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FOREIGN INVESTMENT ARBITRATION: THE ROLE OF THE INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

by

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INTRODUCTION

Until recently, many international business lawyers had been skeptical about the future of the International Center for Settlement of Investment Disputes (ICSID), an institution designed to resolve "legal disputes" arising from private investment abroad. ICSID was established in October 1966 by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, sponsored by the World Bank (International Bank for Reconstruction and Development).[1]

This skepticism was generally based on two reasons. First, arbitral institutions have historically been ineffective in the enforcement and execution of foreign investment arbitral awards granted in favor of foreign private investors against foreign governments. Although several prominent private arbitration institutions around the world have successfully resolved "commercial disputes" between foreign enterprises and governmental agencies, they were not often effective in resolving legal disputes arising out of foreign "private investments." Most often, losing disputant countries invoked sovereign immunity claims or public policy considerations against enforcement of those awards.

ICSID, however, is apparently overcoming this problem. Eighty-seven countries[2] have already pledged their support to the ICSID arbitration mechanism. Many have either included ICSID arbitration clauses in their international investment agreements with foreign investors or incorporated treaty provisions on ICSID within their own domestic laws.[3] These developments are particularly encouraging with respect to the commitment of those countries which are traditionally capital-receiving. Maurice Mendelson, a legal scholar, observed, "Although not the only system in existence for the settlement of disputes between states and foreign investors, the Washington Convention (1965 World Bank Convention) is one of the most refined instruments available for performing this function."[4]

The second reason for skepticism was the limited number of arbitration proceedings actually held before ICSID tribunals.[5] This writer and a few others have suggested that the number of arbitration proceedings should not be a criterion to evaluate the usefulness of the ICSID arbitration mechanism, because ICSID acts as a deterrent to possible disputes between many contracting countries of the ICSID convention (1965 World Bank Convention) and foreign private

investors.[6] This argument was questioned by D. Kokkini-Iatridou, a prominent legal scholar, who in reaching his conclusion quoted B.A.S. Petren, Judge of the International Court of Justice:

> In the case of a hospital the absence of clients could, of course, mean that the health situation in the district was an excellent one. Should, however, potential patients fail to appear at the hospital because they prefer having their illnesses cured elsewhere, or not cured at all, the hospital's doctors would have little reason to indulge in self-laudatory jubilation![7]

Although Judge Petran was referring to the International Court of Justice, Professor Kokkini-Iatridou thought ICSID might be in a similar situation. But Mendelson, in his review of this writer's book, Investment Contracts and Arbitration, observed:

> [T]he efficacy of a watch-dog ought not to be gauged solely by reference to the number of burglars it bites, and it is the experience of this reviewer and of others that States and investors take rather seriously the existence of clauses in investment contracts providing for arbitration under the auspices of ICSID.[8]

Recognition of the above facts and arguments has effectively eroded the skepticism mentioned earlier. Confidence in ICSID has further increased as ICSID tribunals have already granted three major awards[9] and are resolving a number of other disputes,[10] and many investors and foreign governments have included ICSID arbitration clauses in their investment agreements.

In light of these views and observations, lawyers should examine more closely ICSID's role in the resolution of foreign investment disputes. For this purpose this paper has been divided into three major parts: the first, historical and operational background of the ICSID;[11] the second, applicable law of ICSID arbitration;[12] and the third, enforcement, recognition, and execution of the award. The first and second parts are revised versions of the discussions in this writer's book, Investment Contracts and Arbitration.

PART ONE: HISTORICAL AND OPERATIONAL BACKGROUND OF THE ICSID

A. The Development of the ICSID--Historical Perspective

The Convention on the Settlement of Investment Disputes came into force on October 14, 1966, thirty days after the deposit of the twentieth

instrument of ratification.[13] By the end of December 1981, eighty-one nations from both developed and developing areas had become parties to the Convention; a further six countries had signed, but had not yet ratified the Convention.[14]

The ICSID was established in response to the perceived unavailability of adequate machinery for international conciliation and arbitration.[15] This deficiency often frustrated attempts to agree on an appropriate mode for the settlement of investment disputes between sovereign governments and private foreign investors.[16] Tribunals set up by private organizations such as the American Arbitration Association, the Inter-American Commercial Arbitration Commission and the International Chamber of Commerce[17] were frequently unacceptable to several governments to settle investment disputes.[18] Furthermore, the only existing public international arbitral tribunal, the Permanent Court of Arbitration, was not open to private investors.[19] Additionally, all attempts by different agencies to establish conventions[20] to provide facilities for the settlement of investment disputes have resulted in the dissatisfaction of different interested parties.[21]

This particular situation was considered by the Economic and Social Council of the United Nations,[22] but the U.N. has not contributed anything to the resolution of investment disputes abroad other than a General Assembly resolution which requested the U.N. Secretariat to continue its work in cooperation with the World Bank to provide facilities for achieving an effective and satisfactory method of settling foreign investor-capital-importing disputes.[23] The World Bank had already had some experience in facilitating the settlement of disputes between member governments and private investors,[24] but prior to its establishment of the ICSID, the Bank was not equipped to perform these tasks on a regular basis.[25] According to one observation:

> This past experience of the Bank led to the feeling that the creation of some specialized forum for the settlement of these disputes (which would also contribute to improvement of the investment climate) should be investigated.[26]

At its 1962 annual meeting, the Bank's Board of Governors adopted a resolution[27] requesting that the Executive Directors study the possibility of the establishment of an arbitration forum to settle investment disputes between host governments and foreign investors. As a result of this resolution, the World Bank initiated the Convention of 1965[28] with the objective of encouraging a greater flow of private investment[29] for the purpose of accelerating the economic growth of developing countries by resolving legal disputes arising out of foreign investment programs between the capital-exporting foreign nationals and the receiving host states.

It has been noted that this Convention was the first and, so far, the

only attempt since 1945 to get beyond the developing stages in providing protection for investments abroad on a multilateral and potentially universal scale.[30] Finally, on October 14, 1966, the Convention established the International Center for Settlement of Investment Disputes as a new ancillary organization within the World Bank group[31] in order to provide facilities for conciliation and arbitration to resolve investment disputes between contracting states and nationals of other contracting states.

B. The Operational Structure of the ICSID and its Arbitral Tribunals

1. The Organs of the ICSID and their Major Functions

The major organs of the ICSID are the Administrative Council[32] and the Secretariat.[33] The Administrative Council is composed of one representative of each Contracting State. The president of the World Bank serves ex officio as the Chairman of the Council, but has no voting power.

The Secretariat is headed by a Secretary-General,[34] elected by a two-thirds mayority of the Administrative Council on the nomination of the Chairman, for a period of six years. The Convention requires the Secretary-General to perform various administrative functions such those of legal representative, registrar and principal officer of the ICSID.

