ACADÉMIE DE DROIT INTERNATIONAL
FONDÉE EN 1923 AVEC LE CONCOURS DE LA
DOTATION CARNEGIE POUR LA PAIX INTERNATIONALE

RECUEIL DES COURS

COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW

1972

II

Tome 136 de la collection

1973
A. W. SIJTHOFF, LEYDE

5
; *Printing Division, Leyden*

GENERAL TABLE OF CONTENTS

TABLE GÉNÉRALE DES MATIÈRES

THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

by

ARON BROCHES

Vice President and General Counsel of the
International Bank for Reconstruction and Development
Secretary-General of the International Centre
for Settlement of Investment Disputes

CHAPTER I

GENERAL INTRODUCTION

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States contains no less than 75 articles.[1, 2] It will therefore be convenient by way of introduction first of all to give an outline of its principal provisions. I shall then turn to its history, referring particularly to the reasons which led to its adoption and the techniques which were used in the preparation, negotiation and final formulation of the Convention. By way of conclusion of this introductory part I shall single out a few of the principal distinctive features of the Convention from a legal as well as a policy aspect.

(a) Outline of Principal Provisions

The Convention envisages and deals with two distinct types of proceedings for dispute settlement, namely conciliation (Articles 28-35) and arbitration (Articles 36-55). There is no need to elaborate on the difference between the two proceedings. Conciliators may recommend, arbitrators must decide. The Convention imposes a duty on parties to conciliation proceedings to "give their most serious consideration to [the Conciliation Commission's] recommendations" (Article 34), while parties to arbitration proceedings "shall abide by and comply with the terms of the award" (Article 53 (1)). Parties may, of course, agree in advance to accept the recommendations of a Conciliation Commission as a binding determination of their dispute, but such an agreement is not contemplated by and derives no sanction from the Convention.[3]

1. 575 *UNTS* 159 (English, French and Spanish authentic texts); the text of the Convention and of the Report with which it was submitted to Governments ("Report") has been published by the International Centre for Settlement of Investment Disputes ("ICSID" or "Centre") in separate English, French and Spanish editions (Docs. ICSID/2); the English text of the Convention and the Report has also been published in 4 *Int'l L. Mat.* 524 (1965), and the French text of the Convention in annex to Delaume, 93 *Journal du Droit Int'l* 26, 50 (1966).

2. For the legislative history of the Convention see *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* —Documents Concerning the Origin and the Formulation of the Convention— 1970 ("History"). Volume I reproduces the successive drafts of each provision of the Convention in English, French and Spanish, with references to relevant reports, records of meetings and other documents which are reproduced in the remaining volumes in the three languages.

3. The draft submitted to the Legal Committee provided that unless the parties

On the other hand, if during the course of arbitration proceedings the parties reach agreement, they may request the Tribunal to incorporate it in an award with the result that the provisions of the Convention relating to the enforcement of awards will be applicable.[4] Although the Convention does not expressly so provide there is no reason why parties, if they so desire, cannot agree to have recourse first to conciliation and, in case the conciliation effort fails, to submit the dispute to arbitration.[5]

Conciliation and arbitration proceedings are administered by the International Centre for Settlement of Investment Disputes, an international institution created by the Convention. It has its seat at the headquarters of the International Bank for Reconstruction and Development (World Bank) in Washington. The Centre, which is essentially a secretariat, is governed by an Administrative Council to which each State which is a party to the Convention (in the terminology of the Convention "each Contracting State") appoints a representative; each representative casts one vote. The Council has an *ex officio* chairman (without vote) in the person of the President of the World Bank. In relation to proceedings under the auspices of the Centre the Administrative Council's most important task is the adoption of administrative and financial regulations, rules of procedure for the institution of proceedings (Institution Rules), rules of procedure for conciliation proceedings (Conciliation Rules) and rules of procedure for arbitration proceedings (Arbitration Rules).[6] The latter two, which implement in detail the broad provisions of the Convention, will govern proceedings

otherwise agreed the recommendations of a conciliation committee would not be binding. However, this provision was dropped (*History*, Vol. II, p. 786). Cf. the Conventions on the Privileges and Immunities of the United Nations (Section 30 of Article VIII) and on the Privileges and Immunities of the Specialized Agencies (Section 32 of Article IX), which provide that in case of differences arising between the United Nations and a State, a request shall be made for an advisory opinion of the ICJ and that this advisory opinion "shall be accepted as decisive by the parties".

4. See Rules of Procedure for Arbitration Proceedings of the Centre ("Arbitration Rules"), Rule 43 (2).

5. However, unless the parties otherwise agree, neither may in the arbitration proceeding "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" (Article 35).

6. The definitive Regulations and Rules were adopted by the Council on 25 September 1967, pursuant to Article 6 (1) (*a*)-(*e*) of the Convention and took effect on 1 January 1968. They are reproduced in document ICSID/4.

unless the parties agree otherwise.[7] The principal officer of the Centre, who is also its registrar, is the Secretary-General. He is elected by the Administrative Council by a two-thirds majority of its members upon the nomination of the Chairman. Finally, the Centre maintains a Panel of Conciliators and a Panel of Arbitrators. Each Contracting State may designate four persons to each Panel[8] who may but need not be its nationals, and the Chairman of the Administrative Council may appoint ten persons. To date the Chairman has not made any designations.

This much for the Centre[9] which, as I noted earlier, administers conciliation and arbitration proceedings under the Convention. The Centre does not itself conciliate or arbitrate. Conciliation and arbitration proceedings are conducted by conciliators and arbitrators appointed in accordance with the provisions of the Convention, which leave the parties great latitude but at the same time assure that failure of agreement between the parties will not prevent the constitution of a Conciliation Commission or Arbitral Tribunal. With respect to conciliation the only requirement is that the Commission shall consist of an uneven number, including a sole conciliator (Article 29 (2) (*a*)). In the case of arbitration there is the additional requirement that the majority of the members of the Tribunal must be of a nationality other than that of the State which is a party to the dispute and of the State whose national is the other party to the dispute. The parties may not even by common agreement depart from this rule, except if each member of the Tribunal (or the sole arbitrator) has been appointed by agreement of the parties (Articles 37 (2) (*a*) and 39).

If the parties have failed to constitute the Commission or Tribunal within 90 days after registration of the request for conciliation or arbitration by the Secretary-General, the missing designations will be made by the Chairman of the Administrative Council (Article 30 (conciliation), Article 38 (arbitration)). The parties may, but need not, appoint conciliators and arbitrators from the Panels, but the Chairman is restricted to the Panels when he makes the appointments.[10]

7. Article 33 (conciliation), Article 44 (arbitration).

8. 35 States have exercised this right. For the names of Panel Members see Annex 3 of the Sixth Annual Report (1971-1972) of the Centre.

9. For details concerning the matters mentioned above, the financing of the Centre and the Centre's privileges and immunities, see Articles 1-24 of the Convention.

10. Article 32 (conciliation), Article 40 (arbitration). For a criticism of the panel system by a former Secretary-General of the Permanent Court of Arbi-

I have mentioned the types of proceedings that are provided for in the Convention and have touched on some aspects of the role of the Centre in relation to those proceedings. The next subject to be taken up is in what circumstances and under what conditions conciliation or arbitration proceedings may be conducted under the Centre's auspices. This is the question of the scope of the Convention or, in the terminology of the Convention, of the jurisdiction of the Centre. I shall have occasion to discuss various aspects of this question throughout this course and I shall limit myself at this time to a bare outline.

Proceedings under the auspices of the Centre must meet four tests set out in Article 25. The first and most important one is that both parties must have consented to have recourse to the Centre. However, once this requirement of consent, which has been called the cornerstone of the jurisdiction of the Centre, has been met, the consent becomes irrevocable and cannot be unilaterally withdrawn. The second test concerns the quality of the parties. One party must be a Contracting State, or one of its constituent subdivisions or agencies, and the other party must be a national of another Contracting State. In order to determine this jurisdiction *ratione personae* the Convention defines "national" in the case of a natural person as one possessing the nationality of another Contracting State both at the time of consent and on the date when the request for conciliation or arbitration, as the case may be, was registered, but excluding a person who at either point of time also had the nationality of the State party to the dispute. With respect to juridical persons the nationality criterion need only be met on the date of consent and the jurisdictional requirement is that the juridical persons had the nationality of another Contracting State, or had the nationality of the State party to the dispute but by agreement of the parties was regarded as a national of another Contracting State "because of foreign control". I note, but without comment for the time being, that the Convention defines neither "nationality" nor "control".

In addition to the requirement of consent, and the nationality requirement for establishing jurisdiction *ratione personae*, two further tests must be met under the heading of jurisdiction *ratione materiae*:

tration, see François in "International Arbitration", *Liber Amicorum for Martin Domke*, p. 93 (The Hague 1967). It may be noted, though, that in the first arbitration case to come before the Centre the parties each designated an arbitrator from the Panel (Sixth Annual Report 1971-1972, p. 4).

the dispute must be a "legal dispute" and it must arise directly out of an "investment". Neither term is defined in the Convention.

The Convention provides that Conciliation Commissions and Arbitral Tribunals shall be the judges of their own competence. They may deal with an objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre or for other reasons not within the competence of the Commission or the Tribunal as a preliminary question, or they may join it to the merits of the dispute (Article 32 (conciliation), Article 41 (arbitration)).

The provisions I have discussed until now relate equally to conciliation and arbitration. I now want to review briefly a number of matters relating to arbitration.[11]

Unless the parties have given the Tribunal the power to decide a dispute *ex aequo et bono*, the Tribunal shall decide in accordance with such rules of law as may be agreed by the parties. The Convention thus establishes complete party autonomy on the question of law to be applied by the Tribunal. In the absence of agreement, the Tribunal shall apply the law of the State party to the dispute (including its conflict rules) and such rules of international law as may be applicable (Article 42).

The Convention provides for an award to be rendered notwithstanding the default of one of the parties. It states, however, expressly that failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions. That party will therefore still have to prove its case (Article 45).[12]

The Tribunal decides all questions by a majority vote of its members, awards must be in writing, must deal with every question submitted, and must state the reasons upon which they are based (Article 48).

The Convention provides three types of remedies against an award: a request for interpretation (Article 50), a request for revision on the basis of discovery of new facts (Article 51) and, finally, a request for annulment on a limited number of grounds (Article 52). Subject to

11. Omission of a separate discussion of conciliation in this Course was compelled by limitations of space, and may be justified by the fact that it raises far fewer legal questions than does arbitration. It should not be taken as a value judgment as to the potential of the two proceedings as tools for dispute settlement. In my view conciliation under the Centre's auspices may in certain situations be preferable to arbitration.

12. Cf. Article 53 of the Statute of the ICJ. And see Broches in "International Arbitration", *Liber Amicorum for Martin Domke*, pp. 17-19 (The Hague 1967).

these remedies provided by the Convention itself, the award is final and binding on the parties (Article 53). Furthermore, each Contracting State, regardless whether it or one of its nationals was a party to the dispute, must recognize an award rendered pursuant to the Convention as binding, must treat the award, upon its mere certification by the Secretary-General of the Centre, as if it were a final judgment of a court in that State, and must enforce it as such (Article 54).

(b) History of the Convention

The Convention came about as the result of an initiative taken by the World Bank. At first it may seem strange that a financing institution, even though it is a specialized agency of the United Nations, would sponsor an international agreement concerned with investment disputes between States and private foreign investors, that is, disputes in which by definition it would have no direct interest. The explanation is nevertheless simple: while the World Bank's principal activity is to provide finance, it does so in carrying out its task as a development institution.

As such the Bank was and is vitally concerned with capital flows from the developed to the developing countries. These flows may be divided according to their origin and the channels through which they reach the developing countries into the following principal categories:

(a) governmental funds transferred to developing countries under bilateral arrangements;

(b) governmental funds transferred to developing countries (or private or public entities in these countries) through and by multilateral institutions to which the governments in question have made these funds available. Foremost among these multilateral channels are the institutions of the World Bank Group: the World Bank itself, the International Development Association (IDA) and the International Finance Corporation (IFC);

(c) private funds transferred to developing countries through and by multilateral institutions to whom these private savings are loaned. The World Bank, the Inter-American Development Bank and the Asian Development Bank have borrowed many thousands of millions of dollars equivalent in many different currencies in the capital markets of the world for relending for development projects and programmes; and, finally

(d) private funds made directly available for projects in developing countries, whether as debt or equity, and whether the projects are wholly or partially owned by the private foreign investor.

The latter category, private foreign investment, is of great quantitative importance as a supplement to a necessarily limited volume of public development finance, and in many periods has accounted for between one-third and one-half of total capital flows. Its qualitative importance, particularly in the manufacturing industry but in other sectors as well, is even greater. Private foreign investment has a number of potential side benefits in transferring managerial and technical know-how, encouraging the creation of auxiliary industries and development of export markets. We must also recognize, however, that even in those countries in which foreign private investment is welcomed in principle, the terms and conditions on which it operates have given rise to controversy between the host countries and the private investors and these controversies have on occasion, and there are a number of obvious recent examples, involved the national governments of the investors as well.

It is beyond doubt that fear of political risks operates as a deterrent to the flow of private foreign capital to developing countries. The World Bank therefore considered it appropriate to explore whether it could make a contribution to an improvement in the investment climate, by reducing the likelihood of unresolved conflicts between host countries and investors, and in particular by doing so in a manner which would eliminate the risk of a confrontation of the host country and the national State of the investor.

The management of the Bank, and in particular Presidents Black (1949-1962) and Woods (1963-1968), considered that while efforts were being made in other quarters to arrive at a multilaterally agreed Code of Good Behaviour—these efforts eventually came to nought[13]—

13. After many years of work in the Organisation for Economic Co-operation and Development (OECD) the Council in 1967 adopted a resolution (Turkey and Spain abstaining) whose operative language is as follows: "[the Council] I. Reaffirms the adherence of Member States to the principles of International law embodied in the Draft Convention; II. Commends the Draft Convention as a basis for further extending and rendering more effective the application of these principles; III. Approves the publication of the Draft Convention as well as this Resolution." The draft Convention provided in its Article 7 for arbitration of disputes. The parties to the arbitration could be either the host State and the investor's national State, or the host State and the investor himself. However, the investor's right to institute proceedings, apart from being subject to a number

the Bank might make a modest contribution by creating facilities for the voluntary settlement of investment disputes through conciliation and/or arbitration proceedings to which the host country and the foreign investors would be parties on an equal procedural footing, without either requiring or permitting the intervention of the investor's national State.

This proposal had to be seen against the following background,[14] which in turn determined its essential features:

(a) In the absence of an agreement to the contrary between the foreign investor and the host government, the redress of grievances which the investor may seek by direct access to that government is governed by local law, as are the investor's rights and obligations.

(b) If the investor feels aggrieved by actions of the host government and has found no redress through the exercise of local remedies, he may seek the protection of his national government. Even if the investor's government is willing to give that protection and if the investor has not been required, as a condition of entry, to waive diplomatic protection, there is no guarantee that the host government will be willing to submit the dispute to the jurisdiction of an international arbitral or other tribunal. Moreover, the investor's government may in fact not be willing to take up a meritorious claim of the investor because it fears that to do so would be regarded as an unfriendly act by the host government and interfere with bilateral relations on other matters. This political element is likely to weigh particularly heavily if the merits of the investor's case are not wholly clear in his government's view, thus withholding from the investor any opportunity to have his case judged by an impartial tribunal.

