bank does not investigate the foreign or local status of a contractor provided the contractor originates from a member state and Switzerland. The Bank itself will probe the status of a contractor only in the cases where the contractor claims a preference allowed to local contractors in countries below a specified level of GNP per capita.\(^7\)

As a rule, World Bank gives loans and credits to the state or a state entity but more and more loans and credits are being channeled through government departments to private undertakings in which case the loan or credit may be used to finance an international civil engineering contract between a local private undertaking and a foreign contractor. A dispute in connection with such a contract will be outside ICSID jurisdiction as the contract does not involve a state party although the state provides guarantees for the World Bank loans and credits which are onlent or lent directly to the private undertakings unless, under the rule in Klockner, there is state participation in the private undertaking and the undertaking is designated by the state as a state agency.

The arbitration provisions in an international civil engineering contract apply to a dispute arising out of or in connection with the contract or the execution of the works and although there is no specific reference to a legal dispute since the dispute is resolved by the application of the law that governs the contract it has to be a legal dispute. Other disputes such as might arise, for example, when a party seeks to renegotiate the contract or obtain an ex gratia payment are not legal disputes because they would not be justified in law under the contract. Only legal disputes can be referred to ICSID arbitration but the disputes must arise 'directly out of an investment'.\(^8\) The big question, therefore, 


\(^8\) ICSID Convention, Art.25(1).
is whether an international civil engineering contract is an investment within the meaning of the ICSID Convention.

II. Investment in International Law

The question can be answered by looking at the ways states themselves have employed the term 'investment' in bilateral and multilateral investment treaties and their domestic foreign investment laws. The practice of the states would reflect the interpretation that should be given to investment in international law, particularly, in international economic law. International economic law is emerging as a field of law with its own set of rules distinct from the rules of international law which evolved through attempts to eliminate physical warfare. Economic warfare is much more relevant today particularly since the ending of the cold war and the democratization of the eastern European republics and Russia.

(a) Investment in Investment Treaties

There are about 450 Bilateral Investment Treaties (BIT) concluded between states and they have been collected and published by ICSID.9 Most concern economic relations between developing and developed states and many of these treaties make provision for the settlement between nationals of either state and the other state by reference to ICSID arbitration. The treaties give a definition of the term "investment" in great detail and most of them attach a narrow meaning to "investment" as meaning capital contributions. Some, however, give a wider meaning to investments as including any form of association, between foreign nationals and host states. It is to the BITs treaties that one must look for

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9 News from ICSID, Winter 1992 at p. 11.
the customary meaning attached to foreign investments by countries so as to clarify the role of ICSID in the flow of private investment and economic development.

The BITs between developing and developed countries like those between developed countries confer reciprocal rights and duties in respect of investments by each state's nationals, natural and juristic persons, in the other state but what really matters is the treatment of investments by nationals from developed countries in the developing countries. The treaty provisions usually include and extensive definition of what the two states mean by "investments". An example of a BIT with a wide definition of investment is the investment treaty between USA and Morocco which defines "investment" as meaning

"investment owned by a national or company of a Party and includes:

a. financial contributions in the form of foreign exchange or reinvested profits provided as participation in the capital of a company or to acquire shares or any other interest in a company;

b. other contributions, financial or in kind, provided as participation in the capital of a company, or to acquire shares or any other interest in a company;

c. intellectual and industrial property rights, copyrights, patents, trademarks, tradenames, industrial designs, trade secrets and know-how, and good will;

d. provision of services and concessions of licenses and permits pursuant to law or contract, including those issued for manufacture and sale of products;

e. any right conferred by law or contract, including rights to search for or utilize resources, and rights to manufacture, use, and sell products;

f. tangible and intangible property;
g. mortgages, liens, and pledges; and

h. financial or commercial debts which are associated with an investment."

The objective of the treaty is set out in its preamble to the effect that the treatment accorded to such investments will stimulate the flow of private capital.

Several salient characteristics of an investment emerge from the USA/Moroccon Treaty. Investment is something owned by a natural or juristic person and includes several inputs made in the context of an entrepreneurial activity. Financial contribution is the obvious feature of an investment which can also include other assets, such as goods, expertise, industrial and intellectual property rights and other rights having a monetary value.

The analysis of the BITs and foreign investment laws demonstrates overwhelmingly that states regard investment as referring to foreign investment, that is, investment by a national of a state other than the state where the investment takes place. The common meaning of investment is a capital financial contribution but as pointed out above any contribution in the form of other assets for example, expertise and know-how in exchange for an equity or share in a business activity is also increasingly referred to as foreign investment. It can be said to be customary among all nations to think of foreign investment as a capital financial or other contribution and as representing a flow of capital into a state from outside the state in connection with a business or economic activity and the term will not apply to a mere contract of sale, a transaction which takes place in millions every day - the sale of goods and services by nationals of the developed states to nationals and governments of developing states who pay for the said goods and services.

In 1991, the General Counsel of the World bank Group began a study for the preparation of international guidelines for the behaviour of governments towards foreign investors. In this connection the General Counsel made a detailed
survey and analysis of 253 BITs involving 12 industrialized countries of Europe and the United States and 75 developing countries covering all the continents of the world. His report which was adopted by the Development Committee of the World Bank Group in September 1992¹⁰ includes, inter alia, includes an analysis of the representative provisions in the bilateral investment treaties for admission of foreign investments. There is nothing in the analysis to suggest that investment to the countries means anything other than capital contributions for the establishment of business undertakings.

The provisions for admission of foreign investments according to the report fall into four groups as follows:

"Type A

Each State shall encourage and create favorable conditions for nationals and companies to invest capital in its territory, and shall admit such investments in conformity with the law.

"Type B

Each State shall encourage and create favorable conditions for nationals and companies of the other State to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital [such investments].

"Type C

Each State shall encourage and create favorable conditions for nationals and companies of the other State to make investments in its territory, and shall admit such investments in accordance with its law.

"Type D

Each State shall encourage and create favorable conditions for nationals and companies of the other State to establish investments in its territory, and shall

¹⁰ See note 11 below.
admit such investments in conformity with its laws, regulations and administrative practices."\(^{11}\)

Types A and B expressly link 'investment' to 'capital' and Type D speaks of establishing in the state meaning setting up a business undertaking. The majority of the treaties incorporate provisions of the Types A, B and D. The reference merely to investments in Type C is probably intended to capture both capital in the ordinary sense of financial contribution as well as know-how but however worded the provisions seem to indicate admission to a state to invest - to establish a business or economic activity. Establishment implies a degree of permanence and a base or bases from which such activity is conducted.

This is also the gist of the ICC-Guidelines for International Investments of November 29, 1972\(^{12}\) which relate to the establishment of enterprises in a country by foreign nationals. The guidelines are quite clearly directed at foreign nationals who wish to establish businesses and investments in the ordinary sense of the word of bringing in capital into the host state and having a management role in the business enterprise in which they have a clear stake. Although generally it may be difficult to define exactly what constitutes foreign investment it is easy to recognize when a transaction is not a foreign investment.

However, if the two state parties to a BIT agree to regard a civil engineering contract as an investment so be it as far as the two states are concerned because the interpretation of a bilateral treaty is left to the states themselves but it has been customary among states not to do so. Nonetheless, for ICSID to have jurisdiction the dispute must arise out of an investment within the meaning of the Convention.

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If the state party to a BIT which provides for resolution of disputes with foreign nationals to be settled by reference to ICSID arbitration objects to interpreting the undertaking of civil works by a foreign contractor as an investment and hence the jurisdiction of ICSID, then the ICSID tribunal will be forced to give its own ruling on the interpretation of the term investment in the BIT. In almost all cases it will have to interpret investment as meaning ‘foreign investment’ in exchange for an equity or share in the investment proposed or in establishing a business or economic activity because that would be the ordinary meaning in almost all of the BITs and also would be the meaning given to reflect the intention of the parties as expressed in the text of the treaty. Such an interpretation will also be compatible with the rulings of the International Court of Justice and Article 31 of the Vienna Convention on the Law of Treaties which came into force on 27 January 1980.

Where an ICSID tribunal is compelled to examine the meaning of investment under the circumstances where the provisions in a bilateral treaty or foreign investment law are invoked by the claimant party to show consent to ICSID arbitration, the tribunal, having established that the consent exists, will then go on to examine if it has jurisdiction over the subject matter under the ICSID Convention. It has to determine if the dispute is a legal dispute and involves an investment. Where the parties have agreed that a dispute is a legal dispute, an ICSID tribunal will nonetheless have to examine if the dispute is a legal dispute and will admit lack of jurisdiction if the dispute is found to be not a legal dispute. On the other hand, it has been suggested by some writers that where the parties have agreed that a dispute involves an investment, the ICSID tribunal is not required to check if the alleged investment is also an investment under the ICSID Convention for the tribunal to have jurisdiction over the subject matter of the dispute.
In 1966, when the Convention came into force little attention was paid to giving a definition of investment because everyone understood what was meant by it - the flow of private international capital. A definition of the term was not only unnecessary but would have excluded types of investments that were unknown at that time. Many examples of investment were then given but none included reference to civil engineering contracts of a commercial character. Every example given related to some transfer or injection of capital into a business venture. The fact that jurisdiction of the Centre was based on consent (this is not by any means exclusive to ICSID arbitrations because consent is the "cornerstone" of all arbitrations) was said to merge the question of investment with the fact of consent. However, Mr. Aaron Broches, the General Counsel of the World Bank, who was instrumental in securing the support of the member states of the Bank and was the chief architect of the institution, wrote soon after the Convention came into force that "Presumably, the parties' agreement that a dispute is an 'investment dispute' will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling."

More recently, articles have appeared in journals suggesting a widening of the jurisdiction of ICSID which has assumed jurisdiction over a few cases dealing with technical assistance contracts and contracts for the supply of goods

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13 Georges R. Delaume, *Convention on the Settlement of Investment Disputes Between States and Nationals of other States*, 1 Int'l Law. 64 (1966) at p. 65. Mr. Delaume became a Senior Legal Advisor of ICSID.


and services partaking of a commercial character. The flexibility shown by ICSID and ICSID tribunals may have been spurred by the fact that few cases were referred to ICSID arbitrations for over a decade since its inception and the fear that ICSID may suffer the same fate as the Permanent Court of Arbitration which was being little used despite the extension of the use of its facilities by natural and juristic persons. There could also be genuine concerns that an institution such as ICSID with the potential for regulating the conduct of states and foreign investors and developing new rules of international law relating to economic development could be in jeopardy.

A former Senior Legal Advisor to ICSID has argued that the traditional notion of investment should be replaced by an economic concept of investment and that one has to look at investment from the recipient's point of view, namely, from the host state's viewpoint. He says that, from the state's viewpoint, the construction of a dam, because of its benefits to the state's economy, is a vital investment and by implication a similar view can be taken of other civil engineering contracts such as, for example, construction of roads and bridges, erection of electric power lines, and building of schools where the contractor is paid for his work and he goes home at the end of the project in which he has no stake at all. However, the writer did not suggest that ICSID should carry out an economic analysis of every contract to determine if the project will yield a satisfactory economic return to qualify as an investment under the Convention but it must be obvious that many projects do fail the economic tests and some prestige and military projects are not investments even from the state's viewpoint. Where does one draw the line if all contracts where a foreign contractor is involved becomes an investment under the Convention? ICSID will become just another arbitral institution competing against other private arbitral institutions for arbitration work around the world.

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17 Delaume, op. cit. note 13 at p. 117.

18 Under the MIGA Convention, MIGA will undertake an appraisal of a project before extending its guaranty to a foreign investor.
III. The Practice of ICSID

(a) Widening the Scope of Jurisdiction of ICSID Tribunals

Four ICSID cases are cited as examples of the movement away from the traditional concept of foreign investment. In the first example, the Klockner case, the foreign national involved had a stake in the future of the project although it turned sour and the dispute was precipitated as a result. The case centered around the setting up of a company with equity participation paid in cash and in kind to engage in an entrepreneurial activity. It is the materialization of the risks involved in a commercial activity and not problems arising out of construction or management contracts that led to the disputes in that case.

In the Klockner case, Klockner Industrie-Anlagen, a Germany Company, Klockner Belge S.A., a Belgian Company and Klockner Handelmaatschappij B.V., a Dutch Company and the Government of the United Republic of Cameroon signed a protocol of agreement to (i) supply and erect a fertilizer factory in Cameroon, (ii) participate (51%) in a joint venture company with the Government, called the Societe Camerounaise des Engrais (SOCAME), to operate the fertilizer plant and (iii) take responsibility for the technical and commercial management of SOCAME. The contract package comprised, in addition to the protocol of agreement, a supply and erection contract on a turnkey basis between the Klockner Group and the Government and later assigned to SOCAME after its incorporation, a so-called establishment agreement between the Klockner Group and the Government which accorded to SOCAME some tax and customs privileges and finally a management contract between Klockner and SOCAME. The first three agreements provided for ICSID arbitration of disputes and the management contract provided for ICC arbitration. This was logical because the first three agreements were in regard to an

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investment and the management contract was simply a contract for the provision of services.

Klockner's relations with the Government from the outset involved an entrepreneurial activity in which Klockner had a stake via the 51% share of the equity in SOCAME. Although the package of contracts covered certain discrete activities such as a turnkey project and technical assistance yet looking at the contracts in the context of the whole venture it was a genuine example of traditional foreign investment. The civil engineering works contract and the technical assistance contract were part of a larger exercise which fitted the meaning of foreign investment, albeit the Government also shared in the investment, and the whole purpose from the Government's viewpoint was economic. The civil engineering and technical assistance contracts cannot by themselves be regarded as examples of a foreign investment.

However, in the Atlantic Triton case\(^\text{20}\) the facts were as follows. The Ministry of Fisheries of the Revolutionary People’s Republic of Guinea entered into a two year contract with a Norwegian Company, Atlantic Triton, to supervise the conversion, equipping and operation of three Norwegian fishing vessels bought on sale by Guinea for US $ 3.0 million. Following the conversion in a Norwegian shipyard, the vessels were sailed to a port in Guinea where fishing operations began. The results were not successful and an FAO mission reported that the vessels were too large, too expensive and unsuitable for fishing in tropical waters. The Norwegian-made fishing gear was also not suitable and the vessels had been badly maintained under Atlantic Triton and needed a general overhaul after only six months in service. The point here is that Atlantic Triton must have or should have known that the vessels and fishing equipment were not suitable. Yet, Atlantic Triton undertook to supervise the conversion of the vessels and installation of the fishing equipment for use in the waters off Guinea because they looked upon their work as one of execution of a contract for services for

which payments did not depend on the financial and economic viability of the project. They had no stake in the Guinean project. Despite the fact that Atlantic Triton were hired as consultants who, in the event, performed badly, it is incredible that the ICSID tribunal kept referring to Atlantic Triton as the investor.\footnote{Ibid. at p. 186. "Il refuse, en effet, par un \textit{obiter dictum} qui a son importance, d'admettre que la Guinée puisse rejeter l'entière responsabilité de la faillite du projet sur investisseur".}

The \textbf{Atlantic Triton case} clearly demonstrates that the fact that a state and a foreign national have agreed to submit a dispute over a contractual matter to ICSID arbitration means that they have also agreed, if they have not already done that expressly in the arbitration clause,\footnote{ICSID recommends that parties to a contract with an ICSID arbitration clause make declarations to the effect that the dispute is a legal dispute arising directly out of an investment. See ICSID Model Clauses.} that the dispute is a legal dispute arising out of an investment in which case the ICSID Secretary-General will not probe into the validity of the investment character of the dispute and initiate arbitral proceedings. The contract with Atlantic Triton would have contained no reference to an investment in any part of the contract documentation. The ICSID tribunal may go a step further and suggest that a contractor of foreign nationality is indeed an investor.

\textbf{In Colt Industries v. Korea,\footnote{Colt Industries Operating Corporation, Firearms Division v. Government of the Republic of Korea (ICSID Case No. ARB/84/2).} the subject matter of the dispute concerned technical and licensing agreements for the production of weapons. Looking at it from the state’s viewpoint the purpose may not always be an economic one. The state might be a repressive state applying much of its resources in maintaining the security of the political system and the party in power and the purpose may be thoroughly reprehensible and uneconomic. The proceedings in the above case were discontinued and little is known of the details of the agreements so as to be}
able to ascertain if there was an investment element from either the state's or Colt Industries' viewpoint.

The fact that some states prefer to submit to ICSID arbitration disputes generally with contractors and suppliers does not necessarily prove there is an acceptance of a new definition of foreign investment in international transactions as including agreements with foreign contractors for the construction of civil works, contracts for technical assistance and supply of goods and services. It simply means that states see ICSID as a convenient and efficient arbitral institution and that in many respects they might get better arbitral services in terms of quality of arbitrators and conduct of proceedings at less cost than private arbitral bodies. To look at the meaning customarily given to foreign investments by states, one must look at the definition of the term "investment" in their domestic foreign investment laws and the bilateral investment treaties.

(b) ICSID Jurisdiction and Competence of ICSID Tribunals

A double standard can be said to be applied in the exercise by an ICSID tribunal of its powers to rule on its own competence. One standard, namely, that the tribunal must satisfy itself that a dispute is a legal dispute notwithstanding that the parties have consented to submission of the dispute to ICSID arbitration and another standard, namely, that the tribunal will accept consent by the parties as satisfactory evidence that the dispute involves an investment within the meaning of the Convention and is arbitrable by the ICSID tribunal. The rationale for this is of course that it does not take much to determine if a dispute is a legal one or not but that the tribunal will be engulfed in debate and controversy if it has to examine the subject matter of the dispute in every case to determine if a dispute involves an investment within the meaning of the ICSID Convention.

Even if one accepts the economic value test and looks at the transaction from the state's viewpoint to ascertain whether there is an economic purpose one
might occasionally discover that the purpose is not in fact economic and it could even be thoroughly objectionable and a misuse of the state's resources. In any case, it would be unrealistic for an ICSID tribunal to embark on a feasibility study of the subject matter of every dispute that comes before it. So in effect, the practice of the ICSID tribunals seems to suggest that they ignore the meaning given to investment in the Convention and all that really matters is that there is a legal dispute and consent of the parties for ICSID to assume jurisdiction. Is ICSID, therefore, in breach of the Convention in this regard?

There are two points in time when ICSID verifies that a request for arbitration is within the jurisdiction of an ICSID tribunal. One, when the ICSID Secretary-General registers the request for ICSID arbitration and gets the proceedings rolling and two, when the ICSID tribunal sits to hear the dispute.

