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Aron Broches, Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law

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Abstract

With the possible exception of international peace and security, global economic development has been the dominant theme in international law and international relations since the end of the Second World War. The tenor and intensity has varied over the decades, but the objectives, centering on institutional arrangements and programs to promote the global economy, have remained the same. Broches' collection of essays, originally written between 1957 and 1992, attests to his intimate knowledge of the workings of the IBRD and its related agencies. In addition to providing both the history and the jurisprudential analysis of these institutions, these essays constitute a discourse on public as well as private international law. They contribute, moreover, to a progressive development of the international law of foreign investment. Essentially, this is a book about arbitration and dispute settlement, with its history told and explained by one who was present at its creation. Broches puts international arbitration into both the contexts of private and public international law.

This book contains twenty-five essays and is divided into six parts: (1) the International Bank for Reconstruction and Development; (2) Registration of Treaties and International Agreements; (3) the International Center for the Settlement of Investment of Disputes; (4) International Commercial Arbitration; (5) Investment Disputes; and (6) a section devoted to miscellaneous topics.

BOOK REVIEWS

ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW

*Reviewed by Victor Essien**

With the possible exception of international peace and security, global economic development has been the dominant theme in international law and international relations since the end of the Second World War.[1] The tenor and intensity has varied over the decades, but the objectives, centering on institutional arrangements and programs to promote the global economy, have remained the same.

The institutional arrangements started with the twin organizations of the Bretton Woods Conference[2] and the International Bank for Reconstruction and Development[3] ("IBRD"), popularly known as the World Bank and the International Monetary Fund ("IMF").[4] While the IMF has been charged with regulating the international monetary system,[5] IBRD's operations have concentrated on financing for global economic development.[6] The IBRD created the International Finance Corporation[7] ("IFC") in

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1. EVAN LUARD, THE UNITED NATIONS: HOW IT WORKS AND WHAT IT DOES 8 (2d ed. 1994).

2. *See generally* BRETTON WOODS REVISITED (A.L.K. Acheson et al. eds., 1972).

3. *See* Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134. The International Bank for Reconstruction and Development ("IBRD") was established in 1945 as a specialized agency of the United Nations ("U.N."). *Id.*

4. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39. The International Monetary Fund ("IMF") was established in 1945. *Id.*

5. *See generally* ERIK HOFFMEYER, THE INTERNATIONAL MONETARY SYSTEM: AN ESSAY IN INTERPRETATION (1992) (discussing international monetary policy and role of IMF).

6. *See generally* IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS (1991) (accounting history and development of World Bank).

7. Articles of Agreement of the International Finance Corporation, May 25, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117.

1955 and the International Development Association[8] ("IDA") in 1960 in order to enlarge its risk capital portfolio and provide less burdensome loans.[9] The IBRD further launched its dispute settlement institution by creating the International Centre for the Settlement of Investment Dispute[10] ("ICSID") in 1965 and the Multilateral Investment Guarantee Agency[11] ("MIGA") in 1988. These instruments attempt to foster security in international investments.[12]

Apart from MIGA, which was created more recently, Aron Broches was intimately connected with the formation of each of the institutions associated with the IBRD. In the case of ICSID, Broches is frequently referred to as its creator.[13] Broches' collection of essays, originally written between 1957 and 1992, attests to his intimate knowledge of the workings of the IBRD and its related agencies. In addition to providing both the history and the jurisprudential analysis of these institutions, these essays constitute a discourse on public as well as private international law. They contribute, moveover, to a progressive development of the international law of foreign investment.

This book contains twenty-five essays and is divided into six parts: (1) the International Bank for Reconstruction and Development; (2) Registration of Treaties and International Agreements; (3) the International Center for the Settlement of Investment of Disputes; (4) International Commercial Arbitration (5) Investment Disputes; and (6) a section devoted to miscellaneous topics.

The lead essay in Part I is titled "International Legal Aspects

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8. Articles of Agreement of the International Development Association, Jan, 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249.

9. *See* HOFFMEYER, *supra* note 5, at 33-39 (discussing changes in IBRD structure that led to better exchange rates and diversification).

10. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter Convention].

11. World Bank: Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 24 I.L.M. 1598.

12. *See* Malcolm Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT'L L.J. 103, 103-44 (1992) (discussing recent activities of International Centre for Settlement of Investment Disputes ("ICSID") and Multilateral Investment Guarantee Agency ("MIGA")).