(c) In an attempt to overcome these difficulties, some large investors have negotiated arbitration agreements with host governments providing for detailed rules regarding the selection of arbitrators, the arbitral procedure and, in some cases, the law to be applied by the arbitral tribunal. The host government may, however, deny the validity of the arbitration agreement or repudiate it, and in that event the investor is in the end once again thrown back on such protection as his own government may be willing and able to give him.

of other conditions, was subject to the will of his own State, which could preclude him from acting by taking the case up itself.

14. For a fuller statement see Memorandum of 28 August 1961 to the Executive Directors of the World Bank, *History*, Vol. I, pp. 1-3.

The analysis of the problem pointed the way to the solution, namely arrangements, embodied in a treaty, which would ensure that arbitration agreements voluntarily entered into would be implemented.

Having identified the need for institutional mechanisms for the settlement of investment disputes within the context of an international agreement the Bank might simply have recommended the idea to its members, or to the United Nations. Instead it decided to deal with the matter within its own organization. In doing so the Bank merely followed the example it had set in dealing with the creation of two affiliates, the IFC in 1956 and the IDA in 1960. As in those instances, the staff prepared working papers and drafts for the consideration of the Executive Directors, a full-time policy making body of officials designated by the Bank's member countries through a process of election and appointment. The drafting, negotiation and final formulation of the charters for IFC and IDA were not only within the institutional ambit of the Bank, but also within the professional experience and competence of the members of the Board of Executive Directors, and of the officials in their home countries, generally Treasury officials, to whom they report. In the case of the Convention the latter element was lacking. In addition to broad policy issues the Convention raised a host of technical questions which did not lend themselves to full discussion in the Bank's Board without a great deal of technical preparation. It was for that reason that the Executive Directors in 1963 authorized the President to convene regional meetings of experts. They were held in the headquarters cities of the four United Nations Economic Commissions, namely Addis Ababa, Santiago de Chile, Geneva and Bangkok. These meetings, which were chaired by the General Counsel of the Bank, were for purposes of consultation only and the reactions received at the meetings were to guide the Executive Directors in deciding what further action to take. Experts from 86 countries participated. On the basis of the Chairman's report on the regional consultative meetings the Executive Directors concluded that a convention appeared to be negotiable. They thereupon asked and received instructions from the Board of Governors of the Bank, the plenary body, at its 1964 Annual Meeting, to formulate a Convention, "taking into account views of member governments and keeping in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments".

In order to assist the Executive Directors in their task, member countries were invited to send representatives to a Legal Committee

which was to meet in Washington at the World Bank's headquarters. Sixty-one governments responded to this invitation and the Legal Committee met for three weeks during November/December 1964 under the chairmanship of the Bank's General Counsel. During this period agreement was reached on most points. A few issues which had remained unresolved were then dealt with in the early months of 1965 by the Executive Directors who finalized the text and agreed on the text of an accompanying report.

The Board of Governors' Resolution of 1964 had requested the Executive Directors to submit the text of a convention to member governments with such recommendations as they should deem appropriate. This last clause was intended to leave the Executive Directors a choice between a number of possible recommendations including such options as recommendations for further study, a recommendation for calling an international conference and, finally, a recommendation to sign and ratify. In the event the Executive Directors' recommendation substantially conformed to the third option: they submitted a text to member governments "for consideration with a view to signature and ratification, acceptance or approval".[15]

The method by which the World Bank proceeded to prepare, negotiate and formulate the Convention and to submit it to governments was unorthodox and was characterized by a fair amount of innovation and, sometimes, improvization.[16] The central responsibility was shouldered by the Executive Directors, 20 in number, who between them represented the entire membership. This was a group of manageable size which included representatives of capital exporting as well as capital importing countries. It fell obviously far short, however, of an accurate reflection of the individual views of the then roughly 100 individual member countries. This shortcoming was largely cured, first, by the regional consultative meetings and in a later phase by the meetings of the Legal Committee, which served the double purpose of providing technical expertise and communicating individual country positions. There was another problem as well. Unlike the situation in the large majority of international organizations in which all members have equal voting power—one country, one vote—the voting power of members of the World Bank (and for that matter of other international financial institutions as well) is related to their financial

15. See Report, paras. 1-8.
16. Broches, *Proceedings Am. Soc'y Int'l L.*, 36-37 (1965).

contributions. This weighted voting system applies also in the Board of Executive Directors in which each Director casts the number of votes of the member or members by which he was appointed or elected. Suggestions were made that this voting system should not apply when the Board was dealing not with Bank operations or Bank policy, but with a semi-extra-curricular exercise such as drafting an international agreement. The answer which had been given on the earlier occasions when the Board had formulated the charters of the IFC and the IDA, was repeated on this occasion and was to the effect that the World Bank's charter recognized only one voting system and that any formal vote would have to be taken on a weighted basis. The Executive Directors had, however, developed a practice of seeking a consensus in informal meetings in which no votes are taken. This "no-formal-vote" system was also embodied in the Rules of Procedure of the Legal Committee. The system worked quite satisfactorily. Polls gave an accurate reflection of the views of members and in the last round of meetings of the Executive Directors the majority, both in number of members and in weighted votes, deferred to the wishes of the minority in several cases in order to produce a text which would be widely acceptable.

The Executive Directors took final action on the Convention on 18 March 1965 and the Convention entered into force one-and-a-half years later on 14 October 1966, one month after the twentieth country had deposited its instrument of ratification. At the present time the Convention has been signed by 68 States of which 63 have completed the ratification process.[17] Compared to other arbitration conventions of a much less sensitive character this is an impressive number. The Contracting States include most capital exporting countries and on the capital importing side the vast majority of African States, a majority of Asian countries, and some of the new non-Latin countries in the

17. In alphabetical order (States which have not yet ratified indicated by italics)—Afghanistan, Austria, Belgium, Botswana, Burundi, Cameroon, Central *African Republic, Ceylon, Chad, China, Congo (People's Republic of), Cyprus,* Dahomey, Denmark, Egypt (Arab Republic of), *Ethiopia,* Finland, France, Gabon, Germany, Ghana, Greece, Guinea, Guyana, Iceland, Indonesia, *Ireland,* Italy, Ivory Coast, Jamaica, Japan, *Jordan,* Kenya, Korea, Lesotho, Liberia, Luxembourg, Malagasy Republic, Malawi, Malaysia, Mauritania, Mauritius, Morocco, Nepal, Netherlands, *New Zealand,* Niger, Nigeria, Norway, Pakistan, Senegal, Sierra Leone, Singapore, Somalia, *Sudan,* Swaziland, Sweden, Switzerland, Togo, Trinidad and Tobago, Tunisia, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Upper Volta, Yugoslavia, Zaire, Zambia.

Western Hemisphere. The only group that is totally unrepresented is Latin America, which in 1964 had voted *en bloc* against the Board of Governors Resolution instructing the Executive Directors to prepare a convention, an action which became known in the Latin American press as "El No de Tokyo", after the city where the Governors had met. The Latin American opposition to the Convention was essentially based on strongly held political-philosophical views and sovereignty concepts peculiar to that part of the world, which to some outside observers may appear to have outlived both their usefulness and their justification. This is not the place to debate that issue.[18] It is important, however, to make a note of the fact that adherence or non-adherence to the Convention has in no way affected relations between the sponsoring institution, the World Bank, and its members. The Bank has always stressed the doubly voluntary character of the entire ICSID scheme: not only are its members free to join the Centre or not, but even after they have done so, they are free to decide whether or not to utilize the Centre's facilities by consenting to its jurisdiction in respect of particular arrangements or disputes.[19]

(c) Some Distinctive Features

Against this background of the contents of the Convention, the reasons which led the World Bank to sponsor it and the history of its preparation and adoption, I would like to summarize a few of the principal distinctive features of the Convention both in its policy and legal aspects.

The Convention has sometimes been regarded as an instrument for the protection of private foreign investment. This characterization is one-sided and too narrow. The purpose of the Convention is to promote private foreign investment by improving the investment climate for investors and host States alike. The drafters have taken great care to make it a balanced instrument serving the interests of host States as well as investors.[20] The Convention permits proceedings at the initiative of an investor as well as proceedings at the initiative of the

18. See Szasz, 11 *Va. J. Int'l L.*, 256–265 (1971).

19. Convention, final paragraph of the Preamble, and Article 25 (4).

20. This has been generally recognized and noted with approval. See, e.g., 20 *Record of N.Y.C. Bar Ass'n*, No. 6, 401, 409 (1965); Schwarzenberger, *Foreign Investments and Int'l Law*, p. 142 (1969); Reuter in *Investissements Etrangers et Arbitrage entre Etats et Personnes Privées*, p. 7 (Paris 1969).

host State. In fact, one of the provisions of the Convention, namely that for the enforceability of awards in the territories of Contracting States, was inserted primarily with the needs of host States in mind: if a host State obtains an award against an investor in arbitration proceedings before the Centre, and the investor does not comply with the award, the host State can seek forced execution in the territories of any Contracting State without running into the obstacles which frequently stand in the way of enforcement of foreign arbitral awards. Like the Statute of the International Court of Justice, the Convention imposes no obligation on Contracting States to submit any specific dispute to the jurisdiction of the Centre in the absence of consent, and this fact is expressly noted in the Preamble. The Preamble also makes clear that it is not the purpose of the Convention, or the expectation of the Contracting States, that all matters affecting foreign investment should be removed from national jurisdiction. The Preamble recognizes that such disputes would usually be subject to national legal processes but that international methods of settlement may be appropriate in certain cases. I may add in that connection that while Article 26 of the Convention provides that consent to arbitration under the Convention shall unless otherwise stated be deemed consent to such arbitration to the exclusion of any other remedy, that Article expressly recognizes the right of a Contracting State to require the exhaustion of local remedies as a condition of its consent.[21]

From the legal point of view the most striking feature of the Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.[22] The private party does not need the intervention of his national government; in fact, the Convention provides that when an investor and a State have consented to submit a dispute to arbitration before the Centre, the investor's own State may not give diplomatic protection or bring an international claim in respect of that dispute, unless the host State should fail to comply with an award rendered in such a dispute. The Convention enables a private party in agreement with a State to create rights and obligations under international law, including the ouster of any form of national juris-

21. See Schwebel and Wetter, 60 *Am. J. Int'l L.*, 484 et seq. (1966).

22. See Nørgaard, *The Position of the Individual in International Law*, pp. 221-239 (1962).

diction and of diplomatic protection. Finally, and most importantly, the Convention creates a complete jurisdictional system. Once the parties have fulfilled the jurisdictional requirements for activating the Centre, the Centre has jurisdiction which cannot be defeated by the unilateral act of one of the parties, and the Convention ensures that the undertaking of the parties to have recourse to the Centre will be effectively implemented.

CHAPTER II

JURISDICTION OF THE CENTRE

In my opening lecture I listed four requirements for the jurisdiction of the Centre.[1] It may be in order to say a word about the use of the term "jurisdiction" of the Centre, "compétence" in the French text. As you know, the Centre does not itself engage in conciliation or arbitration; it, therefore, does not have jurisdictional powers in the generally accepted sense of the term. The drafters nevertheless decided to speak of jurisdiction of the Centre as a convenient expression to indicate the scope of the Convention, or to put it differently, to indicate the outer limits within which the Centre, as the administrative organ for the implementation of the Convention, can act.

The fundamental condition is consent, "the cornerstone of the

1. Article 25 reads as follows: "(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)."

jurisdiction of the Centre".[2] But consent is not enough. The Centre is an institution of limited jurisdiction, limited by the character of the parties and by the nature of the dispute. I shall first deal with the requirement of consent and then with the limits on the Centre's jurisdiction. But before beginning the discussion I want to stress the overriding significance of consent not merely as a formal requirement for the jurisdiction of the Centre, but as an essential characteristic of the entire system of the Convention. The consensual character of the Convention will serve as a guide to its interpretation and in particular for the interpretation of the Centre's jurisdiction *ratione personae* and *ratione materiae*.

(a) Consent

No procedures can take place under the Centre's auspices unless both parties to the dispute have given their consent. Article 25 of the Convention which imposes that requirement states that the consent must be in writing. It also states that when both parties have given their consent, no party may withdraw its consent unilaterally. This last provision, which makes consent once given irrevocable, is probably the most important provision of the Convention. There are numerous examples of agreements between governments and foreign investors containing arbitration clauses which have been frustrated as a result of unilateral action by the government terminating the agreement, including the arbitration clause. One of the best-known examples is that of the 1933 concession of the former Anglo Iranian Oil Company. That concession contained an arbitration clause, and when Iran cancelled the concession in 1951 and the Company wanted to go to arbitration, it was met by the argument, among other things, that the arbitration clause forming part of the concession had equally been annulled.[3] Under the Convention, mutual consent has the effect of elevating the agreement between a private company and a State to have recourse to ICSID conciliation or arbitration to the level of an international legal obligation, and to that extent the Convention constitutes the private company a subject of international law.

Apart from the requirement that the consent be in writing, the Convention does not prescribe any particular form. In most cases, both parties will give their consent in a single instrument, such as a compromissory clause in an investment agreement or a *compromis*.[4] There are, however, other possibilities; for instance, the consent of the State may be embodied in its investment promotion law,[5] or in an investment protection treaty with another State, which provides that investors meeting certain conditions or falling within certain categories will have the right to submit investment disputes with the host State to the Centre.[6] The consent of the investor may be evidenced by an express statement to that effect made to the host State, or it may be given at the time when the investor institutes proceedings against the host State. It must, however, be remembered that each party's consent becomes irrevocable only after both parties have given it. Therefore, in the examples last mentioned, the host State could withdraw its consent as long as the investor had not equally consented.[7]

Consent may be given both before or after the dispute has arisen. However, both parties must have given their consent at the time when

2. Report, para. 23.

3. See Schwebel and Wetter, 60 *Am. J. Int'l L.*, 490-493, 497-498 (1966). An attempt by the United Kingdom to bring the case before the International Court of Justice failed on jurisdictional grounds (*Anglo-Iranian Oil Co. Case*, [1952] ICJ Rep., p. 93).

4. The Centre has prepared a set of model clauses, in English and French, for use in such instruments (Doc. ICSID/5).

5. E.g., Zaire Investment Code (Ordonnance-loi No. 69-032 portant Code des Investissements) of 26 June 1969, Article 30: "Nonobstant les dispositions de l'article précédent, tout différend survenant à l'occasion de l'interprétation et de l'application des dispositions de cette ordonnance-loi, d'un arrêté conjoint pris dans le cadre du chapitre II du présent texte ou d'une convention passée dans le cadre du chapitre III de ce même texte, et relatif à des investissements étrangers, peut être réglé, à la requête de la partie la plus diligente, par voie d'arbitrage conformément à la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, à la condition que l'investisseur soit un 'ressortissant d'un autre Etat contractant' aux termes de l'article 25(2) de ladite convention. Dans sa demande d'admission au régime général ou conventionnel, ou ultérieurement par acte séparé, l'investisseur donne son consentement à un tel arbitrage conformément à ladite convention et l'exprime tant en son nom qu'en celui de toute société congolaise qu'il contrôle et par l'intermédiaire de laquelle l'investissement est effectué. Il accepte, en outre, qu'une telle société soit considérée comme un 'ressortissant d'un autre Etat contractant'. Dans l'arrêté d'agrément, en cas d'admission au régime général, et dans l'ordonnance-loi d'approbation de la convention en cas d'admission au régime conventionnel, la République démocratique du Congo donnera le consentement requis par ladite convention ainsi que l'acceptation que la société congolaise mentionnée au paragraphe précédent est considérée comme un 'ressortissant d'un autre Etat contractant'. La sentence arbitrale est exécutoire de plein droit en République démocratique du Congo."