IV. ICSID Secretary-General: Judge or Administrator

A request for ICSID arbitration is addressed to the Secretary-General and may be made by a contracting state or national of a contracting state. It may also be made jointly by the parties to a dispute. Under the ICSID rules of procedure, the request must, inter alia, "contain information concerning the issues in dispute indicating that there is between the parties a legal dispute arising directly out of an investment." The particular rule can either mean that the information filed by the claimant must contain some evidence of the dispute being a legal one connected with an investment or that the claimant in his request must, in addition to giving information concerning the issues in dispute, make a declaration that there is such a dispute. The ICSID Convention itself requires that the request

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must contain information concerning the issues in dispute in accordance with the
ICSID rules of procedure.\(^{25}\)

Since detailed pleadings follow the registration of the request by the
Secretary-General, the information in the request need give only a bare outline
of the issues and where there is a declaration by the claimant that there is a legal
dispute connected with an investment, the Secretary-General will probably
register the request forthwith. Where there is no such declaration, however, the
Secretary-General will examine the issues described in the request to ascertain if
the dispute is "manifestly outside the jurisdiction of the Centre."\(^{26}\) A first draft
of the Convention which called for the request to contain \textit{prima facie} evidence
that the dispute fell within the jurisdiction was not accepted by the Legal
Committee because it seemed to give the Secretary-General "the character of a
jurisdictional authority."\(^{27}\)

In essence, the Secretary-General is to have a screening power only and
not a jurisdictional one because there was no support for any review of or appeal
from the Secretary-General's decision which the exercise of a judicial power
would have entailed. He cannot send back the request for more information and
he cannot use any information supplied by the respondent on his receipt of the
request to make the determination whether to register the request or not even if
the respondent challenges the jurisdiction of ICSID before registration of the
request.\(^{28}\) Although there is no requirement that the Secretary-General consult
with a claimant if his request does not comply with the requirements of the
ICSID Convention and the Rules and permit the claimant to give additional

\(^{25}\) ICSID Convention, Art. 36(2).

\(^{26}\) ICSID Convention, Art. 36(3) and ICSID Arbitration Rules, Rule No. 6(1)(b).

\(^{27}\) Extracted from a statement by the Tunisian delegate at a meeting of the Legal Committee
of the World bank responsible for the drafting of the Convention. See History of the
Convention Vol. 2 p. 774.

\(^{28}\) Challenges to jurisdiction is theoretically possible before registration. See Rules, op. cit. note
24, Rule 5(2).
information, he does so in practice. ICSID Rules have to be amended to put this on a formal footing to keep all actions above board.

Where there are complex jurisdictional issues the Secretary-General makes no attempt to examine the request in detail, he registers the request and institutes arbitration proceedings. It is plain that where there is the slightest doubt the Secretary-General will leave it to the ICSID tribunal to decide on jurisdictional issues. The burden is on the Secretary-General to show that a request is manifestly outside the jurisdiction of ICSID. The Secretary-General's role is essentially an administrative one to ensure that the request dossier is complete and all the information required by the ICSID Rules has been given.

There is only one request which was refused by the Secretary-General on the ground that the dispute is "manifestly outside the jurisdiction" of ICSID and it was based on the fact there was no agreement to arbitrate. This suggests that there is an element of judicial power given to the Secretary-General to determine if there is prima facie evidence of written consent to ICSID arbitration. On the other hand, there is record of only one case where the Secretary-General accepted a request for arbitration and the ICSID tribunal declined jurisdiction over some of the parties to an ICSID arbitration. It either points to efficacy of the reception process by the ICSID Secretary-General or that the ICSID Convention has been interpreted widely by ICSID tribunals and that jurisdiction ratione materiae will rarely be declined.

\[29\] Antonio Parra, Screening Power of the ICSID Secretary-General, News from ICSID Vol 2, No. 2, Summer 1985 at p.10.

\[30\] In the Holiday Inns, Klockner and AMCO cases, there were complex jurisdictional issues. According to Parra op. cit. note above at p. 13, "the Secretary-General registered the requests, often shortly after they were received"

\[31\] Asian Express International (S) PTE Ltd. v. Greater Colombo Economic Commission, see News from ICSID op. cit. note 29 above.
In so far as a dispute arises out of or in connection with an international engineering contract, the agreement to ICSID arbitration will usually be provided for in an arbitration clause in the contract in which there will be no reference to an investment. On the identification of the parties to a contract as being a state which has acceded to the ICSID Convention or a state entity thereof and a foreign national originating from another state which has acceded to the Convention and submission of the request in the proper form with the date of the arbitration agreement, the request for ICSID arbitration will be registered although the civil engineering contract does not fit the definition of traditional investment. The consent having been established the ICSID tribunal will not bother to determine if the dispute relates to an investment in the traditional sense.

But if the contractor invokes ICSID arbitration pursuant to a bilateral investment treaty signed with his home state or a domestic foreign investment law, the question will arise as to whether the civil engineering contract is an investment within the definition in the treaty or the investment law if the host state challenges ICSID jurisdiction on that ground. In this event, an ICSID tribunal will be compelled to answer the question which will depend on an interpretation of the bilateral investment treaty or the domestic investment law. The meaning attached to the term "investment" under the ICSID Convention will be the same as what the parties have agreed it should mean. It will be completely within the control of the parties for purposes of ICSID arbitration to decide on the meaning of investment as between them. The subject matter, therefore, can be anything - sale of arms, training of staff, construction of a palace - so long as the parties have agreed that it should be regarded as investment for purposes of ICSID arbitration.

ICSID practice exemplified by the World Bank's approval to use of ICSID facilities to arbitrate disputes in purely civil engineering contracts indicates that there is no duty on the part of the Secretary-General or the ICSID tribunal to verify if the purported subject matter of a dispute submitted to ICSID arbitration
is an investment under the ICSID Convention. ICSID will be principally concerned as to whether there is consent and whether there is a legal dispute. To a lesser extent it will be concerned under certain circumstances with verifying other matters such as identity of parties. Reductio ad absurdum this means that any transaction of a commercial nature involving a foreign national will come within the jurisdiction of ICSID if the parties so agree?. Is ICSID in breach of the Convention by not delimiting the types of transactions that will be accepted as investment under the Convention?.

V. Jurisdiction of ICSID Tribunals is not an Inter Partes Matter

(a) Handling of Jurisdictional Issues in ICSID Arbitrations

Jurisdictional issues arose in the first ICSID arbitration in the Holiday Inns case when Morocco challenged the eligibility of Holiday Inns and its subsidiaries to be parties to the proceedings before ICSID. The Moroccan Government had signed a basic agreement with Holiday Inns, USA and Occidental Petroleum Corporation, USA for the construction and operation of four hotels in Morocco. The agreement contained an arbitration clause calling for ICSID arbitration. The first issue concerned the recognition of the four Moroccan subsidiaries and a Swiss subsidiary of Holiday Inns as foreign nationals for purposes of the Convention and the second concerned the fact that Switzerland was not a Contracting State of the Convention at the date on which the basic agreement including the consent to submit disputes to ICSID arbitration was entered into. Switzerland became a Contracting State afterwards but before the request was actually made for ICSID arbitration.

The ICSID tribunal while holding that Morocco had not agreed to treating the four Moroccan subsidiaries of Holiday Inns and were therefore not foreign nationals for purposes of the Convention held that the critical date that
a home state should be a Contracting State of the Convention was the date of submission of the request on which date Switzerland the home state of the principal subsidiary had become a Contracting State and not the date of the agreement to submit to ICSID arbitration. The tribunal accepted the reliance on the travaux préparatoires, which are also not conclusive, to show that the framers of the Convention did not intend to exclude ratification of the Convention by the home state of the foreign national following consent to ICSID arbitration. The fact that the state party to the dispute need not have ratified the Convention at the date of consent to ICSID arbitration would suggest a lack of mutuality in the provisions in the Convention unless the same rule applied also to the home state of the foreign national. Such an interpretation was considered by one commentator\(^{32}\) as consistent with the necessity to maintain a balance between the interests of the investment-importing states and those of nationals of the investment-exporting states. The point here is that from the outset the Convention was regarded as a Convention to govern relationships between investment-importing states and nationals of investment-exporting states.

Even more to the point is the Alcoa Minerals case,\(^ {33}\) the third case to come before an ICSID tribunal. In that case, Alcoa Minerals, a US Corporation had entered into a 25-year agreement with the Government of Jamaica for the construction of an alumina refining and processing plant and long-term leases for the mining of bauxite in Jamaica. The agreement included tax concessions and provided for the freezing of taxes and royalties at the levels specified therein. Disputes arising under the agreement were to be submitted to ICSID arbitration if they could not be settled amicably. That was in 1968. In 1974, attempts by Jamaica to negotiate increases in taxes and royalties failed and Jamaica introduced the Bauxite (Production Levy) Act which increased the taxes payable on Alcoa mining operations nine-fold notwithstanding anything in the previous


\(^{33}\) Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica (ICSIID Case No. ARB/74/2).
agreement which was to be superceded. Alcoa submitted a request to ICSID to initiate arbitration proceedings. Jamaica became a party to the ICSID Convention in 1966 without reservation. At that time, Jamaica could have excluded the application of the Convention to bauxite mining but did not do so but before enacting the new legislation Jamaica had notified ICSID of its decision not to submit to ICSID arbitration disputes in connection with the exploitation of natural resources.

Jamaica declined to take any step to respond to the request by Alcoa for arbitration and did not appear at the proceedings. The ICSID Convention empowers an ICSID tribunal to continue the hearings despite the failure of a party to appear and to render an award at the request of the other party who must nonetheless prove his assertions to the satisfaction of the tribunal.34 The ICSID tribunal must be satisfied that (i) ICSID has jurisdiction, (ii) the tribunal is competent to hear the dispute and (iii) the assertions of the party present are "well-founded" in fact and law. The powers to deal with a party in default or a non-appearing respondent are similar to those given to the International Court of Justice under its Statute.35 The power of an ICSID tribunal to examine jurisdiction proprio motu also extends to cases where both sides are present.36

According to a report of the Alcoa Minerals case, the ICSID tribunal was supposed to have examined in depth as to whether the case involved an investment and is said to have determined that the jurisdictional requirement was satisfied on two grounds: (i) the ordinary meaning of investment as a


35 Statute of the Court, Art. 53.

36 ICSID Arbitration Rules, Rule 41(2).

contribution of capital was satisfied by Alcoa's mining operations and (ii) the two parties had consented to submission to ICSID arbitration. That the host state and a foreign national were in the best position to determine if their economic relationship amounted to an investment and their consent ipso facto meant that the dispute is connected with an investment was rejected by the ICSID tribunal as simplistic because "it could readily be employed to embrace ordinary commercial sales and other non-investment transactions in which capital contribution is non existent or insignificant." The tribunal refused to consider the fact of consent as conclusive on the investment issue. "It could be firmly established that an analysis of the parties' capital relationship is necessary in each ICSID case." This approach supports "the broad objective of the Convention to encourage the flow of private international investment".

The LETCO case was another example of the non-appearing respondent in an ICSID arbitration proceeding. Liberia granted LETCO a concession for the exclusive right to harvest and process forest products within a defined exploitation area between 350,000 and 400,000 acres in Liberia. In consideration for such rights, LETCO contracted to make annual payments of royalties and rents and other fees as prescribed in the concession agreement which was for a minimum period of 20 years renewable for a further period of 15 years so long as LETCO made all the necessary payments and observed the conditions therein. The agreement provided for ICSID arbitration of disputes. In 1968, prior to the signing of the new concession in 1970, LETCO was granted a forestry concession in two other areas which were alleged by LETCO to be part and parcel of one overall concession governed by the rules and conditions in the agreement of 1970. Even after portions of the concession areas were withdrawn in 1970, 1971 and

38 Schmidt, op. cit. note above at p. 99.
39 Ibid., at p. 100.
40 Report of the Executive Directors at p. 5. Also see preamble to the ICSID Convention.
1977, LETCO was left with a total of 470,000 acres of exploitable land. The agreement was fine until 1979 when problems began to appear and the Liberian Forestry Department requested a renegotiation of the agreement. The department accused LETCO of abandoning quantities of logs in the concession area and later in 1980 indicated that the concession area would be reduced by 279,000 acres immediately. Following these allegations and protests by LETCO to correct the situation, the department suspended the concession altogether in 1983. LETCO began steps to submit the dispute to ICSID arbitration.

Having appointed its arbitrator, the Government of Liberia did not respond to any of the notifications from ICSID and effectively did not participate in the proceedings which the ICSID tribunal continued to conduct. In response to a request by the tribunal to submit their arguments concerning jurisdiction of the tribunal, only LETCO replied and the tribunal proceeded to examine the jurisdictional issues and made an interim award confirming its jurisdiction in respect of LETCO. The tribunal said that Article 25(1) of the ICSID Convention "demands three essential requirements" for the Tribunal to exercise jurisdiction: (i) a legal dispute arising directly out of an investment, (ii) consent in writing to submit to the Centre and (iii) a dispute between a Contracting State and a National of another Contracting State. The tribunal examined all three requirements. After describing the capital outlays made by LETCO, the tribunal declared that there is "no doubt that, based on the Concession Agreement, amounts paid out to develop the Concession, as well as other undertakings, this legal dispute has arisen directly from an 'investment' as the term is used in the Convention".

Both the Alcoa and LETCO cases are the exceptions among the cases that have come before ICSID tribunals in that one of the parties did not take part in the arbitration proceedings. That led to the ICSID tribunal examining the

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43 Ibid.
jurisdictional issues *proprio motu* pursuant to Rule 42(4) of the Arbitration Rules although there is no specific provision in the Convention itself for the tribunal to do so.\(^\text{44}\) In any event, the fact of not appearing and presenting the case implies a challenge by the defaulting party to the jurisdiction and competence of the tribunal to hear the dispute and the tribunal is constrained to examine the jurisdictional issues pursuant to Article 41(2) of the Convention. The Statute of the International Court of Justice where the non-appearing respondent is a common phenomenon\(^\text{45}\) provides specifically in Article 53 of the Statute that the Court must not only satisfy itself that it has jurisdiction but also that the claim is well-founded in fact and law. And in Article 36(6), the Statute provides for the Court to settle the question of jurisdiction if the parties disagree. As non-appearance of a party can be equated to a challenge to the jurisdiction of the ICSID tribunal, it should be clear that in both the cases where a party has failed to appear and where a party challenges the jurisdiction of ICSID, an ICSID tribunal must satisfy itself that it has jurisdiction and that it is competent to hear the dispute and make a final and binding award. Where the issues are complex it may not be possible do this without joining the merits of the case.

It would be relatively easy to discharge this responsibility where the parties to a dispute have a contractual relationship and the consent of the parties to ICSID arbitration can be easily verified from the terms of the contract but where the relationship between the parties is via a bilateral investment treaty or a domestic foreign investment law, the task can be difficult because consent has to be deduced from an interpretation to be given to the relevant provisions in the

\(^{44}\) Under Article 41 (1) of the ICSID Convention, the "Tribunal shall be the judge of its own competence." It means that the tribunal must check on its legality to conduct the arbitral proceedings but as far as the jurisdictional issues generally are concerned it is doubtful if this provision can be interpreted as requiring the tribunal to address the issues *proprio motu*. See discussion on the distinction between competence and jurisdiction in Shabtai Rosenne, Breach of Treaty, Grotius, Cambridge, 1985.

treaty or investment law and to reservations made by the parties. The alleged consents in these cases are of a general character and made in advance of the circumstances giving rise to the dispute and either a party may have not contemplated the application of the treaty or law to prove consent in the particular case under review or it may want to renege on its obligations because the party finds them inconvenient.

(b) Comparison with the Practice of the International Court of Justice

In the Aegean Sea Continental Shelf case before the International Court of Justice, Greece had objected to Turkish research vessels testing for oil in waters of the continental shelf around Greek islands in the Aegean Sea very close to the Turkish coast. Invoking provisions in the Geneva Convention, Greece argued that the continental shelf should be delimited between the two countries by means of a median line equidistant from the coasts of Turkey and the islands. Turkey disputed the applicability of the equidistance rule and suggested negotiations. Greece proposed that the dispute be settled by reference to the International Court of Justice and while reserving its right to institute proceedings unilaterally, Greece was prepared to reach a special agreement with Turkey for reference to the Court. Turkey did not object in principle to reference to the Court but reiterated its desire to settle the dispute by negotiations. Negotiations which included a proposal by Turkey to refer to the Court only ‘unresolved but well defined-legal issues’ failed and Turkey began expanding its exploration for oil in all areas of the Aegean outside the territorial waters of Greece which referred the matter simultaneously to the International Court of Justice and UN Security Council.

46 ICJ Reports (1978) 3.
In its memorial to the Court, Greece requested the Court for a declaration that it was competent to adjudge the dispute on the basis of the General Act for the Pacific Settlement of Disputes 1928 and the Statute of the International Court or on the basis of a communique issued by the two parties in Brussels. Turkey did not file any pleadings and did not take part in the oral proceedings but it wrote two letters objecting to the jurisdiction of the Court on the grounds that judicial proceedings were not warranted when negotiations were going on and that the dispute, if any, was "of a highly political nature." The Court affirmed that in previous cases even where the respondent had not communicated with the Court as to its attitude "the Court has proprio motu enquired into possible objections to its jurisdiction in the case."47 The Court substituted itself in the place of the absent respondent to argue the respondent's case to refuse jurisdiction in the matter. It has been remarked that Turkey was probably better off leaving the learned Court to present Turkey's case than to appear in person to challenge the jurisdiction of the Court.

On the reported occasions on which an ICSID tribunal has examined jurisdictional issues all have been the result of challenges by the respondent state parties except for the Alcoa and LETCO cases where the respondent state did not participate. In the AMCO case,48 the Republic of Indonesia objected to the jurisdiction of the ICSID tribunal on the grounds that (i) there was no consent to submit to ICSID jurisdiction in respect of any dispute between Indonesia and Amco Asia and between Indonesia and Pan American and (ii) Indonesia had not consented effectively to treat P.T. Amco, a locally incorporated company, as a United States national and alternatively (i) P.T. Wisma a state owned enterprise entity had not been designated to ICSID as an agency of the state and (ii) ouster of ICSID jurisdiction by a local court decision. The ICSID tribunal only addressed the jurisdictional issues raised by the respondent. Although the question of whether the dispute was in connection with an investment did not

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47 Ibid. at p. 18.
arise, the ICSID tribunal made reference to the Convention's Preamble and went on to say that "ICSID arbitration is a method of settlement which corresponds to the interests, not only of investors, but of the Contracting States as well."\(^{49}\)

To the tribunal in AMCO, the term "investors" meant nationals of a state other than the state recipient of the investment and ICSID as an arbitral institution is bound by the Convention to balance the interests of foreign investors and the host states.

Again, it would be useful to compare the practice of the International Court of Justice with that of ICSID. In the Anglo-Iranian Oil Co. case (United Kingdom v. Iran),\(^ {50}\) the Iranian Majlis and Senate had enacted legislative measures in 1951 to nationalize the oil industry which included the Anglo-Iranian Oil Company. In 1933, this British Company had been granted an oil concession by the old Imperial Government of Persia under a convention which provided for settlement of disputes by reference to binding arbitration. The United Kingdom's application to the international court called for a declaration of the duty on the part of the Iranian government to submit to arbitration. Alternatively, the application called for a series of declarations to the effect that the unilateral action of the Iranian government was invalid and to adjudge that the Iranian government should give full satisfaction and indemnity for their actions contrary to international law. The Iranian government objected to the jurisdiction of the Court on the grounds that the British government has based its case on treaties which are no longer in force and on exchange of notes which do not constitute a valid treaty or convention between the two states.

In ruling in Iran's favor, the Court held that it had no jurisdiction to hear the case submitted by the application of the British government and refused to deal with the other objections to jurisdiction and admissibility of the British claims. Sir Arnold McNair in an individual opinion appended to the judgement

\(^{49}\) Ibid., p. 368.