2. Jurisdiction of the ICSID and Nature of the Dispute

The ICSID can extend its jurisdiction to any legal dispute arising directly out of an investment between a contracting state or any agency of that contracting state and a natural person or a juridical person belonging to another contracting state.[35] Consent of the parties is the cornerstone of the jurisdiction of the Center.[36] Consent to the jurisdiction must be in writing and, once given, cannot be withdrawn unilaterally. "Consent" may be given, for example, in an arbitration clause included in a transnational economic development contract (TEDC)[37] providing for the submission[38] to the Center of future legal disputes arising out of that agreement or in a compromise regarding a legal dispute which has already arisen.[39] A capital-receiving state may in its investment promotion legislation offer to submit a legal disputes arising out of certain classes of investments to the jurisdiction of the Center. The investor may give his consent by accepting the offer in writing.[40] The right of a foreign investor to submit a claim to the Center depends upon the condition that his national state and the disputing state already have signed the ICSID Convention.[41]

The reference to a legal dispute[42] in Article 25 limits jurisdiction in one important regard. Referring to this aspect of the

provision, the Executive Directors of the World Bank have commented that the expression "legal dispute" had been used to make clear that while conflicts of rights were within the jurisdiction[43] of the Center, mere conflicts of interests were not. The dispute must concern the existence or scope of legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.[44]

3. Arbitration Tribunals Under the ICSID

a. Panels of Arbitrators. Article 3 requires the ICSID to maintain a Panel of Conciliators and a Panel of Arbitrators, and Article 14(1) seeks to insure that Panel members will possess a high degree of competence and be capable of exercising independent judgment.[45] However, the Convention permits parties in a dispute to appoint arbitrators from outside the Panels but requires that such appointees possess the qualities described under Article 14(1):

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.[46]

As the wording of Article 14(1) indicates, there is no absolute requirement that arbitrators be trained in the law. This point raises serious doubt as to how non-legal experts appointed by the parties or the Chairman of the Administrative Council can perform as arbitrators, for arbitration is a judicial method[47] of settling legal disputes.[48] However, the assurance under Article 14(2) that the Chairman will pay due regard to the importance of the representation of principal legal systems of the world provides some assurance to lawyers who may question the required qualifications of the arbitrators. But this assurance applies only to appointments of arbitrators by the Chairman, not by the disputing parties.

b. Formation of the Arbitral Tribunal. After receiving a written request[49] from any contracting state or any national of a contracting state wishing to institute an arbitration proceeding, the arbitral tribunal must be formed as soon as possible.[50] The tribunal may consist of a sole arbitrator or any uneven number of arbitrators.[51] In the absence of an agreement between the parties on the number of arbitrators, the tribunal will consist of three arbitrators, one arbitrator appointed by each party, and the president of the tribunal by the common agreement of the parties.[52] If the tribunal is not constituted within ninety days after the registration of the written request, the Chairman of the ICSID Administrative Council will appoint

either the sole arbitrator or all arbitrators of the tribunal after consulting with the disputing parties. Unlike nominees agreed to by the parties, nominees of the Chairman must be nationals of countries other than those of the parties in the dispute.[53]

c. Powers and Function of the Tribunal. Before acting on an arbitration, all the members of the tribunal must sign a declaration that they will judge the dispute fairly according to the applicable law.[54] The tribunal is the judge of its own competence and is empowered to make rulings on the extent of its jurisdiction.[55] As early as possible after the tribunal has been constituted, the president and members of the tribunal endeavour to ascertain the views of the parties regarding questions of procedure,[56] including the quorum[57] of the tribunal at its hearing, the usage of the language of the proceedings, matters relating to oral and written procedure, and the cost of the proceedings.[58] This rule enables the tribunal to create an atmosphere of cooperation with disputants and provides a concrete procedural framework.[59] This preliminary procedural consultation of the tribunal with the parties may help the parties reach some understanding on issues involved with the taking of evidence,[60] the admissibility of counterclaims,[61] the determination of the law that the tribunal is to apply,[62] and its power to decide the dispute ex aequo et bono if the parties agree.

PART TWO: APPLICABLE LAW OF ICSID ARBITRATION

A crucial question in any arbitration is the choice of law.[63] Article 42 of the SID Convention resolves this problem by establishing certain specific directives to the arbitral tribunal:

> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
> (2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.
> (3) The provision of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

An attempt will be made in the following paragraphs to explain what the wording of Article 42 means and what it meant to those who drafted it, in the light of discussions held during the various stages[64] of the SID Convention.

A. Party Autonomy Under Article 42(1)

It is clear from the first provision of Article 42(1) that the article recognizes the subjective theory of choice of law based on the principle of party autonomy or the will of the parties.[65]

The first sentence of Article 42(1) may be construed as an implicit rejection of the proposition proposals that contracts between states and foreign investors could be legally self-sufficient, so as to exist independently of other legal systems, municipal or international.[66] If this interpretation is accepted, the determination of the legal systems which can be chosen by the parties to the dispute as applicable to their relations is of paramount importance.[67] The absolute freedom of choice of law permitted parties may lead to the adoption of any legal system or combination of legal systems, such as the law of the host state or that law with certain modifications or qualifications,[68] the law of the investor's state, or a third state's law with or without qualification in international law defined under Article 38(1) of the Statute of the International Court of Justice.[69] Whatever may be the law selected by the parties to be applicable, the ICSID tribunal is bound to respect the choice of law by those parties. Thus, if the parties wish to restrict the power of the tribunal from applying either the law of the contracting state or international law as provided by Article 42(2), they can do so.

B. Subsidiary Rules Under Article 42(1)

The remainder of Article 42(1) provides subsidiary rules for the arbitration when the parties have failed to prescribe the applicable law. In other words, where the parties to a TEDC, by an oversight, or because they could not agree, or because of their feeling that the arbitral tribunal was best qualified to decide the question of choice of law, did not reach agreement as to the law applicable, the second sentence under Article 42(1) requires the tribunal to look to two sources, *viz*. firstly to the national law of the contracting country where the investment took place and secondly to relevant rules of international law.[70] Thus, by establishing a specific direction to the tribunal, Article 42(1) eliminates the confusion on a fundamental problem: what law is the applicable law for arbitration in the absence of an agreement between a foreign investor and a contracting state on an appropriate applicable law.[71]

There is no doubt of the appropriateness of applying the law of the contracting state in accordance with Article 42(1) by the ICSID tribunal whenever the question of choice of law arises during an arbitration relating to a TEDC.[72] However, some municipal laws of developing countries often have gaps that make it impossible for the ICSID tribunal to settle the dispute purely through their application.[73] The SID Convention provides that the tribunal "not bring in a finding of *non liquet* on the ground of silence or obscurity of the law."[74] Therefore,

Article 42(2) requires the tribunal to look elsewhere for an applicable law if that of the contracting state is inadequate, and by implication requires the tribunal to so look. The tribunal may apply the contracting states' rules on conflicts of laws in order to ascertain some other applicable body of law, and "such rules of international law as may be applicable."

