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International Commercial Arbitration and African States

Practice, Participation and Institutional Development

AMAZU A. ASOUZU

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International Commercial Arbitration and African States is a timely assessment of the arbitral process in the African context. The book focuses on the contribution that arbitration, and other methods of alternative dispute resolution, may make to the development of African states and peoples, while satisfying the legitimate expectations of inward investors and traders. Although focusing on dispute resolution regimes affecting or concerning African states and their nationals, the work will also have practical, policy and comparative implications for dispute resolution, commercial arbitration and foreign investment in other regions.

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Dedicated to my late parents, Sir Charles Ijoma Asouzu and Lady Juliana Anezi Asouzu

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Foreword

The internationalization of goods and services and, indeed, the phenomenon of globalization have underscored the importance of international commercial transactions as essential aspects of the dynamics of international commercial intercourse. Confronted by the reality of these developments, African countries, like other developing countries, now appreciate that these transactions are inescapable for the implementation of their economic and social programmes. African governments and private parties involved in negotiating international business transactions such as loan agreements, petroleum and mining agreements, industrial joint ventures, management agreements, international procurement contracts, international supply contracts, bilateral or international trade agreements and bilateral investment agreements have come to the realization that foreign parties to these transactions, i.e. foreign governments, transnational corporations, international banks, foreign investors, international suppliers and contractors, all insist on an appropriate dispute settlement mechanism, which is invariably international arbitration.

Such parties predominantly prefer international arbitration because of the strong perception that an international forum for settling disputes provides some insurance against possible bias by a national judiciary. Thus, African countries caught in the web of a plethora of international transactions recognize the virtual inevitability of accepting international commercial arbitration. Indeed, the acceptance of international arbitration has become an invariable ingredient of the liberalization packages which African countries, and developing countries elsewhere, provide as a *sine qua non* of their strategies to attract foreign investment and technology, international finance and foreign trade.

Notwithstanding this realism, the African experience of international

commercial arbitration is bedevilled by a woeful lack of expertise and englightenment. African parties to international commercial transactions often find themselves hauled before international arbitral fora in distant capitals that invoke and apply procedures, rules and laws and issue rulings of which they have little understanding. The results have been disastrous for some African parties.

Dr Amazu Asouzu, a distiguished scholar, is therefore to be warmly congratulated on producing a major work that addresses this critical concern. There is no doubt that the study will make a great contribution to the demystification of international commercial arbitration in Africa.

The book begins with a general survey of dispute resolution mechanisms and then proceeds to deal in depth with international commercial arbitration – its institutional infrastructure, its development in Africa and the rules and procedures of the various arbitration institutions.

The author then embarks on an illuminating analysis of the experience of African states in international arbitration and conciliation and ends with thoughtful and insightful prescriptions for the future of arbitration on the continent.

Dr Asouzu has placed in his debt governments, business executives, lawyers and other parties in Africa who are involved in international transactions.

Samuel K. B. Asante
Chairman of the Ghana Arbitration Centre, Accra, Ghana

Acknowledgments

Many individuals and institutions have been particularly helpful during the study that led to this book and its publication. I wish to acknowledge my deep gratitude to some of them.

First, to my God for the mercies I have been granted; and to the London School of Economics (LSE) at the University of London, for its generosity in awarding me the research scholarship in law which made this study possible. Immense thanks are also due to Judge Rosalyn Higgins DBE, QC and Professor Peter T. Muchlinski, both formerly of the LSE, for their abiding interest in my progress at the LSE during this study. Their dedication, enthusiasm, support and encouragement made working on this study a memorable event for me. This is particularly so as the writing was completed in the year the LSE celebrated its centenary, and in which Professor Muchlinski's book, *Multinational Enterprises and the Law*, on which I acted as a research assistant, was published. Finally, also in 1995, the international community elected Rosalyn Higgins, former Professor of Public International Law at the LSE, as the first female permanent member of the International Court of Justice; she was re-elected in 1999 for a further term of nine years.

Judge Rosalyn Higgins is a scholar of formidable intellect and distinction, and was cheerfully devoted to the welfare and progress of those she taught and supervised. I particularly owe her my continuing gratitude for the suggestions leading to the choice of a research topic, and for the recommendation she made leading to the award of an LSE scholarship in law, which led to this study. In the end, she was to suggest to Cambridge University Press that this study was suitable for publication.

I am grateful to Dr Christopher Hart, formerly the Law Editor at Cambridge University Press, for taking up Judge Higgins' suggestion, and to his successor in that position, the ever helpful and patient

Finola O'Sullivan, for completing the task. Other members of staff at the Press were also helpful in producing this book; I extend my sincere gratitude to them all. This book is, in a way, the outcome of our joint endeavours.

My appreciation extends to the University of London's Central Research Funds Committee for the funds that facilitated my research visits to Egypt, Nigeria and Malaysia. Others whose contributions were equally important and deeply appreciated are those at the University of London who introduced me to international commercial arbitration, namely, Professor Julian D. M. Lew and Professor John Adams (both at Queen Mary and Westfield College), and to alternative dispute resolution, namely, Professor Michael Palmer (at the School of Oriental and African Studies) and Professor Simon Roberts (at the LSE). Professor Thomas W. Wealde (of Dundee University) and Professor John Adams examined this study and their critical but constructive comments and suggestions were helpful in the final drafting. I further express my absolute gratitude to Mrs Margrete L. Stevens, Senior Counsel at ICSID, whose enduring patience and kindness accommodated my regular requests for information and materials from ICSID. I also wish to express my regret at the death of Mr Aron Broches, the 'father' of ICSID, in September 1997.

I am also grateful to Chief (Mrs) Tinuade Oyekunle for making time to discuss arbitration with me during my field studies in Nigeria, to my hosts in Egypt (Dr M. I. M. Aboul-Enein, the Director of the Cairo Regional Centre for International Commercial Arbitration) and in Malaysia (Miss P. G. Lim, the then Director of the Kuala Lumpur Regional Centre for Commercial Arbitration, and Professor K. S. Nathan, Department of History and International Relations, University of Malaya), for their warm hospitality and the superb facilities they provided to me during my research in their countries; to Miss Federica Donati, for efficiently and diligently translating the original French texts of the Arbitration Law of Côte d'Ivoire and the OHADA Treaty into English; to Miss Josiane Bonieux, for using her mastery of languages to make available, within a short time, an English version of the French original of the Algerian Arbitration Law and the national laws implementing the ICSID Convention; and to the secretaries in the LSE law department, particularly Mrs Susan Hunt, Mrs Pam Hodges and Miss Elizabeth Durant, and in the School of Law, King's College London, particularly Miss Lauretta Alexander, for their support and assistance. Mrs Judy Freedberg, Mr Dapo Akande and Professor Dominic McGoldrick, amongst others already mentioned above, made separate and useful comments on aspects of chapters 6 and 12, which were streamlined

and submitted for, and subsequently won, the 1997 Gillis Wetter Memorial Prize.[1]

I am also grateful to the three anonymous readers for Cambridge University Press, as well as to Professor James Crawford, the General Editor of this series, for their successive and helpful comments and suggestions which greatly improved the drafts of this book. A special thanks to Nana Dr S. K. B. Asante, who despite his usually tight schedule agreed to read the manuscript and to write a foreword to this book.

To my brothers and sisters, I am deeply appreciative of your continuing support and encouragement in all I do. Finally, to my wife, Jennifer, and our daughter, Anezi, thanks for your love and understanding.

[1] For the 1997 Gillis Wetter Prize winning essay, see A. A. Asouzu, 'African States and the Enforcement of Arbitral Awards: Some Key Issues', *Arbitration International* 15, 1999 No. 1, 1–52.

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List of abbreviations

AAA	American Arbitration Association
AALCC	Asian–African Legal Consultative Committee
ABA J	*American Bar Association Journal*
ACP	African, Caribbean and Pacific States
AD	*Annual Digest of International Law Cases*
ADR	Alternative Dispute Resolution
ADRLJ	*Arbitration and Dispute Resolution Law Journal*
AEC	African Economic Community
AG	Attorney-General
AJCL	*American Journal of Comparative Law*
AJIL	*American Journal of International Law*
All ER	*All England Law Reports*
ALQ	*Arab Law Quarterly*
ALR Comm	*African Law Reports (Commercial Series)*
Arb Int	*Arbitration International*
Arb J	*Arbitration Journal*
ASEAN	Association of South East Asian Nations
ASIL	American Society of International Law
BULR	*Boston University Law Review*
BYIL	*British Yearbook of International Law*
CADR	Centre for Arbitration and Dispute Resolution (Uganda)
CCJA	Common Court of Justice and Arbitration (OHADA)
CERDS	Charter of Economic Rights and Duties of States of 1974
CILJSA	*Comparative and International Law Journal of Southern Africa*
CJIBLP	*Canadian Journal of International Business Law and Policy*
CMLN	National Liberation Military Committee (Mali)
Columbia JTL	*Columbia Journal of Transnational Law*
COMESA	Common Market for Eastern and South African States

CPMPL	Centre for Petroleum and Mineral Law and Policy (University of Dundee)
CRCICA	Cairo Regional Centre for International Commercial Arbitration
CULR	*Catholic University Law Review*
CUP	Cambridge University Press
CWILJ	*California Western International Law Journal*
CWJIA	*Commonwealth Journal of International Affairs*
CWRJIL	*Case Western Reserve Journal International Law*
DAC	Department Advisory Committee
DRC	Democratic Republic of Congo (formerly, Zaire)
EALJ	*East African Law Journal*
EALR	*East African Law Review*
ECJ	European Court of Justice
ECR	*European Court Reports*
ECSLR	*East Central State of Nigeria Law Reports*
ECT	Energy Charter Treaty
EDF	European Development Fund
EPIL	*Encyclopaedia of Public International Law*
EPZ	Export Processing Zone
FCO	Foreign and Commonwealth Office (UK)
FDI	foreign direct investment
FGN	Federal Government of Nigeria
FHCLR	*Federal High Court Law Reports (Nigeria)*
FSC	*Federal Supreme Court Cases (Nigeria)*
FTA	Free Trade Agreement
GLR	*Ghana Law Reports*
GRBPL	*Gravitas Review of Business and Property Law*
HILJ	*Harvard International Law Journal*
HKLR	*Hong Kong Law Reports*
HLR	*Harvard Law Review*
IBL	*International Business Lawyer*
ICA	Indian Council for Arbitration
ICC	International Chamber of Commerce
ICC Bulletin	*ICC International Court of Arbitration Bulletin*
ICCA	International Council for Commercial Arbitration
ICCLR	*International Comparative and Commercial Law Review*
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICLR	*International Construction Law Review*

ICSID	International Centre for Settlement of Investment Disputes
ICSID Rev-FILJ	*International Centre for Settlement of Investment Disputes Review – Foreign Investment Law Journal*
ICTR	*Iran–United States Claims Tribunal Reports*
ILA	International Law Association
ILC	International Law Commission
ILJ	*International Law Journal*
ILM	*International Legal Materials*
ILR	*International Law Reports*
ILW	*Investment Laws of the World*
IMF	International Monetary Fund
IMSLR	*Imo State (of Nigeria) Law Reports*
Int Arb Rep	*International Arbitration Reporter*
Int Law	*International Lawyer*
Int Org	*International Organization*
ITBL	*International Tax and Business Lawyer*
JAL	*Journal of African Law*
JBL	*Journal of Business Law*
JCAA	Japan Commercial Arbitration Association
JCI Arb	*Journal of the Chartered Institute of Arbitrators*
JENRL	*Journal of Energy and Natural Resources Law*
JIA	*Journal of International Arbitration*
JIBL	*Journal of International Business Law*
JIL	*Journal of International Law*
JILP	*Journal of International Law and Policy*
JPPL	*Journal Private and Property Law* (University of Lagos)
JWT	*Journal of World Trade*
JWTL	*Journal of World Trade Law*
KCAB	Korean Commercial Arbitration Board
KLRCA	Kuala Lumpur Regional Centre for Arbitration
L Ed	*Lawyer's Edition*
LCIA	London Court of International Arbitration
LJIL	*Leiden Journal of International Law*
Lloyd's LR	*Lloyd's Law Reports*
LMCLQ	*Lloyd's Maritime and Commercial Law Quarterly*
LNTS	*League of Nations Treaty Series*
LPIB	*Law and Policy in International Business*
LR	Law Review
LRC (Comm)	*Law Reports of the Commonwealth (Commercial Series)*

LRCICA	Lagos Regional Centre for International Commercial Arbitration
LSE	London School of Economics and Political Science
MALQR	*Model Arbitration Law Quarterly Reports*
MIGA	Multilateral Investment Guarantee Agency
MLJ	*Malayan Law Journal*
MNC	multinational corporation
Model Law	The Model Law on International Commercial Arbitration created by the United Nations Commission on International Trade Law (UNCITRAL)
NAFTA	North American Free Trade Agreement
NCLR	*Nigerian Commercial Law Reports*
NIA	Nevis Island Administration
NIEO	New International Economic Order
Nigerian JIA	*Nigerian Journal of International Affairs*
Nigerian JR	*Nigerian Juridical Review*
NILR	*Netherlands International Law Review*
Nord TIR	*Nordisk Tidsskrift for International Ret*
NSWLR	*New South Wales Law Reports* (Australia)
NVIR	*Nederlandse Verenining Voor International Recht*
NWLR	*Nigerian Weekly Law Reports*
NYBIL	*Netherlands Yearbook of International Law*
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
NYLSJICL	*New York Law School Journal of International and Comparative Law*
NYUJILP	*New York University Journal of International Law and Policy*
OAMCE	l'Organisation africaine et malgache de coopération économique
OAU	Organization of African Unity
OGLTR	*Oil and Gas Law and Taxation Review*
OHADA	Organization for the Harmonization of Business Law in Africa
OJ	*Official Journal of the European Communities*
OUP	Oxford University Press
PASICL	*Proceedings of the African Society of International and Comparative Law*
PASIL	*Proceedings of the American Society of International Law*
PCA	Permanent Court of Arbitration
PCIJ	*Permanent Court of International Justice Reports*

PTA	Preferential Trade Area for Eastern and Southern Africa
RADIC	*African Journal of International and Comparative Law*
RdC	*Receuil des Cours* (Collection of the Hague Academy Lectures)
SADC	South African Development Community
SALC	South African Law Commission
SALJ	*South African Law Journal*
SAYIL	*South African Yearbook of International Law*
SCLR	*Southern California Law Review*
SCNR	*Supreme Court of Nigeria Law Reports*
SOAS	School of Oriental and African Studies, University of London
Syracuse JILC	*Syracuse Journal of International Law and Commerce*
TLR	*Times Law Reports*
TNC	transnational corporation
TRAC	Tehran Regional Arbitration Centre
UKTS	*United Kingdom Treaty Series*
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL YB	*UNCITRAL Yearbook*
UNTS	*United Nations Treaty Series*
Vanderbilt JTL	*Vanderbilt Journal of Transnational Law*
VCLT	Vienna Convention on the Law of Treaties of 1969
WAMR	*World Arbitration and Mediation Reporter*
WAR	*World Arbitration Reporter*
WTAM	*World Trade and Arbitration Materials*
YBCA	*Yearbook of Commercial Arbitration* (International Council for Commercial Arbitration)
YLJ	*Yale Law Journal*

General introduction

International commercial arbitration highlights not only the existence of many controversies in international commercial transactions but also conflicts of interest between developed and developing states. The diversity of the parties to international commercial relations is reflected in their conflicting goals and points of views, making disputes almost inevitable. There is also the rarely articulated but ever-present feeling that African national courts are inappropriate for the resolution of international commercial disputes, leading investors and traders to insist on arbitration or alternative dispute resolution (ADR) mechanisms. These procedures have their particular advantages that may benefit parties to commercial transactions. Their use might also contribute to the economic development and prosperity of African states and their citizens, since such processes can facilitate the efficient allocation of productive resources. Yet, despite their advantages, these dispute resolution methods are little developed in Africa. While some African states are parties to multilateral treaties on arbitration and have enacted specific laws dealing with international commercial arbitration and foreign investment, these same states have misgivings about the international commercial arbitral process. They feel that arbitration runs counter to their interests, undermining national judicial sovereignty and generating considerable expense. Often, cities in these states are not chosen as venues for international arbitral proceedings, nor are their nationals frequently appointed as international arbitrators.

This book focuses on whether arbitration and the ADR methods, as opposed to litigation in national courts in Africa, can contribute to the aspirations and needs of African states and their nationals, whilst at the same time satisfying the expectations of international investors and traders for profit, security and stability, and ensuring fairness and justice

to both parties. Recent developments at the national, regional and international levels tend to lead to the realisation, or at least reconciliation, of the contending expectations. Yet, if it is to fulfil these hopes more fully, the international commercial arbitral process needs complete reorientation, so as to make it compatible with socio-economic development in Africa.

In addition to legislative reassessment of national arbitration and investment laws and accession to arbitral and investment treaties by African states, dispute resolution processes must be fostered in Africa. There is an urgent need for training and education on the dispute resolution processes, for wider publicity of commercial arbitration and conciliation, for the provision of readily available and reliable dispute resolution facilities, for increased trade and investment in and within Africa, and for greater independence of, and efficiency within, national judiciaries.

Scope of the study

There are presently fifty-three states in Africa.[1] The continent is characterised by legal, racial, linguistic and religious pluralism, making it difficult in some subject matters to draw any general conclusions and to discern any uniform trends, a difficulty exacerbated by economic and political volatility. Nevertheless, in this book, uniform developments and trends in commercial arbitration in Africa will be discerned. The study is, however, not an examination of commercial arbitration in every single state in Africa, which would be a very ambitious project. Some studies have already explored the development of commercial arbitration at the national level in Africa.[2] It would not be profitable and, indeed, would present a problem to classify African states geographically in an attempt to reflect the continent's major legal, economic, political and religious systems. Also, care must be taken not to create or artificially emphasise divisions.[3] A problem symptomatic of such an approach is that:

[1] The approach adopted in the Appendix (pp. 458–9) is to name the states of the continent followed by their dates of independence and their former colonial rulers, if any.

[2] Cotran and Amissah (eds), *Arbitration in Africa* (The Hague: Kluwer, 1996).

[3] Cf. 'the Sahara is a sea of communication rather than a chasm of separation': A. A. Mazrui, 'Afrabia', *Journal of Asian–African Affairs* 2, 1990, 137–8. The term 'sub-Saharan Africa' or 'Africa south of the Sahara' is not used in this book. Africa extends from Cairo in the north to the Cape in the south, without abridgment, encompassing, in addition, the island states of the Atlantic and Indian Oceans. It follows that the citation in this book of any publication using such terminology should not be taken as an endorsement.

[s]ome commentators are not yet reconciled to the simple and obvious fact that Africa is an Afro-Arab continent. A quarter of the population of [the] continent is Arab and is represented on both the Organisation of African Unity and the League of Arab States. These societies include the two largest African countries in territory, Sudan and Algeria, and the second largest African country in population, Egypt. There are more Arabs in Africa than there are outside Africa.[4]

For this study, it would be possible to pick and choose representative examples of states from each subdivision of Africa. However, this may be fraught with the problem of making an objective choice. Classification according to legal systems is inevitably arbitrary as well, given that some states of Africa exhibit mixed jurisdiction, combining various elements drawn from common, civil, Roman-Dutch, Islamic and customary laws respectively.

In view of the purpose of this study, the categorisation that appears most sensible is one that looks at the relevance or significance of a state and its participation in, and contribution to, the arbitral process in Africa. By reference to these yardsticks, arbitral developments in Egypt, Nigeria and Djibouti are models.

Of Egypt, in terms of its contribution at the international level, the first African Secretary-General of the United Nations (UN) was an Egyptian, Boutros Boutros-Ghali. The Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) between 1983 and 2000, was Ibrahim Shihata, an Egyptian.[5] Egypt has ratified most of the arbitration treaties to be examined in this book. In addition, Egypt is host to the first Asian–African Legal Consultative Committee's (AALCC) Regional Centre for International Commercial Arbitration established in Africa.

On the other hand, Nigeria was the first state in the world to ratify the Convention on Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and equally the first in Africa to adopt the Model Arbitration Law and Conciliation Rules elaborated by the United Nations Commission on International Trade Law (UNCITRAL). Additionally, Nigeria is host to the second AALCC Regional Arbitration Centre in Africa.

[4] A. A. Mazrui, 'The Reparation Debate', *7th Pan African News*, July/August 1993, p. 2.

[5] In 1995, the ICSID Administrative Council resolved to re-elect Shihata to serve until 2001: R*eport of the Secretary-General to the 29th Annual Meeting of the Administrative Council* (Washington DC, 10–12 October, 1995), Annex. However, the Council elected Mr Ko-Yung Tung, born in Beijing, China, on 25 July 2000, to a five-year term as ICSID's Secretary-General. Mr Tung had earlier been appointed Vice-President and General Counsel of the World Bank in December 1999. He succeeded Mr Shihata, a former Senior Vice-President and General Counsel of the World Bank, who retired after nearly seventeen years as ICSID's Secretary-General: *ICSID News Release*, 26 July 2000.

And, finally, Djibouti, a former French colony, was one African state with a modern and comprehensive law on international commercial arbitration prior to the UNCITRAL Model Law in 1985, having enacted a Code of International Arbitration in 1984. Thanks to the modernity of its arbitration law and its strategic geography, Djibouti is a commercial bridge between Africa and the wider Arab world as well as a suitable arbitral venue in Africa.[6] Indeed, the primary objective of the 1984 Code was to encourage those involved in international commercial transactions to select Djibouti as a seat of arbitration.[7]

As both Egypt and Nigeria had, to varying degrees, adopted the Model Law, the arbitration law of Djibouti presents a contrast to those African states hosting AALCC Regional Arbitration Centres, whose ADR laws are based on the UNCITRAL model. This might well indicate a legislative approach open to African states that reassess their ADR laws. There are, however, some other African states where the Treaty for the Harmonisation of Business Law in Africa (the OHADA Treaty) holds sway.[8]

The above choices may be criticised for omitting important states in Africa; but the selection is strictly for the purposes of this study. No doubt Ghana, Kenya, Gabon, Tunisia and South Africa, etc. are economically and politically significant. South Africa is bound to become even more so in light of political developments there since 1990. South Africa was one of the few independent African states when the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which it has been a party since 1976, was elaborated. Reforms and developments in dispute resolution matters in South Africa since 1995 will enable it to attain a rightful place among the leading arbitral venues in Africa.[9]

Structure of the book

In addition to this general introduction, the book has five parts containing thirteen substantive chapters as well as the general concluding remarks. Although primarily an interdisciplinary examination of dispute resolution regimes affecting or concerning African states and their

[6] K. Karl, 'Djibouti', *The Courier* No. 174, March–April 1999, 17, 20.

[7] 25 ILM pp. 1–2; S. K. Chatterjee, 'The Djibouti Code of International Arbitration', JIA 4, 1987, 57.

[8] 'OHADA' is the French acronym of the organisation that sponsored the OHADA Treaty, i.e. *Organisation pour l'Harmonisation en Africque du Droit des Affaires*. 'OHBLA' is the English acronym of that organisation, i.e. Organization for the Harmonization of Business Law in Africa. The former acronym is used throughout this book.

[9] See chapters 4 and 5 below.

nationals at different levels and written from an African perspective, the book has practical and comparative implications for dispute resolution and foreign investment regimes outside Africa, for non-African states and their nationals.

Part 1, which has a single chapter, is an introduction to the dispute resolution options, parties and concepts considered in the book. The various dispute resolution methods available to commercial parties in Africa, their nature, suitability, relative practical importance and effectiveness are considered, with a preference shown for arbitration.

These issues require a consideration of the institutional infrastructure for dispute resolution in the states where AALCC Regional Arbitration Centres are located. This is the focus of Part 2, which has two chapters – chapters 2 and 3 – dealing with the development of institutional arbitration in Africa. Before 1980, there was no functional arbitration institution in Africa, although various trade associations had limited mechanisms for dispute resolution. This lack of functional arbitral institutions demonstrates the stunted development of the process on the continent. The preference in disputes was for arbitral proceedings to be conducted outside the continent, with the associated cost implications. The justification advanced was that cities in Africa possessed neither the institutional nor the administrative facilities for alternative dispute resolution and that this was unhealthy for the efficiency and effectiveness of the processes. But, following the establishment of UNCITRAL in 1966 and its subsequent involvement with the AALCC, the problem received the attention it deserved, leading to the concept of regional centres for international commercial arbitration. The establishment of the regional arbitration centres, as well as the various national arbitration institutions that have been spawned by their activities, is discussed in Part 2. The argument advanced is that reliance on the facilities of the newer arbitration institutions by disputing parties may hasten the development of arbitral and ADR processes in regions where such institutions exist and further contribute to balance and fairness in international commercial relations.

Parties to disputes rarely select African cities as venues for international arbitration. This is equally true of some international arbitral institutions or arbitrators, when asked to make the choice. Award creditors from outside the continent avoid courts in Africa for the realisation of their credits. In substantive matters, international investors and traders, given the option, are reluctant to litigate before most African courts, an attitude matched by some domestic commercial parties. The justifications, apart from the familiar one of whether courts in Africa can be trusted, are

varied: in relation to arbitration, the relevant state may not be a party to the 1958 New York Convention or other pertinent treaties or regimes, with the result that the enforceability of arbitral awards and agreements cannot be guaranteed. Even when an African state has become a party to the relevant treaties, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith. It is also argued that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings.

In response, Part 3, comprising chapters 4 to 6, looks, comparatively, at the emerging legal infrastructure for dispute resolution in Africa. This involves an examination of developments and trends in arbitration laws in Africa and the problems of, and prospects for, the 1958 New York Convention in the African setting. Substantively, the model regimes for dispute resolution created by UNCITRAL are influencing the legislative policies of some African states. Other African states follow the 1999 Uniform Arbitration Act elaborated under the OHADA Treaty. A comparative examination of the features of arbitration legislation in Africa is followed by a close look at the practical utility of, and obstacles to, the 1958 New York Convention and at what legislative measures, if any, have been taken in Africa to implement the New York Convention where necessary. Suggestions are made for improving the New York Convention's remedial dimensions in an African setting.

Part 4, the longest, comprising chapters 7 to 12, deals with the experiences of African states with arbitration and conciliation under the ICSID Convention, the first major arbitration treaty in whose creation African states participated. The ICSID Convention was promoted in the 1960s as vital to a central policy objective of the newly independent African states – that of stimulating private international capital for economic development. As a result, during its elaboration, the Convention received warmer support in Africa than in Latin America or Asia. That support, and some disputes involving African states, revealed early on the practical relevance of the Convention. The rapid conclusion of bilateral investment treaties (BITs) and the enactment of national investment codes making reference to ICSID proceedings, amongst others, led to ICSID's increasing caseload. ICSID's membership, steadily on the rise at any time, is now virtually universal, encompassing states of different ideological backgrounds and at varying stages of economic development. The chapters on ICSID expose the dilemma between the needs generated by the Convention's growing importance and the fulfilment of the purpose for which it was drafted in

the 1960s. Chapter 11, dealing with 'The problems of ICSID arbitration without privity', shows not only the problems and dangers of exceeding the Convention's mandatory limits (especially through unbalanced BITs) but also the Convention's effectiveness in practice.

Finally, Part 5 comprises chapter 13, which is the substantive concluding chapter, and the 'General concluding remarks'. Respectively, these explain the lag in the growth and the development of arbitration in Africa and prescribe a way forward.

PART 1 · OPTIONS, PARTIES AND CONCEPTS

1 Introduction

Introductory remarks

Arbitration and ADR, although private processes, are not meant only for private parties. They deal to an ever-growing degree and intensity with disputes between private parties, on the one hand, and state parties, on the other hand. In some instances, they involve state parties on both sides.[1] This book will not be concerned with inter-state dispute resolution except if it assists in elaborating the book's core concerns. Inter-state dispute resolution mechanisms and institutions have been adequately covered in other works.[2]

States normally exercise their commercial functions through authorised agencies. Notwithstanding this, there are bilateral investment, and multilateral trade and investment, treaties between states which contain dispute resolution clauses implicating their respective nationals. The treaties are intended to stabilise and regulate trade or investment between the states and the nationals of other states parties, or between their nationals *inter se*, and normally contain procedures for inter-state disputes and for disputes between one party and the nationals of the other party.[3]

Arbitration as a dispute resolution option in Africa

Arbitration is but one of the dispute resolution options available to disputing parties in Africa. Parties to commercial transactions in Africa

[1] K. H. Bockstiegel, 'States in the International Arbitral Process' in Lew (ed.), *The Contemporary Problems in International Arbitration* (London: Queen Mary and Westfield College London, 1986), p. 40.

[2] E.g. J. Collier and V. Lowe, *The Settlement of Disputes in International Law* (Oxford: OUP, 1999); J. G. Merrills, *International Dispute Settlement* (3rd edn, Cambridge: CUP, 1998).

[3] E.g. the 1986 BIT between USA and Cameroon; the 1994 Energy Charter Treaty (ECT); and the 1992 North American Free Trade Agreement (NAFTA).

might litigate or make use of non-binding ADR processes, including negotiation. Arbitration has some common features with litigation. The former is a process by which a dispute between two or more parties as to their legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.[4] Arbitration is an adjudicative process in which disputants present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards.[5]

Arbitration and litigation are decisive as to outcome, and are enforceable by organised coercion, if necessary. Decision-making and outcome are unilaterally controlled by a third party (one person or a panel of more than one person) exercising some degree of accepted authority, whether emanating from the state or from the parties. In these processes, the parties surrender their ability to decide on an outcome, leaving decision on the merits to a third party (whatever its designation) who is not directly involved as a disputant. The third party decides unilaterally, mostly with an 'either/or' or 'all or nothing' effect.[6]

These shared elements distinguish arbitration and litigation from the ADR methods, e.g. negotiation, conciliation or mediation. In the latter processes (with the exception of negotiation), a third party is also involved. However, the extent of that third party's participation and the outcome of that participation, are not as extensive as those of the judge or the arbitrator. In negotiation, a third party is notably absent.[7] The essence of the ADR processes is to achieve an amicable settlement of a dispute through a compromise.

Litigation is a course often chosen by at least one of the disputing parties. It is a highly formal and regulated process with pre-determined rules of procedure. In the common law system, the parties act in an adversarial manner. An official (a stranger) representing the state, whose source of authority is exterior to the parties, resolves their dispute. By contrast, arbitration is an extra-judicial and private consensual means of resolving disputes. It is the most institutionalised of the extra-judicial dispute resolution options. It involves 'private judges' appointed by the disputants or

[4] Lord Hailsham (ed.), *Halsbury's Law of England*, Vol 2 (4th edn) (London: Butterworths, 1991), p. 332, para. 601; *Misr (Nigeria) Ltd* v. *Oyedele* [1966] NCLR 191.

[5] L. Fuller, 'The Forms and Limits of Adjudication', HLR 92, 1978, 353.

[6] P. H. Gulliver, *Disputes and Negotiations* (New York: Academic Press, 1979), pp. 3–24.

[7] Gulliver, *ibid*. at pp. 3–4; Palmer and Roberts, *Dispute Processes* (London: Butterworths, 1998), pp. 63–4.

on their behalf. The arbitral tribunal derives its immediate authority solely from the parties' agreement to arbitrate, although the latter does not exist in a void. Subject to mandatory norms, the extent and scope of how and when an arbitral tribunal would act may be circumscribed by the parties' agreement. Without the parties' valid agreement to arbitrate, there can be neither a valid arbitration nor an award.[8]

Arbitration as an ADR process

Arbitration is usually classified as an ADR mechanism, i.e. an alternative to litigation. Dispute resolution is divided between private and public processes. The public processes are principally represented by the court, hence arbitration's assimilation to ADR.[9] In light of the maturation of arbitration and the popularisation of ADR, however, a new distinction needs to be drawn.

In current usage, ADR refers to methods of dispute processing that are alternatives not only to litigation but also to arbitration.[10] The South African Law Commission (SALC) observed that a vital consideration is that 'ADR provides an opportunity to resolve disputes or conflict through the utilisation of a process that is best suited to the particular disputes or conflict'.[11] Hence the practitioner's preference for the acronym 'appropriate dispute resolution'.[12] Arbitration has matured to become recognised as a distinct dispute resolution process with well-understood principles.[13] Although arbitration depends on the agreement of the disputing parties, the state provides the legal framework within which parties agree to arbitrate and in which arbitration takes place.[14] The invocation of the process nevertheless depends solely on the parties agreeing to use it to resolve their disputes.[15]

The crusade for ADR began in the United States in the mid-1970s. The movement was a reaction against the public judicial system and its defects

[8] Redfern and Hunter, *The Law and Practice of International Commercial Arbitration* (3rd edn, London: Sweet & Maxwell, 1999), para. 1-06; see chapters 10 and 11 below.

[9] V. Zernin and A. Junker, 'Arbitration and Mediation: Synthesis or Antithesis', JIA 5, 1988, 21; K. Lionnet, 'Arbitration and Mediation: Alternatives or Opposites', JIA 4, 1987, 69.

[10] Sir L. Street, 'The Language of ADR', JCI Arb 58, 1992, 17, 18.

[11] SALC, *Alternative Dispute Resolution* (Issue Paper 8, Project 94, 1997), p. 5, paras 2.1–2.3.

[12] The SALC listed arbitration as an example of 'the most common types of ADR', although, instructively, arbitration was considered in a distinct Working Paper. See *ibid*., paras 1.2, 2.3 and 3.3.

[13] C. Schmitthoff, 'Extrajudicial Dispute Settlement', *Forum Internationale*, No. 6, 1985, pp. 3, 12.

[14] Lord Mustill, 'Too Many Laws', JCI Arb 63, 1997, 248.

[15] Redfern and Hunter, *International Arbitration*, paras 1-06 to 1-16; *KSUDB* v. *Fanz* [1986] 5 NWLR (Pt 39) 74 (CA).

such as the inaccessibility of the courts, effective exclusion of deserving aggrieved parties, the costs and delays involved, the oppressive nature of the court and its environs, and the legalisation and professionalisation of society and disputes.[16] Additionally, theoretical literature appeared, advocating that the formal adjudicatory system may not always be the most satisfactory and efficient way of resolving certain disputes, as it might, in some cases, focus on the wrong question. This literature suggested that certain types of disputes were inappropriate for certain processes and asked whether society might not be better served by processes that dealt with the underlying social problems rather than merely with their symptoms.[17]

ADR is not without its detractors.[18] It is argued that there are contradictions in the informal justice system represented by ADR. The processes are presented and glorified as simple models that reduce states' participation in social affairs, but they are ambiguous and indeed open more avenues for expanded state control in order to maintain order and foster capitalism. The ADR processes neutralise or deflect conflicts, favour those with greater bargaining powers and may lead to oppression, the disregard of third party interests and the subversion of public interests. The informal processes also promote occupational self-interest, as they allow judges an excuse not to handle trivial matters while lawyers tolerate them only when the parties would have been unlikely to retain lawyers in any case.[19] Finally, as a symbol, informal methods legitimate the legal system by distorting and deflecting attention from the problems and hardships caused by the formal state institutions.[20]

Most of these views are pertinent to the African context as the ADR processes are well known and used in its social and judicial systems, even if at rudimentary stages of development.

[16] D. Smith, 'A Warmer Way of Disputing: Mediation and Conciliation', AJCL 26, 1978, 205, 208–9 (Supp); W. E. Burger, 'Isn't There a Better Way', ABA Journal 68, 1982, 274.

[17] Smith, *ibid*.; J. Auerbach, *Justice Without Law?* (Oxford: OUP, 1983); Fuller, 'Adjudication', 353.

[18] R. A. Abel, *The Politics of Informal Justice,* Vol. 1 (New York: Academic Press, 1982); H. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema', HLR 99, 1986, 668; O. Fiss, 'Against Settlement', YLJ 93, 1984, 1073; Palmer and Roberts, *Dispute Processes*, pp. 25–62; E. Grande, 'Alternative Dispute Resolution, Africa and the Structure of Law and Power', JAL 43, 1999, 63.

[19] Abel, 'The Contradiction of Informal Justice' in Abel (ed.), *The Politics of Informal Justice*, Vol. 1, p. 267.

[20] Abel, *ibid*. at p. 267; Edwards, 'ADR', 668; Fiss, 'Against Settlement', 1073; Grande, 'ADR in Africa', 63.

Conciliation as a dispute settlement option in Africa

Distinguishing among the ADR processes

There are several ADR processes.[21] This book concentrates on negotiation and conciliation or mediation, processes often discussed in Africa and relevant to this study. These processes, especially conciliation and mediation, suffer from semantic 'tangle' or 'confusion' and a misapprehension of their nature and scope.[22] They have been treated as entirely distinct processes, with an admission that the distinction between them tends to be blurred and difficult to draw in practice.[23] This book, to some extent, challenges this forced distinction. The challenge is anchored to these questions: can and how does one distinguish mediation from conciliation? What is the relationship of mediation and conciliation to negotiation? And how do these processes differ from adjudication, i.e. litigation and arbitration?

One point should be made in advance. These processes are well known in most cultures and legal systems.[24] Probably due to their non-confrontational nature and impact on social solidarity, some cultures prefer them to litigation or arbitration. In some dispute resolution regimes, parties must attempt to settle their differences using negotiation, mediation or conciliation before embarking on arbitration or litigation. The progression is normally from the non-binding processes – whether involving the participation of the disputing parties themselves or a third party facilitator – to the binding third party processes.[25]

Countries in, and peoples from, Africa and Asia are particularly known to have used these processes in settling disputes.[26] African social values and

[21] Palmer and Roberts, *Dispute Processes*, pp. 63–222C; H. D. Brown and A. L. Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell, 1998); S. Goldberg, F. Sanders and N. Rogers, *Dispute Resolution* (2nd edn, Boston: Little, Brown and Co., 1992).

[22] H. Holtzmann, 'Dispute Resolution in Europe Under the UNCITRAL Conciliation Rules' in *The Peaceful Settlement of International Disputes in Europe* (Hague Academy Workshop, 1990), p. 293.

[23] Merrills, *International Disputes*, chapters 2 and 4.

[24] Holtzmann, 'Dispute Resolution in Europe', 296.

[25] A. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', ICLQ 41, 1992, 387, 399; A. A. Agyemang, 'Settling "Political" Investment Disputes Involving African States', JWTL 22, 1988, No. 6, 123. The preference could be seen in BITs and in investment codes: see chapter 10 below.

[26] J. L. Comaroff and S. Roberts, *Rules and Processes* (University of Chicago Press, 1981), chapter 4; V. C. Igbokwe, 'Socio-Cultural Dimensions of Dispute Resolution', RADIC 10, 1998, 446; J. Tsien-Hsin and L. Shao-Shau, 'Peoples Republic of China', YBCA 3, 1978, 153–5; M Marasinghe, 'The Use of Conciliation for Dispute Settlement: The Sri Lankan

family cohesion dictated a dispute settlement process that accorded with these traits and ensured economic and social progress.[27] Family heads and, where they exist, chiefs, usually engage in the 'traditional peace-making effort',[28] the object being not to declare and enforce strict legal rights but to assuage injured feelings, to restore peace and to reach a compromise acceptable to both parties. A greater degree of reconciliation rather than rigid adjudication is used to diffuse tensions in the family and society, since tension in the traditional African society would disrupt the communistic modes of economic production.[29] In the graphic words of Quashigah:

> [i]n traditional Africa, the struggle towards existence makes it imperative for the members to always cooperate in almost all daily endeavour. Two disputing litigants today, together with the judge or judges will, tomorrow, have to cooperate in tilling the farm or hunting.[30]

Again, those processes are found in public international law. At the level of inter-state dispute settlement, a distinction has been drawn between mediation and conciliation. Mediation is said to be where *a third state* endeavours to bring the parties together by conducting negotiations between them, whereas conciliation is where the disputing parties refer the dispute to *a body of persons* for an impartial ascertainment of the facts and a suggestion of an appropriate settlement.[31] The 1907 Hague Convention for the Settlement of International Disputes uses the word 'mediation'.[32] In other

Footnote 26 (*cont.*)
Experience', ICLQ 29, 1980, 389, 393–4. A policy argument which the SALC invoked to include limited provisions on conciliation in South Africa's draft International Arbitration Act was that, as a method of dispute resolution, it 'is apparently more in keeping with traditional African methods of dispute resolution than the adversarial procedure of the (English) common law': *The 1998 SALC Report on an International Arbitration Act for South Africa* (Project 94, July 1998) paras 2.79–2.80, reprinted in *Model Arbitration Law Quarterly Reports*, 3, 1999, Nos. 2 and 3, pp. 75 and 155, citing, approvingly, A. A. Asouzu, 'Conciliation Under the 1988 Arbitration and Conciliation Act of 1988', African JICL 5, 1993, 825–9.

[27] P. E. K. Quashigah, 'Reflections on the Judicial Process in Traditional Africa', *Nigerian Juridical Review* 4, 1988–90, 1.

[28] *Ezulumeri Ohiaeri* v. *Adinnu Akabeze* [1992] 2 NWLR (Pt 221) 1, 28 *per* Belgore JSC.

[29] Igbokwe, 'Socio-Cultural Dimensions', 446; Grande, 'ADR in Africa', 63; Comaroff and Roberts, *Rules and Processes*, p. 107.

[30] Quashigah, 'Reflections', 1–2.

[31] H. Lauterpacht, *Oppenheim's International Law*, Vol. 2 (7th edn, Harlow: Longman, 1952), pp. 1–13. Cf. H. G. Darwin, 'Negotiation' in Waldock (ed.), *International Disputes: The Legal Aspects* (London: Europa, 1972), p. 77; Darwin, 'Mediation and Good Offices' in Waldock, *ibid*. at p. 83.

[32] Article 4 of the Convention provides that the function of the mediator consists in reconciling the 'opposing claims and appeasing the feelings of resentment which may have arisen between the states at variance'.

instances, instruments of international organisations have treated these processes as distinct.[33]

All the processes mentioned are for the peaceful settlement of interstate disputes. In that context too, negotiation, mediation and conciliation are less formal than the judicial and arbitral processes.[34] Yet their use has extended to the settlement of disputes between states and individuals or between individuals *inter se* under different regimes.[35] At these levels, there may be a distinction between negotiation and mediation or conciliation in the former but there is, strictly, none between conciliation and mediation in the latter. It is also becoming clearer that in international practice, while the words 'conciliation' and 'mediation' have been used interchangeably, 'conciliation' has been predominantly used:

> [T]he process by which third parties – be they States or individuals – attempt to resolve disputes is a single, integrated flexible process. This process may or may not include making recommendations depending on whether the third party considers that a recommendation would be productive and on the wishes of the parties. One word should be used to express that entire process. The word that is predominantly used is conciliation.[36]

The distinction made between mediation as relating to *states* and conciliation as relating to *a body of persons* is unwarranted. Both states and

[33] The OAU Charter, Articles 3(4) and 19; the UN Charter, Article 33(1); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN, second para., in Brownlie (ed.), *Basic Documents in International Law* (Oxford: Clarendon Press, 1995).

[34] Merrills, *International Disputes*; Northedge and Donelan, *International Disputes: The Political Aspects* (London: Europa, 1971), pp. 277–330.

[35] E.g. ICSID Convention, Articles 28–35 and accompanying Conciliation and Institution Rules; Conciliation (Additional Facility) Rules; PCA Optional Conciliation Rules 1996; ICC Optional Conciliation Rules 1988; UNCITRAL Conciliation Rules 1980; Rules for International Commercial Arbitration and Conciliation Proceedings in the British Columbia International Commercial Arbitration Centre 1986; the Nigerian Arbitration and Conciliation Act 1988, ss. 37–42 and accompanying Conciliation Rules; the Indian Arbitration and Conciliation Act 1996, ss. 61–81; the Bermuda Conciliation and Arbitration Act 1993, ss. 3–21; the Ugandan Arbitration and Conciliation Act 2000, ss. 49–67; the South African draft International Arbitration Act 1998, ss. 5(3), 11–15 and Schedule 5, etc. Ghana's Alternative Dispute Resolution Bill 2000, apart from providing for the use of mediation and other procedures to facilitate settlement in the course of arbitration as well as for conciliation conference before arbitration, deals with mediation as a distinct process: see pp. 131–2.

[36] Holtzmann, 'Dispute Resolution in Europe', 296–8; Street, 'Language of ADR', 18. Redfern and Hunter, while admitting, as a practical matter, the merging of the two terms, introduced a common law/civil law divide to the distinction: *International Arbitration*, para. 1-54.

individuals can engage in both processes either as disputing parties or as mediators or conciliators.[37] Recently, conciliation has received full international recognition as a separate mechanism capable of use in the settlement of international commercial disputes.[38] Institutions (e.g. the ICC, the PCA, the ICSID and the AALCC Regional Centres), *ad hoc* rules (e.g. the UNCITRAL Rules) and legislation (e.g. in Bermuda, Nigeria, India, Uganda, Ghana and South Africa) provide for conciliation.[39]

What then are the intrinsic features of negotiation? Is it possible to distinguish mediation from conciliation? To appreciate the features of these processes, they will be juxtaposed with arbitration, which by its adversarial nature, relative formality and by the binding nature of an arbitral award is closer to court proceedings than are negotiation, conciliation or mediation, respectively. Arbitration is a form of adjudication leading to unilateral decision-making by an authoritative third party. On the other hand, negotiation is a process leading to joint decision-making by the disputing parties themselves. It is an interactive process of information exchange and learning, leading ultimately to a decision acceptable to both disputing parties.[40]

Negotiation, along with conciliation or mediation, is a consensus-oriented process. Such a process is generally advisory or facilitative in nature and leads merely to a recommendation or non-binding opinion. By its very nature, settlement is normally achieved by compromise. The real difference, however, between negotiation on the one hand and conciliation or mediation on the other hand, is the presence of a third party facilitator in the latter. Mediation or conciliation is a process of joint decision-making with the help of a third party.[41] Both processes are auxiliary to negotiation.

[37] ICSID Convention, Articles 25 and 28–35. Negotiation, mediation or conciliation can be seen in trade and investment agreements with respect to investor-to-state and state-to-state dispute settlement procedures.

[38] In 1980, UNCITRAL adopted the UNCITRAL Conciliation Rules, YBCA 6, 1981, 165.

[39] See note 38, p. 17 above. The 1995 Arbitration Act of Sri Lanka expressly authorises the arbitral tribunal, with the agreement of the parties, to use mediation, conciliation or any other procedure at any time during the arbitral proceedings to encourage settlement. Any settlement that results from the use of these techniques shall, if requested by the parties, be recorded by the arbitral tribunal in the form of an arbitral award on agreed terms. This award has the same status and effect as any other arbitral award made in respect of the dispute (s. 14(2), (3) and (4)). Cf. the Model Law, Article 30(2).

[40] Negotiation is both a social and a universal process: S. Macaulay, 'Non-Contractual Relations in Business', *American Sociological Review* 28, 1963, 55, 60–7; Palmer and Roberts, *Dispute Processes*, pp. 18–19, 63–70; P. Gulliver, 'Negotiations as a Mode of Dispute Settlement', *Law and Society Review* 7, 1973, No. 4, 667–9.

[41] Palmer and Roberts, *Dispute Processes*, pp. 18–19; Gulliver, *Disputes and Negotiations*, pp. 3–7.

Each is normally based and built on negotiation. A mediator or conciliator is essentially a facilitator, a third party that orchestrates the process of joint decision-making (negotiation) which may eventually lead to something acceptable to both disputing parties. Any of the disputing parties may refuse to accept the settlement. In negotiation, the principal disputants are involved in a diadic interactive process; once a third party is involved, the interaction becomes a triadic process which is then rightly called mediation or conciliation.[42] Yet, while in mediation or conciliation a third party is always involved, there is no surrender by the disputing parties to the third party of the power to make a decision, as in arbitration and litigation. An outcome is arrived at through the willing participation of the disputing parties, although the presence of the third party might exert an influence. Nevertheless, the third party is not a unilateral decider; the parties can easily disregard the views or recommendations by the third party.

In the consensus-oriented processes, the disputing parties' own meanings and understandings circumscribe the ultimate settlement. The outcome is qualitatively different from the outcome of adjudication: in arbitration and litigation, a binding either/or, or a zero sum, outcome is reached. In negotiation, mediation or conciliation, the outcome is a non-zero sum. Compromises are made to achieve a settlement acceptable to both parties. There is no winner or loser.

Can one, then, distinguish meaningfully between mediation and conciliation? The views of Holtzmann and Street have been noted.[43] It is common for mediation and conciliation to be treated as if two different procedures were involved.[44] It is even more common to see a description of the functions of a mediator by one writer to be considered by another to be the conciliator's and *vice versa*.[45] Holtzmann observes that *Webster's Unabridged Dictionary*[46] includes the word 'mediation' in defining 'conciliation' and uses 'conciliation' to define 'mediation'.[47] Elsewhere, it has been said that conciliation denotes a less formal procedure than mediation or one in

[42] Gulliver, *ibid*. at p. 213. [43] See p. 17.

[44] Cf. Redfern and Hunter, *International Arbitration*, paras 1-53 to 1-54; Merrills, *International Disputes*, chapters 2 and 4.

[45] Street, 'Language of ADR', 18: 'It is devastatingly significant that, amongst those who assert that the distinction exists [between mediation and conciliation], there is a direct reversal of polarity as to which word describes which process.' [46] 3rd edn, 1976.

[47] Holtzmann, 'Dispute Resolution in Europe', 296. The Bermuda International Conciliation and Arbitration Act 1993, s. 2, the Arbitration (Amendment) Ordinance 1996, s. 3, amending the Arbitration Ordinance Cap. 341 (Hong Kong) and the South African draft International Arbitration Act 1998, s. 5(3), provide that conciliation includes mediation and conciliator includes mediator.

which the neutral third party is less active. According to the Chartered Institute of Arbitrators (UK), the conciliator, in helping the disputing parties, will not generally make a recommendation as to the terms but a mediator will go further and formulate his or her own recommendation on settlement terms.[48] Finally, Murray, Rau and Sherman are of the view that conciliation and mediation are sometimes used to describe the same process, that of involving a third party, *often* in the context of *labour relations* when neutral intervention is used to break a stalemate.[49]

The only point of convergence between these permutations is that mediation or conciliation is a form of third party intervention aimed at an amicable settlement of disputes. Otherwise, mediation and conciliation describe the same process; they are synonyms and are generally used interchangeably.[50] While there is no general consensus as to whether conciliation is an active or a passive pursuit,[51] the utility of attempting to introduce activity or passivity as a distinguishing feature has been rightly questioned.[52] The making of recommendations, which is said to be a feature of active participation by the mediator, is not unique to mediation.[53] Whether or not a third party intervener will make a recommendation depends on the circumstances and is a question of degree and form. Skilful outsiders usually make recommendations only if the likelihood of acceptance is great.[54] It would also be narrowing down the scope of conciliation as a dispute settlement process to suggest that it is restricted to breaking stalemates in labour disputes. Conciliation is a universal process and all disputes involve a stalemate, no matter how indisputably right one of the disputants believes she is or how indisputably wrong she believes her opponent is.[55] There is a subjective element in all disputes.

Conciliation, as a universal process, is available for settling investment disputes between states and nationals of other states, political and legal disputes between states, and commercial and domestic relations disputes

[48] The Chartered Institute of Arbitrators, *Guidelines for Conciliation and Mediation* (1990 edn).

[49] Murray, Rau and Sherman, *Processes of Dispute Resolution* (Westbury: Foundation, 1996), pp. 293–4 (emphasis added).

[50] L. Fuller, 'Mediation: Its Forms and Functions', *Southern California LR* 44, 1971, 305–8; Redfern and Hunter, *International Arbitration*, para. 1-54.

[51] Schmitthoff, 'Extrajudicial', 3; Merrills, *International Disputes*, p. 27.

[52] Street, 'Language of ADR', 17.

[53] E.g. Article 34 of the ICSID Convention authorises a Conciliation Commission, 'at any stage of the proceedings and from time to time [to] *recommend* terms of settlement to the parties'.

[54] Holtzmann, 'Dispute Resolution in Europe', 295; Street, 'Language of ADR', 18.

[55] Adapted from *Hayter* v. *Nelson and Home Insurance Co.* [1990] 2 Lloyd's LR 265, 268 *per* Saville J.

between individuals. The UNCITRAL Conciliation Rules of 1980 have this feature. They are intended primarily for the resolution of international commercial disputes, although their use is not limited by reference to the subject matter of a dispute, provided it relates to a legal relationship.[56] The Rules envisage a scope going beyond contractual relationships to include, for example, labour relations. They also give conciliation a wider scope of application than does the judicial or arbitral process, as the effectiveness of the latter processes might often be hampered by jurisdictional technicalities such as non-arbitrability, non-justiciability, lack of capacity, *locus standi* and choice of law problems.[57]

Strengths and weaknesses of conciliation

There is no doubt that conciliation, due to its simple and flexible nature, would be conducive to the settlement of commercial disputes in Africa. It has the features of confidentiality most desired by commercial parties. Its essentially voluntary and non-adversarial nature will admittedly help to reconcile feelings of resentment and will strengthen existing business relationships.[58] Menkel-Meadow extols settlement – the usual or normal outcome of conciliation – in glowing terms:

> What Settlement offers is a substantive justice that may be more responsive to the parties' needs than adjudication. Settlement can be particularized to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetization of all claim, and achieve legitimacy through consent. In addition, Settlement offers a different substantive process by allowing participation by the parties as well as the lawyers. Settlement fosters a communication process that can be more direct and less stylized than litigation, and affords greater flexibility of procedure and remedy.[59]

However, the extremely consensual and self-enforcing nature of the process and the qualitative nature of its outcome *may* reduce its practical utility in complex transnational commercial disputes. What business managers may desire in a dispute situation is an effective mechanism that

[56] UNCITRAL Conciliation Rules, Article 1(1); Holtzmann, 'Dispute Resolution in Europe', 299–300; Redfern and Hunter, *International Arbitration*, paras 1-55 to 1-57.

[57] I. Dore, 'Peaceful Settlement of International Trade Disputes: Analysis of the Scope of Application of the UNCITRAL Conciliation Rules', Columbia JTL 21, 1983, 339–51.

[58] Street, 'Language of ADR', 20–1.

[59] C. Menkel-Meadow, 'For and Against Settlement', UCLA LR 33, 1985, 485, 504–5. It was also said that: 'If the parties make their own agreement, they are more likely to abide by it and it will have greater legitimacy than a solution imposed from without': Menkel-Meadow, *ibid*. at p. 502. Cf. Abel, 'The Contradictions of Informal Justice', 267; Fiss, 'Against Settlement', 1073; Edwards, 'ADR', 668.

will ensure a binding and final decision capable of coercive enforcement internationally.[60] International commercial arbitration and its mechanisms (like international trade and investment) have the whole world as their field of activities.[61] Conciliation, otherwise called mediation, in an international commercial setting has its limitations. At least, it does not seem to satisfy the dual requirements of effectiveness and internationally binding enforceability.[62]

As a voluntary process, conciliation depends entirely on the willingness of the parties to succeed. Its commencement depends on a coincidence of willingness in the parties to use it and to abide by its outcome. So, if one party refuses to accept a request to conciliate, that party cannot be compelled to do so at the expense of having a decision in its absence – most likely an adverse decision. Not only that, the process might be disrupted midstream, and thereby not guarantee finality, as the consequence of a unilateral withdrawal by a party (which is allowed) is the termination of the process. Generally, this is impossible in arbitration.[63] An arbitration agreement is enforceable both nationally and internationally in the sense that one who is a party to it may not be allowed to disregard this option and litigate its claim in court or be allowed to withdraw midstream. However, even if a party withdrew midstream, this may not deter the arbitral tribunal from rendering a valid award if need be.

Another crucial factor is the nature of a settlement agreement. A settlement agreement is an ordinary contract which, in the absence of voluntary compliance, can only be enforced or refused enforcement in a state court.[64] A settlement agreement *per se* is not an arbitral award properly so called and does not qualify for international enforcement under arbitration conventions such as the New York Convention and the ICSID Convention, unless made in the context of arbitration.

Some national laws provide that a settlement agreement has the same status and effect as an arbitral award on agreed terms on the substance of a dispute and that an award on agreed terms has the same status and

[60] T. E. Carbonneau, *ADR*, p. 45.

[61] P. Sanders, 'Trends in the Field of International Commercial Arbitration', RdC 145, 1975, Pt 11, 205–18.

[62] Redfern and Hunter, *International Arbitration*, paras 1-72 to 1-73.

[63] E.g. the PCA Optional Conciliation Rules 1996, Articles 2(3) and 15(a), (b) and (d); the ICC Rules of Optional Conciliation 1988, Articles 3, paras 2-3 and 7(a) and (c). Cf. the PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State 1993, Articles 28 and 34(1); the ICC Rules of Arbitration 1998, Articles 6(3) and 21(2); and the ICSID Convention, Articles 25(1), 26, 34(2) and 45(2).

[64] A. D. Redfern, 'The Enforcement of International Arbitral Awards and Settlement Agreements', JCI Arb 54, 1988, 124–7.

effect as any other arbitral award rendered by an arbitral tribunal.[65] The SALC, commenting on the Indian provision, observed that, if that provision was intended to make the settlement agreement enforceable outside India as an arbitral award under the New York Convention, it is unlikely to achieve that effect since a foreign court asked to enforce the 'award' could say that it is a settlement achieved through conciliation and not an award under the Convention. Following the Bermuda Act (section 20), the 1998 South Africa draft International Arbitration Act (section 13) provides that a settlement agreement in writing arising out of conciliation in the context of an arbitration agreement, shall be enforced in South Africa as an arbitral award on agreed terms in accordance with Articles 35 and 36 of the Model Law (dealing with the recognition and enforcement of arbitral awards), which shall *mutatis mutandis* apply to the enforcement of the settlement agreement.