\(^{50}\) 1952 I.C.J. Reports 93.
of the Court was keen to stress as follows: "An international tribunal cannot regard a question of jurisdiction as a question inter partes".\textsuperscript{51} This means that, even if the parties submit themselves to the Court's jurisdiction, the Court must be satisfied independently \textit{proprio motu} that it has jurisdiction \textit{ratione personae} and \textit{ratione materiae} in regard to the case before it \textsuperscript{11}. Sir McNair went on: "The Court itself, acting \textit{proprio motu}, must be satisfied that any State which is brought before it \textsuperscript{...............} has consented to the jurisdiction".\textsuperscript{52} This could be interpreted to mean that the Court should act \textit{proprio motu} only in respect of the validity of the consent to submit to the jurisdiction of the Court and having established consent, jurisdiction as regards all other matters is left to the parties themselves. The better interpretation is that the Court or any international tribunal must be satisfied, independently of the submissions of the parties, that it has jurisdiction \textit{ratione personae} as well as \textit{ratione materiae}. Otherwise, parties who do not have \textit{jus standi} may seek audience and parties could submit disputes which are not legal in character and where ICSID is concerned disputes which do not also relate to an investment.

The decision by an international tribunal that it does not have jurisdiction need not always be taken as a preliminary question because the tribunal can decide as to whether to deal with a jurisdictional issue as a preliminary question or to join it to the merits of the dispute.\textsuperscript{53} Therefore, at any stage in the proceedings, an international tribunal would be able to discontinue the proceedings \textit{proprio motu} for lack of jurisdiction. Such provisions suggest that an international tribunal has a duty to ensure that it adjudicates only on matters which are within its jurisdiction as defined in a convention or treaty or statute or such instrument. Whereas the scope of the jurisdiction of a private arbitral body is determined by agreement between the parties who submit to the body's jurisdiction and the private arbitral body may consider itself competent and

\begin{itemize}
\item \textsuperscript{51} Ibid. p. 27.
\item \textsuperscript{52} Ibid.
\item \textsuperscript{53} ICSID Arbitration Rules, Rule No. 41(2).
\end{itemize}
continue to exercise jurisdiction even if there is some doubt under the original agreements between the parties so long as the parties to the dispute agree to continue to a final award, an international tribunal such as the International Court of Justice and ICSID must refuse to hear the case on the merits unless it is satisfied that it has jurisdiction *ratione personae* and *ratione materiae*.

(c) Jurisdiction Conferred by Convention not by Agreement

The submission to the jurisdiction of an international tribunal is a matter of agreement between the parties to a dispute but the competency of the tribunal to exercise jurisdiction *ratione personae* and *ratione materiae* is conferred upon the tribunal not by agreement of the parties to the dispute but by the convention, treaty, statute or such instrument that established the tribunal. In determining its competency under Article 41(1) of the ICSID Convention, the ICSID tribunal will be bound primarily by the provisions in the Convention and not by provisions in any agreement between the parties to the dispute as would be the case in arbitration proceedings administered by private arbitral bodies such as the ICC in Paris. Therefore, if the parties decide to submit a dispute which is not of a legal character or does not arise directly out of an investment, the ICSID tribunal must refuse jurisdiction. It does not possess any discretion whatsoever in its duty to refuse to hear the case. If it does hear the case, it will be acting in violation of the Convention that established ICSID. The jurisdiction of ICSID and the competence of an ICSID tribunal are derived from the ICSID Convention.

A distinction is made between the terms "jurisdiction" and "competence" in the ICSID Convention which in Article 41 speaks of "jurisdiction" in connection with ICSID\(^{54}\) and "competence" in connection with the ICSID tribunal. ICSID does not perform judicial or even quasi judicial functions. The term jurisdiction of the Centre is used to reflect the collective responsibility of the Centre as an administrative body and the ICSID tribunal which conducts the arbitral proceedings. This terminology is said to follow the precedent of the Hague Convention of 1907, establishing the Permanent Court of Arbitration, which refers to the 'jurisdiction of the Permanent Court, which like ICSID does

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jurisdiction is defined in Article 25 of the Convention in terms of the disputes arbitrable under the Convention and the persons who have locus standi. Submission to ICSID jurisdiction is voluntary. Competence is specific and is in relation to a particular dispute between identified parties and a tribunal has competence only if there is a valid arbitration agreement and the tribunal is properly constituted. Competency, therefore, is the capacity of the tribunal to exercise the general jurisdiction of ICSID in a particular case and make a final and binding award. The terms are, however, interchangeable.\(^{55}\) One wonders if the distinction was made deliberately to give power to the tribunal under Article 41(1) of the Convention to examine *proprio motu* only the question of competence in the narrow sense and that under Article 41(2) the question of jurisdiction is examined by the ICSID tribunal only if one party objects to the jurisdiction of ICSID on the ground that the dispute is not within the jurisdiction of the Centre meaning that the dispute is not a legal dispute or that the dispute does not arise directly out of an investment or that there is no valid consent.

Much has been written by distinguished writers on the flexible character of ICSID arbitration and on consent being the key to ICSID jurisdiction. It is easily forgotten in their enthusiasm to expand the scope of ICSID arbitrations that jurisdiction on ICSID is conferred by a Convention and consent is little more than an agreement to submit to ICSID under the terms of the Convention. Consent exemplifies the voluntary character of submission to ICSID but the terms of the consent must correspond with provisions in the Convention, namely, that the consent must be to the settlement of a legal dispute arising directly out of an investment. Moreover, the parties to the dispute must be a foreign national of a "Contracting State on the one part and a Contracting State (or any constituent subdivision or agency of a Contracting State) on the other part".

\(^{55}\) An scholarly analysis of the two terms in great detail is given in the dissenting judgement of Dr. Daxner, Judge ad hoc, in the Corfu Channel case (*United Kingdom v. Albania*), 23 I.C.J. Reports 15 (1952) at p. 39.
Consent by the parties is regarded very much as sacrosanct by the writers as well as ICSID and potential users of ICSID are advised to declare clearly in their arbitration clauses that disputes arising out of or in connection with their main agreement are legal disputes arising directly out of an investment. The parties should also identify themselves as one party being a foreign national and the other a state or a state subdivision or agency thereof with designating certificate in the case of a state entity. The presumption is that these consensual expressions confer jurisdiction on ICSID to arbitrate the disputes between the parties. The parties would be estopped from making challenges to ICSID jurisdiction where they have agreed that they meet the requirements of the Convention.

However, Article 41(1) of the ICSID Convention empowers the ICSID tribunal to determine its competence to (i) hear the parties and (ii) adjudicate upon the subject matter of the dispute between the parties and make an award. Good authority has been cited in the earlier paragraphs both from the practice of the International Court of Justice and ICSID to show that an international tribunal must enquire proprio motu as to its competence in the case of the non-appearing respondent party and satisfy itself that it has the jurisdiction and competence to deal with the parties (ratione personae) and the dispute (ratione materiae). Should it make a difference if both parties are present and neither challenges the jurisdiction and competency of the ICSID tribunal?

The issues relating to ratione personae will be the same whether the transaction, between a foreign national and a state or state subdivision or a state agency, is an international civil engineering contract or some other class of transaction. It is sufficient here to note that while the question whether a party to a dispute is a foreign national or not is left to agreement between that party and the state party concerned pursuant to Article 25(2)(b) of the ICSID Convention, based on the jurisprudence of the International Court of Justice and
the Permanent Court before it, there is support for the view that the question whether a body designated by the state as a state subdivision or agency is not a matter for agreement between the parties to a dispute. At a first stage, the ICSID Secretary-General must be satisfied that the request for arbitration is not "manifestly outside the jurisdiction of the Centre". The ICSID arbitration rules require that the claimant must in his request submit documentary evidence to the effect that the state party is a designated party by the state concerned. The evidence is subject to further scrutiny by the arbitral tribunal.

It is very clear that an international tribunal including an ICSID tribunal has powers to examine its own competence ratione personae and although it is not so expressed in the ICSID Convention, an ICSID tribunal must satisfy itself, if needs be proprio motu, regardless of consent, that the parties before it have locus standi under the Convention. It will be a clear breach of the Convention if an ICSID tribunal extended the jurisdiction to parties not covered by the Convention.

By the same token, an ICSID tribunal will be in breach of the Convention if it extended jurisdiction to any dispute other than a legal dispute arising directly out of an investment. Is a dispute arising out of or in connection with an international civil engineering contract a legal dispute arising directly out of an investment ?.

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56 "The first question to be considered is whether proceedings could be instituted by the four Governments above mentioned .........". Per the Court in the Case of the S.S. Wimbledon, 1 P.C.I.J. (1923) Series A 1 at p. 20.


58 ICSID Institution Rules, Rule 2(1)(c).
VI. ICSID and International Civil Engineering Contracts

Civil engineering contract forms usually provide for settlement by arbitration or other means of all disputes arising out of or in connection with the contract and relating to the carrying out of the civil works. Clause 67 of the FIDIC Conditions of Contract provides for settlement of disputes with an opening statement on disputes as follows:

"If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall..................

There is no reference to the dispute being a legal dispute but the dispute must be resolved under the contract and the applicable law except where the parties have agreed to a resolution ex aequo et bono. The law of the site of the works will also have some effects and may even prevail in some matters. Many disputes in civil engineering contracts relate to differences over factual matters and do not involve disagreements over questions of law. These disputes must necessarily be outside ICSID jurisdiction. Therefore, reference to ICSID may mean a necessary reference also to another arbitral body to determine questions of fact which are not linked to any question of law. Many of the differences over facts may be of a highly technical nature. So at a practical level a general approval for ICSID arbitration of civil engineering disputes may not be to the advantage of the parties to the dispute as they may have to resort to another forum in certain circumstances.

A more difficult issue, however, is whether ICSID has jurisdiction ratione materiae over disputes relating to a purely international civil engineering contracts. The World Bank Group’s incorporation of provisions for reference to ICSID as an appropriate arbitral body in the Group’s sample bidding documents
for civil works financed by the Group indicates that ICSID has been consulted and it has determined that it has general jurisdiction over international civil engineering contracts between a developing state or state entity and a contractor of foreign nationality. However, the actual practice of ICSID is not very clear from the cases that have come before ICSID tribunals. Indeed it is not known if a contract purely for the construction of civil works financed by the Bank Group has included provisions for ICSID arbitration.

A major part of the funding in investment projects is often applied to expenditures on the construction of civil works - roads, buildings, drains, oil platforms, earth works, mining, underground installations etc. - and associated works. A survey of the cases which have come before ICSID tribunals confirms that civil engineering works are invariably involved in a majority of the investments that led to the disputes. But the works are part of a network of activities with an entrepreneurial purpose which the state has identified as contributing to economic development. The projects were to be accompanied by a transfer of foreign exchange to the host state and the investor to have a stake in the outcome of the project.

(a) ICSID Cases Involving a Civil Engineering Element

The first request for ICSID arbitration in 1972, the Holiday Inns Case, involved the construction of four hotels in Morocco under a scheme put together by Occidental Petroleum Corporation and the Holiday Inns Group. The scheme called for government loans to finance the construction and a package of incentives from the government consisting of bonus payments, foreign exchange transfer facilities, exemptions from duties, tax benefits and land at no cost. The joint venture would construct and afterwards operate the hotels the title to which will be given to the joint venture. The joint venture will employ its own

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contractors to execute the civil works. The government transactions and agreements were only with the joint venture and not with any civil engineering or building contractor. The government’s interest was only in having a famous hotel group like the Holiday Inns to have a presence in the country because the government saw it as helping the tourist industry. In passing it may be noted that it is kind of bizarre that a government should approach an oil company to help the country to develop its hotel and tourism industry.

It must have been evident to all parties concerned at the inception that the funds for the project were to be raised locally and that there was to be no "private international investment" other than the know-how of the American Hotel Group. There was to be no flow of foreign private capital which the founders of the Convention contemplated. The government of Morocco changed hands when two of the four hotels had been constructed and its review of the agreements entered into by the previous government led to the disputes with the joint venture. The points here are that most of the investment funds were expended on civil works and that the foreign investment consisted of know-how only. From the information available from unofficial sources it is clear that the ICSID tribunal did not address itself to the fact that the investment did not involve any infusion of foreign private capital although other jurisdictional matters arose during the proceedings and the government had alleged that the hotel group had failed to provide any investment of its own. The tribunal also did not comment on the fact that the letter of intent preceding the web of agreements to carry out the venture provided for arbitration under the Rules of the International Chamber of Commerce in Paris.

Other cases that followed involved civil engineering works of one kind or another - a factory to produce fibers for export in Ivory Coast, bauxite mining

60 P.Lalive, op. cit. note 32.

61 Societe Adriano SpA v. Government of Cote d'Ivoire (ICSID Case No. ARB/76/1).
in Jamaica\textsuperscript{62}, construction of a maternity award\textsuperscript{63}, oil exploration in the Congo\textsuperscript{64}, factory for the production of plastic bottles also in the Congo\textsuperscript{65}, hotel construction in Indonesia\textsuperscript{66} and Egypt\textsuperscript{67}, construction of a fertilizer plant in Cameroon\textsuperscript{68}, housing construction in Senegal\textsuperscript{69}, an aluminium smelter in Iceland\textsuperscript{70}, tourist and holiday resort projects in Tunisia\textsuperscript{71} and so on. Indeed, one would be hard put to find many investments that do not have a civil works component but all the disputes were unconnected to the execution of the civil works.

A majority of the cases involves complex contractual arrangements with the governments consisting of an original basic agreement between the governments and the foreign "investor" followed by several subsidiary agreements made contemporaneously or afterwards between the foreign "investor" and other parties usually created for the purpose of executing the scheme or project. Occasionally, the parties were in the process of gestation. The potential for

\begin{itemize}
  \item Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica (ICSID CASE No. ARB/74/2) and two other cases, ARB/74/3 and ARB/74/4.
  \item Government of Gabon v. Societe Serete S.A. (ICSID CASE No. ARB/76/1).
  \item AGIP SpA v. Government of the People's Republic of the Congo (ICSID CASE No. ARB/77/1).
  \item Societe Ltd. Benvenuti & Bonfant srl v. Government of the People's Republic of the Congo (ICSID CASE No. ARB/77/2).
  \item Amco Asia Corporation and others v. Republic of Indonesia (ICSID CASE No. ARB/81/1).
  \item Southern Pacific Properties (Middle East) Limited and SPP (Hong Kong) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3).
  \item Klockner Industrie-Analagen GmbH and others v. United Republic of Cameroon and Societe Camerounais des Engrais (SOCAME) (ICSID CASE No. ARB/81/2).
  \item Societe Ouest Africaine des Betons Industriels (SOABI) v. State of Senegal (ICSID Case No. ARB/82/1).
  \item Swiss Aluminium Limited (ALUSUISSE), Icelandic Aluminium Company Limited (ISAL) v. Government of Iceland (ICSID Case No. ARB/83/1).
  \item Dr. Ghaith R. Pharaon v. Republic of Tunisia (ICSID Case ARB/86/1).
\end{itemize}
trouble down the road in some cases is quite obvious. Professor Pierre Lalive complained in one of his papers that "it may be recalled that top negotiators, whether acting for governments or for multinationals, have frequently little patience with legal niceties; they are apt to limit the task of their legal staff to one of 'putting into form' the bargain which has been struck by superior minds." 72

The Amco Case 73 involved a fairly straightforward contract between an Indonesian State Corporation (P.T. Wisma) and an American Company (Amco Asia Corporation) to complete the construction of a hotel and to undertake its management for a limited period under a profit sharing agreement. The state corporation would own the hotel and Amco would disappear when the profit sharing agreement terminated and Amco had recovered its total investments plus a reasonable return. Although many complex legal issues were involved, the contract with Amco involved the construction of civil works to be financed partly out of a subsequent lease and management contract including profit sharing - substantially, civil works executed under a contractor-financed project which is quite common in major civil engineering projects. Here also it is strange that an oil company should have been approached to build and operate a hotel and there was no question of a transfer of foreign exchange to Indonesia.

The SOABI case 74 is the closest to a regular civil engineering contract but here again the civil works were a part, albeit substantial, of an entrepreneurial activity in Senegal on the part of the foreign national. In that case, the dispute related to a contract between SOABI a locally established company under foreign

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72 P. Lalive, op. cit. note 32 at p. 129. It is more likely that the parties involved accept the legal risks, the government on political considerations and the foreign investor on commercial grounds.

73 Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia (ICSID Case No. ARB/81/1).

74 Societe Ouest Africaine des Betons Industriels (SOABI) v. State of Senegal (ICSID Case No. ARB/82/1).
control and the Senegalese Government for the construction of 15,000 houses. The objective was not the construction of a fixed number of houses but for SOABI to establish a precast reinforced concrete factory to manufacture components for prefabricated housing generally under terms contained in a so-called Establishment Agreement which provided for ICSID arbitration of disputes. Two other agreements one concerning the construction of the 15,000 houses had preceded the Establishment Agreement. Those agreements did not provide for ICSID arbitration and the dispute arose over the termination of the agreement to construct the 15,000 houses. The government objected to ICSID jurisdiction on the ground that the ICSID arbitration applied only to the Establishment Agreement.

Although the ICSID tribunal rejected the government’s contention and proceeded with the hearings which related to the construction of the houses, the tribunal based its competence on the ground that the agreement to construct the 15,000 houses was subsumed in the wider Establishment Agreement for the establishment of a precast reinforced concrete factory and held that the dispute fell within the scope of the arbitration clause in that agreement. The tribunal remarked that the establishment of the factory was a first phase of a larger project that included the construction of the houses. In other words, the tribunal did not view the project as the execution of a contract for the construction of civil works.

While most projects involved some capital outlay on the part of the foreign party in the SEDITEX case, SEDITEX was party to a purely management contract of a cotton mill. SEDITEX case was referred to ICSID conciliation. In

75 "Comme on l’a d’ailleurs reconnu, pour le Gouvernement les parties y ont défini ‘la totalité du projet que’elles envisagent d’exécuter conjointement’, a savoir la construction d’une usine de préfabrication dans une première phase suivie de la construction de 15,000 logements dans une seconde phase, et pour la SOABI ‘la construction de l’usine de préfabrication constituerait la réalisation de la première phase de ce projet de construction des 15,000 logements.’ See 6 ICSID Rev.-FILJ 125 (1991) at 145.

76 La SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Government of the Democratic Republic of Madagascar (ICSID Case No. CONC/82/1).
the Colt Firearms Case\textsuperscript{77}, the dispute was actually over technical assistance and licensing agreements for the manufacture of weapons. Details of these two cases have not been published and, therefore, it is difficult to make a judgement as to whether the involvement of the foreign national partook that of an investment but the term investment has been broadly or rather loosely interpreted by ICSID so as to include a transfer of technology between a private company and a state of which the company is not a national under a technical assistance contract for which the foreign national was paid. Moneys may actually flow from the state to the private party of foreign nationality\textsuperscript{78} and the investment may not contribute to economic development such as the financing of the manufacture of firearms. Management and technical assistance contracts have a special feature in common with traditional investments in that their performance is measured by the success of the project and, therefore, in that sense the foreign national can be said to have a stake in the outcome of the project. If the project does not yield a satisfactory return, the foreign nationals run the risk of having their contracts not renewed or under extreme circumstances having their contracts terminated as in Klockner.