6. E.g., Article 10 of the Agreement of 15 January 1970 between Belgium and Indonesia on the encouragement and reciprocal protection of investments, *Moniteur belge*, 31 August 1972, p. 9449.

7. His consent in advance is required by the Zaire Code (*supra*, footnote 5).

a request for conciliation or arbitration is submitted to the Secretary-General of the Centre. I shall return to that point when I discuss the screening power of the Secretary-General.[8]

(b) *Jurisdiction* Ratione Personae

I next want to take up the jurisdiction of the Centre *ratione personae*, i.e., the limitation of the Centre's jurisdiction based on the character of the parties. One of the parties must be a Contracting State, or a constituent sub-division or agency thereof, acting with the approval of the State where so required, and the other party must be a national of another Contracting State. Excluded from the jurisdiction of the Centre are, therefore, on the one hand, disputes between States (including sub-divisions and agencies), for which there exist traditional methods of settlement under international law, and on the other hand, disputes between private parties which can be solved either through recourse to municipal courts or to commercial arbitration. It will normally not be difficult to determine whether a party is a sub-division or agency of a Contracting State, since the Convention requires that they be notified to the Centre by that State. Such notification will presumably be accepted as proof of their status as sub-division or agency. A determination whether the other party to the dispute, the national of another Contracting State, has the required capacity may be somewhat more complicated.

I shall speak at some length about the determination of nationality in the light of the provisions of Article 25 (2). But there is another question which is not dealt with by the Convention, namely whether an entity in order to qualify as a "national of another Contracting State" must be a privately owned entity. The broad purpose of the Convention is the promotion of private foreign investment and the first preambular clause of the Convention uses the term private international investment. On the other hand, it was recognized in the discussions leading up to the formulation of the Convention that in today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a "national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function. I believe that it is fair to say that there was a consensus on this point among those participating in the preparation of the Convention. No attempt was made, however, to reduce this common understanding to a legal definition, which would have been a difficult task.[9] Nor was it necessary to do so because of the consensual character of the Convention as a whole which justified leaving a large measure of discretion to the parties. But this is not to say that in an extreme case the Secretary-General or a Commission or Tribunal, each within the sphere of their own competence, could not review the soundness of the exercise of that discretion.

8. *Infra*, p. 365.

(i) *The Nationality Requirement*

The Convention requires that the non-State party to the dispute be "a national of another Contracting State". "National of another Contracting State"—that is, according to Article 25 (2), a natural or juridical person which has "the nationality of a Contracting State other than the State party to the dispute". This requirement consists of two parts, a negative one and a positive one. The negative one (and I shall leave aside for the moment the refinements and exceptions) is that the non-State party may *not* have the nationality of the State with which it has a dispute. The positive one is that it *must* have the nationality of a State which is a party to the Convention.

Why these requirements? As regards the negative one the answer is fairly simple. The Convention establishes international mechanisms for the settlement of disputes. In that sense it offers protection to aliens against the host State. There is no reason to have these international procedures be a substitute, even on an optional basis, for domestic procedures for the settlement of disputes between a State

9. In a comment to Article X of the Preliminary Draft, which contained definitions of "National of a Contracting State" and "National of another Contracting State", it was noted that the term "National" was not restricted to privately owned companies, "thus permitting a wholly or partly government owned company to be a party to proceedings brought by or against a foreign State" (*History*, Vol. II, p. 230).

and its own citizens. As regards the positive requirement—nationality of a State which is a party to the Convention—the answer is maybe less obvious and, in fact the need for this requirement has been questioned. It is quite possible that the nationality requirement may prove to be troublesome in some cases—principally because of the many uncertainties surrounding the concept of "nationality" especially in relation to juridical persons—although I believe that these difficulties can be resolved. The nationality requirement is, however, in my opinion essential in the context of the mutuality principle embodied in the Convention in balancing the interests of host States on the one hand and investors on the other, which was one of the main concerns of the drafters of the Convention.

Let me make clear what I mean by making brief references to two other important provisions of the Convention. I have already touched upon them in the general survey of the Convention in my opening lecture and I shall discuss them in more detail later. They are Article 27 (1) which suspends the right of diplomatic protection of a State whose national has agreed with a host State to submit a dispute to the Centre, and Article 54 (1) which obliges Contracting States to recognize an award rendered pursuant to the Convention as binding and enforce it as if it were a final judgment of their national courts. The purpose of the first provision is to assure a host State which has agreed to the jurisdiction of the Centre that it will not be exposed in the alternative, or cumulatively, to an international claim put forward by the investor's national State in the exercise of diplomatic protection. The purpose of the second provision is in large part to assure host States which have obtained an award in their favour that they can enforce that award. The first objective—protection of the host State against international claims by the national States of investors—could be frustrated unless the State which can claim to exercise diplomatic protection is itself bound by the Convention. The second objective —assurance that host States will be able to enforce awards in their favour—could be frustrated if the national State of the investor, where frequently his principal assets will be located, is not a Contracting State and bound by the Convention to recognize and enforce such an award. I believe that these considerations amply justify the requirement that the non-State party must be a national of a Contracting State.

Let us now look at the provision—Article 25 (2)—in some more detail. It distinguishes between natural and juridical persons.

(ii) *Natural Persons*

With respect to natural persons the Convention (Article 25 (2) *(a)*) requires that the nationality criterion be met both on the date when consent is given—and this must be understood as the date on which both parties had effectively given their consent—and on the date when the request for conciliation and arbitration is registered.

The Convention takes account explicitly of the case of double nationality of natural persons, if one of the nationalities is that of the host State. Article 25 (2) *(a)* excludes from the definition of "national of another Contracting State" a person who *is* a national of another Contracting State but who on either of the two crucial dates—date of consent and date of registration of the request—also has the nationality of the host State. This provision was arrived at after lengthy debate. In fact, the Preliminary Draft which was submitted to the Regional Consultative Meetings had a definition which said just the opposite of Article 25 (2) *(a)*, namely that as long as a natural person had the nationality of another Contracting State the nationality criterion had been met, "notwithstanding that such person may possess concurrently the nationality of a State not party to this Convention or of the State party to the dispute".[10]

Another feature of that draft was that while it did not define nationality it provided that a written affirmation of nationality issued on behalf of the State whose nationality is claimed would be conclusive proof of the facts stated therein. The draft ran into considerable opposition at the Regional Consultative Meetings.[11] It was pointed out, and rightly so, that a certificate of nationality should be no more than *prima facie* evidence. There was therefore no particular point in mentioning it at all. There was a general recognition that problems of dual nationality were difficult and could probably not be resolved in the Convention, but there was a strong feeling that the Convention should exclude the possibility of a confrontation before a Commission or Tribunal of a State and an investor, one of whose nationalities is the nationality of that State. No concern was expressed, on the other hand, about the case where one of the nationalities of a dual national is that of a State which is not a party to the Convention, and in my opinion such dual nationality clearly does not affect a party's standing as a "national of another Contracting State" any more than would

10. *History*, Vol. II, p. 230.
11. For references, see *History*, Vol. I, p. 123.

dual nationality of two "other Contracting States". The problem was once again debated at great length during the meetings of the Legal Committee which was to advise the Executive Directors. The provision which emerged from the Legal Committee was substantially the same as the final text of Article 25 (2) *(a)* and the matter was regarded as sufficiently important to be noted in the Executive Directors' Report accompanying the Convention, which states in paragraph 29: "It should be noted that under clause *(a)* of Article 25 (2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent." In other words, this type of dual nationality cannot be waived by the host State.[12]

It is necessary to realize, however, that the Legal Committee abstained from defining "nationality" and that there was a general recognition that in the course of ruling on their competence Commissions and Tribunals might have to decide whether a nationality of convenience[13] or a nationality acquired involuntarily by an investor could or should be disregarded.

(iii) *Juridical Persons*

We now move to the nationality criterion for juridical persons, which is set out in Article 25 (2) *(b)*. It will first be noted that the criterion need be met only on the date of consent. Subsequent changes of nationality (assuming that these could occur) are irrelevant.

Now, which juridical persons meet the nationality criterion? Those which on the relevant date had the nationality of a Contracting State other than the State party to the dispute, *and* those which had the nationality of the State party to the dispute and which, because of foreign control, the parties have agreed should be treated as nationals of another Contracting State for the purposes of the Convention. There was a compelling reason for this last provision. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country. If we admit, as the Convention does implicitly, that this makes the company technically a national of the host country,

12. For references, see *History*, Vol. I, p. 125.
13. See the *Nottebohm Case*, [1955] ICJ Rep., p. 4.

it becomes readily apparent that there is need for an exception to the general principle that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals. If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention. In order to bring such a situation within the ambit of the Convention, it would be necessary to express the agreements (including conciliation and/or arbitration clauses) with the host State as being made between that State and the shareholders of the local company to be created, rather than the local company itself. Such a construction is not impossible, and is sometimes found in practice, but it may be awkward, for instance where there is a multitude of shareholders, or it may be inconsistent with the host State's legislation. Even though the matter was debated at length, a majority recognized in the end that a foreign-owned but locally incorporated company should not be ineligible *per se* to be a party to proceedings against the host State before the Centre. However, in order to be eligible the host State and the company must specifically agree that the company is to be treated as a national of another Contracting State "because of foreign control".

In interpreting Article 25 (2) *(b)* it is once again important to remember that while the term nationality is used that term is not defined. An attempt at an implicit definition was made in the Preliminary Draft[14] which was submitted to the Regional Consultative Meetings which defined "national of a Contracting State" as a natural or juridical person possessing the nationality of any Contracting State, including a company (the term company was in turn broadly defined) "which under the domestic law of that State is its national" *and* any company "in which the nationals of that State have a controlling interest". It thus accepted both incorporation and control as criteria of nationality and clearly contemplated the possession of dual nationality of companies where these two criteria led to divergent conclusions. The provision under which a company in which the nationals of a State have a controlling interest should for that reason be regarded as a national of that State, ran into criticism from two sides. First, from those in whose view a company organized under the laws of the host State should be ineligible *per se* to be a party to proceedings before the Centre. Second, it was criticized by the opponents of that view on the

14. *History*, Vol. II, p. 230.

ground that "controlling interest" was too vague a term and would be unhelpful in the case where a company, incorporated in the host country, was controlled by foreign shareholders but with ownership widely scattered among numerous shareholders of different nationalities.[15]

The World Bank staff in preparing a new draft for the Legal Committee which was to advise the Executive Directors on a final text, drew the conclusion from the Consultative Meetings that attempts at definitions should be abandoned and that instead an attempt should be made, relying on the consensual character of the Convention, to give the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a "national of another Contracting State".[16] Accordingly, they proposed a new text which after a number of amendments became the present Article 25 (2) *(b)*.

I think it is fair to concede that this text implicitly assumes that incorporation is a criterion of nationality. This follows clearly from the last clause starting "and any juridical person which had the nationality of the Contracting State party to the dispute", etc., which was specifically designed to cover the case of companies incorporated in the host State but owned by foreigners. The International Court in the *Barcelona Traction Case*[17] decided that for purposes of determining the bond of nationality which is a prerequisite for the exercise of diplomatic protection, incorporation (or location of principal office) is the *only* criterion for nationality. I submit that the weight of this decision should be carefully restricted to the context in which it was given, namely that of diplomatic protection. More specifically, I submit that it is without relevance to the meaning of the term "nationality" in Article 25 (2) *(b)*. The purpose of that provision, as well

15. *History*, Vol. II, p. 581, paras. 111-113.

16. The request for conciliation or arbitration must contain "information" concerning the identity of the parties, and indicate with respect to the party that is a national of a Contracting State that the jurisdictional requirements of Article 25 (2) have been met (Convention, Articles 28 (2) and 36 (2) and Institution Rule 2 (1) *(d)*). In case the Secretary-General finds, on the basis of the information contained in the request, that the private party does not fall within the scope of Article 25 (2) of the Convention, he will refuse to register it as manifestly outside the jurisdiction of the Centre *ratione personae* (Institution Rule 6 (1) *(b)*). The agreement that a party, having the nationality of the Contracting State party to the dispute, should be treated as a national of another Contracting State because of foreign control, must also be indicated in the request (Inst. R. 2 (1) *(d)* (iii)) and this information must be supported by documentation (Inst. R. 2 (2)).

17. [1970] ICJ Rep., p. 42.

as of Article 25 (1), is to indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore the parties should be given the widest possible latitude to agree on the meaning of "nationality" and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted. In order to avoid uncertainty or unpleasant surprises in case of a challenge to the jurisdiction of the Centre, it is clearly desirable that whenever a company is not incorporated under the laws of a Contracting State to stipulate the nationality which that company is to have for the purposes of the Convention. In the absence of such a stipulation, a Commission or Tribunal will have to pronounce itself in case of a disputed nationality. I submit that in such a case which, I repeat, would not involve the issue of diplomatic protection but merely that of the outer limits within which parties may agree to submit disputes to the Centre, the decision in *Barcelona Traction* should not be regarded as controlling. When a Commission or Tribunal is faced with a challenge to the validity of an agreement, voluntarily entered into by a government with a company which is not incorporated in any Contracting State, the Commission or Tribunal should sustain that challenge only if not to do so would permit parties to use the Convention for purposes for which it was clearly not intended. That is to say that the Commission or Tribunal should favour giving effect to the agreement between the parties by adopting a more functional approach, taking into account not only formal criteria such as incorporation—as Judge Riphagen said in his dissenting opinion 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"[18]—but adopting a broader approach which would give effect to economic realities such as ownership and control.

(c) Jurisdiction Ratione Materiae

Having dealt with jurisdiction *ratione personae* there are left for discussion the two criteria for jurisdiction *ratione materiae*, namely that the dispute must be a legal dispute and that it must arise directly out of an investment.

18. *Ibid.*, p. 347.

Notwithstanding extensive discussions during the preparatory work on the Convention, and numerous proposed definitions for the terms "investment" and "legal dispute", the final text of the Convention does not define either.[19]

There is no shortage of definitions of investment. One finds them in economic literature, but more particularly in national legislation with respect to investment guarantees or incentives for investment, as well as in bilateral investment protection treaties between capital exporting and capital importing countries.

On review, each of these definitions proved either inadequate from a technical point of view or, more significantly, unacceptable to the one or other country or group of countries because it did not coincide with their view of the type of transactions for which they would, in fact, be willing to accept the jurisdiction of the Centre. The latter type of objection reflected a confusion between absolute limits of jurisdiction, to be established in the Convention, and the flexible limits within which cases would actually be submitted to the Centre's jurisdiction, depending on the parties' consent.

