

FOREIGN INVESTMENT PROTECTION AND ICSID ARBITRATION

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INTRODUCTION

The International Centre for Settlement of Investment Disputes (the Centre) is an international institution set up under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States¹ (the Convention), whose immediate purpose is laid down in its title: the creation of machinery for the settlement of disputes involving a governmental party on one side and a foreign private investor on the other. The further aim of the Convention is related to that of the World Bank Group:² to promote the flow of funds from capital-exporting countries to developing countries.

The present study is not intended to give a detailed account of the functioning of the Centre. Its organization, the scope of its jurisdiction, and the flexibility and enforceability of its provisions have been described and commented upon in numerous excellent publications.³ The aim of this article is to shed some light on the appropriateness of some procedural aspects of arbitration under the auspices of the Centre against the background of traditional means for settling international investment disputes.

The importance and usefulness of the institutional arbitration procedures of the Centre must be seen against an existing gap in international law: there was no forum which functioned effectively and which offered suitable means of settling investment disputes directly between

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¹Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August 25, 1965, [1966] 1 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (entered into force October 14, 1966.) The text of the Convention and the accompanying Report of the Executive Directors (hereinafter ED Report) is reprinted in 60 A.J.I.L. 892 (1966) and 4 INT'L LEGAL MAT'LS 524 (1965). In the United States the provisions of the Convention are in part implemented by the Convention on the Settlement of Investment Disputes Act of 1966, 80 Stat. 344 (1966), 22 U.S.C. §§ 1650 and 1650a (1970).

²The other members of the World Bank Group are the International Bank for Reconstruction and Development, International Development Association, and the International Finance Corporation. The Centre is the only non-financial member of the World Bank Organizations.

³A legal bibliography relating to the Centre is published in the annex to its Annual Reports. For a recent comprehensive study, see Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS (Hague Academy of Int'l Law) 331 (1972).

a private party and a governmental party. Both conciliation and arbitration proceedings can be conducted under the Convention. This study will focus more particularly on arbitration.

Judicial practice in the settlement of investment disputes has been severely criticized for a lack of flexibility and realism in applying the rules of customary international law; the traditional arbitration pattern, which is essentially a conventional way of settling disputes, has been criticized for its lack of binding effect. The aim of the Convention is to fill those lacunae, and the effectiveness of the Convention is to be weighed against the background of the traditional process for the enforcement of international law (with particular reference to the decision of the ICJ in the *Barcelona Traction* case) and of traditional arbitration. An analysis of some procedural aspects of the Convention will show how maximum freedom is offered to the parties to arbitration proceedings under it with the corollary that no party can fail to cooperate once the proceedings have been instituted.

THE LACK OF SECURITY FOR INVESTORS UNDER CUSTOMARY INTERNATIONAL LAW

The recent decision of the International Court of Justice (ICJ) in the *Barcelona Traction* case⁴ has been extensively commented upon⁵ and severely criticized.⁶ Without going deeply into the reasons which led the court to take such a strict position, the following conclusion can be drawn: "If unlawful injuries to a corporation which sap the economic content of the shares do not justify the exercise of diplomatic protection on behalf of the shareholders, then one has to conclude that property in the new form of shareholdings is not protected in international law."⁷ Indeed, Belgium's *locus standi*, espousing the claim of its nationals who were holding a substantial part of the shares in an investment, was denied. If this case is to be considered as a test case for the present status of customary international law, then one has to conclude that international law presents a serious lacuna. The ICJ said in fact that the norm of customary international law was silent in this respect.⁸ The court

⁴*Barcelona Traction, Light & Power Co.* [1970] I.C.J. 3.

⁵See Note, 1 GA. J. INT'L & COMP. L. 179 (1970).

⁶Lillich, *Two Perspectives on the Barcelona Traction Case: The Rigidity of Barcelona*, 65 A.J.I.L. 522 (1971); Mann, *The Protection of Shareholders' Interests in the Light of the Barcelona Traction Case*, 67 A.J.I.L. 259 (1973).

⁷Abi-Saab, *The U.S. in World Affairs*, in ANNALS OF INTERNATIONAL STUDIES 16 (1971).

⁸See 1971 A.S.I.L. PROCEEDINGS 341, and the conclusion drawn by Professor Suy:

I think that the decision of the Court is a very wise lesson, and the Court at the end of the Judgment encourages states to look for bilateral and multilateral solutions. If there

concluded: "Where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim."⁹ Where, as in the case at hand, the shareholders have a substantial interest in the investment, the lack of security is *a fortiori* feared by those corporations involved in a variety of interlocking shareholdings. The court defined¹⁰ and applied strictly the rules of international law as they now stand as to diplomatic protection. Whether customary international law has not reached the stage of development which responds to the needs of modern business transactions, or whether international law merely shows a lack of flexibility, the result remains unchanged: some substantial interests go wholly unprotected under international law.