Nothing in the travaux préparatoires suggests that by leaving out the definition of the term ‘investment’ the founders of ICSID intended to bestow on the Centre jurisdiction \textit{ratione materiae} without limits and the question may be asked as to where the lines should be drawn to set the limits to ICSID jurisdiction. Consent is a factor but in itself cannot set the limits of ICSID jurisdiction because under the Convention the consent must be to a legal dispute arising out of an investment. Otherwise, mere consent as a determinant of the question of jurisdiction will open ICSID to all kinds of disputes including non-legal ones. In as much as an ICSID tribunal must exclude, as not falling within

\textsuperscript{77} Col\textit{t Industries Operating Corp. Firearms Division v. Government of the Republic of Korea} (ICSID Case No. ARB/84/2),

\textsuperscript{78} Compare Article 12 of the Convention Establishing the Multilateral Guarantee Agency (also under the auspices of the World Bank) of 11 October 1985, which gives a narrower definition of investment meaning direct investments in a host country involving transfer of foreign exchange.
its competence, a dispute which is not a legal dispute, an ICSID tribunal must exclude a dispute which does not arise directly out of an investment. That an investment is difficult to define as compared to the legal character of a dispute is not an argument to suggest that an ICSID tribunal should allow the parties to decide whether a dispute is an investment dispute or not but not as to whether a dispute is a legal dispute or not.

In an article written by the General Counsel of the World Bank and the first Secretary-General of ICSID soon after the Convention came into force, he acknowledges the concerns of the member states of the Bank for whose benefit ICSID was established. He remarks that "It is therefore understandable that in agreeing to the creation of this new international procedural framework, states and, in particular, the capital importing states were careful to insist on a delineation of its scope." Although consent is an indicator of a Contracting State's acceptance of a transaction with a foreign national as an investment and therefore consent and the requirement of an investment dispute could be "merged", the General Counsel was careful to confirm that even though "the parties' agreement will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling". That means the ICSID, presumably, the ICSID Secretary-General and the tribunal when constituted must be satisfied that a dispute arises directly out of an investment for ICSID to have jurisdiction and the tribunal to have competence to hear the dispute and make an award.

Although as pointed out in the preceding paragraphs, no dispute to date which relates to a purely civil engineering contract has been submitted to ICSID arbitration, the fact that the World Bank Group has approved the use of ICSID for the resolution of disputes in international civil engineering contracts signals


80 Ibid at p. 268.
the view of the Group, which includes ICSID, that an international civil engineering contract is an investment. Therefore, a request to ICSID for the arbitration of a dispute arising directly out of the contract will be accepted by the Secretary-General of ICSID as not being 'manifestly outside the jurisdiction of the Centre'. The argomento of this Thesis is that an ICSID tribunal will be acting in breach of the Convention if the tribunal decides that it is competent to hear the merits of the dispute and make a final award. Moreover, the Thesis argues that ICSID is not an appropriate forum for the resolution of disputes in international civil engineering contracts.

(b) Free Standing International Civil Engineering Contracts

As pointed out earlier in this chapter, international civil engineering contracts can be regarded as a commercial sale of goods and services. The contractor provides materials, plant and manpower to construct civil works - roads, bridges, dams, structures etc. His contract stipulates a contract sum and generally he is given by his employer an advance representing about 10 to 20% of the contract sum to finance his mobilization costs. Although he is paid usually on a monthly basis for quantities of finished work at unit prices agreed between him and the other party to the contract, the parties may agree to payment separately for materials, plant and manpower or on other terms. Manpower will consist of labor, artisans, technicians, engineers and other professionals and managers. Because the execution of civil works take time, the contract may go on for many months or even years but the payments to him up to the contract sum are guaranteed. He constructs for profit and at the end of the contract he repatriates his plant and foreign personnel and his profit. All his estimated costs including the use of his plant and employment of his foreign personnel and financing costs, if any, are subsumed within the contract sum. Is the contractor making an investment in his host country?

The foreign contractor usually would have won the contract in an international bidding process for which he would have been pre-qualified. He has
made a commercial sale of his goods and services. He enters the host state after the award of the contract for the construction of the civil works for the purpose of executing that particular contract. While he is working on one contract he may be bidding for other contracts in the same state and he may even decide to operate in the state through a local subsidiary. In which case he will be starting an entrepreneurial activity. He is an investor and his profits will depend on the success of his venture in winning other contracts in the host state as a contractor. He will be protected by the host state's treaty if any and will have access to ICSID arbitration if the state has so provided in its laws and treaty but his contract for the construction of the civil works is a commercial sale and not an investment. One can draw an analogy with a foreign national who comes into a country, for example, to set up an electronics factory. That is an investment which can qualify for ICSID arbitration of disputes which may arise directly out of the investment in the factory but his contracts for the sale and servicing of television sets to state schools are not investments -they are mere commercial sales falling outside ICSID jurisdiction but, under the rule in SOABI which is questionable, if the foreign national has signed a protocol of agreement or an establishment agreement with the state including an ICSID arbitration clause to set up the factory and to furnish the state schools with 10,000 television sets in a second phase of the project under a separate agreement that agreement also may be considered as falling within the scope of the ICSID arbitration clause. Surely, the contracts of sales and service of television sets after this - there could be several hundred sales agreements - must be outside the scope of the original ICSID arbitration clause.

In SOABI, the Government of Senegal objected to the jurisdiction of ICSID over the termination of the contract for the construction of 15,000 houses on the ground that this contract fell outside the scope of the ICSID arbitration clause in the Establishment Agreement between the Government and SOABI for the establishment of the precast reinforced concrete factory. Yet the ICSID tribunal held that the contract for the construction of the houses was subsumed within the Establishment Agreement and proceeded to hear the dispute and make
an award. It is apparent that the Government did not view the construction contract as part of the investment agreement for the establishment of the components factory. As has been discussed in preceding chapters, the position taken by Senegal reflects state practice that an investment generally means a capital financial contribution or the provision of skills and know-how as part of business enterprise in which the foreign national has a direct or indirect stake.

The problem associated with attributing the character of an investment to a civil engineering contract can be illustrated with the position of a locally registered contractor under foreign control. He is bidding for state contracts in response to tender notices and when he wins a contract it is a commercial sale of his goods and services. It would be inconceivable that every one of the contracts he signs will be eligible for ICSID arbitration, say, because his business as a contractor is interpreted by ICSID as protected by the state as an investment under its foreign investment laws or a bilateral treaty providing for ICSID arbitration. His contracts with public and private agencies to construct civil works will be mere commercial sales of his goods and services and outside the meaning of an investment because the contracts represent the contractor's day to day activities for which he is paid a contract sum without regard to the financial or economic outcome of the civil works. It is difficult to imagine that the founders of the ICSID Convention intended ICSID to exercise jurisdiction over disputes arising out of these contracts. To hold otherwise would mean that, provided, the state consents, ICSID could conceivably have jurisdiction over every commercial transaction in a state involving a foreign national. Is it tenable to suggest that ICSID is just another arbitral body?

81 "It is entirely possible that the [ICSID] conciliators and arbitrators will adopt a liberal definition of investment in order to open the Centre’s doors to a wide range of important international agreements. Nearly all international commercial transactions, except for cash sales of goods, involve the commitment, or investment, of cash or capital assets in the foreign state for some period of time". Per Michael M. Moore, International Arbitration between States and Foreign Investors - The World Bank Convention, 18 Stan. L. Rev. 1359 (1966). Had this been put in these terms to the member states of the World Bank at the time of drafting the ICSID Convention, the member states may have disagreed.
The Government's position in SOABI probably sets the markers to limit the jurisdiction of ICSID in investment projects that involve civil works. ICSID jurisdiction should only be extended to cover the contractor as a business entity in the business of executing contracts for the construction of civil works. The eligibility of disputes arising out of the business as a contractor should be distinguished from disputes arising out of a civil engineering contract in the ordinary course of business. The ICSID tribunal in that case held that it has competence to hear the dispute arising out of the construction contract although the contract itself did not provide for ICSID arbitration. Only future decisions will enable the deduction of any general rule as to the eligibility of purely civil engineering contracts for ICSID arbitration but for the present it is safe to say that where, however, the establishment of the business of contracting is closely connected with the execution of a discrete construction contract as in the case of SOABI, that contract only and no other will be caught by the provision for ICSID arbitration in respect of disputes arising out of the establishment of the business. To extend jurisdiction over civil engineering contracts generally would be a breach of the ICSID Convention.82

The contractor may well say that he will operate his business as a contractor within the state only if the host state agrees to have an ICSID arbitration clause in every contract he signs with the state or a state agency. This would be tantamount to saying that all foreign nationals engaged in business activities in a state will be able to enjoy ICSID jurisdiction in respect of every contract they enter into with the host state or one of its agencies provided the state consents. Then the question, one has to ask is whether ICSID is a superior

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82 But see Amerasinghe: "Also a construction contract where the duration involved is a period of years and involves the transfer of capital resources for profit would very well qualify for inclusion as an investment." in 19 Indian J. I. L. 166 (1979) at p. 181. A different argument is advanced by Delaume to justify inclusion of purely civil engineering contracts in ICSID arbitration: "The State’s viewpoint ought to be given at least the same, if not more, importance. To illustrate the point, the supply of services by a contractor for the building of a dam may not accord, on the contractor’s side, with traditional notions of ‘investment’, even though the work involved may stretch over several years and require for the period the immobilization of manpower and equipment, not to mention credit facilities. However, from the host State’s viewpoint may constitute a vital ‘investment’ contributing to the development of its economy ........." in 1 J. Int’l Arb. 101 (1984) at p. 117.
arbitral body competing with private arbitral bodies as well as local courts or is it to serve a special purpose - to encourage private capital inflow - by focusing on disputes arising out of investments as ordinarily understood?

The Secretary-General of ICSID is obviously prepared to accept requests for ICSID arbitration of disputes arising out of international civil engineering contracts and advance notice to this effect has been given to member states of the World Bank Group and civil engineering contractors established in those states in the sample bidding documents published by the Group. Provided, the parties have been properly identified, there is evidence of consent to ICSID arbitration and a declaration is made by the claimant that the dispute is a legal dispute arising directly out of an investment, the ICSID Secretary-General considers himself bound to register the arbitration request and take steps to commence pleadings and convene the arbitral tribunal. The question as to whether the Centre has jurisdiction and the ICSID tribunal is competent to hear the merits of the dispute and make an award will be determined by the tribunal.

The decision of the ICSID tribunal may depend on whether all or some members of the tribunal were appointed by the Chairman of the Administrative Council of ICSID who is also the President of the World Bank or whether the members of the tribunal were appointed by the parties themselves. The ICSID Secretary-General maintains a Panel of Arbitrators consisting of four persons designated by each Contracting State and ten nominated by the Chairman. It is difficult to imagine that those arbitrators appointed by the system will not uphold

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83 The Screening Power of the ICSID Secretary-General, 2 News from ICSID, No. 2, at 10 (1985).

84 ICSID Convention Art.38: If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been despatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.
the system and not support the view that international civil engineering contracts fall within the jurisdiction of ICSID.

If the tribunal decides it has no jurisdiction over disputes arising out of civil engineering contracts the arbitration clause in the contract for ICSID arbitration will fail and the parties either have to reach a compromis for arbitration of the dispute elsewhere or litigate in the local courts. Neither course of action will be an easy and pleasant one when the parties are in dispute. The parties may be able to sue the World Bank for damages for misrepresenting that ICSID has jurisdiction over international civil engineering contracts. If the tribunal accepts jurisdiction, the Thesis argues that it will be in breach of the Convention although it is clearly within a tribunal's powers to interpret the Convention wrongly so long as it does it in good faith. One remedy lies in the powers of the ad hoc committee to throw out the award in annulment proceedings on the ground that the tribunal has manifestly exceeded its powers. However, the ad hoc committee which is appointed by the Chairman of the Administrative Council of ICSID is more likely to support the system and uphold the tribunal's award.

VII. Interpretation of the ICSID Convention

The interpretation of treaties and conventions has no universally accepted theoretical basis apart from the acceptance by a limited number of signatories to the Vienna Convention on the Law of Treaties85 which combines the three commonly articulated approaches to the interpretation of treaties: so-called the objective (textual ordinary meaning) approach,86 the subjective (intention of the

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85 Art. 31.

86 Called the South African approach following South Africa's submissions to the International Court of Justice in the South-West Africa Advisory opinions and judgements. See R.P. Schaffer, Current Trends in Treaty Interpretation and the South African Approach, 7
parties) approach and the teleological (object and purpose) approach. Besides, the three schools of interpretation there are those who believe that treaty provisions should be interpreted so as to prevent a failure in application of the provisions and those who believe that subsequent conduct of the parties to the treaty should give an interpretation its validity. To the so-called New Haven School, the travaux préparatoires are valid sources for interpretation of treaty provisions because they present the ‘genuine shared expectations of the parties subject to overriding community policies’. There is also the question whether the interpretation should be restrictive or extensive. Even those states applying the Vienna Convention rules could disagree on the interpretation in any particular case because, in the final analysis, each interpreter will be driven by its own self interest and apply the rule of interpretation most advantageous to it.

(a) Rules of Interpretation Applicable to the ICSID Convention

There are six parties directly or indirectly involved in an ICSID arbitration of a dispute arising out of a civil engineering contract: (i) the World Bank Group, including ICSID, which has provided in its sample bidding documents for ICSID arbitration in international civil engineering contracts financed by the Bank Group, (ii) the ICSID Secretary-General who accepts a request for ICSID arbitration, (iii) the ICSID tribunal, (iv) the State party to a dispute, (v) the foreign contractor, (vi) the Home State of the contractor, and (vi) the State, where the award is to be enforced.

By giving a wide interpretation to the meaning of the term "investment" to include civil engineering contracts, the World Bank Group on behalf of ICSID

87 Attributed to Sir Hersch Lauterpacht, Judge of the International Court of Justice.

has, in effect, designated a class of disputes which the contracting states are invited to consider for submission to ICSID arbitration. Normally, under Article 25(4) of the Convention a contracting state may at the time of ratification indicate the class or classes of disputes to submit to ICSID. The promotional effort on the part of the Group to find work for ICSID suggests that (i) ICSID has unused capacity and the Group would like its member states to make more use of ICSID facilities, or (ii) the Group is aware of the practice among contracting states not to regard a civil engineering contract as an investment for purposes of the ICSID Convention and the Group is therefore trying to give a meaning to investment not held originally by the founders of the Convention or (iii) ICSID is deviating from its original purpose and going into the business of commercial arbitration in competition with other arbitral bodies to capture work for itself.

Although it may be argued that the World Bank Group's objective in promoting ICSID is to offer foreign contractors a superior arbitral facility it was not felt at the time of the intensive consultations for the drafting of the ICSID Convention that there was indeed any problem with existing private arbitral facilities to deal with construction contract disputes but, on the other hand, it was felt unanimously that a facility was needed specifically to encourage the flow of private foreign capital into developing states. In an unusual step for an international judicial organ and, more so, for the administrative or executive officers of an international judicial organ, ICSID administration is giving, sua sponte, an interpretation of the meaning of the term 'investment' not envisaged at the time of the founding of ICSID and, thereby, attempting to pre-empt the

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89 The Executive Directors of the World Bank in seeking the approval of the Board of Governors for the establishment of ICSID make the following statement in their report to the Governors: "The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it." See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, page 4.
decision of ICSID tribunals on jurisdiction issues and to enlarge the scope of ICSID jurisdiction through inadvertent general acceptance by the member states.

A public international organization, even though primarily established by a consensus of states to achieve a specific object and purpose of interest to the states, in regulating the relations between states and between states and the organization itself to achieve that object and purpose the organization must inevitably perform a law making role in the interpretation and application of the convention to which the states are signatories. Therefore, a mechanism must be available under the charter or articles of agreement or other instrument of formation of the organization to make a binding interpretation of the provisions of such instruments. Usually, too, provisions are made in the instruments for their review and amendment. Although interpretation and the process of amendment and modification can be confused for one another yet interpretation and process of amendment are separate and distinct functions. Public international organizations through the process of interpretation and amendment make a substantial contribution to the development of rules of international law. ICSID is no exception and has a vital role to play in the development of rules of international law particular in the development of rules of international economic law to regulate international economic relations.

The World Bank originally consisted only of one body called the International Bank for Reconstruction and Development (IBRD). It was established in 1945 together with the International Monetary Fund (IMF) under the so-called Bretton Woods Agreements.\footnote{The Articles of Agreement of the IMF and IBRD came into force on December 27, 1945.} In 1956, the International Finance Corporation was established came to be established under separate Articles of Agreement followed by the International Development Association in 1960. All four international agreements contained detailed provisions for binding
interpretations of their basic agreements in-house. They are very comprehensive and provide for final binding interpretation of their respective constitutions.

In addition to the provisions in the articles of agreement of the four organizations, the General Assembly of the United Nations by the resolution of November 14, 1947 recommended that the specialized agencies of the United Nations System such as the IMF and the three institutions of the World Bank Group described above consult with the International Court of Justice for its advisory opinion on difficult questions of law relating to the constitutions of the agencies concerned. Thus there are ample provisions in the United Nations System for the institutions of the World Bank Group to have authoritative interpretation of their articles of agreement but the final and binding interpretations rest with the agencies themselves.

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91 Article IX of the Articles of Agreement of the IBRD reads as follows:

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank [IBRD] or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director, it shall be entitled to representation in accordance with Article V, Section 4(h).

(b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

(c) Whenever disagreement arises between the Bank and a country which has ceased to be a member, or between the Bank and any member during the permanent suspension of the Bank, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Bank, another by the country involved and an umpire who, unless the parties otherwise agree, shall be appointed by the Permanent Court of International Justice [now the International Court of Justice] or such other authority as may have been prescribed by regulation adopted by the Bank. The umpire shall have full power to settle all questions of procedure in any case where the the parties are in disagreement with respect thereto.

Similar provisions are provided in Article XVIII of the IMF Agreement and Article VIII of the IFC Agreement.

92 General Assembly Regulation No. 171-III.
Unlike the constitutions of the other members of the World Bank Group, the ICSID Convention does not contain provisions for final and binding interpretation of the Convention. And since ICSID is not a specialized agency of the United Nations it cannot refer questions of interpretation to the International Court of Justice for an advisory opinion either. This is not surprising when one considers that ICSID Convention is similar to the Statute which established the International Court of Justice. The Convention like the Statute of the Court governs the work of a judicial institution. Although the Statute of the International Court does not have provisions for interpretation of the Statute, the Court Secretariat is part of the Court itself which will be directing the Secretariat as to its administrative functions and interpreting the provisions of the Statute for this purpose. Therefore, there is no question of the Secretariat of the Court interpreting the Statute. Whereas the International Court is a permanent body, the ICSID tribunal is appointed only following a request for arbitration and is constituted for that particular case. The ICSID Secretariat must be regarded as a body separate from the ICSID tribunal and its powers of interpretation of the Convention, for purposes other than those conducting its day to day routine functions, must be limited to interpretation in the course of the exercise of the screening function by the Secretary-General in regard to requests for arbitration by the Centre.