In the end, the effort to devise a generally acceptable definition of the term "investment" was given up "given the essential requirement of consent by the Parties".[20]

I believe that this was a wise decision, fully consonant with the consensual nature of the Convention, which leaves a large measure of discretion to the parties. It goes without saying, however—and I have made this remark before in another connection—that this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention.

The term "dispute of a legal character" was used in the Preliminary Draft submitted to the regional consultative meetings. The term was not defined, but in a comment to the Draft, a distinction was made between "disputes of a legal character" and "political, economic or purely commercial disputes". Having drafted this comment myself, I have no difficulty in calling it unfortunate, since the latter class of dispute may well involve legal issues. In order to clarify the matter, a subsequent draft which was submitted to the Legal Committee used the term "legal dispute" and defined the term as meaning "any dispute concerning a legal right or obligation or concerning a fact relevant

19. For references, see *History*, Vol. I, under Article 25 (1) (nature of dispute), pp. 111-119.

20. Report, para. 27.

to the determination of a legal right or obligation". There were some technical objections to the definition, but most of the debate, like that about the term "investment", was not really concerned so much with the meaning of "legal" as with the type of legal disputes that, in the opinion of the participants in the debate, should or should not be submitted to the Centre.[21]

It was impossible to reconcile the different points of view, quite apart from the fact that some of the proposals would have unduly limited the Centre's jurisdiction. In the end, a large majority was in favour of dropping the definition but to retain the term "legal dispute".

The Executive Directors' Report with which the Convention was submitted to governments makes a two-sentence comment on the provision. The Report first says that the expression "legal dispute" has been used "to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not".[22] The purpose of this sentence was to dispel the fears of some developing countries that investors might request a host State to consent to *conciliation* proceedings with respect to disputes in which the investor did not even claim that any of his legal rights had been impaired. This fear was based on another fear, namely that a refusal to consent to conciliation proceedings would lead to what these delegations called "adverse inferences" as to their treatment of foreign investment. It was for that reason that even for conciliation proceedings, the Convention requires that the dispute be a legal one[23] and the quoted sentence was addressed to that point.

21. It was, e.g., suggested that the jurisdiction of the Centre should be limited to claims of denials of justice, or discrimination, or that the Centre should only have jurisdiction to deal with disputes arising out of undertakings by host governments pursuant to investment promotion laws. For more detail see *History*, Vol. II, pp. 564-567.

22. Report, para. 26. Some years later the International Court of Justice held in the *Barcelona Traction Case* that Belgium had no *locus standi* because the Belgian shareholders in the company, in respect of whom Belgium was seeking to exercise diplomatic protection, had not been injured in their legal rights: "Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." ([1970] ICJ Rep., p. 37.)

23. See Lauterpacht in *Recueil d'études de droit international en hommage à Paul Guggenheim*, pp. 643-644 (Genève 1968) and Reuter in *Investissements étrangers et arbitrage entre Etats et personnes privées*, p. 16 (Paris 1969).

Without this background the sentence, standing by itself, is not free from ambiguity. However, the second sentence of the comment, which comes close to a definition, sets the matter in its proper perspective in language taken in part from Article 36 of the Statute of the ICJ. That sentence of the Report says that "the dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation".

CHAPTER III

THE JURISDICTION OF THE CENTRE IN ACTION[1]

The Convention necessarily proceeds on the assumption that recourse to conciliation or arbitration before the Centre with the consent of both parties is not an unfriendly act.[2] The drafters were, however, conscious of the concern felt in certain developing countries that requests for conciliation and arbitration addressed to the Centre in the absence of advance consent of the other party might be used as a means of pressure or embarrassment. In order to avoid vexatious proceedings and the waste of time and effort involved in setting the machinery of the Centre in motion unnecessarily, the Convention (Article 28 and Article 36) introduces a procedure for registration of requests for conciliation or arbitration, requiring the applicant to furnish information regarding the issues in dispute, the identity of the parties and their consent to the jurisdiction of the Centre. More detailed provisions are found in the Institution Rules. The Convention imposes a duty on the Secretary-General to screen these applications and to withhold registration if, but only if, he finds on the basis of the information required to be contained in the request that the dispute is manifestly outside the jurisdiction of the Centre, for instance because the information furnished by the applicant makes clear on its face that the other party has not consented to the jurisdiction of the Centre, or that some other essential element of jurisdiction is patently lacking. The Convention provides no review of the action of the Secretary-General in refusing registration. It is therefore clear that this official will refuse registration only where the dispute, as the Convention says, is manifestly outside the jurisdiction of the Centre on the basis of information supplied by the applicant himself. In case of the

1. For a more detailed treatment see Broches, 5 *Colum. J. of Transnat'l L.*, 263-280 (1966).

2. The same assumption necessarily underlies the Statute of the International Court of Justice. Nevertheless, Canada was led to suggest in the Sixth Committee of the General Assembly that the Assembly declare "unequivocally that recourse to the jurisdiction of the Court was not *per se* an unfriendly act but was prompted by the desire to advance the rule of law" (A/C.6/SR.1279, pp. 11-12), quoted in Gross, "Role of the International Court of Justice", 66 *Am. J. Int'l L.* 479 at 487.

Notwithstanding extensive discussions during the preparatory work on the Convention, and numerous proposed definitions for the terms "investment" and "legal dispute", the final text of the Convention does not define either.[19]

There is no shortage of definitions of investment. One finds them in economic literature, but more particularly in national legislation with respect to investment guarantees or incentives for investment, as well as in bilateral investment protection treaties between capital exporting and capital importing countries.

On review, each of these definitions proved either inadequate from a technical point of view or, more significantly, unacceptable to the one or other country or group of countries because it did not coincide with their view of the type of transactions for which they would, in fact, be willing to accept the jurisdiction of the Centre. The latter type of objection reflected a confusion between absolute limits of jurisdiction, to be established in the Convention, and the flexible limits within which cases would actually be submitted to the Centre's jurisdiction, depending on the parties' consent.

In the end, the effort to devise a generally acceptable definition of the term "investment" was given up "given the essential requirement of consent by the Parties".[20]

I believe that this was a wise decision, fully consonant with the consensual nature of the Convention, which leaves a large measure of discretion to the parties. It goes without saying, however—and I have made this remark before in another connection—that this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention.

The term "dispute of a legal character" was used in the Preliminary Draft submitted to the regional consultative meetings. The term was not defined, but in a comment to the Draft, a distinction was made between "disputes of a legal character" and "political, economic or purely commercial disputes". Having drafted this comment myself, I have no difficulty in calling it unfortunate, since the latter class of dispute may well involve legal issues. In order to clarify the matter, a subsequent draft which was submitted to the Legal Committee used the term "legal dispute" and defined the term as meaning "any dispute concerning a legal right or obligation or concerning a fact relevant

19. For references, see *History*, Vol. I, under Article 25 (1) (nature of dispute), pp. 111-119.

20. Report, para. 27.

to the determination of a legal right or obligation". There were some technical objections to the definition, but most of the debate, like that about the term "investment", was not really concerned so much with the meaning of "legal" as with the type of legal disputes that, in the opinion of the participants in the debate, should or should not be submitted to the Centre.[21]

It was impossible to reconcile the different points of view, quite apart from the fact that some of the proposals would have unduly limited the Centre's jurisdiction. In the end, a large majority was in favour of dropping the definition but to retain the term "legal dispute".

The Executive Directors' Report with which the Convention was submitted to governments makes a two-sentence comment on the provision. The Report first says that the expression "legal dispute" has been used "to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not".[22] The purpose of this sentence was to dispel the fears of some developing countries that investors might request a host State to consent to *conciliation* proceedings with respect to disputes in which the investor did not even claim that any of his legal rights had been impaired. This fear was based on another fear, namely that a refusal to consent to conciliation proceedings would lead to what these delegations called "adverse inferences" as to their treatment of foreign investment. It was for that reason that even for conciliation proceedings, the Convention requires that the dispute be a legal one[23] and the quoted sentence was addressed to that point.

21. It was, e.g., suggested that the jurisdiction of the Centre should be limited to claims of denials of justice, or discrimination, or that the Centre should only have jurisdiction to deal with disputes arising out of undertakings by host governments pursuant to investment promotion laws. For more detail see *History*, Vol. II, pp. 564-567.

22. Report, para. 26. Some years later the International Court of Justice held in the *Barcelona Traction Case* that Belgium had no *locus standi* because the Belgian shareholders in the company, in respect of whom Belgium was seeking to exercise diplomatic protection, had not been injured in their legal rights: "Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." ([1970] ICJ Rep., p. 37.)

23. See Lauterpacht in *Recueil d'études de droit international en hommage à Paul Guggenheim*, pp. 643-644 (Genève 1968) and Reuter in *Investissements étrangers et arbitrage entre Etats et personnes privées*, p. 16 (Paris 1969).

Without this background the sentence, standing by itself, is not free from ambiguity. However, the second sentence of the comment, which comes close to a definition, sets the matter in its proper perspective in language taken in part from Article 36 of the Statute of the ICJ. That sentence of the Report says that "the dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation".

CHAPTER III

THE JURISDICTION OF THE CENTRE IN ACTION[1]

The Convention necessarily proceeds on the assumption that recourse to conciliation or arbitration before the Centre with the consent of both parties is not an unfriendly act.[2] The drafters were, however, conscious of the concern felt in certain developing countries that requests for conciliation and arbitration addressed to the Centre in the absence of advance consent of the other party might be used as a means of pressure or embarrassment. In order to avoid vexatious proceedings and the waste of time and effort involved in setting the machinery of the Centre in motion unnecessarily, the Convention (Article 28 and Article 36) introduces a procedure for registration of requests for conciliation or arbitration, requiring the applicant to furnish information regarding the issues in dispute, the identity of the parties and their consent to the jurisdiction of the Centre. More detailed provisions are found in the Institution Rules. The Convention imposes a duty on the Secretary-General to screen these applications and to withhold registration if, but only if, he finds on the basis of the information required to be contained in the request that the dispute is manifestly outside the jurisdiction of the Centre, for instance because the information furnished by the applicant makes clear on its face that the other party has not consented to the jurisdiction of the Centre, or that some other essential element of jurisdiction is patently lacking. The Convention provides no review of the action of the Secretary-General in refusing registration. It is therefore clear that this official will refuse registration only where the dispute, as the Convention says, is manifestly outside the jurisdiction of the Centre on the basis of information supplied by the applicant himself. In case of the

1. For a more detailed treatment see Broches, 5 *Colum. J. of Transnat'l L.*, 263-280 (1966).

2. The same assumption necessarily underlies the Statute of the International Court of Justice. Nevertheless, Canada was led to suggest in the Sixth Committee of the General Assembly that the Assembly declare "unequivocally that recourse to the jurisdiction of the Court was not *per se* an unfriendly act but was prompted by the desire to advance the rule of law" (A/C.6/SR.1279, pp. 11-12), quoted in Gross, "Role of the International Court of Justice", 66 *Am. J. Int'l L.* 479 at 487.

slightest doubt he will register the request and leave the decision as to the Centre's jurisdiction to the conciliation commission or arbitral tribunal (Articles 32 and 41, respectively).

The system adopted in the Convention may be contrasted with that of the Statute of the International Court of Justice. Under both instruments, jurisdiction is based on consent. However, under the Statute of the ICJ, a State may make an application to the Court in the absence of consent of the other State. When the Court receives the application, the case will be entered in the General List. The other State is then free to accept or reject the Court's jurisdiction. If it accepts, the Court will take jurisdiction as *forum prorogatum*. If the other State does not accept the Court's jurisdiction, the Court will remove the case from the List. While the applicant will in that event not have achieved anything substantial, the procedure is nevertheless likely to give the applicant a certain psychological advantage and may reflect unfavourably on the other State.

The Preliminary Draft submitted to the regional consultative meetings resembled more closely the system adopted in the ICJ.[3] It was, however, dropped and the screening power of the Secretary-General was introduced for the reasons stated.

The registration procedure is not a procedure to determine jurisdiction. After the request for arbitration is registered and the parties duly notified, the Arbitral Tribunal is to be constituted. Article 41 of the Convention provides:

> "(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."

In commenting on this provision the Report of the Executive Directors points out that "registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre".[4]

3. *History*, Vol. I, p. 112.
4. See Report, para. 38.

One of the reasons why a dispute may be outside the jurisdiction may be the absence of consent. If the party against whom the proceedings are instituted, the respondent, is of the opinion that the dispute submitted to the tribunal is outside the scope of its consent, it may raise an objection to the competence of the tribunal and if the tribunal considers the objection well founded, it must declare itself without competence in the dispute. The tribunal will have to consider the adequacy of consent *proprio motu* in case of the respondent's failure to appear: Article 45 (1) provides that failure of a party to appear or to present his case "shall not be deemed an admission of the other party's assertions".[5] But what is the situation where the respondent either explicitly or implicitly (by arguing the case on the merits and not raising an objection to competence) accepts the tribunal's competence to deal with the dispute? Is the tribunal required in such a case to examine independently whether the dispute was within the scope of the respondent's consent prior to the institution of proceedings, and if it concluded that it was not, declare itself without competence in the dispute in disregard of the respondent's acceptance of, or acquiescence in, the tribunal's competence?

The Convention does not provide an answer to this question. Article 41 (2), dealing with objections to competence, merely says that any such objection "shall be considered by the Tribunal", either as a preliminary question or joined to the merits. It does not require the tribunal to examine or refrain from examining its competence in the absence of objections.

Article 25 (1), the basic provision on jurisdiction, speaks in terms of disputes "which the parties to the dispute consent in writing to submit to the Centre". Article 36 (3) assumes that consent exists at the time when proceedings are instituted, that is, before the tribunal is constituted.[6] It could thus be argued that, in the context of the Convention, the consent of the parties is taken to mean a consent in existence before the tribunal is established. This argument would appear to find support in the Report which states that "[c]onsent of the parties must exist when the Centre is seized (Articles 28 (3) and

5. On default procedure generally, see Broches, *loc. cit.*, note 12, p. 339.
6. It reads: "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."

36 (3)), but the Convention does not otherwise specify the time at which consent should be given".[7]

The Secretary-General's screening power is not concerned with a final determination of consent as determining competence of the tribunal, but merely with the prevention of flagrant misuse of the Centre. Therefore, there would seem to be no reason to require a tribunal to declare itself without competence on the ground that the consent of both parties had only been expressed or perfected in the course of the proceedings, even though such consent would be a valid jurisdictional basis for reinstituting the proceedings.

Tribunals constituted after registration of a request are validly constituted even though the consent of the parties was defective; their awards may have to be limited to declaring themselves without competence or may be liable to annulment (in case the tribunal has manifestly exceeded its powers) but cannot be treated as non-existent because of a defective jurisdictional basis. In this respect arbitration under the Centre differs from arbitration under traditional international law where arbitration is strictly a conventional matter and derives its strength solely from the agreement between the parties. Under the Convention an institutional element is introduced that allows, through the mechanisms of the Centre, the creation of tribunals which, once created, derive their powers from the Convention itself.

It may be worth mentioning that in the course of the preparatory work on the Convention questions were raised about a possible role of the International Court of Justice in connection with interpretation of the Convention by arbitral tribunals.