13. Stephen M. Schwebel, *forward* to ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW at ix (1995).

of the Operations of the World Bank." Written in 1959, it was originally published as part of the courses on international law given at the Hague Academy.[14] Its pedagogical value is at once perceptible. In a sense, it reads like a course on public international law using the World Bank as a case study. It touches on the subjects of, among other things, international law, statehood, sovereignty, international personality, international organization, treaty-making capacity, and the registration of treaties.[15]

In this essay, the analysis of the term "international personality" is most instructive. He takes to task those writers like Oppenheim[16] and Lauterpacht[17] who, when at pains to distinguish between states and international organizations, claim that States are entities that possess "full, perfect and normal" international personality while international organizations have less than full international personality.[18] In response, Broches flatly states that "[t]here seems to be no need for gradations in personality."[19] International personality is a quality that an entity either does or does not possess. Therefore, if an entity possesses international rights and can act on the international plane, then it is an international person.[20]

According to Broches, the World Bank is an international person. He arrives at this conclusion applying the reasoning of the International Court of Justice ("ICJ") in the *Reparation for Injuries Suffered in the Service of the U.N.*,[21] when the court had to decide on the international personality of the United Nations ("U.N."). In this case, the ICJ ruled that the U.N .Charter had conferred on the organization a complex bundle of rights and obligations where it was impossible to operate "except on the international plane and as between parties possessing interna-

14. ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 3 (1995).

15. *Id.*

16. *See* 1 LASSA F.L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE 117-18 (1955). Oppenheim asserted that a "full sovereign state" is an international person, while a "not-full sovereign state" is only subject to international law in a limited capacity. *Id.*

17. SIR HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 166 (1966). "The Sovereign State does not acknowledge a central executive authority above itself." *Id.*

18. BROCHES, *supra* note 14, at 16.

19. *Id.*

20. *Id.* at 22.

21. 1949 I.C.J. 174 (Apr. 11) (advisory opinion).

tional personality."[22] By the same token, Broches argues that the Articles of Agreement establishing the World Bank conferred on the Bank certain rights and obligations. "The Bank, being . . . a subject of international law, . . . it possesses international personality."[23]

Part I, Chapter Two discusses how the activities of the World Bank have influenced the development of international law. This chapter also details the creation of the IFC, the IDA, and the ICSID.[24] With regard to establishing these organizations, Broches explains that the Bank acted outside of its day to day operations in order to sponsor the establishment of new international relationships.[25]

Part I, Chapter Three covers the role of the World Bank in international transactions. It reflects the missionary zeal with which Aron Broches undertook his work at the Bank and also the way the World Bank sees itself in the international investment process. Essentially, in the relationship between capital-exporting developed countries and capital-importing developing countries, the World Bank sees itself as a neutral facilitator working towards bringing the two parties together in a financially sound and mutually rewarding partnership.[26]

Part II addresses the registration of treaties and international agreements. Article 102 of the U.N. Charter requires the registration of all treaties and international agreements entered into by any Member State and provides sanctions for non-compliance.[27] Broches, after considering the practice of the World Bank with respect to registration pursuant to Article 102, concludes that the Bank has not registered any agreements other than loan and guarantee agreements and related documents.[28]

Broches then examines the attitude of the ICJ and its failure to address treaty non-registration by reviewing five cases where the issue of registration should have been raised but was ignored

22. 1949 I.C.J. at 179.

23. BROCHES, *supra* note 14, at 22.

24. *Id.* at 79-84.

25. *Id.* at 79.

26. *See id.* at 96 (discussing how World Bank's neutral position permits it to exert considerable influence over form and substance of transactions).

27. *Id.* at 100.

28. *Id.* at 129.

by the Court in their resolution of the disputes.[29] These cases are the *Corfu Channel Case*,[30] *The Asylum Case*,[31] the *Case of the Monetary Gold removed from Rome in 1943* ,[32] *The Anglo-Iranian Case*,[33] and the *Electricite de Beyrouth Case*.[34] Based on this review, Broches concludes, first, that the Court will not apply the penalty of Article 102(2) to every instance of non-compliance with the mandate of registration[35] and, second, that none of the instances in which the Court permitted unregistered or belatedly registered agreements to be invoked violated the spirit of Article 102.[36] The better view, of course, is that the non-compliance of the Article 102 mandate has never been the *ratio decidendi* of any known ICJ case.