The South African provision operates for the enforcement of settlement agreements in South Africa. The provision is not restricted only to settlement agreements entered into in South Africa; a settlement between parties to an arbitration agreement outside South Africa is covered and could be enforced in South Africa. Unlike the Bermudan provision, the South African provision applies until the arbitral tribunal has been appointed. On the occurrence of the latter, the settlement could be made an award on agreed terms capable of enforcement as an award outside South Africa.[66]

The implication of the apparent low status of settlement agreement can also be seen in ICSID proceedings. The latter has an effective mechanism for the recognition and enforcement of arbitral awards, which is not the case for recommendations or reports of an ICSID Conciliation Commission.[67] Parties to ICSID conciliation are only required to give their

[65] Arbitration and Conciliation Act of India 1996, ss. 74 and 30(3) and (4); Arbitration and Conciliation Act of Uganda 2000, s. 31(3); and the Sri Lankan Arbitration Act mentioned at p. 18 note 39 above. In Bermuda, a settlement agreement shall, for the purposes of its enforcement in Bermuda, be treated as an award on an arbitration agreement and may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect: Bermuda International Conciliation and Arbitration Act 1993, ss. 20 and 48. On the other hand, the 2000 Act of Uganda provides that settlement agreement shall have the same status and effect as if it were an arbitral award under the Act, s. 60; and cl. 108 of the Ghana ADR Bill 2000 equates the effect of a mediation agreement (settlement), where the parties agree to be bound by the settlement, to an arbitral award on agreed terms: see p. 132.

[66] *1998 SALC Report,* paras 2.91–2.92. By contrast, s. 60 of the Uganda Act, by equating arbitral award and settlement agreement, might have the problem of international enforcement of the settlement.

[67] See chapter 12 below.

most serious consideration to the recommendations.[68] Not surprisingly, at any given time, far fewer requests for conciliation have been made to ICSID than requests for arbitration.[69] This may be partly because parties to international investment agreements or disputes would like to avail themselves of the bindingness and effectiveness of ICSID awards. Ultimately, the prospect of arbitration or its outcome might compel a settlement.

In 1983, it was suggested that an internationally binding convention be adopted for the enforcement of settlement agreements. The suggested convention was to be patterned on the New York Convention.[70] The suggestion, which is innovative, appears strange. A coercive enforcement procedure for a settlement agreement seems contrary to the nature and purpose of conciliation.[71] Admittedly, state courts may enforce a settlement agreement as any other ordinary contract, or a party in an action or in arbitration may rely upon it for the purposes of *res judicata.* However, in enforcement proceedings, the paradox is who would be enforcing what, against whom and to what purpose if it is admitted that a settlement is a compromise or an outcome founded on consensus? Whilst in the adversarial adjudicatory processes, there is a party who succeeds and a party who loses, in a conciliation process there is, properly speaking, neither a victorious nor a vanquished party. A settlement is a sort of neutralised contract founded on consensus. Having a convention for its enforcement anticipates a challenge for its refusal. That may go against the inherent nature of conciliation.[72]

It has been suggested that enforceability is not against the spirit of conciliation since amicability is important in reaching the settlement; and a

[68] ICSID Convention, Article 34(1).

[69] ICSID Cases: Doc./ICSID/16/Rev. 5 (30 November 1996); e-mail of 5 September 1997 (Amazu Asouzu) and of 5 September 1997 (Margrete Stevens), recording, as of 30 July 1997, three requests for conciliation and forty requests for arbitration under the ICSID Convention: see note 8, p. 216 below, for an up-date.

[70] E.g., Ottoarndt Glossner's draft Convention for the Enforcement of Conciliation Awards/Settlement, in Sanders (gen. ed.), *ICCA Congress Series No. 1*, p. 219. For a revised version, see IBL 11, 1983, 152.

[71] The earlier version of that draft Convention was discussed at the ICCA Seventh Congress at Hamburg in 1982. A working group, after careful deliberation, noted its novelty and stated that: 'While some reservations were expressed concerning this idea, particularly because it might overly formalize an essentially informal process, the Working Group suggests that arbitral organisations and others be invited to express their views concerning the desirability and feasibility of an international convention for this purpose': Sanders (gen. ed.), *ICCA Congress Series No. 1*, p. 267.

[72] G. Herrmann, 'Conciliation as a New Method of Dispute Settlement' in Sanders (gen. ed.), *ICCA Congress Series No. 1*, pp. 145, 159.

serious settlement is one of full commitment. Conciliation, it was further said, despite its informal character, is more than mere party-to-party negotiation because of the active involvement of an independent conciliator. Above all, a settlement agreement in conciliation is similar to a settlement agreement in arbitration (*accord des parties*) usually enforceable as an award.[73]

It is proposed to differ from some of those points. The fact is that parties to conciliation (unlike in arbitration or litigation) opted for conciliation because they do not want to subject themselves to a future coercively enforceable decision. As Herrmann noted, such enforcement would involve extra cost and time, antagonise the parties and involve procedural obstacles. This may not reflect the true intentions of the parties when opting for conciliation instead of arbitration or litigation:

> Genuine and promising conciliation depends ultimately on the positive attitude and willingness of both parties. This follows, above all, from the objective of conciliation; obviously, the dispute cannot be amicably settled against the will of a party. Willingness is not only a necessary condition for the settlement itself but is also conducive to its lasting effect and its swift implementation.[74]

As to the second point – that conciliation is more than mere party negotiation since it involves a third party – this should be admitted; but, it should quickly be added that conciliation is lower in status than adjudication which involves an authoritative third party unilaterally deciding with binding and coercively enforceable effect. Also, a settlement agreement is not similar to an arbitral award on agreed terms (consent award) because the latter, made during the course of an arbitration, is an emanation of a quasi-judicial proceeding intended to lead to a determination of the dispute. It is due to their higher status as binding decisions that arbitral awards are given international recognition and enforcement under treaties. The fact that arbitral decisions are sometimes made by consent of the parties does not alter this position – any more than the fact that judicial decisions are sometimes given by consent affects their status.[75]

A characteristic of settlement through conciliation is that it is an effort to construct a compromise out of a supervised bargain. In negotiation, it is the same process by an unsupervised bargaining. But a compromise

[73] See Herrmann, *ibid*. at p. 164, for a summary of these points made elsewhere.

[74] Hermann, *ibid*. at p. 154. One is inclined to attribute 'full commitment' to the voluntary nature of conciliation and to the willingness of the disputing parties to abide freely by its outcome rather than to any potential for a coercive enforcement.

[75] Redfern, 'Enforcement of Settlement Agreements', 124.

between parties of unequal strength is patently biased.[76] In a dispute involving a weaker party and a stronger party, the terms of the settlement might be unfair to one party. It is notable that some transnational corporations (TNCs) are stronger economically than most small and weak nation-states, including some in Africa. Such corporations enjoy superior skills, information and, at times, the overt or covert support of their home states, mainly powerful industrialised states. On the other hand, due to their territorial sovereignties, states have, subject to treaty provisions, control on the entry, establishment and operations of the corporation and other aliens within their domains. These factors might be a plus or a minus on the bargaining strengths of the corporation and the host state depending on the circumstances. A settlement agreement achieved when one of these elements of power and distributional imbalance or inequality is prevailing cannot be said to be neutral.[77] Concessions might be made to save face or to be in the good books without solving the underlying problems.[78] As has been well said, generally, 'disputes crossing lines of stratification, and more generally those, which involve gross imbalances of power, will seldom be well resolved through negotiation'.[79]

Thus, there is a general distrust of the national court. On the other hand, conciliation and negotiation may be ineffective, as they cannot be relied upon to achieve a binding and internationally enforceable decision. Between these options is arbitration. If well conducted and managed, arbitration can be a viable middle way option, the least of four evils. In procedure, arbitration is or can be less formal than court proceedings but partakes of the decisional formality of the latter and its observance of juridical standards. These ensure effectiveness, bindingness and finality, factors generally lacking in the ADR processes of negotiation and conciliation.

In the remaining section of this Part, it will further be demonstrated why arbitration should be given serious consideration in an African setting.

[76] Abel (ed.), *The Politics of Informal Justice*, p. 9.

[77] *Banco National de Cuba* v. *Chase Manhattan Bank,* 658 F 2d 875, 892 (2nd Cir. 1981); Fiss, 'Settlement', 1073; Edwards, 'ADR', 668.

[78] For safe negotiating conditions, see S. Roberts, 'The Paths to Negotiations', *Current Legal Problems* 49, 1996, 97, 108–9.

[79] Palmer and Roberts, *Dispute Processes*, p. 71.

Why prefer arbitration in Africa?

Introductory remarks

As discussed above, arbitration is an option of necessity and convenience. As a practical matter, in trade and investment transactions in an African setting, arbitration is preferable to those other dispute resolution options that were considered. The reasons for that preference amid the peculiarities of Africa will be examined here. The following discussion is not only one on the general merits or demerits of using arbitration or other means of dispute resolution in Africa but also an attempt at examining those features that might make choosing arbitration a reasonable proposition in trade and investment negotiations in an African setting.

A fact of particular importance in this context is that Africa is the poorest continent. It is also the least developed and the weakest, economically and militarily. Africa's external debt burden is enormous – estimated in the 1990s to be not less than US$250 billion.[80] The burden of servicing debts is made more difficult by the dwindling export earnings of African states.[81] Servicing obligations leads to the diversion of the meagre resources needed for growth and development.[82] Today, the paradox is that, in terms of natural resources and wealth, Africa is one of the richest continents but with the poorest people. As the UN Secretary-General pertinently pointed out: 'It is evident that in development terms Africa has far too little to show for the burden of debt that has now accumulated.'[83]

Furthermore, the continent is afflicted with other political, social and economic problems and conflicts.[84] Political instability is rife due to the general lack of good governance and the presence of unaccountable governments, the prevalence of political corruption, bad economic situations and the vulnerability of political leadership to both internal and

[80] OAU, *Fundamental Changes Taking Place in the World and Their Implications for Africa* (Report of the Secretary-General to the 26th Ordinary Session of the Assembly of the Heads of State and Governments, 6 July 1990).

[81] It was reported in late 1996 that the estimated external debts of African states was US$313 billion, representing more than 70 per cent of the continent's gross domestic product (GDP), with debt servicing obligations taking about 27 per cent of the export earnings: R. Ekpu, 'The Press and Democracy', 24 *Newswatch*, 28 October 1996 (No. 18), pp. 8–9.

[82] UN, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa* (Report of the Secretary-General), RADIC 10, 1998, 549, paras 93–6.

[83] *Causes of Conflict in Africa,* para. 95.

[84] I. L. Griffiths, *The African Inheritance* (London: Routledge, 1995).

external selfish manipulations. It is also a hard fact of history that the continent was afflicted with the crimes of the slave trade and slavery for over four centuries. When the slave trade was eventually abolished, colonialism was introduced in the course of the 'civilising mission'.[85] Partly due to the artificial boundaries created during the colonial era (which were mostly endorsed by the new states in Africa at independence or soon thereafter) and internal maladministration, inter-state and particularly intra-state conflicts are common, thereby intensifying the refugee and other problems of the continent.[86]

Conflicting interests and disputes

After the Second World War and following the political independence of most African states, a crucial item in all national agendas was that of socio-economic development. Today, this problem is as fundamental, if not more so, than at independence. It is probably one of the main sources of the other problems of the continent:

> In general, African countries have under-developed economies. First, they are primary-producers; second, they face population pressures and from the stand point of development, labour is relatively abundant and per capita output is low; third, they have natural resources that are under-utilised or mis-utilised; fourth, they have an economically backward population; fifth, they are oriented towards foreign trade; sixth, and more fundamental, they are generally capital-deficient.[87]

Most economies in Africa are dependent on external aid.[88] African states need and engage in international trade and host foreign direct investments (FDI). The role of the state has increasingly been transformed in the past several decades.[89] A great deal of international trade is conducted by state-created agencies. Most of the joint ventures formed between TNCs from the developed market economies and the national enterprises of the

[85] R. Brown, 'European Colonial Rule in Africa', in *Africa: South of the Sahara* (28th edn), p. 18; Griffiths, *The African Inheritance*, chapter 5; J. N. Pieterse, *White on Black: Images of Africa and Blacks in Western Popular Culture* (New Haven: Yale University Press, 1992), pp. 76–101. The nexus between the slave trade, slavery, colonialism and the development of commercial arbitration in Africa will be explored in chapters 4 and 13 below.

[86] *Causes of Conflict in Africa*, p. 549. Among the principles of the proposed African Union is respect of borders existing on achievement of independence: Constitutive Act of African Union, Done at Lomé, Togo, 11 July 2000, Article 4(b).

[87] A. Akinsanya, 'Host Government's Responses to Foreign Economic Control', ICLQ 30, 1981, 769–73.

[88] The value of aid and its application in Africa has been questioned: P. McAuslan, 'Good Governance and Aid in Africa', JAL 40, 1996, 168; J. Sachs, 'Growth in Africa', *Economist*, 29 June 1996, pp. 25–6.

[89] World Bank, *The State in the Changing World* (World Development Report, 1997).

developing states have this feature of state participation either in the form of equity ownership or in management or in both. In the developed market economies, state participation or intervention is a feature of international business. The modern state has added to its traditional roles of a provider of security and the defender of the territory that of a regulator of trade and investment as well as of a merchant. States pursue the profits so essential to their economies, negotiate with firms and compete with each other to attract firms into their territories. States are generally no longer interested in the acquisition of territories: 'The most prominent form of competition for possessions is in national economic growth and in the commercial activities and possessions abroad which result from it and assist it.'[90] In such new roles, disputes are inherent, and occasions for conflicts are common. And, it appears that the state-centricity of the international political economy is being strongly challenged.[91] However, this does not equate a private firm to a sovereign state – in nature, responsibilities and purpose.

In Africa, as economic and social developments are very important, Africans look to the state to give them control over the allocation of resources, to promote development and to better their standards of living. This often leads to extending the state's activities and intervention in the economy far beyond fiscal and administrative capabilities and resources.[92] The continent generally lacks the technology and capital that are so essential for its development. Accordingly, African states resort mainly to industrialised states for these productive assets, which come largely through trade and investment in inter-regional transactions. This might also explain why disputes involving parties from Africa and the developed states are mainly between an African state and a private enterprise.[93] ICSID proceedings are an exception in a way in that they must involve a Contracting State and a national of another Contracting State.[94] Hence, it may take a long time to reverse the trend in those proceedings as they pertain to the geographical origins and the nature of the parties that might be involved.[95] It is unlikely, in the immediate future, that a dispute

[90] Northedge and Donelan, *International Disputes*, p. 39.

[91] J. M. Stopford, S. Strange and J. Henley, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge: CUP, 1991); S. Strange, T*he Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: CUP, 1996).

[92] Williams, 'African in Retrospect and Prospect' in *Africa: South of the Sahara* (28th edn, London: Europa, 1999), p. 3.

[93] K. H. Bockstiegel, 'Arbitration Between Parties from Industralised and Less Developed Countries' in ILA, *Report of the 60th Conference 1982*, pp. 269, 272. [94] See p. 267.

[95] The only exception to the geographical origin and nature of the parties to ICSID proceedings so far is *Ghaith R Pharaon* v. *Republic of Tunisia*: see p. 249.

would arise under the ICSID Convention between a developed Contracting State (as respondent) and a private party, national of a developing Contracting State (as claimant).[96]

A trend in Africa and much of the developing world is to divest government interests in some commercial enterprises leaving them in the private sector. Much of these privatisation and commercialisation programmes are part of the Structural Adjustment Programmes (SAPs) of the World Bank, the International Monetary Fund (IMF) and creditor states of indebted developing states. It has nevertheless been cautioned that these programmes that may allow foreign firms to regain control over politically sensitive and strategic sectors of developing states' economies run the risk of instigating economic nationalism in these states. It might ultimately lead to a return to more radical FDI policies in the future.[97] Indiscriminate privatisation has not always been of any significant advantage to most African states. Instead, new class systems and social disunity are being established and institutionalised: 'It has made the rich, richer; and the poor, poorer.'[98]

An ultimate positive impact of the privatisation and commercialisation programmes is that they might help to develop and nurture a strong private sector that will need and facilitate the development of the arbitral process in Africa. One reason arbitration is little developed in Africa may be the predominance of the government and its instrumentality in business and economic life of most states.[99] There may not be an organised, strong and viable private sector in most African states. Also, most early, especially the immediate post-independence, arbitration or other national laws in Africa prohibited the state or its agencies from entering

[96] With the tendency for the promotion of inter-African trade and investment along with the several regional integration schemes in Africa and the fact that states which were traditionally considered as capital-importing are, to some extent, exporting capital to other states including into the traditional and established capital-exporting states, the geographical origins and the nature of the parties to commercial and investment disputes and proceedings might, in the long run, slightly shift.

[97] E. Kennedy, 'Relationship Between TNCs and Government of Host Countries: A Look to the Future', Transnational Corp. 1, 1992, No. 1, 67. Cf. P. T. Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell, 1999), pp. 9–11, 493.

[98] R. Akinjide, 'Robbing Paul to Pay Peter', 19 *Newswatch* (No. 8), 24 February 1994, p. 35. See also B. R. Riddell, 'Things Fall Apart', *Journal of Modern African Studies* 30, 1992, 53, 67; P. Gibbon, 'The World Bank and African Poverty', *Journal of Modern African Studies* 30, 1992, 193; S. P. Schatz, 'The World Bank's Fundamental Misconception in Africa', *Journal of Modern African Studies* 34, 1996, 239.

[99] Cotran and Amissah, *Arbitration in Africa*, pp. 10–11, for the remarks of Amos Wako on the point and see pp. 416–28.

into international arbitration agreements or at least from doing so without specific authorisation which may not easily be obtained.[100]

An important part of international commercial intercourse lies in the goodwill and the harmonious relationship it builds across nations and peoples. It promotes specialisation, interdependence and efficiency, thereby bringing out the competitive advantages of nations.[101] Parties to trade and investment transactions have their various interests, stakes and goals. The private investor or trader engages in such transactions for its own economic interests, for example by a drive to make profits which would otherwise not have been made in the metropolitan country or by the desire to seek access to raw materials, markets or cheap labour (which are abundant in Africa) or all of these. However, African states may see these transactions as the instruments for achieving their socio-economic policy objectives. As a result, the state may not only participate and can as a merchant, through its agencies and by virtue of its territorial sovereignty, also assume a regulatory and supervisory role especially with respect to investments made in its territory. Unlike the private trader and investor, profit generation, although important, may not be the only or indeed even the decisive motive for the state's participation or intervention in commercial transactions.

Conflicting interests also attend these different stakes implicated in international commercial intercourse. In the case of investment, an investor wants and needs (and should, accordingly, be given) maximum security and a stable environment for a fruitful achievement of its primary objectives.[102] On the other hand, the host African state or any other state wants and needs (and should, subject to its international obligations, be allowed) maximum freedom of action to regulate investments so as to bring them in line with its other policy objectives – economic, fiscal, social, environmental, etc.

Added to these conflicting interests and goals is the fact that trade and investment is becoming increasingly complex.[103] Commercial dealings involve large sums of money and, generally, longer periods before profits result. This complexity has been and will continue to be accentuated by the commercial activities of sovereign states and their trading agencies.

[100] See pp. 147–8, for changes made by the third generation arbitration laws in Africa in that respect.

[101] M. Porter, *The Competitive Advantages of Nations* (London: Collier Macmillan, 1989).

[102] R. Higgins, 'Pre-Conditions for Foreign Investment', *Energy Law* (IBA), Topic 3, 1986, 3.

[103] Lord Wilberforce, 'The Settlement of Commercial Disputes Within the Context of International Law', Arab LQ 2, 1987, Pt 4, 331.

The involvement of a state or its agency in an international contract brings its complications. It affects the contract from its initial negotiation to its final performance and any eventual dispute.[104] And, because of the emergence of many new states in Asia and Africa since 1945 and, relatively recently, in Eastern and Central Europe, international trade and investment are faced with varied regulatory techniques and consequent conflicts.

However, disputes are a normal part of any legal relationship and, all the more so, in complex commercial ones. This may be due to the excessively long duration of some commercial relationships and the capital involved, as well as to the diverse national backgrounds of the parties, which might engender suspicion and distrust. The occurrence of disputes puts all the vital interests, goals and stakes implicated in commercial relations at risk. Disputes are insidious and diversionary. They are sources of mistrust and ill feeling. They may, accordingly, have an adverse consequence on the good faith, trust and confidence, which are useful ingredients in commercial dealings.[105] Because disputes are inevitable in commercial relationships, the challenge of international commerce is not how to eliminate or suppress disputes but how to provide for fair and effective mechanisms for their objective resolution when they arise. Effective dispute management is ultimately a prerequisite for an orderly growth of transnational commerce.[106] Certainty, predictability and the neutrality of the forum assure and reinforce this.[107]

Efficient allocation of resources

It has been suggested that business people will be more inclined to enter into transnational commercial transactions if they feel confident that potential disputes will be settled in a forum more neutral than the other party's national courts. Many international wealth-creating transactions may, accordingly, fail if commercial parties lack confidence in the available dispute resolution options open to them.[108] The absence of any reasonable certainty of a neutral, predictable and effective forum may

[104] K. H. Bockstiegel, *Arbitration and State Enterprises* (Deventer: Kluwer/ICC, 1984–9); J. P. Carver, 'The Strengths and Weaknesses of International Arbitration Involving a State as a Party', *Arbitration International* 1, 1985, No. 2, 179.

[105] P. J. O'Keefe, *Arbitration in International Trade* (Sydney: Prosper, 1975), p. 10.

[106] R. N. Gardner, 'Economic and Political Implications of International Commercial Arbitration' in M. Domke (ed.), *International Trade Arbitration* (AAA, 1958), p. 15.

[107] *Fritz Scherk* v. *Alberto-Culver Co.*, 417 US 506–16 (1974) (footnote omitted).

[108] W. W. Park, 'Private Adjudication and the Public Interests', Brooklyn JIL 12, 1986, 629, 640; T. Oyekunle, 'New Options in Dispute Management', GRBPL 4, 1991, No. 15, 104.

impede or distort international trade and investment, resulting thereby in a less efficient exploitation and allocation of global resources:

> Whether justified or not, concern over litigation bias against foreigners will inevitably chill international transactions unless there exists a relatively neutral alternative to the judicial system of the potential adversary. In the international commercial arena, there exists no non-national commercial courts of compulsory jurisdiction. Cross-border economic co-operation has therefore come to rely on forum selection mechanisms of a contractual nature to provide the neutrality and predictability which commercial actors in a single-country context take for granted. Contracts do not enforce themselves automatically, but need the intervention of flesh and blood adjudicators. Thus the identity of *who* interprets the agreement may be more significant than *what* the applicable law says about its construction.[109]

Arbitration, if properly conducted and managed, should be seen as a necessary pre-condition for the smooth functioning of international commercial relations.[110]

The primary consideration for a preference of arbitration over court litigation in the African setting is whether arbitration can in any way contribute to the aspirations and needs of African states and their nationals for socio-economic development and prosperity, whilst at the same time satisfy the needs and expectations of the other party (Africa's economic partners) for security and stability, as well as ensure fairness and justice to both parties. If any of these indispensable objectives is lacking, then the process should be reoriented by those concerned towards their realisation.[111]

Fears in litigating in a foreign forum

Due to disparities between the systems of thinking, national ideologies and methods of conducting business in the various regions of the world,

[109] W. W. Park, 'Bridging the Gap in Forum Selection', *Transnational Law & Contemporary Problems* 8, 1998, 19, 26 (footnotes omitted).

[110] *Harbour Assurance Co. Ltd* v. *Kansas General International Insurance Co. Ltd* [1992] 1 Lloyd's LR 81, 93; S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge: CUP, 1987), p. 66. Cf. 'arbitration is not only a work of peace, not to mention justice. It is also an instrument of participation in development': M. Bedjaoui, in Kemicha (ed.), *Euro-Arab Arbitration Congress* (Lloyd's Press of London, 1991), p. 217.

[111] Sempasa, 'Obstacles', 387; S. K. B. Asante, 'The Perspectives of African Countries on International Commercial Arbitration', LJIL 6, 1993, 331; G. Wilner, 'Acceptance of Arbitration by Developing Countries' in Carbonneau (ed.), *Resolving Transnational Disputes Through International Arbitration* (University Press of Virginia, 1984), p. 283; J. T. McLaughlin, 'Arbitration and Developing Countries', *International Lawyer* 13, 1979, 211; T. Oyekunle, 'The Importance of Arbitration in Trade with the Developing World' in Sanders (gen. ed.), *ICCA Congress Series No. 1* (Kluwer, 1983), p. 15.

a national of a particular jurisdiction will be more likely to present a more convincing case by the standards of the court of her jurisdiction than will a foreigner.[112] The negative perception of a judge's national predisposition may prevent parties with different national or cultural backgrounds from agreeing on a suitable court to hear their disputes. In the absence of an agreement as to a proper forum, the only option for one of the parties is to institute a lawsuit in her national court or elsewhere depending on the motives or expected results.[113]

The arguments for submitting disputes arising out of international commercial agreements to arbitration rather than to national courts are strengthened if a state party and a private party are involved. A state or its agency is unlikely to submit to the courts or laws of another jurisdiction, particularly those of the private party's jurisdiction.[114] African states and their commercial agencies may generally dislike litigating in the courts of states, which were their former imperial rulers. Among other things, African states may not have confidence that judges presiding over such courts will adequately understand their cases or appreciate their circumstances. Unlike the past stance of the Latin American states, '[A]frican governments have no policy objections against contracting to submit themselves to arbitration. On the contrary, there would seem to be clear policy preference for submission to arbitration.'[115]

By contrast, a non-state party to a commercial agreement with a state or its agency may be unwilling to submit to that state's courts if there is a major dispute. It may be feared that the state will be a judge in its own cause, or that the court will be predisposed to the state's interests.[116] It is notable in this respect that many parties, especially from the industrially developed states, detest litigating in African courts, an attitude matched by some domestic commercial actors. There is an over-generalised belief that the procedural and substantive rules and the manner in which they may be applied would not be just and fair to them. There is also the rarely

[112] C. Lecuyer-Thieffry and P. Thieffry, 'Negotiating Settlement of Disputes Provisions in International Business Contracts', *Business Lawyer* 45, 1990, 577, 581–2.

[113] W. W. Park, *International Forum Selection* (The Hague: Kluwer, 1995).

[114] S. J. Toope, *Mixed International Arbitration* (Cambridge: Grotius Publications, 1990), pp. 12, 93.

[115] Asante, 'Perspectives', 331–6; S. A. Tiweul, 'The Enforcement of Arbitration Agreements and Awards', U Ghana LJ 11, 1974, 143, 159; F. C. Okoye, *International Law and the New African States* (London: Sweet & Maxwell, 1972), p. 181.

[116] Wilner, 'Acceptance of Arbitration', 285; P. C. Jessup, *A Modern Law of Nations* (New York: Macmillan, 1948), p. 141; D. F. Vagts, 'The Multinational Enterprises and Dispute Resolution Machinery' in *New Strategies for Peaceful Resolution of International Business Disputes* (New York: Oceana, 1971), pp. 97, 103–4; W. W. Park, 'Legal Issues in the Third World's Economic Development', Boston ULR 61, 1981, 1321–8.

articulated but ever present feeling that African courts are not detached from the executive or the legislature and, therefore, impartiality and independence would not be assured if a dispute involved the government and an alien.[117] This fear, which may not be generally justified, assumes some authority when expressed by an African scholar.[118]

Augustus Agyemang is of the view that African courts are unsuitable for the settlement of investment disputes or for the enforcement of arbitral awards since they could be subjected to political pressures and would not decide a case or enforce an arbitral award against African governments.[119] Jan Paulsson has added, rather bluntly:

> It is not realistic for most African parties particularly if they are governmental entities to expect that foreign contracting parties in large contracts will accept the jurisdiction of a local tribunal. Level headed Third World negotiators will in fact concede that truly independent judiciaries do not yet exist in many of their countries. You can say it just as brutally as that. There is no reason to hide what is in everyone's mind. If you have a large contract involving the Government, there is no reason to pretend that the local judiciary will be exempt from political pressures. And in fact, when an important contract is concluded between French and German parties, neither is offended by the other's refusal to accept his own courts. Arbitration in Geneva or Zurich or London would be altogether routine as a contractual compromise.[120]

These viewpoints may seem misconceived. Otherwise, they would, in the strict sense, readily lead to the hasty conclusion that no court is suitable for settling investment disputes, no matter its state or region of origin.[121] As Paulsson argues, when or if German or French parties routinely agree to arbitrate their disputes in Geneva, Zurich or London, there is indeed

[117] Vagts, *ibid*. at p. 103; Wilner, *ibid*.; W. Fox, 'Dispute Resolution Techniques in International Contracts Involving Sales of Goods', IBL 15, 1987, 259; J. Paulsson, 'Third World Participation in International Investment Arbitration', ICSID Rev-FILJ 2, 1987, 19, 44–5.

[118] A. A. Agyemang, 'African Courts, the Settlement of Investment Disputes and the Enforcement of Awards', JAL 33, 1989, 31.

[119] *Ibid*. and see pp. 386–7.

[120] Paulsson, 'North–South Arbitration', JCI Arb 50, 1984, 37, 42.

[121] E.g. the US–Canada FTA 1988, 27 ILM 281, Article 1608(4); the NAFTA between Canada, Mexico and the US 1992, 32 ILM 605, Article 1120; the ECT 1994, 34 ILM 399–401, Article 26, between the EU, Western European, some Eastern European and non-European OECD countries but significantly, excluding the US, all provide for arbitration for the settlement of investment disputes notwithstanding the stages of development of the states involved and the relative sophistication of their national courts. The traditional practice of most Western states, including the US, it must be noted, has been to reject the use of international arbitration for investments made in their territories. They insist on the jurisdiction of their national courts based mainly on the preservation of their sovereignty. Their adoption of arbitration in the above regimes for investments made in their territories is a gradual but radical modification of that practice: T. W. Walde, 'Investment Arbitration Under the ECT', *Arbitration International* 12, 1996, 429, 446–7.

hardly anything exceptional in that, given the convenient proximity between those towns and the places of business and nationalities of the parties concerned, as reflected in their relative financial burdens and the levels of development of their countries. Whether the same expectation would be appropriate for disputes involving African and European parties, over subject matters or investments made by the latter in an African state but to be arbitrated in Geneva, Zurich or London, remains to be seen:

> The usual situation would have involved a contract, performed entirely in the ACP [African, Caribbean and Pacific] State, with most, if not all the ACP witnesses, based in the ACP State, and with at least the most substantial part of the documents required for the proceedings also available in the ACP State, but the arbitration is required to be held in Geneva. Take a case of a British, French or German contractor against a contracting authority from Fiji, Barbados or Botswana. The logistical position of the contracting authority vis-à-vis the contractor would, though not unusual, be quite intolerable. The costs to the contracting authority in the transportation of witnesses, agents and documents, and the maintenance of personnel in Geneva would be several times higher than the costs and inconvenience suffered by the European contractor taking his short trips to Geneva for the arbitration.[122]

If the argument is that courts are unsuitable in the area concerned, it may not only be because national courts are or can be under political pressures; it may be that investment disputes are technical and inherently political. Those disputes may implicate the political functions of sovereign states, one of the nationals of which may be a party to the dispute and the other the source of the complaint.[123] Secondly, it is unlikely that any arbitral award, which is not voluntarily complied with, can be recognised and enforced in any country without resort to its court.[124] Third, African courts have delivered judgments against their governments in important cases. It appears that the nationality of the claimant is irrelevant in this matter once the government has a bad case.[125] Adverse

[122] A. Amissah, 'The ACP/EEC Conciliation and Arbitration Rules', *Arbitration International* 8, 1992, 167, 180.

[123] Park, 'Legal Issues', 1321–8. The need to make use of experts for the resolution of disputes of a technical nature will be stressed: see p. 48.

[124] The NYC assumed this: see p. 177. The ICSID Convention, despite its self-contained and largely delocalised nature, conceded it by providing that courts of Contracting States should co-operate in the enforcement of arbitral awards: see pp. 380–1.

[125] E.g. *the Palm Beach Inn* case extensively discussed in C. T. Ebenroth and C. M. Peter, 'Protection of Investment in Tanzania', RADIC 8, 1996, 842, 860–7. In *Senegal* v. *Express-Navigation*, ICSID Rev-FILJ 3, 1988, 356, the Supreme Court of Senegal upheld an award rendered against that state.

decisions do arise out of African courts against governments in furtherance of the rule of law.

In *Obeya* v. *A-G (Federation) and Anor*,[126] a case involving the military government and a private concern, a shareholder in an incorporated entity – a hospital – was found by the Benue State (of Nigeria) Commission of Inquiry to be indebted to the Benue State Government (BSG). The latter believed that the debtor owned the hospital. Subsequently, acting under a law that ostensibly empowered the State Governor to recover public funds and property from government debtors, agents of the creditor government, with the aid of heavily armed military and airforce personnel, forcibly ejected the hospital's staff and took over possession of the premises. The BSG then entered and remained in possession. Pending the determination of the substantive action, the hospital applied for an injunction restraining the BSG and/or the Federal Government of Nigeria (FGN) or their agents or servants from obtaining access to and occupying the premises and requiring them to restore possession. The Supreme Court of Nigeria (SCN), contrary to the decisions of the lower courts, granted the order sought. Obaseki JSC, speaking for the Court, stated:

> I must stress that the government is entitled to pursue its debtors and recover from them all amounts legitimately due to it. The Courts of law are established both for the people and the government or authority. The government should not shy away from making use and taking advantage of the processes of the Court of law. It is a misconception to think that the measured speed with which the processes of the Court travel is too slow for the military government. Since the government has taken the civilised stand of observing the Human Rights provisions of the 1979 Constitution [identical to those of the 1999 Constitution of Nigeria] and the Rule of Law, it cannot allow its image to be tarnished, stained and mutilated by abandoning the Rule of Law and resorting to the rule of Force which, in the peculiar circumstances, is very barren. The rule of force wearing the kid glove of an Edict can never usher in social justice. It only wears the condemned face of the law. Let the Benue State Government return to the Rule of Law.[127]

Political and other subterranean pressures on courts are hardly peculiar to Africa. As Paulsson also observed: '[I]t is a fact of life that the tradition of a truly independent judiciary, impervious to political pressures, is lacking in a large part of the third world (which is not to say that it is always present in developed countries).'[128] Thus, the initial generalisation

[126] [1987] 3 NWLR (Pt 60) 325.

[127] *Ibid*. at p. 343. See also *Military Governor of Lagos State and Others* v. *Chief Emeka Ojukwu and Another* [1986] 1 NWLR (Pt 18) 621.

[128] Paulsson, 'Third World Participation', 45. For an affirmation, see: Agyemang, 'African Courts', 42. Re-examined at pp. 386–7 below.

and the consequent implication that courts in *all* states in Africa are or could be over-zealous agents of the executive, the legislature or other interests may be too alarming to be credible. As Schmidt rightly suggested: 'It would seem that the better way to characterize the problem of bias in the courts of the host state is to simply recognize that the judiciary of *any* state is capable of prejudice against an alien.'[129]

The traditions and principles of the rule of law, the independence of the judiciary and fidelity to law are enduring legacies in African legal and judicial systems.[130] Because judicial power is not self-motivated and needs to be propelled by an aggrieved applicant, and because it does not have its own coercive mechanisms, it will often rely on the executive condemned in its decisions to enforce and execute its judgments.[131] It is on the readiness of the executive to implement unfavourable decisions in good faith and without delay that the rule of law and executive accountability rest. This, unfortunately, may not be the case in some African states where incidents of executive lawlessness, arrogance and disobedience to court orders are common.[132] However, even when the executive is not the recipient of an unfavourable decision, it promotes the rule of law by having in place legal regimes favourable to efficient and cost-effective enforcement of court and arbitral decisions and to the effective realisation of legal remedies in African states.

It is not denied that the fears expressed about political pressures on African courts are totally groundless or that such pressures are wholly impossible. The crux of my argument is that any generalisation is misleading and unwarranted: 'indeed, it is unfortunately the case that much of what we hear about Africa's predicament is true. The point I want to make is simply that, however truly awful Africa's fate may be today, we need not resort either to myth-making or tautologically parochial explanations.'[133] Not only that, the occasions when African courts have been called upon to enforce (foreign) arbitral awards (one of the issues in point) are too few to warrant any definite generalisations as to their practice in the area.[134]

The view that African courts are subjected to political pressures, and are thus unsuitable for enforcing arbitral awards, is in contradiction to, and

[129] J. T. Schmidt, 'Arbitration Under the Auspices of the ICSID', HILJ 17, 1976, 90–1 n. 4.
[130] S. K. B. Asante, 'Over a Hundred Years of a National Legal System in Ghana', JAL 31, 1988, 70, 91.
[131] B. O. Nwabueze, *Judicialism in the Commonwealth Africa* (London: Hurst, 1977), pp. 225–6.
[132] O. Oyewo, 'The Judiciary in Period of Political Crisis and Conflicts in Nigeria', RADIC 10, 1998, 507.
[133] P. Chabal, 'Democracy and Daily Life in Black Africa', *International Affairs* 70, 1994, 83–7.
[134] See chapters 6 and 12 below.

is an incomplete, if not unfair, assessment of, the support and assistance which arbitration has received in Africa. African courts do give and have given support to arbitration by enforcing arbitration agreements in the face of competing litigation. Those courts have enforced (foreign) arbitral awards against African parties to arbitration.[135] Most importantly, it is incompatible with fundamental principles that African courts – indeed any court – should be expected always to recognise and enforce arbitral awards against a party, especially if it is a state party (because of the desire to be seen as free from political pressures, or as disposed favourably to international commercial arbitration) even when any of the following factors is present:

1. the arbitral award is incurably defective;
2. there was a clear subversion of minimum procedural standards in the arbitral proceedings;
3. the enforcement or recognition of the award would be incompatible with a treaty obligation of the African or other state, or otherwise contrary to its public policy; and
4. an alleged arbitration or arbitration agreement is invalid or non-existent.

A blanket inclination to enforce arbitral awards as far as possible and to view legally justifiable objections to such enforcement as obstacles to the prosperity of international commerce and the development of arbitration, would leave the door open to abuse especially of the facilitative legislation or treaties.[136] This would sustain unaccountability in arbitration, thereby leading to oppression and injustice in particular cases.

In Africa, there are judges with comparable learning, wisdom, independence and professionalism to judges in any other part of the world. Nevertheless, what has to be addressed is that, generally, in some African

[135] S. A. Tiewul and F. A. Tsegah, 'Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice', ICLQ 24, 1975, 395, 398–418; *Kassamali Gulamhusein Co. (Kenya) Ltd* v. *Krytatas Brothers Ltd* [1968] 2 ALR Comm 350; *Re Ghelani Impex Ltd* [1978] 2 ALR 4; *Senegal* v. *Express-Navigation*, 3 ICSID Rev-FILJ, 1988, 356. Some African states have enacted adequate laws on foreign investment and international (commercial) arbitration. It is unlikely that those laws, if invoked in appropriate circumstances, would not be applied. E.g., it has been said that the Tunisian judge demonstrates a willingness to enforce foreign arbitral awards according to international conventional standards: S. Kallel, 'Recognition and Enforcement of Foreign Arbitral Awards in Tunesia [*sic*]', Tilburg Foreign LR 2, 1992, 17, 37; see pp. 189–90.

[136] A. Singhvi, 'Interpretation of Foreign Awards Enforcement Statutes: Three Aspects' (paper delivered at the International Conference on Arbitration, 5–7 January 1990, New Delhi), p. 1.

states, some judges and courts lack most of the basic facilities for the efficient discharge of their duties: there may not be good and decent courtrooms, the pay may be uninviting, good libraries may be non-existent and, where they exist, the relevant books, journals and other reference materials (not just on commercial law and dispute resolution) may be totally out-of-date or completely lacking, and the legal and paralegal staff may have heavy workloads and poor working conditions. All these are part and parcel, if not the results, of the wider economic problems of the continent, which may improve with improved economic performance, with efficient and honest management of resources and by a general change of attitude to work. However, the persistence of such constraints might impair efficiency and access to justice.

An efficient and independent judiciary complements the arbitral process. As arbitration is a private contractual procedure, it needs the court for its own integrity and efficacy. Thus, it is not a question of completely avoiding or eliminating the court once there is an arbitration agreement in a contract in Africa, for, in certain situations, that may be practically impossible and, in others, it may be contrary to a country's international obligations, if not unconstitutional. The crux of the matter is how to make judiciaries in Africa, their environments and personnel more readily responsive to commercial transactions as well as to the needs of commercial arbitration for efficiency, rapidity and maximum economy – all with fairness.[137]

At times, most allegations of political pressures on courts of developing states are exaggerated. Other allegations may be made in order to justify and sustain the clear imbalance in the prevailing international arbitral order which favours certain venues, international arbitrators and representatives of parties. The fears are, in most cases, based more on entrenched psychological prejudice than on concrete facts. Some of those allegations are not made in good faith, and lack any concrete evidence.

In the latter connection and in many other respects, *Caribbean Trading and Fidelity Corp.* v. *NNPC*[138] is a very significant case. An award was made in Nigeria under the repealed 1914 Arbitration Act of Nigeria by a tribunal composed entirely of arbitrators of Nigerian nationality. The award was against the NNPC (Nigeria's oil corporation). CTFC (a corporation with

[137] For an excellent discussion of judicial reform in developing states, see I. F. I. Shihata, *The World Bank in a Changing World*, Vol. II (The Hague: Martinus Nijhoff, 1995), pp. 147–82.

[138] US District Court, New York, 6 Int Arb Rep, 1991, No. 2, F-1.

an office and place of business in New York) as the award creditor petitioned the District Court of New York to confirm the award for execution upon NNPC's assets in the US. NNPC opposed the petition and asked for a stay pending its application in Nigeria to set aside the award. CTFC argued that the District Court of New York should not stay its proceedings, as the application to set aside the award was 'patently frivolous'.[139] Further, CTFC claimed before the District Court of New York that NNPC was at a great advantage before the High Court in Nigeria, because 'Nigeria is not a democratic country but ruled by the military and its principal foreign asset earner is NNPC'.[140] The president of CTFC also alleged that it would be '[p]hysically unsafe for him . . . to go to Nigeria'.[141] The US court was neither impressed by these arguments nor convinced of their relevance. It ruled that the dispute would be more properly resolved by the Nigerian court and that 'NNPC's objections to the arbitration award are far from frivolous and deserve judicial attention'.[142] Replying to the other allegations of the petitioner, Judge Keenan said:

> Petitioner's fear of receiving unfavourable treatment in the Nigerian courts are belied by the treatment it has received thus far. Petitioner has objected to the service of process in the Nigerian proceedings and has been granted extensions of time by that court. Wild accusations made without any basis in fact are of little value to the Court.[143]

Commercial arbitration, economic rights and the judiciary

It should not be ignored that there may be improper practices in some African states. However, the positive evidence of progress in Africa should be objectively assessed. African states with such problems as alluded to earlier concerning the lack of independence on the part of the judiciary are mainly those with one party or military dictatorships. Again, this should not be generalised, as the practices of some African courts have shown even under military regimes. The constitutional aberrations – one party monopoly of political power and military intervention in party politics – may be receding as multipartism takes root.[144] There is also an increasing awareness that those aberrations should be permanently

[139] *Ibid*., F-8. [140] *Ibid*.

[141] *Ibid*. From the facts of the case, it is instructive that the oil lifting contract involved in the dispute was signed during a military regime in Nigeria and that the petitioner was the first to institute an action against NNPC at Lagos. [142] *Ibid*., F8–F9.

[143] *Ibid*., F-9.

[144] A. Hadenius, 'From One-Party to Multipartism in Africa' in Nagel (ed.), *African Development and Public Policy* (London: Macmillan, 1994), p. 231.

ended as their legality and legitimacy is powerfully questioned.[145] And many African states are parties to, and have adopted in their legal orders, instruments on human rights, which might enjoy supremacy in the national legal order.[146] All these will, with time, widen in scope, and sustained political education of the vast majority of African people will help to democratise the affairs of governance. The effects will be recorded in many aspects of public life, including, in particular as far as arbitration is concerned, the judiciary.

But it must be acknowledged that, in the emerging order, mere political and civil rights are insufficient. Popular participation and democratisation must be coupled with economic development and better standards of living for the new order to thrive and be sustained in Africa. As Amos Wako pointed out:

> In as much as development is associated with economic and social rights and democracy with political and civil rights, democracy, development and the rule of law go hand in hand. If there is no sustained economic development in developing countries, then the fragile new democracies will be threatened by enormous economic, social and cultural difficulties and complexities and these in turn will pose a grave danger to the rule of law.[147]

In a continent where people are communalistic and struggling hard for daily survival, the abstract individualism implicit in the market-oriented concept of liberal democracy might be unappealing for a very long time, if ever, without economic development, because the demand for democracy

[145] I. I. Sagay, 'Liberty and the Rule of Law as Inalienable Rights of Nigerian Citizens', *Lawyers' Bi-Annual* 2, 1995 No. 2, 168, 199; P. E. K. Quashigah, 'Legitimacy of Governments and the Resolution of Intra-National Conflicts in Africa', RADIC 7, 1995, 284; J. Crawford, 'Democracy and International Law', BYIL 64, 1993, 113; T. M. Franck, 'The Emerging Right to Democratic Governance', AJIL 86, 1992, 46.

[146] R. Gittleman, 'The Banjul Charter on Human Rights', 21 ILM 58; U. O. Umozuruike, 'The African Charter on Human and People's Rights', AJIL 77, 1983, 902; see chapter 6, p. 205 below.

[147] Wako, 'The Rule of Law', IBL 23, 1995, 350–3. For contrary views, see 'Democracy and Growth', *Economist*, 27 August 1994, p. 17; I. F. I. Shihata, 'Democracy and Development', ICLQ 46, 1997, 635. For yet another perspective on the debate, see A. Goldsmith, 'Democracy, Property Right and Economic Growth', *Journal of Development Studies* 32, 1995, No. 2, 157, arguing that democracy may have first and second order benefits for growth. The more democratic countries grow faster, perhaps because political competition is a check on predatory rulers. Such countries also appear to offer greater protection of property as business interests can wield disproportionate influence on representative government. With motivation and resources, producers can lobby for secure ownership and contract rights. The economic prerogatives, in turn, are conducive to private sector investment and growth.

in Africa draws much of its impetus from the prevailing economic conditions within.[148]

All said, political stability, the rule of law, observance of human rights, accountability and transparency in the affairs of governance as well as a track record of observing commitments (contractual and political) are indispensable elements in the quest for social and economic development as well as prosperity in Africa.[149] Most of these virtues are, one way or another, reflected in the Constitutive Act of the African Union.[150] And, an independent and efficient judiciary, as noted earlier, is complementary to, and reinforces, commercial arbitration. Nor does its existence dispense with the other merits of arbitration, such as confidentiality, convenience, procedural neutrality, forum predictability and reliability in yielding effective and internationally enforceable arbitral awards. Such a judiciary will facilitate the arbitral process, preventing its abuse by furnishing the relevant support and control. It may also be resorted to for disputes that parties might wish to litigate or that are not arbitrable under the laws of a state. In certain situations, the litigation of commercial disputes in a court attracts more overt policy and strategic advantages than does the use of arbitration, which is only a qualified exception to the normal rule.[151] Yet, under most arbitral treaties, courts are required to perform functions vital for the efficacy and efficiency of the regimes established. In doing so, courts will, in most cases, ensure the enforcement and observance of the contracting state's international arbitral obligations.

From all perspectives, therefore, an independent and efficient judiciary

[148] C. Ake, 'The Unique Case of African Democracy', *International Affairs* 69, 1993, 239, 241; and Ake, *Democracy and Development in Africa* (Washington DC: Brookings Institution, 1996). It has rightly been argued that 'for a democratic experiment to succeed [in Africa] there is a need for the electorate to be fairly literate and not too poor as to be easily attracted to vote for candidates who had provided material benefits': J. M. Nasir, 'Impact of Poverty on the Right to Vote in Nigeria', *Lawyers' Bi-Annual* 2, 1995, No. 2, 199, 209. Cf. Quashigah, 'Legitimacy', 296: 'It is a historical fact that whenever poverty is rife and the basic necessities of life are wanting particular political systems matter less to the hungry hordes. Under such conditions, therefore, the people will readily support any emergent dictator who promises them the basics of life.'

[149] Ebenroth and Peter, 'Protection of Investments', 842; World Bank, *Governance and Development* (Washington DC, 1992); World Bank, *Development in Practice: Governance* (Washington DC, 1994); World Bank, *State in a Changing World.*

[150] Preamble, objectives (Article 3) and principles (Article 4).

[151] Fiss, 'Settlement', 1073; Edward, 'ADR', 668; Menkel-Meadow, 'For and Against Settlement', 485; M. Kerr, 'Arbitration v. Litigation', IBL 15, 1987, 152–3; V. Lowe, 'Res Judicata and the Rule of Law in International Arbitration', RADIC 8, 1996, 38. The exception is, however, increasingly becoming notable in its observance in the area of international commercial transactions.

is an asset of inestimable value in all African states and should be supported by governments and policy-makers.

Multiple legal systems and procedural neutrality

Added to the expressed fears of the independence of African courts is the fact that there are many differing legal systems in Africa, such as the common law, the civil law, the Roman-Dutch law, the Islamic law and customary law systems. The relevant procedural rules may be as diverse as the substantive norms. Diversities in national legal systems in the global economic environment are usually pointed to as reinforcing the other attractions of arbitration.[152] Arbitration provides a procedurally neutral mechanism for the fair resolution of controversies.[153] As Sir Michael Kerr explained:

> What matters is that international arbitration has in general given rise to an internationally accepted harmonised procedural jurisprudence. Apart from providing a functional network for the resolution of commercial disputes, it is now playing an important new forensic role. It is establishing a generally accepted procedure for the resolution of disputes which cuts right across past and present barriers between different procedural philosophies and legal systems.[154]

Arbitration laws in Africa, generally speaking, give parties to arbitration the power freely to agree on the arbitral procedure. Parties can, within the limits granted, devise a procedure that will serve their peculiar circumstances. This may enable them to gain a greater control of proceedings than they would in court litigation, in which they would be 'operating within a fixed regime of prescribed procedural rules'[155] in the making of which there is generally less, if any, opportunities for input by the disputing parties. However, if the parties fail to agree on particular rules to guide their arbitral proceedings, the arbitral tribunal is normally given broad procedural discretion and power (within the limits of fair hearing, public policy and the provisions of the law) effectively and efficiently to conduct proceedings in such a manner as it considers appropriate. The power conferred on the tribunal includes, for the avoidance of doubt, the power to determine the admissibility, relevance, materiality and weight of any evidence.[156] The

[152] Thieffry and Thieffry, 'Negotiating', 577; Sempasa, 'Obstacles', 387.

[153] W. W. Park, 'Illusion and Reality in International Forum Selection', Texas JIL 30, 1995, 135.

[154] Kerr, 'Concord and Conflict in International Arbitration', *Arbitration International* 13, 1997, 121, 125.

[155] *Ibid*.

[156] The Tunisian Arbitration Code 1993, Article 64; the Egyptian Law on Arbitration 1994, Article 25; the Arbitration and Conciliation Act of Nigeria 1988, ss. 15, 53 and First Schedule; the Kenyan Arbitration Act of 1995, s. 20, etc.

latter may be coupled with an express exclusion of the applicable evidence laws for the purposes of arbitral proceedings, thereby eschewing the rigidity and technicalities of evidence rules appropriate for the court.

Nevertheless, legal plurality and diversity should be distinguished from the asserted ignorance of the law to justify its non-application. In the *Sapphire Award*,[157] the sole arbitrator refused to apply the law of a developing state because, among other reasons, that law was 'often unknown or not fully known to one of the contracting parties', in this case referring to the alleged ignorance of the foreign investing company.[158] In contemporary times, it would be untenable to suggest, let alone defend, such a stance: 'Nothing raises the spectre of arrogant exclusivity more than such cavalier treatment of the laws of the various members of the international community.'[159]

Reinforcing the rejection of arguments founded on ignorance of host states' laws, especially when published, is the increasing availability of legal literature and sources, electronic databases and the availability of local counsel able, ready and willing to advise businesspersons thinking of investing abroad if and when they consider the legal system important to their business decisions. However, in most African states, although law reform and development have been progressing well, at the continental level the diversity of national procedural and substantive laws and the legal pluralism arising from colonial histories might still make for inaccessibility in other respects and a constraint even for lawyers or investors familiar with particular national legal systems. Co-ordinated and coherent harmonisation, if pursued, would ameliorate the problem to a considerable extent.[160]

Recognition and enforcement of arbitral agreements and awards

An arbitration agreement commits parties to use arbitration for the resolution of any dispute covered by the agreement. It vests jurisdiction over the dispute on the arbitral tribunal and is enforceable under some national laws and international treaties. Most arbitration laws in Africa ensure the efficacy of the arbitral process by making provisions for the recognition and enforcement of arbitration agreements by national courts.[161] As an agreement to arbitrate indicates an intention to use that option without resort to the court or any other forum for the resolution of the

[157] 35 ILR 136. [158] *Ibid*. at p. 176. [159] Asante, 'Perspectives', 331–51.
[160] M. Ndulo, 'Harmonization of Trade Laws in the AEC', ICLQ 42, 1993, 101.
[161] Tiewul and Tsegah, 'Arbitration', 395.

merits of a dispute, African courts will, if requested, enforce the agreement, unless there are compelling reasons not to do so.[162] Also, some African states are parties to multilateral treaties that provide for mechanisms for the recognition and enforcement of arbitration agreements. For example, under the New York Convention, courts of Contracting States shall, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, at the request of one of the parties, refer the parties to arbitration, unless the court finds that the said agreement is null and void, inoperative or incapable of being performed (Article II(1)).

In ICSID proceedings, written consent is indispensable and irrevocable (Article 25(1)).[163] ICSID arbitration is, as a general rule, exclusive (Article 26). In most legal orders in Africa, both treaties have been implemented or preserved.[164] Thus, courts of Contracting States, some of them in Africa, will be most willing to stay proceedings instituted before them in disregard of arbitration clauses or agreements.

Arbitration may be preferred due to its reliability in yielding awards susceptible of easy enforcement under treaties or national laws. The essence of arbitration, unlike conciliation and other ADR methods, is the rendering of a binding and enforceable decision capable of coercive enforcement.[165] Although arbitration and litigation are finality-oriented processes and their outcomes are binding and coercively enforceable, in states without treaties for the mutual recognition and enforcement of foreign judgments, there may be more difficulties in enforcing such judgments than arbitral awards. In some cases, it may involve the initiation of fresh legal proceedings in the country where the judgment is sought to be relied on.[166]

[162] Tiewul, 'Enforcement', 143; the Tunisian Arbitration Code 1993, Article 52; the Egyptian Law on Arbitration 1994, Article 13; the Arbitration and Conciliation Act of Nigeria 1988, ss. 4 and 5; the Kenyan Arbitration Act of 1995, s. 6, etc.

[163] Irrevocability of consent may be theoretical in ICSID conciliation because unilateral withdrawal is of the nature of conciliation. The scheme of the ICSID Convention (Article 34(2)) acknowledges this since if a party fails to appear or participate in the conciliation proceeding, that would practically bring it to an end. By contrast, apart from the irrevocability of written consent to ICSID arbitration, the non-participation or appearance of a disputing party cannot stall the arbitration (Article 45): C. Schreuer, 'Commentary on the ICSID Convention: Articles 45–49', 13 ICSID Rev-FILJ 150 (1998).

[164] See chapters 6 and 12 below.

[165] We noted earlier that some laws provide for the enforcement of settlement agreements as if they were arbitral awards: see pp. 22–3.

[166] *Edokpolor* v. *Alfred C. Toepfer Inc. of New York* [1964] 1 ALR Comm 322, reversed in [1965] ALR Comm 505.

By contrast, it is an implied term of every arbitration agreement that the parties will carry out the award rendered unless there is a countervailing factor.[167] Notwithstanding this, laws and treaties exist to facilitate the transborder recognition and enforcement of arbitral awards. The laws of some African states mandate courts to recognise and enforce arbitral awards that satisfy essential procedural and substantive requirements.[168] However, an award may be set aside by the court on procedural or substantive public policy grounds where this is envisaged in a law or treaty, or it may be denied enforcement for the same reasons. Of the multilateral treaties dealing with the recognition and enforcement of arbitral awards, the best known is the New York Convention, mentioned above in connection with the recognition and enforcement of arbitral agreements.[169] The Convention applies to both *ad hoc* and institutional arbitral awards but is inappropriate for arbitral awards made under the ICSID Convention, which has its own award enforcement mechanism.[170] However, merit review of arbitral awards is impermissible under both treaties.