Since the existence of a legal interest does not per se justify protection under international law, it is up to the parties to an investment agreement to define the limits of such protection. Under the system set out in the Convention, adequate protection can be afforded to the parties to investment transactions. The national State of the investor, party to a dispute submitted to the Centre, waives its right of diplomatic protection¹¹ and the strict rules pertaining to that right no longer apply. The parties, having consented to the jurisdiction of the Centre, will be able to bring their claim directly before an international forum insofar as the requirements as to the jurisdiction of the Centre have been met. While the dispute will be removed from the State-to-State level, the procedural rights and obligations of the parties will be determined by the provisions of the Convention, which are enforceable under international law.

ARBITRATION UNDER CUSTOMARY LAW: LACUNAE AND NEED FOR A CONVENTION

Arbitration is a conventional way of settling disputes. Taking into

is a conclusion to be drawn from the decision, it must be to push forward the efforts of the World Bank and the efforts of the states to solve their investment disputes through the procedures provided for by the World Bank and not to bother any longer the International Court with this type of dispute.

Id. at 354.

⁹[1970] I.C.J. 3, 47.

¹⁰*Id.* at 46:

[I]n inter-state relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State.

The Court then quoted the statement of the Permanent Court in the *Mavrommatis Palestine Concessions* Case:

The question, therefore, whether the . . . dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. [1924] P.C.I.J. ser. A, No. 2.

¹¹CONVENTION art. 27, para. 3.

consideration the arbitration practice between States and individuals,¹² the situation can be summarized as follows: recourse to arbitration proceedings is the result of an agreement to arbitrate, contained in a general or a particular instrument, whereby the parties agree that disputes between them (or arising out of the application or the interpretation of the instrument in which the agreement is embodied) should be referred to an arbitral tribunal. Even if the law governing international contracts between a State and a private party is sometimes difficult to define, these contracts are regarded as being valid, both parties having the capacity to enter into such agreements. The major question arises with respect to the effects of such an international contract, *i.e.*, performance or nonperformance by either party.¹³ The real effectiveness of a contract and the obligations contained in it, such as compulsory recourse to arbitration, depend on its binding character for the State party vis-a-vis an investor and *vice versa*. The parties are, by principle, bound by their undertakings. The question which arises is: how can the performance of that obligation be secured, *i.e.*, what sanctions can be applied, and under which system of law, against unilateral disregard of arbitral commitments? The legal nature of contracts between States (or State agencies) and private entities has been subject to much controversy, and it can still not be said that the nonperformance by a State of its obligations under a contract with an alien individual does give rise to international responsibility. A remedy had to be found for the fragility of the classical arbitration agreement between a State and an individual. In addition, under international law, individuals lack procedural capacity, except where rights have been granted to them specifically by a treaty or an international agreement.

The binding character of the consent to arbitration is the crucial point both in securing the good conduct of arbitration proceedings, and in the performance of the resulting obligations. As to the proper conduct of the arbitration proceeding, it is customary in arbitration agreements to specify that each party appoint an arbitrator and that they in turn appoint an umpire. Failing agreement of the parties to nominate an umpire and in order to prevent frustration in the early stage of the

¹²See Gromley, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS* (The Hague, 1966); Ketcham, *Arbitration Between a State and a Foreign Private Party*, in SYMPOSIUM: PRIVATE INVESTORS ABROAD, RIGHTS AND DUTIES 403 (1965); Domke, *Arbitration Between Governmental Bodies and Foreign Private Firms*, 17 *ARB. J.* 129 (1962); Spofford, *International Status and Access to International Tribunals*, 113 *RECUEIL DES COURS* (Hague Academy of Int'l Law) 171 (1964).

¹³See Schwebel, *Speculations on Specific Performance of a Contract Between a State and a Foreign National*, in SYMPOSIUM: PRIVATE INVESTORS ABROAD, RIGHTS AND DUTIES, 201 (1965).

constitution of an arbitration tribunal, it can be provided that the umpire be appointed by a designated impartial authority, such as the President of the ICJ. Provision can also be made for the appointment of a sole arbitrator. Thus, specific provisions can theoretically prevent frustration in case of nonperformance by the adverse party. As a whole, an arbitration agreement lays down the foundation of a procedure to be conducted by the parties and implies an obligation for the parties to comply with the resulting decision. The *lex fori* can define the *lex arbitri*¹⁴ or the arbitration procedure can be governed by international law.¹⁵

As O'Connell says:

Where a governmental contract contains an arbitration clause and the Contracting State refuses to arbitrate, the latter is guilty of a denial of justice just as much as if it obstructed the contractor in his resort to the municipal law remedies contemplated in the contractual relationship. Hence, the private contractor may instantly invoke the protection of his State or, if the contract lays down sufficient guidance as to the machinery of arbitration and the appointment of an arbitrator, he may proceed to arbitration in the absence of the State and obtain an award.¹⁶

International practice has shown¹⁷ that such situations leave some uncertainty as to the compulsory character of such a procedure and its resulting obligations. Where a private party acting against a State through arbitration cannot rely on direct international law remedies to prevent frustration of its intentions under the arbitration agreement, interstate remedies become available only after his national State espouses his claim.

Refusal to arbitrate can take place in the earliest stage of the proceedings, e.g., in a lack of cooperation in the constitution of the Tribunal. While unilateral measures can be taken by the plaintiff as far as provided in the agreement, they still can be contested by the defendant. Thus, one of the parties could paralyze the effect of the arbitration procedure both in its different stages of progression and once a decision

¹⁴Sapphire Int'l Petroleum Ltd. v. Nat'l Iranian Oil Co., 35 INT'L L. REP. 136, 168-70 (1967); Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION 155, 161 (1967).

