Vanderbilt Journal of Transnational Law

Volume 9
Issue 4 *Fall 1976*

Article 4

1976

The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation

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THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES AND DEVELOPMENT THROUGH THE MULTINATIONAL CORPORATION

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I. INTRODUCTION

The multinational corporation (MNC) as a significant phenomenon in development economics has probably come to stay.[1] The problem for developing countries is how to harness the MNC's power for their own development, and at the same time, limit its all-too-available capacity and potential for unlimited exploitation and influence. Clearly, as pointed out by the Report of the Group of Eminent Persons, there remains much to be done substantively through the medium of the international convention and international organization, both to promote the role of the MNC in development and to control its operations in such a way as to ensure maximum protection and profit for the host state's economy.[2] However, no system of controls or protection would be complete or effective without machinery for the settlement of disputes between MNCs and host countries. By de-emphasizing the role of international dispute settlement, the Report of the Group of Eminent Persons, in the opinion of this author, did a disservice to the cause of an international regime.[3] Nevertheless, the Report does refer to the International Centre for Settlement of Investment Disputes as

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1. For a discussion of private foreign investment as a fact of international life, see C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 7 *passim* (1967).

2. *See* Report of a Group of Eminent Persons, *The Impact of Multinational Corporations on the Development Process and on International Relations*, 13 INT'L L. MAT. 800 (1974) (reproduced from U.N. Doc. E/5500/Add.1 (Part I) of May 24, 1974).

3. *Id.* at 827.

a mechanism for the settlement of disputes between MNCs and host countries.[4]

The existence of unresolved disputes is an obstacle to the smooth transfer of resources from the developed to the less developed world through private organizations, mainly MNCs. Not only do these disputes affect relations between the parties to the disputes, but they influence both present and future relations between the host countries concerned and other MNCs. Therefore, future transfers of resources are also affected. The prospect that disputes can finally be settled not only allows the MNC greater confidence in investing in developing countries, but might act as a deterrent to host countries and MNCs indulging in wrangling or arbitrary behavior. It was in this spirit that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Convention)[5] was conceived and the International Centre for Settlement of Investment Disputes (ICSID) was established. As the Report states, the intention was to strengthen partnership among countries concerned with economic development in the belief that:

> The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.[6]

and further:

> Private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.[7]

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4. *Id.*

5. [1966] 1 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (English, French, and Spanish authentic texts) [hereinafter cited as Convention]. The texts of the Convention and the Report with which it was submitted to Governments [hereinafter cited as REPORT] have been published by the International Centre for Settlement of Investment Disputes in separate English, French, and Spanish editions (Doc. ICSID/2); and in 4 INT'L L. MAT. 524 (1965).

6. REPORT, ¶ 9, at 4.

7. *Id.* ¶ 12, at 4.

II. History of the Convention

The Convention[8] was the result of initial efforts made by the World Bank. While the World Bank's principal activity is to provide finance for development, these efforts are a consequence of its role as a development institution. Therefore, the Bank was and is vitally concerned with capital flows from the developed to the developing countries. Private funds made directly available for projects in developing countries, regardless of whether they are debt or equity, or wholly or partially owned by the private foreign investor, may very well constitute the most important source of development funds. In many periods private foreign investment has accounted for almost one-half of total capital flows. Its qualitative importance, particularly in the manufacturing industry but in other sectors as well, is even greater. Moreover, private foreign investment is a significant instrument in transferring management skills and technology, in encouraging the creation of auxiliary industries, and in developing export markets.

The fear of political risks undoubtedly 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 help improve the investment climate through a process that would reduce the likelihood of unresolved conflicts between host countries and investors and, at the same time, eliminate the risk of a confrontation between the host country and the national state of the investor. Hence, the Bank decided to aim at creating facilities for the voluntary settlement of investment disputes through conciliation and/or arbitration proceedings at which the host country and foreign investors would be parties on an equal procedural footing, without either requiring or permitting the intervention of the investor's national state.

Under customary international law, if an 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, however, there is no guarantee that the host government will be willing to submit the dispute to the jurisdiction of an international tribunal or other arbitral body. Moreover, the investor's government may not be willing to take up

8. *See also*, Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil Des Cours 330, 343-48 (1972) [hereinafter cited as Broches].