In truth, this issue has never really been before the ICJ. Consequently, there is no indication of how the Court would apply the Article 102(2) sanction. As the 1994 postscript to this essay indicates, the position of the law on these issues has not changed since 1957, when the article was first written.

Part III is devoted to the ICSID. In ten essays, Broches dissects this dispute resolution institution and delves into the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States[37] ("Convention"), which formed and governs the ICSID. He discusses, among other things, jurisdiction, applicable law and default procedure, arbitration clauses versus institutional arbitration, case studies of ICSID arbitrations and the finality of ICSID awards.

Several of the essays reprise the question of the jurisdiction of the ICSID. Broches emphasizes that consent is the "cornerstone of the jurisdiction of the centre"[38] and that consent must be given by both parties and in writing. Using the Report of the Executive Directors ("Report") that accompanied the text of the Convention[39] as *travaux preparatoires*, Broches delves into the

29. *Id.* at 130-58.
30. 1949 I.C.J. 244 (Dec. 15) (judgment).
31. 1950 I.C.J. 266 (Nov. 20) (judgment).
32. 1954 I.C.J. 19 (June 15) (preliminary question and judgment).
33. 1952 I.C.J. 93 (July 22) (preliminary objection and judgment).
34. 1953 I.C.J. 41 (Oct. 20) (order).
35. BROCHES, *supra* note 14, at 144.
36. *Id.*
37. Convention, *supra* note 10, 17 U.S.T. at 1270, 575 U.N.T.S. at 159.
38. BROCHES, *supra* note 14, at 168.
39. Report of the Executive Directors on the Convention on the Settlement of

meaning and significance of Article 25(1) of the Convention.[40] He suggests that the context of Article 25(1) indicates that one of the parties to the dispute must be a Contracting State and the other a national of another Contracting State.[41] In other words, private versus private and state versus state disputes are excluded from the jurisdiction of the ICSID. Furthermore, the non-state party must be a "national of another Contracting State."[42]

Article 25(2)(b), however, provides an exception for juridical persons that, by reason of requirements of local incorporation, may be nationals of the state party to the dispute. In such a situation, it may meet the jurisdictional requirements if the state party to the dispute had agreed to treat it as a national of another Contracting State because of foreign control.[43]

In discussing jurisdiction *ratione materiae*, Broches sheds light on what Article 25(1) defines as a "legal dispute arising directly out of an investment." Broches confides that during the negotiations surrounding the formation of the Convention, the drafters considered and rejected several definitions of "investment." Ultimately, the drafters decided to dispense with a definition for "investment" because it would be taken care of by the consensual nature of the jurisdiction.[44]

The Report also indicates that the legal dispute must involve a "conflict of rights" as opposed to a "conflict of interests." In addition, "[t]he 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 legal obligation."[45] Broches ex-

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Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 524, 524-32 [hereinafter Report].

40. Convention, *supra* note 10, art. 25(1), 17 U.S.T. at 1280, 575 U.N.T.S. at 174-75.

Article 25(1) states:

> 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 of agreement of a Contracting 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.

Id.

41. BROCHES, *supra* note 14, at 167.

42. *Id.*

43. *Id.* at 168.

44. *Id.* at 208.

45. Report, *supra* note 39, 4 I.L.M. at 528; BROCHES, *supra* note 14, at 208.

plains how the parties give their consent and notes that a consent once given cannot be unilaterally withdrawn.[46]

Broches further explains that, under the Convention, the home country of the investor may not invoke diplomatic protection.[47]

> 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.[48]

After a closer study of Convention Article 27,[49] which deals with invocation of diplomatic protection, Broches concludes that the Article does not operate as a permanent bar to diplomatic protection and that it may be revived if the Contracting State fails to abide by and comply with an award in favor of the investor.[50] Furthermore, it is within the rights of the investor's home state to engage in informal diplomatic exchanges in order to facilitate the settlement of a dispute.[51]

In discussing applicable law, Broches distinguishes between procedural and substantive law.[52] With respect to the procedural law, Broches takes the view that the Convention, being a treaty, constitutes the *lex fori*[53] and as such excludes the applicability of any national *la loi de l'arbitrage*[54] except where the Convention specifically refers to it.[55]

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46. BROCHES, *supra* note 14, at 200.

47. *Id.* at 214.

48. *Id.* at 198.

49. Convention, *supra* note 10, art. 27, 17 U.S.T. at 1281, 575 U.N.T.S. at 176.

50. BROCHES, *supra* note 14, at 198.

51. *Id.*

52. *Id.* at 220-32.