As has been discussed above, any judicial element in the Secretary-General's function was deliberately excluded during the consultative process to draft the Convention and it would, therefore, be reasonable to assume that he will be exceeding his powers if he interpreted the meaning of investment by specifying in advance a class of disputes such as those arising out of international civil engineering contracts as falling within the jurisdiction of the Centre. That question is for the properly constituted ICSID tribunal to determine on a case by case basis. Although the ICSID Convention unlike the Articles of Agreement of the IBRD, IDA, IFC and IMF, does not include specific provisions in regard to powers of interpretation of the Convention, the Convention has provided for the amendment of the Convention by motion of any contracting state which
amendment must however receive the approval of all the contracting states to be effective.\textsuperscript{93} The proper course for any special interpretation of provisions in the Convention tantamount to a change in the original purpose of the Convention is to pass an amendment.

(b) \textbf{Interpretation Acceptable to States other than the Host State}

While the World Bank, ICSID, parties to a dispute and an ICSID tribunal may agree on the wide interpretation given by ICSID administrators to classify a civil engineering contract with a foreign contractor providing for an advance payment and interim payments within 30 days of submission of monthly certificates of completed works as a foreign investment, the home state of the contractor may disagree when, for example, the host state seeks to enforce an ICSID award in its favor in the home state of the contractor. Although the home state is bound to enforce the award pursuant to Article 53 of the Convention, the home state might argue that ICSID's interpretation of an international civil engineering contract as a foreign investment is in contravention of the Convention and a dispute between the two states would thereby arise concerning the interpretation or application of the Convention by ICSID and the parties involved. Article 64 of the Convention provides for resolution of such disputes between contracting states by reference to the International Court of Justice.\textsuperscript{94} In a matter of contravention of the Convention, Article 64 must surely have precedence over Article 53.

The same issue may crop up where the host state seeks to enforce an ICSID award in its favor in a third state. That state may also contend that a

\textsuperscript{93} ICSID Convention, Arts. 65 and 66.

\textsuperscript{94} Article 64 reads as follows: 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 the application of any party to such dispute, unless the States concerned agree to another method of settlement.
dispute in a civil engineering contract is not an investment dispute and decline to enforce the award within its jurisdiction. The host state will be forced to have recourse to the International Court of Justice to determine the proper interpretation of the term investment in the ICSID Convention under Article 64 of the Convention. This is probably where the strong arm of the World Bank comes into play to pressure the state into enforcing the award by threats of not lending any more to the defaulting state. But if the third state is a so-called Part 1 country member of the World Bank, no similar pressure can be applied because a Part 1 country state is not eligible to borrow under the Bank rules.

In this regard, therefore, a contractor may be said to be in a better position under the Convention to enforce an ICSID award in its favor than a state. Both the host state and a third state must enforce the award even if they disagree with the interpretation given to the term investment by an ICSID tribunal. Pursuant to Article 53 of the Convention a contracting state must recognize an ICSID award and enforce its monetary obligations as if it were a final judgement of a court in that state. There is no provision in the ICSID Convention for the resolution of disputes between a foreign investor and a contracting state other than the host state over matters of interpretation of the ICSID Convention and, therefore, such a state must comply with the provisions in the ICSID Convention in regard to enforcement of ICSID awards.

(c) Non-Acceptability of a Wide Interpretation of the ICSID Convention

Every state is bound to apply the interpretive norms of a convention or treaty most favorable to its interests but the basic rule in international law is that a state

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cannot interpret so as to enlarge unilaterally its rights under the treaty.\textsuperscript{96} However, an international organization is expected to apply the interpretive norms of the multilateral convention that established the organization in the common interests of all the states and not the interests of the organization as such, its personnel and managers and the organization cannot expand unilaterally its rights under the convention to enlarge the scope of its duties and change the nature of its role.

The enlargement of the scope of ICSID jurisdiction to include international civil engineering contracts \textit{per se} will inevitably result in ICSID tribunals assuming jurisdiction over any legal dispute arising out of any project financed by the World Bank Group and the only explanation for such a move is the desirability in the view of the World Bank Group to provide an arbitral facility in-house for all projects financed by the Group. Using its lending facility as a leverage, member countries of the World Bank could be influenced into incorporating ICSID arbitration provisions as standard practice in all contracts in Bank-financed projects. Despite the convenience and some merit in this movement, there is the practical matter of involving ICSID in the settlement of disputes which are usually highly technical. Disputes in engineering issues will require special expertise which is not currently possessed by the panel of arbitrators approved by ICSID and those nominated by the contracting states. Besides, disputes can be of a purely or predominantly factual and technical in nature in which case it may well be argued that the disputes do not fall within the jurisdiction of ICSID.

Most construction claims are based on differences of opinion over what constitute adverse physical conditions and artificial obstructions, clarification of engineering drawings and design, correction of errors in bills of quantities, costs

\textsuperscript{96} "A State is not entitled to extend its rights under a treaty simply by asserting a more expansive interpretation than justified by the wording of the instrument". per Greig, \textit{The Interpretation of Treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty}, 6 Australian Yearbook Int'l L. 77 (1974-75) 94.
of testing, costs of miscellaneous works, adjustment of rates for variation in quantities and character of works and final measurements. Disputes that follow do not arise from breaches of the contract involving necessarily questions of law but under provisions in the contract itself.

Despite the original intention to create an autonomous arbitral body independent of the World Bank and despite the assurances given to member states that reference to ICSID arbitration would not place them in any worse position vis-a-vis the Bank than resort to other arbitral institutions, the trend seems to be towards a close relationship between ICSID and the Bank. If parties to a dispute in Bank-financed projects submit to ICSID arbitration, they may be less reluctant not to call upon Bank technical staff involved in those projects to give testimony before ICSID tribunals. Bank staff may be called upon to play a role, similar to the days before the establishment of ICSID when disputes were mediated by the President of the World Bank, which, inter alia, led to the creation of ICSID.97

The employment by ICSID of Bank technical staff to assist ICSID arbitral tribunals in dealing with technical and financial matters may also be not entirely excluded. The involvement of Bank staff in ICSID proceedings may affect their own relations with member states and reduce their effectiveness in those states. Even if the involvement of Bank staff is prohibited it would be wholly unrealistic to suggest that the arbitral tribunal can be insulated from the views of Bank staff in the projects that caused the disputes. Details of major disputes are public knowledge within the Bank. Often, the Bank executive director representing the state of nationality of the contractor, usually a Part I country, would have intervened and Bank staff is directly or indirectly pressured into taking actions to satisfy the executive director. In these circumstances, it would be difficult for an ICSID tribunal to be seen to be impartial and be seen to do justice in those cases.

97 The Anglo-Iranian dispute over the nationalization of the Anglo-Iranian Oil Corporation by Iran and the Indo-Pakistan dispute over sharing of the waters of the Indus River. See Chapter Four above.
ICSID may be accused of being another instrument in the hands of the developed countries to dominate the developing countries. ICSID's future as a judicial institution would be in jeopardy.
Chapter Nine

ROLE OF ICSID IN THE DEVELOPMENT OF RULES OF INTERNATIONAL ECONOMIC LAW

I. Special Aspects of International Arbitrations

During the period between 1962 and 1964 when consultations were being made among member states of the World bank to establish ICSID, there were many private arbitral institutions around the world and some of them such as the ICC, founded in 1923, had experience in dealing with disputes between states and state entities and foreign nationals but mostly, however, the arbitral institutions dealt with routine contracts of a commercial nature including large civil engineering contracts. Ad hoc so-called mixed commissions to settle disputes between states were common since the Jay Treaty of 1794 to recover debts owed to British merchants by US citizens and residents. Numerous such arbitrations took place in the early part of this century involving disputes between states in matters relating to state actions connected with revolutions and wars resulting in injury to foreign citizens and enterprises. The proceedings of some of these tribunals went on for several years. Even as recent as 1981, the Iran - U.S. Claims

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1 A study made in 1976 showed that about a third of ICC arbitrations involved a state or state entity. It is said to be less now. See W. Laurence Craig, William W. Park and Jan Paulsson, International Chamber of Commerce Arbitration, Oceana, New York, 1990 at p. 8. In the statistics published annually by ICC in the Journal Droit International, state parties are not distinguished from others.


3 The Mexican Claims Commissions, 1923-1934.
Tribunal\textsuperscript{4} was set up to deal with the return of Iranian assets and deciding on claims from nationals of either country arising out of the disruption of normal relations between the two countries following the taking of US hostages by Iran in 1978 and the last award was made in 1993.

(a) Evolution of Mixed International Arbitrations

These arbitrations at international level have political and diplomatic aspects which do not normally occur in disputes between states arising out of commercial and economic relations involving private citizens and enterprises. Many arbitrations also took place under the auspices of the Permanent Court of Arbitration\textsuperscript{5} and some disputes were litigated in the International Court of Justice following establishment of that court in 1944. Foreign nationals had to rely on the exercise of diplomatic protection by their home states to protect rights acquired in a host state. This took the form of state to state arbitration or litigation in an ad hoc or institutional international tribunal.

While the bulk of the arbitrations were initially between states themselves, gradually more and more states were willing to submit to the arbitration of disputes with large foreign contractors and corporations particularly in heavy investment sectors such as oil and mining. Many of these arbitrations were concerned with disputes over breaches of contracts and concession agreements, direct expropriation of foreign assets and nationalization of chunks of the industrial sector in the hands of foreign nationals occasionally triggered by political events. The fifties and sixties saw an increasing use of arbitration for the resolution of disputes between states and private enterprises but for the most part the arbitrations were conducted by ad hoc tribunals.

\textsuperscript{4} Established under the Claims Settlement Declaration made on 19 January 1981 by the Governments of Iran and the United States. In 1993, the last claim was finally settled.

(b) International Commercial Legal Framework

There was no consistency in the approaches taken by the arbitrators towards determination of questions regarding the applicable and procedural laws and widely varying rules were applied in the assessment of monetary compensation but the states were reluctant to submit to private arbitral institutions although the institutions had better control over arbitration proceedings administered by them. Besides, the transactions between states and foreign investors posed highly complex legal issues which deserved specialized attention from a tribunal concerned with the promotion of economic development and which had the capability to balance the interests of the developed and the developing states. There is also no room for lacunae in the law governing foreign investments.

The work of the United Nations and specialized agencies, the regional economic organizations and the regional development banking institutions have all contributed to creating a complex international legal framework within which all economic relations must take place including investment flows. The legal framework can be a combination of rules of international law, terms and conditions of contractual instruments, lex mercatoria and mandatory provisions of municipal laws and other international legal elements of a non-traditional nature such as resolutions of the General Assembly of the United Nations. Environmental and human rights considerations can influence the outcome of any submission to a judicial process particularly in the assessment of compensation. New rules of international economic law are yet to be formulated and the task

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6 Treaties and conventions, international custom, general principles of law common to civilized nations and judicial decisions and teachings of the most highly qualified scholars in law. See Article 38 of the Statute of the International Court of Justice.

would fall naturally to an international tribunal such as ICSID which possesses the power and enjoys the trust of the majority of nations of the world.\textsuperscript{8}

Although the ICSID Convention came into force in 1966, nearly six years passed before a case was registered in January 1972. Only six cases had been registered in a decade by 1976. The next decade saw 15 cases registered with ICSID. In 1987 alone there were four cases and currently there are four cases under process. The first decade of existence was obviously a period of anxiety for ICSID. In 1976 only about 50 percent of the members of the World Bank had acceded to the ICSID Convention. Today, about 90 percent have done so. The initial reluctance of developing member states of the World Bank, to sign the ICSID Convention could probably be attributed to a concern that non-compliance with an ICSID award may have adverse effects on their relationship with the World Bank and jeopardize their borrowing capability. The fact that ICSID was created as an autonomous institution independent of the World Bank to allay those fears\textsuperscript{9} may not have altered the perceptions of the countries concerned because of the dominance of the Bank by the developed states - the United States, Western Europe and Japan, and investors originate mostly from these states.

But the question of non-compliance with an ICSID award is irrelevant as non-compliance with any international arbitral award can affect relations with the Bank because it goes to the root of the credibility of the defaulting state to honor international commitments including compliance with conditions of World Bank loans and credits. Executive directors of the Bank representing foreign investor countries of the Bank can exert considerable pressure on Bank staff to prevent loans and credits from being extended to offending states. The practice of the

\textsuperscript{8} For a study of the "General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists" see World Bank Group, \textit{Legal Framework for the Treatment of Foreign Investment Vol. I, 1992} at pp. 137 - 181.

Bank is to finance arbitral awards connected with Bank-financed projects as part of the increase in project costs even if it means giving a supplementary credit or a fresh loan to cover such costs and although the Bank has not done so yet, executive directors may not be averse to the Bank financing arbitral awards not connected with Bank-financed projects in circumstances where a state is not in a financial position to comply with the award. In this event, it may be submitted that the World Bank could be much more receptive to financing an ICSID award because of its in-house character than arbitral awards of other arbitral bodies.

Although all the developed member states of the World Bank acceded to the ICSID Convention at its inception, for the first six years there was no case registered with ICSID. Investors from the developed states were probably suspicious that ICSID will be biased in favor of the developing states. The increasing adoption and use of ICSID facilities can only testify to the increasing investor confidence in ICSID as an effective non-anti-investor arbitral institution brought about obviously (i) by the character of the arbitral awards which have consistently held that full compensation is payable for damages suffered by a foreign investor as a result of breaches of commitments in law made by the host state and (ii) by the adoption directly or indirectly of rules of international law in dealing with substantive issues of a dispute.

An organized society cannot exist if people were not obliged to keeping their promises to give, to accept, to perform an act or not to perform an act. The law of contract in the common law systems and the law of obligations in the civil law systems set the rules that determine which promises are binding on the promisor, which are not so binding, which are a nullity and which are illegal and the rules that determine the consequences of infraction of the promises. Under modern rules of municipal contract law, contracts are not cast in Greek stone and are voidable or adjustable in some exceptional circumstances or in circumstances

10 E.g. Arbitral award in favor of the Contractor in regard to a dispute between the Road and Bridges Corporation (a Sudanese State Agency) arising out of a contract for the construction of the Jebel Aulia - Rabak Road was paid out of a fresh World Bank Credit.
where things are not the same as when the contract was originally signed. Contracts can also be affected by the operation of new legislative activity but, broadly speaking, contracts must be observed and no single party can alter the conditions of a contract or terminate performance without the consent of the other parties to the contract except where so provided by the law.

In international law, however, the principle of pacta sunt servanda or the sanctity of contracts is applied with absolute rigor compared to the practice in municipal law. The rich nations of the world insist on faithful compliance with international obligations and the poor nations call for less rigidity in the enforcement of international obligations which are economically burdensome or have become so over time\(^\text{11}\) and plead for a lower standard than full compensation for loss suffered by foreign nationals as a result of breaches in some obligations of a vital economic or strategic nature. Breaches of contract meant the payment of compensation to the party suffering loss as a result of the breach but in some limited instances domestic law compelled specific performance.\(^\text{12}\)

Whereas in the case of contracts for the supply of goods and services including international civil engineering contracts full compensation would normally be granted as of right for breaches committed by the host state, in the case of concessions for the exploitation of natural resources and foreign investment in agriculture and industry the standards of measurement applied by non-ICSID tribunals to assess compensation for the loss suffered as a result of

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\(^{11}\) This has been challenged recently by M. Sornarajah, *International Commercial Arbitration*, Longmans, Singapore, 1992.

\(^{12}\) This is also occasionally possible but not practicable in international law in the form of restitution. In *Texaco/Calasiatic v. Libya*, the sole arbitrator Prof. Dupuy awarded *restitutio in integrum* for the unlawful taking by Libya of the oil concessions granted to Texaco/Calasiatic. See 53 I.L.R. 389 (1979).
expropriation, nationalization and other equivalent state actions have been inconsistent and have become the subject of interminable debate.\textsuperscript{13}

The rules of compensation often varied according to whether the actions of the host state were recognized in international law as lawful or unlawful. Generally speaking, the breaches of ordinary contracts and transactions akin to contracts of a commercial nature were unlawful and but breaches of agreements and terms of transactions serving an economic or strategic purpose such as expropriations and nationalization measures were lawful under certain conditions. Generally speaking, too, the Western developed states were content with the so-called Hull formula "for adequate, effective and prompt payment for properties seized."\textsuperscript{14}

The OECD Convention on the Protection of Foreign Property\textsuperscript{15} approved by the Council of Europe in 1967 provides that expropriation is lawful when made under conditions of fair and equitable treatment without discrimination, in the public interest, under due process of law and subject to just and effective compensation.\textsuperscript{16} This was probably the most widely held view by the developed countries in 1967 when the developed countries themselves had implemented domestic nationalization programs within their territories and the principles adopted had spilled out into the international arena. In more recent years, however, not all developed countries agree on the lawfulness of expropriation

\textsuperscript{13} The rich developed nations did not support the United Nations General Assembly Resolutions No. 3201, Declaration of a new International Economic Order and No. 3281, the Charter of Economic rights and Duties of States. The General Assembly Resolutions provided for appropriate compensation.


\textsuperscript{15} 7 I.L.M. 117 (1967).

measures\textsuperscript{17}, especially in regard to concessions and other contractual
arrangements, and almost all support to varying degrees the payment of full
compensation to place the foreign national in the same position he would have
enjoyed had the expropriation not been effected.\textsuperscript{18} The view of the developing
countries is best reflected in successive United Nations General Assembly
Resolutions.

The Declaration on the Establishment of a New International Economic
Order of May 1, 1974 provides for the "Full Permanent Sovereignty of every state
over its natural resources and all economic activities"\textsuperscript{19} within its territories. The
Charter of Economic Rights and Duties of States of December 12 1974 stipulates
that every state has the right "To nationalize, expropriate or transfer ownership
of foreign property, in which case appropriate compensation should be paid by
the State adopting such measures, taking into account its relevant laws and
regulations and all circumstances that the State considers pertinent."\textsuperscript{20}

\textsuperscript{17} "This Tribunal cannot but reaffirm this in its turn that the maxim \textit{pacta sunt servanda} should
be viewed as a fundamental principle of international law." See Preliminary Award of Prof.
Dupuy in Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The
Mahmassani the sole arbitrator in \textit{Libyan American Oil Comapnay} (LIAMCO) v. The
Government of the Libyan Arab Republic, based on facts similar to those in the Texaco case:
"That the right of a State to nationalize its wealth and natural resources is sovereign, subject
to the obligation of indemnification for premature termination of concession agreements."

\textsuperscript{18} "Thus, for the general reasons mentioned above, this Tribunal must hold that \textit{restitutio in
integrum} is, both under the principles of Libyan Law and under the principles of international
law, the normal sanction for non-performance of contractual obligations and that it is
inapplicable only to the extent that restoration of the \textit{status quo ante} is impossible." \textit{Texaco
case} in note above, 53, Int'l L. Rep. 389 (1977) at p. 508. In the LIAMCO case in note above,
however, the sole arbitrator was unable to determine if compensation was justified in law but

\textsuperscript{19} General Assembly Resolution No. 3201 (S-VI), Section 4(e).