a claim by the investor because of fear that such an action would be regarded as an unfriendly act by the host government and interfere with bilateral relations on other matters. 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 can ultimately resort only to such assistance as his own government may be willing to give him. The solution to the problem was thus seen to lie in arrangements, embodied in a treaty, ensuring that arbitration agreements voluntarily entered into would be implemented. Recognizing the usefulness of creating institutional mechanisms for the settlement of investment disputes within the context of an international agreement, the Bank had its staff members prepare working papers and drafts for consideration by its Executive Directors, a full-time policy making body selected by the Bank's member countries through a process of election and appointment. In addition to broad policy issues, the Convention also raised a host of technical questions. These did not lend themselves to full discussion by the Bank's Board of Governors without a great deal of technical preparation, so the Executive Directors authorized the President to convene regional meetings of experts in 1963. These meetings, 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 eighty-six countries participated. Relying upon 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 from the Board of Governors of the Bank, during that plenary body's 1964 Annual Meeting, instructions 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 that 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 and December of 1964 under the chairmanship of the Bank's general coun-

sel. Agreement was reached on most points, with a few unresolved issues settled in the early months of 1964 by the Executive Directors. After finalizing the text and agreeing on the language of an accompanying report, the Executive Directors then submitted them to the member governments as requested by the Board of Governor's Resolution of 1964, and recommended the documents "for consideration with a view to signature and ratification, acceptance or approval."[9]

The method by which the World Bank proceeded to prepare, negotiate, and formulate the Convention and to submit it to governments was unorthodox. The central responsibility was shouldered by the Executive Directors, twenty in number and representing the entire membership among them. This was a group of manageable proportions that included representatives of capital exporting as well as capital importing countries. It did not reflect, however, the individual views of the one hundred or so member countries. This shortcoming was largely cured at the outset by the regional consultative meetings and later by the meetings of the Legal Committee, which served the dual purpose of providing technical expertise and communicating the positions of individual countries. 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 World Bank members is related to their financial contributions. This weighted voting system applies also to the Board of Executive Directors, and each Director casts that number of votes allotted to the member or members who appointed or elected him. It was suggested that this voting system should only apply when the Board was dealing with Bank operations or Bank policy, not with a semi-extracurricular exercise like drafting an international agreement. The answer given on earlier occasions was repeated here: the World Bank's charter recognized only one voting system and any formal vote would have to be taken on a weighted basis. The Executive Directors had, however, developed a practice of seeking a consensus while holding informal meetings in which no vote was taken, and this "consensus" system was embodied into 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 a majority of Executive Directors, both in number of members and

9. REPORT, ¶ 3, at 2.

in weighted votes, deferred to the wishes of the minority so that a widely accepted text would be produced.

The Executive Directors took final action on the Convention on March 18, 1965, and the Convention entered into force eighteen months later on October 14, 1966, one month after the twentieth country had deposited its instrument of ratification. At the present time the Convention has been signed by seventy-two states, of which sixty-seven have completed the ratification process. Compared with other arbitration conventions of a much less sensitive character, this is an impressive number. The contracting states include most capital exporting countries as well as the vast majority of African States, a majority of Asian countries, and some of the new non-Latin countries in the 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. 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.

III. General Outline of the System Under the Convention[10]

A. *Proceedings for Arbitration and Conciliation*

The Convention provides two distinct types of proceedings for dispute settlement, conciliation (articles 28-35) and arbitration (articles 36-55). Conciliators may recommend; arbitrators must decide. Parties to conciliation proceedings must "give their most serious consideration to [the Conciliation Commission's] recommendations" (article 34), but parties to arbitration proceedings must "abide by and comply with the terms of the award" (article 53(1)). It is possible for parties to agree in advance to accept the recommendations of a conciliation commission as a binding determination of their dispute. Such a determination, however, would not derive any special protection from the Convention. On the other hand, if during the course of arbitration proceedings the

10. For the legislative history of the Convention *see* International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States—Analysis of Documents Concerning the Origin and the Formulation of the Convention (1970) [hereinafter cited as 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.

parties reach agreement, they may request the tribunal to incorporate it into an award, with the result that the provisions of the Convention relating to the enforcement of awards will be applicable.[11] Parties may, if they so desire, agree to have recourse first to conciliation and,thereafter, to submit the dispute to arbitration.[12]

Conciliation and arbitration proceedings are administered by ICSID, an international institution created by the Convention that has its seat in Washington, D.C. ICSID, which is essentially a secretariat, is governed by an Administrative Council to which each state that is a party to the Convention appoints a representative with one vote. The Council has an *ex officio* Chairman (without vote), the President of the World Bank. The Administrative Council adopts for proceedings under the auspices of ICSID, 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).[13] The latter two govern proceedings unless the parties agree otherwise.[14] The principal officer of ICSID is the Secretary-General. He is also the registrar. ICSID maintains a Panel of Conciliators and a Panel of Arbitrators. Each contracting state may designate to each panel[15] four persons who may, but need not be, its nationals, and the Chairman of the Administrative Council may appoint ten persons.

ICSID does not itself conciliate or arbitrate. These proceedings are conducted by conciliators and arbitrators appointed in accordance with the provisions of the Convention, and the parties themselves have broad discretion. However, a failure of agreement on their part will not thwart the constitution of a Conciliation Commission or Arbitral Tribunal. It is a requirement for conciliation that the commission consist of an uneven number, including a sole

11. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, "RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS," ICSID REGULATIONS AND RULES, (Doc. ICSID/4), Rule 43(2) [hereinafter cited as ICSID/4].