The Report of the Executive Directors of the World Bank on the SID Convention dated March 18, 1965, clarifies the term "International Law" as used in Article 42(1). The report says:

> The term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to international disputes.[75]

The reference to international law had rightly been recognized from the start of the Convention as an important matter and had been debated at length at various stages of the Convention. The provision under Article 42(1) relating to the application of international law reached its existing form after three major draft stages of the Convention, namely a preliminary draft, a first draft and a final draft.[76] The following paragraphs will examine what these stages meant to the participants of the Convention.

a. The Preliminary Draft. Section 4(1) of Article IV of the Preliminary Draft, which was submitted to regional consultative meetings of government representatives, dealt with international law as follows:

> In the absence of agreement between the parties concerning the law to be applied, and unless the parties shall have given the Tribunal the power to decide ex aequo et bono, the Tribunal shall decide the dispute submitted to it in accordance with rules of law, whether national or international, as it shall determine to be applicable.[77]

The majority of legal experts who participated in the regional consultative meetings found the provision basically acceptable. Howevever, there were objections to the freedom of the tribunal to apply international law. It was argued at the Bangkok (Thailand) Regional Meeting by the delegate from China that the act of making an investment in a host country normally implied that the investor had already given consent to the jurisdiction of the national law of the host state in all aspects of the contract.[78] Therefore, the tribunal should apply the law of the contracting state and should not be permitted to apply international law in the absence of a specific agreement authorizing the

tribunal to do so, and the Convention should so provide.[79] The Indian delegate supported the observation of the Chinese representative.[80]

A. Broches, Chairman of the Regional Meeting, commented that this proposal would not be acceptable.[81] He said that there is no reason to require the litigants specifically to empower the tribunal to do something that every arbitral tribunal is called upon to do in every case involving an international transaction.[82] With respect to the issue of national as opposed to international law, Mr. Broches said that two points should be noted. First, the basic function of the Convention is the establishment of an international jurisdiction, and it is reasonable to provide that an international tribunal will have the power to apply international law unless specifically restricted. Secondly, even an international tribunal would have to look first to national law, since the relationship between the investors and the host state is governed in the first instance by national law and it would be set aside only on those occasions in which that national law was in violation of international law.[83]

b. The First Draft. In light of the discussion at the regional consultative meetings on the preliminary draft, the first draft of the Convention was prepared and submitted to the Legal Committee by the World Bank staff for further consideration. Article 45(1) of the new draft dealt with provisions relating to applicable law. It said:

> In the absence of agreement between the parties concerning the law to be applied, the Tribunal shall decide the dispute submitted to it in accordance with such rules of national and international law as it shall determine to be applicable. The term "international law" shall be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice.[84]

This new revised draft did not incorporate the above-described objections to Article IV, Section 4(1) of the preliminary draft, which had been minority views. The significant change in the new provision on international law was the addition of a definition of the term "international law" and replacement of the words "such rules of law whether national or international" by "such rules of national and international law." The first change became necessary in response to doubts expressed concerning the meaning of the term "international law" in the context of the Convention. The second change was actually intended to refute any inference that the tribunal would have to choose between national and international law.

Again, the mention of the term "international law" under Article 45(1) of the new draft attracted lengthy and spirited discussion during the Legal Committee Meeting. One delegate remarked that the reference to

international law should be qualified and that it should be made applicable only in cases where discrimination was alleged.[85] In other cases, the law applicable should be that of the country where the investment was made because it was on the basis of that law that the investment agreement was signed.[86] Referring to this remark, Broches, Chairman of the Meeting, pointed out that as one could not foresee all the cases in which international law might be applicable, the citation of examples such as "discrimination" might not be very useful.[87] He added that the provision was an accurate reflection of the considerations an arbitral tribunal would have to go through where the parties failed to reach specific agreement on the choice of law.[88]

Some delegates[89] objected to the reference to "international law." They argued that the tribunal should not be authorized to review the domestic legislation of sovereign states and no law other than the national law of the host state should be applied by the tribunal. They insisted that even the contracting parties should not be permitted to derogate from this principle.

According to one delegate, contracts between private persons and states had not been governed by customary international law. If such a development of the law was necessary, he thought the proper body to achieve it was the International Law Commission. He felt that in any event it would be insufficient merely to say that a contractual relationship would be subordinated to international law. It would be necessary to work out in detail the principles, the rights, and the obligations that would be acceptable to the parties before any country was asked to sign the Convention. Otherwise, the full implications of the Convention would not be revealed to the signatories. He thought that the adoption of this provision might result in the actions of a state of a purely domestic or internal nature being tested by an uncertain set of principles. This would run counter to the doctrine of sovereignty of states. The newly independent states of Asia and Africa were willing to accept and abide by the principles of public international law, but were not in favour of expanding the scope of their application. In fact, there had been a persistent demand by these states for the modification of some of the principles of international law which had been created solely to protect the interests of the industrial and colonial powers. The arbitral tribunals would continue to apply the existing law with its imperfections. So long as these imperfections existed, and they could be solved only by an accommodation of balancing of such forces, and not by judicial action, agreeing to this Convention would reaffirm the present system.[90]

Another delegate[91] observed that international law might be applicable to a particular dispute, but only when the national law of the host country provided for such application of international law. He further pointed out that the general principles of international law are embodied in the national laws of most countries and that these principles would be applied to the cases of discriminatory action. Several

delegates said that they might accept the application of international law in those cases where the national law of the host country would be absolutely silent or where there are lacunae.[92]

Against the objections and comments mentioned above, it was pointed out in the Legal Committee Meeting that there was nothing in Article 45(1) of the draft which would authorize a tribunal to disregard national law generally and the principles of international law which might be brought into play would be such as pacta sunt servanda.[93] It was pointed out that the question of pacta sunt servanda would arise whenever a concession agreement was unilaterally terminated by a law of the host state and an issue arises from that termination whether or not the state was acting in good faith.[94]

The Austrian delegate[95] mentioned at the Legal Committee Meeting that countries such as his own would not have difficulties with respect to the application of international law. The West German delegate[96] indicated that there were many countries in which national courts must apply international law as well as national law and that it would seem strange if a tribunal which was admittedly international were precluded from applying international law. The question of the exhaustion of local remedies, for example, would require the application of certain rules of international law.[97] In addition, the delegate pointed out that the initial words of Article 45 of the draft, indicating that the disputing parties could agree otherwise, should dispel the doubts that had been expressed.[98] For this reason, he was strongly in favor of the present wording of Article 45(1). Another delegate[99] added that cases of state succession would be another occasion for the arbitral tribunal to apply international law. The United States delegate said that he considered Article 45 satisfactory and pointed out that it was his country's understanding that national law would usually be applied. He further suggested that it was important to provide for the possibility of applying international law since, under Article 27, a contracting state would have to waive the right of diplomatic protection of its nationals before SID tribunals.[100]

c. The Final Draft. Finally, after considering all remarks of the delegates, the Legal Committee adopted by a majority of twenty-four a new provision to preserve the freedom of the tribunal to apply international law both in case of a lacuna in either domestic law of the host state or international law.[101] It will be noted that the definition of the term "international law" which appeared in Article 45(1) of the First Draft was omitted from the present form of the final test of the second sentence of Article 42(1) of the SID Convention.