Article 64 of the Convention provides:

> "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."

A substantially similar provision appeared in the Preliminary Draft which was discussed at the regional consultative meetings. At the Addis Ababa meeting the question was raised whether it would not be desirable to permit questions of interpretation of the Convention which

7. Report, para. 24.

may arise in the course of arbitration proceedings to be submitted to the International Court. The considerations in favour of opening this possibility were, first, the possibility that the arbitrators composing the tribunal in a case in which such questions of interpretation arise might have been selected by the parties for reasons of their familiarity with the subject-matter of the dispute rather than their experience in the field of international law and, second, the desirability of uniform decisions on questions of interpretation of the Convention. In response to this suggestion an addition to the interpretation provision was drafted which would permit an arbitral tribunal, should a question of interpretation of the Convention arise in the course of the proceedings, to suspend the proceedings to permit the interested Contracting States to bring the matter before the International Court if they so wished.[8] Discussion of this provision at the Regional Meetings disclosed a number of serious objections, among which the danger that the provision might be used as a dilatory device, the difficulty of reconciling the provision with the power (and duty) of an arbitral tribunal to be the judge of its own competence, and inconsistency of the provision with the spirit and purpose of the Convention, which was to insulate investment disputes from the level of inter-state disputes.

The provision was therefore omitted from the Draft submitted to the Legal Committee and no proposal was made by the Committee to revive it. However, one of the representatives expressed concern that even the existing Article 64 might permit a State to delay or frustrate proceedings by way of appeal to the International Court, and he offered an amendment intended to prevent this. As against this it was argued that a review of decisions of arbitral tribunals by the International Court was not provided for in the Court's Statute and would, moreover, be inconsistent with Article 41 which made arbitral tribunals the judges of their own competence, a provision which would be respected by the Court. When it appeared that the Committee shared the latter view without dissent, the amendment was withdrawn, on condition, however, that the Committee's understanding would be reflected in the report of the Executive Directors which was to accompany the Convention upon its submission to governments.[9] This understanding was reflected in the following terms:

8. *History*, Vol. II, p. 290. And see also pp. 279-281. Only States can be parties to contentious proceedings before the Court (Article 34 of the Statute).

9. *History*, Vol. II, pp. 906, 910.

> "While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it."[10]

Thus, once a request has been registered, the role of the arbitral tribunal in matters of jurisdiction is central, and neither the Secretary-General in deciding to register the request, nor the Court in deciding questions of interpretation can encroach on it.

10. Report, para. 45.

CHAPTER IV

THE CONVENTION AND DIPLOMATIC PROTECTION[1]

One of the principal features of the Convention is that it firmly establishes the capacity of a private individual or corporation to proceed directly, i.e., without the need of the intervention of his national government, against a foreign State in an international forum. As already pointed out, the Convention goes even further and provides that when an investor and a foreign State have consented to submit a dispute to arbitration before the Centre, the investor's own State may not give diplomatic protection or bring an international claim in respect of that dispute, unless the host State fails to comply with the arbitral award.

As was said in the Report of the Executive Directors:

> "When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so."[2]

The provision in question, Article 27, deserves closer study. It reads as follows:

> "(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.

1. Among the abundant literature, see e.g., Parry, 90 *Recueil des cours*, II, p. 653 (1956); and de Visscher, 102 *Recueil des cours*, I, p. 395 (1961), with extensive bibliography and giving the following definition of the right of diplomatic protection: "[L]a protection diplomatique est la procédure de droit international général qui permet à un Etat d'obtenir, de la part d'un Etat étranger, la réparation des dommages causés à ses ressortissants en violation du droit international" (p. 427).
2. Report, para. 33.

(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."

What is being waived by this provision is the right of diplomatic protection, which in turn is the foundation for making an international claim, and a few remarks will, therefore, be in order regarding the conditions under which a State may exercise diplomatic protection according to customary international law. It goes without saying that a *conditio sine qua non* is that the other State has committed some act which engages its international responsibility. Nor can a claim be brought unless the requirement of the exhaustion of local remedies has been met. It is also beyond dispute that the right to give diplomatic protection or bring an international claim is a right of the protecting State which may or may not exercise it, according to its discretion. Whatever a citizen's right may be on the municipal law level to demand protection from his own State, no such right is recognized by international law. In fact, the classical doctrinal justification for diplomatic protection and international claims is that in resorting to these remedies a State is in reality asserting its own right, the right to ensure in the person of its national respect for the rules of international law. As the Court said in the *Barcelona Traction Case,* "whether claims are made on behalf of a State's national or on behalf of the State itself, they are always a claim of the State".[3]

The classical view of diplomatic protection can be expressed in terms of action taken to redress a wrong which finds its origin in an injury to one of the State's nationals. As was said in the *Barcelona Traction Case,* the right of diplomatic protection "is necessarily limited to intervention on behalf of its own national 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".[4] The qualification "in the absence of a special agreement", makes clear that the bond of nationality is no more than the general rule which may be departed from. It is, however, the rule under customary international law and the classical interpretation of the rule is not only strict but, at least as an abstract proposition, in my opinion unduly restrictive.

3. [1970] ICJ Rep., p. 46.

4. *Ibid.*, p. 34, quoting *Panevezys-Saldutiskis Railway Case, Judgment* [1939], *P.C.I.J., Series A/B, No. 76,* p. 16.

This is so in two respects:

In the first place, it is held that the bond of nationality must exist continuously from the time when the injury was committed until the time when the international claim is made or, according to some authorities, till the award is given.[5] Secondly, the classical interpretation of the nationality doctrine considers that in the case of corporations the sole criterion for determining nationality is the law under which the company has been incorporated, or in respect of legal systems in which the seat or siège social determines nationality domestically, the law of the country where the company has its siège social. In many treaties broader or additional criteria of nationality have been recognized, such as share ownership or management control, but the International Court has denied in the *Barcelona Traction Case* that these other criteria form a part of customary international law.

Even a cursory discussion of diplomatic protection should not omit reference to the doctrine known by the name of its most articulate proponent, the Argentine diplomat and publicist Carlos Calvo. The Calvo doctrine which was developed as a defence against the abuses of diplomatic protection is basically to the effect (i) that aliens are not entitled to rights and privileges not accorded to nationals and (ii) that diplomatic protection constitutes inadmissible interference. The doctrine has not become part of international law. A large number of Latin American States, however, have tried to implement it in specific cases by so-called Calvo clauses, in which aliens, as a condition of contracts, concessions or other advantages, have agreed to seek redress of grievances only through local judicial and administrative remedies, and to waive the right to seek the protection of their own governments.

What is the effect of these clauses internationally? The undertaking to resort to local remedies has been recognized as binding on the alien, and would normally present no problem with diplomatic protection, since the exhaustion of local remedies is in any event a condition for the exercise of that protection under customary international law. The problem arises with the waiver of diplomatic protection. Since diplomatic protection is based on the theory that the injury to a national is a wrong done to his State and the exercise of diplomatic protection is

5. See, e.g., O'Connell, *International Law,* pp. 1033-1039 [1970]. For a discussion of the continuity rule, see separate opinion of Judge Jessup in the *Barcelona Traction Case,* [1970] ICJ Rep., pp. 203–205.

therefore an exercise of the State's own right, the majority of the international community denies that a private individual can waive a right that belongs to his State. Accordingly, the waiver of diplomatic protection is not binding on the alien's home State in cases of denial of justice or other international wrongs.[6]

After these brief remarks on diplomatic protection on the one hand, and the Calvo clause on the other, the stage is set for a discussion of Article 27 (1).

It will be clear after the foregoing discussion that since the drafters recognized the important reasons of policy in favour of a waiver of diplomatic protection as a *quid pro quo* for ICSID arbitration, and since the investor cannot by contract waive the rights under international law of his State, the desired result could only be achieved on the international law level by a provision to that effect in an international agreement to which the investor's State is a party.

Granting this proposition in general terms, one might nevertheless question whether Article 27 (1) is strictly speaking necessary. After all, so the argument might run, if the investor has the right to arbitrate with the host State or is engaged in actual arbitration proceedings with that State under the provisions of the Convention, it is hard to find a justification for diplomatic action against the host State, unless and until it fails to abide by or comply with the award rendered by the Arbitral Tribunal, and in that case the waiver of diplomatic protection no longer applies by reason of the express language of Article 27 (1).

This argument is not wholly convincing even from a strictly legal point of view. Notwithstanding the existence of an ICSID arbitration agreement, the host State may refuse to co-operate in the proceedings. 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 its resort to the municipal law remedies contemplated in the contractual relationship. Hence, the private contractor may instantly invoke the protection of his State."[7]

While this statement may be too sweeping, it correctly describes the

6. For the Calvo clause, see Shea, *The Calvo Clause* (1955).
7. O'Connell, *op. cit.*, p. 990.

situation of arbitration based on an international agreement. Admittedly there is no need to invoke such protection in an ICSID arbitration since the Convention itself provides all the safeguards to ensure that an agreement to arbitrate will be implemented up to the point of obtaining an award. But that does not exclude the possibility that the investor might opt for diplomatic protection, and this is exactly what the drafters wanted to exclude.

It therefore seemed desirable to make clear beyond doubt that failure to abide by the award was to be the only exception to the waiver of diplomatic protection. These juridical considerations were reinforced by the political desirability of highlighting the almost complete elimination of diplomatic protection.

Article 27 (2) permits informal diplomatic exchanges for the sole purpose of facilitating the settlement of the dispute. The intention was not to establish an exception to the waiver of diplomatic protection but rather to avoid that Article 27 would be construed so strictly as to prevent the use of diplomatic channels even for an informal contact with the State party to the dispute for that purpose.

I have referred to the classical test applied to determine nationality of companies in connection with diplomatic protection. In my earlier discussion of nationality in the framework of the criteria for the jurisdiction of the Centre, I have mentioned the freedom given by the Convention to the parties to a dispute, both explicitly and implicitly, to stipulate nationality on the basis of criteria other than incorporation or siège social. Could this difference in the criteria according to classical customary international law and under the Convention give rise to conflicts under Article 27 (1)? I think not. Take the case of a company organized under the law of Contracting State A, whose capital is owned entirely by nationals of Contracting State B. The Contracting State which is the other party to the dispute will be called State C. The company and State C have stipulated that the company will be regarded as a national of Contracting State B. The question is whether both Contracting State A and Contracting State B are foreclosed from giving diplomatic protection to the company under Article 27 (1). I think the answer is clearly affirmative. If Contracting State A would seek to give diplomatic protection on the ground that the company, being incorporated under its law, is one of its nationals, notwithstanding its stipulation with Contracting State C that it is to be treated as a national of Contracting State B, State A's right of diplomatic protection is barred by the language of Article 27 (1) which prohibits dip-

lomatic protection in respect of a dispute which "one of its nationals" has consented to submit to arbitration. Contracting State B is equally barred: it might claim that it is not bound by the stipulation of the investor with the host State to the effect that the company is to be regarded as one of its nationals, but if the company is not one of its nationals, the essential basis of diplomatic protection, namely the bond of nationality, is absent. It has to be admitted that a conflict could arise where a State not a party to the Convention would seek to give diplomatic protection. Such a State is obviously not bound by the waiver contained in the Convention, which as to it is *res inter alios acta*.

An interesting case of at least apparent conflict with Article 27 is presented where the national State of the investor and the host State have entered into a bilateral agreement which contains substantive rules regarding the treatment of foreign investment and where the investor and the host State have entered into an investment agreement which contains an ICSID arbitration clause. The investment agreement is presumably governed among other things by that bilateral treaty. Let it be supposed that a dispute arises between the investor and the host State under the investment agreement which involves an alleged violation by the host State of its treaty obligations with respect to the investment. Let it further be supposed that the bilateral agreement contains the usual dispute settlement clause under which the two Contracting States agree to submit to arbitration disputes as to the interpretation or application of the treaty which they cannot resolve by mutual agreement. It is clear that in this set of facts the investor has the right to resort to ICSID arbitration for the settlement of his dispute with the host State. It is also clear that the investor's national State is barred by Article 27 of the Convention from giving the investor diplomatic protection. But does this also mean that the investor's national State is barred from resorting to international arbitration with the host State pursuant to the express provision of the bilateral investment treaty?

It is true that the investor's national State cannot present an international claim in respect of the dispute between its national and the host State. That dispute will be determined with binding force by the ICSID arbitration. However, to the extent that the dispute is based on an issue of application or interpretation of the bilateral treaty, it can be argued that that issue may be submitted to arbitration by the investor's national State for a *declaratory* decision.

Consider first the case in which the investor's national State and the host State either by agreement or through a declaratory decision of the intergovernmental Arbitral Tribunal settle a disputed question under the bilateral treaty. Subsequently, the investor brings ICSID proceedings against the host State. It would seem clear to me that the ICSID Tribunal will be bound by the interpretation of the bilateral treaty arrived at by the Contracting States, whether as a result of agreement or of arbitration.

Next consider the case in which the investor starts ICSID proceedings and that the Arbitral Tribunal interprets the bilateral treaty. Thereafter, the national State of the investor being dissatisfied with the interpretation given by the ICSID Tribunal, seeks a declaratory decision in arbitration proceedings under the bilateral treaty. Let it be assumed that those proceedings lead to a different decision of the point in dispute. What will be the effect of those conflicting decisions?

The ICSID decision will have finally disposed of the particular dispute between the investor and the host State. The decision in the intergovernmental arbitration would settle the interpretation of that treaty as much as would a settlement by mutual agreement. With respect to disputes subsequently submitted an ICSID Tribunal would be bound by that interpretation. It would not, however, affect the decision taken by the ICSID Arbitral Tribunal in the earlier case, which is *res judicata*.

The hypothetical cases I have just described are by no means unlikely to occur in practice. Several European countries, and in particular the Federal Republic of Germany, have entered into investment protection agreements with developing countries, a number of which have also entered into investment agreements with nationals of these capital exporting countries which include ICSID arbitration clauses.

The situation may be different again where the bilateral agreement itself takes account of the possibility of an ICSID arbitration between the investor and the host State. For instance, the investment protection agreement between Belgium and Indonesia[8] provides for the traditional intergovernmental arbitration of disputes between Contracting States regarding the interpretation or application of the treaty. In addition, however, each State consents in advance and irrevocably to submit disputes with respect to measures allegedly contrary to the

8. Cf. note 6 at p. 353.

treaty to ICSID conciliation and arbitration at the request of a national of the other State who claims to be injured by those measures.

The question may arise whether the same facts could give rise to two arbitrations, or put differently, whether the two procedures are or are not mutually exclusive? Without trying to answer that question, I want to give as my view that the answer will not be found in Article 27 of the Convention—since no question of diplomatic protection is involved—but by interpretation of the Belgium-Indonesia treaty.

On the other hand, the investment protection agreement between Germany and the Ivory Coast provides that its provisions for inter-State arbitration do not apply when the investor and the host State have agreed to ICSID arbitration, and that treaty bases the exception on Article 27.[9]

In the foregoing I have referred to Article 27 as embodying a waiver of diplomatic protection because I was dealing with the period during which diplomatic protection was barred. Looked at in its entirety, it would be more correct to describe the effect of Article 27 as suspension of diplomatic protection, since diplomatic protection becomes fully operative again in the event the State party to the dispute fails to abide by and comply with the award.