12. *See*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, MODEL CLAUSES RECORDING CONSENT TO THE JURISDICTION OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Doc. ICSID/5), [hereinafter cited as MODEL CLAUSES].

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

14. Convention, art. 33 (conciliation), art. 44 (arbitration).

15. For the names of Panel Members see Annex 3 of the Ninth Annual Report (1974-1975) of ICSID.

conciliator (article 29(2)(a)). In the case of arbitration there is an additional requirement, namely, 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. The parties may only depart from this rule by agreement, 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 appoint the commission or tribunal within ninety days after registration by the Secretary-General of the request for conciliation or arbitration, the remaining 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.[16]

The jurisdiction of ICSID is extremely important and unique. Although discussed in further detail later, an outline of its key features is given here. Proceedings under the auspices of ICSID must meet four tests set out in article 25. The first and most important one is that both parties to the dispute must have consented to have recourse to ICSID. However, once this requirement 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 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*: 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 such a dispute is 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). There are some special matters relating to arbitration. Unless the parties have given the tribunal the power to decide a dispute *ex aequo et bono*, the tribunal must decide in accordance with such rules of law as may be agreed by the parties. The Convention thus

16. Convention, art. 31 (conciliation), art. 40 (arbitration).

establishes complete party autonomy on the question of law to be applied by the tribunal. However, in the absence of agreement, the tribunal must apply the law of the state party to the dispute (including its conflicts rules) and such rules of international law as may be applicable (article 42). A decision cannot be refused on the ground of *non liquet* (article 42(2)). The Convention provides for an award to be rendered notwithstanding the default of one of the parties. It expressly states, however, that failure of a party to appear or to present its 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). The tribunal decides all questions by a majority vote of its members, and its awards must be in writing, deal with every question submitted, and state the reasons upon which they are based (article 48).

The Convention provides three types of remedies against an award: (1) a request for interpretation (article 50); (2) a request for revision on the basis of discovery of new facts (article 51); and, (3) a request for annulment on a limited number of grounds (article 52). Subject to these remedies provided by the Convention itself, the award is final and binding on the parties (article 53). Furthermore, each contracting state must recognize an award rendered pursuant to the Convention as binding, regardless of whether it, or one of its nationals, was a party to the dispute, and must treat the pecuniary obligations of the award, upon its certification by the Secretary-General of ICSID, as if they were a final judgment of a court in that state. Moreover, they must enforce them as such (article 54), subject to any exceptions permitted by its law on the ground of sovereign immunity (article 55). There are special provisions for enforcement in federal states (article 54).

B. *Special Features of ICSID*

The Convention provides several special advantages for participating states. First, a host state that agrees to arbitrate a dispute with a foreign investor is assured that the investor's national state or states will not give him diplomatic protection or bring an international claim on his behalf,[17] thereby minimizing the opportunities for intervention by other states in its affairs. Secondly, the host state may require the exhaustion of local remedies as a condition of its consent to the use of ICSID.[18] Thirdly, unless there is agree-

17. Convention, art. 27.
18. Convention, art. 26.

ment between the parties on another law, the law applicable in an arbitration is that of the host state.[19] Fourthly, in view of the participation of state organs in proceedings under ICSID, the procedural requirements have been kept flexible enough to avoid automatically imposing on states any burdens they might consider unacceptable in view of their special status as parties to a litigation with a private person. Fifth, the Convention makes it possible for a contracting state to offer an investor an invulnerable disputes settlement procedure, without having to submit thereby to some foreign jurisdiction or undertake an inter-state litigation with the investor's state. Lastly, the host state also enjoys the certainty that a pecuniary arbitral award will be treated by the courts of any member state as if it were a final judgment of a court in that state.[20]

Host states are not the only ones to benefit from the Convention, however. The Convention affords private persons the only institutionalized international forum for litigating with states, and its jurisdictional requirements concerning nationality are less restrictive than those of the nationality of claims rule.[21] Also, private persons may invoke the jurisdiction of ICSID against state organs and constituent subdivisions.[22] Finally, private investors are in a position, though to a lesser extent than states, to secure execution of an arbitral award against their adversaries.[23]

Another advantage lies in the fact that the clause dealing with settlement of disputes by ICSID in an agreement between host state and investor is firmly rooted in international law. Even repudiation of the principal agreement would not deprive the other party of the right to resort to ICSID. Both parties would also be certain that any proceeding properly instituted under the auspices of ICSID would actually take place and, in the case of arbitration proceedings, result in due course in an arbitral award.[24] This result would hold true regardless of the other party's failure to participate in the constitution of the commission or tribunal or in the proceedings. Thus, a reduction in both the number and the intensity of

19. Convention, art. 42.

20. Convention, art. 54.

21. Convention, art. 25(2); *see also* Amerasinghe, *Jurisdiction Rationae Personae Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, to appear in the BRITISH YEARBOOK OF INTERNATIONAL LAW (1974) [hereinafter cited as Amerasinghe].