The nature of a commercial dispute, procedural informality, privacy, and desirable and potential attributes of arbitration

The nature of a dispute may be such that parties may desire only a binding and an authoritative pronouncement on their respective claims or rights. An arbitral award, like a court's judgment, is a juridical decision. However, notwithstanding the similarity in the juridical nature and potential effects of awards and judgments, the nature of a dispute *may*, in some cases, tilt the balance in favour of using arbitration:

> Where a party seeks to use a dispute to establish a precedent to bear on another natural gas transaction (perhaps based on the same or a similar contract form or wellhead or royalty agreement), then ADR is likely to be resisted because it is not precedential. Conversely, where a party seeks to avoid establishing a precedent, ADR is likely to be attractive because its results are neither precedent setting nor public as are typical judicial judgments.[171]

Also, in situations where disputing parties hope to continue dealing with each other, i.e. in recurring and ongoing relationships rather than isolated transactions between strangers,[172] the vehemence and mistrust that normally follow a contentious and perhaps acrimonious litigation *might*

[167] Redfern and Hunter, *International Arbitration*, para. 10-01.
[168] See chapters 6 and 12 below. [169] See p. 46. [170] See chapter 12 below.
[171] J. D. Watkiss, 'Considerations Affecting the Choice Between Litigation, Arbitration or Mediation in Natural Gas Disputes' (Conference on the Settlement of Energy, Petroleum and Gas Disputes, CRCICA, Cairo, 18–19 November 1995), p. 3. [172] Watkiss, *ibid*.

be mitigated by using arbitration and the ADR methods. According to Watkiss: 'This is because there is likely to be mutual appreciation between the parties and a shared, long-term interest in continuing amicable relations.'[173] But, all will depend on the attitudes and tactics of the parties and their representatives.[174] In *Ditta Luigi Gallott* v. *Somali Government*,[175] the tribunal,[176] '[n]oticed with satisfaction the attitude of friendly co-operation and fairness which has been shown by all parties concerned in this dispute'.[177]

Additionally, the arbitral process is a private and a procedurally informal dispute resolution option founded on contract. Accordingly, it enables the parties, unlike in a court trial, to control the essentials of proceedings: to adopt, within fair hearing and public policy parameters, a procedure and form, *ad hoc* or institutional, that will best suit their particular circumstances and case. Parties can tailor their arbitral proceedings according to their means, for example by agreeing on a sole arbitrator instead of a tribunal of arbitrators. Strict time limits may be made essential to the arbitral process by the parties, either expressly or through submission to institutional rules.[178] In arbitration, parties can choose their 'own' arbitrators who may be experts in the subject matter in dispute. Some disputes are by their very nature so technical and complex that it will serve the overall commercial and strategic interests of disputing parties to leave their resolution or settlement to experts familiar with the industry concerned.[179]

Arbitration permits parties to choose a venue which is neutral and convenient and which would enable them to ensure privacy.[180] Confidentiality is enhanced in that arbitral awards and documents used in the private process may not be published to third parties except with the consent of both parties to the arbitration.[181]

[173] *Ibid*. at p. 2.

[174] Tiewul and Tsegah, 'Arbitration', 395–7; P. Lalive, 'Some Threats to International Investment Arbitration', ICSID Rev-FILJ 1, 1986, 26; *Arabian American Oil Co. (ARAMCO)* v. *Saudi Arabia*, 27 ILR 117, 135.

[175] 40 ILR 158.

[176] Lagergren, President; Oliveti and Esa, Members.

[177] 40 ILR 158, 162. Cf. Lord Mustill, 'The New Lex Mercatoria', *Arbitration International* 4, 1987, 86, 118.

[178] P. D. Ehrenhaft, 'Effective International Commercial Arbitration', LPIB 9, 1977, 1191.

[179] Watkiss, 'Considerations', 1–2; T. W. Walde, 'Negotiation for Dispute Settlement', Denver JILP 7, 1977, 33, 58–60.

[180] E.g. Article 25(4) of the UNCITRAL Arbitration Rules, common to rules applicable to the AALCC Regional Centres for International Commercial Arbitration at Cairo (CRCICA), Kuala Lumpur (KLRCA) and Lagos (LRCICA), provides inter alia that the [arbitral] hearings shall be in camera unless the parties agree otherwise.

[181] Article 32(5) of the UNCITRAL Arbitration Rules, common to Rules applicable in the CRCICA, KLRCA and LRCICA, provides that the award may be made public only with the

Privacy and confidentiality are important features of arbitration, as most disputes involving (African) states, their commercial agencies and foreign traders or investors involve vital and genuine sovereign or commercial interests, which might be prejudiced if proceedings are held in open court or given undue publicity.[182]

Other advantages attributed to arbitration are that it can be less expensive, speedier and more flexible than litigation. The advantages concerning speed and costs are very relevant in an African setting where delay and congestion are common in the judicial process not only because of heavy workloads, but also the anachronistic colonial relics from which the court system suffers.[183] But the advantages of arbitration over litigation – that it can be cheaper, speedier and less formal – have also been viewed with increasing scepticism.[184] Much would depend on the parties, their representatives and, possibly, on the arbitrator(s). In any event, contrary to popular belief, arbitration is rarely an inexpensive dispute resolution option nor is it always a quick or less complex one. In court litigation, judges paid by the state sit in rooms provided by the state and staffed by public servants, whereas '[i]n arbitration, you pay both the lawyers and the arbitrator, as well as their expenses, out of pocket, travelling and subsistence'.[185] One may add that the parties will, in most cases, also pay the expenses or fees of the witnesses, experts and the room where proceedings

consent of both parties. It has been held that the confidentiality of award derives from an implied obligation arising out of the nature of the arbitration itself. Thus, parties are prohibited from disclosing or using for any other purpose any document prepared for or used in an arbitration (including the award) except with the consent of the other party or pursuant to an order or leave of the court: *Hassneh Insurance Co.* v. *Steuart J. Mew* [1993] 2 Lloyd's LR 243; *Insurance Co.* v. *Lloyd's Syndicate* [1995] 1 Lloyd's LR 272; *Dolling-Baker* v. *Merrett* [1990] 1 WLR 1205; *Ali Shipping Corp.* v. *Shipyard Trogir* [1998] 2 All ER 136. However, the confidentiality of awards and of documents used in arbitral proceedings is not an absolute rule especially if publication is permitted by law, or by the parties, or during the enforcement of an award through the court, or if the validity of an award is challenged by one of the parties. In *Esso and Others* v. *James Plowman*, 10 Int Arb Rep, 1995, No. 5, A-1, the High Court of Australia expressed misgivings about the reasoning in the *Hassneh* and the *Dolling-Baker* cases and held that confidentiality is not intrinsic to arbitration. The court then outlined circumstances under which it may be permissible or mandatory for an award and documents relating to an arbitral proceeding to be published to a third party. The case was followed in *Commonwealth of Australia* v. *Cockatoo Dockyard Pty Ltd* [1995] NSWLR 662.

[182] See pp. 109–10 for the case for the publication of awards.

[183] Tiewul and Tsegah, 'Arbitration', 395–6.

[184] Redfern and Hunter, *International Arbitration*, para. 7-29; A. Redfern, 'Arbitration: Myth and Reality', IBL 4, 1976, 450; M. Sornarajah, 'Arbitration Versus Litigation', MLJ 1, 1991, vii; H. de Vries, 'International Commercial Arbitration: A Transnational View', JIA 1, 1989, 7, 9; A. I. Okekeifere, 'Commercial Arbitration as the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth', JIA 15, December 1998, 81.

[185] P. G. Lim, 'Means of Dispute Resolution in Malaysia', JCI Arb 58, 1992, 34–7.

are held, at times, in places (countries) outside their usual places of residence, domicile or businesses and, in language(s) different from those to which they are accustomed. Thus, a genuine misgiving about the international arbitral process, particularly in African and most developing states, arises from its excessively expensive nature especially when proceedings are held abroad and before arbitrators and by representatives or counsel that must be paid in the stronger currencies of the traditional locales of arbitration abroad.[186]

Concluding remarks

It has been demonstrated, taking into consideration factors peculiar to Africa, that, in the African context, the use of arbitration has relative advantages as against litigation in court. Having advanced arguments for its increased use, it will be appropriate to assess the actual use of the arbitral process in the continent and the problem areas involved. A critical and policy-oriented appraisal will be made of the international commercial arbitral process in the African setting and the infrastructure for its conduct. The review will suggest that there is genuine and urgent need for organised and co-ordinated policy in Africa favouring the development of the *practice* and the infrastructure for alternative dispute resolution in Africa to assuage the obstacles present in its use.

[186] ICSID proceedings are subsidised by the World Bank and, if necessary, by Contracting States and might be relatively cheaper in some cases. This will especially be the case if parties agree to use facilities allowed under agreements between ICSID and regional and national arbitral institutions: see pp. 96–7.

PART 2 · INSTITUTIONAL ARBITRATION IN AFRICA

2 Development of institutional arbitration in Africa

Introductory remarks

Developing states are interested in institutions in which their active participation can generate rules that reflect and protect their interests especially in international trade.[1] The African–Asian Legal Consultative Committee (AALCC or the Committee) and, with its establishment in 1966, the United Nations Commission on International Trade Law (UNCITRAL) furnished those states an opportunity to take part in the development of dispute resolution processes. With the instigation of UNCITRAL, the AALCC commenced deliberations, which led to one of the most distinctive contributions to international commercial dispute resolution. This chapter and the next will examine one of those achievements, namely, the development of regional centres for international commercial arbitration in developing states.[2] Material for the two chapters was derived mainly from fieldwork conducted by the author in Egypt, Malaysia and Nigeria. These are the host states of some of the AALCC Regional Centres for International Commercial Arbitration. Reliance will be placed on primary, often unpublished, sources and reports, which will be identified whenever they are cited.

[1] E. E. Bergsten, 'The Interest of Developing Countries in the Work of UNCITRAL' in *Essays on International Law: Thirtieth Anniversary Commemorative Volume* (AALCC, 1987), p. 28.

[2] Apart from the regional centres, other joint achievements of the AALCC and UNCITRAL in dispute resolution include the popularisation of the 1976 UNCITRAL Arbitration Rules and the 1980 UNCITRAL Conciliation Rules, for the deliberations on whether or not to revise the NYC leading to the elaboration of the 1985 Model Law and the organisation of regional seminars relevant to their areas of interest, see A. A. Asouzu, 'Some Contributions of the United Nations, its Organs and Agencies to International Commercial Arbitration and Conciliation: Implications for Africa's Economic Development', PASICL 7, 1995, 213.

The influencing bodies and their interactions

The AALCC

The AALCC, formed in 1956, is a regional, intergovernmental organisation with a membership of forty-five Asian and African states.[3] The organisation initially started as a non-permanent initiative of only seven Asian states but later developed to become the only organisation at governmental level embracing Asia and Africa orienting its activities to complement the work of the UN in several areas.[4] It has Permanent Observer status at the United Nations General Assembly (UNGA).

An international institution such as the AALCC is normally a creation of the formal agreement of sovereign states, to be an entity distinct from its creators.[5] But an informal agreement between states may arise when '[t]heir representatives, assembled in a conference . . . decide to establish a public international organization without using the form of a treaty and without the usual proviso for subsequent ratification by each of the states'.[6] Such was the case with the AALCC.[7]

The AALCC has an international legal personality, which is not expressly stated in its constitutive instruments.[8] Such a stipulation is not

[3] The member states are Egypt, Bahrain, Bangladesh, China, Cyprus, The Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, the Democratic People's Republic of Korea, the Republic of Korea, Kuwait, Lebanon, Libya, Malaysia, Mauritius, Mongolia, Myanmar (Burma), Nepal, Nigeria, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Palestine, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, the United Arab Emirates and the Yemen Arab Republic. Myanmar was a founding (original participating) state, but for 'unavoidable reasons' it withdrew its membership on 1 January 1974. However, it rejoined the Committee during its 32nd Session at Kampala in February 1993. Botswana is an Associate Participating State, and Australia and New Zealand are Permanent Observers.

[4] Background Note, in AALCC, *Statutes and Statutory Rules* (New Delhi: AALCC), p. 1; B. Sen, 'The Evolution and Growth of the AALCC as a Forum for International Co-operation' in AALCC, *Essays on International Law: Twenty-Fifth Anniversary Commemorative Volume* (AALCC, 1981), p. 3.

[5] H. G. Schermers, *International Institutional Law* (2nd edn, The Hague: Kluwer, 1980), pp. 8–10, paras 11–13 (new edition published in 1995).

[6] Schermers, *ibid*.; A. Reinisch, *International Organizations Before National Courts* (Cambridge: CUP, 2000), pp. 4–9 and 53–9.

[7] Schermers, *ibid*. at p. 9, para. 12.

[8] Background Note, p. 1; Schermers, *Institutional Law*, p. 9, para. 12; the constitutive documents of the AALCC (the Statutes and the Statutory Rules) were respectively elaborated in 1956 and 1957: AALCC, *Report of the First Session Held in New Delhi, India, 18–27 April 1957*, pp. 7–8 and 9–17. The revised Statutes were approved at the 26th Session (1987) and adopted with effect from 12 January 1987, thereby abrogating the 1956 Statutes. The complete texts of the Statutory Rules were adopted at the 28th Session

necessary to endow an international institution with personality.[9] The AALCC is also authorised by its Statutes to conclude arrangements for co-operation with the UN, its organs and agencies and with appropriate international organisations or bodies. Further, the Statutory Rules provide that the AALCC may, from time to time, direct its Secretary-General to enter into arrangements for co-operation with such international, regional or intergovernmental organisations or committees engaged in legal work or other subjects relevant to the Committee's work.

The AALCC is a forum for Asian–African co-operation in international legal matters of common concern.[10] It has a permanent secretariat in New Delhi under an elected Secretary-General and other staff.[11] The AALCC's activities have expanded in international economic law in keeping with the needs of its members. In that field, the AALCC acts through a specialised Trade Law Sub-Committee, which works in concert with the United Nations Conference on Trade and Development (UNCTAD) and with UNCITRAL. The Trade Law Sub-Committee's activities and the mutual influence of the AALCC and UNCITRAL in international commercial dispute resolution are the primary concerns here.

UNCITRAL

UNCITRAL was established by an UNGA resolution to enable the UN to play a more active role in reducing or removing legal obstacles to the flow of international trade by promoting the progressive harmonisation and unification of the law of international trade.[12] UNCITRAL has authority to establish appropriate working relations with intergovernmental

(1989). The Rules took effect from 1 May 1989. The Administrative, Staff and Financial Regulations of the AALCC were adopted at the 29th Session (1990).

[9] F. Seyersted, 'International Personality of Intergovernmental Organizations: Does Their Capacity Really Depend Upon Their Constitution', Indian JIL 4, 1964, 1; P. H. F. Bekker, *The Legal Position of Intergovernmental Organizations* (The Hague: Kluwer, 1994), p. 56; A. S. Muller, *International Organizations and their Host States* (The Hague: Kluwer, 1995), pp. 74–7.

[10] J. C. Wall, 'The AALCC and International Commercial Arbitration', Canadian YBIL 17, 1979, 324.

[11] Dr B. Sen was for three decades, the Secretary-General of the AALCC.

[12] GA Resolution 2205 (XX1) of 17 December 1966, 1 UNCITRAL YB, p. 65, Preamble. The Resolution was adopted pursuant to Articles 1(3) and 13, and Chapters IX and X, of the UN Charter. Members of UNCITRAL are elected by the UNGA taking into consideration adequate representation of the principal economic and legal systems of the world and of the developed and the developing states. Since 1973, its membership has increased from twenty-nine to thirty-six with the following distributions: (a) nine from African states; (b) seven from Asian states; (c) five from Eastern European states; (d) six from Latin American states; (e) nine from Western European and other states: GA Resolution 2205 of 1966, s. 1, para. 1; GA Resolution 3108 (XXVIII) of 12 December 1973, 5 UNCITRAL YB, pp. 10–11, s. 8.

organisations and international non-governmental organisations concerned with the progressive harmonisation and unification of international trade law.[13] Paragraph 11(9) of Resolution 2205 of 1966 directs the Commission to 'bear in mind the interests of all peoples, and particularly those of developing countries, in the extensive development of international trade law'.[14] As the preamble to Resolution 2205 notes, divergences arising from the laws of different states in matters relating to international trade constitute one of the obstacles to the development of world trade. The interests of all peoples, particularly those of the developing countries, demand the improvement of conditions favouring the extensive development of international trade. It was, accordingly, thought desirable that the process of harmonising and unifying international trade law should be substantially co-ordinated, systematised and accelerated and that a broader participation should be secured in furthering progress.[15]

The AALCC and UNCITRAL have maintained a close and fruitful working relationship through the exchange and cross-fertilisation of ideas in their respective fields of activities, especially in international commercial arbitration in which they share a common interest.[16] International commercial arbitration enjoyed a priority status in the work programme of UNCITRAL and was included in UNCITRAL's First Session in 1968 on the suggestion of member states, including some members of the AALCC.[17]

The AALCC has been a regular observer at UNCITRAL sessions since 1970 and has given impetus to projects of UNCITRAL by making valuable inputs and recommending them to AALCC member states for consideration and acceptance. Conversely, the Secretary of UNCITRAL has attended sessions of the AALCC since 1970 and has participated in the deliberations of the AALCC's Trade Law Sub-Committee.[18]

The interactions between UNCITRAL and the AALCC in the development of dispute resolution are within the mandate of both organisations. Fair and effective dispute resolution mechanisms are indispensable components of international trade. They are effective means of promoting and developing world trade, international intercourse and world

[13] GA Resolution 2205, s. 2, para. 12. [14] *Ibid*. [15] *Ibid*.

[16] Bergsten, 'Interest of Developing Countries', 28; F. X. Njenga, 'Value of Universal Application for Regional Integration and Development' in *Uniform Commercial Law in the Twenty-First Century* (New York: UN, 1995), p. 54. [17] 1 UNCITRAL YB, pp. 76–7.

[18] AALCC, Working Paper for the Trade Law Sub-Committee, Vol. 11, Doc. No. AALCC/xxx/17, p. 2, para. 2.

peace.[19] Each of the mandates given to UNCITRAL was employed in its interactions with the AALCC, thereby producing positive practical results in states and for nationals of states that are members or non-members of the AALCC and the UN. The conception of Regional Centres for International Commercial Arbitration was one positive result of their interactions.

The conception of Regional Centres for Arbitration

The Ion Nestor Report

The initiative to regionalise arbitration centres, although implemented by the AALCC, was hardly its original idea. Regionalisation of arbitration centres was an integral part of recommendations made by Ion Nestor who was UNCITRAL's Special Rapporteur on International Commercial Arbitration.[20] The UN Conference on International Commercial Arbitration earlier stressed some of those recommendations.[21]

Nestor was appointed in 1969 to look into '[t]he most important problems concerning the application and interpretation of the existing conventions and other related problems [in international commercial arbitration]'.[22] In a comprehensive report, Nestor made recommendations for the development of international commercial arbitration.[23] The core proposals in the report were that the establishment and improvement of, and the co-operation between, arbitral institutions would lead to the progressive development of international commercial arbitration.[24] This would be coupled with the uniformity of arbitration laws and procedures

[19] M. Domke, 'The Settlement of Disputes in International Trade' in Proehl (ed.), *Legal Problems of International Trade* (University of Illinois Press, 1959), p. 402; Q. Wright, 'Arbitration as a Symbol of Internationalism' in M. Domke (ed.), *International Trade Arbitration* (AAA, 1958), p. 3.

[20] Nestor Report of 1 March 1972, 3 UNCITRAL YB, p. 193. As was explained by an AALCC Secretary-General: 'It was the recommendation contained in that report which provided the impetus for the follow-up action by the AALCC and this was initiated at the Committee's Tokyo Session in 1974. The AALCC's Scheme was thus directly linked with the work undertaken by the UNCITRAL': B. Sen, 'AALCC's Scheme for Settlement of Disputes in Economic and Commercial Matters' in *Proceedings of the Seminar on International Commercial Arbitration and Promotion and Protection of Foreign Investments in the Afro-Asian Region, Cairo, 28–31 March 1988*, p. 65.

[21] 10 June 1958, Arb J 13, 1958, 113, para. 2.

[22] Nestor Report, pp. 193–4, and the decision unanimously adopted by UNCITRAL on 26 March 1969, 1 UNCITRAL YB, p. 108, para. 112.

[23] Nestor Report, *ibid*.

[24] *Ibid*., para. 143.

as practical means towards the promotion and development of international commercial arbitration.[25] 'A move should be encouraged', wrote the Rapporteur, 'to reduce to one standard procedure the rules employed in arbitration practice by the main commercial arbitration centres of the various countries.'[26]

The report noted that a wider diffusion of information on arbitration laws, practices and facilities would facilitate access to arbitration and constitute, at the same time, a first major step towards furthering activities aimed at improving arbitral facilities and legislation.[27] It was also pointed out that technical assistance and experts should be made available to those countries lacking the expertise for the development of effective and modern arbitral legislation, and for the development of adequate arbitration machinery. The organisation of regional study groups, seminars or working parties to agree on the solutions best suited to the needs of the various countries was urged.[28] As the report noted: 'Exchange of views and personal contacts may well lead to practical results . . . The problem now is to intensify such activities and organize more sustained and systematic actions. Some people have advocated the use of educational programmes.'[29]

The report stressed the need to establish arbitral centres and facilities in some geographical regions and certain branches of trade as well as to improve existing institutions:

> Effective commercial arbitration could be greatly enhanced by the establishment of new arbitration centres in those countries where they do not exist . . . the adaptation of existing national arbitration centres to the requirements of international trade should be encouraged by appropriate measures such as adding foreign nationals to the domestic panels of arbitrators and permitting the designation of an arbitration locale in a third country. Other useful steps would be a greater uniformity in the rules of procedure of arbitral institutions and more precise drafting of standard arbitration clauses.[30]

[25] *Ibid*., para. 140.

[26] *Ibid*., para. 137. The rules of the major arbitration institutions are now substantively similar in their basic principles.

[27] *Ibid*., para. 136. In this connection, the report specifically mentioned the publication of the text of arbitration laws and the rules of arbitral institutions, their translation, information on the interpretation of statutory law in court decisions and administrative practices, the creation of arbitration publications in areas where they do not yet exist and the expansion of the activities of the existing publications (*ibid*.).

[28] *Ibid*., para. 138. [29] *Ibid*. [30] *Ibid*., para. 137.

The UNIDO Report

In 1979, the United Nations Industrial Development Organisation (UNIDO) also made similar recommendations. It suggested the establishment, development, improvement and decentralisation of arbitration centres especially in the developing states.[31] UNIDO was of the view that proposals for conflict resolution should recognise the principle of national economic sovereignty. To this end, the establishment and improvement of national and regional institutions for conflict resolution deserve the highest priority.[32] As the UNIDO report noted:

> The philosophy behind the proposal is not of rejecting existing mechanisms, but of improving them and of creating new, complementing mechanisms to increase and enrich the options available to partners in a co-operation contract. By opening up new avenues for agreement, the proposal seeks to create institutions and dynamic processes to stabilise mutually beneficial projects with a lasting community of interest and with terms not negotiated at a time of one-sided bargaining power relationship.[33]

Finally, the proposal was made that such solutions should leave all the freedom to the bilateral negotiations of partners without, however, being coerced, *de jure* or *de facto*, into arbitration through investment insurance or financial leverage. On the other hand, 'appropriate technical assistance, training and international co-ordination should be oriented at making national centres an acceptable form of conflict resolution in respect of expertise, neutrality and expediency. For the purpose of making such national bodies acceptable, utmost care has to be paid to build up a reputation for impartiality and fairness.'[34]

[31] UNIDO, 'Systems for the Resolution of Industrial Co-operation Conflicts', in *Third General Conference of UNIDO, New Delhi, India, 21 January–February 8, 1980* (ID/Conf.4/CRP.11 of 17 December 1979), p. 3. Thomas Walde authored this report. An extended version of the recommendations is reproduced in UNIDO, *Industry 2000 – New Perspectives Collected Background Papers Volume 2, International Industrial Enterprise Co-operation*, issued as Document ID/CONF.4/3 for the Third General Conference of UNIDO, New Delhi, India, 21 January–8 February 1980, especially the reports by Walde, *ibid*. at pp. 1, 86–96 and H. Strohbach, *ibid*. at pp. 262, 277–80.

[32] 'Systems for the Resolution of Conflicts', 7.

[33] *Ibid*. at p. 3. Cf.: 'We have never excluded the existing institutions which had established themselves in the colonial past in the choice of arbitral procedure that may be open to the parties. Some of them can indeed continue to perform useful roles in trading disputes in the private sectors for which they were intended, but we consider it a matter of importance that the parties should have viable options in choosing a procedure for settlement of their disputes': B. Sen, 'Keynote Address' in *Regional Seminar on International Commercial Arbitration, New Delhi, 12–14 March 1984*, p. 43.

[34] 'Systems for the Resolution of Conflicts', 7.

The AALCC dispute resolution scheme

The establishment of the AALCC Regional Centres

Arbitration has been on the work programme of the AALCC since at least 1972.[35] Before then, there were half-hearted and largely uncoordinated attempts to discuss the subject in the AALCC, which attempts were temporarily aborted in 1962.[36] In the late 1960s, other more pressing issues of international concern faced the Committee.[37]

However, 1970 saw rekindled interest in dispute resolution, due partly to the establishment of UNCITRAL. The latter's establishment and activities positively influenced developments and deliberations in the AALCC. Furthermore, there was, within the AALCC, a genuine realisation that arbitration was of great practical importance in the increasing trading and commercial activities of Asian–African states.[38] These led to the adoption of a system, which is unique in its conception, structure and purpose.[39]

The establishment of Regional Centres was a cardinal programme in, and a major achievement of, the AALCC's integrated scheme for dispute resolution.[40] The scheme comprised:

1. the setting up of a network of arbitration centres under the AALCC's auspices at strategic commercial centres in Africa and Asia with several broad-based functions; and
2. promoting and strengthening national arbitral institutions within the region.

Under the scheme, it was proposed to establish six arbitration centres at various locations in the region. On an experimental basis, three centres were established in Kuala Lumpur (1978), Cairo (1979) and Lagos

[35] AALCC, *Report of the 13th Session held in Lagos, 18–25 January 1972*, p. 65.

[36] During the 5th Session of the Committee, it was agreed that discussions which started in the 2nd Session (1958) on the ILC Draft Articles on Model Arbitral Procedures would be removed from the agenda of future sessions: AALCC, *Report of the 5th Session Held at Colombo, 17–30 January 1962*, pp. 184–8.

[37] E.g. the legality of nuclear tests (1964 Session), relief against double taxation (1964 and 1966 Sessions), the rights of refugees (1966 Session), World Court judgment on the *South West Africa* cases (1966 Session), the law of international rivers (1967 Session), and the law of treaties (1969 Session).

[38] Wall, 'The AALCC and Arbitration', 324–8.

[39] *Ibid*.

[40] *Ibid*.; B. S. Chimni, 'AALCC's Regional Centres for Arbitration' in *Regional Seminar on International Commercial Arbitration, New Delhi, 12–14 March 1984*, p. 105; R. Masud, 'AALCC', JWTL 18, 1984, 81–7.

(1989).[41] A fourth centre, which will be devoted largely to oil arbitration, has been located in Tehran.[42]

Earlier, during the AALCC's sessions in Arusha (1986) and Bangkok (1987), Kenya put in a request to consider the feasibility of establishing a Regional Centre for Arbitration in Nairobi to serve the states in Eastern and Southern Africa, 'in view of the transportation and communication difficulties vis-à-vis the proposed establishment of a third Centre in Lagos'.[43] That request was not immediately granted, as the AALCC felt that it had given the Preferential Trade Area (PTA) for Eastern and Southern Africa the technical assistance in establishing an arbitration centre, which could serve the states covered in the Kenyan proposal.[44] The African, Caribbean and Pacific (ACP) states also approached the AALCC for relevant information about the establishment and working of the

[41] At the 27th Session of the Committee, the suggestion to establish new Regional Centres was positively received but with misgivings. It was noted that, before this could be done, it would be better to carry out viability studies, to consider ways of financing any new Centre and to ensure that the new Centres should be given specific areas for their operations in order to avoid duplication and the waste of resources. Views were also expressed that it would be better to consolidate the existing Centres before considering the establishment of new ones: *Report of the 27th AALCC Session Held in Singapore, 14–18 March 1988*, p. 39.

[42] AALCC's *Scheme for Settlement of Disputes in Economic and Commercial Matters Including the Establishment and Functioning of the Regional Centres for Arbitration: Report of the Secretary-General*, Doc. No. AALCC/xxx/Cairo.91/19, pp. 22–3. During the 36th Session of the AALCC in Tehran (3–7 May 1997), a Headquarters Agreement was concluded between the AALCC and Iran with respect to the Tehran Regional Arbitration Centre (TRAC). Under the Agreement, Iran in principle, agreed to the establishment of the Centre and to provide the necessary facilities for its activities. The Agreement has been confirmed by the Iranian Cabinet and approved by the Commission of Foreign Policy of Iranian Parliament. It finally needs ratification by the Parliament: AALCC, *Progress Report on AALCC's Regional Centres for Arbitration*, Doc. No. AALCC/xxxviii/ACCRA/99/ORG.5, pp. 2–3; M. Mashkour, 'Building a Friendly Environment for International Arbitration in Iran', JIA 17, 2000, No. 2, 79–81.

[43] AALCC, *Report of the 25th Session held in Arusha, 3–8 February 1986*, p. 172, para. 25; AALCC, *Verbatim Record of Discussions at the 25th Session of the Committee Held at Arusha, 3–8 February 1986*, p. 512; AALCC, *Progress Report on AALCC's Regional Centre for Arbitration*, Doc. No. AALCC/xxxii/Kampala/93/14, pp. 27–8.

[44] *Progress Report on AALCC's Regional Centres for Arbitration*, Doc. No. AALCC/xxxiii/Tokyo/94/13, p. 29. The PTA Centre for International Commercial Arbitration was opened on 21 November 1987 in Djibouti. It used to function under the auspices of the PTA Federation of Chambers of Commerce and Industry. The Centre has ceased to function. The PTA Centre was invited as an observer in some AALCC Annual Sessions. The CRCICA is exploring the prospect of hosting a Commercial Arbitration Centre for the Common Market for Eastern and Southern African States (COMESA), covering roughly the countries in the former PTA. Egypt, the host state of CRCICA, has become a member of COMESA: *Report of the Activities of the CRCICA Submitted to the 38th Meeting of the AALCC, Accra, Ghana, 19–23 April 1999*, pp. 8–9; see p. 00.

AALCC's Regional Centres with a view to considering the possibility of establishing a centre in Nairobi.[45]

The Secretary-General of the AALCC confirmed to this author in July 1994 that '[w]e are . . . in correspondence with the Governments of Kenya, Uganda and Tanzania for the possible establishment of a Regional Centre in Nairobi to serve the southern and eastern region of Africa'.[46] At the 36th Session of the AALCC (1997), a resolution was adopted expressing appreciation to 'the offer of the Government of Kenya to host a Regional Centre for Arbitration in Nairobi, serving the countries in Eastern and Southern Africa'. The resolution further urged the 'Governments of Kenya and Nigeria to take the necessary steps for early conclusion of the Headquarters Agreements relating to the Centres hosted by them'.[47]

On 26 April 1999, the Federal Government of Nigeria (FGN) and the AALCC signed a Headquarters Agreement with respect to the Lagos Regional Centre for International Commercial Arbitration (LRCICA). By the Agreement, Nigeria *inter alia* recognises 'that the Centre is an international, independent and neutral arbitral institution' (Preamble). Also, the FGN through the Regional Centre for International Commercial Arbitration Decree (now Act No. 39 of 1999) implemented the Agreement making 'statutory provisions in Nigeria to give the Regional Centre for International Commercial Arbitration legal status and recognition' (Preamble).[48]

The objectives of the AALCC Regional Centres

The Nestor Report acted as a catalyst in the establishment of the AALCC Regional Centres and further developments in international commercial arbitration. For a group of states already disenchanted with the prevailing arbitral order that allegedly served only the interests of Western participants,[49] they saw in that report a recipe for action. UNCITRAL's timely and astute support brought this to fruition.

[45] *Progress Report*, *ibid*. at p. 29.

[46] Correspondence of 4–12 July 1994 (Amazu Asouzu and Tang Chengyuan). For the Committee's resolution directing the Secretariat, in collaboration with the states concerned, to consider the feasibility of establishing a Regional Arbitration Centre in Nairobi to serve the Eastern and Southern African states, see *Report of the 33rd Session Held in Tokyo from 17–21 January 1994*, p. 245.

[47] See also Resolution 37/3 of 18 April 1998 adopted at the 37th Session of the Committee in New Delhi, 13–18 April 1998.

[48] More will be said of the 1999 Agreement and the Act in the next chapter. The Federal Ministry of Justice of Nigeria consulted this author in August 1997, during the negotiation of the Agreement and the drafting of the legislation implementing it.

[49] See pp. 424–8.

Thus, the primary focus of the AALCC's dispute resolution scheme was how to correct the perceived imbalance in the existing arbitral order, especially in the concentration of arbitration venues outside Asia and Africa. It was also thought that the lack of competent arbitral institutions which could administer arbitration was a contributory factor in the undeveloped state of the arbitral process in the region and the many handicaps which these states encountered in arbitrating abroad. The scheme, as implemented, aimed at creating stability and confidence in economic and commercial relations by providing adequate means for commercial dispute resolution under a fair, (relatively) inexpensive and speedy procedure.[50]

The scheme's aim was to be realised by encouraging parties to have their disputes settled or resolved at the place of investments or at the place of the performance of contracts. The Regional Centres will fulfil these functions *inter alia* if the place of investment or the place of performance of a contract was in Asia or Africa. By this means, it was hoped that there would be a minimisation of the need to resort to arbitral institutions outside the region, with the attendant problems faced by private and public parties from Asia and Africa. Seen objectively, the AALCC scheme would, if successful, help to reduce, if not eliminate, a source of disenchantment in international commercial dispute resolution.[51]

The regionalisation of arbitral institutions and their establishment in African and other developing states deserve support. They will facilitate the diffusion of the dispute resolution processes at the grassroots, optimally promoting both their benefits and attributes. The positive psychological effect of establishing arbitral institutions in these states should be neither discounted nor ignored. The sense of 'belonging' flowing from that will contribute to spreading the acknowledged virtues of the dispute resolution processes and encourage their development and growth in these places.

It is conceded that old attitudes die hard; that business interests which are accustomed to the services of the traditional dispute resolution providers would not easily abandon them in preference for the newer ones. Moreover, the newer arbitration centres have not come to supplant the traditional arbitral institutions; they can not do that. They are only an option, alternative dispute resolution institutions established in developing states that are also participants in the commercial transactions giving

[50] AALCC, *Cumulative Reports of the 17th, 18th and 19th Sessions Held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)*, p. 149. [51] See pp. 424–8.

rise to disputes. The operations of the newer arbitration institutions would have a direct implication on the balance and fairness of the bargaining and negotiation of forum clauses in contracts involving these states and their nationals.[52]

All said, the idea of arbitrating commercial disputes in far-off venues is increasingly an anachronism, especially in an African setting. As Paulsson cogently argued:

> Take the case of a typical economic development agreement signed, let us say, by the Government of Togo. The Government finds it difficult to understand why it is that the foreign partner can send a team of energetic promoters to spend many weeks operating out of a hotel in Lomé to prepare a project and obtain Government acceptance in principle; to come back again for other sessions, if necessary; then return for several rounds of contract negotiations and be prepared to spend many years executing the contract locally through an operating company duly established under local law – but insist that if an arbitration arises it has to be heard, say, in Zurich. Something here is disturbing, as though an entire region of the world were dismissed when envisaging the hypothesis of things getting really serious.[53]

The above observations are, and will be, reinforced for those African states with adequate infrastructure and legal framework for the efficient and effective conduct of arbitration. The development of the international arbitral process depends so much on the existence of viable regimes and infrastructure for domestic arbitration. As this study asserts, some African states are no exceptions: in Africa, certain states have taken positive measures indicating a willingness to embrace the international arbitral process and the ability to act as its host. The arbitral institutions established in some of them have concluded co-operation agreements with those in developed states. As well as facilitating inter-institutional co-operation in the development of commercial arbitration and arbitrators, the co-operation agreements will assure a wider recognition, acceptance and use of the newer institutions.[54]

However, in those states where the new arbitral institutions are located, the law of arbitration is, generally, in advance of the actual practice and

[52] P. G. Lim, in AALCC, *Verbatim Record of Discussions of the 25th Session Held at Arusha (Tanzania), 3–8 February 1986*, p. 497.

[53] Paulsson, 'Third World Participation', 43. As Paulsson concludes: 'In asking for a situs of arbitration in his region, the Third World negotiator is in many instances being perfectly reasonable. When the entire center of gravity of an investment contract – from its negotiation to its performance – is in an African country, and it resulted in the creation of an enterprise whose physical plant, corporate records and personnel are located in that country, the concept of arbitration in Europe or North America may be not only artificial but truly burdensome' (*ibid*. at p. 44).

[54] See pp. 96–104.

use of arbitration. In the African states without arbitral institutions and adequate legal frameworks, efforts are being made to develop the process and provide the infrastructure necessary for its development and growth. What is encouraging and significant is that the need for arbitration and an awareness for its development are gradually being appreciated in these states.

The international legal personality of the AALCC Regional Centres

Introductory remarks

The AALCC Regional Centres are unique in that unlike most commercial arbitration institutions, which are private, national and mostly profit-oriented, the AALCC Regional Centres are public, regional and non-profit-oriented. They are creatures of an intergovernmental organisation composed only of developing states.

Being intergovernmental, the Regional Centres may be compared to ICSID, an international arbitral institution based on a multilateral treaty sponsored by the World Bank, itself an international institution. The AALCC, under whose auspices the Regional Centres were established and will operate, is also an international institution. Its international legal personality entails its ability and capacity to act in that field as a person distinct from its member states and with the attendant rights and obligations including the ability to maintain international claims and to enforce and defend its rights.[55] In that context, the similarity between the Regional Centres and ICSID is that, as arbitration institutions, they each have a distinct international legal personality and the attendant privileges and immunities. Both were established by intergovernmental agreements and are functionally protected in their host states and in member states by their respective instruments. But, unlike the AALCC Regional Centres, ICSID has a jurisdiction, which is both special and limited. Also, ICSID proceedings and their rules are integrated with the establishing Convention.[56]

In order to establish the Regional Centres, the AALCC concluded agreements by exchange of letters with respectively Malaysia (3 March 1978), Egypt (28 January 1979) and Nigeria (May 1980).[57] The duration of the

[55] *Reparation* case, ICJ Reports 1949, pp. 174–9. [56] See pp. 92–6.

[57] The KLRCA became functional on 16 October 1978. Its e-mail address is klrca@putra.net.my and the homepage is www.klrca.org. The CRCICA was formally inaugurated and started functioning on 5 February 1980. Its e-mail address is crcica@idsc1.gov.eg and the homepage is www.crcica.org.eg. The LRCICA was inaugurated on 29 March 1989 but became fully functional in 1999. Its e-mail address is lrcica@Metrong.com.

agreements was normally three years with the intention of renewing them and confirming the continuation of the Centres' activities.[58]

With respect to the KLRCA, further agreements were concluded between the AALCC and Malaysia. The 1978 establishment agreement was replaced by an agreement through a memorandum of understanding signed on 29 July 1981 for the operation of the Centre for a further period of three years. At the Kathmandu Session of the AALCC (1985), an agreement was reached for the continued functioning of the Centre for another three years after the expiration of the 1981 agreement in 1984. During the Arusha Session (1986), the Trade Law Sub-Committee urged the AALCC Secretary-General to negotiate a new headquarters agreement with Malaysia, as there has not been any formal agreement since July 1984. After negotiations lasting three years, a headquarters agreement was signed on 10 August 1989. The latter agreement, retrospectively, regularised the functioning of the KLRCA during the period August 1984 to December 1988 and formalised the functioning of the Centre for a further period of three years, effective from 1 January 1989. But, upon the expiry of that agreement on 31 December 1991, 'the Centre continued to operate on the basis of the above mentioned Agreements and the Host Government continued to make annual contributions to the Centre and to make available the said premises [the office accommodation of the Regional Centre] for the Centre'.[59]

During its 33rd Session (1994), the AALCC adopted a resolution expressing gratitude to Egypt, Malaysia and Nigeria for hosting the respective Centres whilst 'urg[ing] the Governments of Malaysia and Nigeria to take the necessary steps for the early conclusion of the Headquarters Agreements relating to the Centres hosted by them'.[60] A series of consultations and negotiations between Malaysia and the AALCC led to an agreement, which formalised the continued functioning of the Centre for a further period of five years with effect from 1 January 1995.[61]

[58] The Centres were meant to conduct their affairs under the auspices and supervision of the AALCC for an initial period of three years until they become autonomous with their own governing bodies.

[59] 1995 Agreement between Malaysia and AALCC, para. 5. The latter draft Agreement, which formed the basis of the Headquarters Agreement of 29 February 1996 between Malaysia and the AALCC, will be relied upon in this chapter, as the latter Agreement was unavailable to the author. The draft of the 1995 Agreement is reprinted in AALCC, *Progress Report on AALCC's Regional Centres for Arbitration*, Doc. No. AALCC/XXXIV/DOHA/95/15, pp. 16–19, 27–32.

[60] AALCC, *Report of the 33rd Session Held in Tokyo, Japan, from 17–21 January 1994*, p. 245. The AALCC and Nigeria concluded a Headquarters Agreement with respect to the LRCICA in 1999.

[61] AALCC, *Progress Report on AALCC's Regional Centres for Arbitration*, Doc. No. AALCC/xxxiii/Tokyo/94/13, pp. 14–24. The Headquarters Agreement of 1996 confers functional

The AALCC and Egypt concluded the following further agreements with respect to the CRCICA: the Agreement by Exchange of Letters of 15 November 1983 (for the continued – permanent – functioning of the Centre);[62] the Agreement by Exchange of Letters of 30 March 1986 and 3 June 1986 (for the temporary financial and administrative arrangements of the Centre); the Agreement of 24 May 1987 (the Headquarters Agreement which guarantees for the CRCICA all the privileges and immunities of independent international organisations in Egypt);[63] and the Agreement of 24 July 1989 (for the permanent financial and organisational structural arrangements of the CRCICA).[64]

The Regional Centres at Cairo, Kuala Lumpur and Lagos function as international arbitral institutions under the auspices of the AALCC.[65] The international and independent statuses of the Regional Centres are reflected in their constitutive documents and have been confirmed in case law and arbitral awards. For example, Article 2(1) of the Statute of the CRCICA provides: 'The Centre is an independent international institution having its own international status in the field of international commercial arbitration.'[66] Under Article 10 of its Statutes, the CRCICA is authorised to enter into agreements with national and international institutions where appropriate.[67]

In the first arbitral award rendered under the Rules of the CRCICA, entitled *A European Co. and the Minister for Agriculture of an African State*,[68] a sole arbitrator acknowledged that:

privileges and immunities on the Centre and its officials as provided in the International Organisation (Privileges and Immunities) Act 1992 (Malaysia): AALCC, *Report of the 37th Annual Session of the AALCC Held in New Delhi, 13–18 April 1998*, p. 9.

[62] The 1979 and 1983 Agreements were approved by the Egyptian Parliament on 20 March 1984 and ratified by Presidential Decree No. 104 of 1984 dated 24 March 1984.

[63] Ratified in December 1987.

[64] A. S. El-Kosheri, 'Egypt' in Sanders (gen. ed.), *ICCA: International Handbook*, Vol. 1, Supp. 11 (1990), p. 15.

[65] The words 'under the supervision of' the AALCC have been dropped from the Headquarters Agreements of these Regional Centres.

[66] Article 2 of the Administrative Rules of the KLRCA provides *inter alia*: 'The Centre shall serve as an international institution in the field of arbitration.' And the Preamble to the 1999 Agreement between the AALCC and Nigeria with respect to the LRCICA, provides *inter alia*: 'the Centre is an international, independent and neutral arbitral institution.' Nigeria, as the host state, undertakes to respect the independent functioning of the Centre (Article II(2)).

[67] The Regional Centres have entered into agreements with public and private international law institutions: see pp. 96–9.

[68] Award of 7 July 1985, Case No. 1/1984, in M. E. A. Eldin, *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* (The Hague: Kluwer, 2000), p. 3.

The Centre is a public international body that enjoys a distinct juristic personality established by virtue of the decision of the President of the Arab Republic of Egypt No. 104 of 1984. The decision approved two letters exchanged between Egypt and the Asian–African Legal Consultative Committee (AALCC) at New Delhi, India, signed on 15.9.1983, and approved by the Parliament in Egypt. The letters supplemented the international convention between the above in 1978 and ratified on 24.3.1984 by Egypt.[69]

In another award under the Rules of the CRCICA, entitled *A Saudi Party and an Egyptian Party*,[70] the tribunal exaggeratedly asserted:

The Cairo Regional Centre for International Commercial Arbitration and its Alexandria Maritime Arbitration Branch are the only arbitral fora in the African–West Asian region that are deemed *international* and the Alexandria Centre is not an affiliate to the Arab League as so claimed by the respondent.[71]

Case law in Malaysia has endorsed the international status of the KLRCA. In *Klockner Industries Anlagen GmbH* v. *Kien Tat Sdn Bhd and Another*,[72] Mr Justice Zakaria Yatim observed:

The Arbitration Centre is an independent international institution[73] . . . It was established in Kuala Lumpur pursuant to an agreement between the government of Malaysia and the Asian–African Legal Consultative Committee through an exchange of letters in March 1978. It was a term of the agreement that the Arbitration Centre would function as an independent institution under the auspices of the AALCC.[74]

The immunities and privileges of the Centres

Each of the agreements provides that it shall enter into force upon the completion of the legal procedures applicable in their respective Contracting States – Egypt, Malaysia, Nigeria and Iran.[75] The Regional

[69] *Ibid*. at p. 4. [70] Case No. 72/96 (May 1997).

[71] Cited in *Report on the Activities of the CRCICA Presented During the AALCC 37th Annual Session Held in New Delhi, 13–18 April 1998*. Of course, within the African–West Asian region, there are other *international* arbitration institutions. [72] (1990) 3 MLJ 183.

[73] *Ibid*. at p. 184, citing and relying on his papers in *Seminar on International Commercial Arbitration, Kuala Lumpur, 2–3 November 1982*, p. 9 and on 'Settlement of Commercial Disputes: Malaysia', MLJ 1, 1983, cxviii, cxxiv.

[74] Citing also Z. Yatim, 'The Regional Centre for Arbitration, Kuala Lumpur', 2 MLJ, 1978, lxxx, lxxxi. It must be observed that Mr Justice Yatim, who wrote the *Klockner* decision, retired as a judge of the Federal Court of Appeal of Malaysia and was, from 1 February 2000, appointed the Director of the KLRCA, in succession to Ms Lim, who retired as Director on 31 January 2000. Dr Yatim, a former Solicitor-General of Malaysia, was the first Director of KLRCA when it was established in 1978. On appointment as a judge of the High Court of Malaysia, Ms Lim, his predecessor as Director, succeeded him: KLRCA, *Arbitration News*, May 2000, pp. 1 and 9.

[75] The 1987 Agreement, Article XIV (Egypt); the 1995 Agreement, Article VIII (Malaysia); the 1997 Agreement, Article IX (Iran); and the 1999 Agreement, Article IX (Nigeria). Each

Centres each possess a juridical personality and the capacity to contract, to dispose of immovable and movable property and to institute legal proceedings in their own names.[76]

The requisite privileges and immunities accompany the international legal personality for the Centres and their staff. Privileges and immunities accorded under the agreements are due to the functional necessities of the Centres as international arbitral institutions; not for the benefit of individuals.[77] With respect to the CRCICA, the AALCC can waive the immunity in any case where it would impede the course of justice. Any waiver is without prejudice to the purpose for which the immunity is accorded.[78]

The 24 May 1987 Headquarters Agreement between Egypt and the AALCC is more detailed and aims 'to define the status, privileges, and immunities of the [CRCICA] in the light of its international status'.[79] The agreement formally establishes the CRCICA as an international arbitral institution with juridical personality and, along with its staff, with the attendant privileges and immunities.[80] Egypt undertakes to provide the required facilities for holding meetings and consultations of the Centre

Agreement allows the parties to enter into such supplementary agreement(s) as may be necessary to fulfil the purpose of the main Agreement: the 1987 Agreement, Article XIII; the 1995 Agreement, Article VI; the 1997 Agreement, Article VII; and the 1999 Agreement, Article VII. The interpretation of any of the Agreements has to be purposive in the light of its primary objective of enabling the Centre fully and efficiently to discharge its duties and fulfil its purposes and functions (as an independent arbitral institution of an international character – as added by the 1995, 1997 and 1999 Agreements): the 1987 Agreement, Article XII; the 1995 Agreement, Article V; the 1997 Agreement, Article VI; and the 1999 Agreement, Article VI.

[76] The 1987 Agreement, Article III; the 1995 Agreement, Article II; the 1997 Agreement, Article IV; and the 1999 Agreement, Article III.

[77] The 1987 Agreement, Article IX; the 1997 Agreement, Article IV; the 1995 Agreement, Article III(1); and the 1999 Agreement, Article IV(1); Bekker, *Legal Position; Reparation Case 1949*, p. 180; *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the UN*, ICJ Reports 1989, pp. 177, 193–6; Reinisch, *International Organizations.*

[78] 1987 Agreement, Article X. The 1995, 1997 and 1999 Agreements do not have comparable provisions for waiver of immunity by the AALCC. In that case, customary international law and Article 32 of the Vienna Convention on Diplomatic Relations 1961, to which Malaysia (1965), Iran (1965) and Nigeria (1967) are parties, or any other applicable regime in these states covering the immunities and privileges of international organisations, may be resorted to, as may be appropriate.

[79] The Preamble to the 1987 Agreement, second paragraph. This Agreement was ratified on 29 December 1987 and entered into force on 2 January 1988 upon the issuance of Presidential Decree No. 199/1987.

[80] Under the 1987 Agreement, the [CRCICA] shall be entitled to display the flag and emblem of the AALCC in its premises (Article V). Egypt shall provide the staff of the Centre with special identity cards certifying that they are officers enjoying the privileges and immunities specified in the Agreement (Article XI).

in Cairo (Article VII).[81] Additionally, the Egyptian Government, in policy statements and official practices, has assured the Centre's independence, immunities and privileges as an independent international arbitral institution.[82]

With respect to the LRCICA, the FGN had indicated – and due to its practical importance, it has to be quoted extensively – that:

> The Regional Centre for International Commercial Arbitration was established by the Federal Government of Nigeria on the 27th of March, 1989 on behalf of the Asian/African Legal Consultative Committee (AALCC) on the basis of an agreement entered into by the Federal Government of Nigeria and the AALCC and in accordance with the terms therein. In that regard, the Federal Government of Nigeria was requested by the AALCC to act as Host Government to this Centre and it acceded to this request. Consequently, the Federal Government of Nigeria promulgated the 'Regional Centre for International Commercial Arbitration Decree No. 39 of 1999', to give domestic legislative force to the establishment of the Centre in Nigeria. I must emphasise here that the promulgation of the 'Regional Centre for International Commercial Arbitration Decree No. 39 of 1999' now an Act, in no way makes the Centre an agency of the Federal Government. Indeed, the Centre is an international institution hosted by Nigeria. The promulgation of the Act therefore is in compliance with [section 12 of] the [1999] Constitution of Nigeria which provides that international agreements or treaties entered into by the Government of Nigeria should be domesticated and incorporated into our laws before enforcement in the country . . . I must add that the Centre is entitled to enjoy all the privileges and immunities accruable to similar international bodies. The Government of Nigeria therefore does not interfere and will not interfere with the activities of the Centre. Our involvement in the Centre's activities therefore is to enable us to fulfil our international obligation embodied in the Headquarters Agreement signed in April, 1999 between the Government of Nigeria and the Asian/African Legal Consultative Committee (AALCC) under whose auspices the Centre operates.[83]

Egypt and Nigeria have adequate legal regimes that would enable the Centres to realise their targets. Both countries also had each enacted arbitration laws based on the Model Law.[84]

[81] Under the 1987 Agreement, the permanent site of the Centre will be in Cairo (Article II). The CRCICA has a branch office in Alexandria.

[82] Welcome Address of Ahmed Esmat Abdel-Meguid (Deputy Prime Minister and Minister of Foreign Affairs of Egypt), in *Seminar on International Arbitration and Foreign Investments in the Afro-Asian Region, Cairo, 1988*, pp. 33–41. The 1987 Agreement which reflected the undertakings of Egypt was preceded by a December 1978 Agreement which guaranteed for the CRCICA, on establishment, all the privileges and immunities of independent international organisations in Egypt.

[83] Address Delivered by Senator Kanu Godwin Agabi (SAN), former Attorney-General of Nigeria in *Seminar-Workshop Organised by the LRCICA in Association with the Foundation for International Commercial Arbitration and Alternative Dispute Resolution (SICA-FICA), Abuja, 7–9 June 2000*, pp. 3–4.

[84] See pp. 125 and 128–9 below.

With respect to the KLRCA, in a speech by the then Deputy Prime Minister of Malaysia (later, the Prime Minister), the Government stated its support for arbitration under the auspices of the KLRCA, pledged its willingness to take all necessary measures to make the awards of the Centre internationally recognisable and gave an assurance to 'respect the independent functioning of the Centre as an international arbitral institution'.[85]

The CRCICA, its property and assets in the territory of Egypt enjoys immunity from every legal process. However, the AALCC may waive this immunity in any particular case provided that no such waiver shall extend to any measure of execution (Article IV(A)). Also, the premises of the CRCICA, its property and assets as well as its archives in the territory of Egypt and all documents belonging to it shall be inviolable and be immune from search, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action (Article IV(B)).[86] The CRCICA, its assets, income and other property whether owned or occupied shall be:

1. exempted from all direct taxes, except those taxes, charges or duties which are for public utility services;[87]
2. exempt from custom duties and prohibitions and restrictions on imports in respect of equipment imported by the Centre for its official use;[88] and

[85] Speech by Rt Hon. Dr Mahathir Bin Mohammed, at the inauguration of the conference on the settlement of disputes at Kuala Lumpur, 3 July 1979, in *Reports of Conference on International Commercial Arbitration Kuala Lumpur, 3–8 July 1979*. The undertakings by Malaysia were reflected in the Agreements of 1995. Additionally, in 1980, Malaysia amended its 1952 Arbitration Act to immunise inter alia the KLRCA proceedings from judicial intervention (see pp. 94–6 below) and ratified the 1958 New York Convention in 1985. Also, case law in Malaysia is favourably disposed to international arbitration, e.g. *Zublin Muhibbah Joint Venture* v. *Government of Malaysia* [1990] 3 MLJ 125, allowing foreign lawyers (and, indeed, non-lawyers) to appear in arbitral proceedings in Malaysia.

[86] Article IV(2) of the 1999 Agreement with respect to LRCICA provides that Nigeria shall take the necessary steps to ensure that the premises of the LRCICA, its property, assets and archives and all documents belonging to it or held by it shall be inviolable.

[87] Article IV(3)(ii) of the 1999 Agreement with respect to the LRCICA provides that Nigeria shall take the necessary steps to ensure that the LRCICA, its assets, funds, income and other property whether or not owned or occupied, shall be exempted from taxes. This is reflected in s. 13(1) of Act No. 39 of 1999.

[88] The sale of equipment imported under this exemption can only be done after the expiry of five years with the approval of the Government of Egypt and in conformity with the laws and regulations prevailing in Egypt. On the other hand, under Article IV(3)(i) of the 1999 Agreement with respect to the LRCICA, Nigeria shall take the necessary steps to ensure that the Centre is exempted from customs duties in respect of equipment used by it for its official purposes. This is reflected in s. 14 of Act No. 39 of 1999.

3. exempt from custom duties, prohibitions and restrictions on import and export in respect of publications necessary for the Centre's official activities (Article IV(D)).

The CRCICA enjoys freedom from exchange controls. It shall, without being restricted by financial regulations or moratoria of any kind, hold funds or currencies of any kind, and be free to transfer its funds or currencies from Egypt in accordance with the relevant rules of Egyptian law (Article IV(C)).

Also, the CRCICA enjoys freedom of communications for its official correspondence. Accordingly, no censorship shall be applied to the official correspondence of the Centre certified as such and bearing its official seal. The appropriate Egyptian authority could however, take appropriate security measures in co-ordination with the Centre (Article VI).

The 24 May 1987 Agreement with respect to the CRCICA was reinforced by another Agreement of 24 July 1989. The latter agreement makes provision for the permanent financial and structural arrangements of the CRCICA. Its preamble recites, among others, the 1987 Agreement, significantly summarising the latter's main purposes as '[c]onferring on the Centre full diplomatic privileges and immunities, thereby making the Centre an independent non-Governmental arbitral institution of an international character based in Cairo'. Further, the Preamble to the 1989 Agreement deems it desirable, 'in view of the steady progress made by the Centre', to place the CRCICA on a permanent footing so that it could provide countries in West Asia and Africa with an efficient, expeditious and (relatively) inexpensive dispute resolution system under the UNCITRAL Arbitration Rules. It goes on to emphasise the 'need to ensure the [CRCICA's] continued functioning on firm financial footing, until it can become fully self-sufficient financially'.[89]

The 1989 Agreement sets out to endorse and confirm the previous financial arrangements made with respect to the CRCICA. Article 1 reemphasises that '[t]he Centre shall continue to enjoy full independence vis-à-vis Governments [interestingly, not full independence from the Government of Egypt only] and functions under the auspices of the [AALCC] only'.[90] The 1989 Agreement indicates that the AALCC is the sole

[89] The 1989 Agreement provisionally entered into force upon signature and definitively upon completing the constitutional procedure in Egypt (Article 4).