¹⁵See Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 INT'L L. REP. 117, 155-56 (1963); for comments see Kojanec, *Problèmes de l'Arbitrage Entre Etats et Compagnies Privées Étrangères*, 37/38 Y.B. of the A.A.A. (Ass'n of Attenders & Alumni, Hague Academy of Int'l Law) 99, 104 (1967/68).

¹⁶2 D. O'CONNELL, INTERNATIONAL LAW 990 (1970).

¹⁷For example, cases where the governmental party did not appear in the proceedings, as in the case of Société Européenne d'Etudes et d'Enterprises v. Yugoslavia, 24 INT'L L. REP. 761 (1957); cf. the Sapphire case, note 14 *supra*.

is reached. Even if the rights of one of the parties are defined in such a way that the proceedings themselves cannot be prevented by hindrance of the other party, once an award has been rendered such an arbitral tribunal may have no power to have it enforced.

THE CONVENTION SECURES THE PERFORMANCE OF THE OBLIGATIONS
OF EITHER PARTY TO ARBITRATION PROCEEDINGS

No Contracting State shall by the mere fact of being a member of the Centre be under any obligation to submit any particular dispute to the Centre,¹⁸ but once given, *a consent cannot be unilaterally withdrawn by either party*, even if one of the Contracting States concerned should withdraw from the Centre.¹⁹

A very important feature of the Convention, as compared with arbitration under customary law, is the internationalization of the arbitration agreement itself, of the procedure in its entirety, and of the obligations of both the private and the governmental parties under this procedure. In addition, the provisions contained in the Convention prevent frustration of an arbitration agreement as a result of gaps in the agreement between parties or through the action or inaction of one of the parties. Similarly, while the parties are relatively free to agree on any procedural rules for the conduct of their proceeding, rules have been promulgated which apply automatically to the extent that the parties fail to agree on any procedural points. Thus, such disagreements will not prevent the initiation or progress of a proceeding.

The Convention not only allows a private claimant to bring a claim himself without espousal by his national State, but his national State expressly abandons its power of diplomatic protection.²⁰ This principle could be considered as being inconsistent with traditional international law where a wrong done to a national of one State for which another State was internationally responsible is actionable, not by the injured national, but by his State. In a number of instances, provision had been made for direct arbitration between a host State and a foreign investor, but those arrangements did not have an internationally binding character. The Convention filled that gap, and by doing so recognized the individual as a subject of international law.

The jurisdiction of the Centre *ratione materiae* extends to "legal disputes," and the dispute must be one "arising directly out of an investment".²¹ In addition, the *conditio sine qua non* for submission of a

¹⁸Preamble, to the CONVENTION.

¹⁹SID CONVENTION art. 25, para. 1; art. 72.

²⁰*Id.*, art. 27, para. 1.

²¹*Id.*, art. 25, para. 1, and ED Report 26,27 *supra* note 1. See SZASZ, *A Practical Guide to the*

dispute to the Centre is the existence of valid consent by the parties.²² Agreements consenting to the jurisdiction of the Centre obtain *irrevocable* force from the Convention itself.²³ Once they have given their consent, the parties are taken up in the network of internationally binding rules set out in the Convention. As soon as proceedings are initiated, the machinery, *i.e.*, the self-contained system of the Convention, is set in motion with obligations to be performed under treaty law.

The role of an international convention in securing the performance of arbitration proceedings by institutionalizing them consists of reinforcing the mere agreement to arbitrate to the extent that the uncertainty affecting the traditional arbitration pattern is diminished. The Convention secures recognition of the principle that a private party may have direct access to a State before an international tribunal. As a corollary, not only the Contracting States are bound by the provisions of the Convention, but also the private party. The Convention grants rights and imposes duties on both consenting parties.

Like the traditional arbitration clause, the consent to arbitration under the Convention can be incorporated in a general or a particular instrument.²⁴ But the legal character of the contract, the law applicable to it, etc., are no longer crucial to the determination of the procedural rights and duties of the parties under arbitration. Without isolating the consent clause from the contract in which it appears, the consent belongs to a different legal sphere. The consent, without necessarily being an international instrument, creates international obligations. When a party consents to bring a dispute before the Centre, the performance of that agreement is ensured by an international convention.

What are the consequences of a valid consent to arbitrate under the Convention? Consent involves submission to compulsory arbitration with, as a corollary of the direct access of the individual to this interna-

Convention on the Settlement of Investment Disputes, 1 CORNELL J. INT'L L. 1, 13-15 (1968).

²²CONVENTION art. 25, para. 1 and ED Report 23, 24. Except that consent must be given in writing, there are no other special requirements as to form. The consent can be recorded in two separate instruments.

²³*Id.* See also *supra* note 19 and *infra* note 24.