22. Convention, art. 25(1) & (3).

23. Convention, arts. 54, 55.

24. Convention, art. 48.

differences arising between the parties should result. Provision is also made in the Convention for a fall-back procedure if the parties cannot, or do not, agree on a procedure.[25] Similarly, a finding of *non liquet* on the ground of silence or obscurity of the law cannot be brought by a tribunal.[26] The Convention also enables a state, whose investors might wish to seek its protection, to avoid the embarrassment of foreign conflicts by persuading or otherwise inducing them to rely on ICSID, removing any disputes from the inter-governmental level.[27]

To understand why ICSID is a specially useful instrument for the regulation of relations between states and multinational corporations, a brief discussion of two principal aspects which make the Convention important is necessary. These aspects concern the scope of the Convention, or the jurisdiction of ICSID, and the enforcement of arbitral awards under the Convention.

IV. JURISDICTION

Article 25 of the Convention, the basic clause on ICSID's jurisdiction, clearly indicates that the services of ICSID are not available for disputes between private individuals, between states (including subdivisions or agencies), or between a state and its own nationals. These are not unreasonable restrictions: disputes between private individuals can be settled through municipal systems of law, disputes between the states and their own nationals fall outside the scope of an international convention intended to deal with foreign investment, and disputes between states are left to be settled under traditional international law.

Because of their constitutional nature, the several jurisdictional limitations cannot be waived by the parties, whether acting individually or jointly. Nevertheless, as described below, certain limitations are sufficiently vague to make it likely that in applying them to a particular dispute considerable weight will be given to the agreed interpretation of the parties and to their desire to rely on the facilities of ICSID, as long as these facilities are used as intended. In short, it is possible in many instances to regard the Convention as laying down only the outer limits of ICSID's jurisdiction.

It is well to bear in mind that the basic tenet of the Convention

25. Convention, arts. 33, 44.
26. Convention, art. 42(2).
27. Convention, art. 27.

is that consent between the parties is the cornerstone of jurisdiction. This principle would result, it is believed, in the recognition of jurisdiction over parties clearly consenting to it whenever it is possible to do so without damaging the express words and clear intent of the Convention or ignoring the limitations implied by the Convention's provisions relating to jurisdiction.

A. *Ratione Materiae*

With regard to the nature of disputes within ICSID's jurisdiction, article 25 requires that they arise directly out of an investment and concern legal disputes. As the Executive Directors of the World Bank explained, the Convention does not define the term "investment."[28]Apparently there is no need to give a strict definition to the term "investment" since both parties must always consent to the jurisdiction of ICSID over the dispute. Nevertheless, a stipulation by the parties that they consider the transaction to be an investment would be helpful in settling the question. Despite the primarily subjective meaning of the term "investment" in the context of article 25, however, it is not entirely without objective significance. Disputes may be of such a nature that they obviously do not relate to an investment. In such a case, despite express stipulation by the parties, ICSID would lack jurisdiction. Also, the context of the Convention seems to suggest that a broad approach to the interpretation of this term in article 25 is warranted. Conceivably, all assets may not be included in the definition of investment. Equally possible, however, is the inclusion of even consultants' contracts within the term "investment" under appropriate circumstances. The duration of the agreement, the regularity of profit or return,[29] and the surrounding circumstances of the agreement would all be relevant factors in the decision. Thus, not only bonds, but a consultant's contract that is part of a production contract or of a larger complex of production contracts stretching over a considerable length of time could be considered an investment. Any transfer of resources, whether money, goods, services, or all three, could be an investment, depending of course on such other facts as return or profit motive, the spread out feature of return, duration and the like. An ordinary sales contract, therefore, would not normally be an investment.

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28. REPORT, ¶ 27, at 9.

29. See J. L. HANSON, A DICTIONARY OF ECONOMICS AND COMMERCE 281 (1974) for a definition for the purpose of finance; A. GILPIN, DICTIONARY OF ECONOMIC TERMS 114 (3d ed. 1973).

The Report of the Executive Directors explains that the "expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of ICSID, mere conflicts of interest are not. The dispute must concern the existence or scope of a legal right or obligation. . . ."[30] This would mean, for instance, that disputes over the proposed terms of a renegotiated contract (particularly where there is no preexisting legal obligation to renegotiate such contract) would not be within the jurisdiction of ICSID. On the other hand, any dispute concerning legal rights or obligations would be within its jurisdiction.