\textsuperscript{20} General Assembly Resolution No. 3281, Chapter II Article 2(c).
II. ICSID and International Law

(a) Developing Compensation Rules and Standards

In the first published award of an ICSID case, the AGIP Case,\(^{21}\) although AGIP was willing to forego compensation for loss of future profits by claiming a nominal sum of one French Franc for loss in respect of each of three categories of demands for loss of profits, the ICSID tribunal made a declaration to the effect that AGIP was entitled to full compensation for all losses including loss of profit even after the tribunal had ruled that "a State had a sovereign right of nationalization" and, therefore, the taking of AGIP property by the state was not unlawful.\(^{22}\) Two of the demands were clearly in respect of rights, under the agreement, which had no fixed duration and as the tribunal observed AGIP would have been entitled to appreciable profits. In fact the agreement, in addition to providing for stabilization clauses without a time limit, granted an indefinite monopoly to the company as sole supplier of oil and oil products to the state and quasi-state agencies.

The authority cited by the tribunal for the payment of full compensation was a rule of the Congolese Civil Code which was the same as the rule in Article 1149 of the French Civil Code providing for both the actual loss suffered (\textit{damnum emergens}) and loss of profit (\textit{lucrum cessans}).\(^{23}\) Article 1151 of the code, however, requires that damages may include only the immediate and direct


\(^{23}\) 67 Int'l L.R. 318 (1984) at p. 341. The relevant article of the French Civil Code in English is as follows: Damages due to a creditor are, in general, from the loss which he incurred [\textit{damnum emergens}] and from the gain of which he was deprived [\textit{lucrum cessans}], apart from the hereinafter exceptions and modifications.
consequence of non-performance of an agreement. The matter of remoteness was addressed by the tribunal.

There is no evidence in the published records of the case of any argument that the agreement with the government should be governed by rules of public law as would have been the case in France. The rules of international law in regard to compensation were also not invoked although there was argument over the meaning of the provision in the agreements that the applicable law is "the law of the Congo, supplemented if need be by any principles of international law." The domestic law was again employed to justify payment of full compensation to the claimant in the later AMCO case but the tribunal in that case had ruled that the action of the Indonesian state was unlawful. There a conclusion was drawn that full compensation was "a general principle of law which may be considered as a source of international law."

In the Benvenuti and Bonfant (B & B) Case, B & B made a claim, inter alia, against the Government of the Congo for 250,000,000 CFA for compensation for intangible loss on a variety of grounds, namely, that it "lost work and investment opportunities in Italy; was no longer able to resume its own activities in Italy by reason of lack of capital, having invested all its financial resources in the Congo; lost its credit with suppliers and banks, having put the banks in touch with the Congolese Government for business matters in which it later defaulted; suffered the loss of its own organization at management level and of its own technical staff, following the forced and hasty departure from the

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24 Art. 1151: Even in the case where the inexecution of the agreement results from the wilfulness of the debtor, damages are to include, with regard to the loss incurred by the creditor and the gain from which he was deprived, only what is an immediate and direct consequence of the inexecution of the agreement.


26 Ibid. at p. 1037.

Congo (certain managers and technicians remained in the Congo where they took other activities; others, having returned to Italy, found jobs with other firms).\textsuperscript{28}

The ICSID tribunal did not hesitate to reject B & B's claim as there was no evidence other than simple statements "unsupported by any concrete evidence". But, the tribunal went on to make an equitable award of 5,000,000 CFA as damages for intangible loss and thus can be said to have accepted the principle of liability for intangible loss. There is no evidence as to how this sum was arrived at by the tribunal which did not discuss the question of remoteness of some of the heads of damages claimed by B & B, thereby, giving the impression that the tribunal would have been prepared to entertain any claim for intangible loss. By definition, intangible loss is loss which one cannot put his hands on and loss which, therefore, cannot be measured. That means a loss that is too remote. The ICSID tribunal may have given an extra dimension to the meaning of the term full compensation.

In the \textit{LETCO Case},\textsuperscript{29} a concession granted in 1970 to LETCO by the Government of Liberia for the exploitation of forest land for the sale of timber and other forest products for a period of 20 years renewable for a further period of 15 years under conditions to be agreed was rescinded by the government after 8 years of operation. The ICSID tribunal in its award in favor of LETCO determined that the government should pay damages to LETCO for loss of profits for the entire balance of the concession period of 27 years and that, too, on the basis that the conditions of the renewed concession remained the same even though the government had the right under the original concession agreement to reduce the size and scope of the concession area, make adjustments in royalties, fees, duties and rents when the agreement came up for renewal. It


is also not clear from the agreement that the right to renewal was automatic and that the government was indeed obliged to renew the concession. 30

From the rulings made in the award in regard to damages, it is doubtful whether it would have made a difference to the ICSID tribunal if the balance of the concession period remaining was 50 years or even a 100 years. The tribunal would have awarded damages for loss of profit for the entire period.

The tribunal's declaration in AGIP and the awards in Benvenuti and LETCO in regard to liability for payment of full compensation for damages including loss of future profits sustained by a foreign national as a consequence of a lawful act by the state make no distinction between lawful and unlawful acts of state when it comes to payment of compensation. Such a distinction was confirmed recently by the U.S. Chairman of the Iran - U.S. Claims Tribunal in Amoco International Finance Corporation v. Iran. 31 That case arose out of the expropriation by Iran of 50 percent of the interest held by Amoco in a joint venture company, Khemco. The tribunal held that the compensation to be paid in case of an expropriation which lacks only the payment of fair compensation to be regarded as lawful is "limited to the value of the undertaking at the moment of the dispossession, i.e., 'the just price of what was appropriated'". 32

30 Article 1.6.(2.) of the concession agreement reads as follows:
"If the CONCESSIONAIRE, not more than two years and not less than three months before the expiration date of this Agreement, applies in writing to the Secretary of Agriculture for a renewal of the Concession, the subject of this Agreement, and if it shall have paid all taxes, fees and rents to and shall have satisfactorily performed its obligations under this Agreement up to the date of such application, it shall be entitled to renewal of this Agreement for a further period of (15) years on the same terms and conditions as set out in this Agreement except those provisions relating to (a) the size and scope of the Concession Area; (b) taxes, royalties, fees, duties and rents; (c) this right of renewal". See 26 Int'l L. Mat. 647 (1987) at 671. The underlining is by the present writer.

31 15 Iran - U.S. Claims Tribunal 189 (1987 - II).

32 Ibid. at 247-248. See also LIAMCO v. Libya where the sole arbitrator Dr. Mahmassani "had no difficulty in holding that Libya was under no obligation to compensate LIAMCO for the loss caused by nationalization." Christopher Greenwood, State Contracts in International law - The Libyan Oil Arbitrations, 52 B.Y.I.L. 27 (1987) at 77.
It meant that in the case of a lawful expropriation or lawful taking of acquired rights of a foreign national the compensation payable is limited to what is referred to in international law as *damnum emergens*. Compensation in regard to loss of future profits, *lucrum cessans*, would only apply to the period between expropriation and award. To the Iran - U.S. Tribunal, a lawful taking of foreign property entitles the foreign owner only to the full equivalent value of the property taken. The award in the Amoco international case may be said to crystallize the law in regard to compensation for lawful taking of foreign property and the ICSID tribunal decisions, in holding consistently a contrary view that the foreign investor is entitled to full compensation including loss of future profits in all cases, therefore, point to ICSID's commitment to developing its own rules of law affecting economic relations aimed primarily at encouraging the flow of private investment into developing countries. This juridicial role of ICSID is a crucial one.

(b) **Supremacy of Rules of International Law**

ICSID has also taken a similar creative approach to insulate ICSID proceedings from the effects of municipal law which is applied to the substantive issues of a dispute. In the *LETCO Case*, the applicable substantive law was held by the tribunal to be the law of Liberia and "such rules of international law as may be applicable" on the ground that the parties did not expressly choose the law governing the concession agreement although the agreement itself in its opening paragraph provided that the agreement is made "under the Business Law, Title 15 of the Liberian Code of Laws of 1956." The rule appears to be that in an ICSID arbitration where the dispute is between a state or state entity and a foreign national there is a presumption that the applicable substantive law is the state law and applicable rules of international law. For the exclusive application

33 ICSID Convention, Art. 42.

34 26 Int'l L. Mat. 647 (1987) at 658.
of state law, the choice of applicable substantive law by the parties to the dispute must be unique and crystal clear and pointedly so. If the LETCO decision is anything to go by, the choice by the parties to the dispute of state law as the only applicable substantive law must be proved beyond all reasonable doubt.

There is no evidence in the published award to the effect that any reference to Liberian law was made in the determination of the categories of damages for which LETCO was entitled for compensation under Liberian law. Therefore, it is submitted that an ICSID tribunal will probably apply rules of international law in all matters, relating to compensation for damages suffered by a foreign national, where both the state law and rules of international law have to be applied concurrently pursuant to Article 42 of the ICSID Convention. That is, rules of international law will have precedence over rules of the state law except perhaps in the unlikely case that the state law is more advantageous to the foreign national than the rules of international law because foreign nationals should not be treated any less favorably than nationals of the state.

In the AMCO Case, the parties having not agreed to the rules of law to be applied to the substantive issues of the dispute, the ICSID tribunal pursuant to Article 42(1) of the ICSID Convention determined that the Indonesian State law will apply and "such rules of international law as may be applicable." The three issues discussed in the award, namely, the questions of expropriation, breach of contract and unjust enrichment were all analysed both from the perspective of Indonesian law and rules of international law although much of the reference to Indonesian law was to show that it corresponded with the rules of international law.

Except in regard to the question as to whether the revocation by the Indonesian authorities of the investment license granted to AMCO amounted to a breach of contract, much of the attention in the arbitral award was given to the

35 Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia (ICSID Case No. ARB/81/1).
application of rules of international law. Even in respect of the matter of revocation of the license, the discussion of the rules of Indonesian law was carried out in the context of examining if the rules corresponded with the general principles of law common to all civilized nations which constitute a subsidiary source of international law. It is clear that the interpretation given to Article 42(1) by the ICSID tribunal is that, where the choice of applicable law is by default, the state law is only applicable to the substantive issues of the dispute to the extent that the rules of the state law are not in conflict with rules of international law including the general principles of law common to all civilized nations.

Where the express choice of the host state law has been made as the applicable substantive law, an ICSID tribunal may yet resort to the application of a rule of international law if a rule of the state law is not available because an ICSID tribunal cannot give a non-liquet decision pursuant to Article 42(2) of the ICSID Convention "on the ground of silence or obscurity of the law.". This opens up the possibility of ICSID tribunals excluding rules of state law that are not directly applicable to the case. Even if rules of state law are available to apply directly to the case, it can be argued that those rules must in any case yield to rules of international law or be interpreted so as to avoid conflicts with such rules because of the parties agreement to submit disputes to an international tribunal.36

Under the ICSID Convention parties to a dispute are not allowed to make their own choice of procedural law. Being an international tribunal, ICSID arbitration is governed by rules of international law and, except as the parties otherwise agree, arbitration proceedings are conducted in accordance with ICSID's own procedural rules.37

36 "therefore, the application of municipal law does not exclude the application of the general principles of law which themselves are part and parcel of the principles of international law." See Dupuy, op. cit. note 17 at p. 461.

37 ICSID Convention, Art. 44.
As part of the World Bank Group and as another instrument to promote economic growth, ICSID is in a better position than other arbitral tribunals to give clear directions to the development of the law governing foreign investment in its ordinary meaning. The ICSID decisions may have put to rest the debate between those who support the principle of *pacta sunt servanda* and *clausula rebus sic stantibus*. States will be held strictly to their international commitments and that the standard of compensation is full compensation for lawful and unlawful taking alike of foreign owned property. Looking from another angle, in modern international economic law, all taking of foreign acquired rights without the consent of the foreign national is unlawful.

The simplistic and direct approach of ICSID tribunals in regard to international commitments cannot satisfy those who genuinely hold the view that the same rules of international law cannot govern the relatively permanent presence of foreign investors as well as commercial contracts of sales of goods and services such as technical assistance and freestanding civil engineering contracts of clearly defined and limited duration. Nothing can be frozen in time as a matter of principle of law, when everything around you has changed, without undermining the ability of a state to act to the common good including that of the foreign investor.  

There are hosts of issues to be considered in foreign participation in a state's economic development and ICSID probably is the only institution that can recognize and distinguish the complex issues arising out of


39 E.g. Rules of law to establish an international economic base by guaranteeing open and competitive markets, to narrow differences between developed and developing states when they are in conflict over economic issues, to set the conditions for protection of the environment, and to influence the adoption of national legislation to create free and competitive internal markets and link economic development with respect for human and civil rights. See Judith H. Bello and Alan F. Holmer, *After the Cold War: Whither International Economic Law?*, 32 Harv. Int'l L. J. 323 (1991).
durable economic relations and develop an equitable body of international economic law. For that ICSID must concentrate on investment disputes.
CONCLUSION

Sustained economic growth is necessary to provide the peoples of this world with the means to better their living standards, the wealth to advance the sciences and the leisure to enhance the arts and cultures. Civil engineering works provide the infrastructures, the buildings, the houses, the schools and the hospitals without which production of goods and services is all but impossible. Civil works involve the execution of large contracts many of which, in developing countries, are undertaken by foreign contractors from the developed countries of Europe, the United States and Japan under contract with the state or a state entity. The regulation of the relationships between the foreign contractor and the host state is of great significance and includes provision for resolution of disputes which is increasingly effected by reference to arbitration.

International civil engineering contracts extend the right or duty to refer to arbitration to both sides to a contract. Mutuality is not regarded by Russell and Fox LJ as necessary to validate an arbitration agreement or clause but the Thesis tries to show that the lack of mutuality in a domestic context may be unconstituional and unenforceable in democratic jurisdictions for the reason that every body is equal before the law and must have identical rights of access to the courts. One party to a claim alone cannot be obligated to resort to arbitration while the other party can go to court except perhaps by provisions in a statute, for example, in a country without a written constitution such as the United Kingdom. In any event, the absolute prohibition of intervention by municipal courts of law in private arbitral proceedings is unknown in any jurisdiction.

International arbitrations became practical propostions as means of resolving disputes in an international context by the application of customary
rules providing for autonomy of the arbitral clause or agreement by invoking the
doctrine of severability and giving arbitral tribunals competence to decide on their
own jurisdiction. In most countries, the two doctrines now have a statutory base
particularly in regard to international arbitrations but the scope of their
application may exclude decisions by arbitral tribunals on the validity of both the
main agreement and the arbitration agreement. The UNCITRAL Model Law
while empowering the arbitral tribunal to determine their jurisdiction reserves the
power of giving a binding decision to the courts of law.

The Thesis argues that the doctrine of severability of the arbitral clause is
a needless assumption if the law of contract provides for termination of a contract
meaning extinction of a contract only by agreement, express or implied, between
the parties to a contract or by order of a court of law or an arbitral tribunal in
which case the contract does not come to an end until all obligations including
debt obligations have been settled. The civil law jurisdictions are closer to such
an approach to the termination of contracts than the common law jurisdictions
which do not distinguish between termination of performance of the purpose of
a contract and termination or extinction of the contract itself.

An analysis of the interfacing of national laws, legal systems and
international law illustrates the impossibility of complete insulation of
international arbitrations from the municipal law and courts and indeed the
smooth functioning of the private international arbitral proceedings is only made
possible by the resort or threat of resort to municipal courts. The autonomy of
the international arbitral process cannot be sustained without the supporting role
of municipal law and courts. The Thesis points out that too much had been read
into the French and Swiss decisions in the Gotaverken to suggest that
international arbitrations can be delocalized and that subsequent legislation has
preserved the rights of the courts to intervene in some exceptional circumstances
related to due process.
The weakness in the recognition and enforcement of arbitral awards is the product of the diversity in national arbitration laws and in the procedural rules employed in ad hoc arbitrations and by arbitral institutions. The adoption of the United Nations sponsored New York Convention in 1958 has improved effectiveness in the recognition and enforcement of international arbitral awards. Subsequent efforts by UNCITRAL culminating in the production of Model Arbitration Rules in 1978 have enabled ad hoc arbitration tribunals to conduct arbitration proceedings on the basis of the widely accepted procedural rules. Some arbitral bodies provide for parties to opt for arbitration under the UNCITRAL rules rather than their own rules. The Model Arbitration Law in 1983 has contributed to the harmonization of the arbitration laws of many states including developed states who have incorporated the Model law into their national laws.

Yet the outcome of arbitral proceedings could be influenced by the make-up of the legal cultures of the arbitrators. The Thesis points out that there are currently three prominent legal systems from which international arbitrators originate - the Common law, the Civil law and the Islamic law. The Thesis illustrates the integration of the common law and the civil law legal systems in the adjudicatory process by the example of the European Court of Justice where judges from the two systems regularly take decisions together. The Thesis cites the writer’s article on "Who is Afraid of Sharia?" (Appendix One) to distinguish the aspects of the rules of Islamic law in commercial arbitration which separate the Islamic legal system from the two European systems. The article is optimistic about the course of development of the rules of Islamic law in international commercial arbitration and stresses the potential for cohabitation of the three legal systems in international commercial arbitrations.

Some success has been achieved in the delocalization of international commercial arbitrations by the International Centre for the Settlement of Investment Disputes between States and Nationals of other States (ICSID). The Centre was established under a Convention, sponsored by the World Bank in
Washington, which came into force on October 14, 1966 following involvement by the Bank in disputes between member states and requests to the Bank for technical advice and mediation by its President. The Thesis points out that although the Centre was created as an autonomous institution independent of the World Bank so that disputes may not affect relations between borrower-states and the Bank yet the fact that staff of the centre and the Bank is interchangeable and the promotion of provisions for ICSID arbitrations in Bank-financed civil engineering contracts indicate a trend for closer association and potential loss of independence.

The Thesis disagrees with the view that the Convention excludes absolutely a contracting state's right of diplomatic protection because of the provision in Article 27(2) of the Convention permitting states to pursue informal exchanges for the resolution of disputes sub judice and holds that the right of diplomatic protection under modern rules of international law is also excluded when a dispute is being subject to settlement by other peaceful means as would be the case where arbitrations are held under the auspices of private arbitral bodies such as ICC.

The binding character of an ICSID award because of the prohibition of any challenge in municipal courts even on grounds of public policy and the simplicity of the recognition and enforcement procedures are unique to ICSID. The Thesis, however, is concerned about the internal annulment procedure which permits automatic annulment proceedings and re-referral to fresh arbitration in the event of annulment. In the AMCO case, a second annulment led to eventual reference to three arbitral tribunals. Two hearings, one by an ICSID arbitral tribunal and another by an ad hoc committee for annulment proceedings, may become a familiar routine in ICSID arbitrations.

Even an ICSID arbitration cannot exclude the jurisdiction of national courts in regard to provisional and conservatory measures (see the MINE and
Atlantic Triton cases) and to resistance to enforcement measures in some jurisdictions on grounds of diplomatic immunity (see LETCO case).

An ICSID tribunal will apply state law in conjunction with rules of international law by default where the parties have not chosen the law applicable to the substantive issues of the dispute and AMCO confirms the view that rules of international law will prevail. Because ICSID is an international tribunal the Thesis argues that even where the parties have chosen the state law as the applicable law, ICSID practice supports the view that rules of state law should not in any event conflict with rules of international law.