Aron Broches considered that the final text of Article 42(1) achieves all the objectives that could be reasonably pursued within the framework of the Convention.[102] Further, Mr. Broches optimistically commented on the possibility of the application of international law:

> The history of the provision leaves no doubt, in my opinion, that the tribunal may apply international law (i) where national law calls for its application, (ii) where the subject matter is directly regulated by international law (a case which may not be easily distinguishable in practice from (i)), and (iii) where national law or action taken thereunder violates international law.[103]

C. The Rule on Non Liquet Under Article 42(2)

Article 42(2) directs: "The tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of law." Non liquet is the phrase used by a tribunal when it confesses an inability to give a verdict because the available legal rules are insufficient, uncertain, or lacking in clarity.

The provision of prohibiting non liquet[104] was originally incorporated with Article IV, Section 4(2) of the Preliminary Draft of the SID Convention.[105] There were no debates on this provision and subsequently it was approved without any objection by the regional meetings and finally by the Legal Committee Meeting.[106] Thus, the Convention specifically directed that a tribunal would not be excused from rendering an award on the ground that law is not sufficiently clear. In other words, the Convention required that a decision be reached by the tribunal in every arbitration submitted for its consideration.

On scholar suggested that the non liquet problem has sometimes incorrectly been placed under a widely extended notion of non-justiciability.[107]

> Non-justiciability in the more precise sense is concerned with the overriding assertion of certain State interests even when they may be contra or at least extra legem. Non liquet comes into arguments rather when applicable rules of appropriate content and precision are simply not available for adjusting the particular clash of interest.[108]

Further, according to the same writer, the non liquet question inevitably would draw into controversy both the source of validity of international law and the authority of international tribunals to develop, adapt, and create rules of new content. He added, "[H]ighly speculative questions of legal theory as well as very technical legal questions, have become entangled in it."[109]

Stone's view is relevant to a study of the power of the international

tribunals of the ICSID. There is always a possibility in an ICSID arbitration between a foreign private investor and a developing country for a finding of non liquet. For instance, in a dispute relating to the protection of interests of both a private foreign investor and a developing country, when an ICSID arbitral tribunal applies the municipal law of the host state, it may be revealed that the law of the host state is silent or obscure[110] in the matter of protection of certain vested or acquired rights of the foreign investor. The tribunal which tries to apply international law may find that international law does not possess sufficient principles or rules relating to national economic or welfare interests of the developing country.[111] In these circumstances, the tribunal may show a tendency to avoid the responsibility of giving the award on the rules of law, since the case may be interrelated with new issues of national and international law which are not yet settled by any international convention. Article 42(2) prohibits such an outcome in any arbitration brought before an ICSID tribunal.

There is no doubt that the consent of the contracting states to approve this specific provision as a guideline for the tribunal is a valuable contribution to the law of international arbitration. Although the International Law Commission has previously recommended the prohibition of non liquet findings in its Draft on Model Rules for Arbitral Procedure,[112] this is the first time that a large group of countries have agreed on the introduction of a general prohibition of non liquet in an international arbitration convention. Perhaps this provision may even inspire the members of the tribunal to accept radical principles and rules in order to resolve certain cases involved with the protection of foreign private investment relating to the economic development of developing countries.

D. The Maxim Ex Aequo Et Bono Under Article 42(3)

According to Article 42(3), the parties in a dispute may give the arbitral tribunal the power to decide a matter ex aequo et bono; that is, to decide in accordance with what is just and equitable in particular circumstances rather than by application of rules of law.[113] The authority given to the tribunal in an arbitration to decide a case ex aequo et bono merely empowers it to apply the principles of equity in the broader signification of the latter word.[114] This means the maxim ex aequo et bono will provide an opportunity to arbitrators to apply certain equitable principles to render an award on the basis of good conscience, fairness and justice.

Article 42(3) is a reproduction of Section 2 of Article 38 of the Statute of the International Court of Justice.[115] It is also compatible with the Section 2 of Article 9 of the 1953 Draft Convention on Arbitral procedure sponsored by the International Law Commission.[116] The proposal to include a provision on ex aequo et bono among Articles of the SID Convention did not draw debate either in the

regional meetings of the Draft Convention or in the Washington Conference of Legal Experts.

In an arbitration where the parties are agreed that the tribunal might decide ex aequo et bono, provision 3 of Article 42 would seem to enable the tribunal to depart from applicable law for giving its award. All similar occasions will put the arbiters into the shoes of amiagables composedores in Spanish law or amiables compositeurs[117] in French Law.

As has been observed, the authority of a court to decide a dispute ex aequo et bono:

> relieves the Court from the necessity of deciding according to law. It makes possible a decision based upon considerations of fair dealing and good faith, which may be independent of or even contrary to the law. Acting ex aequo et bono, the court is not compelled to depart from applicable law, but it is permitted to do so, and it may even call upon a party to give up legal rights .... Such considerations depend, in large measure, upon judges' personal appreciation and yet the court would not be justified in reaching a result which could not be explained on rational ground.[118]

Although these words of Hudson were with reference to Article 38 of the Statute of the Permanent Court of International Justice and the role of the judges in the court, they are relevant in a study dealing with Article 42(3) of the charter of the ICSID. Actually, Article 42(3) is an alternative basis for arbitration if the disputing parties before the tribunal wish to avoid a decision on the basis of pure rules of law. In the ICSID arbitration in Benvenuti & Bonfant Co. v. People's Republic of The Congo,[119] the tribunal used this alternative method to render an award.[120]

E. Municipal Law v. International Law

The review of Article 42 leaves unanswered the question: Which rule of law will survive in a conflict between the rule of municipal law and the rule of international law? For instance, say the tribunal faces a legal issue relating to the expropriation of a private investment without compensation. In this hypothetical situation, the municipal legislation of the host state bans the state from giving any kind of adequate, prompt, and effective compensation to the foreign investor. It is possible that the existing rule of international law is not consistent with this particular state legislation. At this point, the tribunal may be confused as to which law should be accepted in the absence of any specific direction from the parties. However, the present writer presumes that the ICSID tribunal has discretionary power to apply

international law in such occasion. The rationale behind this presumption is the incorporation of "rules of international law" by Article 42 to the Convention as a step not found in common arbitral practices. In addition, the intention expressed by the delegates of the various countries who participated in different regional meetings and legal committee meetings and views expressed by the officials of the ICSID, also provide reasonable grounds for this conclusion that rules of international law will pre-empt the law of host state in the instance of a conflict between them.[121] In fact, the ICSID tribunal which presided over the arbitration proceedings between AGIP Spa v. The People's Republic of the Congo[122] followed the same legal philosophy that the international law will pre-empt the law of the contracting state, the People's Republic of Congo, since the latter was in conflict with the principles of international law.

An argument of the late Professor Schwarzenberger lends support to the right of the tribunal of the ICSID to apply international law in cases of conflicts with national law whenever necessary. He states: "If the arbitration tribunals under the Convention were international tribunals, they would have to apply their own lex fori, which is international law."[123]

One can easily identify the ICSID tribunals as international tribunals, because the documents of the ICSID Convention reveal that the Convention was basically designed to establish international arbitral machinery to which private individuals and corporations could have substantially the same access as state claimants have to the International Court of Justice.[124] Therefore, the right of the ICSID tribunal to apply its lex fori, international law, is unquestionable.