B. *Ratione Personae*

1. *The State Party.*—One of the adversary parties in the proceeding must be a state or a constituent subdivision or agency of a state.[31] There are some limitations imposed by the Convention on the nature of this party. Article 25(1) requires that one of the parties must be not merely a state, but a contracting state. A noncontracting state cannot be a party to proceedings before ICSID. However, the crucial date for determining the status of a state is not the date on which a consent clause submitting to ICSID's jurisdiction is reduced to writing or embodied in an instrument, but the date on which the Secretary-General considers the request for conciliation or arbitration. Therefore, it is possible for a noncontracting state to be a party to a contingent agreement calling for submission of a dispute to ICSID's jurisdiction, and this agreement would take effect automatically as soon as the state becomes a contracting state.[32]

The term "constituent subdivisions" seemingly purports to cover a fair range of subdivisions. Not only would it cover municipalities and local government bodies in unitary states, but it could cover semi-autonomous dependencies, provinces, or federated states in non-unitary states and the local government bodies in such subdivisions. The term "agencies" was apparently intended to cover as wide a range of entities as possible.[33] The main limitation would seem to be that the entity must act on behalf of either the government of the state concerned or one of its constituent

30. REPORT, ¶ 26, at 9.

31. For detailed discussion *see* Amerasinghe.

32. See MODEL CLAUSES No. X; and Amerasinghe, *Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6 JOURNAL OF MARITIME LAW AND COMMERCE 213 (1974).

33. 2 HISTORY at 960.

subdivisions. Indeed, the use of the term "agencies," as opposed to "instrumentalities," may well indicate that the term was intended to include even certain government-owned companies or government-controlled corporations. On the other hand, mere ownership by the government of shares in a public company may be inadequate for the entity to qualify as an agency.

If a contracting state designates a body to ICSID as an agency or constituent subdivision of that state, a strong presumption is raised that this body is such a constituent subdivision or agency. On the other hand, the Convention does not leave to the contracting state concerned the ultimate determination of whether a body falls within the concepts mentioned. This determination must ultimately be made on an objective basis by the tribunal or commission. Article 25(1) requires that the constituent subdivision or agency be "designated" by ICSID, if ICSID is to have jurisdiction over the case. The Convention further requires in article 25(3) that either the consent by a subdivision or agency of the contracting state to submit a dispute or disputes to ICSID must be approved by that state or that state must notify ICSID that no such approval is required.

2. *The Requirement That the Other Party Must Be a National of Another Contracting State.*—Article 25(1) requires that the other party to a proceeding before ICSID be a "national of another Contracting State." Wholly government-owned corporations, or companies in which the government has equity or shares, may qualify as nationals of other contracting states. As has been stated:

> 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.[34]

The meaning of the term "nationality" in the context of article 25(2) may not be identical with the meaning of the term for the law of diplomatic protection. In the latter field, the purpose of nationality is to establish an adequate link between the private

34. Broches, at 354-55.

party and the state giving protection, enabling that state to espouse his claim. Hence, there is reason to insist on a particularly *meaningful* link, and in certain circumstances, nationality conferred by the laws of the state concerned may be inadequate.[35] In the case of the Convention, however, the role of nationality is different. It serves as a means of bringing the private party within the jurisdictional pale of ICSID. The capacity to appear in proceedings before ICSID does not involve a question of diplomatic protection, nor is it conditioned on a state's right to exercise diplomatic protection over a private party. In the case of a juridical person such as a multinational corporation, article 25(2)(b) requires either the possession of a contracting state's nationality other than the host state on the date of consent to the jurisdiction of ICSID or, if it has the nationality of the host state, an agreement with the host country that because of foreign control it should be treated as a national of another contracting state.

There is a question whether a juridical person could have more than one nationality. Clearly if dual nationality was possible and one of the nationalities claimed was that of the host state, then an agreement based on foreign control would have to be reached between the parties. This is implicit in the formulation of article 25(2)(b).

The meaning of the term "nationality" of a juridical person is not further defined. Nevertheless, one point emerges from the formulation of article 25(2)(b): In answering the question of whether a juridical person has the nationality of the host state, a "control" test cannot be applied. Instead, some other test such as the place of incorporation or the *siege social* must be employed. Furthermore, the "control" test cannot be applied initially to establish a nationality other than that of the host state when it is found through some other test that the nationality is that of the host state. Otherwise, the second part of article 25(2)(b) would not make sense.