53. *See* 8 THE OXFORD ENGLISH DICTIONARY 875 (2d ed. 1989). *Lex fori* is the latin term for the law of the country in which an action is brought as determining the nature and mode of the proceeding. *Id.*

54. *See* BROCHES, *supra* note 14, at 221-22. *La loi de l'arbitrage* is the French terminology for latin term *lex fori*, which means that law of the country in which the tribunal is seated is the law that governs procedure. *Id.*

55. *Broches, supra* note 14, at 224. Broches refers to the relevant sections of the Convention that spell out this *la loi de l'arbitrage*: Articles 37 to 40, on the composition of the arbitral tribunal; Articles 56 to 58, on the replacement and disqualification or arbitrators; Article 45, on failure of a party to appear; Article 43, on production of evidence, and; Article 44, on the right of the tribunal to decide on questions of procedure not covered by the Convention. *Id.* at 224-25.

On the question of the applicable substantive law, Broches points out that unlike the procedural law provisions, which are scattered throughout the Convention, only Article 42 deals with substantive law.[56] Article 42 acknowledges the party autonomy principle. In the absence of an agreement by the parties, however, the law of the Contracting State party, including its rules on conflict of laws and relevant rules of international law, will apply.[57]

With regard to the question of the hierarchy between international and national law within the context of Article 42, Broches concludes that international law is superior to national law.[58] This conclusion, however, is arrived at through a self-contrived analytical process. Broches asserts that an arbitral tribunal will first look to the law of the host state and that state law will, in the first instance, be applied to the merits of the dispute. The result will then be tested against international law to determine whether or not it violates international law. If it does, then the substantive law will not be applied.[59]

While Broches argues that the Report supports his position with regard to the supremacy of international law in this realm,[60] in actuality, the Report does not contribute to this contention. Neither the text of the Convention nor the Report provide a hierarchy of national and international law. Rather, this is a position that has worked its way through as a result of ICSID case law, and, in particular, the decision of the first ad hoc Committee in *Klockner et al. v. The United Republic of Cameroon.*[61] *Klockner*, which interprets Article 42 of the Convention, states that rules of international law are given a dual role to complement and correct state law.[62] Subsequent ICSID decisions have relied on *Klockner* on the issue of hierarchy of norms.[63]

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56. *Id.* at 225.

57. *Id.* at 227-28.

58. *Id.* at 229.

59. *Id.*; *but cf.* Ibrahim F.I. Shihata, *Towards a Greater Depoliticiation of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV.-F.I.L.J. 1, 14 (1986) (emphasizing primacy of domestic host law).

60. BROCHES, *supra* note 14, at 229.

61. Decision of the Ad Hoc Comm., *reprinted in* 1 ICSID Review-F.I.L.J. 139 (1986).

62. *Id.*

63. *See* Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1 (citing to Klockner as authority). Excerpts of the award are reprinted in 24 I.L.M. 1022 (1985).

Broches discusses the finality of ICSID awards in the last chapter of Part III. Admittedly, Broches wrote this piece in response to the slew of criticisms that greeted the annulment proceedings in *Klockner, Amco Asia Corp. v. Republic of Indonesia,*[64] and *MINE v. The Republic of Guinea.*[65] While Broches is quick to point out that the annulment proceedings have been instituted in only three out of the twenty-four disputes submitted to ICSID arbitration,[66] his criticisms, nevertheless, predicted the breakdown of the ICSID system.

In examining the sections of Article 52 that provide for the annulment remedy, Broches notes that: Section 52(1)(b) addresses violations of the excess of power provision; Section 52(1)(d) permits a request for annulment where there are serious departures from fundamental rules of procedure; and recovery for failure to state reasons is found under section 52(1)(e).[67] Broches discusses how each of the annulment proceedings have treated these issues and concludes, reassuringly, that the ICSID annulment process is "on track"[68] and will fulfill the limited purposes for which it was established. He reckons that there is no basis for the position that the finality of awards is taking a back seat to annulment.[69]

Part IV deals with international commercial arbitration. Here, Broches flirts with other arbitral fori, in particular, the U.N. Commission on International Trade Law ("UNCITRAL") system. In Part IV, Chapter Sixteen, Broches undertakes what he calls a "superficial treatment" of other arbitration conventions and makes suggestions for their improvement.[70] Then in Part IV, Chapter Seventeen, Broches gives a detailed account of the 1985 UNCITRAL Model Law on International Commercial Arbitration.[71] His discussion is steeped in the legislative history of UNCITRAL'S model law. He first tells of the Commission's choice to work toward a convention, a uniform law, or a model