F. General Principles of Law and the ICSID Tribunal

It must also be pointed that Article 42 and, subsidiarily, Article 48 of the ICSID Convention make possible the acceptance of certain new principles of law within the scope of international law which would be particularly appropriate to apply in arbitration proceedings relating to transnational economic development contracts (TEDC). This possibility would allow ICSID's arbitral mechanism to achieve a unique position[125] among the existing institutional arrangements in the international arbitration field. The development of new general principles of law would be a by-product of the decision-making process of the ICSID tribunal as a result of the resolution of the question of choice of law. In other words, the ICSID tribunal, which applies various prescribed legal systems such as the municipal law of the contracting state or international law (due to the failure of the parties to select an arbitration law) and finds gaps in those legal systems or conflicts among them, may make use of certain principles and rules of law from other available legal systems in order to give a just and impartial award. There is a long history of international courts and tribunals making use

of general principles taken from other legal systems to fill gaps in the corpus of international law and so to permit the finding of a fair solution to a particular legal dispute.[126] Furthermore, authority for such a development can be specifically found in two articles of the ICSID Convention.

First, there is the specific directive of Article 42(2) which says, "The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law." One can readily imagine circumstances where, due to this prohibition of Article 42(2), the tribunal will be forced to search for appropriate general principles and rules from other available legal systems such as the municipal law of the investor's state or the law of a third state when the body of customary public international law principles does not seem to cover satisfactorily the situation in dispute.[127] The acceptance of general principles of law would be logical to an arbitral tribunal which applies international law, because general principles of law are considered recognized sources for the enrichment of international law. Furthermore, the founding fathers of the ICSID have permitted the ICSID tribunals to apply international law (defined under Article 38 of the Statute of the International Court of Justice and designed originally to apply in the disputes between sovereign states) to a dispute between a private party and a sovereign state.[128]

The second reason concerns the absolute requirement provided by Article 48(3) which says, "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." When the tribunal states each reason which leads to a particular award, the tribunal must support that reason with certain legal principles and rules, since the issues involved with the disputes are legal issues.[129]

Thus, though there is no rule of stare decisis in international law or in the arbitration process, whenever the ICSID tribunal accepts general principles and rules from other legal systems and applies such principles and rules to an arbitration relating to a TEDC, the future ICSID tribunal automatically gets an opportunity to interpret and develop such principles and rules for application to similar legal disputes in the future. Such new principles of law might appropriately be termed, "principles of transnational economic development law," since they would have been generated in a form suitable for application to arbitration directly linked with transnational economic development contracts. This product of the ICSID tribunal would not only make ICSID tribunals unique, especially useful, and acceptable to parties with TEDC disputes, but also could be used by other tribunals faced with similar disputes once ICSID tribunals had "found" these priciples to be a part of international law.

PART THREE: RECOGNITION AND ENFORCEMENT OF THE ICSID AWARD

Articles 53, 54, and 55 deal exclusively with various provisions on recognition and enforcement of an award granted by an ICSID tribunal. The award will be binding on the parties to the dispute. No appeal or other remedy is permitted except as provided by the Convention under Articles 51 and 52. Although the award is final and mandatory on the parties, it is subject to two remedies which are available in rare situations: (1) revision on the ground of newly discovered facts and (2) annulment because of serious procedural errors. These remedies must be exhausted under the auspices of ICSID. If any dispute as to the meaning or scope of the award arises, either party may request interpretation of the award by a petition to the Secretary General of the ICSID. The Secretary General will submit the petition to the tribunal which rendered the award or, under certain circumstances, to a newly constituted tribunal.[130] The tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its final decision. However, once the award becomes final, it is not subject to challenge on any ground in the courts of any country. Each disputant must abide by and comply with the terms of the award.[131]

Each contracting state (country) to the ICSID Convention must recognize the award as binding. Each state must enforce all monetary or financial obligations imposed by that award within its jurisdiction as if it were a final judgment by a court of that particular country. Further, a country with a federal constitution must enforce such award in or through its federal courts and provide that such courts treat the award as a final judgment of the courts of a constituent state.[132]

The ICSID Convention has provided a simple and effective procedure to recognize and enforce awards. Any party to an ICSID award may obtain recognition and enforcement of the award by furnishing to the competent court or other authority designated in advance by each contracting country a copy of the award certified by the Secretary General of ICSID.[133] This procedure eliminates the problems common to the recognition and enforcement of foreign arbitral awards which subsist in local laws or under international conventions, including the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[134] Under the ICSID Convention there is no exception, not even on the basis of public policy, to the binding character of ICSID awards and to their recognition and enforcement by contracting countries.[135]

The recognition and enforcement rules of ICSID awards are independent from other prevailing rules regarding measures of execution following recognition and enforcement.[136] In this respect Article 55 provides that the procedure established in Article 54 cannot be construed as derogating from the laws in force in any contracting countries relating to sovereign immunity of the country or of any foreign country from execution. In the opinion of Georges Delaume, the Convention with this provision surrenders measures of execution to domestic rules of

immunity.[137] Under another view Article 55 requires that contracting countries equate an ICSID award with the final judgment of a national court to the extent permitted by the practice of that country regarding sovereign immunity. However, it is expected that appropriate judicial bodies in contracting countries will not create obstacles to the effective immunity consideration. It is presumed that the local court will acknowledge that by ratifying the Convention all contracting countries have already implicitly waived all jurisdictional claims against foreign courts under those countries' sovereign immunity policy.[138] In other words, the courts should rule that the contracting countries who uphold sovereign immunity were aware of the "anticipatory consequence" of an ICSID award being referred to local execution free from all immunity issues. By signing the Convention those countries have consented to refrain from invoking any of the traditional obstacles involved with their sovereign immunity policy. Therefore, the present writer strongly believes that domestic courts of contracting countries will facilitate speedy recognition, enforcement and execution of an ICSID award irrespective of traditional objections arising out of sovereign immunity considerations.

In 1981 two domestic courts, one in Paris (Benvenuti & Bonfant Co., v. People's Republic of The Congo)[139] and another in Washington, D.C., (Maritime International Nominee Establishment v. Republic of Guinea),[140] reviewed petitions based on ICSID arbitration-related cases. The Court of Appeals of Paris examined a lower court decision (Tribunal da Grande Instance--the Court of First Instance) on recognition of an ICSID award granted from an arbitration arrangement in Benvenuti & Bonfant Co. v. People's Republic of The Congo and removed a restriction imposed by the latter court on the execution of that award. This is the first decision of a domestic court in a contracting country which recognized the finality of an ICSID award. By removing the restriction[141] the Court of Appeals of Paris upheld the unique advantages of an ICSID award, in contrast to ordinary foreign arbitral awards. As soon as an ICSID award is recognized, it becomes a valid title on which basic measures of execution can be taken, e.g., in the form of attachment. This may not be the case with other arbitration awards granted by arbitral tribunals which are not established by intergovernmental conventions.