In connection with the question of the juridical person's nationality, a preliminary problem arises over the relevancy of criteria applicable in establishing the nationality of a juridical person for the purposes of diplomatic protection (eliminating of course, the

35. *See* Nottebohm Case, [1955] I.C.J. 4 [hereinafter cited as Nottebohm Case]. In a different sense the effect of the decision in Case Concerning Barcelona Traction Light and Power Co., Ltd., [1970] I.C.J. 3 [hereinafter cited as Barcelona Traction], was to restrict the situations in which national states could exercise diplomatic protection.

criterion of "control," if indeed that is applicable in the law of diplomatic protection).[36] It has already been mentioned that diplomatic protection should be distinguished from eligibility or ineligibility under the Convention. Consequently, the law of diplomatic protection, though it may be examined, may neither be automatically nor exactly applicable in deciding ICSID's jurisdiction. This conclusion does not, however, solve all problems, for it would appear that there is no single and exclusive test that is used to determine the nationality of juridical persons, whether for the purposes of diplomatic protection or otherwise. Apparently, different circumstances call for different tests.[37] Since a tribunal or commission constituted under the Convention need not blindly follow the international law of diplomatic protection in deciding issues connected with its jurisdiction, it would seem that it could take a more flexible approach in deciding what is the nationality of a juridical person. It could conceivably apply some other test than incorporation or registered seat, for example.

If the juridical person does not have the nationality of the host state, then the next question to be asked is whether the juridical person has the nationality of another contracting state. In answering this question the tribunal or commission will actually be interested in distinguishing between contracting states and non-contracting states.

The question of nationality of juridical persons for the purposes of ICSID's jurisdiction can be dealt with by a tribunal or commission in extremely flexible terms, particularly since it is not bound by the law of diplomatic protection. Under the Convention, the nationality of a juridical person can be determined in the light of a broad definition requiring some adequate connection between the juridical person and a state. There may be more than one state to which a connection could reasonably be established. Also, because of the specifically consensual nature of jurisdiction, every effort should be made to give ICSID jurisdiction by the application of the flexible approach, using a broad definition of nationality to reach all possibilities not explicitly excluded by the Convention itself. This does not mean that a tribunal or commission may indiscriminately hold that it has jurisdiction on the ground that a juridical person has the nationality of another contracting state

36. See Barcelona Traction, at 48 on this point.

37. *See* Van Hecke, *Nationality of Companies Analyzed*, 8 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAL RECHT 223 (1961).

and does not initially have the nationality of the host state. In every case in which it is held that there is jurisdiction on these grounds there would have to be a rational justification based on acceptable criteria.

Theoretically, if there is more than one criterion for determining nationality, it should be possible to apply several criteria at the same time and come up with the solution that a juridical person has more than one nationality. However, when one of the multiple nationalities is initially that of the host state and there is no agreement on nationality based on foreign control, it may be useful, because of the impediment to jurisdiction, to avoid a finding of multiple nationality. Here a tribunal or commission may follow the principle that a juridical person can have only one nationality unless multiple nationality exists by agreement based on foreign control. A search can be made for the "operative" or "effective" nationality in terms of a broad definition of nationality. The relevant exercise would involve finding which state the juridical person was most closely connected with considering all the circumstances of the case in terms of the applicable tests.[38]

In the case where there is a choice of nationality between a contracting state and a non-contracting state, the selection of a single nationality could lead to the exclusion of ICSID's jurisdiction. Therefore, when an agreement has been made to invoke ICSID's jurisdiction, there should be a preference in *favorem jurisdictionis*. There is no absolute or compelling logic requiring that a juridical person have only one nationality, and the cases where the nationality of the host state is involved should be regarded as special cases, since the express terms of the Convention give such cases special treatment. Accordingly, the principle of a single and exclusive nationality should be followed only when the nationality of the host state is one of the competing nationalities under the applicable tests.

The parties, of course, may certainly agree on the nationality of the juridical person. So long as the choice is not unreasonable, a commission or tribunal will not interfere with such agreement. Particularly, the parties may agree that the juridical person has a nationality other than that of the host state on the basis of foreign control. Only if the condition of foreign control is manifestly absent will a commission or tribunal upset the agreement.

The present formulation of the Convention implies that the rele-

38. This would be one of the circumstances in which the test enunciated in the *Nottebohm Case* would be relevant.

vant time for the fulfillment of the nationality requirement is that date when the consent to jurisdiction is effective for both parties. It also means that any change in the nationality of a juridical person after that date is immaterial for the purposes of ICSID's jurisdiction, regardless of how inappropriate such an alignment would have been initially.

C. *Consent*

The third jurisdictional requirement is that of consent to submission of a dispute to ICSID by the parties. This is "the cornerstone of the jurisdiction"[39] of ICSID. The Convention requires only that the consent be in writing.[40] Thus, it is not necessary that the consent of both parties be included in a single instrument. The consents may, indeed, be expressed in instruments of completely diverse character, and not necessarily addressed to the other party or made with particular reference to any dispute or arrangement with it.[41] Thus, the consent of the host state may be expressed in some legislative act, such as an investment promotion law, or in a bilateral or multilateral agreement with the investor's own state. Both these possibilities have already been used to some extent, and ICSID has issued model clauses designed for the latter purpose.[42] On the investor's part, a unilateral expression of consent might appear in general form in a charter or other instrument of incorporation, or in a by-law or resolution.