²⁴See *supra* note 22. Advance consents to the jurisdiction of the Centre have been recorded in numerous investment agreements (*e.g.*, 6 INT'L LEGAL MAT'LS 1085 (1967)), in bilateral treaties for the protection and promotion of foreign investments and in domestic legislation such as investment laws and codes. Consent can be given in connection with a new investment agreement, with an existing agreement whose disputes provisions are considered unsatisfactory by the parties, or with respect to any legal dispute that has already arisen. The Centre has prepared a set of "Model Clauses" for this purpose, and the Secretariat of the Centre is at the disposal of interested parties in connection with the drafting of conciliation and/or arbitration clauses and other matters arising under the Convention.

tional forum, a waiver of diplomatic protection on the part of the national State of the private investor. The Convention creates a complete jurisdictional system, which leaves the parties great latitude, but at the same time ensures that the absence of an agreement between the parties as to specific aspects of the procedure will not prevent the arbitration machinery to function properly. Consent to such arbitration involves, unless otherwise stated, the exclusion of any other remedy²⁵ and the applicability of 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.²⁶ The consent of the parties can require exhaustion of local administrative and judicial remedies and determine specifically which are the rules of law to be applied. Thus, the Convention grants a direct internationally binding character to obligations which could not have been secured in a classical arbitration clause. Furthermore, important gaps, as they appeared in the conduct of traditional arbitration procedures, are covered by the general and the specific provisions of the Convention, which complement each other in offering solutions for most foreseeable situations.

Once one or both of the parties to an investment dispute has addressed a request for arbitration to the Secretary-General of the Centre following the modalities prescribed by the Rules of Procedure for the Institution of Proceedings²⁷ and if the matter is not manifestly outside the jurisdiction of the Centre, that request will be registered,²⁸

²⁵CONVENTION art. 26; see Schwebel and Wetter, *Arbitration and the Exhaustion of Local Remedies*, 60 A.J.I.L. 484 (1966).

²⁶CONVENTION art. 41, para. 2; see Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Applicable Law and Default Procedure*, INTERNATIONAL ARBITRATION 12, 13-19 (1967); Lauterpacht, *The World Bank Convention on the Settlement of International Investment Disputes*, RECUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM, 652-62 (1968).

²⁷Doc. ICSID/4, Part B., [hereinafter Institution Rules]; reprinted at 7 INT'L LEGAL MAT'LS 363-65 (1968).

²⁸CONVENTION, Art. 36. On January 13, 1972 the Secretary-General registered the first request for arbitration pursuant to Article 36 of the Convention. The request concerned a dispute arising out of an agreement between the Government of Morocco and two private companies, Holiday Inns S.A. (A Swiss company) and Occidental Petroleum Inc. (a U.S. corporation). The arbitral tribunal was constituted on March 28, 1972, having as President Judge Sture Petré (Swedish) and as other members Sir John Foster (British) and Professor Paul Reuter (French). On December 29, 1972, the counter-memorial of the Defendant Party raised an objection to jurisdiction pursuant to Arbitration Rule 41(1). On July 1, 1973 the Tribunal decided *inter alia*: that it was competent with respect to the dispute submitted to it; and that Holiday Inns S. A., Occidental Petroleum Corporation and Holiday Inns, Inc. were entitled to be parties to the proceedings. At the time of publication, the proceedings in this case, were still pending Annex 6, International Centre for Settlement of Investment Disputes, Seventh Annual Report 1972/1973. On March 6, 1974, the second such request was registered. It concerned a dispute between Société Adriano Gardella S.P.A. (anltolian Company) and the Government of Ivory Coast.

and the proceedings will be deemed to have been instituted.²⁹ The Convention leaves great latitude to the parties as to the constitution of the tribunal. Nevertheless, if one party refuses to cooperate, the Chairman of the Administrative Council of the Centre can, at the request of either party, take the necessary action so that a tribunal be constituted.³⁰ In addition it should be noted that the challenges which appeared in traditional arbitration practice have been eliminated under the Convention.

As soon as the tribunal has been constituted, proceedings can begin.³¹ For the working procedure of the tribunal, as for the constitution of the tribunal, the Rules of Procedure for Arbitration Proceedings³² (except those that merely reproduce binding provisions of the Convention) apply only to the extent that the parties do not otherwise agree.³³ Whenever the parties do not agree on some procedural point that is not, or is only inadequately covered by these Rules, then the tribunal has a residual power to decide the question.³⁴ This is, in fact, only declaratory of the inherent power of the arbitral tribunal to formulate its own rules of procedure in the event of a lacuna.

CAPACITY OF PARTIES TO SUBMIT DISPUTES TO THE CENTRE

The jurisdiction of the Centre *ratione personae* is very narrowly defined. However, parties desiring to submit existing or future disputes to the Centre in many cases are in a position to remedy a jurisdictional disability at the time of their consent. Compared with traditional means of settling investment disputes, the Convention offers maximum freedom in this respect.

One of the parties to a dispute submitted to the Centre must be "a Contracting State . . . or a constituent subdivision or agency of a Contracting State designated to the Centre by that State."³⁵ In addition to the requirement that the subdivision or agency must have been designated to the Centre by that State, to consent validly to the jurisdiction of the Centre this consent must either be approved by the Contracting State concerned or that State must have informed the Centre that it has waived the requirement of such approval.³⁶

²⁹Institution Rule 6(1).