On January 12, a 1982 United States District Court in Washington, D.C., decided in the matter of the arbitration in Maritime International Nominees Establishment (MINE) v. The Republic of Guinea,[142] that (1) Guinea's agreement to arbitrate before ICSID constituted a waiver of immunity under the U.S. Foreign Sovereign Immunity Act (FSIA), and (2) a dispute arising out of such an agreement was within the jurisdiction of the United States District Court. On the basis of these findings, the District Court granted a petition filed by MINE to enforce an ex parte arbitration award given by an American Arbitration Association (AAA) tribunal against the Republic of Guinea. According to the records, MINE unilaterally refused to submit the dispute to the ICSID's jurisdiction

and initiated an AAA arbitration. Presently this case is being reviewed by the United States Court of Appeals of the District of Columbia. In filing a brief for the U.S. Government as intervenor, the United States Department of Justice argued that (1) the consent to ICSID jurisdiction is not a waiver of sovereign immunity in its entirety, other than for purposes of enforcing an ICSID award, and (2) the ICSID may have exclusive jurisdiction over this particular dispute between MINE and Guinea. The final outcome of this case may not be available for some time. These two cases above mentioned point out the unique nature of the ICSID arbitrations which may be beyond the reach of traditional domestic judicial processes affecting recognition and enforcement of foreign arbitral awards.

CONCLUSION

In light of the above discussion on the operational structure of ICSID, arbitration law applicable to its proceedings, and issues relating to the enforcement of its awards, it becomes clear that ICSID creates a unique dispute-settling agency which is capable of satisfactorily resolving legal disputes arising out of investment contracts abroad. Although the ICSID has granted only three arbitration awards and is not yet involved in more than eleven arbitration proceedings, this is a reflection of the praiseworthy sense of discipline that the contracting countries and their nationals have in relation to transnational economic development activities. Aron Broches, former Secretary General of ICSID, has stated that although there is no conventional statistical standard by which to measure the usefulness of the Center, the real test of its performance is the degree to which parties to investment agreements are willing to commit themselves in advance to its settlement procedures should the occasion arise. In this sense ICSID has made much substantial progress during the past several years: provision for ICSID jurisdiction was contained in more agreements, in the investment legislation of more developing countries and in more bilateral agreements between developed and developing countries.

It is hoped that more countries and foreign private investors will recognize the potential of ICSID's arbitration mechanism, which is capable of resolving questions of choice of law through equitable and impartial techniques. It is also hoped that more countries and foreign private investors will seek the facilities offered by this mechanism for the settlement of legal disputes arising out of investment.[143] This recognition and the increased use of ICSID's arbitration process as more countries sign the 1965 World Bank Convention and submit disputes for arbitration will without doubt create a healthy atmosphere in transnational investment activities and will encourage a larger flow of private transnational investment which will in turn promote the economic development of emerging countries.

FOOTNOTES

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1. See J. Cherian, Investment Contracts and Arbitration 65-73 (1975). The Convention is reproduced in: World Bank--IDA, 1973 Annual Report 69, 575 U.N.T.S. 159, 17 U.S.T. 1270, T.I.A.S. No. 6090; International Center for Settlement of Investment Disputes, ICSID/3 (1966); 4 Int'l Leg. Mat. 524 (1965); 60 Am. J. Int'l L. 892 (1966) and G. Delaume, Transnational Contracts, App. II, at 17 (1980). The official address of the Center is ICSID, 1818 H. St., N.W., Washington, D.C. 20433.

2. See ICSID Doc., ICSID/3/Rev. 42 at 1 (1981). Recently Paraguay and Cost Rica, two Latin American countries, also signed this Convention.

3. See ICSID, Fifteenth Annual Report 1980-1981, 19-29 (1981).

4. Mendelson, Book Review: Investment Contracts and Arbitration, 93 L.Q. Rev. 318 (1977).

5. Kokkini-Iatridou, A Book Review: Investment Contracts and Arbitration, 23 Neth. Int'l L. Rev. 287 (1976).

6. Cherian, supra note 1, at 118.

7. Kokkini-Iatridou, supra note 5, at 241.

8. Mendelson, supra note 4, at 318.

9. The first award from an ICSID tribunal was rendered on August 29, 1977 in the case of Adriano Gardella Spa v. Ivory Coast (an Italian Company) Case No. ARB 74/1, cited in Bernardini, infra, note 120. On November 30, 1979, and on August 1980, two more unanimous awards were given in the case of: (1) AGIP Spa v. People's Republic of the Congo, (2) Benvenuti & Bonfant Co. v. People's Republic of the Congo, respectively. See ICSID, Fifteenth Annual Report, supra note 3, at 39-42.

10. Id. at 30-43.

11. Cherian, supra note 1, at 65.

12. Id. at 74.

13. Article 67; See also regarding the United Kingdom, Executive

Directors of the International Bank for Reconstruction and Development, Report on the Convention and the Settlement of Investment Disputes Between States and Nationals of other States, CMD No. 2745, at 30 (1965).

14. See ICSID, Doc., ICSID/3/Rev.42. (1981).

15. 2 ICSID, History of the Convention pt. 1, at 1 (1968).

16. Id. at 2.

17. Id.

18. In the opinion of Paul C. Szasz, "Although there is no formal obstacle to submitting to the International Chamber of Commerce or to the Inter-American Commercial Arbitration Commission, governments are often reluctant to do so in connection with major investment arrangements, in view of the basically private, commercial orientation of these organizations." Szasz, Using the New International Center for Settlement of Investment Disputes, 7 E. Afr. L. J. 128 (1971); Sutherland, The World Bank Convention on the Settlement of Investment Disputes, 28 Int'l & Comp. L. Q. 371 (1979).

19. The Permanent Court of Arbitration (PCA) in 1962 formulated "rules of arbitration and conciliation for settlement of international disputes between two parties of which only one is a state." But these rules constitute a practically untested extension of the normal inter-governmental jurisdiction of PCA of which in any event relatively few developing states are members. Also see the comments on this point by Ketcham: Arbitration Between a State and a Foreign Private Party, in Rights and Duties of Private Investors Abroad 403, 405-06 (Southwestern Leg. Found. ed. 1965).

20. Professor Schwarzenberger has described such attempts made by Deutsche Bank, the Organization for European Co-operation and the Organization for Economic Co-operation and Development; G. Schwarzenberger, Foreign Investments and International Law 136-38 (1969).

21. ICSID, History of the Convention, supra note 15, at 2.

22. U.N. Doc. E/3325 at 63 (1960).

23. U.N. ESC, Promotion of Flow of Private Capital, Res. 836, 32 U.N. ESCOR Supp. (No. 1) at 4 & 5, U.N. Doc. E/3355 (1961). See Sasoon, The Convention on the Settlement of Investment Disputes Between States and Nationals of other States, 1 Isr. L. Rev. 29 (1966).

24. See, e.g., The Suez Canal Compensation Agreement signed in Rome in

April 29, 1958. N.Y. Times, April 30, 1958, at 8, col. 4, quoted in E. Lauterpacht, Suez Canal Settlement 3 (1966).