[90] This latter part of Article I of the 1989 Agreement is a reconfirmation of Article 3 of the Statute of the CRCICA, which provides that the Centre shall function under the auspices of the AALCC. The issue of 'supervision' is no longer relevant: the 1995 Agreement, Article 1; the 1997 Agreement, Article II(1); and the 1999 Agreement, Article II(1).

institution to which the Centre shall report on all matters including technical, administrative and financial matters.[91]

The administrative and financial arrangements for the functioning of the CRCICA were reconfirmed and amended by the Agreement of 30 March and 3 June 1986 between the AALCC and Egypt (the 1986 Agreement by Exchange of Letters, paragraph 3(B)).[92] The 1986 Agreement applied from 1 July 1986 to 30 June 1989 when it expired. But the 24 July 1989 Agreement revalidated the financial and administrative arrangements of the 1986 Agreement and made them permanent.[93] Until such time as the CRCICA shall become financially self-sufficient, the financial arrangements shall continue to be on the same pattern as envisaged in paragraph 3(B) of the 1986 Agreement.[94] According to the latter, the expenses of the CRCICA are met from:

(a) a yearly contribution by the Government of Egypt;
(b) fees and receipts for services rendered by the Centre;
(c) contributions from the AALCC's main budget to be fixed by the Committee in each year; and
(d) voluntary contributions by international organisations, other institutions and member governments of the AALCC.

[91] A resolution adopted on 18 February 1989 was the source of this requirement: see the 1989 Agreement, Article 1, and AALCC, *Report of the 28th Session Held in Nairobi, 13–18 February 1989*, pp. 39–41, for the draft resolution subsequently adopted unamended. The 1995, 1997 and 1999 Agreements, each provides that the Director of the respective Centres shall send annual reports on the Centre's activities to the Secretary-General of the Committee and the appropriate department of the host government (i.e. in the case of Malaysia, since April 1990, the Ministry of International Trade and Industry; before then, the reports were sent to the Attorney-General's Department). The Directors of the Regional Centres normally present progress reports in Annual Sessions of the AALCC.

[92] The 1986 financial arrangements which were to apply from 1 July 1986 were renegotiated after a period of three years in light of the Centre's activities, its financial resources and the overall expenses: the 1986 Agreement, para. 3(C). The 1986 financial arrangements amended and supplemented the initial financial arrangements set out in the memorandum annexed to the letter of 15 November 1983 by the AALCC to Egypt. An acceptance-reply of the same date by the latter constituted an Agreement between the AALCC and Egypt with respect to the continued functioning of the Centre at Cairo. Under paragraph 3 of the November 1983 Agreement: 'The operational costs of the Centre shall be met by the host government subject to the condition that (a) any fees or receipts for service to be rendered by the Centre shall be utilised towards such costs; (b) that all expenses on promotional work undertaken by the AALCC relating to the Centre that may have to be incurred outside Egypt shall be borned [*sic*] by the AALCC.' Paragraph 3(B) of the 1986 Agreement superseded the 1983 arrangements.

[93] This included the provision for the administrative pattern of the CRCICA initially made in the Memorandum accompanying the 1983 Agreement and confirmed in paragraph 3 of the Agreement of 1986: see below.

[94] The 1989 Agreement, Article 2.

With respect to the LRCICA, its financial arrangements in the 1999 Agreement and Act are more detailed. Under Article V(2) of the 1999 Headquarters Agreement, the Government of Nigeria continues to make available the administrative premises and an annual grant for the purposes of the functioning of the Centre including:

(i) operating costs;
(ii) the purchase of office furniture, equipment, stationery, telephone, faxes, etc.;
(iii) the costs of seminars and conferences which are to be conducted in Nigeria under the auspices of the Centre.

And, by Article V(3) of the Agreement, the AALCC makes an annual contribution towards the operating costs of the Centre. Section 7 of Act No. 39 of 1999 creates a fund for the LRCICA into which all monies due from the above sources, from gifts, bequests, grants or other contributions, from foreign aid and assistance and other sums accruing to the Centre shall be credited. The Centre shall apply those monies for purposes related to its functions (section 8). It has the power to accept gifts but not if accompanying conditions are inconsistent with the Centre's functions under the Act. Also, the Centre can borrow for the purposes of its functions but with the prior consent of the Secretary-General of the AALCC (section 12). Its accounts shall be audited and a report thereon and on the activities of the Centre shall be sent annually to the AALCC and the appropriate authority of the host state (section 10).

A remarkable provision in the agreements is one making their duration and automatic renewal subject to the concurrence of the parties or unless contrary written notice is given within a stipulated time by any party. For example, according to Article 3 of the 1989 Agreement:

> This Agreement shall remain in force for a period of five years and thereafter shall be automatically renewed for similar successive periods of five years, unless either party gives the other, in writing, prior notice of its desire to revise or amend it, at least one full year prior to the end of the period. This Agreement would however continue to be in force until it is replaced by the revised text.[95]

Immunities and privileges of the Centres' staff

Broadly speaking, the CRCICA has two categories of staff:

(a) officers in the international category;[96] and
(b) staff other than in the international category.[97]

[95] For similar provisions, see the 1995 Agreement, Article VII (KLRCA); the 1997 Agreement, Article VIII (TRAC); the 1999 Agreement, Article VIII (LRCICA).

[96] That is, the Director, Deputy Director and Counsels (*sic*).

[97] In this category are these grades of staff: (i) professional staff; (ii) general services staff and (iii) subordinate staff: the 1987 Agreement, Article VIII(1)(A) and (B).

The 1995, 1997 and 1999 Agreements with respect to KLRCA, TRAC and LRCICA respectively, have no clear staff category. But, the directors, professional and foreign professional staffs of the Centres are mentioned under different provisions in the Agreements, which might have differing legal implications depending on the category of officer.[98] For example, under the 1995, 1997 and 1999 Agreements, foreign professional staff of the Centres shall be exempt from taxation on the salaries and emoluments paid to them by the Centres.[99] Thus, assuming that the directors of those Centres are or should be in the category of professional staff, then there is a notable restriction thereon because the director of each of the Centres shall be a national of the host state, i.e. Malaysia, Iran or Nigeria, as the case may be, and appointed by the host government in consultation with the AALCC Secretary-General.[100]

The Director of the CRCICA has a special status under the applicable agreement. The occupant of that office will be accorded, with respect to himself, his spouse and minor children, all the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law.[101] This provision, which is extensive in implication, is not in any of the 1995, 1997 and 1999 Agreements. In the latter situations, it is arguable that customary international law on diplomatic relations, the 1961 Vienna Convention on Diplomatic Relations[102] and the 1963 Vienna Convention on Consular Relations[103] will be relevant, especially in view of other privileges and immunities afforded to the Centres and their staff.[104]

[98] E.g. Article III(4) and (5) of the 1995 Agreement and Article IV(4) and (5) of the 1999 Agreement, making provision for professional staff and foreign professional staff and the nature of immunities and privileges they enjoy. Under s. 6 of Act No. 39 of 1999 with respect to the LRCICA, the latter may, with the approval of the AALCC, from time to time, appoint such persons, whether from within or outside Nigeria, as he (*sic*) may deem necessary, to assist the Centre in the performance of its functions under the Decree. And, by s. 15 of the Act, a non-Nigerian employed by the Centre; or engaged by the Centre in a professional capacity as an adviser, shall be deemed to have accepted employment with the FGN for the purposes of s. 8 of the Immigration Act, cap. 171, and shall not be required to produce consent to enter Nigeria. The latter provision is solely for immigration purposes where a non-Nigerian is employed or engaged by the LRCICA. The provision has no other implications for the relationship between the person and the LRCICA – the only parties to the contract of employment or engagement.

[99] The 1995 Agreement, Article III(5); the 1997 Agreement, Article IV(5); and the 1999 Agreement, Article IV(5).

[100] The 1995 Agreement, Article IV; the 1997 Agreement, Article V(1); and the 1999 Agreement, Article V(1).

[101] The 1987 Agreement, Article VIII(2).

[102] AJIL 55, 1961, 1064.

[103] AJIL 57, 1963, 995.

[104] It must nevertheless be borne in mind that, under the 1995, 1997 and 1999 Agreements respectively, Directors of the KLRCA, the TRAC and the LRCICA must always be nationals of the host states. This, in itself, may well constitute an element restricting the privileges and immunities that a host state might be willing to confer under international law.

With respect to the CRCICA generally, officers in the international category under the 1987 Agreement (i.e. the director, deputy director and counsel and the professional staff (the first grade of staff other than in the international category)) shall:

(a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;[105]
(b) be exempt from taxation on the salaries and emoluments paid to them by the Centre;[106]
(c) be immune, together with their spouses and dependent relatives, from immigration restrictions and alien registration;[107]
(d) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions accredited to the Government of Egypt;[108]
(e) be given, together with their spouses and dependent relatives, the same repatriation facilities in times of international crisis;[109] and
(f) have the right of provisional exemption for their used furniture and personal effects imported at the time of first taking up their post in Cairo, for a period not less than one year in accordance with the relevant rules of Egyptian law (Article VIII(3)).[110]

There are some qualifications on the privileges and immunities accorded to the relevant officers of the CRCICA. For example, if the deputy director, counsel and the professional staff are nationals of, or permanent residents in, Egypt, they shall be entitled only to the privileges and immunities in paragraphs (a) and (b) of Article VIII(3), i.e. respectively, immunity from legal process for written or spoken words and all acts performed in

[105] The 1995, 1997 and 1999 Agreements each contain provision to the effect that professional staff employed by the Centres, including foreign professional staff, shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity: the 1995 Agreement, Article III(4); the 1997 Agreement, Article IV(4); and the 1999 Agreement, Article IV(4).

[106] The 1995, 1997 and 1999 Agreements make similar provisions but are more restrictive. Each provides: 'Foreign professional staff of the Centre shall be exempted from taxation on the salaries and emoluments paid to them by the Centre': the 1995 Agreement, Article III(5); the 1997 Agreement, Article IV(5); and the 1999 Agreement, Article IV(5).

[107] There is no equivalent provision in the 1995, 1997 and 1999 Agreements. But s. 15 of Act No. 39 of 1999 will have equivalent implication with respect to non-Nigerians employed by the LRCICA or engaged by it in a professional capacity as advisers.

[108] There is no equivalent provision in the 1995, 1997 and 1999 Agreements.

[109] There is no equivalent provision in the 1995, 1997 and 1999 Agreements.

[110] There is no equivalent provision in the 1995, 1997 and 1999 Agreements. In any event, the Directors of the KLRCA, the TRAC and the LRCICA, must be nationals of their respective host states.

their official capacity, and exemption from taxation on their salaries and emoluments.[111]

Also, the general service and subordinate staff of the CRCICA, i.e. the second and third grades of staff other than those in the international category, shall only be exempted from taxation on salaries and emoluments paid to them by the Centre. In other words, only Article VIII(3)(b) (above) applies to them.

Finally, there shall be no immunity from criminal law for staff of the Centre who are Egyptians other than from legal process in respect of words spoken or written or acts performed by them in their official capacity.[112] It would appear that this provision is applicable to all categories of staff – from the director to the subordinate staff – provided, they are Egyptians.[113]

The legal relevance of the AALCC host states agreements

The Agreements between the AALCC and the host states of the Regional Centres have significant international legal implications.[114] They are international agreements in the sense of a treaty.[115] In the *Applicability of the*

[111] These qualifications do not relate to the Director of the CRCICA who under the 1987 Agreement (unlike under the 1995, 1997 and 1999 Agreements) need not be (even though it has in practice always been) an Egyptian. However, the Director of the CRCICA, whether or not an Egyptian, enjoys the full range of privileges and immunities under international law.

[112] The 1987 Agreement, Article VIII(6) and (3)(a). Under the 1995, 1997 and 1999 Agreements, as earlier noted, professional staff employed by the KLRCA, the TRAC and the LRCICA, including foreign professional staff, are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

[113] The policy behind the restriction is clear if a state will continue to have the competence to control persons, events and activities in its territory, especially the criminal activities of her nationals. It is a qualification, which is in deference to the territorial sovereignty of the host state.

[114] Cf. *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, ICJ Reports 1980, p. 73; *US* v. *PLO and Others*, US District Court, SDNY, 82 ILR 283.

[115] The 1969 Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, which entered into force on 27 January 1980, applies to treaties between states. However, the Convention preserves customary international law with respect to the legal force of international agreements concluded between states and other subjects of international law or between such other subjects of international law (Article 3). The 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 25 ILM 543 (not yet in force as of 22 February 2001) provides that international organisations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes (Preamble). Article 2(1)(i) defines 'international organization' as meaning an 'intergovernmental organization.'

Obligation to Arbitrate Case,[116] involving the Headquarters Agreement between the UN and the US with respect to the seat of the former in New York,[117] the question was whether the US was under an obligation to submit to arbitration a dispute under the Agreement. The ICJ observed that '[t]here is no question but that the Headquarters Agreement is a treaty in force binding the parties thereto'.[118]

By a headquarters agreement, a Regional Centre is recognised as an independent (international) legal person in the host state's domestic legal order. The agreement relates to an international arbitral institution which is separate from, and independent of, the host state, the AALCC and their organs. A Centre's personality will enable it to carry out its activities and enjoy some immunities and privileges (from and in the jurisdiction of the host state) for the efficient, effective and independent execution of its mission.[119] This is particularly so as an arbitral institution performs duties with juridical implications in which the government or any of its organs, agencies, nationals or residents might be implicated especially as a party-disputant.

Reinforcing the Agreements are the international legal implications of policy statements proceeding from officials of the host states' governments on the legal status of the Centres.[120] Such statements, especially when made publicly, are evidence of state practice and might create legal obligations on the part of the state making them. As the International Court of Justice (ICJ) said:

> When it is the intention of the State making the declaration that it should be bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[121]

[116] ICJ Reports 1988, p. 3. [117] 11 UNTS 11 (1947). [118] ICJ Reports 1988, p. 15.

[119] E.g. Article III(1) of the 1995 Agreement provides that the Centre shall enjoy such privileges and immunities as may be necessary for the purposes of executing its functions including immunity from suit and legal process.

[120] See pp. 70–1 with accompanying footnotes.

[121] *Nuclear Test* case (*Australia* v. *France*), ICJ Reports 1974, pp. 252, 267–8, further holding that the statement capable of having such an implication need not be in any particular

The Agreements between the host states and the AALCC as well as the policy statements by the host states relating to the Centres ensures that the independence and permanence of the Centres is an international obligations of those states. Without doubt, these are features indispensable to any arbitral institution. Each Agreement creates specific contractual legal regimes implying mutual obligations of good faith, understanding and co-operation. Pursuant to the Agreements, each state agrees to 'host' a Regional Centre providing it with the privileges, immunities and facilities necessary for an independent and effective discharge of its activities as an arbitral institution. None of the host states can unilaterally change the legal nature of any Centre without the agreement of the AALCC. Non-compliance will engage that host state's international responsibility.[122] On the other hand, a Regional Centre will enjoy the privileges and immunities appertaining to it and is expected to carry out its activities in good faith and without abusing its immunities and privileges.[123]

The implications of the legal personality of a Regional Centre and of the AALCC in the legal order of its host state should be appreciated even if partly derived from the act of the AALCC and the state.[124] The AALCC and the Regional Centres have objective international legal *personalities* in the territories of AALCC member states.[125] However, for the activities of the Centres in their particular locations, their host states have, in recognition of their separate international legal personalities, agreed to confer on them domestic legal personalities with the attendant *privileges and immunities* to facilitate their activities. Non-member states of the AALCC are under no legal obligation to recognise, in their national legal orders, the separate legal personality of the AALCC or of the Regional Centres, for example if a suit directly pertinent to the latter is brought before the courts in those states.[126] But this does not detract from the fact that the AALCC and the Regional Centres are separate international legal

form; it could be made orally. For critical re-assessments, see W. Fiedler, 'Unilateral Acts in International Law', EPIL 7, 1984, 517; J. W. Garner, 'The International Binding Force of Unilateral Oral Declaration', AJIL 27, 1933, 493; A. P. Rubin, 'The International Legal Effects of Unilateral Declarations', AJIL 71, 1977, 1.

[122] *Interpretation of the Agreement Between the WHO and Egypt*, ICJ Reports 1980, p. 73; the *Westland Helicopter* interim award, 80 ILR 595, 611–2.

[123] Cf. *WHO Opinion*, ICJ Reports 1980, para. 43.

[124] Reinisch, *International Organizations*, pp. 35–168.

[125] That is, each Regional Centre has objective personality in the territory of each AALCC member state even if the latter does not host the Centre.

[126] Reinisch, *International Organizations*. For the recognition and enforcement of arbitral awards and agreements under the Rules or auspices of the Regional Centres in non-AALCC member states, see pp. 90–2.

persons.[127] In practice, however, recognition by non-member states might be a reciprocal act anchored to comity or based on legislative and judicial practices.[128] It has been suggested that once an entity is an international organisation (a subject of international law as defined) and capable of acting and is acting on the international plane, its separate juridical personality should be recognised as a 'legal reality' by other international actors, especially states.[129] Such recognition may be ancillary to the functions and purposes of the entity and would enable it to assert and defend its rights and interests.

Concluding remarks

A concomitant of the international status of the Regional Centres is that a measure of immunities and privileges could be extended to arbitrators sitting under their rules, counsel appearing before them and witnesses which parties to disputes before them wish to call. All could be granted limited immunities and privileges in the course of their travel to, from and between the Regional Centres and in the course of performing activities related to proceedings under the rules and auspices of the Regional Centres. No doubt, the headquarters agreements would have assured for the Centres their firm foundation as legal persons in their respective locations. But the immunities and privileges suggested might still be needed, at least as a confidence-building measure and given that states have divergent rules on the subject.

The 1998 revised Rules of Arbitration of the KLRCA and the 2000 revised Rules of the LRCICA provide that neither the KLRCA/LRCICA nor the arbitrator shall be liable to any party for any act or omission related to the conduct of the arbitration proceedings (Rule 11). Further, the 1998 revised Arbitration Rules of the CRCICA provide that neither the arbitrators, nor the Centre, nor its members of the board or staff shall be liable to any person for any act or omission in connection with any means of settling disputes (Article 40). These provisions are more limited in scope and significance than the immunities and privileges being suggested.

[127] Schermers, *Institutional Law*, p. 778, para. 1391.

[128] Schermers, *ibid*., paras 1391 and 1413; Reinisch, *International Organizations*; *Arab Monetary Fund* v. *Hashim and Ors*, 83 ILR 243 and 85 ILR 1; *Westland Helicopters Ltd* v. *AOI* [1995] 2 WLR 126. Cf. *Rayner (Mincing Lane)* v. *DTI*, 81 ILR 670; *African Reinsurance Corp.* v. *Abate Fantaye* [1986] 3 NWLR 811; (1991) 86 ILR 655.

[129] R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), pp. 90–4; Muller, *International Organizations*, p. 47; *Ary Spaans* v. *Iran–US Claims Tribunal,* Supreme Court of Netherlands, 94 ILR 321–9. Cf. Reinisch, *International Organizations*, pp. 53–9.

3 Functions and activities of the Regional Centres

Introductory remarks

The functions of the AALCC Regional Centres were determined in light of the overall objectives of the AALCC dispute resolution scheme. Those functions were prescribed by the AALCC Trade Law Sub-Committee and approved by the AALCC in 1977.[1] They are substantially reflected in the respective instruments of the Regional Centres.[2]

The KLRCA and the TRAC, both being in Asia, are examined or mentioned in this book for comparative purposes and to demonstrate the trend towards the harmonisation of dispute resolution norms in the Asian–African region, through the AALCC scheme. In that connection, what is significant is that the scheme might lead to the harmonisation of arbitral regimes in the host states of the Regional Centres. The Centres' functions and rules are already substantially identical. However, uniformity in procedure will, it is hoped, be followed by harmonised applicable arbitration laws.[3]

By Article 6 of its Statute, the CRCICA performs the following functions:

(a) providing for arbitration under the auspices of the Centre where appropriate;
(b) promoting international commercial arbitration in the region;
(c) co-ordinating and assisting the activities of existing arbitral institutions particularly among those within the region;

[1] AALCC, *Cumulative Reports of the 17th, 18th and 19th Sessions Held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)*, pp. 149–50.

[2] Statute of the CRCICA, Article 6; Administrative Rules (KLRCA), Article 2; and Act No. 39 of 1999, s. 4 and Article 1 of the 1999 Headquarters Agreement (LRCICA).

[3] This will be reinforced by the expected enactment by Malaysia of an arbitration law based on the Model Law. The applicable arbitration laws in Egypt, Nigeria, Kenya and Iran – the host states of the Regional Centres – are based largely on the Model Law.

(d) rendering assistance in the conduct of *ad hoc* arbitration particularly those held under the UNCITRAL Arbitration Rules; and
(e) assisting in the enforcement of arbitral awards.

The above functions of the CRCICA and those of the KLRCA are substantially identical with the 'functions and powers' of the LRCICA.[4] However, the 1999 Act with respect to the LRCICA, added to the functions and powers of the LRCICA the power:

to maintain registers of
(i) expert witnesses, and
(ii) suitably qualified persons to act as arbitrators as and when required; and carry out such other activities and do other such things as are conducive or incidental to its other functions under this Act.[5]

Furthermore, section 3 of the Act provides that the objectives of the LRCICA are to:

(a) provide a unified legal framework for the fair and efficient settlement, through arbitration and conciliation, of commercial disputes within the region;
(b) promote the growth and effective functioning of national arbitration institutions within the region; and
(c) promote the wider use and application of the UNICTRAL Arbitration and Conciliation Rules within the region.

Proceedings under the Regional Centres

Introductory remarks

Arbitration under the Rules of the Regional Centres is conducted under a modified version of the UNCITRAL Arbitration Rules.[6] Accordingly, their procedural norms are substantially indistinguishable in nature and implications from those of the traditional arbitration institutions. In this section, we shall look at the features of the UNCITRAL Arbitration Rules as modified for the purposes of the Regional Centres, the jurisdiction of the Centres and the enforceability both of arbitral awards rendered by them, and of agreement to submit to their jurisdiction.

[4] Act No. 39 of 1999, s. 4 (a)–(f) and the 1999 Headquarters Agreement, Article 1.
[5] Act No. 39 of 1999, s. 4 (g) and (h). The above functions are within the powers of the CRCICA and the KLRCA.
[6] The KLRCA and the CRCICA both adopted revised Rules for Arbitration effective from 1 January 1998; and the revised Rules of the LRCICA came into force on 1 January 2000.

The AALCC and the Regional Centres brought the UNCITRAL Arbitration Rules to the attention of the global arbitration community.[7] An objective of the AALCC scheme is to promote the wider use and application of the UNCITRAL Arbitration Rules.[8] Each Regional Centre has a specific mandate in that direction.[9] The KLRCA and CRCICA were the first dispute resolution institutions to use the UNCITRAL Arbitration Rules (between 1978 and 1980). The Iran–US Claims Tribunal subsequently followed them in 1981.[10]

The Centres were primarily established 'with the objective of providing a system for settlement of international commercial disputes by arbitration'.[11] Their aim is to provide commercial parties with efficient, expeditious, fair and relatively inexpensive dispute resolution mechanisms under their Rules. This will generally minimise the need to have recourse to institutions outside the Asian–African region, which are not without difficulties and inconvenience.

The jurisdictional competence of the Regional Centres

Questions were once asked whether the Regional Centres were intended to serve only the AALCC member states, or if each Centre was intended to serve only the AALCC member states in its locality.[12] When classifying arbitral institutions into 'international', 'regional' and 'local', Paul Davidson placed the AALCC Centres in the category of regional institutions – which indeed they are.[13] But he further observed that the regional institutions 'are institutions which deal with disputes arising within a more defined regional geographical area'.[14]

The latter assertions and earlier queries about the territorial scope of the Centres' jurisdiction are as confusing as they may be misleading with respect to the regional character of the AALCC Centres. The position taken by the AALCC, correctly, was that the Centres are intended to serve all

[7] Bergsten, 'Interest of Developing Countries', 33–5. [8] See p. 82.

[9] The Statute of the CRCICA, Article 11; and the Administrative Rules of the KLRCA, Article 9. Act No. 39 of 1999 with respect to the LRCICA extends its objectives to the wider use and application of the UNCITRAL Conciliation Rules (s. 3 (c)).

[10] The International Bureau of the PCA has, since 1992, adopted the UNCITRAL Arbitration and Conciliation Rules as the bases for its Optional Rules: PCA, *Basic Documents* (The Hague PCA, 1998). [11] Statute, Article 2(1). [12] Doc. No. AALCC xxx/iii/89/5, pp. 25–6.

[13] P. J. Davidson, 'Arbitration Institutions Around the Globe' in *The First Congress of IFCAI* (Cairo: CRCICA), p. 87.

[14] Davidson, *ibid*. at pp. 93–4. In J. Paulsson, N. Rawding, L. Reed and E. Schwartz, *Freshfields Guide to Arbitration and ADR* (2nd edn, The Hague: Kluwer, 1999), p. 59, reference is made to a number of important regional and national arbitration institutions which should be considered whenever a dispute arises in a particular geographical area.

AALCC member states in the Asian–African region as well as non-members.[15] Arbitrations so far registered under the Rules of the CRCICA and the KLRCA confirm this understanding. As indicated in the 1999 *Annual Report* of the CRCICA:

> What is distinctive about the arbitration filed during 1999 is that they unveil the fact that *the CRCICA Arbitration Clause grows also effective where no nationals of the region are concerned*; Case no. 141/1999 provides the most outstanding example as both parties to the dispute are from North America – one being a Ministry of a North American State and the other a construction company from the same State. Although it did happen in the past that the CRCICA administered cases with the two parties being African or Asians (Non-Egyptians), it is actually significant to have parties of a dispute [*sic*] from outside the Afro-Asian Region.[16]

With respect to the LRCICA, it has been pointed out whilst explaining the relationship between the Centre and the host state:

> [T]he Regional Centre for International Commercial Arbitration is established to cater for the Arbitration and other Alternative Dispute Resolution (ADR) needs of both the private and public sectors of the economy as well as countries in sub-Saharan Africa. The facilities for Arbitration at the Centre are made available to all nationalities, irrespective of whether the parties to such international commercial disputes are nationals of member-states of the AALCC or not. By this Act [Act No. 39 of 1999, implementing the Headquarters Agreement of the LRCICA], Lagos has become an International Arbitration Centre.[17]

The regional character of the Centres is only evident in their structure and promotional activities. The allocation of spheres of influence to each Regional Centre is intended primarily for the purposes of:

1. their promotional works; and
2. the co-ordination of the activities of national institutions.

[15] Doc. No. AALCC xxx/iii/89/5, pp. 25–6; AALCC, *Report of the 27th Session Held in Singapore, 14–18 March 1988*, pp. 44–5, 61–2.

[16] *Report of the Activities of the CRCICA Submitted to the 39th Meeting of the AALCC, Cairo, 19–23 February 2000*, p. 3 (emphasis in the original). Also, in 1998, the CRCICA registered the first international arbitration involving an Uzbek party (*ibid*. at p. 9, n. 5). With respect to the KLRCA, in 2000, it was said that: 'Foreign parties not just from within the region but worldwide have chosen to arbitrate at the Centre, including parties from Australia, Bangladesh, British Virgin Islands, Cayman Islands, China, Egypt, France, Germany, Holland, Hong Kong, India, Indonesia, Italy, Japan, Korea, Malaysia, Nepal, Norway, New Zealand, Philippines, Singapore, Spain, Sweden, UK, USA, USSR. It is significant that arbitrations are now conducted at the Centre where neither party is Malaysian – there are currently three such ongoing arbitrations': An Address by Dr Z. M. Yatim, to the 39th AALCC Annual Session, Cairo, in KLRCA, *Arbitration News* (May 2000), p. 9.

[17] From the statement of the Attorney General of Nigeria, p. 70 above.

However, that does not affect their:

3. jurisdiction as arbitration institutions;
4. rendering administrative assistance in *ad hoc* arbitration; or
5. advising or assisting in the enforcement of arbitral awards.

In these latter situations, the choice of a Regional Centre is for the parties to make. The jurisdiction *ratione personae* and *ratione materiae* of the Regional Centres is global.[18]

The UNCITRAL Arbitration Rules in the Regional Centres

Where parties to a contract have agreed in writing that disputes arising out of, or in relation to, that contract shall be settled through arbitration under the auspices of a Regional Centre, such disputes shall be settled in accordance with the Rules of the Centre (which are the UNCITRAL Arbitration Rules subject to modifications and adaptations).[19] Although not within the scope of their initial Rules, the KLRCA and the CRCICA, like the LRCICA, conduct conciliation (mediation) proceedings if the parties expressly request to use that process. A modified version of the UNCITRAL Conciliation Rules is in operation.[20] If the dispute is not settled by conciliation, parties can resort to arbitration under the Rules of the Centres if they so wish, or as previously agreed. But resort to conciliation is not a precondition for using arbitration.

Arbitration under the UNCITRAL Arbitration Rules as applicable in the Regional Centres is characterised by procedural efficacy, diversity and flexibility inherent in the principle of party autonomy recognised by those Rules.[21] In most procedural steps required to activate the arbitral process

[18] This will reinforce the point made below (pp. 90–2) that arbitral awards and agreements under the Rules and auspices of the Regional Centres are potentially enforceable in any Contracting State to the NYC (about 125 as of 12 March 2001) or in a state that has regimes for the recognition and enforcement of arbitral awards or agreements, whether or not an AALCC member state.

[19] Statute, Article 12. The UNCITRAL Arbitration Rules as applicable to the Regional Centres are different from the Statute or Administrative (Arbitration) Rules of the Centres. The latter contain the administrative modifications and adaptations to the 1976 UNCITRAL Arbitration Rules.

[20] The CRCICA has Rules for Conciliation/Mediation and Technical Expertise whereas the KLRCA and the LRCICA each have Rules for Conciliation/Mediation. The Directors of the Centres perform certain administrative functions under the Conciliation/Mediation Rules, e.g. communication between the parties and the conciliator(s), appointment of conciliator, providing accommodation and other facilities for the conciliation, and secretariat and interpretation facilities.

[21] S. A. Baker and M. D. Davis, *The UNCITRAL Arbitration Rules in Practice* (Deventer: Kluwer, 1992); J. van J. Hof, *Commentary on the UNCITRAL Arbitration Rules* (Deventer: Kluwer, 1991).

under the Rules, the parties have, in the first instance, the power to agree or to disagree, or the taking of the step is subject to their agreement.[22] This general principle is anchored to the contractual nature of arbitration and of the Rules.[23] Where parties agree or fail to agree on any procedural step granted to them in the first instance, recourse may be had to the Regional Centres (normally through the directors) or to the arbitral tribunal, or to an authority previously designated (by the parties) for assistance.

The principle of party autonomy is inherent in the very nature of the UNCITRAL Arbitration Rules and is applicable in the Regional Centres. The Rules are at once contractual and optional. For them to apply, the parties must have 'agreed in writing' to use them, 'subject to such modifications as the parties may agree in writing'.[24] The only qualification is that the Rules shall be subject to any mandatory provisions of the *lex arbitri*.[25]

An essential aspect of the UNCITRAL Arbitration Rules is that the administrative support of an appointing authority is indispensable for the efficacy of proceedings conducted under them. An appointing authority has special roles to play in arbitration administered under the UNCITRAL Arbitration Rules especially in the appointment and replacement of and challenge to arbitrators.[26] Under the Arbitration Rules of the Regional Centres and the UNCITRAL Arbitration Rules, the parties enjoy the freedom to designate an appointing authority of their choice, which may be an institution or a natural person. The Centres' Arbitration Rules made some modifications to the UNCITRAL Arbitration Rules in this respect. The UNCITRAL Arbitration Rules allow the parties to propose or to agree on their own appointing authority. But, in the appointment of arbitrators, those Rules further state that if the parties fail to designate an appointing authority, or if the appointing authority designated by the parties refuses to act or fails to appoint the arbitrator within a specified time limit of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to

[22] E.g. appointment of arbitrators, Article 5; nominating an appointing authority, Articles 3(4)(a), 6(1)(b) and 7(2)(a); choice of the place of arbitration, Article 16; the language(s) of the arbitral proceedings, Article 17; the applicable substantive law, Article 33; whether an award should be without reasons, Article 32(3), all of the UNCITRAL Arbitration Rules.

[23] However, the right of a party to choose its representative or assistant under the UNCITRAL Arbitration Rules is absolute (Article 4).

[24] UNCITRAL Arbitration Rules, Article 1(1).

[25] UNCITRAL Arbitration Rules, Article 1(2); see pp. 92–3, note 47, with respect to the implication of the 1980 amendment to Malaysia's Arbitration Act to the above provision.

[26] UNCITRAL Arbitration Rules, Articles 6(1)(b); 7(1)(b) and 12(1).

designate an appointing authority for the parties.[27] A modification made in these provisions of the UNCITRAL Arbitration Rules (for the administrative purposes of the Regional Centres) is that, unless the parties agree otherwise or if the appointing authority designated by them refuses to act or fails to appoint an arbitrator, the Centre shall be the appointing authority for the purposes of the UNCITRAL Arbitration Rules and the Arbitration Rules of the Centres.[28]

As noted above, the Arbitration Rules of the Centres endorse the right of parties to designate their own appointing authority other than the Centre. However, in such an event, the parties shall inform the Director of a Centre of the name of that authority.[29] Thus, where the parties who had agreed to arbitrate under the Rules and auspices of the Centre exercise their autonomy by designating an appointing authority, that appointing authority shall carry out the duties reserved for the appointing authority under the UNCITRAL Arbitration Rules. Even in situations where the parties remain silent as to who their appointing authority would be, or if a designation was made and there was default or failure or refusal to act by such authority, the arbitral process will not stall as the Centres shall then become the appointing authority for all purposes under the UNCITRAL Arbitration Rules and the Centres' Rules.[30]

[27] UNCITRAL Arbitration Rules, Articles 6 and 7.

[28] Arbitration Rules of the KLRCA, Rule 3(1) and (3). Also, under the latter, where, pursuant to Article 6 or 7(3) of the UNCITRAL Arbitration Rules and Rule 3(1) of the KLRCA Arbitration Rules, the KLRCA is to appoint a sole arbitrator or the presiding arbitrator, the list of names to be communicated by the KLRCA to the parties shall be determined by the Director of the KLRCA (Rule 3(2)). In a similar circumstance under the Arbitration Rules of the LRCICA (Rule 3(b)), the list of names to be communicated by the Centre to the parties shall be drawn from the international panel of arbitrators maintained by the Centre. In the Arbitration Rules of the CRCICA (Rule 3(a)), and the UNCITRAL Arbitration Rules as applicable in CRCICA (Articles 6(2) and 7(2)), in the event of the refusal or failure of the parties' previously designated appointing authority to appoint the sole or remaining arbitrator within *30 days* of the receipt of a party's request to make the appointment, either party may request the Centre to make the appointment. The UNCITRAL Arbitration Rules as applicable in CRCICA further indicate in the last paragraph of Article 6(2) that: 'The Centre may make such appointment according to the procedures outlined below in these rules, or designate the appointing authority. The said period [i.e. the 30 days] may be extended if compelling circumstances prevent [the Centre or the appointing authority] from making this appointment in due time.' By contrast, the requisite time period is 60 days in the UNCITRAL Arbitration Rules (Article 6(2)) and as applicable to each of KLRCA and the LRCICA.

[29] Arbitration Rules, Rule 2(c) (CRCICA); Rule 2(3) (KLRCA); and Rule 2(c) (LRCICA).

[30] The CRCICA Rules contain an important provision (on multi-party arbitration) not yet in the Rules of the KLRCA or the LRCICA. Article 8*bis* of the UNCITRAL Arbitration Rules as applicable in the CRCICA has this addition: 'In multi-party arbitration and where there are two or more claimants or two or more respondents, the parties may agree on the

The specified modifications and adaptations of the UNCITRAL Arbitration Rules are necessarily linked to the very nature of those Rules as adopted by the Centres. Such modifications or adaptations ensure the smooth administration of arbitral proceedings. A party to a dispute under such a system may not be in a position to frustrate the process. Arbitration under the Rules of the Regional Centres has the advantages of institutional arbitration, obviates the procedural pitfalls of *ad hoc* arbitration whilst retaining the flexibility of both. The efficiency, effectiveness and fairness of arbitration under the Rules of the Centre are assured. Enhancing the arbitration are the broad procedural powers given to the arbitral tribunal including the power to rule on objections to its jurisdiction.[31] The Centres and arbitral tribunals functioning under their Rules (and with respect to the CRCICA, including its board members and staff) enjoy immunity from liability for acts or omissions and, according to the more widely drawn revised CRCICA Rules, for acts or omissions 'in connection with any means of settling disputes'.[32] The above are in addition to the privileges and immunities of the Centres and their staff under international law.

Arbitral awards of the Regional Centres

It may be difficult assessing arbitral institutions by the number of disputes reported to have yielded awards under their rules and auspices. This is because, in dispute resolution, the general rule is the privacy of

Footnote 30 *(cont.)*
number and the means of appointing arbitrators. If this agreement is not realized within 45 days from the date of notifying them by the claim of arbitration, the Centre will appoint all the arbitrators upon request of any of the parties. In this case the Centre shall also designate one of the appointed arbitrators to act as chairman.' For similar provisions, see the ICC Rules of Arbitration, Article 10; and the LCIA Rules of Arbitration, Article 8.

[31] UNCITRAL Arbitration Rules, Article 21(1) and (2); see pp. 434–5.

[32] UNCITRAL Arbitration Rules as applicable in the CRCICA, Article 40. This is one of the additions to the Rules made by the 1998 revision. The 1998 or the 2000 revised Rules for Arbitration and Conciliation of the KLRCA and the LRCICA respectively exclude liability to any party, of the Centre or any arbitrator or conciliator, for any act or omission related to the conduct of the arbitration or conciliation proceedings: Rule 11 of the Arbitration Rules and Rule 22 of the Conciliation Rules. Since the Rules of the KLRCA and the LRCICA cover the immunity of the 'Centre', then, like the Rules of the CRCICA, they will cover staff and those acting in the name of the Centres. And Article 40 of the CRCICA Rules applies to 'any means of settling disputes' under the Centre. This formulation covers proceedings under the CRCICA Mediation/Conciliation Rules and under the Technical Expertise Rules. For similar provisions, see the ICC Rules of Arbitration, Article 34; the LCIA Rules of Arbitration, Article 31; and the AAA International Arbitration Rules, Article 35.

proceedings and confidentiality of decisions. Also, the Regional Centres are relatively new and not yet as well known as the traditional arbitration institutions. However, with respect to awards made under its rules, the CRCICA and, to some extent, the KLRCA, annually publish (e.g. in newsletters) the different legal principles they contain. This practice, although encouraging and helpful, is not as adequate as the authorised publication of the award itself. Apart from that, awards of the CRCICA have appeared in dispute resolution publications.[33] In 1998 only, it was reported that '[t]he cases filed with the Centre [CRCICA] have scored a considerable leap from 72 cases last year [1997] to 101 cases during the current year [1998]. Beside disputes in construction, export, import and supply contracts – forming the core point of the majority of cases administered by the Centre – new types of cases are being introduced involving, for instance, management and operation contracts, insurance issues and spatial emission disputes'.[34]

A book that compiled, with useful commentaries, thirty-two of the most important arbitral awards rendered between 1984 and 1996 under the Rules of the CRCICA, has been published.[35] The subject matters covered in those awards are: supply of services, sales contract, construction, maritime transportation, work and material contracts, joint ventures, commercial agencies, management contracts, fees of consulting engineers, interpretation of contracts and exchange rates.

The awards digested in the book evidence a great diversity of natural and juridical parties from Africa, Asia, Europe and North America, although the identities of those parties and details of the contracts in issue in the arbitrations, were deleted, probably to maintain confidentiality. Of those arbitrations, arbitral tribunals made up of sole arbitrators, mostly of Egyptian nationality and nominated at the request of the

[33] E.g. the *Case Between the Egyptian Party and the French Party* (24/91 of 21 December 1995), in which the French party prevailed. The arbitration was in Cairo and the Egyptian state party first initiated arbitral proceedings: Int Arb Rep 11 (August 1996), p. 13; 22 YBCA (1997), p. 13.

[34] www.crcica.org.eg (dated January 1998), pp. 4–5. The *Report on the Activities of the CRCICA Presented During the 37th Annual Session of the AALCC Held in New Delhi, 12–17 April 1998* listed these additional subject matters that were, during the relevant period, submitted to arbitration under the CRCICA: petroleum investment, stock market and technology transfer (*ibid*. at p. 2). The total number of international cases submitted to the CRCICA rose to 155 in early 2000: *Annual Report to 38th AALCC Meeting*, pp. 2–3.

[35] Eldin, *Arbitral Awards of the CRCICA*. This book has, as appendices, the Rules of the CRCICA, the 1994 Egyptian Arbitration Law and provisions of the Egyptian Civil Code pertinent to contracts. These three instruments, in varying degree, featured prominently in awards digested in the book.

disputing parties by the CRCICA's Director, are few. The three-member tribunals have predominantly arbitrators of Egyptian nationality or at least one arbitrator of that nationality. In some cases, arbitrators or chairmen of other nationalities, e.g. American, British, French, Yugoslav, Swiss, Jordanian, Indian or Lebanese, have sat on the panel of the CRCICA. One arbitration had a tribunal of five members with a chairman and two arbitrators of Egyptian nationality and the remaining arbitrators of Lebanese and Jordanian nationalities respectively. The language of the proceedings was mostly Arabic. In one arbitration, both Arabic and French were used, and in another only English.[36]

Finally, Egyptian law was the applicable substantive law in most of the arbitrations since the parties may not have designated the applicable law for arbitration with a seat in Cairo.[37] A tribunal under CRCICA Rules, however, has applied 'principles established in international contracts', and, in two other instances, the applicable substantive law was Egyptian coupled with a request by the parties that the arbitrators should act as amiable compositeur and decide *ex aequo et bono*.

No doubt, as more cases are submitted under the Rules of the CRCICA and other Regional Centres, there is bound to be greater diversity in the subject matters and parties to disputes, in the language of proceedings, in the applicable substantive law and in the composition of arbitral tribunals. However, even if the identity of disputing parties remains confidential, it may be advisable to publish the names – not just the nationalities – of tribunal members and also of the parties' representatives, if any.

The enforcement of arbitral agreements and awards under the Regional Centres

In the preceding chapter, we examined the legal personalities of the Regional Centres and their implications.[38] The legal personalities of the Regional Centres in the domestic legal orders of their host states should, however, not be confused with the potential enforceability (under treaties or national laws) of arbitral awards rendered under, or agreements submitting to, them. In relation to the KLRCA, it has been observed that

[36] In the book, awards rendered in a language other than English have been translated into English.

[37] Article 33(1) of the UNCITRAL Arbitration Rules as applicable in the CRCICA provides: 'The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules, which it considers applicable.'

[38] See pp. 65–80.

neither the preparatory legal material available from the AALCC nor the agreement between the latter and Malaysia leads to the conclusion that *arbitrations* and *awards* of the Centre could be linked, in one way or the other, with the public international legal order.[39] It is a different question whether *arbitrations* in, and *awards* of, the Regional Centres (as distinct from their personalities) could be linked with the public international legal order. The international enforceability of agreements or awards relating to the Regional Centres has, *prima facie*, no connection with their legal personalities in their respective host states. In this respect, comparison with the ICSID Convention and regime may be misleading.[40]

An arbitral agreement or award made under the Rules or auspices of the Regional Centres will, on its face value, benefit from laws and treaties on the recognition or enforcement of arbitral agreements and awards, e.g. the 1958 New York Convention.[41] The Regional Centres' host states are mostly parties to the New York Convention and each has taken legislative measure to implement the Convention.[42] Accordingly, arbitral agreements concluded in, or to submit to, and awards rendered at and under the Rules of, the Regional Centres, will be potentially enforceable under the New York Convention where applicable, or under any applicable national legal regime for the recognition and enforcement of arbitral awards and agreements.[43] Under the Rules of the Regional Centres, parties

[39] H. Arfazadeh, 'Settlement of International Trade Disputes in South East Asia', MLJ 1, 1992, cxxii, cxxvi (emphasis added).

[40] For juridical similarities between ICSID and the Regional Centres, see p. 65.

[41] See pp. 177–211.

[42] E.g. Act No. 320 of 1985, in P. G. Lim, 'Malaysia' in Van den Berg (gen. ed.), *ICCA: International Handbook*, Supp. 14 (The Hague: Kluwer, 1993), Annex III; Arbitration and Conciliation Act 1988 of Nigeria, ss. 54(1), 51 and 52; and the 1994 Egyptian Law on Arbitration, Article 1. Whereas Egypt, Malaysia, Nigeria and Kenya are parties to the NYC, Iran is yet to become a party. Iran has, however, enacted an arbitration law based on the Model Law. It has been pointed out that 'although, at present Iran is not a party to the New York Convention, recognition and enforcement of foreign arbitral awards is possible under existing laws': J. Seifi, 'The New International Commercial Arbitration Act in Iran', JIA 15, 1998, 5, 35. Cf. 'the enforcement in Iran of an international award is an aleatory matter left up to local courts to decide': P. R. Monney, 'Piercing the Islamic Veil', IBL 28, January 2000, 23, 27.

[43] There are laws more favourable than the NYC for the recognition and enforcement of arbitral awards: see pp. 195–7. But, for the TRAC to be a viable dispute resolution option, positive measures should be taken by Iran to ratify the 1958 NYC: M. Jafarian and M. Rezaerian, 'The New Law on International Commercial Arbitration in Iran', JIA 15, 1998, 31, 40–1; H. G. Gharavi, 'The 1997 Iranian International Commercial Arbitration Law', *Arbitration International* 15, 1999, 85. A Bill to ratify the NYC has reportedly been presented to the Iranian Government for approval: Mashkour, 'Building Friendly Environment', 81–3.

may determine the seat of arbitration.[44] Practically, before the arbitral seat is chosen, the enforceability of any possible award rendered there is normally taken into account by the parties, their representatives, the arbitral tribunal and by the arbitration institutions.[45]

States, whether or not members of the AALCC, will potentially recognise and enforce arbitral agreements submitting to, or awards rendered under, the Regional Centres, if the states are, subject to any reciprocity declaration, parties to the New York Convention or have any other relevant treaty or law for the recognition and enforcement of arbitral agreements or awards. That the AALCC Regional Centres are legal persons is immediately relevant to their activities in the domestic legal orders of their host states and internationally. Even if a state which is not a member of the AALCC refuses to recognise the legal personality of the AALCC or of the Regional Centres, that non-recognition does not have any negative impact for the potential enforceability, in the non-recognising state, of agreements submitting to, or awards rendered under, the Regional Centres, if that state is a party to the New York Convention or has other regimes for the recognition and enforcement of arbitral agreements and awards.

As the Regional Centres operate under a modified version of the UNCITRAL Arbitration Rules, their Rules are anchored to the assumption that they are subject to the agreement of the parties and a national legal order.[46] That is, arbitration in and award arising out of the Rules of the Regional Centre *ought* to benefit positively from the mandatory provisions of the relevant national laws and applicable treaties.[47] This flows from the

[44] The seat of arbitration is a legal concept which does not necessarily include, even though in most cases it may comprehend, the geographically convenient site of the arbitration hearings: *Naviera Amazonica Peruana SA* v. *Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's LR 116, 120–1; *Union of India* v. *McDonnell Douglas Corp.* [1993] 2 Lloyd's LR 48; A. J. van Den Berg, 'Non-Domestic Arbitral Award Under the 1958 New York Convention', *Arbitration International* 2, 1986, 191, 202. Under the UNCITRAL Arbitration Rules (Article 16(1) and (2)), unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration. The tribunal may, however, determine the 'locale' of the arbitration within the country agreed upon by the parties. The tribunal may also hear witnesses and hold meetings for consultation among its members at any place it deems appropriate having regard to the circumstances of the arbitration.

[45] Under the NYC, the place where an award was made is a criterion for enforceability barring any reciprocity declaration (Article 1).

[46] UNCITRAL Arbitration Rules, Article 1(2).

[47] Section 34 of the Malaysian Arbitration Act (as amended) excludes the application of the 1952 Arbitration Act or any other written law to *inter alia* arbitration under the

nature of arbitration and awards arising under the Regional Centres' Rules: the latter are not derived from, nor were they prescribed by, or enforceable pursuant to, the Agreements between the host states and the AALCC.

By contrast, ICSID proceedings, rules and awards are covered by, and integrated with, the ICSID Convention.[48] Under the Convention, the consent of disputing parties to submit to the Centre is indispensable and irrevocable (Article 25) whether or not there is a comparable provision in a Contracting State's arbitration law for the enforcement of arbitration agreements.[49] And the consent of parties to arbitration under the Convention shall, unless otherwise stated, be deemed to be consent to such arbitration to the exclusion of any other remedy (Article 26). Not only that, the Convention excludes any appeal or any other remedy against an ICSID award except those provided for in the Convention itself (Article 53). As an ICSID *ad hoc* Committee observed:

> The post-award procedures (remedies) provided for in the Convention, namely, addition to, and correction of, the award (Art. 49), and interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52) of the award are to be exercised within the framework of the Convention and in accordance with its provisions. It appears from these provisions that the Convention excludes any attack on the award in the national courts. The award is final in that sense. It is also final in the sense that even within the framework of the Convention it is not subject to review on the merits. It is not final, on the other hand, in the sense that it is open to being completed or corrected, interpreted, "revised" or annulled.[50]

The exclusive, self-contained and largely delocalised nature of ICSID proceedings renders the place of arbitration insignificant to their award's validity and enforceability.[51] A failure to appreciate the nature of arbitration and award under the Regional Centres and under the ICSID Convention must have informed the ill-made attempt in section 34 of the 1952 Malaysian Arbitration Act (as amended) to equate both. Due to the

UNCITRAL Rules of 1976 and the Rules of the Centre, thereby making their application non-mandatory except as preserved. In effect, s. 34, excludes Article 1(2) of the UNCITRAL Arbitration Rules with negative consequences for arbitration under the Centre's rules: A. A. Asouzu, 'The National Arbitration Law and International Commercial Arbitration: The Indispensability of the National Court and the Setting Aside Procedure', RADIC 7, 1995, 68.

[48] The ICSID Convention, Articles 44 and 33. The Administrative Council, pursuant to Article 6(1)(c) of the Convention, drafted the ICSID Arbitration and Conciliation Rules.

[49] ICSID proceedings will be discussed in Part 4 below.

[50] *MINE* v. *Guinea*, Annulment, 22 December 1989, 4 ICSID Reports 84, para. 4.02.

[51] Cf. Caron, 'Iran–US Claims Tribunal', 113.

implications of that provision on the arbitral process, it is given attention in this book and also as a caution to countries in Africa that might otherwise wish to emulate it.[52] According to section 34:

1. Notwithstanding anything to the contrary in this Act [i.e. the Arbitration Act 1952] or in any other written law, but subject to subsection (2) in so far as it relates to enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.
2. Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as may be appropriate.
3. The competent court for the purpose of such enforcement shall be the High Court.[53]

The above provision excludes not only the 1952 Arbitration Act but also *any* written law from being applicable to arbitration held under the Rules of the KLRCA and under the ICSID Convention.[54] In effect, this will exclude Malaysian law as the proper law of the arbitration agreement, of the contract and of the arbitration.[55] Indeed, the provision totally excludes the High Court from interfering in proceedings brought under the UNCITRAL Arbitration Rules *and* the Rules of the KLRCA or under the ICSID Convention, except for the enforcement of arbitral awards rendered

[52] The opinion of this author has been sought concerning the possibility of enacting in a host state of an AALCC Regional Centre a provision similar to s. 34.

[53] Lim, 'Malaysia' in Sanders (gen. ed.), *International Handbook*, Vol. II, Supp. 14 (1993), Annex 1.

[54] *Sarawak Shell Bhd* v. *PPSE Oil and Gas Sdn Bhd* [1998] 2 MLJ 20 (CA). This was preceded by some cases confirming that the High Court of Malaysia, in applying s. 34, does not have the jurisdiction to interfere in an arbitration proceeding conducted under the Rules of the KLRCA: *Klockner Industries-Anlagen GmbH* v. *Kien Tat Sdn Bhd* [1990] 3 MLJ 183, followed in *Solichem Sdn Bhd* v. *Standard-Electrik Lorenz AG* [1993] 3 MLJ 68, and applied in the *Sarawak Shell* case, *ibid*. By contrast, in *Syarikat Yean Tat (M) Sdn Bhd* v. *Ahli Bina Pamong Sari Sdn Bhd* [1996] 5 MLJ 469, the High Court held that s. 34 only relates to foreign (international) arbitration and not to domestic arbitration. Thus, the court could exercise supervisory jurisdiction under the 1952 Arbitration Act.

[55] C. E. Silverster, *Judicial Intervention in Commercial Arbitration in Malaysia* (MSC Thesis, King's College London, 1993), p. 8.

under them.[56] But the remedies excluded by section 34 include the High Court's power to set aside arbitral awards rendered under the Rules of the KLRCA, to recognise and enforce arbitration agreements to submit to the KLRCA both under the 1952 Arbitration Act and the 1958 New York Convention, as well as the High Court's power to grant provisional measures under both the Rules of the KLRCA and the ICSID Convention and their applicable arbitration rules.[57] Thus, under section 34, parties to ICSID proceedings taking place in Malaysia (or in any Contracting State emulating the provision) have lost the right, if stipulated in the instrument recording their consent, to request provisional measures from the High Court as permitted under the 1984 ICSID Arbitration Rules.[58] With respect to the ICSID Convention, in relation to excluding the setting-aside procedure, section 34(1) is obviously superfluous as no court in a Contracting State has the competence to set aside an ICSID award.[59]

The Agreements between the AALCC and the host states of the Regional Centres do not have the same implication on the arbitration and award of the Regional Centre as the ICSID Convention on its arbitration and award. Section 34 is not directed at implementing the Agreement between the AALCC and Malaysia nor was the section integrated into that Agreement. Conceptually, section 34 is neither inherent in nor integrated with the public international law nature of the KLRCA. Instead, it was directed primarily at a notorious regime: the outdated 1952 Arbitration Act of Malaysia, which could be reformed by a suitable adoption of the Model Law.[60] Thus,

[56] Under the ICSID Convention, each Contracting State (e.g. Malaysia) shall take such legislative or other measures as may be necessary for making the provisions of the Convention effective in its territories (Article 69). Section 34, to that extent, is consistent with the obligations of Malaysia under the Convention, especially with respect to the recognition and enforcement of awards under Article 54 thereof.

[57] In the *Klockner* case [1990] 3 MLJ 183, which arose out of an arbitration under the Rules of the KLRCA, the judge left open the question whether, in view of s. 34, the High Court can grant interim measures under Article 26(3) of the UNCITRAL Arbitration Rules as applicable in the KLRCA.

[58] 1 ICSID Reports 171, Article 39(5). This implication would be inconsistent with the obligations of Malaysia under the Convention, as it will undercut Article 26 of the ICSID Convention in an appropriate circumstance.

[59] The court of a Contracting State can only recognise and enforce an ICSID award: see p. 369. In repeating this with respect to the enforcement of ICSID awards in Malaysia, s. 34(2) of the 1952 Act saves what was apparently excluded by s. 34(1) within the meaning of 'any other written Law', which includes Act No. 14 of 1966 that implemented the ICSID Convention in Malaysia. The NYC, which was implemented in Malaysia by Act No. 320 of 1985, was also saved by s. 34(2) with respect only to the *enforcement of arbitral awards*, and is not appropriate for recognising or enforcing ICSID awards.

[60] The Model Law was elaborated in 1985 after the Malaysian Amendment of 1980.

in seeking to equate arbitration in, and award of, the KLRCA with those of ICSID, by completely delocalising the former except for the enforcement of arbitral awards, section 34 is misconceived.

The co-operation agreements between the AALCC and other arbitral institutions

Agreements between the AALCC Regional Centres and other arbitral institutions and how the contentious issue of venue for dispute resolution was addressed in them will now be considered. Amongst the agreements are those respectively with the American Arbitration Association and ICSID.

The AALCC–ICSID Co-operation Agreements

The Agreements between ICSID and each of the KLRCA and the CRCICA (acting through the AALCC) are identical.[61] The Agreements are founded in public international law, as the parties to them are subjects of that law. Their juridical origins derive from the constituent instruments of the AALCC, the Regional Centres and ICSID. The AALCC has the power to enter into arrangements for co-operation with international organisations.[62] On the other hand, the Regional Centres are authorised to enter into agreements with national and international institutions where appropriate.[63] In relation to ICSID, the Convention and the applicable Rules contemplate that proceedings may be held outside Washington DC, which is the headquarters of ICSID.[64] Such proceedings may be held, if the parties so agree, at the seat of the Permanent Court

[61] For the Agreement of 5 February 1979, see 22 ILM 522 (KLRCA); and for the Agreement of 6 February 1980, see 22 ILM 524 (CRCICA). The Agreement between ICSID and the KLRCA became effective on 11 April 1979 upon its approval by the Administrative Council of ICSID: ICSID, *Thirteenth Annual Report 1978/79*, p. 4. The Agreement between the CRCICA and ICSID came into force upon signature. An identical Agreement will be concluded between ICSID and the LRCICA: *Progress Report on AALCC's Regional Centres for Arbitration*, Doc. No. AALCC/XXXIII/Tokyo/ 94/13, p. 13. [62] See p. 55.

[63] Statute of the CRCICA, Article 10. The Administrative Rules of the KLRCA are slightly different since they would appear to be restricted to national institutions only. They provide *inter alia* that the KLRCA shall enter into agreements with national institutions where appropriate. However, it would seem that the omission of the phrase 'and international' after 'national' must have been typographical.