³⁰CONVENTION art. 38; in addition, Chapter V of the Convention contains rules in connection with the replacement and disqualification of arbitrators.

³¹Arbitration Rule 6(1) (See note 32 *infra*).

³²Doc. ICSID/4, Part D. [Hereinafter Arbitration Rules].

³³CONVENTION art. 44.

³⁴*Id.*

³⁵*Id.*, art. 25, para. 1.

³⁶*Id.*, art. 25, para. 3.

The Convention lays down no requirements as to what constitutes a "constituent subdivision or agency." This matter is left to the discretion of the Contracting State. This is a necessary expansion since many foreign investment transactions are conducted, not through the State itself, but through political subdivisions, public agencies or other offices created especially for that purpose, mostly with some financial autonomy.

The other party to the dispute must be a national of a Contracting State other than that of the governmental party and it may be either a natural or a juridical person.³⁷

The nationality of investors in the context of settlement of international investment disputes has become a recurrent theme of debate for many years,³⁸ and the problem has not been solved by the International Court's decision in the *Barcelona Traction* case. The increasing importance of multinational corporations is likely to render the problem even more acute. The nationality of the investor is also significant within the framework of the Convention in connection with the issue of the protection of shareholders.

The Convention requires the private party to have the nationality of a Contracting State other than the governmental party, but it does not further specify what is meant by such nationality. In the drafting stage³⁹ of the Convention, a special procedure for dealing with preliminary questions as to nationality was prescribed; these questions were not submitted to the Conciliation Commission or Arbitral Tribunal, but were left to be decided in the last instance by the ICJ.⁴⁰ The comment on this draft said that "The objection to the jurisdiction dealt with in this section is based not on a dispute as to the agreement of the parties, *i.e.*, the consent of the parties which is an indispensable prerequisite for the jurisdiction of the Centre, but as to the applicability of the Convention to the dispute, which is another indispensable element. While the first interests only the parties, the second interests the Contracting States. For that reason [the draft] prescribes a different method for deciding whether the objection is well founded." A further draft provided that any claim of a party to a dispute that the Commission or the

³⁷*Id.*, art. 25, paras. 1,2.

³⁸See van Hecke, *Nationality of Companies Abroad*, 8 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 223 (1961).

³⁹All relevant preparatory documents have been collected and reproduced in a legislative history on the Convention known as DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION (1970), [hereinafter HISTORY].

⁴⁰Working paper in the form of a draft Convention, prepared by the General Counsel of the IBRD, 2 HISTORY 5.

Tribunal lacks competence on the ground that a party to the dispute is not a national of a Contracting State, would be dealt with by the Commission or Tribunal as a preliminary question, and that in any proceedings in this connection a written affirmation of nationality signed by or on behalf of the Ministry of Foreign Affairs of the State whose nationality is claimed by the party, would be conclusive evidence of the facts stated therein.⁴¹ The reason for this change is that the procedure for dealing with questions of nationality and their submission to the ICJ seemed unduly cumbersome and there appeared to be no compelling reason why the determination of nationality could not be left primarily to the State whose nationality is claimed or, should that State make no such determination, to the Conciliation Commission or Arbitral Tribunal.⁴² A further objective test was adopted in this draft: "national of a Contracting State" was to mean a person (natural or juridical) possessing the nationality of any Contracting State on the date of consent to the jurisdiction of the Centre, and included: (a) any company which under the domestic law of that State was its national; and (b) any company in which the nationals of that State had a controlling interest. "Company" included any association of natural or juridical persons, whether or not such association was recognised by the domestic law of the Contracting State concerned as having juridical personality.⁴³

However, all provisions defining the term "nationality" were dropped in subsequent drafts; the present Convention does not give definite criteria for nationality. The only requirement for eligibility found in the Convention is the possession of a nationality of a Contracting State other than the State party to the dispute. The nationality of the investor is not here of significance in the traditional sense of the link conferring the right of protection of his State, a right withheld in any event, since the right of diplomatic protection is to be given up by the national State of the private party conducting proceedings under the Convention. Consequently, the definitions in the Convention of "national of another Contracting State," are not the essence of nationality itself.⁴⁴ The nationality is left to be determined by the Arbitral Tribunal in light of domestic and international law.⁴⁵

The Convention does not require that nationality be specified in the consent agreement.⁴⁶ If the private party to a dispute is a natural person,

⁴¹First Preliminary Draft, 2 HISTORY 148.

⁴²*Id.* at 152.

⁴³*Id.* at 170.

⁴⁴CONVENTION art. 25, para. 2.

⁴⁵2 HISTORY 579.