The consent of both parties must exist at the time a request for conciliation or arbitration is filed with the Secretary-General. If such a request fails to show that both parties have consented, then he must refuse to register it.[43] There is no requirement that the consents either precede or follow the incidence of a particular dispute. Thus, consent may be expressed in general terms to cover any future disputes that might arise out of a transaction. Consent may also be given after a dispute has arisen and be expressly limited to that dispute. It does not matter that the underlying

39. REPORT, ¶ 23, at 8. It has already been noted that, if the party to a dispute is a constituent subdivision or an agency of the government, its consent must be approved by the contracting state concerned, unless such state has already notified ICSID that its approval is not required.

40. Convention, art. 25(1).

41. REPORT, ¶ 24, at 8.

42. INTERNATIONAL CENTRE OF SETTLEMENT OF INVESTMENT DISPUTES, MODEL CLAUSES RELATING TO THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES; DESIGNED FOR BILATERAL INVESTMENT TREATIES (Doc. ICSID/6).

43. Convention, arts. 28, 36.

transaction or even the dispute itself antedates the Convention.

The considerable freedom allowed by the Convention for instruments of consent does not mean that legal caution may be completely abandoned. For example, the consent to the jurisdiction of ICSID must be expressed unambiguously and in a manner which does not require further action by the "consenting" party. Thus legislative or charter provisions, which may ostensibly appear to be a general consent to submission of certain types of disputes to ICSID, may merely constitute an authorization for some appropriate organ of the state or the investor to submit to the jurisdiction of ICSID. Hence, even when such a provision contains an obligation to agree to submit, the view may be taken that this obligation is merely an internal matter, without external effect until the competent organ has taken the necessary steps. Furthermore, when consent is expressed in diverse instruments, it is only where the language coincides that the consent is both effective and irrevocable. Thus, an investment promotion law might provide for the submission of any dispute relating to or arising out of the application of that legislation, while the investor may have agreed to submit any dispute arising out of the particular instrument under which his investment was made. When an actual dispute arises, it may be found to come within the terms of one instrument but not the other.

There are some special consequences of a valid consent under the Convention which should be noted. First, the consent will remain valid even though the larger agreement or arrangement in which it is found is not legally valid or has been legally terminated. This is true because the consent is not only governed by international law, but is also by its very nature an agreement *sui generis* under the Convention. Secondly, neither party can revoke its consent once given[44]—not even if one or both of the states concerned should denounce the Convention and thus cease to be a contracting state.[45] Thirdly, consent to arbitration is deemed to be an agreement excluding all other remedies, unless an express reservation is made.[46] Fourthly, the date of the consent tends to fix the mutual rights and obligations of the parties with respect to proceedings under the Convention. Thus no subsequent amendment to that instrument, and no subsequent change in the Conciliation or Arbitration Rules, can be applied to a proceeding initiated pur-

44. Convention, art. 25(1).
45. Convention, art. 72.
46. Convention, art. 26.

suant to an earlier consent,[47] even if the proceeding is not instituted until after the change in the Convention or the Rules has been perfected, unless of course both parties agree to take account of such change. Lastly, once consent to arbitration has been given, the contracting state of which the private party is a national is precluded from giving "diplomatic protection," or from bringing "an international claim" with respect to such a dispute.[48]

V. Enforcement of Awards

The provisions of the Convention relating to the enforcement of arbitral awards make it a particularly special contribution to the regulation of MNCs. The subject of enforcement is of obvious practical interest, and articles 53-55 deal with it. The main objective of these provisions was to assure the effectiveness of the Convention through the application of international as well as domestic procedures. Article 53(1) states that an arbitration award is binding on the parties and that each party shall abide by and comply with its terms. Notwithstanding general acceptance of the principle involved in this article, the losing party in an international arbitration has sometimes not only refused to comply with an award, but 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, and essential or manifest error. The obligation to submit in good faith to an award has been interpreted to mean an obligation to submit to a valid award. Since the bulk of inter-state arbitrations have taken place outside any institutional framework providing remedies against allegedly improper or invalid awards, the losing party has in practice too often been the final judge.

The Convention, therefore, provides several remedies, but at the same time provides that those shall be the *only* remedies. Article 53(1) states that the awards "shall not be subject to any appeal or to any other remedy except those provided for in this Convention." That provision also permits a party to depart from its obligation to abide by the award only "to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

The three remedies provided by the Convention are contained

47. Convention, arts. 33, 44, 66(2).
48. Convention, art. 27.

in article 50 (interpretation), article 51 (revision), and article 52 (annulment). In all three cases the applicant may request a stay of enforcement, and 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. Either party may make a request for *interpretation* of the meaning or scope of an award. This request will, whenever possible, be submitted to the tribunal that rendered the award. If this is not possible a new tribunal will be formed in accordance with the same provisions of the Convention which governed the formation of the first tribunal. The request for *revision* may be made "on the ground of discovery 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 ninety 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 be submitted to the tribunal which rendered the award and, if this is not possible, to a new tribunal formed 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 was based.