The revival of the right of diplomatic protection may present a question which arises from the difference between the narrow definition of nationality of companies under customary international law as most recently evidenced in the *Barcelona Traction* decision, and the much more flexible and broader nationality concept under the Convention as a result of its consensual character.

To illustrate this by an example: a company is organized under the law of Contracting State A and its entire capital is owned by nationals of Contracting State B. The company and Contracting State C have entered into an investment agreement which includes an ICSID arbitration clause which does not specify the nationality of the company. The company obtains an award against Contracting State C which refuses to comply with the award. Under the *Barcelona Traction* rule the company must be regarded as a national of Contracting State A under whose law it was incorporated.

9. 27 October 1966; see *Bundesgesetzblatt*, Bonn, 8 February 1968, II, p. 61. Article 11 (6) provides: "Lorsque les deux Parties Contractantes sont membres de la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats du 14 octobre 1966, le tribunal d'arbitrage prévu ci-dessus ne pourra pas être saisi, compte tenu de la réglementation prévue à l'article 27, paragraphe 1 de cette Convention, dans la mesure où un arrangement au sens de l'article 25 de la Convention a été conclu entre le ressortissant ou la société d'une des Parties Contractantes et l'autre Partie Contractante. La possibilité de faire appel au tribunal d'arbitrage prévu ci-dessus en cas de non-observation d'une sentence rendue par le tribunal d'arbitrage de ladite Convention (article 27) ou en cas de transmission par l'effet de la loi ou d'un contrat conformément à l'article 5, n'est pas mise en cause."

However, since none of the shares are owned by its nationals, State A decides that it has no interest in exercising diplomatic protection on behalf of the company. An attempt by Contracting State B to espouse the Company's claim is likely to be met by the *Barcelona Traction* argument that it has no *locus standi*. This would be a highly unsatisfactory situation. The revival of diplomatic protection is not, however, the only remedy against failure of the State party to the dispute to comply with an award rendered against it. The Convention provides another remedy in Article 64 in which Contracting States accept the compulsory jurisdiction of the International Court of Justice with respect to any dispute arising between Contracting States concerning the interpretation or application of the Convention.

In my opinion, this provision would enable Contracting State B, that is, the State whose nationals own the capital of the company, to bring proceedings against Contracting State C in the International Court of Justice for a decision as to the obligation for the State to comply with the award.

Article 64 is clear and unambiguous and cannot be read as imposing any requirement for *locus standi* other than the fact that the Contracting State is a party to the Convention. I would not even have thought it necessary to make the point if it were not for the controversial 1966 decision of the International Court of Justice in the *South West Africa Case* in which *locus standi* was denied to Ethiopia and Liberia on the ground that they lacked a sufficient legal interest in the performance by South Africa of its obligations towards the inhabitants of the mandated territory.[10] The compulsory jurisdiction clause in the Mandate under which Ethiopia and Liberia acted was in relevant part practically identical with Article 64 of the Convention. However, the Mandate was an instrument to which the individual members of the League were not parties, and there was an organ of the League, the Council, which was charged with the supervision of the Mandatory's obligations. Whatever the cogency of the Court's reasoning, it would not apply in our case. Any party to the Convention has a clear legal interest in

10. *South West Africa Case*, Second Phase, Judgment, [1966] ICJ Rep., p. 6.

seeing its provisions observed, whether or not its immediate interests or those of its nationals are affected. Failure by Contracting States to comply with awards, or to recognize and enforce awards as required by the Convention, are violations of the Convention which endanger the achievement of its purposes and the security of investments made in reliance on ICSID arbitration agreements. Hence each Contracting State may, as Article 64 provides, bring alleged violations before the Court for a declaratory judgment and, where the applicant has suffered material injury, for an award of damages.

CHAPTER V

APPLICABLE LAW

This Chapter deals with questions of applicable law, questions which I submit are dealt with by the Convention in an exhaustive although by no means detailed manner, so that the Convention may be said to present a complete jurisdictional system of applicable procedural as well as substantive law.

I believe that it will be useful in elaborating on this submission to deal separately with procedural and substantive law. By procedural law I mean the law governing the arbitration proceedings as such, whereas by substantive law I mean the law to be applied by the Arbitral Tribunal in deciding the merits of the dispute.

(a) Procedural Law

In order to indicate the significance of the relevant provisions of the Convention, I shall first devote some remarks to the procedural law applicable to international arbitration proceedings which are *not* governed by the Convention. Since the term "international arbitration" is used in different meanings, I should perhaps say that I am using it here simply as a short-hand way of referring to any arbitration that has an international element, that is, any arbitration other than one in which all elements, including the parties, the applicable law, the place of the proceedings, the remedies against the award, and the enforcement of the award are localized within one national system of law.

I take as a starting point the most frequent case, in which both sides to an arbitration proceeding are private parties. In such cases, as was noted by the Arbitral Tribunal in the *Aramco Case*, "ordinary Courts possess by law . . . powers of supervision and interference. The Courts can sometimes appoint the arbitrators or the umpire directly by virtue of the law, particularly when one Party violates the arbitration agreement or fails to designate its arbitrator. They can also require that the award, in order to be valid, should be filed with the registry of the Court. They can declare the nullity of the award in various circumstances", and the Tribunal goes on to give further instances of the

"powers of supervision and interference" of national courts.[1] A particular form of "interference" is found in the (British) Arbitration Act, 1950, providing for the so-called "special case stated".[2] There are also a few states of the United States in which arbitrators are authorized to submit to a court any questions of law arising during the course of a proceeding.[3] Now, the question is, the courts of *which* country have these powers in a case of *international* arbitration. In 1952 the Institut de droit international adopted a resolution to the effect that the *lex fori* or, in the French terminology, *la loi de l'arbitrage*, i.e., the law which governs procedure, is the law of the country in which the tribunal has its seat.[4] This view is said to have been accepted, explicitly or tacitly, in most countries. According to another view the law chosen by the parties is to be regarded also as the *lex fori*. Mann[5] says that arbitrators "are inevitably subject to the legislative jurisdiction of the country in which the tribunal functions" and that the "legislative and judicial authorities of the seat control the tribunal's existence, composition and activities". Accepting this statement, it is also true that the law or the courts may accord the parties to a dispute a measure of autonomy in agreeing on matters of procedure, with the result that the law of the seat, while controlling, may not in fact be applied.

The procedural law governing international arbitration proceedings is dealt with, directly or obliquely, in a number of treaties. To mention three examples:

Article 1 *(c)* of the 1927 Geneva Convention on the Recognition and Enforcement of Foreign Arbitral Awards[6] requires the party seeking recognition or enforcement to show, *inter alia*, that the award has been made by the tribunal constituted in the manner agreed upon by the parties *and* "in conformity with the law governing the arbitration procedure". While this provision does not say which law governs the procedure, it becomes apparent from other provisions of the Convention that it is the law of the country where the arbitration has taken place. On the other hand, the *lex fori* is given only subsidiary significance in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[7] Article V (1) *(d)* lists as one ground of refusal of recognition or enforcement that the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties, and it is only in the absence of such an agreement that the test is whether these matters were "in accordance with the law of the country where the arbitration took place". Finally, the 1961 Geneva European Convention on International Commercial Arbitration[8] appears to give the parties almost complete autonomy in determining the constitution of the tribunal and the arbitral procedure.

We may therefore conclude that, subject to the exceptions noted, the arbitral procedure will normally be subject to the law of the country, or of the jurisdiction within that country, where the arbitration takes place. The place of arbitration is frequently stipulated in the arbitration clause. Where it is not, and where no specific agreement is made subsequently, there may be uncertainty as to the applicable *loi de l'arbitrage*. Clarity as to the seat is therefore highly desirable.[9]

The discussion has dealt until now with international arbitration proceedings between private parties. Taking the discussion a step further, the question may be asked whether what has been said here applies equally when one of the parties is a State or a State-owned entity. Two recent arbitral awards indicate that the answer may be different depending on the intentions of the parties reflected in the arbitration agreement, and probably also depending on whether the State itself or a State-owned entity is involved.

The first award was made in the *Sapphire Case*.[10] The agreement

1. Arbitral Award given on 23 August 1958 in the Arbitration between *Saudi Arabia* and *The Arabian American Oil Company (Aramco)*, see 27 *Int'l L. Rep.*, 117, 155-156 (1963) and 52 *Rev. Critique de Droit Int'l Privé*, 272, 305 (1963).

2. Under Section 21 of the Act any question of law arising in the course of an arbitration proceeding may be stated in the form of a special case for the decision of the High Court, and is therefore taken out of the hands of the arbitrators.

3. Connecticut, Pennsylvania, Nevada, North Carolina and Utah; see Domke, *The Law and Practice of Commercial Arbitration*, p. 260 (1968).

4. *Annuaire de l'institut de droit international* I, pp. 469 et seq. (1952).

5. "International Arbitration", *Liber Amicorum for Martin Domke*, p. 161 (The Hague, 1967).

6. 92 *LNTS* 301 (1929).

7. 330 *UNTS* 38 (1959).

8. 484 *UNTS* 364 (1963).

9. Existence of a seat does not mean that if some hearings are held elsewhere this would lead to a change of the *lex fori*.

10. Arbitral Award given on 15 March 1963 in the case *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*. *Sapphire* was a Canadian Company and *NIOC* is a statutory corporation in charge of all oil matters. Portions of the award are published in 35 *Int'l L. Rep.*, 168-170 (1967); Lalive, XIX *Annuaire suisse de droit international*, pp. 273 et seq. (1962); Lalive, 13 *Int'l & Comp. L.Q.*, 1002 et seq. (1964).

between the parties contained an arbitration clause, which provided that in certain circumstances an umpire, or a sole arbitrator, would be designated by the President of the Swiss Federal Tribunal, or failing action by that official, by the President of the highest court of Denmark, Sweden or Brazil, in that order. The arbitration clause further provided that the place of proceedings *and* the arbitral procedure would be determined by the parties, and failing such agreement, by the umpire or sole arbitrator as the case might be.

In the event *Sapphire* requested the President of the Swiss Federal Tribunal to appoint the sole arbitrator. The President appointed a Swiss federal judge who, in the absence of agreement of the parties, determined that the seat of arbitration would be Lausanne in the Canton of Vaud which meant that the arbitration would be subject to the law of procedure of that Canton, and, presumably as permitted by that law, the arbitrator, applying the arbitration clause, determined that the arbitral procedure would be governed by the Federal Law of Procedure.[11] In that connection the arbitrator noted in his award that the jurisdictional power given to him implied necessarily that the arbitration be governed by a *lex fori* and be subject to the supervision of the State's judiciary. In other words, in the *Sapphire Case* the rule of the *lex fori* being the law of the place where the arbitration took place was followed, even though this place could not be known in advance, and even though one of the parties was an entity owned by a foreign State and entrusted with the management of that State's oil assets. This decision appears to have been based on the arbitrator's interpretation of the intention of the parties and may also have taken account of the fact that NIOC was an entity separate and distinct from the Iranian State itself.

The second case concerns an arbitration between *Aramco,* an American corporation, and the Kingdom of Saudi Arabia.[12] The parties agreed to establish the seat of the arbitration at Geneva. The umpire in the case was Professor Sauser-Hall, who in 1952 had proposed the solution adopted by the Institut de droit international which held that the law of the country of the seat should be the *loi de l'arbitrage*. However, the *Aramco* award had the following to say:

> "Although the present arbitration was instituted, not between States, but between a State and a private American corporation, the Arbitral Tribunal is not of the opinion that the law of the country of its seat should be applied to the arbitration. The jurisdictional immunity of States . . . excludes the possibility, for the juridical authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases."

11. 35 *Int'l L. Rep.*, pp. 168-170 (1967).
12. See note 1, *supra*.

Noting that the practice of Swiss courts has limited the jurisdictional immunity of States in certain circumstances which the Tribunal did not, however, deem present in the instant case, the Award concluded that "the arbitration, as such, can only be governed by International Law" and expressed the view that the rules set forth in the Draft Model Rules on Arbitral Procedure adopted by the International Law Commission of the United Nations[13] should be applied by analogy.

Thus, in the *Aramco Case no* national law was deemed applicable to the arbitration procedure. Therefore, *no* powers of "supervision and interference by national courts", in the language of the Tribunal, but that is also to say *no* assistance from those courts, for instance in the constitution of the tribunal, if one of the parties refuses to co-operate. In the *Aramco Case* no such assistance proved necessary, but in other cases involving a State as one of the parties, there may well be such a need, for instance in getting the tribunal appointed. In that connection it is interesting to note that under the restrictive theory of sovereign immunity followed in the United States under the so-called Tate letter, three foreign Governments, those of Spain, Egypt and Greece, were successfully brought to court upon a refusal on their part to honour arbitration clauses in charter parties and other maritime agreements. In all these cases the federal courts in New York rejected the defence of sovereign immunity and ordered the Governments concerned to appoint their arbitrators.[14]

What now is the situation under the Convention? The Convention, being a treaty, constitutes the *loi de l'arbitrage* and as such excludes the applicability of any national *lex fori,* except where the Convention itself refers to it.

The composition of the Tribunal is regulated exhaustively by the Convention itself (Articles 37-40). It leaves the parties a considerable

13. *Yearbook of the International Law Commission*, 1958, Vol. II, pp. 1-15.
14. See Domke, *The Law and Practice of Commercial Arbitration*, pp. 165-166 (1968).

measure of freedom, imposes a few limitations, such as with respect to the nationality of arbitrators,[15] and provides rules to prevent frustration of the establishment of the Tribunal by conferring residual powers of appointment on the Chairman of the Administrative Council of the Centre. The Convention also contains rules governing the replacement and disqualification of arbitrators (Articles 56-58).

As regards the proceedings in the narrow sense of the term, i.e., covering the period between the constitution of the tribunal and the rendering of the award, the situation is as follows:

(i) The Convention deals directly with a few matters of procedure such as the procedure to be followed in case of failure of a party to appear or to present its case (Article 45), and the right of the Tribunal, unless the parties have otherwise agreed, to call upon the parties to produce evidence, to visit the scene connected with the dispute (Article 43), to determine appropriate incidental or additional claims or counterclaims (Article 46) and to recommend provisional measures which should be taken to preserve the respective rights of either party (Article 47).

(ii) With respect to other matters of procedure the Convention provides that, once again except as the parties otherwise agree, the proceeding shall be conducted in accordance with the Arbitration Rules which were in effect on the date on which the parties consented to arbitration (Article 44, first sentence).

(iii) Finally, questions of procedure which are not covered by the Convention itself or the Arbitration Rules or by any rules agreed by the parties, will be decided by the Tribunal (Article 44, second sentence).

With respect to the award the Convention provides that the Tribunal shall decide questions by an absolute majority of its members, that the award shall be in writing and shall be signed by the members of the Tribunal who voted for it, that the award shall deal with every question submitted to the Tribunal and that it shall state the reasons upon which it is based. The specific character of this provision, Article 48, is particularly useful in view of the great variety in the law and practice of different States.

The Convention also contains rules about the place of proceedings.