[64] The ICSID Arbitration Rules (Rule 34(2)) and Conciliation Rules (Rule 28(3)) provide for the possible examination of witnesses and experts in places other than before a conciliation commission or arbitral tribunal.

of Arbitration at The Hague, or at any other appropriate institution, whether private or public, with which ICSID may make arrangements for that purpose.[65]

The AAA–CRCICA Agreements

The American Arbitration Association (AAA) and the CRCICA concluded three agreements between 1984 and 1993, the first being on 2 July 1984 (the Main Agreement).[66] The latter was supplemented by the Agreement of 12 July 1991.[67] The 1991 Agreement has a limited scope but ambitious purpose. It relates particularly to the effective promotion, use and facilitation of arbitration in the international trade relations of the US and Egypt, a purpose that will be achieved through co-operation between the two institutions. The Agreement stipulates a standard arbitration clause, which may be incorporated 'in contractual trade and commercial relations by parties from Egypt and the US':

> Any dispute, controversy, difference, or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with [the] agreement between the Cairo Regional Centre for International Commercial Arbitration and the American Arbitration Association dated July 12, 1991.

The inclusion of the clause in a contract by the concerned parties might have far-reaching implications in subsequent arbitration between them. For, unless the Egyptian and American parties agree otherwise, the provisions of the 1991 Agreement between the two institutions shall be deemed incorporated into their contract. The inclusion may, in some cases, amount to an 'agreement' or 'a contrary intention' by those parties,

[65] ICSID Convention, Article 63(1)(a). Pursuant to the latter provision, in addition to the Agreements with the AALCC Regional Centres, the first such Agreement concluded by ICSID was in 1968 with the PCA at the Hague: ICSID, *Second Annual Report 1967/1968*, Annex 7, pp. 19–20. ICSID subsequently concluded similar Agreements with the Australian Commercial Arbitration Centre in Sydney, the Australian Centre for International Commercial Arbitration in Melbourne, the Singapore International Arbitration Centre and the Gulf Co-operation Council Commercial Arbitration Centre in Bahrain: *Report of the Secretary-General During the Thirty-Third Annual General Meeting of the Administrative Council*, Washington DC, 28–30 September 1999, p. 3.

[66] L. E. Brown, *The International Arbitration Kit* (4th edn) (AAA, 1993), p. 320. In 1986, the AAA and the KLRCA, concluded an Agreement (*ibid*. at p. 331) identical to that between the AAA and the CRCICA. Since both Agreements are identical, only the one involving the CRCICA will be cited unless otherwise indicated.

[67] Brown, *Arbitration Kit*, p. 356.

thereby excluding relevant provisions of the Rules of either institutions that would otherwise be applicable.[68]

Secondly, the choice of the place of arbitration by the parties in a contract bearing the standard clause will be sufficient to determine the institution under whose auspices or rules the arbitration will be conducted. The parties need not mention any arbitral institution and its rules for this to result. This indirect choice of arbitral institution and rules might have some unforeseen and undesirable consequences since the factors that determine the place for arbitration *and* under which institution in that place to arbitrate, are not always the same or compatible.[69] Rules of arbitration institutions, although evincing substantive uniformity, might still contain unique features that could, in the face of varying applicable arbitration laws, drag unwary parties to embarrassing destinations.[70] It may be advisable that, before the AAA–CRCICA standard arbitration clause is incorporated into a contract, the parties should familiarise themselves with the rules of these institutions and how any potentially applicable arbitration law might affect their rights.

The 'deemed provisions' in the AAA–CRCICA Agreement which the standard clause will imply are as follows: if Egypt is selected as the place of arbitration, the arbitration shall be conducted in the CRCICA, but shall

[68] E.g. under Article 16(1) of the UNCITRAL Arbitration Rules as applicable in the CRCICA, unless the parties agree upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration. Also, under Article 13(1) of the AAA International Arbitration Rules, if the parties disagree as to the place of arbitration, the place of arbitration may initially be determined by the Administrator (i.e. the AAA) subject to the power of the tribunal to determine finally the place of arbitration within sixty days after its constitution. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.

[69] Parties may choose a place for their arbitration without intending to use the arbitration institution located there. But the inclusion of the standard clause in issue evinces intention to use either the AAA or the CRCICA depending, in the first instance, on the place of arbitration chosen by the parties.

[70] The waiver of the right to appeal permitted under some arbitration laws may be valid under some institutional rules but not others. E.g. Article 28(6) of the ICC Rules of Arbitration provides: 'Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.' To the same effect is: Article 26.9 of the LCIA Rules. The former Article 24 of the 1988 ICC Rules of Arbitration was considered in *Arab African Energy Corp.* v. *OPN* [1983] 2 Lloyd's LR 419; *Marine Contractors, Inc.* v. *Shell Petroleum Development Co.* [1984] 2 Lloyd's Rep 77; and *CBI NZ Ltd* v. *Badger Chiyoda* [1990] LRC (Comm) 621: see p. 160. By contrast, the AAA International Arbitration Rules and the UNCITRAL Arbitration Rules as applicable in the CRCICA, have no comparable provisions.

be conducted under the International Arbitration Rules of the AAA if the place chosen is in the US. In a situation when the place of arbitration is not designated or the parties are unable to agree on it in writing, the claimant, if residing in Egypt, is to give notice to the CRCICA, or, if residing in the US, to the AAA.[71] Then the CRCICA or the AAA, as the case may be, shall promptly notify the parties or their counsel to submit, within 21 days of the receipt of the notice, their contentions as to the proper place of arbitration. A joint committee of three members, with each of CRCICA and the AAA appointing one member, and the third member (the chairman) chosen by the two members so appointed, shall determine the place of arbitration.[72] The CRCICA or the AAA, as the case may be, shall advise the parties of the decision of the joint committee, which shall be final and binding.

On 3 March 1993, the AAA and the CRCICA concluded yet another agreement supplementary to the 1984 Agreement.[73] The 1993 Agreement is identical to the 1991 Agreement although with a wider scope. Whilst the 1991 Agreement relates to the trade and commercial relations between the US and Egypt, the 1993 Agreement recommends a clause identical to that in the 1991 Agreement for incorporation 'in contractual trade and commercial relations by parties from Arab countries and the United States'.[74] The 1993 Agreement is relevant to nationals of these North African states: Algeria, Libya, Tunisia, Morocco and Sudan (with the possible exception of Egypt covered by the 1991 Agreement) and, to some extent, to nationals of Tanzania, Djibouti, Mauritania and Arab states outside Africa, whose nationals contract with Americans.[75]

[71] 'Residence' in the Agreement is not defined and might constitute a problem in a situation involving a wholly owned but locally incorporated subsidiary of a TNC. If such a subsidiary is involved in a dispute, applying the residence criterion may lead to double-edged result. Seen as a separate entity, the local subsidiary might be said to be residing at the place it has its corporate office or at the place it was incorporated. But, if the local subsidiary is taken as part of the 'group', its residence might be where its central management is located, most likely not the same as the place of incorporation and the location of the corporate office of the subsidiary, but likely outside the place where the dispute arose. There is here a recipe for litigation before national courts.

[72] The chairman of the Joint Committee shall not be an officer or former officer of either institution.

[73] Brown, *Arbitration Kit*, p. 384.

[74] The two institutions recognise and acknowledge the freedom of the parties mutually to agree on whatever arbitration arrangements best suit their needs.

[75] As was pointed out earlier, the jurisdiction of the AALCC Regional Centres is global. Also, agreements to submit to the Centres and awards rendered under their rules and auspices can potentially be recognised and enforced in states that are parties to the relevant treaties or with legal regimes, for the recognition and enforcement of arbitral agreements and awards: see pp. 83–5; 90–2.

Appraisal of the Agreements

The Agreements between the Regional Centres and the AAA and ICSID respectively, address to some extent, a legitimate misgiving of developing states about international commercial arbitration as concerns the venue of arbitration. If made known to parties and potential parties to disputes and utilised, those agreements would go a long way in introducing balance and fairness in international arbitration.

However, in North–South commercial relations, due to the relative bargaining strengths of the parties and their resource disparities, the decision on the choice of arbitration venue may not always produce a 'just' result. In this respect, the Agreements between the Regional Centres and the AAA would appear to be more attuned to more equitable result since if the parties do not designate the place of arbitration, either out of default or due to their disagreement, a claimant shall notify the concerned arbitral institution at the place it resides for the determination of the seat of arbitration. It is foreseeable that in the parties' submissions as to the appropriate place for the arbitration, contentions based on objective criteria relevant to the dispute and the parties will be made and generally would guide the joint committee.[76] Such criteria may include the genuine convenience of the parties, their representatives and the arbitrators, the nature of the dispute, the locations of the actual or immediate parties to the dispute, the nature and location of the subject matter of the arbitration and, if witnesses will be called, the preponderance of convenience and costs were arbitration to be held in either of the contested or alternative venues, the overall costs of the arbitration and the enforceability of the arbitral award when rendered in the proposed venue.[77]

Parties to arbitration may, in the first instance, agree on the seat of

[76] Another pitfall in the arrangements between the Regional Centres and the AAA is that, where parties include the recommended clauses in their contracts, they may add a second layer of procedure to arbitration under the rules of those institutions with the attendant costs and delays.

[77] The 1996 UNCITRAL Notes on Organizing Arbitral Proceedings provide, in Article 22, that various factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the state where the arbitration takes place and the state or states where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject matter in dispute and proximity of evidence.

arbitration.[78] In default or in furtherance of their agreement, an arbitral tribunal, an institution, a designated authority or another third party may choose such a seat.[79] It is arguable that objective considerations should also apply in the circumstance.[80]

Again, if the parties have selected arbitral venues in advance, *prima facie* they should be held to their commitments, for *pacta sunt servanda*. But the latter is not an absolute rule.[81] Exceptions could and should be admitted in arbitration where there is a genuine and fundamental change of circumstances at the chosen arbitral venue at the time the dispute is ripe for resolution, circumstances fundamentally different from situations envisaged during the negotiations or signing of the contract.[82] In such a situation, it may be onerous and unfair to hold parties to their agreement.[83]

All said, a wholesale endorsement of any argument to vary the arbitration clause or agreement must be resisted in the absence of a genuine cause. Otherwise, the predictability and certainty which parties desire in resorting to arbitration will be jeopardised. The dilemma, however, is that a greater jeopardy might be suffered by insisting on the invariability of a forum clause in deserving situations.

The Agreements between ICSID and the Regional Centres were said to

[78] E.g. Article 20(1) of the Model Law; Arbitration Conciliation Act 1988 of Nigeria, s. 16(1); Arbitration Code of Tunisia, Article 65; AAA International Arbitration Rules, Article 13(1); ICC Rules of Arbitration, Article 14(1); LCIA Rules, Article 16:1; UNCITRAL Arbitration Rules, Article 16(1).

[79] E.g. the Model Law, Article 2(d) and (e).

[80] In *Ethyl Corp.* v. *Canada*, Decision Regarding the Place of Arbitration, 28 November 1997, 38 ILM 700, an arbitral tribunal set up under Chapter 11 of the NAFTA (investor-to-state dispute), applying the factors in the UNCITRAL Notes (see n. 77 above) and Article 16 of the UNCITRAL Arbitration Rule (see n. 44 above), determined that Toronto, instead of Ottawa or New York City, would be the place of arbitration on the grounds that Canada was the location of the subject matter of the dispute, that a Canadian venue would prove less expensive than New York, more convenient for the counsel and their parties and more proximate to the likely evidence.

[81] It was cautioned in *Amco Asia* v. *Indonesia* that the transposition of the principle of *pacta sunt servanda* to agreements between states and private enterprises is being debated: 1 ICSID Reports 492, para. 248.

[82] E.g. *NIOC* v. *Ashland Oil Inc.*, 817 F 2d 326 (5th Cir. 1987), concerning the situation in Tehran during the hostage crisis and the failed attempt to arbitrate a dispute between an American and an Iranian party in Mississippi, Tehran being the originally selected seat of arbitration.

[83] A. Rogers, 'Forum Non-Conveniens in Arbitration', *Arbitration International* 4, 1988, No. 3, 240; Redfern and Hunter, *International Arbitration*, paras 6-26 to 6-27. Cf. *Janos Paczy* v. *Haendler & Natermann GmbH* [1981] 1 Lloyd's LR 302, 307–9, where impecuniosity was rejected as a ground for holding an arbitration clause 'incapable of being performed'. However, in *Teleserve System Inc.* v. *MCI Telecomm Corp.*, 230 AD 2d 585 (4th Dept 1997), an arbitration clause requiring a disproportionately high filing fee was held unconscionable and unenforceable: Park, *Transnational Law and Contemporary Problems* 8, 1998, 39 n. 102.

be dictated by the policy of the AALCC 'to bring about [a] wider acceptability of the ICSID Convention of 1965 in the Asian–African Region'.[84] The question of securing a wider acceptance of the Convention would seem not to arise in this context with respect at least to African states as their support for, and acceptance of, the ICSID Convention demonstrates.[85] Most African states have, in their investment laws and treaties, provisions that ICSID proceedings may be used.[86] However, ICSID proceedings are not regularly held in Asian–African cities.[87] States in Africa and Asia are not usually claimants in arbitral, particularly ICSID, proceedings. Most of those states may encounter problems participating in arbitral proceedings abroad. They may also find it difficult to appreciate the wisdom, or to reconcile the contradictions, in arbitral proceedings conducted outside the region where the investment was made, where the physical plant or project is located, where the injury probably occurred, where all corporate records and officers involved were situated, where probably all key witnesses reside and, indeed, where profits were made. Arbitration is after all an extra-judicial procedure meant to serve commercial parties by its relative economy, inherent flexibility, adaptability and convenience. Austin Amissah had aptly illustrated the point and the unfairness which the subversion of the essence of arbitration would engender in the context of dispute resolution under the former Lomé Convention but equally relevant in the present context.[88]

Hence, in 1979, a call was made for agreements to be concluded between ICSID and the AALCC Regional Centres permitting ICSID proceedings to be held in the region.[89] The fear embedded in that call was justified

[84] 22 ILM 521. [85] See chapter 7 below. [86] See chapters 8–11 below.

[87] With respect to Africa, between 5–7 October 1998, the tribunal in *Société d'Investigation de Recherche et d'Exploitation Miniere (SIREXM)* v. *Burkina Faso* (Case ARB/97/1), an ICSID arbitration registered on 27 January 1997, and made up of a Greek (president), a Togolese and a Swiss (arbitrators) met with the parties in Ouagadougou: *News from ICSID* 15, 1998, No. 2, 2. This was probably the first instance when an ICSID tribunal met in Africa. And, in relation to Asia, *Philippe Gruslin* v. *Malaysia* (Case ARB/94/1), registered on 13 January 1994, was unique in many respects. It was the first ICSID arbitration to have a sole arbitrator (Sompong Sucharikul) who was also from a developing state (Thailand). The case was probably the first time an ICSID tribunal 'met with the parties' in developing states cities: Bangkok on 8 July 1994 and 13–15 June 1995, and in Kuala Lumpur on 7–12 August 1995: *News from ICSID* 11, 1994, No. 2, 2; *News from ICSID* 12, 1995, No. 2, 2. With the meeting at the KLRCA, it probably became the first ICSID case to have been held in a venue in a Contracting State, which was also a party to the dispute. The case was the first opportunity to use the Agreement between ICSID and the AALCC (on behalf of KLRCA); see pp. 96–7. [88] See p. 36.

[89] *Conference of Government Officials and Representatives of Chambers of Commerce on Modalities for Settlement of Disputes in International Commercial Transactions, Kuala Lumpur, 3–6 July 1979*, pp. 11–12.

by practical experiences of one state in an ICSID arbitration. In *Amco Asia* v. *Indonesia*,[90] Indonesia incurred considerable expenses for bringing out witnesses and experts from Jakarta to Washington, DC for the several hearings.[91] It was observed that it would have been more economical and practical if the witnesses would only have to travel from Jakarta to Kuala Lumpur.[92]

The hitherto unnecessary inconvenience involved in arbitrating in far-off venues with its negative economic and psychological impacts for parties from developing states could be mitigated if, in future, Asian–African parties to ICSID proceedings make greater use of the opportunity afforded by the agreement between ICSID, the AALCC Regional Centres and other arbitration centres in the region (e.g. for Asian states, in Bahrain, Singapore, Malaysia and Australia; and, for African states, in Cairo and, when concluded, at Lagos and Nairobi). Generally speaking, due to the nature of the ICSID Convention, particularly the privileges and immunities conferred on the Centre, its officers, parties, agents, counsel, advocates, witnesses, experts, conciliators, arbitrators and members of the *ad hoc* committee,[93] it does not make much difference if the place of the ICSID proceedings is located within the Contracting State party to the investment dispute or that of another Contracting State nearby.[94] In some cases, it will serve the interests of the non-state party agreeing to use facilities proximate to its investment or associated project. As Tinuade Oyekunle pertinently observed: 'These [co-operation] arrangements have been made with a view to ensure expeditious determination of cases, minimising costs of arbitration and to suit the convenience of the parties'.[95]

It may, however, be pointed out that some developing states may, in some cases, be able to afford to participate effectively in dispute resolution proceedings outside their jurisdictions. But, with the fragility of the economy of African states due mainly to depreciating export earnings,

[90] ICSID Case No. ARB/81/1, registered on 27 February 1981.

[91] The first tribunal held sessions in Washington DC and Copenhagen for hearing witnesses and oral evidence. Indonesia called ten witnesses but actually presented the evidence of nine of them. Amco Asia called six witnesses. In the resubmitted *Amco Asia* case, proceedings were held in London and Washington DC. The tribunal held hearings on the merits at Washington DC on 18–29 September 1989, at which Indonesia called seven witnesses whilst Amco called one witness: 1 ICSID Reports 415–16, 576.

[92] Gautama, 'Some Legal Aspects of International Commercial Arbitration in Indonesia', JIA 7, 1990, No. 4, 93, 100 n. 25. Sudargo Gautama was counsel for Indonesia at various stages of the arbitration.

[93] ICSID Convention, Articles 18–24 and 52.

[94] Walde, 'Negotiating for Dispute Settlement', 61.

[95] Oyekunle, 'Regional Centre for Arbitration in Lagos, Nigeria – Need for Revival' (unpublished position paper), p. 7.

and the genuine need to spread and develop arbitration and ADR in these states, expecting them and their nationals always to conduct their proceedings in venues where they would expend their already meagre foreign exchange and for proceedings which are so far removed as to influence genuinely the practice and knowledge of their legal and business communities, would, at the least, be unfair, if not inequitable.

Appraisal of the AALCC dispute resolution scheme

Discussion of international commercial arbitration by the AALCC was a child of circumstance: the establishment of UNCITRAL. However, the outcome of the various deliberations was unique only in the establishment and regionalisation of arbitration institutions. Added to that, was the genuine appreciation by Asian–African states that arbitration is important in their international economic relations.

The adoption by the Regional Centres of a modified version of the UNCITRAL Arbitration and Conciliation Rules as their institutional rules, was not only a practical, but a positive, step indicating that, in principle, Asian–African states are not opposed to modern arbitration. The utility of those Rules as administered by the Regional Centres and other institutions, will largely depend on their success in effectively resolving particular disputes satisfactorily.

An implication of the promotional programmes of the Regional Centres might be that, in the short term, arbitration and the ADR methods, their values and the activities of the Centres would be more widely known. A large number of potential arbitrators would also emerge in Africa and Asia. This might, in the long run, lead to an appreciation of local dispute resolution resources by governments and private parties, causing a shift in the patterns of appointment of arbitrators and the choice of parties' representatives. The Centres and their activities have stimulated interest and created greater awareness and opportunities in dispute resolution matters in Africa and Asia. In addition to the impact of the dispute resolution projects of UNCITRAL, the establishment and activities of the Regional Centres facilitate their wider diffusion and instigated the establishment of national arbitral institutions by private organisations in Africa and beyond.[96]

[96] Instances include the Commercial Arbitration Centre in Harare (1995), the Permanent Court of Arbitration of the Mauritius Chamber of Commerce and Industry (1996), the Arbitration Foundation of Southern Africa, Johannesburg (1996), the Arbitration Forum of Johannesburg (1996), the Ghana Commercial Arbitration Centre, Accra (1997), the

Significantly, too, in most states where arbitration institutions were established, modern laws on international (commercial) arbitration (and conciliation) have been enacted or are about to be enacted. Such laws further stimulate interest in ADR. Those states are also taking steps to ratify or have ratified and, where necessary, implemented the requisite arbitration treaties. These developments will hasten regional participation in, and the actual use of, ADR.

However, some critiques may perceive the development of newer arbitration institutions as an unnecessary diversion from, if not a potential threat to, the traditional dispute resolution institutions and would develop arguments, even if couched in altruistic terms, to undermine the impact, influence and relevance of those newer institutions. The focus is maintaining and reinforcing the *status quo*:

> Influential circles in the West tend to discredit attempts by developing countries to create alternative forums for arbitration. Particular interests should not be allowed to jeopardise the future of arbitration as a factor of integration, to which all members of the international community should contribute.[97]

Views held in notable quarters exacerbated this impression. It was estimated that the perception of parties from 'Third World countries' of international arbitration 'as a game invented, operated and dominated by Westerners' '[gave] rise to a number of initiatives to establish competing arbitration systems outside Western countries. These efforts, fragmentary from the outset, never built up a head of steam and may now be said to be

Court of Arbitration of the Chamber of Commerce of Cote d'Ivoire (1997), the Centre of Arbitration, Mediation and Conciliation, Dakar (1999) and other not so widely known national arbitration institutions, associations and initiatives. It has been reported that Kenya, Tanzania and Uganda have together agreed to establish a business dispute arbitration body, which will form part of the East African Business Dispute Settlement Centre. It is the intention that each participating country will harmonise its arbitration laws so as to ensure international enforceability and effective adoption of the Model Law: ADRLJ 7, June 1998, 186. So far, Kenya and Uganda have adopted the Model Law and, with Tanzania, are all parties to the 1958 NYC. The 2000 Act adopting the Model Law in Uganda also establishes the Centre for Arbitration and Dispute Resolution (CADR) with broad-based functions (ss. 68–71). The US Agency for International Development (USAID), which supported the enactment of that Act, is also supporting the establishment of Dispute Resolution Centres in Madagascar and in Zambia: R. Jakoba, 'Comments on the New Malagasy Arbitration Act', JIA 17, 2000, No. 2, 95, 99, and see the website of the Forum for International Commercial Arbitration (FICA), www.intrarb.com/fica/Zambia.htm.

[97] H. Arfazadeh, 'New Perspectives in South East Asia and Delocalised Arbitration in Kuala Lumpur', JIA 8, 1991, No. 4, 103, 121.

sputtering'.[98] On the costs of arbitrating in far-off venues, especially for developing states, it was reasoned:

> [t]he response . . . need not be to create new arbitral *institutions* all over the world, but to select *places of arbitration* closer to the centre of gravity of the transaction or dispute, particularly in relation to small or medium size contracts. ICC arbitrations were initiated in no less than 102 Asian or African venues in the period 1980–89. The LCIA and the ICC have developed extensive regional connections and know how to manage proceedings far away from London and Paris.[99]

The above views may seem to underestimate the philosophy and purpose of the emerging arbitration institutions. In any event, it takes time for arbitral institutions to get going.[100]

However, the second revised edition of the *Freshfields Guide* (1999), authored by Paulsson, Rawding, Reed and Schwartz, does not retain much of the views in the first edition; instead, the second edition is accommodative of the new generation arbitration institutions – albeit not yet any in Africa. More encouraging is the third edition of Redfern and Hunter's successful book on *Law and Practice of International Commercial Arbitration*. Whilst underlining the continuing popularity of the traditional arbitral venues in Europe, the authors bravely asserted:

> In the modern climate of international trade, it is desirable that more international commercial arbitrations should be held outside Europe, and preferably in the less-developed countries, since there still exists in those countries a lingering suspicion that an arbitration clause providing for the proceedings to take place in Europe builds in elements of inconvenience, and even bias, against parties from the less-developed countries.[101]

The impact of the Model Law, the establishment and importance of the newer arbitration institutions, including the CRCICA and the KLRCA, were mentioned as factors making cities in some less developed countries attractive as venues for international arbitrations.[102] To this may be added the relative inexpensiveness of arbitral proceedings in most venues in less

[98] M. Hunter, J. Paulsson, N. Rawding and A. Redfern, *The Freshfields Guide to Arbitration and ADR* (Deventer: Kluwer, 1993), pp. 16–17. Also, the rather controversial proposal was made for the creation of a single worldwide arbitral institution with the existing ones serving as branches in the countries where they are located, as a way of eliminating the present deficiencies in, and improving, institutional international arbitration: H. Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?', Columbia JTL 25, 1986, 9.

[99] Hunter, Paulsson, Rawding and Redfern, *Freshfields Guide,* p. 18.

[100] The ICSID Convention entered into force in 1966 but the first dispute was registered only in 1972. The KLRCA, which was established in 1978, registered its first arbitration in 1985, whereas the CRCICA, established in 1979, registered its first arbitration in 1984.

[101] Redfern and Hunter, *International Arbitration*, para. 6-22.

[102] *Ibid*.

developed states when compared to the costs of those proceedings in the traditional arbitral venues.

It must be remarked that the AALCC regional arbitration scheme is not only concerned with the resolution of commercial disputes: it aims also at the promotion of the arbitral process, making it more efficient, cost-effective and convenient – attributes desired by commercial parties. Again, decentralising the *places of arbitration* (and conciliation) 'closer to the centre of gravity of the transaction or dispute' *and* the establishment of *new arbitral institutions* and their decentralisation, are neither necessarily mutually exclusive nor incompatible. Competition is of the nature of the endeavour.[103]

Before the emergence of new arbitral institutions in some (developing) states and the spread of the knowledge of, and information about, arbitration and ADR, many arguments were advanced against choosing developing states for arbitration based on genuine concerns that:

1. The relevant states may not have been a party to the 1958 New York Convention and other pertinent treaties on arbitration and that the enforceability of arbitral awards and agreements made there would not be guaranteed.
2. The national legal framework for arbitration was not conducive for dispute resolution or for constituting arbitral tribunals, and would also allow the court to interfere in arbitral proceedings as well as to review the merits of arbitral awards.
3. Those states possessed neither the institutional nor the administrative facilities for holding arbitrations, and the efficiency and effectiveness of proceedings may be compromised.[104]

However, as the knowledge of arbitration and ADR is spreading, and those states became parties to the relevant treaties, enacted laws amd established the institutional and administrative infra-structure favourable to efficient and effective arbitral proceedings, the direction of the arguments changed, at times concealed amid other perfectly sensible and pragmatic considerations.[105] Whatever might happen, parties to contracts or disputes could opt for *ad hoc* proceedings although the latter, like institutional

[103] Cf. *ibid*., para. 6-23: 'The creation of arbitration centres and arbitral institutions in different parts of the world is important.'

[104] E.g. van den Berg, 'Arbitration and the Third World', *Financial Times* (London), 6 December 1978, p. 11. Note that this paper was published in late 1978.

[105] Cf. 'Institutional experience, competence and integrity generally count for more than the choice of venue. There are many occasions when it is quite appropriate for Western parties to accept a venue far from home. There are no occasions when any party – no matter where it comes from – should entrust its fate to an unknown institution': Hunter, Paulsson, Rawding and Redfern, *Freshfields Guide*, p. 18. This passage with a very slight adjustment, was retained in the second revised edition of *Freshfields Guide*, p. 60

proceedings, might have their merits and demerits. The creation of the UNCITRAL Rules for arbitration and conciliation and their procedural diversity and adaptability reinforces the choices available to parties.

The lack of sufficient qualified personnel and competent arbitral institutions and the infrequency of arbitral proceedings held in Africa, are amongst the factors contributing to the underdeveloped state of the arbitral process on the continent.[106] Arbitration institutions were subsequently established in Africa partly as a means of correcting some imbalance in the existing arbitral order, especially the concentration of arbitration institutions and venues outside the region, the regional imbalance in the appointment of international arbitrators as well as the expenses involved in arbitrating abroad.

The AALCC scheme was devised to address the many needs and practical problems which states in the region and their nationals encounter in commercial arbitration, whilst at the same time creating awareness of the practical utility of the process. The functions of the Regional Centres were devised having regard to those needs and problems. Attracting international commercial arbitration business, although an important aim, is not their only activity. Other important aims include promoting international commercial arbitration and conciliation, co-ordinating and assisting the activities of existing arbitral institutions, rendering assistance in the conduct of *ad hoc* arbitration and conciliation and assisting in the enforcement of arbitral awards.[107]

Arbitrating disputes involving African parties outside Africa generally constitutes an unnecessary drain on meagre resources needed for development. But developing in Africa viable, competent, neutral and permanent facilities for the conduct of proceedings under internationally approved rules would minimise costs for disputing parties and provide security and protection which international traders and investors usually need, yet, ultimately, contribute to, or facilitate, the development of commerce and of African states.

> In relation to the existing systems, be that of Paris or of London, their rules [i.e. of the AALCC Regional Centres] are far more flexible and democratic in as much as they follow the UNCITRAL [Arbitration and Conciliation] Rules, if necessary, with modifications. The factor of cost may also favour the AALCC system. As in recent times, the litigation expenses have sky-rocketed in the West, businessmen in the developing countries might find it cost-effective to have recourse to the arbitral institutions nearer home employing lawyers of the developing world.[108]

[106] See pp. 416–28. [107] See pp. 81–2.

[108] Al-Baharna, 'International Commercial Arbitration in a Changing World', Arab LQ 9, 1994, 144, 152.

The activities of the Regional Centres have been given more prominence as their rules and facilities are prescribed as dispute resolution options in investment laws and treaties.[109] Finally, the World Bank's standard bidding documents for procurement of works suggests arbitration under the UNCITRAL Arbitration Rules. It further indicates that several arbitration centres offer to provide administered arbitration under those rules, including the Regional Centres.[110]

However, prescribing those institutions as dispute resolution options, although a step in the right direction, does not necessarily guarantee that they would be so used in practice, or that commercial parties will incorporate their model clauses into contracts. For this to happen, there would need to be an intensification of attempts to popularise their activities and facilities.

Furthermore, the authorised publication of reasoned awards of these institutions will contribute effectively in spreading their activities. Encouraging parties to arbitral awards to consent to the continuing publication of awards is advantageous to the Regional Centres and to arbitration generally. The authorised publication of reasoned awards is not always prejudicial to the arbitral process or to the parties' interests – a fact arbitral institutions or counsel might wish to suggest to parties to obtain their consent for publication. The publication of awards contributes to the development and diffusion of the arbitral process.[111] Publication confers on arbitration the mark of a fair and rational adjudicative process even in situations where these virtues are questionable.[112]

Also, the confidentiality of arbitral awards, although desirable in

[109] Investment Treaty by South East Asian States, 27 ILM 612–24, Article 10(2); and an Egyptian Law: see p. 318. Also the Model Concession Agreement by Egypt and the Egyptian General Petroleum Corporation (EGPC) with contractors undertaking to explore, develop and produce petroleum stipulates that disputes between the EGPC and the contractor shall be settled by arbitration in accordance with the Arbitration Rules of the CRCICA (Article XXIII(b)).

[110] World Bank, S*tandard Bidding Documents: Procurement of Works* (Washington DC, 1995), pp. 205–6. The Regional Centres have been designated on several occasions as appointing authority by the Secretary-General of the PCA acting under the UNCITRAL Arbitration Rules: PCA, *Annual Reports*, 1994 onwards, at www.pca-cpa.org.

[111] P. Sanders, *Quo Vadis Arbitration?* (The Hague: Kluwer, 1999), pp. 14–15; Sempasa, 'Obstacles', 387–93 (footnotes omitted).

[112] The awards of the Iran–US Claims Tribunal (since 1982, about 29 volumes as at the time of writing) and of ICSID and the ICC, under the UNCITRAL Arbitration Rules and other arbitral regimes published mainly in the *Collection of ICC Awards*, YBCA, ILM, ILR, ICSID Rev-FILJ, Clunet, ICSID Reports, etc., are unparalleled contributions to legal and arbitral jurisprudence. They have attracted further jurisprudence through scholarly comments.

certain circumstances, is not an absolute principle.[113] In some cases, when the award is not being contested, it has regrettably been published without the consent of the parties. Statistics on cases submitted to arbitral institutions and their annual analysis could be published without compromising confidentiality. Such publication is healthy for the growth and development of those institutions and their activities. In the light of the above, the book on *Arbitral Awards of the CRCICA* must be applauded.

Additionally, the policy statements of the AALCC and other intergovernmental fora should be followed up by concerted action. The AALCC passed a resolution in 1978 calling on member states to use the facilities of the Regional Centres.[114] That Resolution was followed by another in 1992 requesting AALCC member governments to recommend to appropriate entities and parties in their respective countries to include an arbitration clause in each agreement or contract, referring the settlement of disputes related thereto to the Regional Centres taking into consideration their respective geographical locations.[115] Those resolutions are encouraging and realistic. But persistent efforts should be made to publicise the Regional Centres. The inclusion of their model clauses in contracts would ensure the long-term viability of the emergent arbitration institutions. What is important, however, is not to assess their successes by the number of cases which they are able to generate. An arbitration clause in a contract is not *per se* an instigation to a dispute. Rather, it is a guarantee that if any dispute arises there will be an effective and efficient mechanism for its fair and objective resolution.

A follow-up to the above is the question of the permanence, impartiality and independence of the new institutions. These features are no doubt necessary for any dispute resolution body and are at the core of its effectiveness and success. Developing states are prone to political upheavals leading to changes in policies; and long-term commitments may later prove burdensome to comply with. As contracts are known to have incorporated the model clauses of the Regional Centres, it would be a mistake were the AALCC or the host states to take any action that would jeopardise

[113] Rule 10 common to the Arbitration Rules of the KLRCA, the CRCICA and the LRCICA provides: 'The arbitrator and the parties must keep confidential all matters relating to the arbitration proceedings. Confidentiality extends also to the award, except where its disclosure is necessary for purposes of implementation and enforcement'; see pp. 48–9 above.

[114] Simmonds and Hill (eds), *Commercial Arbitration in Asia and the Pacific* (New York: Oceana, 1992), p. 13.

[115] AALCC, *Minutes of the Heads of Delegations Meetings During the 31st Session Held in Islamabad, 25 January–1 February 1992*, p. 47.

the permanence and international legal status of the Centres. Any such action would harm international commercial interests and confidence and amount to a breach of international law.[116]

When parties enter into contracts, they may not have future disputes in mind. If a dispute later arises, there must be a reliable mechanism for its objective, fair and final resolution.[117] It would be frustrating for parties to designate arbitral institution in their contracts only to discover that the specified institution has ceased to exist. The usual attitude of a party in such a circumstance is to resort to litigation or to ask a court to designate an alternative arbitral institution or an arbitrator. Most courts have statutory powers to appoint arbitrators in situations where the internal mechanism for constituting a tribunal has failed or been rendered unworkable by a party's default, unwillingness and non-cooperation.[118] This express statutory power is fundamental and expedient for a successful conduct of arbitration because, otherwise, no court has inherent jurisdiction to appoint arbitrators for the parties.[119] Also, it may be difficult in some jurisdictions to persuade a court to impose an arbitral institution on the parties if there was already an existing commitment to resort to a particular institution which, unknown to the parties, had closed down.[120]

Nevertheless, a trend is emerging whereby courts will go further to discover if in fact the dominant intention of the parties was to use arbitration to settle their disputes rather than the instrumentality through which arbitration was to be conducted. Once this is answered affirmatively, the court will designate an alternative arbitral forum. Any reference to a non-existent institution or rules may be ignored in order to give effect to the clear intentions of the parties.[121]

[116] See pp. 77–80.

[117] *Ad hoc* arbitration agreements should have, as guarantee for their reliability, a built-in mechanism that would prevent an unwilling party from stalling the process, e.g. an external and impartial default provision for constituting the arbitral tribunal. In this sense, the UNCITRAL Arbitration Rules are a good model to adopt.

[118] E.g. the Arbitration and Conciliation Act 1988 of Nigeria, s. 7; Egyptian 1994 Law on Arbitration, Article 17; Kenyan Arbitration Act 1995, s. 12; Arbitration Act of Zimbabwe 1996, First Schedule, Article 11.

[119] *Salah El-Assad* v. *Misr (Nigeria) Ltd* (1968) 3 ALR Comm 178; *Astra Footwear Industry* v. *Harwyn International Inc.*, 442 F Supp 907, 910–11 (SDNY, 1978); *Rocco Gouseppe and Figli SpA* v. *Tupinave* [1992] 3 All ER 669.

[120] *Astra* case, *ibid*.

[121] *Lucky-Goldstar International (Hong Kong) Ltd* v. *Ng Moo Kee Engineering Ltd* [1993] HKLR 73, citing *Laboratories Grossman* v. *Forest Laboratories*, 295 NY Supp 2d 756; *Warnes SA* v. *Harvic International Ltd* [1994] ADRLJ 65. The same principle may likely apply *mutatis mutandis* if a designated appointing authority is non-existent or has been abolished: *Gatoil International Inc.* v. *NIOC* (1992) 17 YBCA 587, 589–90.

In the succeeding chapters, the legal infrastructure for international commercial arbitration in African states will be examined. This will entail a review of the development of, and trends in, arbitration laws in African states and the problems and prospects of the 1958 New York Convention in an African setting.

PART 3 · LEGAL INFRASTRUCTURE FOR DISPUTE RESOLUTION IN AFRICA

4 Development of arbitration laws in Africa

Introductory remarks

The aim of this chapter is to review the nature of dispute resolution in some traditional African societies and how that was altered by external influences in the nineteenth and twentieth centuries. It was such influences that led to the introduction of dispute resolution regimes in statutory form for the first time in most African states. Those regimes will be examined in the light of the pre-existing traditional dispute resolution means with which they co-existed. This historical context will help to explain subsequent arbitral developments and trends in African states.

Dispute resolution in traditional African society

Every society must of necessity have a means of resolving conflicts among its constituents. The traditional African communities were no exception. Before the conquest or annexation and consequent colonisation of most African societies by alien powers, these societies had their informal dispute resolution methods, which they retained. Each African community has unique rules and norms for the resolution of controversies over property and other rights.[1] These may vary depending primarily on the nature of a community's political organisation – whether it is centralised or acephalous. In the former, the chief or a central political authority may maintain a traditional court, over which he presides, or he could delegate his judicial powers to a specialised officer.[2] As the political authority is

[1] A. P. Merriam, 'Traditional Cultures of Africa and their Influence on Current Problems', PASIL 55, 1961, 146, 149.

[2] H. S. Daannaa, 'The Acephalous Society and the Indirect Rule System in Africa', *Journal of Legal Pluralism* 34, 1994, 61.

diffused in acephalous societies, they have, as a result, a community or family-based means of dispute settlement anchored to the council of elders, heads of families and traditional social groups and institutions.[3] However, in both forms of political organisations, customary means of dispute resolution are present.[4]

The customary dispute resolution processes are prevailing practices governed by rules of customary law. The nature of customary law has been explained in learned works and in case law.[5] According to the Supreme Court of Nigeria,[6] customary law is any system of law not being the common law or a law enacted by a legislative body but which is enforceable and binding within a community as between the parties subject to its sway. Probably, the most eloquent statement on the nature of customary law by that court was made in *Oyewunmi* v. *Ogunesan*:

> Customary law is the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static. It is regulating in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.[7]

Negotiation, arbitration and other extra-judicial institutions for the settlement of disputes are not entirely an innovation of the European imperial powers. Arbitral and conciliation proceedings were and are of frequent occurrence and importance in African society.[8] The customary

[3] E. E. Uwazie, 'Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria', *Journal of Legal Pluralism* 34, 1994, 87.

[4] J. B. Ojwang, 'Rural Dispute Settlement in Kenya', *Zambia* LJ 7–9, 1975–77, 63; F. M. Chomba, 'Zambia: Alternative Forms of Adjudication' in *1990 Meeting of Commonwealth Law Ministers and Senior Officials 1990*, p. 533; Comaroff and Roberts, *Rules and Processes*, chapter 4; Allott, *Essays in African Law* (London: Butterworths, 1960), pp. 117, 120–1; Morris and Read, *Uganda: The Development of its Laws and Constitution* (London: Stevens, 1966), pp. 214–16; Cole and Denison, *Tanganyika: The Development of its Laws and Constitution* (London: Stevens, 1964), pp. 106–8; Goldin and Gelfand, *African Law and Custom in Rhodesia* (Cape Town: Juta, 1975), pp. 119–20; Rouland, *Legal Anthropology* (Stanford University Press, 1994), pp. 263–6; Kolajo, *Customary Law in Nigeria Through the Cases* (Ibadan: Spectrum, 2000), pp. 219–34; Ezejiofor, *The Law of Arbitration in Nigeria* (Ikeja: Longman, 1997), pp. 22–31.

[5] 'In essence customary law is what the people make through their practice and the respect that they accord to its precepts and institutions': Allott, 'Customary "Arbitration" in Nigeria: A Comment on *Agu* v. *Ikewibe*', JAL 42, 1998, 231, 233; G. R. Woodman, 'Legal Pluralism and the Search for Justice', JAL 40, 1996, 152, 162.

[6] *Zaidan* v. *Mohssen* (1973) 11 SC 1, 21.

[7] [1990] 3 NWLR (Pt 137) 182, 207, *per* Mr Justice Obaseki JSC.

[8] See note 4 above. Cotran and Amissah, *Arbitration in Africa*, Preface, pp. xx–xxi; A. Allott, 'Arbitral Proceedings in Customary Law: Suggestions for a Model Ordinance' *Journal of*

dispute resolution methods are, like substantive customary law, largely unwritten and may be particular within regions. Although customary law and its means of dispute resolution may differ within and amongst communities, some rules, procedures and institutions are common despite the marginal divergences. The basic aims of dispute resolution in customary law are reconciliation, peace and the assuagement of feelings that might otherwise dislocate social cohesion and solidarity.[9] And a predominant number of reported cases on customary law dispute resolution in Africa deal with or are related to land-use and domestic relations disputes.

The contact which Africa had with the outside world inevitably changed many of the traditional ways of doing things. This was visible in the rules regulating private transactions. Most of the customary law rules of transactions between and among Africans before the introduction of aliens into the continent were modified to address the changed situations with optimum benefit to all concerned.[10]

Reinforcing the customary arbitral process

The existence, validity and development of the customary dispute resolution processes might suggest their potential relevance for trade and investment in the African setting. If nothing else, their existence indicates a consciousness and willingness in Africans to use extra-judicial means to settle disputes.[11] In Ghana, it has developed to the extent that codification in statutory form is underway.[12]

African Administration 9, 1957, No. 2, 96; I. Ehiribe, 'The Validity of Customary Law Arbitration in Nigeria' in Campbell (gen. ed.), *Comparative Law Yearbook of International Business Law* 18, 1996, 131; Record of the Judicial Advisors' Conference 1953, *Journal of African Administration* 5, Special Supp., October 1953, 1, 28; Record of the Judicial Advisers' Conference 1956, *Journal of African Administration* 9, Special Supp., April 1957, 1, 25–7; Kom, 'Customary Arbitration', *Review of Ghana Law* 16, 1987–88, 148; S. Ezediaro, 'Guarantee and Incentives for Foreign Investment in Nigeria', *International Lawyer* 5, 1971, 770, 775; U. Nwangwu, 'Is Customary Arbitration Part of Nigerian Jurisprudence', GRBPL 2, 1989, 62; Igbokwe, 'The Law and Practice of Customary Arbitration in Nigeria: *Agu* v. *Ikewibe* and Applicable Law Issue Revisited', JAL 41, 1997, 201, commented upon in Allott, '*Agu* v. *Ikewibe*' 231.

[9] Grande, 'ADR in Africa', 63.

[10] Woodman, 'Legal Pluralism', 152; D. Brown and A. P. J. Allen, *An Introduction to the Law of Uganda* (London: Sweet & Maxwell, 1968), p. 32; A. E. W. Park, *Sources of Nigerian Law* (London: Sweet & Maxwell, 1963), p. 16.

[11] Cf. M'baye, 'Commentary' in *60 years of ICC Arbitration* (Paris: ICC Publication No. 412, 1984), p. 293.

[12] Plans were mooted in 1988 for enacting an arbitration law which will have two parts, dealing separately with statutory and customary arbitrations: *13th Annual Report of the Law Reform Commission of Ghana* (Accra: Government Printer, 1988), p. 11. As of June 2000, efforts are in progress to codify in the proposed Arbitration Act the principles of

The unwritten nature of a large part of customary law, on which the customary dispute resolution means are based, is a feature that might count against the process in modern times. Although a distinctive feature of their flexibility and adaptability, the parole quality of the processes is a notable weakness which could affect their permanence, wider transmissibility and sustainability:

> In most African societies, there are more or less institutionalised ways of settling interpersonal disputes below the level of the formal court system. Since the informal judicial or arbitrative groups responsible for carrying out these procedures do not usually meet at regular times and places, and do not keep written records, often little is known of their activities outside the small communities in which they function.[13]

The sources of the law and practice of customary dispute resolution are, first, decided disputes which are seldom reported; secondly, reported and unreported court cases arising out of the customary dispute resolution process; thirdly, the observation of, or practical experience gained as participants in, the process; and, fourthly, that transmitted in oral history.[14] With the exception of attempts by Allott to elaborate a Model Ordinance for Arbitral Proceedings in Customary Law,[15] and the effort to codify customary law arbitration in Ghana,[16] there are as yet no attempts in Africa to codify the customary arbitral process, its principles as enunciated in decided cases or as seen in practice.[17] Also, with the exception of the proposed Arbitration Act of Ghana, as of 2000 no arbitration statute in Africa has an explicit provision for customary law arbitration. It has therefore

Footnote 12 (*cont.*)
customary law arbitration as developed in judicial precedents. The proposed Act will also adopt the UNCITRAL Model Law. By contrast, in Nigeria, a first significant step is the book by Kolajo, *Customary Law Through the Cases*, which devoted a chapter to customary law arbitration as developed in cases. And, it has been argued that the UNCITRAL Model Law or Laws patterned to it, could be amenable to dispute resolution arising out of transactions conducted under customary law: A. I. Okekeifere, 'International Commercial Arbitration and the UNCITRAL Model Law Under Written Federal Constitutions', JIA 16, 1999, No. 2, 49, 65–70.

[13] Beattie, 'Informal Judicial Activity in Bunyoro' *Journal of African Administration* 9, 1957, No. 4, 188–95. Woodman, 'Legal Pluralism', 162 n. 33, argued that: 'Customary law is by nature well known to those who are subject to it. The problem of lack of access to knowledge of customary law and especially lack of access to written information about it is a problem of the [colonial] administrators from outside the community.'

[14] Rouland, *Legal Anthropology*, pp. 136–49. [15] Allott, 'Arbitral Proceedings', 96.

[16] See p. 117, note 12. [17] Kolajo, *Customary Law*.

been lamented that arbitration laws in the continent have no 'African distinctiveness'.[18]

Any attempt at reform and codification should be coupled with a substantial improvement and refinement taking into consideration the nature of the international political economy, of transnational commercial transactions, as well as the changes that African states have undergone since independence. One suggested improvement is the introduction of writing given that, in contemporary commercial transactions, documentation is essential. It is because the customary arbitral process does not insist on writing that courts held its proceedings not to be covered by or subject to the arbitration statute.[19] But if the customary arbitral process is to be relevant for disputes that are common in current transnational dealings, then writing has to be a compulsory requirement or, at least, a stipulated option. Admittedly, the unwritten nature of an agreement to arbitrate where it exists and an award in customary law arbitration does not deprive them of recognition and enforcement by courts in Africa. What is being urged, nevertheless, is that the unwritten nature of a large portion of substantive customary law and, it follows, of customary arbitral proceedings, agreements and awards, makes the process, as it stands, unsuitable for the settlement of international trade and investment disputes. If codification or the use of writing will lead to rigidity, it may be recalled that customary law is flexible and adaptable to changing times and circumstances.

Arbitration law: the legacy of colonialism

Introductory remarks

The enactment of arbitration legislation in Africa was a legacy of colonialism. It was partly necessitated by the inability of the colonial administrators to appreciate the nature and philosophy of the customary means of dispute resolution and the apparent incompatibility of those means

[18] R. Amoussou-Guenou, 'The Evolution of Arbitration Laws in Francophone Africa', JCI Arb 64, February 1998, 62, 66. In relation to the Arbitration and Conciliation Act 1988 of Nigeria, its omission of customary law arbitration has been criticised: Ehiribe, 'Validity of Customary Law Arbitration', 131. It has however, been suggested that s. 35 of the Act and the Constitution of Nigeria recognise customary law arbitration: Igbokwe, '*Agu* v. *Ikewibe*', 205–6. On the constitutional recognition of customary law arbitration in Nigeria, see *Agu* v. *Ikewibe* [1991] 3 NWLR (Pt 180) 385. [19] See note 30, p. 121 below.

with the changed pattern of economic interactions following the introduction of external influences.

Most African states are post-colonial, gaining their independence after 1945.[20] In Africa, the principal imperial powers were France, the UK, Portugal, Spain, Belgium and Germany. The latter lost all its colonies or protectorates in Africa after the end of the First World War. In terms of the backgrounds to the development of arbitral enactment in Africa, the impact of colonial rule on the arbitral systems on the continent should be recognised.[21]

Of the colonial powers, France and the UK had the greatest influence on the development of arbitration legislation in Africa.[22] For example, the 1889 UK Arbitration Act (as amended), that was largely the prevailing arbitral regime during the colonial era, had great influence on the development of arbitration legislation in many Commonwealth states.[23] In the former French African colonies, the Napoleonic Code of Civil Procedure of 1806 (without its provisions on arbitration) was extended by the Decree of 15 May 1889. But the Decree of 31 December 1925, which sanctioned, for the first time, the validity of arbitration clauses, was made applicable to some former French colonies in Africa.[24]

The first generation arbitration laws

After the colonisation of most African societies, the colonial administrators of the various imperial powers discovered that they could, in the

[20] See pp. 458–9, for African states, their dates of independence and their former colonial rulers, if any. Only Ethiopia and Liberia were not subjected to colonial rule; Egypt (1922) and South Africa (1931) gained political independence from external powers before 1945.

[21] Some Southern African states inherited, to some extent, the Roman-Dutch legal tradition, due again to historical reasons. Furthermore, in Africa, customary and Islamic laws continue to form part of the legal order.

[22] Cotran and Amissah, *Arbitration in Africa.*

[23] Recent arbitration laws in the Commonwealth, however, increasingly follow Models elaborated by UNCITRAL: Christie, 'Model Law in Southern Africa', 272; Sanders, 'Unity and Diversity in the Adoption of the UNCITRAL Model Law', *Arbitration International* 11, 1995, 1; J. K. Schaefer, 'Leaving Colonial Arbitration Laws Behind: Southeast Asia's Move into the International Arbitration Arena', *Arbitration International* 16, 2000, No. 3, 297; Raghavan, 'New Horizon for ADR in India', JIA 13, 1996, No. 4, 5; Asouzu, 'The United Nations, the UNCITRAL Model Arbitration Law and the Lex Arbitri of Nigeria', JIA 17, October 2000, 85; Asouzu and Raghavan, 'The Legal Framework for ADR in Sri Lanka', JIA 17, December 2000, 111.

[24] That Decree is, subject to the OHADA regime, to be examined subsequently, and is still applicable in most of those former colonies; Cotran and Amissah, *Arbitration in Africa*, pp. 272–6; Amoussou-Guenou, 'Evolution of Arbitration Laws', 62.

exercise of the legislative powers that devolved on them following the transfer of sovereignty which occurred, introduce legislation in their colonies similar to those in the metropolitan countries. This was in line with the then prevailing social and economic conditions. For example, the introduction of legitimate trade in commodities replaced the obnoxious trade in slaves, and hence the urge to enact laws to render the new commercial environment amenable to the needs of commercial interests.[25]

In most African states that passed through colonial rule, the first arbitration legislation was an enactment of colonial administrators.[26] Those laws were applicable only to domestic disputes based on written arbitration agreements. Although they may have been scanty in their substantive provisions and allowed the court considerable influence in the arbitral process, those laws also established for the first time formal, even if rudimentary, arbitral frameworks. They were mainly patterned according as the prevailing legislation and, in most cases, the treaty obligations of the colonising powers.

When the colonial powers annexed African traditional societies, they expressly recognised and preserved the peoples' customs, traditions and institutions, subject to statutory and judicial limitations.[27] The complete abolition of the pre-existing traditional institutions and customs was never contemplated nor was it either feasible or expedient.[28] The continuing validity of the customary dispute resolution processes was expressly preserved.[29] Those processes therefore co-existed with the colonial arbitration legislation.[30] The courts established by the colonial governments had a duty to observe and enforce customary law so far as it was not repugnant to public policy, or incompatible with natural justice, equity or good

[25] See pp. 417–18.

[26] Sempasa, 'Obstacles', 390–1; R. Amoussou-Guenou, 'International Commercial Arbitration in Sub-Saharan Africa', ICC Bulletin 7, 1996, No. 1, 59; Cotran and Amissah, *Arbitration in Africa*; Morris and Read, *Uganda*, pp. 217, 276; Cole and Denison, *Tanganyika*, pp. 174–5; C. M. Peter, *Foreign Private Investment in Tanzania* (Konstanz: Hartung-Gorre, 1989), pp. 111–16; Hahlo and Kahn, *South Africa: The Development of its Laws and Constitution* (London: Stevens, 1960), pp. 218, 224 and 240; Butler and Finsen, *Arbitration in South Africa*, pp. 4–5, 299–300; E. Atanda, 'Review of Arbitration Law and Practice in Sub-Saharan Africa', Am Rev Int Arb 1, 1990, 123.

[27] *Oke Laoye* v. *Amao Oyetunde* [1944] AC 170, 172–3; Brown and Allen, *Law of Uganda*, p. 28; A. Allot, 'Unification of Laws in Africa', AJCL 16, 1968, 51, 54–5.

[28] F. A. Ajayi, 'The Interaction of English Law and Customary Law in Western Nigeria', JAL 4, 1960, 98.

[29] Cotran and Amissah, *Arbitration in Africa*, p. 186; Allott, *Essays*, pp. 142–4.

[30] *Kwabena Mensah* v. *Ernestina Takyiampong and Others* (1940) 6 WACA 118; *Kuturka Yardom* v. *Kurankyi Minta 111* (1926–9) Gold Coast LR 76, 80–81 (Full Court); *Okyame Kwasi Mire* v. *Kwasi Danso* 95 (1921–5) Gold Coast LR (Div. Court).

conscience, or with any enactment for the time being in force.[31] Those courts have also had occasion to render decisions with considerable implications for the existence, validity and nature of dispute resolution in customary law.[32]

The first generation arbitration legislation (those enacted in Africa between 1898 and 1960) as indicated above, introduced the certainty and predictability of writing in the arbitral process. But, to a large extent and although suitable for their times, if tested by the standards set by the 1985 Model Arbitration Law, those laws were inadequate and unsuitable for effective and efficient arbitral proceedings in many ways: they were usually scanty and lacked elaborate or even merely adequate provisions on the essential aspects of the arbitral process; they contained provisions allowing for substantive judicial review of arbitral decisions as well as other multifaceted control functions for the court in the arbitral process.[33] Those laws did not contain specific definitions of, or allusions to, either 'commercial' or 'international' characteristics in arbitration or conciliation. The latter process was normally not provided for; nor did the laws which predominant regulated domestic arbitration distinguish between 'domestic' and 'international' arbitrations. In most cases, they drew no distinction between *ad hoc* and institutional means of dispute resolution nor did they recognise the legality of institutional arbitration.

The failure of those laws to distinguish, for example, between domestic and international arbitrations, may be because they were mostly enacted during the colonial era when there was a concentration of economic activities in the metropolises. Every person was then seen as a national or subject of the same imperial power. Most companies, business houses or individuals engaged in commerce and needing arbitration were mostly from the imperial powers.[34] Accordingly, most of those laws were meant to regulate domestic arbitrations and were suitable for their times; but, at

[31] *Oke Laoye* v. *Amao Oyetunde* [1944] AC 170 (Nigeria); *Kamaca* v. *Nkhota (No. 2)* [1966–8] ALR Comm 518, 526–7; *Matimati* v. *Chimwala* [1964–6] 3 ALR Comm 34, 37; *Chitema* v. *Lupanda* [1961–3] 2 ALR Comm 162, 163 (Malawi); *R* v. *Kenan Hunga* (1934) 4 Nyasaland Protectorate LR 1; *Ciliza* v. *Ciliza* (1956) 1 Reports of Native Appeal Courts 127.

[32] *R* v. *Karonga* (1946–52) 5 Nyasaland Protectorate LR 134; *Budu* v. *Caesa*r (1959) GLR 410; *Iddi S/o Ntanza* v. *Yonaza S/o Mbayo and Others* (1969) Tanzania H. Court Digest 256 (Case No. 289); *Agu* v. *Ikewibe* [1991] 3 NWLR (Pt 180) 385. For critical reviews, see Ezejiofor, *Law of Arbitration*, pp. 21–4; G. Ezejiofor, 'The Prerequisites of Customary Arbitration', JPPL 16–18, 1992–3, 19; G. Elombi, 'Customary Arbitration: A Ghanaian Trend Reversed in Nigeria', RADIC 5, 1993, 803; A. A. Asouzu, 'The Legal Framework for Commercial Arbitration and Conciliation in Nigeria', ICSID Rev-FILJ 9, 1994, 214.