The second paragraph of article 53 defines "award" to include any decision interpreting, revising or annuling such award. An award, as defined, is unconditionally binding. It is binding "on the parties," according to article 53, and article 53 further provides that "each party" shall carry out the award. One of the parties is of course 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 its 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 remedies are provided for in the Convention, which permits revival of the right of diplomatic protection on the part of the investor's national

state and also proceedings under article 64 of the Convention against the recalcitrant state before the International Court of Justice, at least on the application of the investor's national state.

Although the other party to the dispute is not a state but the investor, the Convention imposes the same obligation to be found by the award and to comply with it. The Convention confers an international status on the investor by granting him the capacity to arbitrate with a state in an international forum. Hence, the Convention also imposes a direct obligation on him to comply with the award, an obligation that arises only as a result of the exercise of the procedural capacity granted to him. Moreover, by ensuring compliance with the investor's obligation at the domestic level through a set of provisions on the enforcement of awards by contracting states, the Convention provides a practical solution to an investor's refusal to carry out an award.

Subject to stays as permitted under articles 50 to 52 or to annulment, the parties must carry out the award. Enforcement by municipal courts is provided for by article 54. That article imposes a duty, not merely on the state that had been a party itself 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.[49] All that is required is the simple presentation of a copy of the award certified by the Secretary-General. Article 53 asserts the absolute binding force of the award at the international law level. Article 54 affirms its finality vis-à vis domestic courts. The award is *res judicata* in each and every contracting state.

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 where execution is sought. Because of the different legal techniques followed in civil law, common law, and other jurisdictions and the differences in judicial systems among unitary, federal, and 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.[50] The Convention imposes obligations of recognition and enforcement of awards on all contracting states. In the absence of article 54, such

49. Special provision is made for federal states in Article 54.

50. Article 69 provides that each contracting state "shall take such legislation or other measures as may be necessary for making the provisions of this Convention effective in its territories."

awards would probably be regarded as "foreign awards" for purposes of recognition or enforcement in all states, including the state that was a party to the dispute and the state whose national was the other party to the dispute. Article 54 goes further than merely requiring contracting states to recognize the award as *res judicata*. It also requires each contracting state to enforce within its territories the pecuniary obligations imposed by the award as if it were a final domestic judgment, and to do so on the simple presentation of a certified copy of the award. No state has an obligation under customary international law to recognize or enforce foreign judgments or foreign arbitral decisions. States are therefore usually free either to withhold recognition and enforcement, or to subject it to such conditions as they prescribe. It should be noted that under the 1958 New York Convention on arbitral awards the party resisting recognition or enforcement may prove the existence of grounds for its action. While the grounds for refusal of recognition or enforcement have been reduced under the New York Convention, principally through granting the parties increasing autonomy both in procedural and substantive law, a state may still refuse recognition or enforcement if the dispute is incapable of settlement by arbitration under its law, or if the award offends the public policy, the *ordre public*, of the forum. The Convention on the Settlement of Investment Disputes goes beyond customary international law and the New York Convention in regard to the enforcement of arbitral awards. Even the *ordre public* exception has been excluded in the Convention on the ground that this would have been a dangerous erosion of the binding character of the award, particularly if the state party to the dispute was allowed to employ it.

Article 54(1) also 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.[51] Although sovereign immunity could be an obstacle 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, in the context of the Convention, no problem of immunity from jurisdiction arises.

Immunity from jurisdiction must, however, be distinguished

51. The Convention on the Settlement of Investment Disputes Act, 22 U.S.C. § 1650(a) (1970).

from immunity from execution. With very few exceptions, 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*. 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 manifested so many variations at the time the Convention was drafted that any attempt to create a new law, even within the limited context of the Convention, would be premature. Hence article 55 provides that, "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." In other words, article 54 requires contracting states to equate an award with a final judgment of a domestic court. The Convention does not require states to go beyond that equation, *i.e.*, it does not require the forced execution of awards in cases where final judgments could not be so executed. Article 55 does no more than acknowledge state practice on immunity from execution. If a contracting state now permits 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.

Articles 53 through 55 give the investor (including the MNC) 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. It is highly unlikely that a state would not carry out that obligation, except in circumstances when no legal sanction would be effective. When the losing party is not the state itself but one of its agencies, there is a reasonable possibility that forced execution will be possible. Host states may also enforce awards against investors in cases in which they, the host states, are the winning party in an arbitration. This is the main implication of the rules relating to the domestic enforcement of awards. While these provisions are likely to be of primary benefit to host states, they may be of potential benefit to investors as well.