15. See Chapter I, p. 337.

Unless the parties otherwise agree these proceedings will be held at the seat of the Centre in Washington, D.C. From what I have said before it will be clear that the choice of a site for the proceedings is without any influence on the applicable law of procedure.[16]

I want to leave the discussion of procedural law at this point although I have not yet discussed two extremely important aspects, namely remedies against an award and its recognition and enforcement. As to these matters, too, the Convention provides a special régime insulating the proceedings from review by national courts, although calling on these courts in connection with recognition and enforcement. These matters will be taken up in my last lecture.

(b) Substantive Law

In contrast to the provisions of procedural law which are scattered throughout the Convention, the provisions dealing with the substantive law, i.e., the law to be applied by the Tribunal to the merits of the dispute, are dealt with in a single Article, namely Article 42.[17] The first paragraph deals directly with the applicable law and we shall examine it in detail. The second paragraph provides that the Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law. The drafters followed here the precedent of the Model Draft on Arbitral Procedure adopted by the United Nations International Law Commission.[18] The provision, which is not found in the Statute of either the old or the new International Court reflects the view that existing international law provides the international judge or arbitrator with sufficient elements for a legal decision of

16. The United Kingdom Arbitration (International Investments) Act 1966, which is a statute enacted to implement the Convention, explicitly excludes (sub. 3 (2)) application of the Arbitration Act of 1950, which among other things gives the courts certain review powers (note 2, *supra*), in relation to ICSID proceedings (46 *Halsbury's Statutes of England*, p. 9 (1966)).

17. Article 42 provides: "(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 aequo et bono* if the parties so agree."

18. See note 13, *supra*.

disputes, contrary to earlier positivist opinion that the international legal order was incomplete.[19]

The third paragraph deals with the power of the Tribunal to decide *ex aequo et bono*. One can debate whether this is a question of applicable law or one relating to the jurisdiction of the Tribunal. I shall treat it as the former, after having dealt with the central part of Article 42 which is paragraph 1 and reads as follows:

> "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."

The first sentence is intended to settle one of the more difficult questions in international arbitration, namely that of the freedom of the parties to choose the law applicable to the merits of the dispute.[20] According to one view, choice of the place of arbitration implies a choice not only of the procedural law—we have discussed that—but also of the substantive law to be applied by the Tribunal. Next there is a wide range of opinion as to the degree of autonomy of the parties in stipulating the applicable law. Finally, it is argued by some, and just as vigorously denied by others, that particularly with respect to disputes between States and private investors the parties should have the freedom to contract out of any national law and delocalize or internationalize their legal relationships by reference to general principles of law, principles of law common to a group of legal systems, principles of international law and the like. It has even been argued that parties should have the freedom to make their contract, or other instrument defining their legal relationship, the sole law applicable. The first treaty which recognized party autonomy without reference back to a national law was the 1961 Geneva Convention which leaves the parties free to determine the law applicable to the merits of their dispute. Failing an "indication" of the applicable law by the parties, the

19. Scheuner in "International Arbitration", *Liber Amicorum for Martin Domke*, p. 277 (The Hague, 1967).

20. Understandably, Article 42 has attracted much attention of commentators of the Convention, who have arrived at different views concerning its merits and interpretation. Publications which deal with Article 42 in detail are so marked in the Bibliography.

tribunal will determine it by the application of such conflict rules as it shall deem appropriate.[21]

The provision that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties", firmly confers on the parties unlimited autonomy as to the applicable law, and makes their choice binding on the Tribunal.[22] The parties are free to agree on rules of law defined as they choose and whether national or international, or a combination of both. Where the reference is to a national law several questions may arise which are not answered by the Convention. One such question is whether reference to the law of a certain country should be understood as a reference to the law as in effect at the time of the agreement or as it may have been amended at the time when the Tribunal is to apply it. I think the answer here is that a mere reference to the law of a country must be understood to be to that law as it exists at the time when the Tribunal is called upon to decide the dispute, including its inter-temporal provisions. In my opinion Article 42 permits, however, that the parties agree on the applicability of a particular law as it stands at the time of their agreement. They may stabilize their relationship by incorporation of the law as of a certain date. Another question, to which attention was drawn by Lauterpacht,[23] is whether on the assumption that parties have stipulated the law of the host State as the applicable law and that the host State subsequently changes its law in order to defeat the rights of the investor, the Tribunal would be free to disregard such a change on the ground that it violated international law. Phrased in a more abstract manner, the question is whether the Tribunal can apply international law where international law is not in terms included in the rules of law agreed by the parties pursuant to the first sentence of Article 42 (1). This is a difficult question on which I hesitate to express a firm opinion. However, I submit that in this situation the application by the Tribunal of international law rules is at least permissible to the extent that these rules are "the law of the land", which is to say that they would presumably be applied by the national courts of the host country.

21. See note 8, *supra*, Art. VII, 1.

22. The question could be raised whether the first sentence of 42 (1) requires an express choice, or whether the Tribunal may conclude that the parties had implicitly "agreed" on certain rules of law. Incidentally, the French text uses the term "adopté", but both texts seem to me to require an affirmative choice.

23. Lauterpacht in *Recueil d'études de droit international en hommage à Paul Guggenheim*, pp. 657-658 (Genève 1968).

Next we take up the second sentence of Article 42 (1) which becomes operative in the absence of agreement between the parties as to the applicable law, a situation which, on the basis of the ICSID arbitration clauses I have seen, is likely to arise with considerable frequency. It was this residual rule embodied in the second sentence that caused considerable difficulty during the negotiations leading up to the final formulation of the Convention. According to that sentence 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. In this case, therefore, the Tribunal is clearly called upon to take account of both national and international law. The order in which the two systems of law are mentioned, national law first and international law second, does not denote their hierarchical order. In fact, one could argue that the reverse is true as we shall see in a moment. It does however reflect the fact that the investment which has given rise to the dispute is made within a national jurisdiction and in the absence of a stipulation to the contrary—in which event the first sentence would apply—should in the first instance be examined in the light of the law of that jurisdiction. This could have been expressed as well, and in fact it was so expressed in an earlier draft, by saying that a Tribunal should apply such rules of national and international law as may be applicable. This draft ran, however, into very strong opposition on the part of many developing countries, including those who were not opposed to the application of international law. This group felt that the applicable national law would of necessity be the law of the host country, since that is where the investment is made. It has to be admitted that in most cases this result would be reached in any event by the application of conflict rules. It therefore seemed acceptable to provide for the law of the host State as the applicable national law, but to make specific references to the conflict rules of that law.[24]

At this point I want to return for an instant to the first sentence of 42 (1) which applies in the case where the parties have made a choice of law. The question has been raised whether the choice of law of a certain country would exclude that country's conflict rules. I submit that the answer is negative. In any event no argument in favour of exclusion could be derived from the fact that no mention of conflict

24. For a more detailed account see Broches in "International Arbitration", *Liber Amicorum for Martin Domke*, pp. 13-19 (The Hague, 1967).

rules is made in the first sentence and that they are expressly mentioned in the second. The first sentence speaks of rules of law, which may not be the rules of a national system at all, so that a reference to conflict rules would have been wholly inappropriate. Their express mention in the second sentence, the necessity for which as a matter of law may be debated, was motivated by a desire to remove any possible ambiguity.

This leaves the meaning of the last words of the second sentence of 42 (1): "and such rules of international law as may be applicable". When comparing these words with the French text, which is equally authentic with the English and Spanish texts, one will find two differences. Instead of *rules* of international law, the French text speaks of "principes", literally therefore "principles". The Spanish text uses "normas", i.e., rules. The difference is hard to explain since the trilingual drafting committee, although divided into three sections, approved the text of each provision in a joint session. It seems to me in any event that "principles" cannot have been intended or have the effect of excluding specific "rules". The other difference is that the English and Spanish texts speak of international law which "may be applicable" whereas the French text uses the term international law "en la matière", in English literally "on the subject", but better translated as "relevant". I see no difference in substance between rules of international law that may be applicable and "relevant rules of international law". The major question whether rules or, for that matter, principles of international law can be directly applied to a dispute between a State and a non-State party is clearly answered in the affirmative by the text of the Convention. If the intention had been merely to refer to the rules of international law which were applicable as part of the law of the State party to the dispute, the text could have dealt with them in the same manner as with the conflict rules and could have stated that "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of law and its rules of international law)". The separate mention of international law is unambiguous. This view is supported by the Report of the Executive Directors with which the Convention was submitted to governments and which states:

> "The term 'international law' as used in this context should be understood in the sense given to it by Article 38 (1) of the Statute of the International Court of Justice, allowance being

made for the fact that Article 38 was designed to apply to inter-State disputes."[25]

The reference to international law had rightly been recognized from the very first as a matter of the greatest importance and had been debated and discussed at length at the Regional Consultative Meetings, at the meetings of the Legal Committee and, finally, by the Executive Directors themselves.[26]

My submission as to the relationship between the law of the host State and international law in the second sentence of 42 (1) is as follows. The Tribunal will first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law. In that sense, as I suggested earlier, international law is hierarchically superior to national law under Article 42 (1).

Summing up, there are four situations on which an ICSID tribunal will have occasion to apply international law:

(i) where the parties have so agreed;

(ii) where the law of the Contracting State party to the dispute *calls* for the application of international law, including customary international law;

(iii) where the subject-matter or issue is directly regulated by international law, for instance a treaty between the State party to the dispute and the State whose national is the other party to the dispute; and, finally,

(iv) where the law of the Contracting State party to the dispute, or

25. Report, para. 40. The text of Article 38 (1) is set out in a footnote to the Report: "1. The court, whose function it 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 the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

26. For references, see *History*, Vol. I, pp. 190-193.

action taken under that law, violates international law. In this instance international law operates as a corrective to national law.

The last item to be discussed under Article 42 is the third paragraph which provides that the earlier paragraphs—paragraph 1 dealing with applicable law and paragraph 2 containing a prohibition against *non liquet*—will not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree. The specific mention of paragraph (1) is self-evident since an authorization to decide a question *ex aequo et bono* is, in the words of O'Connell, "an authorization to decide without deference to the rules of law".[27] The specific reference to paragraph (2), which was a product of the work of the drafting sub-committee of the Legal Committee,[28] where the provision had not elicited any substantive comment, is interesting because it correctly emphasizes that *ex aequo et bono* decisions are not gap-filling exercises to avoid a *non liquet*.

The power to decide *ex aequo et bono*, with the agreement of the parties, is found in the Statutes of both the old and new International Courts.

Provision for *ex aequo et bono* decisions, with or without express authorization of the parties, has been made in a considerable number of treaties, but practice in the PCIJ and ICJ has been non-existent and there appears to have been no significant relevant practice elsewhere. There is, nevertheless, a substantial volume of learned discussion of the subject, to which I cannot do justice in the context of this course.[29] But since I believe that the power to decide *ex aequo et bono* is of particularly great potential significance for the settlement of investment disputes I do want to make a few comments and suggestions, which I hope to substantiate and enlarge upon in the near future.

I have already said that decisions *ex aequo et bono* are not to be regarded as gap-filling exercises. I want to add that neither should *ex aequo et bono* decisions be regarded as solely appropriate for the settlement of non-justiciable as opposed to justiciable disputes. The Convention certainly rejects that view, because only legal disputes are within the jurisdiction of the Centre and these legal disputes may by

27. *International Law*, p. 14 (1970).

28. *History*, Vol. II, p. 863.

29. See, e.g., Sohn, 108 *Recueil des cours*, I, pp. 1 et seq. (1963) (with extensive bibliography) and in "International Arbitration", *Liber Amicorum for Martin Domke*, pp. 330 et seq. (The Hague, 1967).

the express provision of Article 42 (3) be decided *ex aequo et bono.* As was aptly said in a recent study:

> "Settlement of a dispute *ex aequo et bono,* rather than on the basis of law, results neither from the nature of the dispute, nor from *lacunae* in international law, but solely from the decision of the parties to obtain such a solution."[30]

What are the characteristics and limitations of jurisdiction *ex aequo et bono?* Briefly, the tribunal may not only take into account equitable considerations *infra legem,* that is in interpreting the law, or *praeter legem,* that is in supplementing the law, but may decide *contra legem,* in disregard of the law, when considerations of equity and justice so require. But there are limitations. The Tribunal may change the relationship of the parties but in doing so it does not have complete freedom of action. As Hudson said, speaking of the Permanent Court:

> "It cannot act capriciously and arbitrarily. To the extent that it goes outside the applicable law . . . it must proceed upon objective considerations of what is fair and just. Such considerations depend, in large measure, upon the judges' personal appreciation, and yet the Court would not be justified in reaching a result which could not be explained on rational grounds."[31]

Major investments in developing countries almost always involve agreements extending over long periods of time, and it is extremely difficult to agree on terms which will be regarded as fair or suitable during the entire course of the agreement. This is true even when both parties act in the best of faith and make intelligent and sincere efforts to predict and foresee possible future developments. New developments may call for renegotiation. The need for renegotiation has already become painfully apparent in the case of investments dating back 20, 30 or 40 years. With respect to some of those, the investor has been unwilling to renegotiate. In even more cases, the host State has taken unilateral action. I need not enlarge on the unfortunate effect

30. Degan, *L'équité en droit international,* p. 239 (1970) (own translation of the French text).

31. Hudson, *The Permanent Court of International Justice,* 1920-1942, p. 620 (1943).

of such disputes not only on the investment climate but on international relations generally.

Some of the more recent investment agreements include renegotiation clauses, sometimes indicating the basis for renegotiation. It seems clear to me that *ex aequo et bono* decisions can in appropriate cases lead not only to a satisfactory settlement of a disputed question, but, more importantly, permit and encourage the continuation of investor-host State co-operation. And in saying this I am not implying that the decision will necessarily be in favour of the State party to the dispute.

The Centre is aware of at least five cases in which an investment agreement contains an *ex aequo et bono* arbitration clause.[32] In view of the flexibility permitted parties by the Convention, I can envisage arbitration clauses which authorize *ex aequo et bono* decisions on a limited number of points only, leaving other issues to be determined in accordance with rules of law. Finally, even where the arbitration clause is silent, parties can always authorize the Tribunal to decide *ex aequo et bono after* the dispute has arisen.

32. For an example see the Convention of Establishment between Mauritania and SOMIMA (Société des Mines de Mauritanie) 1967, Article 50 reproduced at 6 *International Legal Materials* 1085 (1967).

CHAPTER VI

THE AWARD: FINALITY AND BINDING CHARACTER

The last subject to be taken up is recognition and enforcement of awards, which is governed by Articles 53, 54 and 55 of the Convention. The subject is of obvious practical interest. In addition, however, these three Articles contain some innovations, to which the drafters were led by a dual set of objectives. The first of these was to achieve an equitable balance between the respective interests of investors and of host States, a concern which extended as well to other parts of the Convention. The second objective was to assure the effectiveness of the Convention through the application of international as well as domestic law, taking into account the different juridical spheres to which the parties to the dispute belong, leading to the erection of a mixed juridical structure.