[33] E.g. the case-stated procedure in the 1914 Nigerian Arbitration Act, ss. 15 and 8(b); the Arbitration Act cap. 12 (Zimbabwe), ss. 31 and 15(b).

[34] See pp. 417–18.

the same time, they were unsuitable and inappropriate for post-colonial Africa. It is a little surprising that some of those colonial laws are still in force in some African states, possibly with or without any revision, despite the fundamentally changed circumstances of those states.[35]

Post-independence arbitration laws

The second generation arbitration laws

To an extent, things are changing in African states. Some African states enacted arbitration Acts or revised their colonial arbitration laws in the late 1950s and 1960s. Most of those laws were influenced by the 1950 Arbitration Act of the UK (now largely repealed) or by the prevailing regime in the Civil Procedure Code of France.[36] This second generation arbitration legislation (those enacted in Africa between 1960 and 1984) is not entirely outmoded as a basic framework for commercial arbitration at least at the domestic level. However, they may retain some negative features drawn from the first generation arbitration legislation while exhibiting some unique drawbacks making them inadequate or unsuitable for international commercial arbitration by the Model Law standards. This is particularly so in their retention, as in the earlier laws, of the case-stated procedure, the 'deemed' provisions, their non-recognition of the specificity of the international commercial arbitral regime or institutional arbitration, in making no provision for conciliation and in their retention of other procedures allowing wide judicial review of arbitral decisions and curial intervention in the arbitral process. Of a notably advanced law relative to its contemporaries, it was said in 1998:

> The Arbitration Act 42 of 1965 [of South Africa] was designed with domestic arbitration in mind and has no provisions at all expressly dealing with international arbitrations. By present-day standards, the Act is characterised by excessive opportunities for parties to involve the court as a tactic for delaying the arbitration process, inadequate powers for the arbitral tribunal to conduct the arbitration in a cost-effective and expeditious manner and insufficient respect for party autonomy (i.e. the principle that the arbitral tribunal's jurisdiction is derived from the

[35] Sempasa, 'Obstacles', 391; S. C. Nirwani, *Arbitration Laws and Dispute Settlement Procedures in Middle East and African Countries* (New Delhi: Photo Flash, 1980).

[36] E.g. Arbitration Proclamation 1959 of Botswana; Arbitration Act 1961 of Ghana; Arbitration Act 1965 of South Africa; Law No. 66-154 of 8 June 1966 of Algeria: Arbitration Act 1967 of Malawi; Code of Civil Procedure 1964, Articles 795–820 of Senegal; Civil Procedure Code of Madagascar, Book Four.

parties' agreement to resolve their dispute outside the courts by arbitration). In short, the 1965 Act is widely perceived by those involved in international arbitration as being totally inadequate for this purpose.[37]

The third generation arbitration laws: chronological development

A feature of the third generation arbitration legislation (enacted in Africa from 1984) is that they make specific and express provisions for international (commercial) arbitration.[38] Their development has neither been consistent nor uniform due to the divergent legislative approaches countries adopted when engaging in reform. There are:

1. countries that adopted the UNCITRAL Model Law wholly or partly; and
2. countries with laws not based on the UNCITRAL Model Law or only partly, and influenced by their former imperial countries or by the 1993 OHADA Treaty.[39]

Djibouti

In Africa, third generation arbitration legislation was ushered in by the International Arbitration Code of Djibouti enacted on 13 February 1984.[40] The Code, which applies to international commercial arbitration, 'offer[s] arbitration users the possibility to organise arbitration proceedings in a third world country within a legal framework, which, although denationalised, provides indispensable legal security'.[41] A significant feature of the Code was its enactment before 1985, i.e. when UNCITRAL completed work on the Model Law.[42] Nevertheless, the drafters of the Djibouti Code benefited from UNCITRAL's work, which had reached an advanced stage in 1984.[43] The Djibouti Code may well have presented an alternative legal

[37] *The 1998 SALC Report,* para. 1.3, citing R. H. Christie, 'South African as a Venue for International Arbitration', *Arbitration International* 9, 1993, 153, 165. The SALC has embarked on reform of domestic arbitration and of the 1965 Arbitration Act. The law proposed to replace the 1965 Act would combine the best features of the Model Law and of the 1996 UK Arbitration Act, whilst retaining certain provisions of the 1965 Act that have worked well in practice: *Domestic Arbitration* (SALC: Project 94, Discussion Paper 83, 1999). [38] See chapter 5 below.

[39] The OHADA Treaty, which entered into force on 18 September 1995, and the accompanying 1999 Uniform Arbitration Act, will be discussed subsequently.

[40] 25 ILM 1; Chaterjee, 'The Djibouti Code', 57. Before 1984, the arbitration law of Djibouti, which dealt mainly with domestic matters, was based on the old French Code of Civil Procedure: W. S. Dorman, 'Djibouti', WAR 2, 1986, 1499. [41] Y. Derains, 25 ILM 1.

[42] The Model Law has achieved universal recognition as setting some minimum international standards for national laws on commercial arbitration. The international acceptability of any arbitration law enacted after 1985 has to be assessed by those standards. [43] Derains, 25 ILM 1, 2; Dorman, 'Djibouti', 1499.

framework and approach for African states that might wish to reassess their arbitration laws.

Nigeria

The next country in Africa to enact a specific law on international commercial arbitration was Nigeria. The Arbitration and Conciliation Act (No. 11) of 14 March 1988 (Cap. 19 of 1990) was unique as the first legislation in Africa based on the UNCITRAL Model Arbitration Law with provisions for conciliation based on the UNCITRAL Conciliation Rules 1980. Certain provisions of the 1988 Act followed the UNCITRAL Arbitration Rules 1976 and a few provisions of the 1914 Arbitration Act, which it repealed.[44]

Togo, Algeria, Tunisia, Côte d'Ivoire and Senegal

Nigeria was followed by Togo, which, in 1989, enacted an Act to regulate and encourage international arbitration.[45] Algeria enacted the Arbitration Law (No. 93–09) on 25 April 1993 (Articles 458(1)–(28)) modifying and complementing the 1966 Code.[46] The Algerian Law was followed a day later by the Tunisian Arbitration Code (Law No. 93–42) of 26 April 1993,[47] repealing Articles 250–280 of the Code of Civil and Commercial Procedure of 1959.[48] Next, on 9 August 1993, Côte d'Ivoire introduced Law No. 93–671 Concerning Arbitration, the Fifth Part of which deals with international arbitration.[49] Finally, Senegal enacted Arbitration Law No. 98–30 of 14 April 1998 and Decree No. 98–492 of 15 June 1998, repealing

[44] Asouzu, 'Legal Framework', 214; Ezejiofor, *Law of Arbitration*; E. Akpata, *The Nigerian Arbitration Law in Focus* (Lagos: West Africa Book Publishers, 1997); J. O. Orojo and M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates, 1999).

[45] Noted in Amoussou-Guenou, 'Arbitration in Sub-Saharan Africa', 70.

[46] Legislative Decree No. 93-09 amending and completing Order No. 66-154 of 8 June 1966 on the Code of Civil Procedure, *Journal Officiel* 27, 42–6, 27 April 1993, Articles 458(1)–(28). The latter law inserted a Chapter IV (international trade arbitration) into Book VIII of the 1966 Code of Civil Procedure (Articles 442–458), further amended by Ordinance No. 71-80 of December 1970 and Ordinance No. 75-44 of 17 June 1975. For comments, see M. Bedjaoui, 'Remarkable Turning Point in the Algerian Law Relating to International Commercial Arbitration', ICC Bulletin 4, 1993, No. 2, 53; A. H. El-Ahdad, 'Algeria Enacts New Arbitration Statute', WAMR 4, 1993, No. 11, 271. Prior to 1966, commercial arbitration in Algeria was regulated by French arbitration law: V. Pechota, 'Algeria' in WAR 2, 1986, 501.

[47] Law No. 93-42 issued on 26 April 1993 relating to the promulgation of the Arbitration Code, *Tunisian Official Gazette*, No. 33, 4 May 1993, p. 580; H. Malouche, 'Tunisia' in A. J. van Den Berg (gen. ed.), I*CCA: International Handbook*, Vol. IV, Supp. 19 (1994), p. 1.

[48] No. 59-130 of 5 October 1959.

[49] *Official Journal*, 14 September 1993. The Law was greatly influenced by Arbitration Decrees of France (1980) for domestic and (1981) for international arbitration.

the relevant provisions of the Civil Procedure Code and replacing them with Articles 795 to 819–95. The Senegalese Law deals with both domestic and international arbitration.[50]

It may be appropriate at this point to observe that, apart from aspects of the Tunisian Code dealing with international arbitration, the above arbitration laws in those French-speaking civil law African countries which were reformed after 1985, are not based on the UNCITRAL Model Law.

OHADA Treaty and Uniform Arbitration Act

Significant to the development of the international arbitral process in Africa and with implications, respectively, for the 1989, 1993 and 1998 arbitral regimes in Togo, Côte d'Ivoire and Senegal, as well as for some other (mostly civil law) countries in Africa, is the OHADA Treaty.[51] The Treaty, which does not permit reservations, aims at the harmonisation of business law in the Contracting States, including the promotion of arbitration for settling contractual disputes.[52] Although it has been in force mainly for French-speaking West and Central African states,[53] the Treaty evinces an intention to achieve a more extensive geographical application. According to Article 53, the Treaty is open to all members of the OAU and to any other non-member of the OAU invited by the unanimous agreement of all Contracting States to adhere to it.

For the purposes of achieving its objectives, the Treaty created OHADA, an international organisation having an international legal personality with attendant privileges and immunities.[54] OHADA consists of a Council of Ministers (comprising the ministers of justice and of finance of member states) as the legislative arm (Articles 3 and 27–30) and a Common Court

[50] This is subject to the OHADA Uniform Arbitration Act: see p. 128.

[51] Amoussou-Guenou, 'Arbitration in Subsaharan Africa', 72–3; P. K. Agboyibor, 'Harmonization of Business Law in Africa', ICCLR 1, 1995, 15; A. Fall, 'Harmonization of Commercial Law in the Franc Zone', IBL 23, February 1995, 82; M. Lecerf and G. Blanc, 'The Arbitration in the Treaty for the Harmonization of African Business Law', *International Construction Law Review*, 1999, Pt 2, 287; M. Bolmin, G. Bouillet-Cordonnier and K. Medjad, 'The Prospect for Integration in West and Central Africa', ICSID Rev-FILJ 13, 1998, 440; G. K. Douajni, 'OHBLA Arbitration', JIA 17, 2000, No. 1, 127.

[52] OHADA Treaty, Preamble, Articles 1, 2 and 54.

[53] The African states parties to the OHADA Treaty, as of October 1998, were: Benin, Burkina Faso, Cameroon, Central African Republic, Congo, The Comoros, Côte d'Ivoire, Gabon, Guinea-Bissau; Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. It should be noted that Guinea-Bissau is a Portuguese-speaking country whereas Equatorial Guinea is a Spanish-speaking country: see Appendix, pp. 458–9 below.

[54] OHADA Treaty, Articles 3 and 46–51.

of Justice and Arbitration (CCJA), which is a supranational judicial and administrative institution based in Abidjan.[55] The Council of Ministers is assisted by an administrative organ – the Permanent Secretariat – based in Yaounde, to which is attached a Regional High Judiciary School based in Porto Novo which deals with the continuing legal education of judges and lawyers regarding the OHADA scheme.[56]

Part IV of the OHADA Treaty (entitled 'Arbitration') is, in its features and contents, greatly influenced by the 1988 ICC Rules for Arbitration and the basic features of the ICC system. Article 21 of the Treaty provides *inter alia* that 'any party to a contract may, either because it has its domicile or its usual residence in one of the Contracting States, or if the contract is enforced or to be enforced in its entirety or partially on the territory of one or several Contracting States, refer a contract litigation to the arbitration procedure of this Section'.

The Treaty contains provisions on the removal and the challenge of arbitrators; on the enforcement of an arbitration agreement by courts of Contracting States (Article 23); and on the power of the CCJA to order *exequatur* (recognition) pursuant to which an arbitral award (which has the authority of *res judicata* in a Contracting State) will be executed.[57]

OHADA's basic harmonising instruments are the 'Uniform Acts'. These are prepared by the Permanent Secretary in conjunction with the government of states parties, and are then discussed and adopted by the Council of Ministers following an opinion of the CCJA.[58] Uniform Acts are published in the official journals of OHADA and of the Contracting States or by any other appropriate means.[59]

A Uniform Act is directly applicable and enjoys supremacy in the territories of Contracting States. According to Article 10 of the OHADA Treaty: 'Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactments of municipal laws'. The implication of

[55] *Ibid*., Articles 3 and 28–39. More will be said later about the CCJA, as it is more relevant to arbitration in the OHADA region.

[56] *Ibid*., Articles 3 and 40–41. The officials and employees of the Permanent Secretariat, the Judiciary School, of the CCJA and arbitrators appointed by the latter, enjoy, in the fulfilment of their functions, diplomatic immunities and privileges (*ibid*., Article 49).

[57] *Exequatur* will be refused only on the grounds set out in Article 25: '(1) The Arbitrator has not ruled by virtue of an agreement giving him jurisdiction, or has ruled by virtue of a void or expired agreement; (2) The arbitrator has not ruled in compliance with its conferred mandate; (3) The principle of adversarial procedure has not been respected; (4) The decision is contrary to the international public order.'

[58] *Ibid*., Articles 5 and 8.

[59] *Ibid*., Article 9.

this provision is that, once a Uniform Act enters into force, i.e. 90 days after its adoption unless it contains specific modalities for that purpose (Article 9), it overrides any incompatible national law, whether previously or subsequently enacted. Given that the OHADA Treaty prohibits reservations and that the CCJA is a supranational judicial institution, the OHADA scheme will therefore limit and harmonise the legislative competences of Contracting States in areas of business law covered by Uniform Acts.[60]

A Uniform Act on Arbitration Within the Framework of the OHADA Treaty was adopted by the Council of Ministers on 12 March 1999.[61] The Act is modern and flexible and has the purpose of promoting arbitration as an efficient means of settling disputes.[62] The Act has 36 Articles divided into seven Chapters and applies to 'any arbitration when the seat of the arbitral tribunal is in one of the Member States' (Article 1). The Act is the law governing any arbitration in the member states and is only applicable to arbitration proceedings arising after its entry into force (Article 35).

Due to the direct applicability of Uniform Acts and the supranationality of the CCJA, with the entry into force of the 1999 Uniform Arbitration Act, the validity of any arbitration law, whether in existence – as in the case of the ones in Togo, Côte d'Ivoire and Senegal mentioned above – or to be enacted in any Contracting State, has to be viewed in the light of, and must comply with, the OHADA Treaty and the 1999 Uniform Arbitration Act. Arbitral proceedings arising in member states after 11 June 1999 must be in accordance with the 1999 Uniform Arbitration Act.[63] Some other provisions of the 1999 Uniform Arbitration Act will be considered in this book.

Egypt, Kenya and Zimbabwe

An arbitral project initiated in Egypt in March 1986 was finalised on 18 April 1994, when Law No. 27 for 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters was issued, adopting the Model Law to a great extent, and repealing aspects of the Code of Civil

[60] Bolmin, Bouillet-Cordonnier and Medjad, 'Prospects for Integration', 444–5.

[61] OHADA, *Journal Officiel*, 10 December 1999. The Act entered into force on 11 June 1999.

[62] OHADA, *In Brief*, June 1999.

[63] In addition to Guinea, the African countries affected were earlier noted (see note 53, p. 126 above). Most of those former French colonies did not have specific legislation on arbitration: Amoussou-Guenou, 'Arbitration in Sub-Saharan Africa', 59. Mauritania (a former French colony hitherto without a specific arbitration law) is not a party to the OHADA Treaty but is in favour of adopting the UNCITRAL Model Law: M. I. M. Aboul-Enein, 'The Development of International Commercial Arbitration in the Arab World', JCI Arb 65, November 1999, pp. 314, 318.

Procedure relating to arbitration.[64] Law No. 9 of 1997 amended Law No. 27 of 1994.[65]

In May 1995, an Arbitration Bill was introduced in the Kenyan Parliament. It became an Act on 18 August 1995, adopted the Model Law and repealed the Arbitration Act Cap. 49.[66] Before then, the Arbitration Committee of the Law Development Commission of Zimbabwe had recommended the adoption of the Model Law.[67] A final report based on responses to the interim report was later considered and adopted by the Commission, leading to the 1996 Arbitration Act.[68]

Madagascar, Zambia, Uganda, Ghana and South Africa

It is certain that work is being done in other African countries to reform arbitration laws.[69] Arbitration laws may also be about to be enacted in other African states not mentioned in this book. Arbitral reform and development in Africa is rapidly developing.

In Madagascar, Arbitration Law No. 98–019 was passed on 11 November 1998 and entered into force on 1 January 1999.[70] The Act has 93 Articles and added new provisions on arbitration to the Fourth Book of the Civil Procedure Code. It has three titles dealing respectively with definitional provisions, domestic arbitration (Articles 440 to 451–5) and international

[64] *Official Gazette*, No. 16*bis*, 21 April 1994: A. H. El-Ahdad, 'The New Egyptian Act in Civil and Commercial Matters', JIA 12, 1995, 65; M. I. M. Aboul-Enein, 'Reflections on the New Egyptian Law on Arbitration', *Arbitration International* 11, 1995, 75; A. A. Asouzu, 'The Egyptian Law Concerning Arbitration in Civil and Commercial Matters', RADIC 8, 1996, 139. [65] See p. 157.

[66] *Kenya Gazette,* Supplement No. 53 (Act No. 5) of 18 August 1995.

[67] Law Development Commission of Zimbabwe, *Interim Report on Arbitration*, Report No. 24, May 1993, cited in R. H. Christie, 'Arbitration: Party Autonomy or Curial Intervention I', South African LJ 111, 1994, 143.

[68] Law Development Commission of Zimbabwe, *Final Report on Arbitration*, Report No. 31, January 1994. The approved report was then submitted to the Minister of Justice with a recommendation that it be passed into law (*ibid*. at pp. 3–4). The Minister accepted the final report. The Arbitration Bill 1995 made a few changes to the LDC's recommendations. The only change of substance is that there was no appeal on fact or law against an arbitrator's decision. Aggrieved parties will be left to the remedies of setting aside or application for the recognition or enforcement of an award as under the Model Law: correspondence of 18–31 July 1995 between Amazu Asouzu and A. R. McMilliain, Deputy Chairman, LDC, Zimbabwe.

[69] For reform efforts in Southern Africa that would lead to the adoption of the Model Law in some states, see Christie, 'Model Law in Southern Africa', 272 and *The 1998 SALC Report*, para. 2.3, noting that Mozambique and Lesotho are giving active consideration to implementing arbitration statutes based on the Model Law. For Mauritius, see G. Collett, 'A New Arbitral Centre in the Indian Ocean', JCI Arb 62, 1996, No. 3, 224.

[70] Jakoba, 'Malagasy Arbitration Act', 95.

arbitration (Articles 452 to 464–2). French law and practice influenced the provisions on domestic arbitration, whereas the international arbitral regime is reportedly modelled on a modified UNCITRAL Model Arbitration Law.[71]

In Uganda, the Arbitration and Conciliation Act of 2000 adopts the Model Law for domestic and international arbitration,[72] while repealing the 'obsolete' Cap. 55 of 1930.[73] The Act has provisions for conciliation based on the UNCITRAL Conciliation Rules 1980[74] and implements the 1958 New York Convention[75] and the 1965 ICSID Convention.[76] That Act also established a dispute resolution institution, the Centre for Arbitration and Dispute Resolution (CADR) in Uganda.[77]

The Long Title of the draft Arbitration Act 1999 of Zambia comprehensively captures its purposes as:

> An Act to revise the law relating to Arbitration in Zambia so as to provide a comprehensive legal framework for domestic and international Arbitration, to provide for the settlement of disputes by arbitral tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitral tribunals, to encourage the use of arbitration as an agreed method of resolving commercial and other disputes, to promote consistency both on a domestic and international basis of arbitral laws based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June, 1985, to harmonise domestic and international arbitral laws, to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards, to facilitate the recognition and enforcement of arbitral awards, to give effect to the obligations of the State of Zambia under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), to provide for matters connected with or incidental to the repeal of the Arbitration Act, 1933, and to foregoing.[78]

[71] *Ibid*. at pp. 96–7. [72] Act of 2000, s. 2. The Act entered into force on 19 May 2000.
[73] *Ibid*., s. 75(1). [74] *Ibid*., ss. 49–67. [75] *Ibid*., ss. 40–45. [76] *Ibid*., ss. 46–48.
[77] *Ibid*., ss. 68–71. USAID was instrumental in sponsoring the Ugandan Act as well as those of Madagascar and Zambia: see note 96, pp. 104–5 above.
[78] www.interarb.com/v1/zambia.htm (version of 9 August 1999). Among other provisions, the draft Act, which has three Schedules, establishes the Zambia Dispute Resolution Centre (ZDRC) with broad-based functions, composition, management and organisation (ss. 4–22). A modified Model Arbitration Law is the First Schedule whereas the Second and Third Schedules respectively contain the general rules relating to arbitration and the two Geneva Conventions and the NYC. The Model Law applies to both domestic and international arbitration whereas the Second Schedule applies to international arbitration if the parties agree, and to domestic arbitration unless the parties agree otherwise (Article 26). The FICA with the assistance of the USAID and the International Trade Centre of the World Trade Organisation, is developing the draft Act, the enactment of which is imminent (www.interarb.com/fica/zambia.htm)

With respect to Ghana, an Alternative Dispute Resolution Bill based on a modified UNCITRAL Model Law has been elaborated as of June 2000. The Bill aims to replace the Arbitration Act of 1961, Act 38; to bring the law governing arbitration in Ghana into harmony with international treaties, rules and practices in arbitration; to provide the legal and institutional framework that will facilitate and encourage the settlement of disputes through ADR procedures; and to regulate customary arbitration through legislation.[79] Some essential features of the Bill, which has seven Parts, are discussed below.

Part 1 of the Bill establishes the Alternative Dispute Resolution Centre (ADRC), an independent corporate body with the object of facilitating and undertaking ADR: 'The ADRC will be expected, not only to provide comprehensive education on ADR but [also] to bring ADR to the doorsteps of every person in Ghana'.[80]

Part II of the Bill deals with arbitration, making provision for written arbitration agreements, which may be by way of a clause or a separate agreement:

> What constitutes writing is, however, made flexible by the recognition in clause 17(4) that exchange of any communications in writing such as letter, telex, fax, e-mail or other form of telecommunications which provides a record of the agreement constitutes writing. A written agreement also subsists when the existence of a statement of claim and defence is alleged and the existence is not denied. In all cases an arbitration agreement is a separate agreement and is not affected by the invalidity of any agreement of which it forms a part (clause 18).[81]

Amongst other provisions, the Bill has provisions authorising an arbitrator before the arbitral hearing, unless the parties decides otherwise, to hold an arbitration management conference with the parties or their representatives, in order to decide essential steps or other matters with respect to the arbitration, for example, the issues to be resolved; the date, time, place and estimated duration of the hearing; the need for discovery, production of documents or issue of interrogatories, the law, standards, rules of evidence and the applicable burden of proof; the form of award; costs and arbitrator's fees; and any other issue relating to the arbitration (clause 52). The conference may be held through electronic or telecommunications media.

To facilitate a speedy resolution of the dispute during the arbitral process, clause 53 provides that the person or institution or the ADRC

[79] *Alternative Dispute Resolution Bill Memorandum* (Attorney-General's Office, 20 June 2000).
[80] *Ibid*. at p. 4. [81] *Ibid*. at pp. 5–6.

authorised to administer the arbitration may, with the consent of the parties, at any time in that process, arrange a conciliation conference for the parties, the purpose being to narrow down the issues in dispute and to facilitate compromise. The arbitrator must not be the conciliator.

The duties and powers of the arbitrator are to be fair and impartial to the parties, to give each party an opportunity to present its case, to avoid unnecessary delay and expenses, and to adopt measures that will expedite the resolution of the dispute (clause 54). On the other hand, the court has power to support arbitral proceedings, for example, in the taking and preservation of evidence, with respect to property the subject of the proceedings, etc., and for the sale of goods subject of the proceedings and for granting interim injunctions or the appointment of receivers. The power of the court is, however, subject to limitations aimed at avoiding unnecessary interruption of the arbitral process by incessant applications to the court. Thus, the court can intervene only with the agreement of the parties, and, except in cases of urgency, its power can be exercised only upon notice to the other party and with the prior permission of the arbitrator and the written agreement of the other party (clause 62).

Part III of the Bill makes for fast track (expedited) arbitration allowing for shorter hearings and the use of telephone or electronic means of communication to speed up the arbitral process.

Part IV makes provisions for mediation, its conduct and organisation. The process could be resorted to by the mutual agreement of the parties or when a court, with a view to facilitating the resolution of a matter before it, refers the matter or a part thereof to mediation. A mediation settlement is binding on the parties where they so agree and will have the same effect as an arbitral award (clauses 106–108).[82]

Part V of the Bill provides for customary arbitration as distilled from case law and current practice, in order to popularise and facilitate ADR.

In *Budu* v. *Caeser*,[83] Ollennu J (as he then was) stated the following principles of customary arbitration, which were adopted in the Bill except as indicated:

1. there must be a voluntary submission of the dispute by the parties to arbitrators for the purpose of having the dispute decided informally, but on its merits;
2. there must be a prior agreement by both parties to accept the award of the arbitrators;
3. the award must not be arbitrary but must be arrived at after the hearing of both sides in a judicial manner;

[82] See pp. 22–3. [83] [1959] GLR 410.

4. the practice and procedure for the time being followed in the local court or tribunal of the area must be followed as nearly as possible;[84] and
5. the award must be published.

Except criminal matters, disputes on any matter may be submitted to customary arbitration. It is an offence for a person who has not been ordered by a court to submit a criminal matter to customary arbitration to do so (clause 115).[85] Except in certain circumstances, a customary arbitral award need not be in writing (clause 125) and the award is binding as between the parties and persons claiming through or under the parties even if not registered (clause 126). A customary award may be registered in the nearest Community Tribunal, Circuit Court or High Court as may be appropriate (clause 127) and may be enforced in the same manner as a judgment of a court (clause 128).[86]

As regards South Africa, the reform process was instigated by the Executive Committee of the Association of Arbitrators of South Africa (AASA) which had, in a 1994 report, proposed '[t]hat South Africa should adopt the UNCITRAL Model Law on International Commercial Arbitration for international arbitration only, while retaining separate legislation for domestic arbitration'.[87] For the latter purpose, the 1965 Arbitration Act was to be and is being revised.[88] This became necessary because the Committee felt that:

[84] The *ADR Bill Memorandum* departed from this principle as 'it imposes an unnecessary burden on the parties and the arbitrator and also does not reflect actual customary arbitration practice'.

[85] Customary arbitration is made flexible and wide enough to cover not only arbitration where customary law is applicable but any dispute settlement which is not governed by a written agreement (cll. 118–119). The services of the ADRC are available for customary arbitration (cll. 120–121).

[86] Finally Parts VI and VII of the Bill deal with administrative and financial matters pertaining to the ADRC, its funding and transitional provisions. The Bill also has three Schedules: Schedule 1, containing the 1958 NYC; Schedule II, containing the Rules of the ADRC (further dealing with arbitration based on the 1976 UNCITRAL Arbitration Rules, expedited arbitral proceedings, and mediation) and Schedule III, containing specimen arbitration clauses and agreements.

[87] D. W. Butler, *Association of Arbitrators: Amendments to Arbitration Act No. 42 of 1965, Revised Commentary on Proposed Amendments* (Stellenbosch, 14 April 1994). On why the Model Law should be adopted, see Christie, 'South Africa as a Venue', 153; Christie, 'Arbitration: Party Autonomy or Curial Intervention II', SALJ 111, 1994, 360; D. W. Butler, 'South African Arbitration Legislation – The Need for Reform', CILJSA 27, 1994, 118.

[88] From fax messages of 13–17 June 1994 (between Asouzu and Finsen, Executive Director, AASA); Draft of the Proposed Act, reprinted in Association of Arbitrators (Draft D4 of 11/4/1994), Annexure B. of *Domestic Arbitration* (SALC: Project 94, Discussion Paper 83, 1999).

the UNCITRAL Model Law is not sufficiently comprehensive for use as a statute for domestic arbitration without changes. Although the compilers of the UNCITRAL Model Law anticipated that state legislatures would make changes to meet their particular needs, such changes undermine the goal of global harmonisation of international arbitration and will tend to diminish the attractions of that state as a venue for international arbitration.[89]

The views of the AASA were placed before the South African Law Commission (SALC), which took up the matter from August 1994.[90] The SALC recommended in 1996 that South Africa should join the ICSID Convention as well as enact an Arbitration Act based on the Model Law, for international arbitration only, while retaining a separate statute for domestic arbitration. There will, however, be an opt-in provision to the Model Law for parties to domestic arbitration. It was also recommended that the Act implementing the 1958 New York Convention in South Africa should be repealed and replaced with legislation that would further carry out the Convention's purposes in South Africa. An all-purpose International Arbitration Act was also recommended.[91]

On 10 July 1998, the SALC approved the Project Committee's Report on International Arbitration.[92] The 1998 report not only endorsed some of the basic recommendations in the 1996 discussion paper but was also a vast improvement.[93] The basic difference between the 1996 recommendations

[89] Draft D4, *ibid*. at p. 3, and SALC, *Arbitration* (Working Paper 59, Project 94, September 1995), paras 43–4; R. H. Christie, 'Arbitration: Party Autonomy or Curial Intervention III', SALJ III, 1994, 552, on why the Model Law should not be adopted for domestic arbitration in South Africa.

[90] *The 1998 SALC Report*, paras 1.21–1.46. Arbitration entered into the programme of the SALC on 29 August 1994. The terms of reference of the Commission were to 'investigate whether, and if so, to what extent, the provisions of the draft Model Law should be implemented in South Africa and what measures should be taken for that purpose; and to examine the Arbitration Act 42 of 1965 in the light of the Model Law and to recommend any legislative or other steps which should be taken to improve the system of domestic arbitration in South Africa': SALC, *Arbitration* (Working Paper 59, Project 94, September 1995), paras 5.1–5.2. On 8 July 1996, the mandate of the SALC was expanded to include investigation into 'all facets of alternative dispute resolution (ADR) in order to provide a framework within which ADR could be discussed in an orderly fashion. The Minister stressed the urgency of the project, as formalised methods of ADR could relieve the overburdened court system': SALC, *ADR*, para. 1.3.

[91] Discussion Paper 69.

[92] *The 1998 SALC Report*. As with Discussion Paper 69, the SALC reports on international and domestic arbitrations were prepared on behalf of the Commission by Professor David Butler, a member of the Project Committee.

[93] Discussions of the position in South Africa are based on both the draft International Arbitration Act 1997 (Annexure C) accompanying Discussion Paper 69 (which has the Model Law, with appropriate modifications, as Schedule 1) and on the draft International Arbitration Act 1998 (annotated text and the proposed final version are Annexures E and F, respectively, accompanying *The 1998 SALC Report* on international arbitration).

and those in the 1998 report was that the Model Law will, according to the latter, apply in South Africa to international arbitration only. In other words, there will be no opt-in provisions to the Model Law for parties to domestic arbitration. Also, provisions on conciliation for parties to international arbitration agreements were added to the draft International Arbitration Act 1998.[94]

The draft International Arbitration Act 1998, according to the Long Title, aims to 'amend and consolidate the law relating to international commercial arbitration and the recognition and enforcement of foreign arbitral awards and to provide for the settlement of certain international investment disputes'. The draft Act has five Chapters and five Schedules. The draft Act excludes the application of the 1965 Arbitration Act to an arbitration agreement, a reference to arbitration or arbitral award covered by it (section 3(1)).[95] The intention of the exclusion of the 1965 Act in this respect is that: 'Foreign users of the Model Law in South Africa will therefore know that they do not have to search outside the enacting legislation for possible hidden pitfalls'.[96]

The 1998 draft Act applies to any arbitration under an arbitration agreement to which the state is a party, the purpose being to ensure the efficacy of arbitration agreements where one of the parties is a South African governmental organ or state corporation.[97] Nothing in the Arbitration Act 1965 or in Chapters 2 and 3 of the 1998 draft Act applies to a dispute within the jurisdiction of ICSID or to an award rendered under the ICSID Convention.[98]

[94] Other changes and additions to the Model Law recommended in *The 1998 SALC Report* (paras 1.13–1.40) and reflected in the 1998 draft International Arbitration Act, will be mentioned in the course of this discussion. Most of the suggestions by the present author in response to Discussion Paper 69 were accepted in the 1998 report. However, the SALC did not accept, as this author had suggested in response to Discussion Paper 69, adopting the Model Law as the applicable regime for domestic arbitration in South Africa in a single statute, which also deals with international commercial arbitration. According to the SALC, that suggestion 'overlooks the fact that the consideration of domestic arbitration legislation would need to be preceded by its own extensive consultative process with interested parties and the urgency relating to the enactment of the Model Law for international arbitration': *The 1998 SALC Report*, para. 1.38, n. 29. Many individuals and institutions responded to the SALC's work on arbitration: *ibid*., Annexures B (list of respondents to Working Paper 59), C1 (list of respondents to Discussion Paper 69) and C2 (list of persons who accepted the invitation to, or who attended, the consultative meetings).

[95] Chapter 2 of the 1998 draft Act (dealing with international *commercial* arbitration) has its own provision on arbitrability in s. 7: see p. 152.

[96] *The SALC 1998 Report*, para. 2.32. By s. 3(2) of the 1998 draft Act, s. 2 of the 1965 Arbitration Act (on matters not subject to arbitration) shall apply for the purposes of Chapter 3 of the 1998 draft Act (dealing with the recognition and enforcement of foreign arbitral awards): see p. 153, for the latter's purpose.

[97] The 1998 draft Act, s. 4; *The SALC 1998 Report*, para. 2.35.

[98] The draft Act 1998, s. 23(2).

An International Arbitration Act implementing a modified Model Arbitration Law for international commercial arbitration only (with limited provisions for conciliation), reforming the 1977 Act which implemented the New York Convention in South Africa and containing an Act to implement the ICSID Convention when acceded to by South Africa, is expected to be enacted.

Two minor changes were proposed to the wordings of the Model Law by the 1998 report because, 'it is important that the Model Law be implemented in South Africa with minimum changes to further the goal of uniformity with other Model Law jurisdictions'.[99] First, the meaning of an 'arbitration agreement in writing' was extended slightly to deal with certain difficulties experienced in international practice.[100] Secondly, although parties will be free to determine the number of arbitrators, failing such determination an arbitral tribunal shall consist of a single arbitrator (instead of three arbitrators as the Model Law provides in that circumstance).[101]

The additional provisions proposed to enable the Model Law to operate more effectively in South Africa are those dealing with the following matters:

- the purposes of the Act;[102]
- the UNCITRAL documents that may be consulted as interpretative aid;[103]

[99] *The 1998 SALC Report,* paras 1.13, 2.4 and 2.9, mentioning, as reasons why the Model Law should be adopted with minimum alterations in South Africa, the restriction of alteration to those that are essential for the effective implementation of the Model Law, ensuring uniformity with international standards and the promotion of South Africa as an attractive Model Law jurisdiction for holding international arbitration.

[100] The draft International Arbitration Act 1998, s. 2(1)(a) and (b): see pp. 145–6. See also Zambia draft Act 1999, s. 2 and First Schedule, Articles 2 and 7.

[101] The draft International Arbitration Act 1998, Schedule 1, Article 10(1) and (2); the Model Law, Article 10(1) and (2). The Zambian 1999 draft Act, while allowing the parties the freedom to determine the number of arbitrators stipulates a single arbitrator for domestic arbitration, and three arbitrators for international arbitration, in the event of failure of agreement (s. 10). Also, consistent with the position in British Columbia and a 1996 constitutional requirement in South Africa, was the removal of references to gender in the Model Law with respect to an arbitrator or a party: *The SALC 1998 Report*, para. 2.15. This is a matter that is also addressed in the Zambia's modified Model Law. 'Commercial' in the second footnote to Article 1(1) of the Model Law was deleted as being unnecessary, although the draft International Arbitration Act applies to international *commercial* arbitration, 'commercial' being understood in the sense used in the *travaux preparatoires* of the Model Law: *ibid*., paras 2.23, 2.102–2.105; Zambian draft Act, s. 2(2) and First Schedule, Article 1.

[102] Draft Act 1998, s. 1.

[103] Draft Act 1998, s. 8 and Schedule 2. See Zambian draft Act, ss. 2(2) and 26.

- the clarification of the law on arbitrability;[104]
- arbitral immunity;[105]
- the consensual consolidation of arbitral proceedings;[106]
- conciliation (otherwise called mediation) in the context of arbitration;[107]
- conferring the default power of appointing arbitrators when the parties' own appointing mechanism has failed on an authority to be specified by the Chief Justice in the Gazette (instead of in a specified court or other authority as in the Model Law) pending which, the function shall be performed by the Chief Justice;[108]
- spelling out the extent of court's powers regarding interim proceedings;[109]
- empowering the arbitral tribunal to order security for costs, unless the arbitration agreement provides otherwise, and the enforcement thereof as if it were an award of the arbitral tribunal's order on interim measures;[110]
- the power of the court to take evidence;[111]
- the power of the arbitral tribunal to award interest and costs;[112] and
- the clarification that 'public policy' as a ground for setting aside an arbitral award by the court or for refusing an application to the court to recognise and enforce an award includes an express reference to serious procedural irregularities involving a breach of the arbitral tribunal's duty to act fairly, entailing substantial injustice to the applicant or when the making of the award was induced or affected by fraud or corruption, and the exclusion of the time limit of three months from the receipt of the award, if the latter is attacked on the basis of fraud or corruption.[113]

[104] Draft Act 1998, ss. 3(2) and 7. See Zambian draft Act, s. 23.
[105] Draft Act 1998, s. 9. See Zambian draft Act, s. 25.
[106] Draft Act 1998, s. 10. Cf. Zambian draft Act 1999, Second Schedule, Article 3.
[107] Draft Act 1998, ss. 5(3), 11–15 and Schedule 5.
[108] Draft Act 1998, Schedule 1, Articles 6(2)–(4), 11(3), (4) and (5). See Zambian draft Act, First Schedule, Article 6.
[109] Draft Act 1998, Schedule 1, Article 9(2)–(5); and Zambian draft Act, First Schedule, Article 9.
[110] Draft Act 1998, Schedule 1, Article 17(2) and (3); and Zambian draft Act 1999, Second Schedule, Article 4(1)(d).
[111] Draft Act 1998, Sch.1, Article 27(2); and Zambian draft Act, First Schedule, Article 27(2).
[112] Draft Act 1998, Schedule 1, Article 31(5) and (6); and Zambian draft Act, s. 24, and Second Schedule, Article 7.
[113] Draft Act 1998, Schedule 1, Articles 34(3) and (5) and 35(3); and Zambia draft Act, First Schedule, Article 34(3).

Concluding remarks

With respect to the stance taken in the 1998 SALC Report on International Arbitration concerning the utility of the Model Law as South Africa's regime for both domestic *and* international arbitrations,[114] the report did not accept this author's in his comments on Discussion Paper 69 that the Model law *with appropriate adjustments and reinforcements* could be a valuable basis for domestic arbitration legislation, although also dealing with international (commercial) arbitration.[115] That suggestion was in direct response to an earlier recommendation by the SALC – which it abandoned in the 1998 report – for the adoption of the Model Law for international arbitration only, with its optional application to domestic arbitration, whilst retaining a separate statute based on the 1965 Arbitration Act as improved, for domestic arbitration.[116] Therefore, contrary to that aspect of the 1998 SALC report addressing this author's suggestion[117] (i.e. to adopt the Model Law as the applicable regime for domestic arbitration in South Africa in a single statute which also covers international arbitration) that suggestion did not 'overlook' the Commission's recommendations in Discussion Paper 69 on the possible dispute resolution options for parties to domestic arbitration whilst the Commission was considering the regime for international arbitration. The Commission only decided to deal with international arbitration in the 1998 Report. What, however, weighed on the SALC in taking the stance it eventually took – that the Model Law should apply only to international arbitration in South Africa without its optional application for parties to domestic arbitration – was that the 'consideration of domestic legislation would need to be preceded by its own extensive consultative process with interested parties and the

[114] As was indicated earlier, in 1998, the SALC recommended that the Model Law, with suitable changes and additions, should be applicable to international commercial arbitration but without opting-in provisions for parties to domestic arbitration, which was slightly different from its 1996 stance: see pp. 134–5.

[115] Asouzu, 'Comments on Arbitration: Discussion Paper 69, Project 94' (submitted to SALC, Pretoria, 24 March 1997), paras 2–24. The adoption of the Model Law for domestic arbitration was also advocated by Mr Ronald E. Goodman of White and Case, Johannesburg, in response to Discussion Paper 69. The Building Industries Federation of Southern Africa supported the retention of a separate user-friendly statute for domestic arbitrations. And, a third respondent requested that the possibility of using the Model Law for domestic arbitration be considered once the issue of international arbitrations has been dealt with: *The 1998 SALC Report*, para. 2.5.

[116] *Discussion Paper 69*, paras 2.1, 2.28–2.37. The SALC was able, in 1998, to recommend against an optional application of the Model Law to domestic arbitration: *The SALC 1998 Report*, paras 2.270–2.276.

[117] See note 94, p. 135 above.

urgency relating to the enactment of the Model Law for international arbitration' prevented such consultation.[118]

Apart from supporting the adoption of the Model Law with appropriate reinforcement or modification for international (commercial) arbitration in South Africa, this author firmly remains of the view that the Model Law could be a valuable basis for legislation on domestic (commercial) arbitration – even if the same also deals with international (commercial) arbitration. This can be seen in legislation in states, some of them in Africa, that have already adopted the Model Law.[119] In any event, no state has yet adopted the Model Law exactly as it is, whether for domestic or international (commercial) arbitration.

[118] *The 1998 SALC Report,* para. 1.38, n. 29, comparing with the view in Discussion Paper 69, para. 1.9, where it indicated that international arbitration was a separate aspect of the investigation, which required urgent attention. The reform of domestic arbitration was potentially a more controversial topic involving a much broader range of interests groups, with the result that the investigation of that aspect would be more protracted, particularly if the project committee should be mandated to consider the promotion of ADR as well. The SALC further observed in the 1998 report that respondents to Discussion Paper 69 were not asked to assess the suitability of the Model Law for domestic arbitrations. For that reason, and because of the generally accepted urgency of the need to introduce the Model Law for international arbitrations, further examination of the question will have to await the next phase of the Law Commission's investigation on arbitration legislation regarding the revision or replacement of the 1965 Arbitration Act, for domestic arbitrations and that any need in practice for an opting-in provision will be lessened once the revision of the domestic arbitration legislation has been completed: *The SALC 1998 Report*, paras 2.5 and 2.275.

[119] See chapter 5 below.

5 Trends in the third generation arbitration laws in Africa

Introductory remarks

There are some shared features in the third generation arbitration laws, although no two such laws are identical as they all have unique features. Some of their features have been in arbitration laws in Africa since the nineteenth century. Others are features drawn from, or influenced by, the arbitration laws of some Western states and, to a greater extent, by the UNCITRAL Model Arbitration Law.

The third generation arbitration laws incorporate streamlined functions for the court in the arbitral process. Some make provision for conciliation (otherwise called mediation) and also give recognition to the legality of institutional arbitration. Those laws tend towards giving a greater degree of party autonomy in an atmosphere of procedural equality and fairness, coupled with the preservation of mandatory norms and the necessary judicial intervention compatible with the private and contractual nature of arbitration. Arbitral tribunals are progressively given more powers and responsibilities. In the third generation arbitration laws, instead of 'deemed provisions', there are express and fallback provisions in the absence of agreement or due to disagreement by the parties and, indeed, if a party defaults or proves recalcitrant. Additionally, effective regimes for the recognition and enforcement of arbitral awards which, at times, include the implementation of relevant treaty obligations in that respect and, where appropriate, for the denial and attack of arbitral awards on exhaustively defined grounds, are enacted. All these may be pertinent to domestic and international (commercial) arbitration.[1]

[1] Third generation arbitration laws in Africa that contain controversial provisions contrary to the standard of the Model Law are the 1999 Arbitration Law of

This chapter will deal with the nature of the arbitration agreement, with subject-matter arbitrability, with the specificity of international arbitration, with the recognition of institutional arbitration and with the court and the arbitral process under the third generation arbitration laws in Africa.

The nature of the arbitration agreement

In customary law arbitration, a written agreement to arbitrate is lacking and, indeed, unknown. Arbitration under parole agreement is regulated by the common law and has many weaknesses discouraging its prevalence.[2] The colonial arbitration laws regulated only domestic arbitration under written arbitration agreements.[3] Under such legislation, a 'submission' meant a written agreement to submit *present or future* differences to arbitration, whether an arbitrator is named therein or not.[4] In some second and third generations arbitration laws, instead of 'submission', more modern and interchangeable phrases such as 'arbitration agreement' and or 'arbitration clause' may be used.[5] A comprehensive definition may include the two technical meanings of arbitration agreement, i.e. 'arbitration clause' relating to future disputes ('disputes which may

Madagascar, Article 462(6) and the 1993 Arbitration Code of Tunisia, Article 78(6). The latter, *mutatis mutandis*, is similar to the former, and provides: 'If neither party is domiciled nor has its habitual residence or place of business in Tunis, the parties may expressly agree to waive their right to challenge the arbitral award.' Such provisions, deriving from the 1987 Swiss Private International Law Act, 27 ILM 37, Article 192(1), can also be seen in the 1998 Belgian Arbitration Law, 25 ILM 725, Article 1717(4), and in the 1999 Swedish Arbitration Law, s. 51. These provisions misunderstand the basic nature of the arbitral process, are inimical to its integrity and could undermine the international arbitral obligations of the enacting states: Asouzu, 'The National Arbitration Law', 68.

[2] Ezejiofor, *The Law of Arbitration*, pp. 20–2; *Oline and Others* v. *Obodo* [1958] 2 FSC 39. The Zimbabwean Arbitration Committee recommended that a revised Arbitration Law should apply to arbitration agreements, whether oral or in writing. This was reversed by the Full Commission, which restored the Model Law's provision under which all arbitration is based on a written agreement. It was noted that a written agreement makes for clarity and that there may be problems if a written agreement were to be varied by a subsequent oral one to include additional disputes. Also oral agreements (extremely rare in practice) would continue to be regulated by common law and that the former Act only covered written submissions: *Final Report,* pp. 6, 16; Arbitration Act of Zimbabwe 1996, s. 5 and Article 7 of First Schedule thereto. [3] See p. 121.

[4] E.g. the Arbitration Act of 1914, s. 2 (Nigeria); Arbitration Ordinance of 1930, s. 2 (Uganda).

[5] E.g. the 1965 Arbitration Act of South Africa, s. 1. The Djibouti Code uses 'an agreement to arbitrate', 'arbitration agreement' and 'the submission' (Articles 2, 3 and 4).

arise')[6] and 'submission' relating to existing disputes ('disputes which have arisen').[7]

Some second and third generation arbitration laws may define 'arbitration' in substantive terms. According to section 1 of the 1961 Arbitration Act of Ghana: 'An Arbitration is the reference of a difference between two or more parties to a person other than a court for determination after hearing the parties in a judicial manner'.[8] The Model Law, and laws based on it, normally define arbitration in formal terms as 'any arbitration whether or not administered by a permanent arbitral institution'[9] or, as in Uganda, 'by a domestic or international institution where there is an arbitration agreement'.[10] Stressing the nature of arbitration, Article 1 of the 1993 Tunisian Code provides: 'Arbitration is a private procedure for the settlement of certain categories of disputes by an arbitral tribunal; the parties confer the mission of deciding for them on the arbitral tribunal by means of an arbitration agreement'. Combining both criteria, Article 4 of the 1994 Egyptian Arbitration Law provides: '"[A]rbitration" relates to the voluntary arbitration agreed upon by the two parties to the dispute according to their own free will, whether or not the chosen body to which the arbitral mission is entrusted by agreement of the two parties is a permanent arbitral organisation or Center.'[11]

A significant feature of some second and the third generation arbitration laws is the recognition that present and future disputes (whether contractual or not) are arbitrable and that an arbitrator need not be named in the agreement.[12] These features are lacking in common law

[6] Model Law, Article 7(1); Tunisian Code, Article 3; South African draft International Arbitration Acts 1997 and 1998, Schedule 1 and Article 7(1), respectively; Ugandan Arbitration and Conciliation Act 2000, s. 3(1).

[7] Djibouti Code 1984, Article 2; Model Law, Article 7(1); South African draft Acts 1997 and 1998, Schedule 1 and Article 7(1); Tunisian Code 1993, Articles 2 and 4; Kenyan Arbitration Act 1995, s. 4(1); Zambian draft Act 1999, s. 2(1) and First Schedule, Article 7(1); Egyptian Arbitration Law 1994, Article 10; Ugandan Arbitration and Conciliation Act 2000, ss. 3(1) and 4(1), etc. [8] See p. 12.

[9] Model Law, Article 2(a); draft South African Acts 1997 and 1998, Schedule 1, Article 2(a), respectively. [10] Ugandan Arbitration and Conciliation Act 2000, s. 3(1).

[11] On the other hand, the Zambian draft Act 1999 provides that 'Arbitration' refers to any arbitration whether or not administered by a permanent arbitral institution and means the determination of a dispute by an independent third party or parties who are appointed as a result of a consensual process and who determine the dispute according to the principles set out in the Act and thereafter make an award (s. 2(1)).

[12] E.g. Article 2(1) of the Zambian draft Act 1999 provides: '"Arbitration Agreement" means an agreement in writing by the parties providing for the submission to arbitration of any existing dispute or any future dispute which may arise relating to any matter specified in the agreement, whether contractual or not and whether an arbitrator is named or designated therein or not.'

arbitration and were not always present in the first generation arbitration laws.[13] For example, Article 501 of the Egyptian Code of Civil Procedure required *inter alia* that the subject matter of the dispute should be defined in the arbitration document or during the pleadings; otherwise the arbitration shall be deemed null and void. Further, Article 502(3) thereof provided that the arbitrator should be identified in the arbitration agreement or in a separate agreement.[14]

The implication of restricting arbitrable subject matters only to existing disputes and before named arbitrators is that the parties may not appoint arbitrators indirectly by agreeing to institutional rules.[15] In the above situation, an agreement to submit future disputes to arbitration may be impossible in some cases except if the dispute is identified in the pleadings. Such a reference will require the naming of an arbitrator therein with the effect that the agreement may be void if before the dispute arises the designated arbitrator has died, becomes incapacitated or is otherwise disqualified.[16]

The situation, as can be seen, is rapidly changing in arbitration laws in Africa. The third generation arbitration laws also define an agreement to arbitrate in terms showing that it has to be in writing covering both existing and future disputes. But an arbitration agreement (whether an arbitration clause or a separate agreement) is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegram or other means of telecommunication which provides a record of the agreement, or in the exchange of a statement of claim and a defence in which the existence of an agreement is alleged by one party and not

[13] The validity of arbitration agreements in relation to future differences was first recognised as an international rule in 1923: see p. 180.

[14] Article 529 of the Moroccan Code of Civil Procedure (as amended) is not as absolute, in that, in addition to providing that the arbitration agreement must contain the subject matter of the dispute and the name of the arbitrator, it allows parties to agree to refer to arbitration 'disputes arising from performance' of any contract. However, parties are to appoint arbitrators in advance, in the agreement, in default of which the court appoints. This feature was further improved by Chapter VIII of the Act of 28 September 1974, Articles 308–309.

[15] El-Kosheri, 'Egypt' in P. Sanders (gen. ed.), *ICCA: Handbook*, Vol. 1, Supp. II (1990), pp. 9–10.

[16] Article 502(1) of the former Code of Egypt provided that an arbitrator should not be a minor, interdict, deprived of his civil rights because of a criminal sentence or bankrupt unless he restored his reputation. The 1994 Egyptian Law contains similar grounds for the disqualification of an arbitrator (Article 16(1)). However, under it, arbitrators need not be named in the agreement and institutional arbitration is expressly recognised. See also the Tunisian Code, Article 10.

denied by another.[17] The 1999 Zambian draft Act (section 2(1)), the Model Law as adopted in Zambia (Article 7(3)) and the 2000 ADR Bill of Ghana (clause 17(4)) add 'exchange of email' to their definitions of 'arbitration agreement in writing'. An arbitration agreement by reference in a contract is possible provided the contract is in writing and the reference is such as to make the arbitration clause part of the contract.[18]

The requirement for writing is not unique to the third generation arbitration laws since it appeared in the first and second generation arbitration laws and was recognised in case law in Africa.[19] What is, however, significant in the third generation laws is that what constitutes an 'arbitration agreement in writing' is flexible and consistent with modern means of business communication and practices. Writing makes for certainty and predictability as to the terms of the agreement to arbitrate and any resultant award. It makes enforcement by the court possible and easier and is required by international conventions for the same reason.[20] A written agreement is easily identifiable especially during the challenge of an award. As the Department Advisory Committee also observed: 'An arbitration agreement has the important effect of contracting out of the right to go to the court, i.e. it deprives the parties of that basic right. To our minds an agreement of such importance should be in some written form.'[21]

It has been suggested that an arbitration agreement by contractual adoption or by conduct should be recognised, to cover the perceived

[17] Model Law, Article 7(2); Egyptian Arbitration Law 1994, Articles 10(3) and 12; Algerian Arbitration Code 1993, Article 458(1); Nigerian Arbitration and Conciliation Act 1988, s. 1; Tunisian Code 1993, Article 6; Djibouti Code 1984, Article 2(1); Kenyan Arbitration Act 1995, s. 4; Ugandan Arbitration and Conciliation Act 2000, s. 4; Zimbabwean Arbitration Act 1996, First Schedule, Article 7; South African draft International Arbitration Acts 1997 and 1998, Schedule 1, Article 7(2), respectively.

[18] Article 3 of the OHADA Uniform Arbitration Act 1999 provides: 'The arbitration agreement shall be in writing, or by any other means permitting it to be evidenced, notably, by reference made to a document stipulating it.'

[19] E.g., the Arbitration Act 1961 of Ghana, s. 5(1); *Alhaji Buraimoh Alli* v. *Commerce Assurance Ltd* [1981] 3 *Plateau Law Reports* 300 (HC).

[20] Under the NYC, 'agreement in writing' includes the arbitration clause or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams (Article II(2)). An award must be in writing to benefit from the NYC and most national laws. For the argument that the Convention's provision dealing with the 'writing requirement' is inadequate: see pp. 144–5 below.

[21] The 1996 Department Advisory Committee (DAC) Report on the English Arbitration Bill, *Arbitration International* 13, 1996, 282, para. 33; see note 2, p. 141 above, with respect to Zimbabwe.

defects in Article II(2) of the New York Convention and Article 7(2) of the Model Law, dealing with 'the writing requirement'. Both provisions, it was argued, are not consistent with modern business practices and commercial realities.[22] Reforms in that direction have been introduced in the UK, Hong Kong and Germany.[23] UNCITRAL is also considering a harmonised solution to the matter.[24]

In the 1998 SALC Report on International Arbitration, the SALC, after observing that the revised definitions of the arbitration agreement in the UK and Hong Kong did not expressly address 'the problem of the bill of lading',[25] positively revisited the issue.[26] For the sake of clarity, the SALC recommended in the 1998 report 'that an appropriate addition should be made to deal expressly with the bill of lading, following the example of Singapore'.[27] In that report, the SALC also considered 'the situation where, for example, a written purchase order contains or refers to an arbitration clause, and a contract is concluded orally or by conduct on the basis of the purchase order without there being any signature or writing

[22] N. Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?', JCI Arb 62, 1996, 19, arguing in light of *H. Small Ltd* v. *Goldroyce Garment Ltd* [1994] HKLD E8; and *Robobar Ltd* v. *Finncold SAS*, Italian Supreme Court, (1995) 20 YBCA 739.

[23] The 1996 UK Arbitration Act, s. 5, with the DAC comment on cl. 5 of the 1996 Arbitration Bill, *DAC Report*, paras 31–40; Arbitration (Amendment) Ordinance 1996, s. 2AC, amending the Model Law as applicable in Hong Kong and the Arbitration Ordinance, cap. 341 of Hong Kong; and German Arbitration Law 1998, Article 1031. A comment on the 'margins' of Kaplan's view argued that the NYC is flexible enough to allow local legislatures and courts to give greater meaning to 'writing' as their contract laws are modernised: Cohen, 'Arbitration "Agreement in Writing"', *Arbitration International* 13, 1997, 273.

[24] Note by the Secretariat, *Possible Future Work in the Area of International Commercial Arbitration*, A/CN.9/460 of 6 April 1999, paras 20–31; Report of the Secretary-General, *Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes*, A/CN.9/WG.II/WP.108/Add.1 of 26 January 2000, paras 1–42; *Report of the Working Group on Arbitration*, 20–31 March 2000, A/CN.9/468 of 10 April 2000, paras 88–106; Working Group on Arbitration, *Report of the Secretary-General*; 33rd Session, A/CN/WGII/WP.110, 20 November–1 December 2000, paras 10–51.

[25] See The SALC 1998 Report, para. 2.132, for the nature of the problem.

[26] *Ibid*., paras 2.130–2.136. In the 1996 Discussion Paper (para. 2.72), the SALC recommended that no changes should be made to the definition of the arbitration agreement as contained in the Model Law 'in the interests of uniformity with most other Model Law countries'.