The Convention provision against a non liquet, may lead an ICSID tribunal, according to the Thesis, to assimilating a non liquet situation as justifying a decision ex aequo et bono resulting in a further dilution of the ability of the parties to choose their own applicable law and the making of an ex aequo et bono decision against their will. The arbitration proceedings will be governed by rules of international law in all cases because of the character of the tribunal as an international tribunal. The Thesis, therefore, points out that the parties do not possess the same freedom to choose their own applicable laws as in the case of arbitrations by private institutions.

The Thesis deduces from the rule against a non liquet decision and the opportunities to apply rules of international law that ICSID possesses a judicial law making potential which is not even available to the International Court of Justice.

Although the ICSID Convention was intended to apply to disputes between a Contracting State or a constituent subdivision of the state or a state agency, the fact that the state is responsible for the determination of the identity of an entity as falling within the jurisdiction of an ICSID tribunal has led to commercial undertakings in which state has some participation to be regarded as a state agency. Quite apart from the fact that a commercial undertaking because
of its essentially non-state functions cannot be held ordinarily as an agent of the state, the undertaking is in the paradoxical position vis a vis ICSID tribunals to be either a state agency or a foreign national, if the state so determines. For example, see the Klockner case. It is theoretically possible for parties of all legal complexions to fall within ICSID jurisdiction at the will of a Contracting state.

The competence of an arbitral tribunal to determine its own competence has practical significance in that where parties have solemnly agreed to submit to an arbitral tribunal, the burden of proof of challenges to the jurisdiction not only rests with the challenger but proof may have to be beyond all reasonable doubt to oust the jurisdiction of the tribunal. This can lead to the wasteful situation like ICC readily assuming jurisdiction in the Pyramids case and the AAA in the MINE case before ICSID took up the cases - the ICC award was eventually annulled by the French Court of Appeal - and not entirely consistent with situations like ICSID tribunals' contrasting handling of the question whether a foreign corporation is a national of a contracting state or not in the AMCO and SOABI cases. In AMCO, the ICSID tribunal was not prepared to probe further than the evidence of initial control by nationals of a Contracting state whereas in SOABI it was prepared to lift the successive veils of incorporation until it exposed a controlling party originating from a Contracting state.

Jurisdiction ratione materiae also pose similar issues to ICSID tribunals which have been constrained to investigate questions of jurisdiction only in the event of challenges to its jurisdiction. Although there are some conflicting authorities to the effect that ICSID tribunals must proprio motu satisfy themselves that they have jurisdiction as in the ALCOA case as well as the Holiday Inns and AMCO cases, the overall impression is that ICSID tribunals will be concerned with questions of jurisdiction ratione materiae only if challenges are made to ICSID jurisdiction or the respondent does not appear or in any way participate in the proceedings.
The extension of ICSID jurisdiction to the settlement of a dispute arising out of a purely management contract as in the SEDETEX case, in a licensing agreement for the manufacture of firearms as in the Colts Firearms case, in a commercial contract for the repair of fishing boats and their management as in the Atlantic Triton case has been interpreted by writers as widening ICSID jurisdiction to apply to disputes not relating to investment in the ordinary meaning of the term investment as an injection of foreign capital funds with or without the accompaniment of know-how and skills for the purpose of establishing a business undertaking in which the investor has a stake.

In the opinion of the writer of this Thesis, such a widening of ICSID jurisdiction is tantamount to regarding ICSID as an arbitral body per se and does not reflect the intentions of the Convention widely reported in the 2136 pages of travaux préparatoires to devise means to encourage the flow of private capital into the developing states. According to the Thesis, the meaning of investment to be given in the interpretation of the Convention should be the meaning customarily admitted in the bilateral investment treaties and national investment laws of states. Investments partake of the establishment of a business or economic activity in the host state. The ICSID cases, which have been cited as ICSID having a general jurisdiction over civil engineering contracts, consist of a package of activities which are connected with the establishment of hotel businesses or factories or other industrial activities and exploitation of natural resources. The cases do not involve freestanding civil engineering contracts.

The Thesis concludes that the submission to ICSID arbitration of disputes in international civil engineering contracts of a purely commercial character is in breach of the ICSID Convention for the reason that freestanding civil engineering contracts are commercial sales of good and services and cannot be characterized as investments within the meaning of the Convention. By interpreting otherwise and providing for ICSID arbitration of disputes in civil engineering contracts in the sample bidding documents published by the World Bank Group, the ICSID secretariat is, in effect, specifying in advance a class of disputes which the
secretariat has determined to be investments falling within the jurisdiction of
ICSID under the Convention, a jurisdictional power the secretariat does not
possess. It is submitted that the ICSID secretariat is in breach of the Convention
by doing so.

A perceived breach of the Convention by ICSID itself would result in a
contracting state refusing to recognize and enforce an ICSID arbitral award
despite the provision in the Convention mandating all contracting states to
recognize and enforce ICSID arbitral awards. Where a contracting state seeks to
enforce an award in its favor in another state, that state may want to refer the
matter of breach of the ICSID Convention to the International Court of Justice
pursuant to another provision in the Convention. The Thesis points out that in
the matter of breach of the Convention that provision will have precedence over
the provision mandating a state to recognize and enforce the award.

By drawing attention to the special role of ICSID in regulating economic
relations and the potential which ICSID enjoys of making rules of international
law, which even the International Court of Justice does not possess, the Thesis
suggests that ICSID does not detract from its central purpose to deal with issues
relating to the flow of private foreign capital into developing countries. Some
rules of international law such as pacta sunt servanda and clausula rebus sic
stantibus and rules and standards of compensation will have to be reconciled.
The principles of law applied by ad hoc arbitral tribunals can be chaotic as
illustrated by the three Libyan cases involving B.P., Texaco and LIAMCO. Surely,
the same rules of law cannot apply to both long term economic relationships such
as concessionary agreements and durable investments as well as to commercial
contracts of sales of goods and services such as freestanding international civil
engineering contracts where the issues are of a short term and highly technical
nature. The Thesis describes other urgent issues awaiting resolution in the future
and suggests that ICSID should concentrate on investment disputes in the
ordinary meaning of the term and leave commercial contracts such as civil
engineering contracts to private arbitral institutions in the business of arbitration.
APPENDIX ONE

Who is Afraid of Sharia? – Islamic Law and International Commercial Arbitration

by K. V. S. K. NATHAN, BSc, BSc(Eng), LLM, FICE, FIStruct E, Barrister

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Introduction

THE influx of major international civil engineering contractors into the Middle Eastern Arab countries began with the discovery of oil. The extraction and exploitation of the oil entailed large civil works contracts for the installation of oil platforms and operation of drilling equipment, the building of refineries and processing facilities and the construction of access roads, ports and other infrastructure. The wealth the oil revenues brought to these countries generated other large civil works contracts for the construction of roads, railways, airports, power stations, public buildings, housing, water desalination plants and other public works to meet the variety of needs of a growing modern nation.

Between 1980 and 1990, it is estimated that civil works amounting to a value of about US$3-4 billion per annum were executed in Saudi Arabia alone. There was construction of major civil works in other countries too such as Iran, Iraq, Syria and in the smaller states Kuwait, Qatar and the Emirates and these works will continue for years to come. The damage to infrastructure, buildings, installations and numerous other facilities in Iraq and Kuwait during the Gulf War are also bound to generate demand for large scale civil works for reconstruction of destroyed property and services.

Most of the earlier contractors were from Western Europe and the USA but following the dramatic rise in crude oil prices in 1974, the demand for construction attracted contractors from Korea, China, Japan, Philippines and other countries. The construction of the civil works in the Arab countries involves the execution of contracts between Arab clients, mostly state or state entities, and foreign contractors.

The contracts have an international element in that the contractor is of a nationality other than the Arab state and the contracts provide for international arbitration in the event that disputes arise in connection with or arising out of the contracts. The contracts would usually stipulate the applicable law of the contract and procedural rules for arbitration. The fact that the civil works are located in an Islamic state and that other Islamic elements are present mean that the contractor has entered a legal system that he may not be familiar with and cannot entirely ignore.

Sharia

All Middle Eastern Arab states are to one degree or another subject to rules of law that originate from Islamic law, called Sharia in Arabic. The constitutions of some countries refer to Sharia as the primary source of law. Sharia is the source of all laws in at least one country. While not so laid down in their constitutions, Sharia law is applied, in some other countries, as a matter of practice and tradition.

Sharia itself is principally derived from (i) the Quran, the sacred book revealed by God to the

1. The literal meaning of Sharia is 'the path leading to the watering place'.
2. Bahrain, Egypt, Kuwait, Qatar, Syria and UAE (Dubai, Abu Dhabi and Sharjah). Saudi Arabia has recently introduced a constitution based on Sharia.
3. North Yemen
4. For example, Oman.
Prophet and (ii) the Sunna, the actions and teachings of the Prophet and his approval of the conduct of others. After the passing of the Prophet, Sharia developed as a body of law through (i) the Qiyas, the application of Shana to changing times and to problems that could not have been foreseen by the Prophet by a process of reasoning by analogy, (ii) a consensus among Muslim legal and religious scholars on the interpretation of the words of the Quran and the words and deeds of the Prophet and (iii) many secondary sources. Naturally, this has led to various interpretations of the details of Sharia.

Thus, many schools of Sharia have sprung up and have been flourishing since the Prophet died in 632 A.D. The four major schools of Islamic jurisprudence are the Sunni schools - Hanafi, Maliki, Shafi'i and Hanbali. They represent the most significant regional and doctrinal differences in the interpretations of Sharia law and procedure. Other minor schools such as the Ibadili and Liydi coexist with the major more important schools. Each of the schools has its own adherents among the Arab nations but in most of the countries resort is made to more than one school. Much of the development of Sharia, however, ceased around the tenth century. Nonetheless, it is true to say that there is "an infrastructure of Sharia covered by a layer of modern statute law" in all Islamic nations.

The Majalla is a codification of the teachings of the Hanafi school in the field of finance and now dominates business transactions in most Arab states. Sharia law in Islamic states can be said to be the equivalent of the common law in England and Wales but, unlike the common law, some rules of Sharia law cannot be overturned by statute. Sharia law can override provisions in a statute that deviate from mandatory Sharia tenets originating from the scriptural sources, namely, the Quran and the Sunna.

Sharia Arbitration

Arbitration is perhaps the second oldest profession in the world. In the Arab world, the prevalence of arbitral methods of dispute resolution dates to the pre-Islamic era when they were used in settling the numerous squabbles that occurred between warring tribes and in the resolution of domestic quarrels. Institutionaiised and more formal methods were adopted in the market place by traders and in the regulation of aspects of one's personal life by the pagan priests who pretended to having divine powers.

Arbitration was subject to much abuse during this era. It probably explains the pointed references to 'hakamyat' (Arabic for arbitration) in the Quran which established the Prophet as the supreme judicial (arbitral) authority having universal and unlimited jurisdiction. Sharia arbitration can be interpreted as the product of the contest for power between the pagan priests and the Prophet and the maintenance of the Prophet's power in the absence of a government, in the modern sense with legal and judicial institutions, in a divided Arab world.

One might also argue that the role of the Prophet as the supreme arbitrator and the references in the Quran to resolution of disputes other than by resorting to courts of law (courts did not exist at that time) signify that even after the passing of the Prophet, arbitration, because of its religious connotations, has a greater meaning to the Arab countries than litigation in a court of law. In fact, the processes employed in relatively primitive arbitration have in many respects been taken into the litigation process and this is evident from some rules of evidence and procedure in Arab courts that would surprise lawyers brought up in other legal systems.

For example, a person summoned before a Sharia judge in a civil matter is presumed to be free of liability and the legal burden of proof always rests with the plaintiff who must prove his case to the satisfaction of the court. Oral testimony when properly administered in Sharia courts is superior to a written statement (notarised or not) which is presumed to be a forgery or an alteration of the truth if challenged. The testimony of two qualified witnesses of good standing is given more credence than the testimony of one witness. A Sharia judge may refuse to make a decision in the absence of clear cut evidence and procedural technicalities can be ignored in Sharia courts if they are seen to subvert the truth. But, in modern times, the arbitrator is nevertheless regarded as inferior to the qadi, the Islamic public judge.

Arbitration
Resurgence of Islamic Fundamentalism

Arbitration is, historically, a common relatively developed institution in the Arab world, albeit with crude origins. The earliest record of an arbitration agreement, in an amazingly modern form, is the one between Ali Ben Abi Taleb and Muawiya B. Nabi in 645 D. to resolve a dispute between them over the right of succession to the fourth Caliph. The agreement stipulated the location for the arbitration proceedings, the applicable law to govern the dispute, namely, Quranic law, and the procedural rules which were laid down in some detail. 11

It is obvious from a reading of the test of that agreement as to why Sharia arbitration rules are relevant today as during the years after the passing of the Prophet. In commercial law, Sharia has been replaced, in some Islamic states, by statute law said to be "often enacted under foreign business pressure" 12 to apply to business transactions with non-Muslim nationals but with the resurgence of fundamentalist movements in many Islamic states the constitutionality and legality of the statutes, that are at variance with the strict provisions of Sharia law, are likely to be brought into question. Sharia law can become a force in procedural as well as substantive matters in international commercial arbitrations where an Islamic element is present; this, notwithstanding the accession to international conventions such as the New York Convention (1958) 13 and the Washington Conventions (1966). 14

The Revolution of 1979 ushered a new era in Iran with the adoption of a constitution prescribing an order based on the Quran and its role in expounding the laws of Islam. 15 Saudi Arabia has recently introduced a constitutional structure based on the Quran and Sharia Law. 16 Islamic fundamentalism is spreading to countries outside the Middle East too. In Algeria, fundamentalists have the support of the majority of the Algerian people as demonstrated by the recent elections held there. It is clear that in the years to come the struggle between the fundamentalists and modernists will intensify: ignoring the implications of the Sharia to international business transactions can be at one's peril. It is, therefore, provocatively surprising that in the latest edition of a popular standard work on international commercial arbitration there is no reference to Sharia at all. 17

Role of National Laws in Arbitration

It can be said that inside the territories of all independent sovereign nations, the jurisdiction of the national courts cannot be ousted by agreement between persons or entities in any combination except in so far as the constitution and national laws expressly allow. In any event, national courts can intervene where questions of domestic public policy are involved. Within a sovereign territory, national courts may also be called upon to decide on rules of international law and they may intervene on grounds of the country's international public policy. Such rulings of national courts on questions of international law and policy could differ from generally accepted rules of international law and conduct.

In sum, national courts exercise a supervisory function over all activities within their territories, including the conduct of arbitration proceedings. In addition, the courts execute responsibilities assigned to them by specific legislation relating to arbitration. Different rules of national laws can apply to domestic arbitrations and international arbitrations 18 and although national laws are usually designed to assist with the arbitration process yet they can inadvertently or inadvertently also impede it.

The importance of the jurisdiction of national courts and application of national laws and public policy cannot be sufficiently emphasised even among sophisticated developed nations which are committed to facilitating arbitration proceedings, whether they be held in their own countries or in another country. National laws and national courts even in those countries can affect arbitration proceedings in many ways, some positive and others negative, including assistance in arbitration proceedings and with recognition and enforcement of arbitral awards.

First, national courts can intervene to stop reference to arbitration in certain circumstances. 19 Secondly, the assistance of national courts may be needed to serve notices on parties to attend arbitration proceedings. 20 Thirdly, national courts may be needed to make provisional and conservatory measures and to enforce

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12 Samir Salem at p. 35.
14 Convention on the Settlement of Investment Disputes between States and Nationals of other States, 14 October 1966.
15 Principle 2.1(1) of the Constitution of the Republic of Iran.
18 National laws also regulate international relations including international arbitrations.
20 This can occur in English law when a party contests the validity, the binding effect and scope of the arbitration agreement as in the case of any other agreement (contract).
21 Under the Rules of the Supreme Court 1965, Ord 73, r 7(1), a person not present in England can be served with a notice with leave of the court to appear in arbitration proceedings in England.
them. Fourthly, national courts can intervene to protect a party against fraud and other illegal actions. Fifthly, national laws can allow a party or parties to refer to the national courts in resolving questions of law. Sixthly, appeals can be made to national courts to set aside awards, albeit in limited circumstances. Finally, assistance of the nationals’ courts would generally be needed to recognise and enforce arbitration awards.

The Global Aspect of Sharia

While it is obvious that Sharia should be a matter of serious concern for anyone within Islamic territory, it is often not realised that Sharia has extra-territorial applications and that classical Shari'ah treatises prescribe Sharia’s own rules of international law. The foreign character in Sharia is based on religion and not on territory. Sharia follows Muslims wherever they are and strict adherence to its tenets can result in a collision with other national laws and generally accepted rules of international law. However, in arbitration, the non-Muslim party would have the choice to take it or leave it.

The reality is different and most Islamic countries subject themselves to the generally accepted rules of international law because of their dependence on European technology, technical assistance and imports of goods, arms and services. Nonetheless, Sharia tenets have influenced the laws of 45 Islamic states not counting the new states of the Soviet complex and apply to more than 20% of the world’s population. It is time to recognise Sharia as a valid legal system and to provide for compatibility with Sharia in all civil engineering contracts with Muslim parties and Islamic states and state entities. This could be less onerous than ignoring Sharia and allowing serious disputes to crop up during execution of the civil works.

The Significance of Sharia as the National Law

Where the party to an international civil engineering contract is a state or state entity, the contract would usually stipulate that the contract will be construed and interpreted in accordance with the provisions of the law of that state. Sharia could, therefore, conceivably be the applicable substantive law in Islamic states in such contracts. Although non-Islamic states would agree to arbitration under the rules of well known arbitral institutions such as the ICC and ICSID or under UNCITRAL Rules, the mandatory provisions of the national arbitration law cannot thereby be avoided. Thus, normally, the applicable procedural law in arbitration proceedings, as distinct from the substantive law governing the contract, will always be a combination of the rules agreed as between the parties to the arbitration and compulsory rules of the national arbitration law.

Consequently, in fundamental Islamic states, both procedural and substantive law in arbitration proceedings can be the Sharia because, in those states, Sharia arbitration rules cannot be overridden by an agreement to the contrary between the parties to a dispute. Besides, there are situations when Sharia courts will assume jurisdiction in any case and apply rules of Sharia in a dispute between a foreign contractor and a Muslim party or an entity within an Islamic state regardless of any agreement excluding the jurisdiction of Sharia courts.

First, although arbitration agreements cannot be revoked after the proceedings have been completed and award made, for the simple reason that the agreement may no longer subsist, a Muslim party can resort to litigation in a Sharia court despite the

The English Arbitration Act 1996 (s 242), the court can terminate an arbitration agreement and revoke the authority of any arbitrator, where a party is guilty of fraud.

The English Arbitration Act 1979, s. 2 provides for reference to the courts for determination of a question of law provided all the parties consent. It may be realistic to submit questions of anti-trust and European Community law to the national courts to determine some countries allow appeals to national courts on points of law. See French law until the passing of the Decree Law No. 81-500 of 12 May 1981.