⁴⁶This specification must be included in the request. SID CONVENTION art. 36, para. 2, and

the general nationality requirement must be fulfilled on the date on which the request for conciliation or arbitration is registered as well as on the date of consent.⁴⁷ The nationality of the private party may be dubious and controversies may arise in this connection. These uncertainties are most likely to occur in the case of corporate nationality. Problems determining corporate nationality are made flexible in the sense that the only date relevant for nationality is that on which the parties consented to the jurisdiction of the Centre. Moreover, even if a juridical person had the nationality of the State party to the dispute on that date, the parties *can agree that because of foreign control such a person should be treated as a national of another Contracting State for the purpose of the Convention*.⁴⁸ It must be stressed that the essence of this procedure is the mutual consent of the parties. Under the Convention, control in itself is not an absolute nationality test or a general criterion of nationality.⁴⁹ This provision contains a general rule which is not made more specific. This again broadens the scope of the Convention, since it is left to the parties to specify what is meant by "control" for this purpose and the Convention does not require that this control be exercised by the nationals of only one particular Contracting State or that this State be named in the stipulation. This stipulation could apply to all possible situations in which a company is incorporated in the host State and is controlled or owned in great part by nations of another State or in which a corporation, although organized under the law of the host State, is a subsidiary of a foreign corporation. In all of those cases, under the control test, that corporation could have foreign nationality, instead of the formal citizenship of the place of incorporation.

As said, this nationality question is relevant only to determine whether the facilities of the Centre could be used by the parties which had agreed to do so.⁵⁰ Should the Secretary-General find on the basis of the information contained in the request that the private party obviously does not fall within the scope of Article 25(2) of the Convention, he will refuse to register a request on the basis that the dispute is manifestly outside the jurisdiction of the Centre *ratione personae*.⁵¹ On

Institution Rule 2(1)(d).

⁴⁷CONVENTION art. 25, para. 2(a).

⁴⁸*Id.*, para. 2(b).

⁴⁹Neither does control in and of itself justify diplomatic protection of shareholders in customary international law (beneficial ownership, as opposed to legal ownership).

⁵⁰The nationality of the parties must also be taken into account for the constitution of an Arbitral Tribunal (CONVENTION arts. 38, 39, Arbitration Rule 1 (3)) or of an ad hoc Committee considering the annulment of an award. CONVENTION art. 52, para. 3.

⁵¹CONVENTION art. 36, para. 3; Institution Rule 6(1)(b).

the other hand, if the nationality of the private party is disputed, then the Conciliation Commission or the Arbitral Tribunal will be empowered to determine the nationality.⁵²

In this connection, the question might arise as to which indicia the Tribunal could take into account to determine positively the nationality of a private juridical person. Under the scope of the Convention, the ties of corporate nationality are in fact much looser than under customary international law on the matter. On the other hand, since the Convention does not define the concept of nationality one will logically turn to the general principles of the nationality as they apply in the field of State responsibility.⁵³ Is it only the State of incorporation or the State where the seat of management is located, which is conclusive? Are criteria of ownership (*i.e.*, "real" citizenship—where the owners of more than 50% of the shares reside—if indeed that many reside in any one place), control, etc. constitutive elements of nationality? It is probable that in the spirit of the Convention a more functional approach may be observed, taking into account the protection of the investment activity as a whole. As Judge Riphagen said in his dissenting opinion on the judgment of the ICJ in the *Barcelona Traction* case, "a true bond of nationality, such as exists between a State and its nationals who are natural persons, is obviously inconceivable for juristic persons as such."⁵⁴ Also, the ICJ stated in the *Nottebohm* case that the bond of nationality between the State and the individual is not always a sufficient basis for State protection.⁵⁵

In the general spirit of the Convention, more attention should be paid to the nationality of the real rights which arise directly out of an investment, rather than to overly restrictive criteria, which very often rely on a legal fiction. The very rigid position of the ICJ in the *Barcelona Traction* case has been the origin of much controversy on the subject of nationality. Even under the system of diplomatic protection, but more than ever under the Convention, each case must be considered on its individual merits. Or, in the words of Judge Gros in his separate opinion in the *Barcelona Traction* case, to place the problem within the controversial scheme of diplomatic protection once more:

⁵²Art. 41, para. 2 of the Convention provides: "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."

⁵³See *supra* note 38.

⁵⁴[1970] I.C.J. 3, 347. (Dissenting opinion of Judge Riphagen.)

⁵⁵[1955] I.C.J. 3, 24.

The company's link of bare nationality may not reflect any substantial economic bond. As between the two criteria, the judge must choose the one on the test of which the law and the facts coincide: it is the State whose national economy is in fact adversely affected that possesses the right to take legal action.⁵⁶

But by enunciating very strict principles for the establishment of corporate nationality, *i.e.*, rejecting types of ties like those of ownership and control, the Court limited the indicia that could be taken into account. According to the ICJ, the traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.⁵⁷ One of the consequences of this state of the law is that an investment in the form of shareholdings, that is, the content or economic value of these shares, is not protected in public international law. "In the present state of law," the court said in *Barcelona Traction*, "the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed."⁵⁸ It is true also that the adoption of the theory of diplomatic protection of shareholders could lead to competing diplomatic claims, which is obviously no longer the case under the Convention.

Under the Convention the Contracting States have deviated from these general principles. The private party is no longer a subject of the diplomatic protection of his national State with all the ties which this situation implies. Rather, he is granted direct and autonomous access to an international forum. A private party will not be denied *ius standi* on the basis of the classical pattern of interstate responsibility where responsibility is the necessary corollary of a right.⁵⁹

Under the Convention, it is not the existence or absence of this particular right which is decisive for the problem of the claimant's legal capacity; the only requirement for a private party to have access to the Centre after consent is that he be a national of a Contracting State other than the contracting State party to the dispute. Since jurisdiction of the

⁵⁶[1970] I.C.J. 3, 280. (Separate opinion of Judge Gros.)