64. *Id.*
65. ICSID Case No. ARB/84/4.
66. BROCHES, *supra* note 14, at 309.
67. *Id.* at 311-33.
68. *Id.* at 352.
69. *Id.*
70. *Id.* at 363.
71. *Id.* at 375-432. In Part IV, Chapter Seventeen Broches focuses his discussion on the development, adoption, and effect of the Model Law on Commercial Arbitration. *Id.*

law and how the Commission eventually settled on a model law. Broches then discuses a comment made in one of the working sessions about the difficulty of unifying procedural law.[72] While this concept may be true as a matter of general proposition, Broches argues that it does not apply to the law of arbitration. He notes that in arbitration national traditions, such as the differences between common law and civil law jurisdictions, play a relatively minor role.[73]

It is also in this section where Broches delves into a discussion of features of the model law including competence, conduct of proceedings, rules applicable to substance of dispute, setting aside, recognition, and enforcement of arbitral awards.[74] He then ends on his characteristicly optimistic evaluation of the model law and praises Canada for being the first country to adopt federal legislation based on the model law.[75]

Part V deals with investment disputes. Part V, Chapter Nineteen shows the link between arbitration of investment disputes and the plethora of bilateral investment protection treaties that have evolved between capital importing and capital exporting countries. The remaining three chapters discuss the regional perspectives to the investment dispute settlement process. One of the issues first highlighted here is the promotion of pacific settlement of investment disputes through such instruments as multilateral and bilateral conventions, guidelines, draft codes of conduct, and U.N. resolutions in the area of economic development.[76]

Broches explains that the use of these various instruments is reflective of the differing viewpoints on the subject. The 1967 OECD Draft Convention on the Protection of Foreign Property,[77] for example, aims to assure the security and protection of foreign investment.[78] This draft convention served as the basic model for the bilateral investment treaties.[79] The OECD was to

72. *Id.* at 384.
73. *Id.*
74. *Id.* at 375-419.
75. *Id.* at 415-16.
76. *Id.* at 498.
77. Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention (Paris, Oct. 12, 1967) (on file with the OECD).
78. BROCHES, *supra* note 14, at 498.
79. *Id.*

follow this in 1976 with its Guidelines for Multinational Enterprises.[80] In addition, there were the various U.N. resolutions on foreign investment, beginning with the more conciliatory 1962 Resolution on Permanent Sovereignty Over Natural Resources[81] and ending with the hotly contested 1974 Charter of Economic Rights and Duties of States.[82] Between these polarities lies the Draft United Nations Code of Conduct for Transnational Corporations.[83] As Broches notes, this Draft Code reached an impasse on account of the lack of agreement with respect to the treatment of transnational corporations, and he predicts that even when concluded, this Code is not likely to be anything but a soft law much like the OECD Guidelines.[84]

In Part VI, which he classifies as miscellaneous, Broches ironically puts the rest of the essays in their natural context, the context of development. In Chapter Twenty-Three he writes about the dimensions of development. Originally written in 1973, the themes he sounds still resonate with equal clarity and fidelity. He chastises the international community for having failed to improve the quality of life of its poorer and weaker members. The reasons he offers for this state of affairs are sobering. He writes:

> [W]e failed to meet adequately the moral obligations accepted in all civilized societies since the beginning of time, the obligations of the strong to help the weak. These moral obligations which international law is moving, however slowing and painfully, to recognize as legal obligations, exist not only between rich and poor societies, but also between any given society and its poor members.[85]

In the end, Broches challenges his audience, the membership of the International Law Association, then meeting in Brussels in August 1973, to take up the task of rectification. He asked them, "to help create the conditions for economic and social progress, with dignity and in freedom, remembering that the ultimate ob-

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80. *Id.* at 500.

81. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

82. G.A. Res. 3821, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974).

83. U.N. Doc. E/1990/94 (1990).

84. BROCHES, *supra* note 14, at 503. Regulations promulgated by the OECD are considered "soft law" because they have no binding force.