[27] *The SALC 1998 Report*, para. 2.132, citing the Singapore International Arbitration Act 1994, s. 2(1) and the German Arbitration Law, Article 1031(4).

from the side of the seller'.[28] The SALC recommended an addition to the definition of arbitration agreement in Article 7 of the Model Law to include the situation '[w]here parties agree otherwise than in writing by reference to terms which are in writing'.[29] The SALC also recommended that the two additional and extended definitions are to be incorporated in the definition of 'arbitration agreement' in section 2(1)(a)(b) of the International Arbitration Bill 1998. Apart from the fact that 'arbitration agreement' in section 2(1) was defined for the purposes of Chapter 2 (on international *commercial* arbitration) and Chapter 3 (recognition and enforcement of foreign arbitral awards) of the 1998 International Arbitration Bill,[30] it was further provided that that amplified definition and the Model Law's provisions on the recognition and enforcement of arbitration agreement (Schedule 1, Article 8 of the 1998 Bill) shall apply *mutatis mutandis* to the recognition and enforcement of arbitration agreements in South Africa under the New York Convention by virtue of section 17(2) of the 1998 Bill. These provisions have thus reflected for South Africa suggestions by Kaplan and Cohen.[31]

The nature of the arbitration agreement is shaped and will continue to be shaped, to a great extent, by commercial practices and transactions as well as the volume and nature of commercial disputes arising therefrom in particular jurisdictions.

Subject-matter arbitrability

A general overview

In terms of subject-matter coverage, i.e. what kind of dispute may be submitted to arbitration, customary law arbitration is generally narrow and out of touch with the complex nature of modern commercial transactions and disputes. The nature of disputes involved in most of the reported cases on customary law dispute resolution pertains to land-use and domestic relations.[32]

[28] *The SALC 1998 Report*, para. 2.133, citing cases relied upon by Kaplan (see note 22 above) and distinguishing them from *Zambia Steel & Building Supplies Ltd* v. *James Clark & Eaton* [1986] 2 Lloyd's LR 225 (CA), which was decided on the wider definition of s. 7(1) of the 1975 UK Arbitration Act (now repealed for England, Wales and Northern Ireland).

[29] Relying on the 1996 UK Arbitration Act, s. 5(3) and on s. 2AC(2)(d) of the 1996 (Amendment) Ordinance (Hong Kong).

[30] See p. 135.

[31] See pp. 144–5. A concept always present in the third generation arbitration legislation in Africa is the separability of the arbitration clause from the main contract. It may be joined with the competence of the arbitral tribunal to rule on its jurisdiction: see pp. 433–5.

[32] However, customary law arbitration is being codified in Ghana to be applicable to a dispute on any matters except criminal matters unless ordered by the court: see p. 133.

Some first generation arbitration laws in Africa may not always delimit the scope of subject-matter arbitrability. However, most enumerate subject matters that cannot be arbitrated or make the question of arbitrability conditional on the ability of the parties to settle the matter. For example, the Egyptian Code of Civil Procedure required that the subject matter for arbitration must be one which can be the subject of a compromise by those capable of legally disposing their rights (Article 501(4)).[33] Under the Code of Civil Procedure of Cameroon, the following may not be submitted to arbitration: matters relating to gifts and bequests of food, housing and clothing; separation between husband and wife and divorce; questions of status; or any dispute that would require the involvement of the Attorney-General (Article 577). However, all persons may submit to arbitration the rights of which they may freely dispose (Article 756). Article 442 of the Algerian Law of 1966 listed as non-arbitrable matters concerning maintenance obligations, rights of inheritance, housing, clothing or questions concerning public policy or the status and capacity of persons. The state and public legal entities may not resort to arbitration.[34]

Section 5(2) of the 1961 Arbitration Act of Ghana provides that an arbitration agreement may cover issues between parties which are capable of being the subject of civil action but that an award should not be made affecting the status of a person or thing or determining any interest in property except as between the parties themselves. Finally, under the South African Arbitration Act of 1965, a reference to arbitration shall not be permissible in respect of any matrimonial cause or matter incidental to any such cause, or any matter relating to status (section 2).[35]

Some third generation arbitration laws in Africa maintain the trend on subject matter arbitrability noticeable in the first and second generation laws, although coupling it with vast improvements in favour of

[33] That provision is more or less retained in the 1994 Egyptian Arbitration Law, Articles 10(2) and 11. But the latter's definition of 'commercial' transactions is elaborate.

[34] Article 740 of the Code of Civil and Commercial Procedure of Libya mentions these non-arbitrable subjects: nationality and status of persons including legal separation, labour disputes relating to social security, labour accidents, occupational disease, illness as well as matters of public policy. But there are no limitations on the state or its agencies entering into arbitration agreements. See also the Act of 28 September 1974 (Morocco), Article 306, for subject matters that may not be arbitrated or the extent to which they may be submitted to arbitration.

[35] The draft International Arbitration Act 1998 excludes the latter provision from matters covered by Chapter 2 of the 1998 Act but retains the applicability of s. 2 of the 1965 Act for the purposes of Chapter 3 (on the recognition and enforcement of arbitral awards under the NYC). Chapter 2, on international commercial arbitration, has its own provision on arbitrability in s. 7 of the draft Act: see pp. 152–3.

arbitrability. For example, the Legislative Decree No. 93–09 of 1993 of Algeria (Article 1) repealed and replaced the Article 442 noted earlier, providing:

> Any person may compromise on the rights which he/she is free to enjoy. It is not possible to compromise on obligations relating to food, rights of succession, accommodation and clothing, or questions relating to public order, the state or capacity of persons. *Entities of public law may not compromise except in international trade relations*.[36]

The OHADA Uniform Arbitration Act 1999 which is applicable to 'any arbitration' when the seat of the arbitral tribunal is in one of the member states (Articles 1 and 35) is equally extensive. Its Article 2 provides:

> Any natural person or corporate body may have recourse to arbitration on rights which he [*sic*] has free disposal. States and other territorial public bodies as well as public establishments may equally be parties to an arbitration without having the possibility to invoke their own law to contest the arbitrability of the claim, their authority to sign arbitration agreements or the validity of the arbitration agreement.

Article 2(2) of the 1984 International Arbitration Code of Djibouti provides: 'Any actual or future dispute arising out of a specific juridical relationship as to which parties have capacity to settle their claim can be made the subject of an arbitration'. The breadth and flexibility of this provision becomes clear when it is remembered that the Code provides that 'arbitration is international if it implicates international commercial interests' (Article 1).[37] It is likely that the above provisions would apply to arbitration agreements to which only nationals of, respectively, Djibouti, Algeria and, subject to the OHADA Treaty and the 1999 Uniform Arbitration Act, Cote d'Ivoire, are parties provided the agreements 'implicated international commercial interests'.[38] The respective provisions will certainly cover disputes involving nationals and non-nationals of, respectively, Djibouti, Algeria and, subject to the OHADA regimes, Cote d'Ivoire.

Omitting references to subject-matter criteria

Further trends could be discerned in subject-matter arbitrability in Africa. First, an attempt is made in some laws to omit any reference to subject-matter restrictions and criteria either by not mentioning or by deleting

[36] Emphasis added.

[37] Similar provisions are in the Algerian Arbitration Code 1993, Article 458*bis*, and in the Cote d'Ivoire Arbitration Law 1993, Article 50.

[38] This wide concept of arbitrability is derived from French arbitral law and practice: see p. 159.

'commercial', and then stipulating those subject matters that are not considered arbitrable. For example, the scope of the Tunisian Code, unlike that of the Model Law, is not expressly limited to, or restricted by, any reference to 'commercial' arbitration.[39] The word 'commercial' is not mentioned in the titles of the above arbitration laws.[40] By contrast, the Model Arbitration Law applies to international *commercial* arbitration. In a footnote, it also indicated inexhaustive illustrations of what are 'relationships of a commercial nature'. The arbitration regimes earlier mentioned dispensed with the Model Law's provisions in that respect.[41]

Article 7 of the 1993 Tunisian Code indicates matters that may not be the subject of an arbitration agreement:

- matters affecting public policy;
- questions relating to nationality;
- questions relating to personal status with the exception of questions arising therefrom concerning pecuniary obligations;
- matters regarding a compromise which cannot be made; and
- disputes concerning the state, state administrative agencies and local communities with the exception of disputes arising in international relations of an economic, commercial or financial nature which are governed by Chapter Three of the Code (on international arbitration).[42]

In the Report on Arbitration in Zimbabwe, it was recommended that the Arbitration Law would cover every subject matter that could lawfully be arbitrated:

[39] This is also the case with the Model Law as applicable in Hong Kong, Zimbabwe, Kenya, Uganda, and under the South African draft International Arbitration Act 1998, the Zambian draft Act of 1999 and the ADR Bill of Ghana 2000.

[40] The Zimbabwean Arbitration Act 1996, Schedule 1, Article 1(1) deleted the meaning of 'commercial' in the second footnote to the Model Law, and provides that the Model Law applies as provided in ss. 3 and 4 of the Act. The 1998 South African draft Act, chapter 2, applies to international *commercial* arbitration in light of the *travaux preparatoires* of the Model Law: *The SALC 1998 Report*, paras 2.52–2.61; 2.102–2.105 and draft Act of 1998, s. 8 and Schedule 2; Zambian draft Act, s. 2(1) and First Schedule, Article 1.

[41] South Africa draft Act 1998, Schedule 1, Article 1(1) (the Model Law), provides that this Law applies to international *commercial* arbitration, subject to any agreement in force between South Africa and any other state or states (emphasis added).

[42] Under the Tunisian Code, parties to an arbitration agreement must have the capacity to dispose of their rights (Article 8). The 1993 Algerian Law and the 1999 Malagasy Arbitration Law (Article 453-1(5)) lifted earlier prohibitions on state entities from participating in arbitration: see pp. 147–8. Under the latter, state and public entities can now be parties to international arbitration disputes regarding international relations in financial, economic or commercial matters. The same is true of the 1998 Arbitration Law of Senegal which is compatible with the OHADA regime in this respect: F. Camara, 'Le Nouveau droit de l'arbitrage au Senegal: du liberal et de l'ephemere', *Revue de l'arbitrage*, 1999, No. 1, 45, 47–8.

[I]n adopting the UNCITRAL Model Law as the law for Zimbabwe, it would not be confined to commercial arbitrations as the Model Law was, but would cover any subject that could lawfully be arbitrated upon. (For guidance and clarification, a list of matters that definitely could *not* be the subject of arbitration would be set out).[43]

In furtherance of the above recommendation, section 4(1) of the 1996 Arbitration Act provides that, subject to that section (which lists some exceptions to arbitrability in subsection (2)), any dispute which the parties have agreed to submit to arbitration may be determined by arbitration. However, by virtue of section 4(2) of the Act, the following subject matters shall not be capable of determination by arbitration:

- an agreement that is contrary to public policy;[44]
- a dispute which, in terms of any law, may not be determined by arbitration;
- a criminal case;
- a matrimonial cause or a matter relating to status, unless the High Court gives leave for it to be determined by arbitration;
- a matter affecting the interests of a minor or an individual under a legal disability, unless the High Court gives leave for it to be determined by arbitration; and
- a matter concerning a consumer contract as defined in the Consumer Contracts Act 1994, unless the consumer has by a separate agreement agreed thereto.[45]

In its inclination towards expanding the scope of arbitrable disputes, the 1996 Zimbabwean Arbitration Act further provides that the fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration (section 4(3)).[46] In adding the latter provision and to facilitate arbitrability, a modification was made to the Model Law as adopted in Zimbabwe and Zambia by the deletion of Article 1(5) thereof.[47] The latter provision was also not adopted in Kenya, Tunisia and Uganda.

[43] *Final Report*, pp. 5–6, 8.

[44] This paragraph is, like Article 7(1) of the 1993 Tunisian Code, potentially vague.

[45] This provision is similar to s. 23(1) and (2) of the Zambian draft Act 1999, except that the latter does not require the leave of the High Court with respect to arbitrating matrimonial causes or incidental matters or any matter relating to status, or affecting minors or those under legal disability. It does not mention consumer contracts.

[46] As in s. 23(3) of the Zambian draft Act 1999.

[47] Zambian draft Act 1999, First Schedule, Model Law, Article 1(5) provides: 'This Law [the Model Law] shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.'

Under the 1996 Arbitration Act and the Model Law as applicable in Zimbabwe, a party arguing (say, during an application to stay proceedings or to challenge the jurisdiction of the arbitral tribunal) that a particular kind of dispute or disputes cannot be submitted to arbitration, or cannot be a subject matter for an arbitration agreement, because under a particular enactment a court or other tribunal has or could exercise exclusive jurisdiction, has a very difficult case to establish.[48] There is a strong presumption in favour of arbitrability in section 4, except if the subject matter comes within any subparagraphs of section 4(2).[49] These matters will be the same for Zambia under the draft Act of 1999 and the Model Arbitration Law as proposed, particularly as Zambia desires to ratify the New York Convention, which is in the Third Schedule to the draft Act.

Section 6 of the South African draft International Arbitration Act 1997[50] provides with respect to arbitrability:

> (1) A reference to arbitration shall not be permissible in respect of any matter relating to status.
> (2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.
> (3) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration.[51]

[48] K. H. Bockstiegel, 'Public Policy and Arbitration' in P. Sanders (gen. ed.), *ICCA Congress Series No. 3* (Deventer: Kluwer, 1986), pp. 176, 198.

[49] On the reverse side, depending on the circumstances, the arbitrability permitted in Zimbabwe would allow for the recognition and enforcement of arbitral awards, even if made elsewhere, based on arbitration arising out of a wide range of subject matters. Articles 35(1) and 36(1) (on the recognition and enforcement of arbitral awards), common to the Arbitration Act 1996 of Zimbabwe (Schedule 1) and Zambia's draft Arbitration Act 1999, apply irrespective of the country in which the arbitral award was made. Zimbabwe, although a party to the NYC, entered neither the commercial nor the reciprocity declaration: see p. 188. Reinforcing this is the fact that the arbitral tribunal or court has the discretion, in interpreting the Acts, to have resort to the *travaux preparatoires* of the Model Law, and to have regard to the latter's international origin and to the desirability of achieving international uniformity: the 1996 Arbitration Act, s. 2(3); Zambia's draft Act 1999, s. 2(2).

[50] Discussion Paper 69, Annexure C.

[51] In the Model Law, as adopted in the 1997 South African draft Act, Schedule 1, the illustrative list of matters of a 'commercial nature' in the second footnote to Article 1(1) was left intact, as was Article 1(5) on arbitrability.

In the 1998 Report on International Arbitration, the SALC recommended the substitution of section 6 by a new provision in section 7 of the 1998 draft Act. Paragraphs (2) and (3) of section 6 were slightly redrafted and paragraph (1), which referred to 'status' and was perceived as having a potentially difficult meaning in practice, was deleted. Arbitrability is to be circumscribed in another way by reference to provisions on arbitrability in civil law jurisdictions.[52] The SALC also considered that a provision to the effect that all disputes concerning 'patrimonial rights' were arbitrable would probably result in difficulties of interpretation in practice as to which claims are included by that term.[53]

In light of the above, the SALC took the view that the phrase 'a matter which the parties are entitled to dispose of by agreement' is wide enough to include disputes relating to patrimonial rights while still being narrow enough to exclude matters relating to status'.[54] It was observed that arbitrability with reference to matters which parties are entitled to dispose of by agreement is still subject to public policy and any restriction on arbitrability imposed by any other law. Thus, section 6(2) of the 1997 draft Act should be amplified by the inclusion after 'under any other law' of the words 'of this State'.[55] According to the SALC, this will clarify that the intention was not to overrule other restrictions on arbitrability, which may from time to time exist in South African law. However, where an issue is not arbitrable under foreign law without there being a similar restriction in South African law, the issue could still be arbitrated in South Africa although the award would probably be unenforceable in the relevant foreign jurisdiction.[56] Section 7 of the 1998 draft Act thus provides:

> (1) For the purposes of this chapter [Chapter 2], any dispute which the parties have agreed to submit to arbitration under an agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration unless the arbitration agreement is contrary to the public policy of South Africa or, under any

[52] *The SALC 1998 Report*, paras 2.41–2.43. The civil law jurisdictions referred to by the SALC were: the Swiss Private International Law Act, Article 177(1); the German Arbitration Law 1998, Article 1030(1); and the Netherlands Arbitration Act 1986, Article 1020(3): *The SALC 1998 Report*, paras 2.43–2.45. [53] *Ibid*., para. 2.46.

[54] Compared with Butler and Finsen, *Arbitration in South Africa*, pp. 53–4, where the non-arbitrability of a matter relating to status is explained as being a matter which the parties could not themselves determine by agreement: *The SALC 1998 Report*.

[55] This was a suggestion to the Project Committee by Gerold Herrmann, the former Secretary of UNCITRAL. [56] *The SALC 1998 Report*, para. 2.47.

other law of South Africa, such a dispute is not capable of determination by arbitration.

(2) The fact that an enactment confers jurisdiction on a court or tribunal to determine any matter shall not, on that ground alone, be construed as excluding the determination of the matter by arbitration.[57]

In section 3(1) of the 1998 draft Act, section 2 of the 1965 Act (matters not subject to arbitration) was excluded from being applicable to an arbitration agreement or an arbitral proceeding or award covered in Chapter 2 (dealing with international commercial arbitration). But section 2 of the 1965 Act shall apply for the purposes of Chapter 3 (dealing with the recognition and enforcement of foreign arbitral award under the New York Convention).[58] The purpose of the latter is 'to make it clear that the usual restrictions on arbitrability, for example in relation to a matrimonial cause, will continue to apply to non-commercial disputes with an international connection'.[59] Thus, section 7 of the 1998 draft Act (in Chapter 2) deals with arbitrability with respect to international *commercial* arbitration (Chapter 2) and not to arbitration or foreign arbitral awards relating to non-commercial matters which are the subject of Chapter 3, which implemented the New York Convention.[60]

Also, the Model Law in the First Schedule to the 1998 draft Act provides: 'This Law shall not affect any other law of South Africa by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law' (Article 1(5)). Commenting on this provision, the SALC had earlier observed:

Article 1(5) of the Model Law makes it clear that the Model Law is not intended to affect other laws of the relevant state regarding the arbitrability of disputes . . . In South Africa, apart from the common-law prohibition on arbitration in criminal matters and the restriction in s. 63 (1) of the Insurance Act 27 of 1943 on arbitration regarding disputes pertaining to insurance matters[61] further restrictions on arbitrability are contained in s. 2 of the Arbitration Act 42 of 1965. By excluding Chapter 2 of the Draft Bill (the legislation enacting the Model Law) from the operation of the 1965 Act . . . it becomes necessary to include in Chapter 2 a provision

[57] *Ibid*., para. 2.50.

[58] The 1998 draft Act, s. 3(2). Also, the 1965 Act, and Chapters 2 and 3 of the 1998 draft Act, are excluded with respect to proceedings or awards under the ICSID Convention: *ibid*., s. 23(2). [59] *The SALC 1998 Report*, para. 2.33 (omitting the footnote).

[60] South Africa is a party to the NYC without the reciprocity and commercial declarations: see p. 188. [61] Citing Butler and Finsen, *Arbitration in South Africa*, pp. 55–6.

equivalent to s. 2 of the Arbitration Act [of 1965]. Similar provisions making it clear that the enactment of the Model Law does not affect arbitrability of disputes appear in the New Zealand and Zimbabwean legislation.[62]

In 1997, the question was raised whether, in view of Article 6 of the 1997 Draft Act (revised in Article 7 of the 1998 Draft Act), the retention of Article 1(5) of the Model Law in Schedule 1 was superfluous. It was suggested that, if any subject matter in section 2 of the 1965 Arbitration Act was still deemed necessary to be non-arbitrable, it could easily be transferred to the then section 6. In that connection, section 4 of the Zimbabwean Act was cited for comparative purposes.[63] However, the SALC, whilst admitting that 'there is some duplication', recommended 'that article 1(5) should be retained in view of our declared policy of restricting changes to the text and substance of the Model Law to a minimum'.[64]

Comprehensive definition of subject matters

The second trend discernible in subject-matter arbitrability in Africa is that some third generation arbitration laws, whilst not stipulating any non-arbitrable subject matters, will comprehensively define the subject-matter scope as relating to 'commercial' disputes (extensively defined) but delimiting 'commercial' by an omnibus provision referable to other national legislation indicating subject matters that cannot be submitted to arbitration, or that may be submitted to arbitration only under other special or specific regimes. In this class is Nigeria's Arbitration and Conciliation Act 1988, which largely adopted the Model Law's provisions pertaining to subject matter arbitrability. Section 57(1) of the Act provides that, unless the context otherwise requires, 'commercial' means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, the construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements or concessions, joint ventures and other forms of industrial or business co-operation, and the carriage of goods or passengers by air, sea, rail or road.[65]

[62] Citing the New Zealand Arbitration Act of 1996, s. 10(1) and (2); M. Richardson, 'Arbitration Law Reform: The NZ Experience', *Arbitration International* 12, 1996, 57, 61–2; M. Richardson, 'Arbitration Law Reform: The NZ Experience – An Update', *Arbitration International* 13, 1997, 229–30; the Zimbabwean Arbitration Act of 1996, s. 4: *The SALC 1998 Report*, para. 2.40, n. 39 [63] Asouzu, *Comment on Discussion Paper 69*, para. 25.

[64] The SALC explained that Article 1(5) was deleted from the Zimbabwe version of the Model Law due to the comprehensive provision on arbitrability in s. 4 of the 1996 Act: *The SALC 1998 Report*, para. 2.51, n. 51. [65] Cf. the Model Law, Article 1(1) (second footnote).

However, the above provision has to be read in conjunction with section 35 of the Act to appreciate the Act's subject-matter scope. Section 35, the equivalent of Article 1(5) of the Model Law, provides that the Act shall not affect any other law by virtue of which certain disputes may not be submitted to arbitration, or may be submitted to arbitration but only in accordance with the provisions of that or another law.

The above statutory provisions should be distinguished from arbitrability in case law.[66] As Sornarajah pointed out:

> The doctrine of arbitrability leaves it as a matter for decision whenever a dispute arises as to whether or not there are sufficient public interest elements to make it non-arbitrable. The inference can be drawn by implication and does not depend on the existence of a definite legal provision.[67]

Again, as it pertains to section 35(a) of the Act, under the Constitution and certain other statutes in Nigeria, civil jurisdiction with respect to certain subjects is vested in the Federal High Court 'to the exclusion of any other court',[68] for example, trademark matters,[69] patents and designs,[70] and copyrights.[71] The import of such provisions may be that with respect to those subject matters and the courts (i.e. as between courts), the Federal High Court has exclusive jurisdiction; not necessarily that, in appropriate cases, the relevant subject matters are incapable of being submitted to arbitration, unless the Arbitration and Conciliation Act is expressly excluded.[72] For instance (and this also explains section 35(b) of the Act) in labour disputes, arbitration under a special statute, the Trade Disputes Act 1976,[73] is the mechanism to be used if conciliation fails or if the

[66] *KSUDB* v. *Fanz* [1992] 4 NWLR (Pt 142) 1, 32–3, relying on *Halsbury's Law of England* (4th edn), para. 503; *A-G (Imo State)* v. *Road and General Construction Co. Nigeria Ltd* [1979] IMSLR 66, for the category of matters that case law has held cannot be the subject of an arbitration agreement in Nigeria.

[67] M. Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint', JIA 6, 1989, 7–16.

[68] 1999 Constitution, s. 251; and ss. 7 and 8 of the Federal High Court Act 1973, cap. 134, *Laws of the Federation of Nigeria*, Vol. 8 (1990).

[69] Trademark Act 1965, cap. 436, *Laws of the Federation of Nigeria*, Vol. 23 (1990), ss. 50–56, and 67(1).

[70] Patent and Designs Act 1970, cap. 344, *Laws of the Federation of Nigeria*, Vol. 19 (1990), s. 26.

[71] Copy Rights Act 1988, cap. 68, *Laws of the Federation of Nigeria*, Vol. 5 (1990), s. 38.

[72] This further clarifies an earlier view which this author expressed in 1994: Asouzu, 'The Legal Framework', 233–4; A. A. Asouzu, 'Developing and Using Commercial Arbitration and Conciliation in Nigeria', *Lawyer's Bi-Annual* 1, 1994, 1, 12–13, including the endnotes. The fact is that arbitration is not litigation in a court of law as much as an arbitral tribunal is not a court of law: A. A. Asouzu, 'Arbitration and Judicial Powers' (a paper presented at the 2000 Annual Conference of the Nigerian Bar Association, Abuja, Nigeria, 21–25 August 2000).

[73] Cap. 432, *Law of the Federation of Nigeria*, Vol. 23 (1990).

Labour Minister refers a labour dispute directly to the Industrial Arbitration Panel.[74] The Trade Disputes Act expressly provides that the Arbitration and Conciliation Act shall not apply to any proceedings of an arbitral tribunal appointed under section 8 of the Trade Disputes Act or to any award made by such a tribunal.[75]

As noted earlier, the Model Law as adopted in the South African 1997 draft Act, retained both the illustrative matters of a 'commercial nature' and Article 1(5).[76] However, the 1998 draft Act retained Article 1(5) of the Model Law but deleted the illustrative matters of a commercial nature. Although the Model Law (Schedule 1 to the Act) as adopted deals with international *commercial* arbitration as understood in the preparatory documents of the Model Law, account must be taken in that respect of section 7(1) of the 1998 draft Act. The latter, whilst giving parties the right to conclude agreement to submit to arbitration any dispute which the parties have agreed to submit and which relates to a matter which the parties are entitled to dispose of by agreement, excludes matters contrary to public policy, or that are not arbitrable under any other law of South Africa.[77]

General definitions without limitations

The last discernible trend in subject matter arbitrability in Africa's third generation laws is one that generally defines 'commercial' without further delimiting the definition either by an express exclusion or by subjecting it to other qualifying legislative standards. Egypt's adoption of the Model Law in relation to the subject-matter scope is in a way ingenious. The Egyptian Law of 1994 applies to arbitration conducted in Egypt or, where the parties agree, to one conducted abroad. Article 1 of the Law preserves the international arbitral obligations of Egypt thus:

[74] *Ibid*., ss. 4, 7 and 8. [75] *Ibid*., s. 11(1). [76] See note 51, p. 151 above.

[77] See pp. 152–3. These models might, through what was enumerated (e.g. in the Nigerian or South African situations) or through what was implied in the preparatory documents of the Model Law (Zimbabwe and Zambia), make for wide application. This is particularly so, as relationships of a commercial nature are introduced in the Nigerian situation as 'including' those indicative items enumerated. The limitations on arbitrability occur where certain matters are objectively not arbitrable or are against public policy, or where a specific law (including laws enacted subsequent to the conclusion of an arbitration agreement – including laws without retrospective effect) is enacted declaring that a subject matter is not arbitrable, or where a subject matter is indeed arbitrable but only under specific regimes. In some countries (e.g. Nigeria and South Africa), labour disputes are resolved under special industrial arbitration or conciliation regimes. See also the common law prohibition and s. 63(1) of the 1943 Insurance Act mentioned with respect to South Africa at p. 153 above.

Without prejudice to the provisions of international conventions applicable in the Arab Republic of Egypt, the provisions of the present Law shall apply to all arbitrations between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law.

Law No. 9 of 1997[78] added this clause to Article 1 of the 1994 Law:

With regard to administrative contract litigation, agreement on arbitration shall be reached with the approval of the concerned minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized therefor.[79]

The latter provision makes clearer the arbitrability of administrative contracts.[80] The subject matter considered as commercial under the 1994 Law is elaborate. Arbitration is commercial 'when the dispute arises over a legal relationship of an economic nature, whether contractual or non-contractual'. This is followed by an illustrative list of relationships of an 'economic nature', which are not strictly identical with the Model Law's enumerated items of 'relationships of a commercial nature, whether contractual or not'.[81]

Whilst admitting the elaborateness of the subject-matter arbitrability under the 1994 Law, it is nevertheless not unlimited. The Law applies without prejudice to Egypt's international arbitral obligations. Thus, special dispute resolution regimes, for example under the ICSID Convention, are preserved. Otherwise, under the Law, once a subject matter is of an economic nature, disputes relating thereto are arbitrable, whether or not they have a contractual foundation.[82]

Whilst under customary law arbitration, land-use and domestic

[78] Amending the 1994 Arbitration Law, Article 1(1).
[79] Eldin, *Arbitral Awards*, p. 235.
[80] Eldin, *ibid*. at p. 11.
[81] The Egyptian list contains these items: 'The supply of commodities or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, touristic and other licences, technology transfer, investment and development contracts, banking, insurance and transport operations, and operations relating to the exploration and extraction of natural wealth, energy supply, laying of gas or oil pipelines, building of roads and tunnels, reclamation of agricultural land, protection of the environment and establishment of nuclear reactors' (Article 2).
[82] Other possible limitations are those imposed by public policy or capacity and those where the dispute relates to a subject matter which the parties cannot compromise. Under the 1994 Law, arbitration agreements may only be concluded by natural or juridical persons having the capacity to dispose of their rights. Arbitration is not permitted in matters which cannot be subject to compromise (Article 11).

relations are predominant subject matters of dispute, these are not the staple of modern commercial disputes. In Ghana, customary law arbitration is being rendered the subject of statutory provisions and applicable to a wider range of disputes. It is hoped other African countries might emulate this healthy development.

The trend in third generation arbitration law is to define arbitrable subject matter widely, except for those disputes which parties may not themselves settle, especially matters with public policy implications or relating to personal status, or those that are otherwise excluded as being against public policy or patently contrary to enactments of a fundamental nature. The non-arbitrable subject matters might be as varied and wide ranging as the arbitrable subject matters, depending on the state concerned. While international regulation of arbitrability is rare, the basic criteria for determining objective and subjective arbitrability may be similar, as national implementation methods vastly differ.[83] The Model Law which influenced the legislative policies of states renders the distinctions, if any, between elements of foreign trade and investment indistinguishable by characterising both as 'relationships of a commercial nature'.

The specificity of international arbitration

Due to the influence of national law on international commercial arbitration, definitions of 'commercial' and 'international' are country-specific. It has indeed been argued that the term 'international arbitration' is a misnomer since every arbitration is national or tied to a specific national law.[84] The point has also been made that the sharp distinction between national and international arbitration 'is vastly overstated' as their connections are often quite obvious.[85] As Albert van den Berg explained:

> In fact, when reference is made to 'International (Commercial) Arbitration', it is in the sense of an arbitration 'Internationalized' within the limits of an applicable national arbitration law, that this term is commonly used.[86]

Criteria for internationality

The common law does not distinguish between domestic and international arbitration. Hitherto, arbitration enactments in Africa did not draw

[83] Bockstiegel, 'Public Policy and Arbitration', 193.
[84] F. A. Mann, 'Lex Facit Arbitrum', *Arbitration International* 2, 1986, 241, 244.
[85] Y. Dezalay and B. G. Garth, *Dealing in Virtue* (University of Chicago Press, 1996), pp. 120–6.
[86] Van den Berg, 'Some Recent Problems in the Practice of Enforcement Under the New York and the ICSID Conventions', ICSID Rev-FILJ 2, 1987, 439, 443.

a clear distinction between both forms and, consequently, no conscious effort was made to define them.[87] In some cases, the simplest criterion used to distinguish whether arbitration was international was to ask whether it was a domestic arbitration, that is, an arbitration where the relevant elements (the subject matter of the dispute, the substantive applicable law, the making of the arbitration agreement, the nationality or places of business of the parties or of the arbitrator(s), and the place of arbitration and of enforcement of the arbitral award) are located in or linked to one country.[88] An arbitration agreement or proceeding lacking this feature is then 'truly international'.[89] In international trade or investment, therefore, little, if any, arbitration would be domestic due to the essentially international domain of these transactions and related disputes.[90]

Under the laws, rules and practices of arbitration institutions, a dispute may be regarded as international by virtue of its nature or of the parties to it. The subject-matter test looks at the dimension and scope of the subject matter in dispute or at the nature of the dispute to see if it has transborder implications.[91] The ICC uses the nature of the dispute as the criterion for deciding whether or not arbitration is international under its Rules. The function of the International Court of Arbitration of the ICC is to provide under its Rules for the settlement by arbitration of business disputes of an *international character*. However, it may accept business disputes not of an international nature if the ICC Court has jurisdiction by reason of an arbitration agreement.[92] The ICC adopts a broad view of what constitutes a business dispute of an international character:

> The international nature of the arbitration [or conciliation] does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders, when for example, a contract is concluded between two nationals of the same State for the performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State.[93]

[87] See pp. 120–4. [88] Nestor Report, para. 149.

[89] E.g. features of the agreement involved in *Scherk* v. *Alberto-Culver Co.*, 417 US 506, 515 (1974).

[90] Developments particularly under the Model Law's criteria for international character are such that what normally would be regarded as mere domestic arbitration may end up as an international arbitration: see pp. 162–6.

[91] E.g. the French Decree of 1981, 20 ILM 917, Article 1492, providing that an 'arbitration is international if it implicates international commercial interests'.

[92] Rules of Arbitration of the ICC, Article 1(1). The International Court of the ICC does not settle disputes. It ensures the application of the ICC Rules: ICC Rules, Article 1(2) and the Statutes of the ICC Court, Article 1(1).

[93] ICC, *International Solutions to International Business Disputes* (ICC Publication No. 301, 1977), p. 19.

The party-oriented test looks at the nationality or the place of residence, domicile or business of the parties and, if the party is a corporate entity, the seat of its central management.[94] For example, the US legislation implementing the New York Convention looks at the parties' nationalities, although it excludes arbitration agreements or awards between US citizens from the Convention's scope unless 'that relationship involves property located abroad, envisages performance or enforcement abroad, or has some reasonable relation with one or more foreign States'.[95]

The prevailing trend, seen in the Model Law, is towards merging the party-oriented and the subject-matter approaches or defining international to include several discriminating elements and giving consideration to party autonomy in characterising disputes as international.[96] A factual illustration is *CBI NZ Ltd* v. *Badger Chiyoda*.[97]

The dispute involved a group of companies (CBI) based in Chicago and a joint venture between Dutch and Japanese companies (Badger Chiyoda) arising out of a contract related to a vast refinery expansion project in New Zealand. CBI formed a subsidiary in New Zealand also called CBI, to enter into and carry out the subcontract. CBI subsequently applied for the judicial review of the partial award made in the course of arbitration in a dispute with Badger Chiyoda. The subcontract incidental to the project contained a clause for arbitration in Wellington under ICC Rules. The applicable substantive and procedural law was that of New Zealand and the language of the arbitration was English. Badger challenged the application, arguing that the ICC Rules incorporated in the contract excluded a review or an appeal against the award on the merits before a court. The Court of Appeal, which heard the matter, as the award in question was rendered by a High Court judge sitting as an arbitrator, held the award not reviewable due to the intentions of the party and the international nature of the contract and of the arbitration. Explaining the nature of the arbitration, Cooke P said:

[94] E.g. the 1996 UK Arbitration Act, s. 85(2) (not in force by virtue of Arbitration Act 1996 (Commencement No. 1) Order 1996, Article 3; the Swiss Private International Law Act, cap. 12, Article 192(1); the Belgian Judicial Code 1972 as amended, Article 1717(4), repealed by the Arbitration Reform Act 1998; the European Convention on International Commercial Arbitration 1961, 484 UNTS 364, Article 1(1)(a). One African state – Burkina Faso (26 January 1965) – is party to the latter Convention.

[95] US Code, Title 9 (Arbitration), s. 202. This provision does not seem to reflect the full scope of the NYC, which applies irrespective of the nationalities of the parties. Nevertheless, US courts have applied the Convention to enforce arbitral awards made in the US and involving foreign interests, or two US nationals: *Fuller Co.* v. *Compaigne des Bauxites de Guinee*, 421 F Supp 938 (WD Pa 1976); *Bergersen* v. *Joseph Muller Corp.*, 548 F Supp 650, 654 (SDNY 1982) affirmed in 710 F 2d 928 (2nd Cir. 1983); *Lander Co., Inc.* v. *MMP Investments Inc.* (1997) 22 YBCA 1049.

[96] See pp. 162–6.

[97] [1990] LRC (Comm) 621.

The contract containing the ICC arbitration clause was freely entered into by two very large, perhaps 'giant', international concerns, with no suggestion of inequality of bargaining power. Most of the negotiations, certainly in the earlier stages, took place at The Hague. An international arbitral agency and its rules were chosen. The concept of an 'international' arbitration is not one of art and may not always be easy to define precisely, but this arbitration falls within the concept clearly enough, and none the less because the contract was to be performed in New Zealand and, like the arbitration itself, is governed by New Zealand law. To describe the case as just a large New Zealand building dispute, as suggested on behalf of CBI, is less than real.[98]

An implication of the above characterisation was that the arbitral award in issue cannot be reviewed for error of law on its face (as would have been the case in a domestic situation).[99]

Legislative developments

Arbitration laws in Africa have started drawing distinctions between domestic and international arbitrations and, in most cases, make separate provisions for either type or retain the same provisions for both.[100] Starting with the 1984 Arbitration Code of Djibouti, arbitral regimes in Africa indicate the territorial scope of their coverage and expressly recognise the international character of disputes or arbitrations even in situations where the same regime is applicable to matters that are essentially domestic and those that are notably international. It appears that this trend will continue due to the impact of the Model Law on the revision of arbitration laws.

The 1984 Djibouti Code, which was not based on the Model Law, provides that: 'An arbitration is international when it involves international commercial interests' (Article 1).[101] This criterion can be seen, in varying

[98] *Ibid*. at p. 629. In the *ARAMCO* arbitration, the tribunal indicated that the concession signed by Saudi Arabia and an American corporation had, because of its parties and ramifications, an international character: 27 ILR 117, 166.

[99] Due to the incorporation of the ICC clause in the contract, Article 24 of the 1988 ICC Rules of Arbitration was held applicable. It provided: '(1) The arbitral award shall be final. (2) By submitting the dispute to arbitration, by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.' For nearly identical provision in the superseded Rules, see the ICC Rules of Arbitration 1998, Article 28(6), p. 98 above.

[100] The Arbitration and Conciliation Act 2000 of Uganda, except as otherwise provided in any particular case, shall apply to domestic arbitration and international arbitration (s. 2). These concepts are not defined in the Act.

[101] This provision was influenced by the French Decree of 1981: see note 91, p. 159 above.

degrees, in the arbitration laws of other former French colonies in Africa although there is no consistency in their formulations.[102] For example, Article 458*bis* of the 1993 Arbitration Law of Algeria defines international arbitration as 'Arbitration which deals with disputes relating to international commercial interests and, in which, at least, one of the parties is domiciled abroad'. And, in defining when an arbitration is international, the 1993 Tunisian Code largely adopted the criteria laid down in the Model Law, although adding, in line with the French model, that '[i]n a broader sense (generally), an arbitration is international, if it concerns international business transactions'.[103]

In this area as in most others, although the Model Law has had a great impact in Africa, it has been adopted with modifications, changes or additions. In its 1993 report, the Arbitration Committee of the Law Development Commission of Zimbabwe noted the desirability of arbitration as an alternative method of settling disputes. It pointed out that the then prevailing arbitral regime in Zimbabwe – the Arbitration Act Cap. 12, deriving from the 1889 UK Arbitration Act – 'has become outdated and needed reform *in particular to cater for the increase in international arbitrations* that have now become a feature of international commercial transactions'.[104] The Committee recommended that Zimbabwe should adopt the Model Law with certain modifications and as a uniform arbitration law, i.e. one without a distinction between the international regime applicable only to parties from different states and the domestic regime applicable only to Zimbabwean parties.[105] The Committee also stressed that '[t]he approach should be to make it as clear as possible that the UNCITRAL Model Law applies for all arbitrations in Zimbabwe, international/domestic, and commercial/non-commercial'.[106]

The 1995 Arbitration Act of Kenya and the 1999 draft Arbitration Act of Zambia, each based on the Model Law, contain explicit definitions of both

[102] The closest to the French model (after the Djibouti Code) is the Arbitration Code 1993 of Cote d'Ivoire, Article 50. [103] Article 48(1)(d); see p. 165.

[104] Final Report, p. 5 (emphasis added).

[105] *Ibid*. This recommendation was reflected in the Final Report of the Law Development Commission, which formed the basis for the 1996 Act. The Commission also recommended that the international origins of the Law have to be recognised in its interpretation: *ibid*. at pp. 8–9. The Zimbabwean Act and the Model Law, subject to the provisions of the Arbitration Act, apply when arbitration is within or outside Zimbabwe (s. 3). The definition of international arbitration in Article 1(3) and (4) of the Model Law was, accordingly, deleted from the Model Law as adopted in Zimbabwe. The draft International Acts 1997 and 1998 of South Africa adopted the Model Law with its definition of international arbitration. [106] Final Report, p. 8.

domestic and international arbitrations.[107] Under section 3(2) of the 1995 Kenyan Act:

An arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya: and at the time when proceedings are commenced or arbitration is entered into—

(a) the parties are nationals of Kenya or are habitually resident in Kenya;
(b) in the case of a body corporate, that body is incorporated in or its central management and control is exercised in Kenya; or
(c) the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is Kenya.[108]

The 1995 Act is probably the first in Africa with an explicit and exhaustive definition of when arbitration is 'domestic' – a concept neither known nor defined in the Model Law and in most other laws adopting it.[109] In Africa, before 1995, that characterisation could generally be determined by implication from what did not qualify as 'international' under a particular regime, or from the scope of the parties' agreement, or the nature or location of the subject matter in dispute, or from the nationality or residence of the parties to arbitration agreements. The provisions defining domestic arbitration in Kenya and Zambia make for certainty and predictability especially in light of the meaning of 'international arbitration' under those Acts. Section 3(3) of the 1995 Kenyan Act provides that:

An arbitration is 'international' if—

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;

[107] The Kenyan and Ugandan Acts each provide that, except as otherwise provided in a particular case, it shall apply to domestic and international arbitration: the Kenyan 1995 Arbitration Act, s. 2; the Ugandan Arbitration and Conciliation Act 2000, s. 2. The latter, unlike the published Arbitration and Conciliation Bill 1999 of Uganda and the 1995 Kenyan Act, does not define either 'domestic' or 'international'. The Model Law as adopted in Zambia applies to international and domestic arbitration. But, the general provisions (Second Sch.) apply to international arbitration only if the parties agree, and to domestic arbitration unless the parties agree otherwise (s. 26(1) and (2)). The 1995 Kenyan Act and the 1999 draft Zambian Act, each defines 'domestic' and 'international' arbitration: s. 3(2) and (3) of the Kenyan Act and First Schedule, Article 1(2) and (3) of the draft Zambian Act 1999. As pointed out earlier, the Model Law was recommended in the 1998 SALC Report to be applicable in South Africa only to international (commercial) arbitrations.

[108] Identical, *mutatis mutandis*, to the 1999 draft Zambian Act, Article 1(2).

[109] The 1999 draft Zambian Act resembles the 1995 Kenyan Arbitration Act in defining domestic and international arbitration. The 1985 Model Arbitration Law, although amenable to, did not expressly deal with, domestic arbitration.

(b) one of the following places is situated outside the state in which the parties have their places of business—
  (i) the place of arbitration if determined [in], or pursuant to, the arbitration agreement; or
  (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.[110]

Further, under the 1995 Kenyan Act, section 3(4), provides that, for the purpose of subsection (3):

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and
(b) if a party does not have a place of business, reference is to be made to his habitual residence.[111]

By contrast, the 1996 Arbitration Act of Zimbabwe does not define either 'international' or 'domestic' arbitration. In fact, the definition of 'international' contained in Article 1(3) and (4) of the Model Law was specifically deleted. The only distinguishing element in the Act between those concepts and which might be indicative of what could be called – although in the relevant part of that Act, is not expressly so called – 'domestic' arbitration, is the modification made to the Model Law with respect to the number of arbitrators where there is a failure to make that determination. According to section 10 of the First Schedule to the 1996 Zimbabwean Act (the modified Model Law):

(1) The parties are free to determine the number of arbitrators.
(2) Failing such determination, the number of arbitrators shall be three:

Provided that where each party has one of the following in Zimbabwe—
  (a) his place of business; or
  (b) if he has more than one place of business, his principal place of business; or
  (c) if he has no place of business, his place of habitual residence;

the number of arbitrators, failing such determination, shall be one.[112]

Except for this modification and addition in italics with respect to the default provision on the number of arbitrators for what might be called

[110] Identical, *mutatis mutandis* to the 1999 draft Zambian Act, First Sch., Article 1(3).
[111] Identical to the 1999 draft Zambian Act 1999, First Sch., Article 1(4).
[112] Emphasis in the original.

'domestic arbitration', the 1996 Act and the Model Law as modified by that Act are a uniform regime for all arbitrations in Zimbabwe.

The Model Law's criteria for determining international character were adopted in Tunisia along with the French model noted earlier.[113] Under that Code,[114] a definition of international arbitration identical to the Model Law's definition of the concept[115] was adopted:

An arbitration is international if:

(a) the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

  (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

  (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.[116]

However, the Tunisian Code added paragraph 48(1)(d), providing: 'Generally [i.e. in a broader sense], an arbitration is international if the arbitration concerns international trade [if it implicates international commercial interests]'.[117] The 1999 Malagasy Arbitration Law adopted both the Model Law and the economic criteria of French law, and applies 'if arbitration deals with international trade, especially when it shows, as between the parties, transfers of interests, services, funds or capital across a border'.[118]

[113] See p. 159. The Tunisian Code has three Chapters: Chapter 1 (Articles 1–15) which are general provisions applicable to both domestic and international arbitrations; and Chapter 2 (Articles 16–46) which applies only to domestic arbitration. Chapter 3 (Articles 47–82) is largely based on the Model Law, and regulates only international arbitration.

[114] Article 48(1)(a), (b)(i) and (ii) and (c).

[115] The Model Law, Article 1(3)(a), (b)(i) and (ii) and (c). The numbering order in the text is from the Model Law.

[116] Model Law, Article 1(3); Tunisian Code 1993, Articles 48(1).

[117] Model Law, Article 1(4)(a) and (b); Tunisian Code 1993, Article 48(2)(a) and (b). For the purposes of the above (in the Model Law or in the Tunisian Code): (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; (b) if a party does not have a place of business, reference is to be made to his habitual residence. It should be noted that the South African draft International Arbitration Acts 1997 and 1998, Schedule 1, adopted Article 1(3) and (4) of the Model Law respectively.

[118] Jakoba, 'Malagasy Arbitration Act', 97.

Egypt made an ingenious modification to the Model Law's definition of an international arbitration without greatly altering its substance or primary purpose. Under section 3 of the 1994 Law, within the context of the Law:

An arbitration is international whenever its subject matter is a dispute related to international commerce in any of the following cases—

I. If the principal places of business of the two parties to the arbitration are situated in two different states at the time of the conclusion of the arbitration agreement.[119]
II. If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration center having its headquarters in the Arab Republic of Egypt or abroad.[120]
III. If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one state.[121]
IV. If the principal places of business of the two parties are situated in the same state at the time of the conclusion of the arbitration agreement, but one of the following places is situated outside that state:
    (a) the place of arbitration as determined in the arbitration agreement or pursuant to the methods provided therein for determining it;
    (b) the place where a substantial part of the obligations emerging from the commercial relationship between the parties shall be performed;
    (c) the place with which the subject matter of the dispute is most closely linked.

In Nigeria, a special regime was created for international commercial arbitration and conciliation whilst the general provisions applicable to domestic arbitration and conciliation may also be applicable to the former where appropriate. The Arbitration and Conciliation Act 1988 has four Parts.[122] The first provision of Part III, section 43, provides: 'The provision of this Part of this Act shall apply solely to cases relating to international

[119] However, where either party has more than one place of business, consideration will be given to the place of business closest to the arbitration agreement. And, if either party does not have a business establishment, then the place of its habitual residence shall be relied upon.

[120] This provision is peculiar to the Egyptian Law, as it has no equivalent in the Model Law. The provision potentially converts all arbitration held by or under the Rules of the CRCICA or any other arbitral institution within or outside Egypt to 'international'.

[121] Under the Model Law's definition, the parties have to agree expressly that the subject matter of the arbitration agreement relates to more than one country.

[122] Part I (arbitration) ss. 1–26; Part II (conciliation), ss. 37–42; Part III (additional provisions relating to international commercial arbitration and conciliation), ss. 43–55; and Part IV (miscellaneous), ss. 56–58.

commercial arbitration and conciliation in addition to the other provisions of this Act'.[123]

Section 57(2)(a)–(c) of the Act adopts the Model Law's definition of international. However, like the Tunisian Code and the Malagasy Law, it added an extra ground (not contained in the Model Law) for treating arbitration as international. This innovative addition in section 57(2)(d) of the Act provides that an arbitration is 'international' if 'the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration'.

What is significant in these permutations is that an attempt is made to define expressly what is international arbitration with the implication that what is not international is deemed domestic arbitration. Both the 1995 Kenyan Act and the 1999 Zambian draft Act define when arbitration is domestic and international.[124]

A further implication of the definition of 'international', and even when not defined as in Uganda and Zimbabwe, is that, in most cases, a uniform regime is made applicable to both domestic and international arbitration (and conciliation, in the case of Nigeria and Uganda). The usual flexibility, certainty and predictability characteristic of the regimes normally established for international arbitration will thus be extended to domestic proceedings by its uniformity. Special and, in most cases, more liberal provisions are made, consistent with the international nature of international proceedings,[125] for example that parties are free to appoint their arbitrators who may not be disqualified by reason of nationality,[126] that the parties are free to agree on the language or

[123] The implication of this provision is clear in relation to the scope of the Act *vis-à-vis* other Parts.

[124] Under these regimes however, disputes which ordinarily are of a domestic origin and nature might still qualify as 'international': *Fung Sang Trading Ltd* v. *Kai Sun Sea Products & Food Co. Ltd* (1992) 17 YBCA 289. The further definition of 'domestic arbitration' will, to a great extent, introduce certainty and predictability in characterising disputes.

[125] Under the Arbitration and Conciliation Act 1988 of Nigeria (s. 54(2)), the Secretary-General of the PCA at The Hague is the appointing authority in international cases. But under the Arbitration Rules in the First Schedule to the Act (applicable to all domestic commercial arbitration and to international commercial arbitration, if the parties expressly adopted them – ss. 15(1) and 53), the national court acts as the appointing authority: the Arbitration and Conciliation Act 1988, First Schedule, Articles 6–8.

[126] Tunisian Code 1993, Articles 56(1) and 10; Egyptian Law 1994, Article 16(2); the Arbitration and Conciliation Act 1988 of Nigeria, s. 44(10); Djibouti Code 1984, Article 5; Kenyan Act 1995, s. 12(1); Ugandan Act 2000, s. 12(1); Zambian draft Act 1999, First Schedule, Article 11(1); Zimbabwean Act 1996, Schedule 1, Article 11; the South African draft International Arbitration Acts 1997 and 1998, Schedule 1 and Article 11, respectively, applicable to international commercial arbitration only.

languages of the proceedings,[127] on place of the arbitration[128] or on the applicable substantive law,[129] that the procedure will, subject to law, be as agreed by the parties or, failing their agreement, determined by the arbitral tribunal,[130] and that equality of treatment and opportunity are assured for the parties.[131] In any of the above cases, if the parties fail to reach agreement, there are express or fallback provisions covering any eventuality.

Recognising institutional arbitration

Institutional arbitration was not specifically recognised in the first and second generation arbitration laws in Africa. Their recognition may, however, be implicit in those laws that implemented the New York Convention, which is applicable to arbitral awards rendered in institutional and *ad hoc* proceedings.[132] In third generation arbitration laws, the recognition of institutional arbitration may be unequivocally

[127] Egyptian Law 1994, Article 29; Tunisian Code 1993, Article 67; the Arbitration and Conciliation Act 1988 of Nigeria, s. 18; Djibouti Code 1984, Article 10; Kenyan Act 1995, s. 23(1); Ugandan Act 2000, s. 23(1); Zambian draft Act 1999, First Schedule, Article 22(1); Zimbabwean Act 1996, Schedule 1, Article 22(1); the South African draft International Arbitration Acts, 1997 and 1998, Schedule 1 and Article 22(1), respectively.

[128] Egyptian Law 1994, Article 28; Tunisian Code 1993, Article 65; the Arbitration and Conciliation Act 1988 of Nigeria, s. 16; Kenyan Act 1995, s. 21(1); Ugandan Act 2000, s. 21(1); Zimbabwean Act 1996, Schedule 1, Article 20(1); Zambian draft Act 1999, First Schedule, Article 20(1); South African draft International Arbitration Acts 1997 and 1998, Schedule 1 and Article 20(1), respectively.

[129] Djibouti Code 1984, Article 12; Tunisian Code 1993, Article 73; the Arbitration and Conciliation Act 1988 of Nigeria, s. 47(1); Kenyan Act 1995, s. 29(1); Ugandan Act 2000, s. 29(1); Zimbabwean Act 1996, Schedule 1, Article 28(1); Zambian draft Act 1999, First Schedule, Article 28(1); the South Africa draft International Arbitration Acts 1997 and 1998, Schedule 1 and Article 28(1), respectively; OHADA Uniform Arbitration Act, Article 15.

[130] Tunisian Code 1993, Article 64; the Arbitration and Conciliation Act 1988 of Nigeria, s. 15; Kenyan Act 1995, s. 20; Zimbabwean Act 1996, Schedule 1, Article 19; Ugandan Act 2000, s. 20; Zambian draft Act 1999, First Sch., Article 19; the South African draft International Arbitration Acts 1997 and 1998, Schedule 1 and Article 19, respectively; OHADA Uniform Arbitration Act, Article 14.

[131] Egyptian Law 1994, Article 26; Tunisian Code 1993, Article 63; the Arbitration and Conciliation Act 1988 of Nigeria, s. 14; Djibouti Code 1984, Article 9(2); Kenyan Act 1995, s. 19; Ugandan Act 2000, s. 19; Zambian draft Act 1999, First Schedule, Article 18; Zimbabwean Act 1996, Schedule 1, Article 18; the South African draft International Arbitration Acts 1997 and 1998, Schedule 1 and Article 18, respectively; OHADA Uniform Arbitration Act, Article 9.

[132] E.g. Ghana Arbitration Act of 1961, s. 36 and Sch., Article 1(2), implementing the NYC, which Ghana actually joined in 1968.

explicit;[133] or it may be implicit in the powers given to the parties;[134] or in powers given to the court;[135] or in the explicit or implicit recognition of institutional arbitration rules;[136] or in the implementation of an arbitration treaty.[137] In most third generation laws, especially as influenced by the Model Law, these features recognising institutional arbitration may, in varying degrees, be present.[138] By contrast, the OHADA Treaty and the Uniform Arbitration Act establish the Common Court of Justice and Arbitration (CCJA) as a supranational institution with both judicial and administrative roles in the organisation and management of arbitration in member states.[139]

[133] Egyptian Law 1994, Articles 5 and 9; Algerian Law 1993, Article 458(2)(a); the Arbitration and Conciliation Act 1988 of Nigeria, s. 57(1); Kenyan Act 1995, s. 3(5) and (6); Ugandan Act 2000, s. 3(1); Zambian draft Act 1999, s. 2(1). Article 1 of the Egyptian Law endorses international commercial arbitration conducted abroad. Such arbitration, if institutional, is also by definition 'international' (Article 3(2)). The OHADA Uniform Arbitration Act, the laws of Djibouti, Uganda and Zambia, and the ADR Bill in Ghana, establish dispute resolution centres with functions that include those of traditional arbitration institutions.

[134] E.g., the power of the parties to agree on the number of arbitrators or to determine the method of their nomination, either directly or indirectly by reference to arbitration rules: Djibouti Code 1984, Article 6(1); Algeria Law 1993, Article 458(2); Tunisian Code 1993, Article 56(2); Kenyan Act 1995, ss. 11 and 12(2); Ugandan Act 2000, ss. 11, 12(2) and 3(2) and (3); and OHADA Uniform Arbitration Act, Article 10; the power to agree on the procedures to be followed by the arbitral tribunal: Egyptian Law 1994, Article 25; Djibouti Code 1984, Article 9(1); Tunisian Code 1993, Article 64; and Kenyan Act 1995, s. 20(1); the power to agree on the procedure for the challenge of an arbitrator: Tunisian Code 1993, Article 58(4); Kenyan Act 1995, s. 14; and Ugandan Act 2000, s. 14; and the power to set, either directly or indirectly by reference to arbitration rules, the time period for the making of the award: Djibouti Code 1984, Article 15(1).

[135] The court may appoint an arbitrator under a procedure agreed by the parties if an authority, including an institution, fails to perform any function entrusted to it under such a procedure. E.g. Tunisian Code 1993, Article 56(4)(c).

[136] Section 53 of the Arbitration and Conciliation Act 1988 of Nigeria provides that, notwithstanding its provisions, the parties to an international commercial arbitration may agree in writing that disputes in relation to the agreement shall be referred to arbitration, in accordance with the Arbitration Rules set out in the First Schedule to the Act, or the UNCITRAL Arbitration Rules or *any other international arbitration rules acceptable to the parties.* See also Tunisian Code 1993, Articles 58(4) and 59(1), where an arbitral institution may rule on a challenge of an arbitrator or on the termination of the mandate of an arbitrator if it has the power conferred on it by the parties.

[137] Egyptian Law 1994, Article 1; Zimbabwean 1996 Act, Preamble; the South African draft International Arbitration Acts 1997 and 1998, s. 1(e), respectively; and Ugandan Act 2000: see p. 130.