25. E. Lauterpacht, supra note 24, at 3; see also Sassoon, supra note 23, at 29.

26. Sassoon, supra note 23, at 29.

27. Id. at 30.

28. Broches, Development of International Law by the International Bank for Reconstruction and Development, in Proceedings of the American Society of International Law 59, 33-38 (1956).

29. ICSID, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Resolution No. 214, September 10, 1964, cited in ICSID/2, para. 13.

30. G. Schwarzenberger, supra note 20, at 135.

31. For more details on the characteristics of the ICSID, see Szasz, The Investment Disputes Convention--Opportunities and Pitfalls, 5 J. L. & Econ. Dev. 23 (1970).

32. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Articles 4, 5, 6, 7 and 8.

33. Id., arts. 9, 10 and 11.

34. On October 2, 1980, the Administrative Council of the ICSID elected Heribert Golsong, Vice President and General Counsel of the World Bank, Secretary-General of the ICSID for a six-year term ending in October 1986. Pursuant to ICSID's Administrative and Financial Regulation 8(2), Mr. Golsong, on November 11, 1980, designated Mr. Georges R. Delaume, Senior Legal Adviser of the World Bank, to act as Secretary-General during his absence or inability to act.

35. Art. 25. See, Amerasinghe, Dispute Settlement Machinery in Relations Between States and Multi-national Enterprises-with particular reference to the International Center for International Settlement of Investment Disputes, 11 Int'l Law 45, 50 (1977).

36. ICSID, Report of the Executive Directors on the Convention, ICSID/2 at 8 (1966).

37. J. Cherian, supra note 1, at 16.

38. Various aspects of submission to the ICSID jurisdiction have been discussed in detail in Amerasinghe, Submission to the Jurisdiction

of the International Center for Settlement of Investment Disputes, 5 J. Mar. L. & Com. 217 (1974).

39. Id.

40. Id.

41. Amerasinghe, supra note 35, at 166.

42. F. S. Hamzeh has described legal disputes generally as conflicts in which the "parties disagree on a question of law," or as "disputes in connection with which the parties are in conflict as to their respective legal rights," or as "disputes relating to a right asserted by one of the parties and contested by the other." For further discussion, see F. Hamzeh, International Conciliation 67-68 (1960).

43. For an elaborated discussion on the jurisdiction of ICSID, see, Masood, Jurisdiction of the International Center for Settlement of Investment Disputes, 14 J. Indian L. Inst. 119-40 (1972).

44. ICSID, Report of the Executive Directors on the Convention, ICSID/2, at 9 (1966).

45. SID Convention, Art. 14(1).

46. According to Art. 14(1), arbitrators are required to decide a dispute in accordance with "rules of law."

47. Generally, arbitration has been considered as a judicial method of dispute settlement. J. Brierly, The Law of Nations 347 (6th ed. 1963); I. Brownlie, Principles of Public International Law 543 (1960).

48. Art. 25 makes it clear that the arbitrator's function is a legal one and not one of conciliation.

49. Art. 36.

50. Art. 37(1).

51. Art. 37(2a).

52. Art. (2)(b).

53. Art. 38.

54. See ICSID, Rule 6 on the Constitution of the Tribunal, ICSID Regulation and Rules, [hereinafter cited as ICSId] ICSID/74/Rev. 1, ch. 1, at 82 (1975).

55. Art. 41 of the Convention.

56. ICSID, Rule 20 on Preliminary Procedural Consultation, at 92.

57. ICSID, Rule 20(a).

58. ICSID, Rule 20(f).

59. ICSID, at 92.

60. Id., and also see Art. 43.

61. Id., p. 92.

62. ICSID, at 92.

63. A similar view has been expressed in Szasz, supra note 31, at 38. See also M. Domke, The Law and Practice of Commercial Arbitration 254 (1968).

64. "Various stages" means regional consultative meetings of legal experts held in Addis Ababa, Santiago, Bangkok and the Washington Conference of Legal Experts.

65. Georges R. Delaume also concurs with this view. See Delaume, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1 Int'l Law 64, at 77 (1966) and Delaume, supra note 1, at para. 1.01.

66. According to the view of some writers, contracts between nations and foreign private investors could be legally self-sufficient and exist independently of other, legal systems, municipal or international. For more details, see Verdross, Quasi-International Agreements and International Economic Transactions, 18 Y. B. of World Affairs 231-34 (1964); see also Bourquin, Arbitration and Economic Development Agreement, 15 Bus. Law 860 (1960).

67. Delaume, supra note 65, at 77.

68. Szasz, supra note 63, at 39.

69. Cherian, supra note 1, at 76.

70. For a similar view, see the comments of Broches during the Legal Committee Meeting, SID/65-5, at 3 (1965).

71. The fundamental problem of choice of law has been discussed in many judicial opinions. See the Abu Dhabi Arbitration, 1 Int'l & Comp. L. Q. 247 (1952); The Lena Goldfield Arbitration, 5 Ann. Dig. Pub. Int'l L. Cas. 3, 28 (1929-30); Marine Oil Co., 20 Int'l L. Rep.

534 (1953); The Arbitration between Saudi Arabia and Aramco, 27 Int'l L. Rev. 117 (1963); Saphire International Petroleum Ltd. v. NIOC, 3 Colum. J. Transnat'l L. 152 (1964); Nogen S. Rodly also refers to the fundamental problems of choice of law in his article: Some Aspects of the World Bank Convention on the Settlement of Investment Disputes, 4 Can. Y.B. Int'l L. 57 (1966).

72. See Cherian, supra note 1, at 76.

73. Id.

74. SID Convention Art. 42(2).

75. See Report of the Executive Directors of the World Bank, Resolution No. 214, adopted in September 10, 1954, para. 40. This report was published on March 18, 1965, attached to ICSID/2, at 13. Art. 38(1) of the Statute of the International Court of Justice reads as follows:

> 1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international convention, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations; and
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

76. The Preliminary Draft was proposed by the legal experts of the World Bank and the First Draft and the Final Draft were drafted by them in light of the discussions held during consultating meetings of legal experts from various countries.

77. ICSID Doc. No. 24, COM/AF/WA/EU/AS/1, at 28 (1963).

78. ICSID Doc. No. 31, Z10, (July 20, 1964), at 54.

79. Id.

80. Id. at 55 & 56.

81. See Report of the Chairman in ICSID Doc. No. 22, Z11, at 15 (1964). Broches is presently one of the Vice-Presidents and

General Counsel of the World Bank and is the ICSID's Secretary-General.

82. Id.

83. Id.

84. See ICSID Doc. No. 43, Draft Convention: Working Paper for the Legal Committee, X12, at 21-22 (1964).

85. See Summary Proceedings of the Legal Committee Meeting, December 7, 1964, SID/LC/SR/14, at 2 (1964).

86. Id.

87. Id.

88. Id.

89. Delegates to the Legal Committee Meetings were mainly legal experts from various countries. Some of them namely, Bilgen of Turkey, Serb of Yugoslavia, da Cunha of Brazil, Wanasudra of Sri Lanka (formerly Ceylon), objected to the reference to "international law."