⁵⁷*Id.* at 43.

⁵⁸*Id.* at 48.

⁵⁹As the Permanent Court stated in the *Panevezys-Saldutiskis Railway Case*:

This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.

[1939] P.C.I.J., ser. A/B, No. 76, at 16.

Centre rests essentially on consent between the parties, it is this instrument of consent that should be referred to for the determination of the nationality of that party, through consideration of factors such as the capacity in which that party concluded the agreement and its identification. Thus, there is no reason to extend the principles dictated in interstate decisions for the determination of the nationality of a company to the private party under the Convention.

One could say that the Convention has remedied this unsatisfactory⁶⁰ state of law. The Convention is designed to replace the classical pattern of diplomatic protection; principles of interstate responsibility do not apply to claimants under it. Thus, while many controversies have arisen in traditional international judicial practice with respect to an alleged nationality for the purpose of diplomatic protection, this is not likely to be the case in the scheme of the Convention. Indeed, since the Convention offers individuals direct access to an international forum on a consensual basis, it allows maximum freedom for the parties to act by agreement.

In considering the principles governing the nationality of corporations under the regime of diplomatic protection and, more particularly, the principles governing the rights of shareholders for seeking redress on the international legal plane as they apply in customary international law, it is apparent to what extent the system of the Convention, having here the character of *lex specialis*, deviates from them.

ENFORCEABILITY OF AWARDS

In the general context of this article, a final question must be raised: How can the successful investor be sure that an award in his favor will be executed by the adverse party? The way this question is generally phrased should not reflect an assumption that the Convention is to be a tool in the hands of the investor against the host State. On the contrary, the Convention is an extremely well balanced instrument. What is expressed here is the classical fear of the foreign investor, who is in many cases much more vulnerable than the host State.

Third party arbitration awards are usually more freely enforced than are foreign judgments. An award represents the carrying out of an agreement between parties, whereas a judgment represents the act of another sovereign. The general rule is that a valid award duly pronounced by an international tribunal is binding upon the parties to the

⁶⁰While in *Barcelona Traction* the I.C.J. recently took a very restrictive position for the establishment of nationality on the international plane, judges in their separate opinions pleaded for more flexibility in this respect. See *supra* notes 54 and 56.

dispute which has been submitted to it and is considered to be final in that particular dispute. The obligatory character of international decisions, based on the principle of *res judicata*, has gained general recognition and is a sanctioned principle of international law. The concept of *pacta sunt servanda*, inherent in the contractual agreement or compromise to arbitrate, is the second concept on which the obligatory character of arbitral awards is based. Both principles⁶¹ are embodied in Article 53(1) of the Convention, which provides: "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 enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

As provided by the foregoing article, no appeals may be taken outside of the procedures provided for by the Convention. The only post-award remedies are those available under and regulated by the Convention itself: (a) The original Tribunal may be requested to rectify any errors and to supplement any incomplete decisions (*i.e.*, when the Tribunal has omitted to decide any questions submitted to it);⁶² (b) The original Tribunal or, if necessary, a newly constituted one, may be requested to interpret⁶³ or revise⁶⁴ an award; (c) The Chairman of the Council may constitute an ad hoc Committee of Arbitration to consider the annulment of an award on certain grounds specified in the Convention.⁶⁵ If the award is thus annulled in whole or in part, the dispute may be submitted to a new Tribunal. Those different remedies in fact cover most grounds on which execution could be refused in customary international law. However, there is no recourse to an outside authority against decisions of tribunals set up under the Convention, and even the classical exception of public policy is no longer admitted. The applicability of local law or the jurisdiction of local courts is excluded with regard to the arbitral award. The Convention thereby goes beyond most of the provisions of the existing conventions on recognition and enforcement

⁶¹Both principles were established by the Hague Convention for the Pacific Settlement of International Disputes (1907), arts. 37, 81, 84. In the *Société Commerciale de Belgique* case, the Permanent Court declared, "Recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of that award are definitive and obligatory." [1938] P.C.I.J. Ser. A/B, No. 78, at 175 proceedings in which the principle was adopted are cited in E. NANTWIL, *THE ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS AND ARBITRAL AWARDS IN PUBLIC INTERNATIONAL LAW* 74-75 (1966).

⁶²CONVENTION art. 49, para. 2.

⁶³*Id.*, art. 50.

⁶⁴*Id.*, art. 51.

⁶⁵*Id.*, art. 52.

of foreign arbitral awards⁶⁶ which have been offered to internationalize the award or to alleviate the problems in connection with the allocation of juridical control over the recognition and enforcement of awards, as between the rendering State and the enforcing State.

The case of default by a party is also dealt with by the Convention. Failure of a party to appear or to present its case cannot prevent the tribunal from rendering an award, though it is required to follow special procedures in case of such a default.⁶⁷ The need for a default procedure is a corollary of the binding character of the undertaking to have recourse to arbitration.