Besides appeals from arbitration awards on points of law, most countries allow appeals for procedural irregularities such as not serving notices, a party was not given the opportunity to present its case, the dispute was not arbitrable etc.

An arbitration award is enforced in the same manner as a judgment or an order of the court. An application to the national courts is usually made for a judgment in the same terms as the award. This generally applies even in countries which have acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The exception is an award by a tribunal of the International Center for Settlement of Investment Disputes, Washington, which is enforceable on a certificate signed by the Secretary-General. Also see Appendix, Art. 2.9 of the Convention on the Recognition of the awards. 1980 signed in Amman.

This might be a converse version of a practice that originated in Arab states to permit dhimmis (foreigners, mainly Jews and Christians) permanently resident in the states to follow their own rituals and customs. Note the concerns of the British public and the Government regarding the recent convention of a Muslim Parliament in the United Kingdom.

Abdur Rahman I. DDI. Shahab - The Islamic Law (London) (1984) at pp. 420-5. The rules of Sharia International Law called the Al-Siyar regulated the conduct of a Muslim state in war, peace and neutrality.

Samir Saich at p. 83.

The exception would be arbitration administered by ICSID which will apply its own arbitration rules. See ICSID Convention, Art. 44.
existence of an arbitration agreement and at any stage
in the arbitration proceedings. The same right would
belong to the foreign party, too, though it is unlikely
he would invoke it. A foreign contractor constructing
civil works on fundamental Islamic territory cannot
protect himself against proceedings in a local Shana
Court because there are no provisions in Shana for a
stay of judicial proceedings except when the parties to
the dispute agree to the stay.

Second, a Shana judge can set aside an award on an
application to him for a confirmation of the award by
the winning party if he concludes that the award does
not conform to his doctrine. The winning party may
have to shop around for a judge who belongs to the
right Shana school for confirmation of the award.
Naturally, this need would only arise where the losing
party refuses to comply with the terms of the award
and the winning party has to seek the assistance of the
courts. Therefore, an arbitration award should be
confirmed by a Shana court to enable recognition and
enforcement of the award.

Third, because Shana treats an arbitral award as the
equivalent of a judgment in court, the award is subject
to the appellate process open to judgments. Thus, an
award is revocable and can be set aside if it violates the
scriptural sources of Shana, namely, the Quran and the
Sunna. In a sense, therefore, that apart from the fact
that arbitration is a private arrangement between
parties, there is little distinction between litigation and
arbitration following the making of the arbitral
award.

Theoretically, it is also possible that an appeal from
a decision of a Shana judge or qadi can be made to the
imam who has powers to override the decision of the
qadi. The qadi’s powers emanate from the authority of
the imam who is the supreme judicial authority and
appoints the qadis under the Shana. Described as the
‘mazalim’ technique, unlike an ordinary qadi, and
imam’s justice is rooted in equity and judgments and
awards can be annulled on grounds other than
violation of the Shana rules.

Sharia Arbitration

A typical arbitration clause in an international civil
ingineering contract would stipulate that in the event a
dispute arises between the Employer and the Contractor ‘in connection with, or arising out of, the Con-
tract ...’17 and the dispute is not resolved by the
Engineer the parties may resort to arbitration under
the rules of a specified arbitral institution which may
also be asked to administer the proceedings. There are
actually two agreements here – one to carry out the
civil works and the other to resort to arbitration for
the resolution of disputes.18

Unfortunately Shana traditionalists, except those
from the Maliki School, hold the view that arbitration
agreements are not binding and each of the parties can
revoke the agreement at any time before the award is
made. The Hanbali School believes that the agreement
cannot be revoked once proceedings have started.
Since there are differences in the interpretation of
Shana by the various Schools, it is important that
draftsmen of arbitration clauses are clear as to which
school applies in any particular Arab country and
counsel in arbitration proceedings advise the arbi-
trators on the right law to apply.

In Texaco Overseas Petroleum Company v the Government of Libyan Arab
Republic,19 the arbitrators applied the Hanbali School
to a dispute involving Libya which is governed by the
Maliki School. Obviously, this careless attitude to the
Shana may not be sustained by the Arab states in
modern times.

Inasmuch as an arbitration agreement is not bind-
ing on the parties, except for adherents of the Maliki
School, the appointment of the arbitrator is also
similarly revocable by a party even though the arbi-
trator was appointed with the consent of all parties. A
continuing consent of all parties is necessary. How-
ever, the appointment of the arbitrator is not revoc-
able if confirmed by a qadi, Muslim judge. Counsel for
the parties should, therefore, ensure that the appoint-
ment of arbitrators is so confirmed.

The revocability of the arbitration agreement and
the appointment of arbitrators stems from the view in
Shana that arbitration agreements are not contracts
and each agreement consists of two agency contracts
entered into between each party and the arbitrators
who act as agents for the parties nominating them.

However, there is a consensus among all the Schools
that arbitration agreements are not binding if they
provide for the resolution of a dispute in the future. To
be binding arbitration agreements must have been
made after a dispute has arisen.20 This view developed
as a result of the absence of arbitration clauses in early
business transactions which dealt mainly with sales
and like contracts of very short duration. Arbitration
agreements were usually made in early Islamic era
after a dispute had arisen. Shana Schools ceased to be
active after about the tenth century and Muslim
societies have been transformed by contact with the
outside world. Many industries have cropped up in
the Islamic states and the discovery of oil has brought
about a technological revolution in Muslim society.

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17 FIDIC Conditions of Contract for Works of Civil Engineering
Constructions, Part 1 Art 67.1.
18 Paul Wilson & Co. v. Panienredere, Hannah Blumenhal (1983) 1
Lloyd’s Rep 103.21
20 The Maslka, Art 1790.
and opened up the countries to outsiders who are mostly non-Muslim.

Modern jurists, therefore, contend that the binding quality of contracts which have been specifically named in the Quran should be extended to other contracts because they could not have been envisaged during the time of the Prophet. They rely on the general dictum in the Quran to the effect that all believers should honor their obligations, meaning contractual and other obligations, and argue that all contracts are valid, including arbitration agreements providing for resolution of disputes in the future, provided they are not against public order or dealt with a purpose forbidden by Allah.

On the other hand, the traditionalists agree that because of the uncertain element in an arbitration agreement in that a dispute may or may not arise, the agreement would fall under the category of contracts called the gharar which is forbidden by the Quran. The fact is that Sharia simply ignored arbitration agreements during the Prophet's time contracts were mostly made orally and dealt with immediate sales and other transactions in identifiable property. Conditions have changed with contracts with long implementation periods regularly now made in writing and that it was now permissible to make undertakings for the future.

The exact position is still not without doubt although many Arab states have introduced legislation to enforce arbitration clauses in contracts and arbitration agreements generally. However these statutes may be in violation of Sharia and can be challenged in Sharia Courts when attempts are made to enforce awards.

Although it is not suggested that Arab states will default on their agreements with foreign contractors because that might go against rules of international law yet it may be advisable to confirm the arbitration clauses or agreements after a dispute has arisen to avoid problems during enforcement of an arbitration award in a Muslim state.

In Western European countries and the United States there are no special qualifications required of arbitrators. Parties have absolute freedom to choose the persons of their choice as arbitrators. Engineers, architects and other professionals not trained in the law can be appointed arbitrators. If a party so desires, the arbitrator need not have any expertise and be not trained in the law either Sharia rules are strict regarding the qualifications of an arbitrator.

The Sharia arbitrator must be a person of excellent character, irreproachable, a man of moderation and honorable behaviour. He should continue to be so until the award is made. An intervening indiscretion on his part, even in his private life, which has nothing to do with the arbitration proceedings would disqualify him from continuing as an arbitrator. He must be a Muslim and must possess all the qualifications of a judge. He is regarded as exercising a judicial function and therefore must be neutral and act impartially as between the parties in dispute. He must have knowledge of Islamic law and would be expected to decide on the basis of his own knowledge of the law. These qualifications are more likely to result in unanimous decisions by Sharia arbitrators who normally do not exceed two in number.

Some Islamic writers, particularly those who have also studied other legal systems, have argued that Sharia has evolved since the time of the Prophet and continues to evolve like other systems to deal with the changing times. Admittedly the scriptural texts are invariable but their interpretation can undergo modifications to reflect the actual times in which people live because many aspects of modern life were not foreseen when the scriptural texts became the law for Muslims. Few Sharia arbitration rules materially differ from the accepted norms of modern international arbitration rules and it would make practical sense to bring them closer.

First, according to them, Sharia would not apply to contracts concluded outside Sharia territory. It is not clear if this is the case even if the performance of the contract is within Sharia jurisdiction such as a civil engineering contract to construct a refinery or an airport within Sharia territory. Second, arbitration rules of institutions such as the ICC and ICSID will apply where the arbitrations are held outside Sharia territory. This would make it convenient for state and state agencies to bypass local laws that mandate intervention by courts in arbitrations held locally. Iran, for example, while declaring its adherence to the Sharia has introduced several provisions in its civil code to make special arrangements for business

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41 The Quran, Chapter 2 Verse No. 283: O you who believe fulfill all obligations.
43 Abu Dhabi, Dubai, Iraq, Kuwait, Lebanon, Libya, Morocco, Sharjah in UAE, Saudi Arabia, Syria and Tunisia. Saudi Arabia may repudiate its recognition following the recent adoption of a new Constitution based on Sharia. Oman, Qatar and Yemen are subject to the Sharia rules of arbitration.
44 Although the International Bar Association favors the Sharia rule for international arbitrations, the conventional position in modern international arbitrations is that only the presiding arbitrator is subject to the stronger code of neutrality. See Vantage S. S. Corp. v. Commerce Tankers Corp., 342 NYS 281 (1973) where it was held that there was no misconduct in the appointment as arbitrator of a party's attorney who had previously been involved in the drafting of the contract that led to the dispute and Robert Coulson's defence of the court decision as reported in (1992) 18, JCI Arbl. 1 at p. 40.
transactions with foreign companies as part of Iran's efforts to attract European and American technology. It could also be argued that ICSID arbitrations in Sharia territory can apply ICSID arbitration rules to the exclusion of Sharia arbitration rules if that state has acceded to the ICSID Convention. Even if the state concerned may not be liable under Sharia, the ruler of the state may be called upon to enforce an ICSID award.

There is, therefore, the question of recognition and enforcement within Sharia territories that has been ignored in the compromises that have been made by Islamic nations. The Inter-Arab Convention on the Enforcement of Judgments and Awards was signed by member states of the Arab League on September 14, 1952 to address this matter but, from the grounds for refusal to enforce an award under the Convention, one deduces that there would be risks in not following Sharia tenets where applicable.

Conclusion
Although some aspects of Sharia may seem strange and even repugnant to many Moslems and outsiders such as the rule of evidence that the testimony of one man is equivalent to that of two women, it has to be remembered that only recently women established the right to vote in Switzerland, and France did not validate arbitration agreements in respect of disputes in the future until 1981. Other aspects of Sharia, however, seem to indicate institutionalised efforts to ensure that arbitrations are conducted in a fair and just manner by properly qualified arbitrators.

The apparently free rein given to Sharia courts to intervene may suggest that the intervention of the courts is seen as a rare event in Islamic states. From the point of view of devout Moslems, Sharia arbitrations if conducted faithfully by qualified arbitrators should not yield unjust results because of the moral and religious connotations. There is no reason to believe that Sharia arbitration will not evolve so as to limit the powers of the courts to intervene on the ground that the Prophet himself supported arbitration of disputes and was himself arbitrator before the courts of law came into existence. In any event, it is reasonable to assume that appeals to the imam would continue to be allowed because of his supreme spiritual role in a Moslem's life.

Assuming, then, that the likely course of evolution of Sharia arbitration would be towards limiting the powers of Sharia courts over arbitration, it should not be difficult to live with other aspects of Sharia as we have lived with many aspects of European law for so long before the changes wrought by the internationalisation processes that are popular now. Many of the changes in modern European national arbitration laws can be said to be the outcome of competition among private arbitral institutions in European countries to attract international arbitration work from around the world, rather than to a profound belief in the basic and universal fairness of the changes. Otherwise, why do these changes not apply to domestic arbitrations also?

43 Article 3 of the Convention.

May 1993
APPENDIX TWO

1

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

PREAMBLE

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:
CHAPTER I

International Centre for Settlement of Investment Disputes

SECTION 1

Establishment and Organization

Article 1

(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

SECTION 2

The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be ex officio its representative and its alternate respectively.
Article 5

The President of the Bank shall be ex officio Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

(a) adopt the administrative and financial regulations of the Centre;
(b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
(d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
(e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
(f) adopt the annual budget of revenues and expenditures of the Centre;
(g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.
Article 5

The President of the Bank shall be ex officio Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

(a) adopt the administrative and financial regulations of the Centre;

(b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;

(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);

(d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;

(e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;

(f) adopt the annual budget of revenues and expenditures of the Centre;

(g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.
Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.
(2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

Article 11
The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

Section 4
The Panels

Article 12
The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13
(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.
(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.
Article 14

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

Section 5

Financing the Centre

Article 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts,
the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

Section 6
Status, Immunities and Privileges

Article 18
The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity
(a) to contract;
(b) to acquire and dispose of movable and immovable property;
(c) to institute legal proceedings.

Article 19
To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20
The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21
The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat
(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;
(b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same
treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

**Article 22**

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that the sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

**Article 23**

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

**Article 24**

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.
CHAPTER II

Article 25

(1) The jurisdiction of the Centre shall extend 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. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

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. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

CHAPTER III

Conciliation

SECTION 1

Request for Conciliation

Article 28

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings
shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall 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. He shall forthwith notify the parties of registration or refusal to register.

**SECTION 2**

**Constitution of the Conciliation Commission**

*Article 29*

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

(2) (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

*Article 30*

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.
Article 31

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3
Conciliation Proceedings

Article 32

(1) The Commission shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33

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

Article 34

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable
the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

CHAPTER IV

Arbitration

SECTION 1

Request for Arbitration

Article 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.
(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall 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. He shall forthwith notify the parties of registration or refusal to register.

SECTION 2

Constitution of the Tribunal

Article 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contract-
ing State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 19
The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40
(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.
(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3
Powers and Functions of the Tribunal

Article 41
(1) The Tribunal shall be the judge of its own competence.
(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42
(1) The 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, the Tribunal shall 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.
(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex arque et bono* if the parties so agree.

*Article 43*

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) call upon the parties to produce documents or other evidence, and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

*Article 44*

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.

*Article 45*

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

*Article 46*

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or
additional claims or counter-claims arising directly out of
the subject-matter of the dispute provided that they are
within the scope of the consent of the parties and are other-
wise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal
may, if it considers that the circumstances so require, re-
commend any provisional measures which should be taken
to preserve the respective rights of either party.

SECTION 4

The Award

Article 48

(1) The Tribunal shall decide questions by a major-
ity of the votes of all its members.

(2) The award of the Tribunal shall be in writing
and shall be signed by the members of the Tribunal who
voted for it.

(3) The award shall deal with every question sub-
mitted to the Tribunal, and shall state the reasons upon
which it is based.

(4) Any member of the Tribunal may attach his
individual opinion to the award, whether he dissents from
the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without
the consent of the parties.

Article 49

(1) The Secretary-General shall promptly dispatch
certified copies of the award to the parties. The award shall
be deemed to have been rendered on the date on which the
certified copies were dispatched.

(2) The Tribunal upon the request of a party made
within 45 days after the date on which the award was ren-
dered may after notice to the other party decide any ques-
tion which it had omitted to decide in the award, and shall
rectify any clerical, arithmetical or similar error in the
award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

Section 5

Interpretation, Revision and Annulment of the Award

Article 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of
enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(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.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.
(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

SECTION 6
Recognition and Enforcement of the Award

Article 53
(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54
(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. 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.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify
the Secretary-General of the designation of the competent
court or other authority for this purpose and of any subse-
quent change in such designation.

(3) Execution of the award shall be governed by the
laws concerning the execution of judgments in force in the
State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogat-
ing from the law in force in any Contracting State relating
to immunity of that State or of any foreign State from
execution.

CHAPTER V

Replacement and Disqualification of Conciliators
and Arbitrators

Article 56

(1) After a Commission or a Tribunal has been con-
stituted and proceedings have begun, its composition shall
remain unchanged; provided, however, that if a conciliator
or an arbitrator should die, become incapacitated, or resign,
the resulting vacancy shall be filled in accordance with the
provisions of Section 2 of Chapter III or Section 2 of
Chapter IV.

(2) A member of a Commission or Tribunal shall
continue to serve in that capacity notwithstanding that he
shall have ceased to be a member of the Panel.

(3) If a conciliator or arbitrator appointed by a
party shall have resigned without the consent of the Com-
misson or Tribunal of which he was a member, the Chair-
man shall appoint a person from the appropriate Panel to
fill the resulting vacancy.

Article 57

A party may propose to a Commission or Tribunal
the disqualification of any of its members on account of any
fact indicating a manifest lack of the qualities required by
paragraph (1) of Article 14. A party to arbitration pro-
cedings may, in addition, propose the disqualification of
an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

**Article 58**

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

**CHAPTER VI**

**Cost of Proceedings**

**Article 59**

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

**Article 60**

(1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

(2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

**Article 61**

(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the
charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

CHAPTER VII

Place of Proceedings

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or,

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

CHAPTER VIII

Disputes between Contracting States

Article 64

Any dispute arising 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 the application of any party to such dispute, unless the States concerned agree to another method of settlement.

CHAPTER IX

Amendment

Article 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

CHAPTER X

Final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open
for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

**Article 68**

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

**Article 69**

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

**Article 70**

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

**Article 71**

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

**Article 72**

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising
out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

**Article 73**

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

**Article 74**

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

**Article 75**

The depositary shall notify all signatory States of the following:

(a) signatures in accordance with Article 67;
(b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
(c) the date on which this Convention enters into force in accordance with Article 68;
(d) exclusions from territorial application pursuant to Article 70;
(e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
(f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfil the functions with which it is charged under this Convention.
BIBLIOGRAPHY

Books


Amin, Sayed Hassan, Commercial Arbitration in Islamic and Iranian Law, Teheran.


Sandifer, Dunward V., Evidence Before International Tribunals, University of Virginia, Charlottesville, 1975.


Wilson, Clifton E., *Diplomatic Privileges and Immunities*, University of Arizona, 1967.

**Conference Proceedings**


Second Euro-Arab Arbitration Congress, Bahrain,


Articles


Amerasinghe, C.F., Dispute Settlement Machinery in Relations between States and Multinational Enterprises - With Particular Reference to the International Centre for Settlement of Investment Disputes, 11 Int'l Law. 45 (1977).


Delaume, Georges R., Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1 Int'l Law. 64 (1966).


Ris, Martin, Treaty Interpretation and ICJ Recourse to Travaux Preparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 14 Boston College Int'l and Comp. L. Rev. 111.

Rowat, Malcolm D., Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA, 33 Harvard Int'l L. J. 103 (1992).

Rubino-Sammartano, Mauro, Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law), 9 Int'l Arb. 5 (1992).


Documents

Articles of Agreement of the International Bank for Reconstruction and Development.


ICSD Basic Documents. World Bank Publications.


Principaux Indicateurs Economiques, OCDE. Paris.


Statistical Bulletin, United Kingdom.


Miscellaneous