90. Id.

91. Id. at 4.

92. See the comments of Lokur of India, Lara of Costa Rica, and Florenzo of Ivory Coast, Id. at 4-5.

93. Broches has remarked on the comments made by various delegates. For his point of view, see Id. at 2.

94. Id. at 3.

95. Id. at 5.

96. Id. at 3.

97. Id.

98. Id.

99. Id.

100. Id. at 5. Art. 27 of the SID Convention says:

> "(1) No Contracting State shall give diplomatic protection, or bring an international claim, in

respect of a dispute which one of its nationals and another Contracting State shall have consent to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by any comply with the award rendered in such dispute.
(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

101. See the comments of Broches concluding the discussion on Article 45(1). Id. at 6.

102. Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure, in International Arbitration Liber Amicorum for Martin Domke 15 (P. Sanders ed. 1967).

103. Id.

104. In the words of Sir Hersch Lauterpacht, "The Prohibition of Non Liquet" constitute one of the most undisputable established rules of positive international law as evidenced by an uninterrupted continuity of international arbitral and judicial practice. See Lauterpacht, Some Observation on the Prohibition of Non Liquet and the Completeness of the Legal Order, Symbolic and the Function of Law in the International Community, 35 Y.B. of RIIA 124 (1959).

105. See ICSID Doc. No. 24 COM/AF/WH/EU/AS/1, at 28 (1963).

106. See SID/LC/SR/15, at 805 (1964).

107. Stone, Non Liquet and The Function of Law in the International Community, XXXVth 35 Brit. Y. B. Int'l L. 124 (1959).

108. Id.

109. Id. at 125.

110. According to the observation of Haliburton Fales, "An unclear rule is dangerous both because the ambiguity may be resolved against you--and because the tribunal may return a finding of non liquet. A provision in the terms of reference forbidding such a result may be useful, and, in fact, the rules laid down by the 1965 Convention on the Settlement of Investment Disputes contain that kind of provision." See Fales, International Arbitration of Private Disputes--The Draftman's Dilemma, in Private Investors Abroad: Problems and Solutions 232 (V. Cameron ed. 1971).

111. According to S. Prakash Sinha, developing countries need an international law which would adequately promote their interests relating to economic prosperity and social well-being. In this repsect, they may find the traditional rules of international law lacking. See, for further details, Sinha, Perspectives of the Newly Independent States on the Binding Quality of International Law, 14 Int'l & Comp. L. Q. 130 (1965).

112. Article 12(2) of the Draft Arbitral Procedure proposed by the International Law Commission says, "The tribunal may not bring in a finding of non liquet on the ground of the silence or obscurity of international law or of the compromise". See, the United Nations, International Law Commission, Report of the Fifth Session, A/2456, at 12 (1953).

113. This is the comment given by the Drafters of the SID Convention on the meaning of "ex aequo et bono." See ICSID Doc. No. 24, COM/AF/WA/EU/AS/1, at 29 (1963); See H. Lauterpacht, The Development of International Law by the International Court of Justice 213, 23 (1958); 1 M. Whiteman, 98 (1963). See also Scheuner, Decisions ex aequo et bono by International Courts and Arbitral Tribunals, in P. Sanders, supra note 102, at 275; Sohn, Arbitration of International Disputes Ex Aequo Et Bono, in P. Sanders, supra note 102, at 330-37.

114. The opinion of Judge Kellogg supports this view. See, Free Zone Case, Series A, No. 24, Series A/B No. 46., 1 M. Hudson, World Court Reports 506 (1934).

115. Art. 38(2) says that this provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

116. Art. 9(1) of the 1953 Draft Convention on Arbitral Procedure. See United Nations, International Law Commission, supra note 112, at 12. Article 9(1) says "[T]he law to be applied by the tribunal, [includes] the power...to adjudicate ex aequo et bono...."

117. In the United States, Louisiana State Law provides power to arbitrators to act as amicables compunders, who are the American counterparts of French amiables compositeurs. See La Civ. Code Ann., arts. 3109 and 3110 (West 1983).

118. See M. Hudson, The Permanent Court of International Justice (1920-1942) 168 (1943).

119. Ct. of App., Paris 1981, reprinted in 20 Int'l Leg. Mat. 878 (1981).

120. Bernardini, First Experiences in Arbitration of the International Center for Settlement of Investment Disputes, 17 Revista di diritto

internazionale privato e processuale 8 (1981) (translated by the ICSID Staff).

121. See comments of Broches in the Legal Committee, SID/LR/SR/14, supra note 28, at 5; see also Abbott, Latin America and International Arbitration Conventions: The Quandary of Non-Ratification, 17 Harv. Int'l L. J. 139 (1976).

122. Case No. ARB/77/1, cited in Bernardini, supra note 120.

123. Schwarzenberger, supra note 20, at 143. For further discussion on the issue, see Bernardini, supra note 120, at 10-11.

124. See ICSID Doc. No. 1, Sec. M61-192, at 2 (1961).

125. Not only is the tribunal unique in that the Convention settles the choice of law problem, but also it does so in such a way as to permit the development of specifically adopted principles of law particularly suited to the settlement of disputes arising out of TEDC's.

126. See awards given in the arbitration in Sapphire International Petroleum Ltd. v. National Iranian Oil Company as reported in 3 Colum. J. of Transnat'l L., 152 (1964); the arbitration between Saudi Arabia and Aramco, 117 Int'l L. Rep., 27 (1963), and the Arbitration between the Lena Goldfields Ltd. and the Soviet Government, 36 Cornell L. Q. 39 (1950); Radio Corporation of America v. The National Government of China, 1 D. O'Connell, State Succession in Municipal and International Law 980 (1967); and Arbitration between the Ruler of Quatar and International Marine Oil Company Ltd., Lord McNair, The Law of Treaties 13 (1961).

127. Cherian, supra note 1, at 91.

128. See Cherian, supra note 1, at 106.

129. According to Art. 25 of the SID Convention, the ICSID is designed to deal only with disputes involving legal issues.

130. Id. Art. 50.

131. Id. Art. 53.

132. Id. Art. 54(1).

133. Id. Art. 54(2).

134. ICSID Doc. 12, at 13 (1979).

135. Delaume, An Introductory Note to France: Court of Appeals of Paris

Judgment Concerning Recognition and Enforcement of Award in Context of ICSID Convention, 20 Int'l Leg. Mat. 877 (1981).

136. Id.

137. Id.

138. Id. at 878-882.

139. Ct. of App., Paris 1981, reprinted in 20 Int'l Leg. Mat. 878 (1981).

140. 505 F. Supp. 141 (1981); 20 Int'l Leg. Mat. 667 (1981).

141. 20 Int'l Leg. Mat. 669 (1981).

142. 505 F. Supp. 141 (1981); 20 Int'l Leg. Mat. 667 (1981).

143. I. Frank, Foreign Enterprise in Developing Countries 142 (1980).