Under customary law, the investor who has obtained an award against a State that does not recognize the award will have to face different requirements, according to the country in which he seeks enforcement. One of those requirements is the granting of an *exequatur*, by which a foreign arbitral award must be reduced to a domestic judgment. The external finality of ICSID awards vis-a-vis domestic jurisdictions is stipulated in Article 54(1) of the Convention, which provides that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations⁶⁸ imposed by that award within its territories as if it were a final judgment of a court in that State."⁶⁹ Thus, the Contracting States have agreed to consider an ICSID award as a final judgment of their own courts without reexamination; this finality is subject only to the internal remedies as provided by the Convention.

The consequence of the introduction of this principle into the different legal systems is an absolute exception from the customary *exequatur* procedure in the domestic jurisdiction of the Contracting States. For this purpose, each Contracting State must designate to the Centre a court or other authority competent to recognize and enforce awards certified by the Secretary-General of the Centre.⁷⁰ Though the execution

⁶⁶See the United Nations 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959), arts. III-V, and the 1961 Geneva European Convention on International Commercial Arbitration, 484 U.N.T.S. 364 (1963) art. IX.

⁶⁷CONVENTION art. 45, para. 2; see Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Applicable Law and Default Procedure* in INTERNATIONAL ARBITRATION 12, 17 (1967).

⁶⁸Enforcement is limited to pecuniary obligations imposed by the award. This means practically, that while an award would remain *res judicata* as to all its provisions between parties, enforcement through the strongarm of the law would be limited to the obligation to pay a sum of money contained in the award.

⁶⁹The same article continues in its second sentence, "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."

⁷⁰CONVENTION art. 54, para. 2.

of awards under the Convention is governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought,⁷¹ there are no longer any limitations or exceptions on enforceability. The enforcement of the award is an international obligation not only for both parties to the proceedings but also the award is valid and enforceable in the jurisdiction of all Contracting States as a final judgment of their own courts. Noncompliance would be in violation of treaty obligations under the Convention, which implies direct recourse to international law remedies.⁷² Although all Contracting States have waived their requirements for the recognition of foreign arbitral awards, the Convention does not provide a restriction on sovereign immunity from execution. As stated in Article 55 of the Convention: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." It must be stressed that the situation under which a State would resist execution as being opposed to its sovereign immunity is not in contradiction with its obligation to execute the award under Article 54.

Article 54, as well as the *exequatur* procedure would do, grants automatic executory force to an ICSID award. In case a State does not enforce an award voluntarily, the obstacle of sovereign immunity from execution intervenes only in the stage of the use of measures of execution.⁷³ While there is not to be any derogation from the laws relating to the immunity of States from execution, the wide recognition and enforceability of awards rendered pursuant to the Convention is one of its principal features. The victor in arbitration will also be afforded a wider choice of *fora* in which to enforce the award. The Contracting States, by becoming parties to the SID Convention, have gone into an express undertaking sanctioned under international law to execute the awards rendered under the auspices of the Centre.⁷⁴ One cannot go any further than this maximum undertaking.

⁷¹*Id.*, art. 54, para. 3; ED Report 43.

⁷²The remedies are, as provided by the Convention itself: revival of the right of diplomatic protection on the part of the investor's national State (art. 27, para. 1); proceedings before the I.C.J. (art. 64).

⁷³The problem must be examined from a dual point of view: the immunity of a State from execution of an award directed against it in its own court, and immunity of a foreign State from such execution in the courts of the state in which execution is sought. The latter case is particularly relevant here since under the Convention the victor in arbitration can seek enforcement in the forum of his choice. Both cases have been placed on the same footing in the Convention. While arbitration awards will normally be complied with voluntarily, the parties to the dispute and all Contracting States having legally bound themselves to do so, many states still adhere to the theory that any sovereign is immune from forced execution.

⁷⁴For further comments on the award enforcement provisions of the Convention, see Broches,

CONCLUSION

How can ICSID encourage the flow of foreign capital? When foreign investors contemplate investing in another country, they are influenced in making their decision by that country's stability of structure, but mainly by the safeguards offered. The final test of the effectiveness of the Centre is the binding character of the undertaking to arbitrate before an impartial international forum and the enforceability of awards resulting from such arbitration. As to this, it may be said that the Convention offers maximum security in the present stage of development of both conventional and customary international law. In addition, the many options that are open to parties to ICSID arbitration before and after the institution of proceedings, were designed to meet the requirements of today's investments.

This article gives only a very incomplete account of the provisions of the Convention. The extent to which the Convention has succeeded in filling some lacunae appearing in the traditional pattern of the settlement of international investment disputes has been illustrated by a few of its most important features. In submitting their disputes to arbitration under the auspices of the Centre, the parties involved avoid litigation over the procedural aspects of the arbitration they are conducting. They are also offered maximum security as to the cooperation of the other party and as to the enforceability of resulting awards. The efficiency and the flexibility of the procedures set out in the Convention therefore, responds to the needs of today's international investment community.

The Convention the Settlement of Investment Disputes Between States and Nationals of Other States, 136 RECUEIL DES COURS (Hague Academy of Int'l Law) 331, 396-405 (1972); West, *Award Enforcement Provisions of the World Bank Convention*, 23 ARB. J. 1, 38 (1968).