85. *Id.* at 514.

ject of law is the welfare of mankind."[86]

The subject of development is addressed again in Chapter Twenty-Four, this time in relation to one of the principal actors in global development: the multinational corporation. This essay begins with a discussion about the appropriateness of the term "multinational corporation." Broches states flatly that "from a lawyers' point of view the term . . . has . . . no validity."[87] His reason is that "there is no corporation that is created and exists under the law of more than one state."[88] From an entity theory perspective[89] this position is incontrovertible. From an enterprise theory perspective,[90] however, a corporation can exist under the law of more than one state. Better still, more than one state might assert legislative competence over a corporation.[91] Although Broches, in 1974, could not foresee a "multinational control or regulation" of foreign investment as a realistic possibility,[92] in 1995 it is believed to be inevitable that multinational corporations or transnational enterprises are subject to some form of international regulation.[93]

In this section Broches also refers to and comments on the issues raised by the Group of Eminent Persons appointed by the United Nations to report on "Multinational Corporations in World Development."[94] Moreover, Broches touches upon the unequal bargaining position between the foreign investor and the developing countries in negotiating the entry of investment. He believes that strengthening the bargaining capacity of host countries is in the interest of both the investor and the host country, and that inequitable agreements are strictly non-viable.[95] To clarify, it appears that Broches meant to describe the

86. *Id.* at 516.

87. *Id.* at 517.

88. *Id.* at 518.

89. *See* PHILIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 79-81 (1993). Entity theorists define the term "agency" loosely, treating corporations and their subsidiaries as one entity. *Id.*

90. *See id.* at 70-79. The enterprise theory establishes that there may be separate enterprises within a corporation. *Id.*

91. *Id.* at 78-79.

92. BROCHES, *supra* note 14, at 518.

93. *See* Matter of Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1983) (holding that it is not abuse of discretion to subject Swiss corporation to U.S. jurisdiction and fines for failure to comply with U.S. subpoena).

94. BROCHES, *supra* note 14, at 519.

95. *Id.*

inequalities between parties with regard to the negotiating skills or bargaining skills, not bargaining positions. In fact, the bargaining positions of the various sides to the investment process are bound to be unequal.[96]

In addition to bargaining skills, there are other factors that may affect the position of each party at the negotiating table. As Smith & Wells, in their seminal book, *Negotiating Third World Mineral Agreements*[97] point out, bargaining positions tend not only to be unequal but also to be dynamic.[98] For the developing host country, this may depend on the quantity and global availability of national resources, the amount of control it wants in the investment, whether it desires downstream or upstream integration, and other localization concerns.[99] For the foreign investor, their bargaining position will be influenced by the importance of the technology to be transferred, its financial resources, its managerial resources, the investor willingness to share control of the investment, and how the particular investment relates to the investor's overall goals.[100]

Broches next draws attention to the need for review of long term development contracts. Apparently, Broches' advice has been heeded by development lawyers, as renegotiations are now a regular feature in most development contracts.[101] Broches then raises the problem of transfer pricing but mixes his discussion with the issue of host country participation in joint-ventures.[102] Ultimately, it is difficult to say what his "interesting approach to a solution" relates to.[103]

When Broches waltzes into the realm of extraterritorial application of U.S. legislation to U.S. owned subsidiaries abroad, it becomes obvious that he is out of his league. Again his com-

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96. *See* DAVID N. SMITH & LOUIS T. WELLS, JR., NEGOTIATING THIRD WORLD MINERAL AGREEMENTS 1-27 (1975) (discussing changing relationships in consession process) (1975).

97. *Id.*

98. *Id.* at 4.

99. *Id.* at 6-18.

100. *Id.*

101. *See generally* Samuel K.B. Ansante, *Restructuring Transnational Mineral Agreements*, 73 AM. J. INT'L L. 355 (discussing issues related to transnational ventures that are emerging in mineral-rich third world nations).

102. BROCHES, *supra* note 14, at 520.

103. *Id.*

ments are strictly based upon an entity theory[104] and are innocent of the growing extraterritorial application of antitrust legislation, securities legislation, tax legislation, and an enterprise doctrine[105] that is embraced with different degrees of enthusiasm in the developed world.

Fortunately, Broches promptly returns to arbitration and dispute settlement where his brilliance shows once again. Essentially, this is a book about arbitration and dispute settlement, with its history told and explained by one who was present at its creation. Broches puts international arbitration into both the contexts of private and public international law. Even though we may disagree with him on occasion, there is a lot of passion and scholarship displayed in his two decades of writing.

104. *See supra* note 89 (defining entity theory).
105. *See supra* note 90 (defining enterprise theory).