(a) Award Binding on the Parties

We shall first turn to Article 53 (1)[1] from which I quote the following: "The award shall be binding on the parties . . ." and "Each party shall abide by and comply with the terms of the award . . .". The quoted portion of Article 53 is no more than a restatement of customary international law, based on the concepts of *pacta sunt servanda* and *res judicata*. Article 37 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 expresses the effect of *pacta sunt servanda* as follows: "Recourse to arbitration implies an engagement to submit in good faith to the award." And Article 81 of the 1907 Convention provides that the award "duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal". This, I believe, was equally intended as a codification of the customary international law concept of *res judicata*. In the *Socobel Case*, the Permanent Court of International

1. Article 53 (1) 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 that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

Justice 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."[2]

Notwithstanding general acceptance of the foregoing principles, it is a fact not only that the losing party in an international arbitration has sometimes refused to comply with an award, but that it has done so under a claim of right, claiming that the award was a nullity. Grounds for nullity cited in State practice include: lack of jurisdiction, violation of the rules of natural justice, failure to give a reasoned award, fraud, essential or manifest error.[3] Thus, not every award constitutes *res judicata* and the obligation "to submit in good faith to the award", to use the terms of the Hague Convention, may have to be read as an obligation to submit to a proper, a valid award. Since the bulk of inter-State arbitrations have taken place outside any institutional framework which provided remedies against allegedly improper or invalid awards, the losing party has in practice too often been the final judge.

In this respect the Convention has established rules that are both clearer and more equitable. The Convention provides several remedies, but at the same time provides that those shall be the *only* remedies. Article 53 (1) states that the award "shall not be subject to any appeal or to any other remedy except those provided for in this Convention". And that provision permits a party to depart from the obligation to abide by the award only "to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention".

Let me briefly mention the three remedies provided by Article 50 (Interpretation), Article 51 (Revision) and Article 52 (Annulment). I note that in all three cases the applicant may request a stay of enforcement, and that in the cases of revision and annulment a request by the applicant for a stay will operate as a provisional stay of enforcement pending a ruling on his request.

A request for *interpretation* of the meaning or scope of an award may be made by either party. It will, if possible, be submitted to the Tribunal which rendered the award. If this is not possible a new Tribunal will be constituted in accordance with the same provisions of the Convention which governed the constitution of the first Tribunal.

A request for *revision* may be made "on the ground of discovery

2. [1939] PCIJ Publications, *Series A/B, No. 78,* p. 175.
3. O'Connell, *International Law,* p. 1110 (1970).

of some fact of such a nature as decisively to affect the award". The fact must have been unknown to the Tribunal and the applicant, and the applicant's ignorance must not have been due to negligence. The application must be made within 90 days after discovery and within an absolute limit of three years after the award was rendered. As in the case of a request for interpretation, it will if possible be submitted to the Tribunal which rendered the award and, if not, to a new Tribunal constituted in accordance with the provisions of the Convention.

A request for *annulment* may be made 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."

Application for annulment must be made within 120 days after the award was rendered, or in the case of alleged corruption 120 days after discovery, and within an absolute time-limit of three years.

A request for annulment will of course not be submitted to the Tribunal which rendered the original award. It will be heard by an *ad hoc* Committee of three members appointed by the Chairman of the Administrative Council from the Panel of Arbitrators. The Chairman is further restricted in his choice by a number of exclusions stated in Article 52 (3) intended to ensure impartiality and freedom of action on the part of the members of the *ad hoc* Committee. The Committee may annul the award in whole or in part.

Returning now to Article 53, the second paragraph defines "award" to include any decision interpreting, revising or annulling such award. And this closes the circle.

An award, as defined, is unconditionally binding. Binding on whom? Binding "on the parties", says Article 53 and Article 53 further provides that "each party" shall obey the award. Now we know that one of the parties is a Contracting State, or a political subdivision or agency of such a State which has become a party to the proceedings under circumstances which leave no doubt that the State is responsible

for the performance of their obligations under the Convention. Failure by a Contracting State to meet its obligations gives rise to at least two remedies on the international law level, both provided for in the Convention, namely revival of the right of diplomatic protection on the part of the investor's national State and proceedings against the recalcitrant State before the ICJ under Article 64 of the Convention on the application of the investor's national State or, in my submission, of any other Contracting State.[4]

The other party to the dispute is not a State, and the Convention imposes on that non-State party, the investor, the same obligations as on the State party with respect to the binding character of the award and compliance with it. The investor is not a party to the Convention. Can the Convention nevertheless impose an obligation on him? We have seen that the Convention has conferred an international status on the investor, the capacity to arbitrate with a State in an international forum. Could not then the Convention also impose a direct obligation on him, and in particular an obligation which can arise only as a result of the exercise of the procedural capacity granted to him?

Whatever doctrinal complexities this question may evoke, it is relevant for our purposes to note the absence in general of direct sanctions under international law against an individual.[5] Could the Convention be construed as making the individual's national State amenable to the sanctions of international law for the violation by the individual of the obligations, if any, imposed on him by the Convention? Side-stepping various conceptual options, the drafters of the Convention provided a practical solution by ensuring compliance with the investor's obligations at the domestic level through a set of provisions on the recognition and enforcement of awards by Contracting States.

(b) Recognition and Enforcement

Article 54[6] imposes a duty on each Contracting State, not merely on

4. See *supra*, p. 379.

5. Nørgaard, *The Position of the Individual in International Law*, pp. 81-95 (1962).

6. Article 54 provides: "(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

the State which had been a party to the dispute or whose national had been a party to the dispute, but on *each* Contracting State, to recognize an award as binding as if it were a final judgment of a court in that State, on the simple presentation of a copy of the award certified by the Secretary-General. Just as Article 53 affirmed the absolute binding force of the award on the international law level, Article 54 affirms its external finality, i.e., vis-à-vis domestic courts. The award is *res judicata* in each and every Contracting State.

But Article 54 requires more of Contracting States than recognition of the award as *res judicata*. It also requires each Contracting State to enforce the pecuniary obligations imposed by the award within its territories as if it were a final domestic judgment and this, too, on the simple presentation of a certified copy of the award.

After a few comments on the text of Article 54, we shall compare the régime established by that Article with the law of recognition and enforcement of international arbitral awards, first, in the absence of any treaty and, then, under the various treaties concluded on the subject since the end of World War I.

It will be noted, first, that enforcement under Article 54 is limited to the pecuniary obligations imposed by an award. In other words, enforcement does not extend to negative or positive injunctions. It may be assumed, however, that awards will wherever possible impose pecuniary obligations, in the form of liquidated damages, penalties or otherwise, in case of non-compliance with obligations of specific performance.

Attention should also be drawn to the second sentence of Article 54 (1) which permits States with federal constitutions to enforce awards through federal courts and to provide that those courts shall treat the awards as if they were final judgments of courts of a constituent State. The United States has taken advantage of this provision in its legislation implementing the Convention.[7]

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 subsequent 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."

7. The Convention on the Settlement of Investment Disputes Act of 11 August 1966, 80 Stat. 344, provides: "The pecuniary obligations imposed by such an award shall be enforced and shall he given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."

Finally, Article 54 (3) provides that execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories execution is sought. Because of the different legal techniques followed in civil law, common law and other jurisdictions and the differences in judicial systems as between unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.[8]

The Convention imposes obligations of recognition and enforcement of awards on all Contracting States. In the absence of Article 54, such awards would probably be regarded as "foreign awards" for purposes of recognition or enforcement in all States, including the State which was a party to the dispute and the State whose national was the other party to the dispute.

No State is under an obligation under customary international law to recognize or enforce foreign judgments and the same is true of foreign arbitral decisions.[9] States are therefore free either to withhold recognition and enforcement, or to subject it to such conditions as it may prescribe. Beginning in the 1920s efforts have been made to reduce the resulting uncertainties for litigants.[10] This matter has successively been dealt with in the Geneva Convention of 1927 on Execution of Foreign Arbitral Awards,[11] the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[12] the United Nations 1961 Geneva Convention on International Arbitra-

8. And note that Article 69 provides that 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".

9. For a discussion of the recognition and enforcement of foreign judgments see, e.g., Dawson and Head, *International Law, National Tribunals and the Rights of Aliens*, pp. 256-290 (1971).

10. See Note by the United Nations Secretary-General relating to the draft of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, cited by Firth, 25 *Arbitration Journal* 10 (1970): "The extent of judicial control over the recognition and enforcement of arbitral awards must be defined with precision, so as to avoid the possibility that a losing party could invoke without adequate justification a multiplicity of possible grounds for objections in order to frustrate the enforcement of awards rendered against it."

11. 92 *LNTS* 301 (1929).

12. 330 *UNTS* 38 (1959).

tion[13] and the Council of Europe's 1966 Strasbourg European Convention providing a Uniform Law on Arbitration,[14] of which the last one has not yet entered into force. These instruments constitute a progressive development favouring the recognition and enforcement of foreign arbitral awards. The conventions are of necessity highly technical and do not lend themselves to a brief summary. By way of generalization it can, however, be said that progress has been made principally on two fronts. First, the 1927 Geneva Convention imposed a number of conditions, the fulfilment of which had to be proved by the moving party, in addition to specifying a number of grounds for refusing enforcement and recognition. The great improvement brought about by the 1958 New York Convention was to reverse the burden of proof. The moving party merely need furnish a copy of the arbitration agreement and of the award. The party resisting recognition or enforcement must prove the existence of grounds for refusing it. Secondly, beginning with the 1958 New York Convention the grounds for refusal of recognition or enforcement have been reduced, principally as a result of granting the parties increasing autonomy both as to procedural and substantive law. Notwithstanding these improvements, a State may still refuse recognition or enforcement if the dispute was not capable of settlement by arbitration under its law, or if the award offends the public policy, the *ordre public*, of the forum.[15]

In the discussions leading to the formulation of the Convention creating the Centre there was no major difficulty in gaining acceptance of the general principle that awards should be *res judicata* in national courts, and not be subject to review by those courts, in view of the internal remedies provided by the Convention. The view was expressed, however, that there should be one exception to this general principle, namely the exception of public policy. According to that view, no State should be required to recognize or enforce an award where to do so would conflict with its *ordre public*. The difficulty which this raised was that if the *ordre public* exception was accepted, this exception would have to be granted to all States, including the State which was the party to the dispute, and that this would be a dangerous erosion of the binding character of the award. It was consequently decided not to permit any exceptions at all.[16]

13. 484 *UNTS* 364 (1963).

14. *European Treaty Series*, No. 56.

15. See Broches, "Promotion of the Improvement of Conventions on Arbitration", *Co-operation among Arbitration Organizations*, pp. 325-337 (Milan 1970), translated and republished as: "Promotion du perfectionnement des conventions en matière d'arbitrage", *Revue de l'arbitrage*, No. 4, pp. 271-284 (1969).

Judicial as well as arbitral action against a State will frequently be shipwrecked on the rocks of sovereign immunity.[17] Sovereign immunity will sometimes be a bar to jurisdiction in proceedings against a State in its own courts and, more frequently, in proceedings against a State in the courts of another State. While some countries continue to accept the absolute immunity of foreign States, others recognize immunity from jurisdiction where States act *jure imperii* but deny it for acts *jure gestionis*. In the context of the Convention, no problem of immunity of jurisdiction arises. The Convention itself has removed this immunity which would be wholly inconsistent with its purposes.

Immunity from jurisdiction must be distinguished from immunity from execution. With very few exceptions[18] national courts have upheld an absolute immunity from execution even in cases where immunity from jurisdiction had either been waived or had been denied on the ground that the sovereign State had acted *jure gestionis*.[19]

The drafters of the Convention were therefore faced with the question whether they should attempt to include in the Convention a waiver of sovereign immunity from execution. They answered this question in the negative. The attempt would surely have run into almost unanimous opposition on the part of the developing countries. Moreover, questions of sovereign immunity are delicate ones in all countries, and although the doctrine of sovereign immunity is part of international law, State practice and the practice of domestic courts show so many variations that the time was clearly not ripe for an attempt to create

16. For discussions during drafting stage, see, *History*, e.g., Vol. II, pp. 424-431 and 899-904.

17. See O'Connell, *op. cit.*, pp. 841 et seq., and Delaume, *Legal Aspects of International Lending and Economic Development Financing*, pp. 204-208 (1967).

18. E.g., *Socobelge* v. *Greek State and Bank of Greece*, Civil Trib. Brussels, 30 April 1951, *Journal des Tribunaux*, Col. 298 et seq. (1951) and 47 *Am. J. Int'l L.* 508-509 (1953); and *United Arab Republic* v. *Madame X*, 10 Feb. 1960, *Rec. Off.* 86.1.23, 88 *Journal du droit int'l* 459 et seq. (1961) and 55 *Am. J. Int'l L.* 167 et seq. (1961).

19. E.g., *République socialiste fédérative de Yougoslavie* v. *Société européenne d'études et d'entreprises*, 6 July 1970, 98 *Journal du droit int'l* 131-139 (1971); *Clerget* v. *Banque Commerciale pour l'Europe du Nord et autres*, 2 November 1971, *Jurisc. Pér.*, II, 16969 (1972); and *New York and Cuba M.S.S. Co.* v. *Republic of Korea*, 13 July 1955, 132 F. Supp. 684, S.D.N.Y.

new law even within the limited context of the Convention. In fact, it was decided to make perfectly clear that this had not been the intention. Hence Article 55 provides that "[N]othing 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". In other words, Article 54 requires Contracting States to equate an award with a final judgment of a domestic court. It does not require them to go beyond that, and to undertake forced execution of awards in cases in which final judgments could not be so executed.

The express provision of Article 55 has been regretted by some. These critics overlook the fact that Article 55 does no more than acknowledge State practice as regards immunity from execution. Accordingly, the scope of Article 54 will evolve along with State practice. If a Contracting State now permits forced execution of judgments against governments in respect of actions *jure gestionis* or will permit this at some future time, that Contracting State will have a corresponding obligation of enforcement with respect to awards made under the Convention at the relevant time. It is perhaps not realistic to expect a great change in State practice as regards forced execution against States. On the other hand, there already exist now a number of national systems which apply the theory of restricted immunity both of jurisdiction and of execution as regards agencies or instrumentalities of States and I expect this development to continue.[20]

(c) Evaluation

I want to conclude by a brief evaluation of the régime laid down in Articles 53 through 55 in terms of the interests of host States as well as investors. As I said in introducing the subject, one of the concerns of the drafters was to achieve a reasonable balance between these two classes of litigants.

Articles 53 through 55 give the investor almost all the assurances he could wish for, and all he could realistically expect. If he obtains an award against a host State or agency of the State, that State is under a treaty obligation to comply with the award. I would think it highly unlikely that a State would not carry out that obligation, except in

20. See for a recent example: *N.V. Cabolent* v. *National Iranian Oil Company*, Hague Court of Appeal, 28 November 1968, 9 *Int'l L. Mat.* 152 (1970), *Nederlandse Jurisprudentie*, 69/484.

circumstances in which no legal sanction would be effective. When the losing party is not the State itself but one of its agencies, there is moreover a reasonable possibility that forced execution will be possible.

The host States have not only legally bound themselves to abide by awards, but consider in addition that failure to observe that obligation would bring them into conflict with the capital-exporting community. They were concerned, however, that they might not be able to enforce awards against investors in cases in which they, the host States, were the winning party in an arbitration. It was to reassure host States on this score that the drafters decided to include in the Convention rules for the domestic enforcement of awards. While these provisions are likely to be of primary benefit to host States, they were drafted in such a manner as to be applicable generally, and to be of potential benefit to investors as well.