[138] In addition to the implications of other provisions in relation to institutional arbitration, Article 13 of the Tunisian Code 1993 expressly defines *ad hoc* and institutional arbitration, limiting their recognition to rules relating to fundamental civil and commercial procedure as well as to those regarding the right to a defence.

[139] See pp. 126–7 and 172–3.

The implication of recognising institutional arbitration is to legitimise the activities of such institutions in the enacting state. Thus, parties to arbitration agreements may refer disputes to institutions by adopting or submitting to their published rules. The institution may be in the country where the agreement was concluded or abroad. Any agreement relating to such an arbitration and any resultant arbitral award rendered under the institutional rules, are enforceable according to laws and treaties as may be appropriate.

The court and the arbitral process

The relationship between the court and the arbitral process can be appreciated by looking at the jurisdictional theory of arbitration which is based on the assumption that judicial power is the exclusive preserve of the state and arbitrators exercise powers delegated to them by the state.[140] Arbitration as a private consensual procedure may be perceived as a challenge to or in competition with the state's administration of justice.[141] The jurisdictional theory attaches considerable importance to the place of arbitration, to the law of arbitration (*lex arbitri*) and to the influence of the court at the place of arbitration. The court at the place of arbitration enjoys the power to enforce or not to enforce the arbitration agreement or award, to set aside or to refuse to set aside an arbitral award, or to enforce or deny recognition and enforcement to the same. That court may also exercise its statutory power to support or remove arbitrators. All these are possible since the *lex arbitri* contains a body of rules prescribing standards exterior to the agreement to arbitrate, the parties' wishes and any directions of the arbitral tribunal for the conduct of the proceedings.[142]

The role of the court in the process is necessary, as arbitration is a private adjudicative process founded on contract. It enables the state's coercive power to reinforce the process, to enforce or defeat the will,

[140] J. D. M. Lew, *The Applicable Law in International Commercial Arbitration* (Dobbs Ferry: Oceana, 1978), pp. 51–61; A. Samuel, *The Jurisdictional Problems in International Commercial Arbitration* (Zurich: Schulthess, 1989), chapter 1; O. Chukwumerije, *Choice of Law in International Commercial Arbitration* (Westport: Quorum Books, 1994), pp. 9–15.

[141] Arbitration does not entail the exercise of the judicial powers appertaining only to the judiciary as the third arm of government. Nevertheless, an arbitrator may, by contract between the disputing parties, be authorised to make decisions which are judicial in nature: *QH Tours Ltd* v. *Ship Design & Management (Aus.) Property and Another* [1992] LRC (Comm) 650, 667–8 (Australia); Asouzu, 'Arbitration and Judicial Powers'.

[142] Lord Mustill, 'Too Many Laws', 248; Steyn J. in *Smith Ltd* v. *H & S International* [1991] 1 Lloyd's LR 127, 130, citing Redfern and Hunter, *International Arbitration* (1st edn), p. 53.

agreement or expectations of the arbitrating party.[143] Control mechanisms and safeguards are desirable in the private adjudicative process to ensure the rule of law, to bring the process into line with the public policy of the state and its international obligations and to prevent the abuse of the arbitral process. Arbitral accountability is essential to arbitration itself, to the parties and to society.[144]

Generally, under the first and second generation arbitration laws in Africa, courts have powers to enforce arbitral agreements by staying their proceedings in deference to valid arbitral agreements, to appoint arbitrators and umpires, to summon witnesses before arbitrators, to order interim measures of protection, to grant extensions of time for the making of awards, to remit matters to arbitrators or umpires for reconsideration, to remove arbitrators or set aside awards due to the misconduct of arbitrators or the improper procurement of awards, and to enforce awards, etc.

Most of the above powers are still considered necessary for the fairness and efficacy of the arbitral process and are, more or less, retained in third generation arbitration laws in Africa. What is, however, considered objectionable and indeed has been mitigated or abandoned in third generation laws is the power of the court to order arbitrators to 'state a case'.[145]

What is discernible in the third generation laws is an increasing empowerment of the arbitral tribunal for the efficacy, speed and fairness of arbitral proceedings. A disagreement by the parties may mean that the arbitral tribunal will act to ensure the smoothness of proceedings. Most powers, which under the first and second generation arbitration laws were given to the court, are, in third generation arbitration laws, transferred to or conferred on the arbitral tribunal. There is a concomitant decrease in the role of the court in the arbitral process except in those

[143] E.g. in recognising or enforcing arbitral agreements, or awards, or in ordering interim measures of protection.

[144] Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repairs* (Durham: Duke University Press); Lord Mustill, 'Too Many Laws'; W. W. Park, 'National Legal Systems and Private Dispute Resolution', AJIL 82, 1988, 616, 627–31; W. W. Park, 'Private Adjudicators and the Public Interest', Brooklyn JIL 12, 1986, 629; Asouzu, 'The National Arbitration Law', 68; Asouzu, 'A Threat to Arbitral Integrity', JIA 12, December 1995, 145.

[145] The 1995 Arbitration Act of Kenya reserves the power, on the agreement of the parties, to refer questions of law to the High Court, only in domestic arbitration. The same is the case under the 2000 Ugandan Act (s. 39 of both Acts). In the Zambian draft Act 1999, it applies to international arbitration only if the parties agree, and to domestic arbitration unless the parties otherwise agree: Zambian draft Act 1999, s. 26(2) and Second Schedule, Articles 5 and 6.

circumstances where it is necessary to ensure the protection of basic procedural rights of the parties, the integrity of the arbitral process and consistency with a state's public policy and international arbitral obligations.[146]

There is a tendency in third generation arbitration laws towards certainty and predictability as to the permissible nature and extent of judicial intervention in arbitration as well as the court or authority that will perform particular arbitral functions. Minimal judicial intervention in arbitration is an aim of the Model Law. But certainty and predictability as to the circumstances in which the court will intervene is epitomised by its Article 5, which provides: 'In matters governed by this Law [the Model Law], no court shall intervene except where so provided in this Law'.[147]

Also, arbitral functions required to be performed under a law or treaty may for the sake of efficiency, centralisation and specialisation be conferred on a specified or specific court or authority.[148] For example, the OHADA Treaty establishes the Common Court of Justice and Arbitration (CCJA), which is a supranational judicial institution.[149] The CCJA ensures in Contracting States the interpretation and enforcement of the Treaty, the Regulations adopted under it and the Uniform Acts. Member states or the Council of Ministers may request advisory opinions from the CCJA (Article 14 of the Treaty) which is also the court of last resort with respect to appeals arising out of member states' courts in civil cases involving the application of the Uniform Acts and of Regulations adopted under the Treaty (Articles 13 and 14). Any dispute which may arise between the

[146] In this sense, Article 78(6) of the 1993 Tunisian Code and Article 462(6) of the 1999 Malagasy Law, despite their positive provisions, are incompatible with the international standards of the Model Law.

[147] Similar or identical provisions are in the laws of Nigeria (s. 34); Tunisia (Article 51); Kenya (s. 10); Uganda (s. 10); Zambian draft Act 1999, First Sch., Article 5; Zimbabwe (Article 5, Schedule 1) and in the South African draft Acts 1997 and 1998 (Schedule 1, Article 5(1)). The Nigerian, Kenyan, Ugandan, Zimbabwean and Zambian provisions apply to both domestic and international commercial arbitrations. The Tunisian and South African provisions apply respectively to 'matters which are the object of an international arbitration agreement' or to international commercial arbitration. A general principle of the proposed domestic Arbitration Law of South Africa (s. 1(c)) is that 'in matters governed by this Act the court should not intervene except as provided by this Act.'

[148] In South Africa, the *1998 SALC Report* recommended specifying an authority other than the court to perform the default appointing power under the Model Law: see p. 137.

[149] See pp. 126–7. The organisation, composition and power of the CCJA are, pursuant to Articles 26 and 8 of the OHADA Treaty, elaborated in the 1999 Arbitration Rules of the CCJA: *Journal Officiel*, 10 December 1999; Bolmin, Bouillet-Cordonnier and Medjad, 'Prospects for Integration', 447–9.

Contracting States regarding the interpretation or the application of the Treaty and which cannot be settled amicably may be referred by a Contracting State to the CCJA (Article 56). The CCJA does not itself settle contractual disputes between private parties; rather, it names and confirms arbitrators (which may be one or three) on behalf of the parties who could not agree; it is informed of the progress of arbitral proceedings; and it examines draft awards in accordance with Article 24 of the Treaty (Articles 21–22).[150] A judgment of the CCJA is final and conclusive and Contracting States shall ensure its execution and enforcement in their territories. In no case may a decision contrary to a judgment of the CCJA be lawfully executed in a Contracting State (Article 20).

Also, under the 1984 Djibouti Code, a Commission of Arbitration Appeals is established as the central body that performs certain arbitral functions in international arbitration. The Commission is composed of a president and a vice-president, who shall be magistrates residing in Djibouti, and four assessors selected amongst international specialists in arbitration. The appointment, which is for three years, is renewable once by the President of Djibouti. The selection is made from a list prepared by another new body established by the Code, the International Centre for Arbitration Services and Training (Article 25).[151] Some of the arbitral functions are conferred solely on the President of the Commission probably to ensure consistency and rapidity.[152] However, decisions in relation to the annulment of an award (Article 21) or an appeal against an order granting

[150] Article 24 of the Treaty provides: 'Before signing a partial or final award, the arbitrator shall submit the proposed decision to the Common Court of Justice and Arbitration, which may suggest any formal amendments to such a decision.' This provision is similar (although not identical) to Article 27 of the ICC Rules of Arbitration providing: 'Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court [i.e. the ICC International Court of Arbitration]. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.'

[151] The Centre is established to assist parties to arbitration by providing them with appropriate arbitral facilities: Derains, 25 ILM 3. The Centre is the depository for arbitral awards (Article 18) and plays some roles during the annulment or enforcement of awards (Articles 21(2) and 22(2)).

[152] E.g. the appointment of arbitrators to fill a vacancy or to avoid a default by a party (Article 6), deciding challenges of arbitrators (Article 7), imposing final deadlines on arbitral tribunals to make an award where there is excessive delay (Article 15(1)), making an order for the enforcement of arbitral awards (*exequatur*) (Article 22). The President has an obligation to inform other members of the Commission within 15 days of taking any such decision.

or denying enforcement (*exequatur*) (Article 24) can only be validly made by a Committee that includes the President (or, in his absence, the Vice-President) and two assessors or their alternates. The decisions of the President or the Commission are unappealable (Article 26).

In other jurisdictions, competent courts may be designated out of administrative convenience, due to their specialisation in commercial matters and for the convenience of the parties. For example, arbitral functions expected of the Egyptian judiciary under the 1994 Law arise from the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies within the Cairo Court of Appeal unless the parties agree on the competence of another appellate court in Egypt (Article 9).

In Tunisia, arbitral agreements may be enforced by 'a court before which an action is brought in a matter which is the subject of an arbitration agreement'.[153] However, only the First President of the Court of Appeal of Tunis is designated to appoint arbitrators at the request of a party if there was a default in appointing an arbitrator by a party or the parties;[154] to decide on the challenge to an arbitrator (Article 58(3));[155] to rule on the termination of the mandate of the arbitrator (Article 59(1)); and to assist the arbitral tribunal to enforce an interim measure ordered by the former (Article 62).[156] But, the full Court of Appeal of Tunis decides on the jurisdiction of the arbitral tribunal when it is challenged (Article 58(3)), may set aside an arbitral award in an appropriate case (Article 78(6)) and may grant or refuse recognition and enforcement to an arbitral award (Articles 80(1), 81 and 82).

In a large country, there may be a decentralisation of powers, according to administrative convenience and where constitutionally permissible, to courts competent to act in arbitral matters. For example, in Nigeria, which is a federation of thirty-six states and the Federal Capital Territory, Abuja, the Arbitration and Conciliation Act 1988 (which, in any event, is

[153] Any court may grant interim measures of protection (Article 54). 'The Court' is defined as the panel or the organ of the judicial organisation (s. 5(c)). This distinguishes the state organ from such bodies as the LCIA, the International Court of the ICC or the PCA, which are basically arbitration institutions or organs thereof. Also, a court being an organ of a sovereign state is not the same as an arbitral tribunal.

[154] Tunisian Code 1993, Article 56(2)(a) and (b) and (4). See also Algerian Law 1993, Article 458(2) and (3).

[155] If the parties entrust the function to an arbitral institution by agreeing to its rules, the institution will decide and the court will declare the challenge inadmissible (Tunisian Code 1993, Article 58(4)).

[156] See also Algerian Law 1993, Article 458(9).

applicable throughout the federation – a contentious question under Nigeria's Constitution) defines 'court' to mean 'the High Court of a state, the High Court of the Federal Capital Territory, Abuja or the Federal High Court' (section 57(1)).[157]

Concluding remarks

From the discussion in this chapter, it can be seen that irreversible steps have been taken by certain African states to embrace modern principles of arbitration. The urge to obtain much needed investment, to facilitate international trade and, most importantly, to host international arbitration, may be the influencing factors. Certainly, the enactment of arbitration laws may not be enough for the realisation of those ends. The timeliness and cost-effectiveness of legislative reforms is to be applauded, given the former colonial legal frameworks and the increasing trading and investment activities in African states.

Unlike the Model Law, which enumerated in a footnote what could be considered as commercial (widely defined), some third generation arbitration laws enacted that definition (still widely defined) substantively. Some of those laws, like the Model Law, allow wide subject-matter arbitrability, permit the use of the preparatory materials of the Model Law as interpretative aids, acknowledge the impact of commercial practice on the nature of the arbitration agreement, accord the arbitration clause a separate identity from that of the main contract and the arbitral tribunal the competence to decide its own competence. The arbitral tribunal is increasingly empowered as the intervention of the court in arbitration is correspondingly restricted to only those powers necessary to support, and minimally control, the arbitral process, due largely to the latter's private and contractual nature.[158] Under the third generation laws in Africa, the specificity of both international and institutional arbitration are recognised, with the positive consequence that arbitration agreements and awards relating thereto will receive the recognition of, and enforcement by, courts.

The impact of the Model Law would be felt more in Africa if more states on the continent were to take more positive steps towards arbitral reform and development and if there were sufficient court cases and arbitrations to present opportunities for those laws to be invoked and tested and for

[157] Asouzu, 'Arbitration and Judicial Powers'.

[158] As indicated earlier, Article 78(6) of the Tunisian Code and Article 462(6) of the 1999 Malagasy Law, are exceptions.

decisions to be published. The limitations in existing and outdated laws would be appreciated making the need for further reassessment compelling.

The extent and nature of judicial intervention in the arbitral process has been an intense tussle between the contractual and jurisdictional theories of arbitration and would continue to be. But, as a matter of policy and principle, whilst it is desirable to give parties the autonomy to organise their arbitral proceedings, it is thought that there must be some mandatory provisions enforceable by the court (as the repository of the state's coercive power) in order to avoid the abuse of the arbitral process, and to protect and enforce basic procedural norms, the public interest and the state's international arbitral obligations. The desire to ensure rapidity in arbitral proceedings and the finality of arbitral awards and disputes (worthy ends in themselves) could be balanced against the equally paramount need to protect the basic procedural rights of the parties as well as fundamental norms in the legal order.

Arbitration does not, in principle, entail an agreement to opt out of the court and the judicial process in all circumstances. In international transactions, it rather involves an agreement by commercial parties not to use each other's national courts for the resolution of the merits of a dispute. This does not, however, carry with it an implication that there cannot be a court endowed with appropriate powers to support and control the private adjudicative process at the place of arbitration.[159] States could distinctively create favourable legal climates for arbitral proceedings and arbitrators could easily reach perfectly fair and sensible awards without compromising the basic integrity of the arbitral process.

We shall proceed in the next chapter to examine the New York Convention in an African setting, its problems and prospects.

[159] This should be qualified relative to the self-contained annulment procedure of the ICSID Convention (Article 52).

6 The New York Convention in an African setting: problems and prospects

Introductory remarks

Trade and investment are as mobile as arbitration and its enforcement mechanisms. The essence of an arbitration clause in a contract is that any resultant award can be realised through legal means should the debtor prove recalcitrant. The expected debtor behaviour is compliance in good faith with the outcome of the agreed dispute resolution mechanism. In some cases this may not be the case. This study will, accordingly, cover the legal means of realising arbitral awards in Africa.

It is possible in Africa to recognise and enforce an arbitral award under national laws and bilateral treaties.[1] Various multilateral treaties are of practical importance to the issue, although their scope of application and use might be limited.[2] Of those treaties, the New York

[1] E.g. the US and Togo Treaty of Amity and Economic Relations, signed at Lomé on 8 February 1966, entered into force on 5 February 1967, 680 UNTS 159, Article III(3). Some national laws in Africa, and how they facilitate the recognition and enforcement of arbiral awards, will be considered in this chapter and in chapter 12.

[2] E.g. the Convention on Judicial Co-operation between States of the Arab League of 6 April 1983, entered into force October 1985, overrides the 1952 Convention of the Arab League on the Recognition of Judgments and Awards. African states that signed and ratified the 1983 Convention are: Tunisia, Libya, Somalia, Sudan, Morocco and Mauritania. Algeria and Djibouti have only signed (but not ratified) the Treaty; the 1974 Agreement on the Settlement of Disputes Between Arab Investment Receiving States and Nationals of Other Arab States which entered into force on 20 August 1976. This Convention, which was influenced by the ICSID Convention, was complemented by the 1980 Unified Convention for Investment of Capital in Member Countries of the Arab League, in force September 1981. Finally, there is the Arab Convention on Commercial Arbitration of 14 April 1987 (the Amman Convention), which Iraq, Jordan, Libya, Tunisia, Palestine, Lebanon, Sudan, the Yemen Arab Republic and the Yemen Democratic Republic (Yemen) have ratified. All treaties entered into by both Yemens before merger in 1990 remain in force: 30 ILM 820. However, the following states have

Convention[3] and the ICSID Convention[4] will be singled out for discussion, due to their universal importance, relatively widespread membership in Africa and the easier access and availability of practices under them. Additionally, some African states that are parties to various bilateral or regional treaties are also parties to the New York Convention, the ICSID Convention or both. There are, however, a few African states that are parties to neither of the Conventions.

The two preceding chapters of this book were a general overview of developments and trends in arbitration laws in Africa. Most of the laws examined in those chapters may, in this and in subsequent chapters, be in focus as they are the foundations on which the treaties to be considered rest in a particular African state. This chapter will assess the obstacles to, and the practical utility of, the New York Convention in Africa. As will also be demonstrated, there are in African states arbitration laws with provisions that are more favourable than, yet compatible with, the New York Convention, for the recognition and enforcement of arbitral awards.

According to Article I(1) of the New York Convention, the latter provides for the recognition and enforcement of two sets of arbitral awards:

1. arbitral awards made in the territory of a state other than where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal; and
2. arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.[5]

Footnote 2 (*cont.*)
merely signed (but not ratified) the Amman Convention: Algeria, Djibouti, Syria, Morocco and Mauritania. The Convention entered into force on 22 February 1993: A. H. El-Ahdab, 'General Introduction on Arbitration in Arab Countries' in A. J. van den Berg (ed.), *ICCA: International Handbook,* Supp. 15 (Deventer: Kluwer, 1993), pp. 1, 21–4; F. Kemicha, 'Future Perspectives on International Commercial Arbitration in the Arab Countries' in A. J. van den Berg (ed.), *ICCA Congress Series No. 6* (Deventer: Kluwer, 1994), pp. 221, 226 n. 29 and 233 n. 51.

[3] Done at New York, 10 June 1958, 330 UNTS 38 and entered into force on 7 June 1959.

[4] See Part 4 below.

[5] Under the Convention, 'arbitral awards' include those made in *ad hoc* and institutional proceedings (Article I(2)). The Convention also imposes an obligation on a Contracting State's court to recognise and enforce an arbitration agreement in writing unless the latter is null and void, inoperative or incapable of being performed (Article II(1) and (3)). For the background materials, cases and authoritative commentary on the Convention, see G. Gaja, *New York Convention* (3 vols., Dobbs Ferry: Oceana, 1990); A. J. van den Berg, *The New York Convention of 1958* (The Hague: Kluwer, 1981); A. J. van den Berg (gen. ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of the New York Convention: ICCA Congress Series No. 9* (The Hague: Kluwer, 1999); and see 'Commentary on Court Decisions on the New York Convention 1958', in ICCA, *Yearbook of Commercial Arbitration* (The Hague: Kluwer) since 1976.

The New York Convention expects each Contracting State to recognise arbitral awards as binding, and to enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions stipulated in the New York Convention. Thus, there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which the New York Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards (Article III).

To obtain the recognition and enforcement of an arbitral award, the applicant shall, at the time of the application, supply the authenticated original award or a duly certified copy thereof, and the original agreement or a duly certified copy thereof (Article IV(1)). The recognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked (the respondent), only if the latter furnishes to the competent authority where the recognition and enforcement is sought, proof of any of the grounds exhaustively stipulated in Article V(1) of the New York Convention. These are:

(a) the invalidity of the arbitration agreement; or
(b) the violation of due process; or
(c) excess of arbitral authority; or
(d) irregularity in the composition of the arbitral tribunal or the arbitral procedure; and
(e) that the award is not binding or has been set aside or suspended where, or under the law of which, it was made.

In addition, under Article V(2)(a) and (b) of the New York Convention, recognition and enforcement of arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the dispute was incapable of settlement by arbitration under the law of that country or that the recognition and enforcement of the award would be contrary to the public policy of that country.

The New York Convention was preceded by the 1923 Protocol on Arbitration Clauses (the 1923 Geneva Protocol)[6] and the 1927 Convention on the Execution of Foreign Arbitral Awards (the 1927 Geneva Convention).[7] Both were concluded under the auspices of the League of

[6] 27 LNTS 157 (1924). The Geneva Protocol entered into force on 28 July 1924 in accordance with its Article 6.
[7] 92 LNTS 301 (1929–30). The Geneva Convention entered into force on 25 July 1929 in accordance with its Article 8.

Nations and at the instigation of the ICC.[8] The 1923 Protocol and the 1927 Convention became applicable to some African states through their varying ratification or accession by the colonial powers in Africa. These treaties may still be applicable in a few African states. A very short discussion would be helpful in appreciating their contemporary practical relevance and limitations. An effective link would have been created for introducing the 1958 New York Convention, its improvements on the 1920s Geneva Treaties, and its benefits, problems and prospects in Africa.

The limitations of the Geneva Treaties and improvements by the New York Convention

Under the 1923 Protocol, each Contracting State recognises the validity of an arbitration agreement relating to either existing or future differences *between parties, subject to the jurisdiction of different Contracting States* wherever the arbitration takes place.[9] If disputes covered by such agreements are brought before a court of a Contracting State, the court is bound, on the application of any party to the agreement, to refer the parties to the agreed arbitrator, rather than proceeding with the matter.[10] The Contracting States are to ensure the execution by their authorities in accordance with their national laws of arbitral awards made in their territories.[11] Those States are allowed to declare that their acceptance of the Protocol does not include their colonies, overseas possessions or territories, protectorates or territories over which they exercised a mandate. However, they may subsequently adhere separately on behalf of any territory excluded.[12]

To varying degrees, each of the colonial powers in Africa became a party to the Geneva Protocol and extended or excluded its application to their colonies, protectorates or other territorial possessions.[13] For instance, France ratified the Protocol on 7 June 1928, indicating *inter alia* that '[i]ts acceptance of the present Protocol does not include the Colonies, Overseas

[8] A. Nussbaum, 'Treaties on Commercial Arbitration – A Test of International Private Law Legislation', HLR 56, 1942, 219; K. W. Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (London: Butterworths, 1984), pp. 195–201.

[9] 1923 Protocol, Article 1. [10] *Ibid*., Article 4. [11] *Ibid*., Article 3.

[12] *Ibid*., Article 8. Contracting States are allowed to limit their obligations under either Treaty to contracts, which are considered as commercial under their national laws. France, Portugal, Spain and Belgium – some of the colonial powers in Africa – entered such declaration to both Treaties.

[13] *Multilateral Treaties Deposited with the UN Secretary-General* (UN: New York, 1997), pp. 964–8. This publication, as regularly updated, can be viewed at www.untreaty.un.org.

Possessions or Protectorates or Territories in respect of which France exercises a mandate'.[14] Portugal ratified the Protocol on 10 December 1930 declaring *inter alia* that 'its acceptance of the present Protocol does not include its Colonies'.[15] Spain's ratification of 29 July 1926 was coupled with the more specific declaration that 'the present Protocol does not include the Spanish Possessions in Africa, or the territories of the Spanish Protectorate in Morocco'.[16] Much earlier, on 27 September 1924, the UK ratified the 1923 Protocol declaring that it '[a]pplies only to Great Britain and Northern Ireland and, consequently, does not include any of the Colonies, Overseas Possessions or Protectorates under His Britannic Majesty's sovereignty or authority or any territory in respect of which His Majesty's Government exercises a mandate'. However, the UK's exclusion did not apply to some territories on whose behalf the Protocol was separately and subsequently adhered to.[17]

The 1927 Convention was linked to, and to some extent reinforced the scope of, the 1923 Protocol. Thus, the Convention applied in 'High Contracting States' to arbitral awards made pursuant to a Protocol arbitration agreement *provided the award was made in a territory of one of the High Contracting Parties and between persons who were subject to the jurisdiction of one*

[14] In Africa, it follows that the Protocol was never applicable to Algeria, Benin, Burkina Faso, Cameroon under French mandate, Central African Republic, Chad, Comoros Islands, Congo, Cote d'Ivoire, Djibouti, Gabon, Guinea, Madagascar, Mali, Mauritania, Morocco, Niger, Senegal, Seychelles, Togo and Tunisia. However, it must be observed that the French Decree of 31 December 1925 approved for the first time the legal validity of agreements to arbitrate future disputes. That Decree, which was promulgated soon after the 1923 Protocol, was made applicable to French colonies in Africa and is still applicable to some, if not to most: Cotran and Amissah, *Arbitration in Africa*, pp. 272–6.

[15] Thus, the Protocol was never applicable to these former colonies of Portugal in Africa: Angola, Cape Verde, Guinea-Bissau, Mozambique, and Sao Tome and Principe.

[16] Thus, in Africa, the Protocol was not applicable to Equatorial Guinea.

[17] In Africa, the territories on whose behalf the Protocol was separately adhered to by the UK were: Southern Rhodesia (Zimbabwe) (18 December 1924); the Colony and Protectorate of the Gambia; Gold Coast (including Ashanti, the Northern Territories of the Gold Coast and Togoland) (Ghana); the Colony and Protectorate of Kenya; Mauritius; Northern Rhodesia (Zambia); Zanzibar (12 March 1926) and Tanganyika (on 17 June 1926) (Zanzibar and Tanganyika are today's Tanzania); and Uganda (on 28 June 1929). Thus, in Africa, the Protocol never applied to Botswana, part of Cameroon under British Mandate, Lesotho, Nigeria, Sierra Leone, South Africa, Sudan and Swaziland. Malawi (former Nyasaland) must also be in the latter group as the Geneva Treaties were never extended to it as a dependency of the UK nor did independent Malawi take any steps to join the Treaties. However, the 1967 Malawi Arbitration Act, enacted after Malawi's independence, purported to implement the Geneva Treaties: Patchett, *Recognition*, p. 243. Cf. *Kassamali Gulamhusein Co. (Kenya) Ltd* v. *Kyrtatas Brothers Ltd* [1968] 2 ALR Comm 350, a case arising from Kenya, but useful in understanding the Malawi situation.

of the High Contracting Parties.[18] The 1927 Convention applied only to an award made after the coming into force of the Protocol,[19] and was opened to all signatories of the Protocol and members or non-members of the League of Nations on whose behalf the Protocol had been ratified.[20] An enforceable award under the 1927 Convention was one that was 'final in the country in which it has been made' in the sense that its validity was not being challenged there.[21]

The 1927 Convention, unlike the 1923 Protocol, did not apply to colonies, protectorates or territories under the suzerainty or mandate of any High Contracting Party unless they were specifically mentioned. However, the application of the 1927 Convention to one or more of such colonies, protectorates or territories to which the 1923 Protocol applied could be effected at any time by a declaration by a High Contracting Party.[22] Some Contracting States with territorial possessions in Africa made such declarations. For instance, Belgium ratified the 1927 Convention on 27 April 1929 and acceded on behalf of Belgian Congo (Zaire, now the Democratic Republic of Congo) and the territory of Ruanda-Urundi (Burundi and Rwanda) on 5 June 1930.[23] The UK ratified the Convention on 2 July 1930. It subsequently acceded on behalf of some territories in Africa.[24] When Portugal ratified the 1927 Convention on 10 December 1930, it declared *inter alia* that the Convention did not apply to its colonies.[25]

Thus, if the 1923 Protocol and the 1927 Convention are, or if any of them is or was, applicable or inapplicable to any African state, it was largely due to the action or inaction of the imperial powers.[26] Nevertheless, some

[18] 1927 Convention, Article 1. [19] *Ibid*., Article 6. [20] *Ibid*., Article 7.

[21] *Ibid*., Article 1(d). [22] *Ibid*., Article 10.

[23] Belgium ratified the 1923 Geneva Protocol on 23 September 1924 without any apparent extension to its colonies or territorial possessions.

[24] These were Gold Coast (Colony, Asante, Northern Territories, Togoland under British Mandate) (now in Ghana); Kenya, Tanganyika Territory and Zanzibar (Tanzania); Uganda Protectorate (26 May 1931); Mauritius (13 July 1931) and Northern Rhodesia (13 July 1931) (Zambia). These entities were also covered by the 1923 Protocol, except for Southern Rhodesia (Zimbabwe) which was only covered by the 1923 Protocol.

[25] This was also the stance of Portugal with respect to the 1923 Protocol: *Multilateral Treaties*, p. 964. Italy (excluding its colonies) ratified the Protocol on 28 July 1924 and the Convention on 12 November 1930. Thus, both Treaties have no relevance to either Libya or Somalia. France ratified the 1927 Convention on 13 May 1931. No extensions were made, as was the case under the Protocol.

[26] Abyssinia (Ethiopia) and Liberia, although former members of the League of Nations, never became parties to the Geneva Treaties nor were either of them colonised. South Africa was a member of the League of Nations (although then subordinate to the British Empire). But South Africa was not a party to the Geneva Treaties nor did Britain extend those Treaties to it. Finally, although Egypt was an independent state by 1922, it was not a party to the Geneva Treaties.

African states covered by those colonial extensions subsequently succeeded to or signed the Geneva Treaties after their independence.[27] These states, except probably The Gambia and Zimbabwe, implemented the Geneva Treaties in their national legal orders.[28] And, since Ghana, Kenya, Mauritius, Tanzania, Uganda and Zimbabwe had respectively acceded to the 1958 New York Convention, the Geneva Treaties ceased to have effect between each state and other New York Convention Contracting States to the extent that they were bound.[29] Of the African states to which the Geneva Treaties are applicable, only Burundi, Rwanda, the Democratic Republic of Congo, Zambia and Malawi are yet to accede to the New York Convention.[30]

The Geneva Treaties might have some, even if negligible, contemporary practical relevance. For example, section 99 of the 1996 UK Arbitration Act, dealing with the enforcement of certain foreign arbitral awards, permits the continuing application of Part II of the 1950 UK Arbitration Act (in relation to foreign arbitral awards within the meaning of that Part which are *not also* New York Convention awards).[31] Thus, there may be a possibility 'with regard to the enforcement in a New York Convention country [e.g. the UK, which has entered a reciprocity declaration] of an award made in a country which has adhered to the Geneva Treaties but not to the New York Convention'[32] between persons subject to the jurisdiction of the UK and a Geneva Treaty state. Also, there is a further possibility that an arbitral award could be enforced in those very few African states that are parties only to the Geneva Treaties if made there or in other

[27] E.g. Tanzania, Zambia and Kenya, each respectively succeeded to both Treaties: Cotran and Amissah, *Arbitration in Africa*, reviewed by Goodman-Everard in *Arbitration International* 14, 1998, 457; Asouzu, ADRLJ 6, December 1997, 373. The Zambian draft Arbitration Act 1999 has the Geneva Treaties and the NYC as the Third Schedule. Mauritius succeeded to the Geneva Treaties on 18 July 1969, whereas Uganda formally signed both Treaties on 5 May 1965. Ghana's 1961 Arbitration Act repealed colonial ordinances that implemented the Geneva Treaties replacing them with the NYC, which, interestingly, was ratified by Ghana in 1968.

[28] Patchett, *Recognition*, pp. 240–1 and 269–70. As was noted earlier, Malawi implemented the Geneva Treaties in the 1967 Arbitration Act although never succeeded to nor signed it after independence nor were the Treaties extended to it before independence.

[29] Article VII(2) of the NYC.

[30] See note 43, p. 187 below. Zambia is preparing to ratify the NYC. The 1999 draft Arbitration Act, s. 31, stipulates that a certificate by the Secretary of Foreign Affairs and Trade (or his Deputy) that, at the time specified in the certificate, any country had signed and ratified or had denounced, or had taken any other treaty action under the Geneva Treaties or the NYC, in respect of the territory specified in the certificate shall be presumptive evidence of the facts stated therein. The above treaties are the Third Schedule to the draft Act.

[31] Part II of the 1950 Act implemented the 1927 Convention in the UK (emphasis added).

[32] Van den Berg, *The New York Convention*, p. 116.

states that are also only parties to the 1927 Convention *and* between persons subject to the jurisdiction of *different* (not the same) Contracting States to the 1927 Convention.

Practically speaking, these are remote possibilities in light of the network of states that are parties to the more modern New York Convention without any reciprocity declaration. Furthermore, as will soon be observed, the New York Convention, which has a superseding effect on the Geneva Treaties, discarded the nationality requirement with respect to its coverage and applicability. Pursuing the Geneva Treaties option may now involve jurisdictional problems that are more cumbersome, uncertain and unpredictable than joining the New York Convention or opting for arbitration in a New York Convention or Model Law state. The increasing membership of the New York Convention and the elaboration by UNCITRAL of the Model Law, which many states have adopted, reinforced the loopholes in the Geneva Treaties.

With particular reference to the UK and the enforcement of Geneva Convention arbitral awards, the impact of section 66 read with section 2(2)(b) of the 1996 UK Arbitration Act should not be underestimated. Such is also the case with respect to the enforcement or recognition of an arbitral award sought in any country with legislation based on Articles 35 and 36 of the Model Law. Under these regimes, the seat of arbitration and the nationality of the parties are immaterial in recognition and enforcement proceedings.[33] In contemporary times, however, the scope and effect of the Geneva Treaties are highly circumscribed.

As observed above, one reason the limitations of the Geneva Treaties became conspicuous was the elaboration in 1958 by the UN of the New York Convention and latter's popularity with states. When the UN was established after the Second World War, many states of diverse economic and ideological backgrounds joined the organisation. Due to this, and the consequent escalation of commercial activities, there was a need to have a uniform convention on the recognition and enforcement of arbitral awards and agreements to reflect the changed times. This was all the more so in light of the inadequacies of the 1920s Geneva Treaties.[34]

[33] A. A. Asouzu, 'The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards', JBL, March 1999, 185, 196–201.

[34] Redfern and Hunter, *International Arbitration*, paras 1-118 to 1-120 and 10-18 to 10-29; Patchett, *Recognition*, pp. 195–202. In 1958, there were eight independent African states: Egypt, Ethiopia, Liberia, Libya, Morocco, South Africa, Sudan and Tunisia. Of these states, as of 12 March 2001, Egypt, Morocco, Tunisia and South Africa are parties to the NYC: see p. 188.

The 1958 New York Convention consolidated and improved on the Geneva Treaties in many respects.[35] The New York Convention has a wider scope of application and effect, and inaugurated a greater degree of party autonomy, than the Geneva Treaties. Although allowing Contracting States to enter the commercial or the reciprocity declarations, or both, the New York Convention, encouragingly, discarded nationality as a criterion for entitlement to invoke its provisions, unlike under the 1927 Convention.[36] In other words, subject to any reciprocity declaration, arbitral awards may be recognised and enforced in a Contracting State of the New York Convention even if the disputing parties are not 'subject respectively to the jurisdiction of different Contracting States'. Under Article I(1) of the New York Convention, the crucial yardstick, in the first instance, is that an arbitral award is made in the territory of a state other than the state where it is sought to be enforced.[37]

Under the New York Convention, courts of Contracting States are given wider powers to recognise and enforce arbitration agreements and awards. They could also, as before, deny the recognition and enforcement based on grounds contained in the Convention. However, the burden of proof to establish grounds for refusal to recognise and enforce an arbitral award shifted to the party contesting the enforcement, unlike under the 1927 Convention, when an applicant was expected to establish grounds entitling the award to be recognised and enforced. Under the New York Convention, the party contesting the recognition or enforcement of an award must furnish to the competent enforcing authority, on the basis only of any of the grounds stipulated in its Article V, proof upon which recognition or enforcement *may* be refused.[38] Thus, the presumption is in favour of the validity and enforceability of arbitral awards. An enforceable award need only be *binding* under the New York Convention, not *final*, as was the case under the 1927 Convention. This has the implication of abolishing the notorious 'double *exequatur* rule' whereby a confirmatory order

[35] Redfern and Hunter, *International Arbitration*; Gaja, *New York Convention*; van den Berg, *The New York Convention*; S. M. Schwebel, 'A Celebration of the UN New York Convention', *Arbitration International* 12, 1996, 83–4; D. H. Freyer and H. G. Gharavi, 'Finality and Enforceability of Foreign Arbitral Awards', ICSID Rev-FILJ 13, 1998, 101–10; AALCC, 'Enforcement of Foreign Arbitral Awards: Assistance Through Inter-Institutional Co-operation' in *Regional Seminar on International Commercial Arbitration, New Delhi, 12–14 March 1984*, Topic 4. [36] Van den Berg, *The New York Convention*, pp. 115–6.

[37] This obligation could, however, be limited by a declaration of reciprocity by a Contracting State under Article 1(3) of the NYC.

[38] For these grounds, see p. 179. Although the Article V(2) grounds are to be raised *suo moto* by the enforcing authority, the respondent can also rely on or raise them.

was needed from the court at the place where an award was made before it could be enforced at the place where the award is sought to be relied upon.[39] Nevertheless, the New York Convention mitigated but retained territoriality as a cardinal philosophy.

Having noted its improvements on the Geneva Treaties, it may be appropriate to mention that, in the interpretation and application of the New York Convention in Africa, there are some obstacles that might undermine its practical utility and effectiveness. It is proposed to examine those obstacles making suggestions for their amelioration.

Obstacles to the New York Convention in Africa

The New York Convention has been applied on only a few, and not very prominent, occasions by courts in Africa. This contrasts with the situations in Europe, the US and Asia, particularly in India. Practical problems relating to the Convention's interpretation and application by courts in Africa will only be known if cases arise frequently under its provisions and are decided, reported and widely discussed. The practical experiences and decisions of African courts with respect to the New York Convention are so few as to make the discernment of trends very difficult.

Nevertheless, there are some known obstacles or problems, which, if allowed to continue, might hinder the full realisation of the Convention's potential in Africa.[40] Apart from the fact that some African states are yet to accede to the New York Convention and the question of whether the New York Convention, when acceded to, would or would not be properly interpreted by African courts, there is the important question of non-implementation. Some African Contracting States to the New York Convention that are members of the Commonwealth (i.e. ex-colonies of the UK) are yet to take legislative measures which are necessary to make the treaty enforceable by their courts. Furthermore, amongst the promising cases where the New York Convention has been implemented in

[39] Van den Berg, *The New York Convention*, pp. 8–10.

[40] For comparative reports and materials on problems of interpretation and application of the NYC, see Report of the Secretary-General, 'Study on the Application and Interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (A/CN.9/168) of 20 April 1979', 10 UNCITRAL YB, p. 100; Note by the (UNCITRAL) Secretariat, 'Further Work in Respect of International Commercial Arbitration (A/CN.9/169) of 11 May 1979', 10 UNCITRAL YB, p. 108; UN: *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (New York, 1999); *The New York Convention of 1958* (ASA Special Series No. 9, August 1996); Kerr, 'Concord and Conflict', 129–41; Freyer and Gharavi, 'Finality and Enforceability', 101.

Africa, there may be questions of defective implementation. Other obstacles are the narrow scope of some arbitration laws in Africa, the unfamiliarity of judges and legal practitioners with the New York Convention as engendered by the general lack of relevant information and materials on arbitration in Africa and, finally, the possible negative implications of the commercial and reciprocity declarations which Contracting States to the New York Convention are allowed to make. We shall attempt to elaborate on these obstacles.

Not all African states are parties to the Convention

Some African states are not parties to the New York Convention notwithstanding that most of these states are parties to the ICSID Convention and other treaties on arbitration. As of 12 March 2001, only twenty-seven out of the fifty-three states in Africa have become parties to the New York Convention.[41] Nevertheless, there was, as at that date, a total of 125 Contracting States to the New York Convention.[42] As shown in Table 1, the New York Convention is inapplicable in the following twenty-six African States: Angola, Burundi, Cape Verde, Chad, Comoros Island, Congo, Democratic Republic of Congo, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Guinea-Bissau, Liberia, Libya, Malawi, Namibia, Rwanda, Sao Tome and Principe, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Togo and Zambia.[43]

Since the 1958 New York Convention has a superseding effect on the earlier Geneva Treaties and, as more states join the former, the geographical

[41] This contrasts with forty-two African ICSID Contracting States as of 21 September 2000. The last African state that ratified the NYC within the period mentioned was Mozambique, on 11 June 1998.

[42] The number of Contracting States to the ICSID Convention as of 21 September 2000 was 132: see note 3, p. 215 below. The status of the NYC may be viewed electronically in *Multilateral Treaties Deposited with the Secretary-General*, www.untreaty.un.org or on the UNCITRAL homepage, www.un.or.at/uncitral/status. The recent increase in the number of Contracting States to the NYC was due to some new accessions (some from Africa) and successions to the Treaty by some states from disintegrated old states (in Eastern Europe and the former Soviet Union): R. J. Graving, 'Status of the New York Arbitration Convention', ICSID Rev.-FILJ 10, 1995, 1.

[43] The remaining African states in which the 1920s Geneva Treaties are the applicable regime (as they are yet to join the superseding NYC) are Burundi, Rwanda, DRC, Zambia and Malawi. But Zambia is preparing to ratify the NYC: see p. 183, note 30. Some African states that are yet to become parties to the NYC may also have not been parties to the Geneva Treaties nor were those Treaties ever applicable to them, e.g. Angola, Cape Verde, Chad, Comoros Island, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Guinea-Bissau, Liberia, Libya, Namibia, Sao Tome and Principe, Seychelles, Sierra Leone, Somalia and Sudan.

Table 1 *The status of the New York Convention in Africa (as of 12 March 2001)*

Contracting States in Africa	Date of ratification and accession	Declarations pursuant to Article I(3)	Date of entry into force
Algeria	7 February 1989	Reciprocity, Commercial	8 May 1989
Benin	16 May 1974		14 August 1974
Botswana	20 December 1971[a]	Reciprocity, Commercial	19 March 1972
Burkina Faso	23 March 1987		21 June 1987
Cameroon	19 February 1988		19 May 1988
Central African Republic	15 October 1962	Reciprocity, Commercial	13 January 1963
Cote d'Ivoire	1 February 1991		2 May 1991
Djibouti	14 June 1983[b]		27 June 1977
Egypt	9 March 1959[c]		7 June 1959
Ghana	9 April 1968[d]		8 July 1968
Guinea	23 January 1991		23 April 1991
Kenya	10 February 1989	Reciprocity	11 May 1989
Lesotho	13 June 1989		11 September 1989
Madagascar	16 July 1962[e]	Reciprocity, Commercial	14 October 1962
Mali	8 September 1994		7 December 1994
Mauritania	30 January 1997		30 April 1997
Mauritius	19 June 1996	Reciprocity	17 September 1996
Morocco	12 February 1959[f]	Reciprocity	7 June 1959
Mozambique	11 June 1998	Reciprocity	9 September 1998
Niger	14 October 1964		12 January 1965
Nigeria	17 March 1970[g]	Reciprocity, Commercial	15 June 1970
Senegal	17 October 1994		15 January 1995
South Africa	3 May 1976[h]		1 August 1976
Tanzania	13 October 1964	Reciprocity	12 January 1965
Tunisia	17 July 1967[i]	Reciprocity, Commercial	15 October 1967
Uganda	12 February 1992[j]	Reciprocity	12 May 1992
Zimbabwe	29 September 1994[k]		28 December 1994

Notes:

[a] Implemented by the Recognition and Enforcement of Foreign Arbitral Awards Act No. 41 of 1971.

[b] 14 June 1983 was the date of succession. France, the colonial ruler of Djibouti, had extended the application of the NYC in 1959 to the territory (then known as the Territory of Afars and the Issas) before its independence in 1977. Djibouti only deposited notification of succession to the NYC on 14 June 1983: Gaja, *The New York Convention*, Part I, at A.1; Dorman, 'Djibouti', 1499. France also extended the treaty to Réunion, French Somaliland and Comoros Island before independence. Réunion is still a *départmente* of France. Comoros Island, now an independent state, is yet to file any notice of succession to the NYC or

otherwise expressly declared that she is bound: Gaja, *The New York Convention*, at Part. I, A.1. Somaliland (part of Somalia), not being an independent state, will be precluded from joining the NYC. In any event, Somalia itself is not yet a party to the NYC.

[c] The now defunct United Arab Republic originally ratified the NYC. Egypt and Syria (two members of the defunct Republic) succeeded to the NYC: Gaja, *The New York Convention*, Part I, A.1. The NYC is 'an integral part of the Egyptian legal system, and enjoys therein a privileged position as its provisions prevail over any contradictory domestic rules': El-Kosheri, 'Egypt', 48. The 1994 Arbitration Law of Egypt applies 'without prejudice to the provisions of international Conventions applicable in the Arab Republic of Egypt' (Article 1). This provision also preserves the obligations of Egypt under the NYC: Asouzu, 'The Egyptian Law', 139.

[d] Implemented by s. 36 of the Arbitration Act 1961, which provides: '(1) This Part applies to any award made after the commencement of this Act in any reciprocating State, and to any award made in the Republic in pursuance of an arbitration agreement not governed by the Law of the Republic, and an award to which this Part applies is here referred to as a "foreign award." (2) In this section "reciprocating State" means a State declared by the President by legislative instrument to be a party to the Convention set out in the Schedule to this Act or any other State to which this Part is, by legislative instrument, applied by the President on the basis of reciprocity.' However, Ghana formally acceded to the NYC on 9 April 1968, after the enactment and commencement of the 1961 Act. In *Strojexport v. Edward Nasser & Co.* [1965] ALR Comm 493, the question was whether awards rendered in the former Czechoslovakia after the commencement of the Act but before the declaration of Czechoslovakia as a reciprocating state (declared by the President of Ghana in 1963) could be enforced under the Act. The High Court enforced the award in 1965. However, the NYC was not applied in *Jadbranska Slobodna Plovidba v. Oysa Ltd* [1978] 2 ALR Comm 108. There, the High Court refused to enforce a foreign arbitral award rendered on behalf of a Yugoslav firm against a Ghanaian company in an 'alleged arbitration' based on an arbitration agreement in a charterparty concluded before the company-award debtor was formed. Thus, under the applicable law, the court held that there was no capacity in the company to conclude the agreement, which it had not ratified after its formation.

[e] Implemented by Decree No. 1847 of 24 August 1962 Providing Publication of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[f] Implemented by Dahir No. 1-59-1039 of 1 September 1959 Providing for Ratification of a Convention Adopted by the Economic and Social Council of the UN.

[g] Implemented by the Arbitration and Conciliation Act 1988, s. 54(1), Schedule 2 and the Long Title: Asouzu, 'Legal Framework', 234–5.

Footnotes to Table 1 (*cont.*)

[h] Implemented by the Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 25 March 1977. In *Transvaal Alloys (Pty) Ltd* v. *Polysius Pty* (1983) 8 YBCA 404–5, the court denied applying the NYC on the ground that it had not been implemented. However, in *Benidai Trading Co. Ltd* v. *Gouws & Gouws (Pty) Ltd* [1977] (3) SA 1020 (T), an award rendered in London was recognised and enforced in South Africa before the latter acceded to the NYC. The court held that the parties had intended the contract to be enforceable and the award to be effective. Thus, the only option was for the appellant to apply for the award to be recognised and enforced in the court to which the respondent was amenable. It is appropriate to note that the SALC recommended in 1996 that the 1977 Act implementing the NYC should be revised, repealed and re-enacted in an International Arbitration Act: see pp. 202–3.

[i] The Tunisian 1993 Arbitration Code provides that its Chapter 3 applies to international arbitration subject to international agreements in force in Tunisia (Article 47(1)). Further regimes for the recognition and enforcement of arbitral awards are elaborated in Articles 79–82 of the Code. The provisions of Article 79 are applicable to arbitral awards rendered in international arbitration matters, in any country in the world, under the principle of reciprocity, to foreign arbitral awards: S. Kallel, 'The Tunisian Law on International Arbitration', Am Rev Int Arb 4, 1993, 233, 250–2; see p. 39.

[j] Part III, ss. 40–45, of the 2000 Arbitration and Conciliation Act of Uganda implemented the NYC, subject to the reciprocity declaration. Section 45 preserves regimes for enforcing arbitral awards notwithstanding the NYC.

[k] The Long Title to the 1996 Arbitration Act of Zimbabwe provides that the Act is, *inter alia*: 'To give effect to domestic and international arbitration agreements; to apply, with modifications, the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st June, 1985, thereby giving effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10th June 1958.'

influence of the latter is shrinking as their practical relevance increasingly diminishes. This is more so in some African states, due to the direct applicability of the OHADA regimes and the supranationality of the jurisdiction of the CCJA. The OHADA Uniform Arbitration Act applies to the enforcement of arbitral awards in the absence of pertinent international agreements.[44]

Nevertheless, increased ratification of the New York Convention by African states and its implementation in their legal orders, where necessary, will make arbitration more efficient, effective and attractive. That way, African courts could enforce valid arbitration agreements by staying competing litigations before them. Any award arising from an arbitral proceeding in any country could be enforced, subject to any reciprocity declaration entered by the enforcing Contracting State and to any defence available to the award debtor. The New York Convention's provisions are generally conducive for uniform international requirements for the recognition and enforcement of arbitration agreements and awards in Contracting States.

It has been argued that, although non-Contracting States enjoy the benefit of having awards made in their territories, subject to Article I(3) on reciprocity, enforced under the New York Convention, they cannot invoke the New York Convention in their favour against a Contracting State.[45] The latter contention may cover the rights of a non-Contracting State *vis-à-vis* a Contracting State at the inter-state level. But the New York Convention can be invoked against a non-Contracting State or a private party from such a state if the decisive consideration of having the *situs* of the arbitration in the territory of a Contracting State is present, or that the enforcing state does not demand reciprocity as a condition notwithstanding where the award was made.[46] A non-Contracting State or a private party from such a state could invoke the New York Convention against a disputing party from a Contracting State. Amongst the benefits for a non-Contracting State under the New York Convention is that state's ability to rely on it as an award creditor if the award was made in a Contracting State, or, subject to reciprocity under Article I(3), if made in a non-Contracting State.

The New York Convention can be and, indeed, has been relied upon by

[44] See p. 197 below.

[45] R. J. Graving, 'How Non-Contracting States to the "Universal" New York Arbitration Convention Enjoy Third-Party Benefits but Not Third-Party Rights', JIA 14, September 1997, 167.

[46] *Creighton Ltd* v. *Government of Qatar (Ministry of Public Works)*, US District Court, District of Columbia (1996) 21 YBCA 751; *Imbar Maritima SA and Others* v. *Republic of Congo*, Grand Court of Georgetown, Cayman Islands (1990) 15 YBCA 436.

African states to enforce arbitral awards rendered in their favour including, in some interesting instances, where the concerned states were not parties to it. Thus, as nationality is not a relevant factor for the New York Convention's application, between 1983 and 1984 the New York Convention was (ironically) relied upon by an African state, Algeria (then non-contracting), to enforce an award made on its behalf in an ICC arbitration against a private company from the US, a Contracting State.[47] The enforcement of the award on behalf of Algeria was granted by the New York court because, as the US is a Contracting State and has implemented the New York Convention in the Federal Arbitration Act,[48] that court was under a treaty obligation to apply the New York Convention 'to the recognition and enforcement of arbitral awards *made in the territory of a state other than the state where the recognition and enforcement of such awards are sought*, and arising out of differences between persons, whether physical or legal'.[49]

Also, in another case arising out of another ICC arbitration involving yet another non-contracting African state, Gabon, and its national oil company (as award creditors) and a Cayman Islands company with presence in Europe (as award debtors),[50] the issue was whether a party may take steps to enforce an arbitral award abroad even while the party against whom the award was made seeks its annulment in the court of the place where it was made. An ICC tribunal rendered an award in favour of Gabon. However, the award debtor applied to the Court of Appeal in Paris to have the award annulled on the ground that the arbitral tribunal exceeded its jurisdiction and stated inconsistent reasons in the award. The award creditors, on the other hand, moved to have the award enforced in the Cayman Islands while the application for annulment was still pending.

The Grand Court of Cayman Islands held that, under Article VI of the New York Convention,[51] it had the discretion either to grant enforcement

[47] *Shaheen Natural Resources Co. Inc.* v. *Société Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures (Sonatrach of Algeria)* (1985) 10 YBCA 540.

[48] Title 9, Chapter 2.

[49] Article I(1) (emphasis added). The US entered the reciprocity and commercial declarations pursuant to Article I(3) of the NYC. Switzerland, the country in whose territory the award was made, is also a Contracting State but without any declaration under Article I(3). One good turn deserves another. Thus, Algeria joined the NYC in 1989, entering commercial and reciprocity declarations.

[50] *Republic of Gabon* v. *Swiss Oil Corp.*, Grand Court of Cayman Islands (1989) 14 YBCA 621.

[51] Article VI of the New York Convention provides: 'If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e) [i.e. to a competent authority of the country in which, or under the law of which, that award was made], the authority before which the award is sought to be relied upon

or to adjourn its decision and that, in any event, the Cayman company's petition for annulment in France was not a ground to refuse enforcement in favour of the award creditor.[52] The Cayman Islands court finally decided to suspend its decision since the French court was due to give a decision only a few days later. The French court eventually denied the petition to annul the award. Thus, the next day, the Cayman Islands court entered an order of enforcement in favour of Gabon in the Cayman Islands.[53]

These cases are only illustrative of the possible merits the New York Convention might have if states increasingly become parties to it. An application for the recognition and enforcement of an arbitral award or agreement may, depending on the circumstances, be sought in any Contracting State. And, depending further on how the arbitral tribunal decided, that application might involve or be made by any of the parties to a dispute.[54]

Implications of the commercial and reciprocity declarations

Article I(3) of the New York Convention allows a state to enter declarations – reciprocity or commercial or both – when becoming a party:

> When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

From Table 1,[55] it can be seen that as of 12 March 2001, there were fifteen African Contracting States to the New York Convention which had made no declarations.[56] Six African Contracting States entered only one declar-

may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.'

[52] The NYC applies to the Cayman Islands and in France. Cayman Islands benefited from the notification of territorial application of the NYC made by the UK on 26 November 1980. The territorial application is, however, subject to reciprocity in conformity with the declaration made by the UK on 5 May 1980: fax messages of 4–16 December 1996 (between Amazu Asouzu and Julio A. Baez, Legal Officer, UNCITRAL).

[53] The Republic of Gabon is a party neither to the NYC nor to the Geneva Treaties.

[54] For the recognition and enforcement of arbitral awards under the ICSID Convention, see chapter 12.

[55] See pp. 188–90 above.

[56] Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Djibouti, Egypt, Ghana, Guinea, Lesotho, Mali, Mauritania, Niger, Senegal, South Africa and Zimbabwe.

ation – with respect to reciprocity.[57] On the other hand, six African Contracting States entered both reciprocity and commercial declarations.[58]

With respect to the commercial declaration, it has rightly been said:

> For a State whose legal system does not include a generally accepted definition of what constitutes a commercial matter, the application of this reservation may create some problems. Even within such legal systems, the reference to commercial matters will rarely appear as being completely devoid of meaning, and the reservation will therefore find some application.[59]

Although this does not yet seem to have arisen, it is foreseeable that, as in other jurisdictions, what is 'commercial' may constitute a problem before African courts. This is because the decision whether or not a transaction is commercial is solely on a state-by-state basis. And, national laws in Africa may be diverse.

Under the New York Convention, a state may not only enter a commercial declaration; it may also define what is 'commercial'. This may be relevant to subject matter arbitrability and public policy, and therefore the New York Convention's effective application and interpretation. For example, under the New York Convention, Contracting States are mandated to recognise an agreement in writing under which parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by

[57] Kenya, Mauritius, Morocco, Mozambique, Tanzania and Uganda. A practical effect of the 1995 Arbitration Act of Kenya may have been to undermine or neutralise the reciprocity declaration entered by Kenya to the NYC. Sections 36(1) and 37(1) of the Act provide that the High Court may recognise and enforce an award 'irrespective of the State in which it was made': see pp. 196–7 below.

[58] Algeria, Botswana, Central African Republic, Madagascar, Nigeria and Tunisia. For declarations to the Convention, see *Multilateral Treaties* website, see note 13, p. 180 above; Brown, *Arbitration Kit*, pp. 21–31.

[59] Gaja, *The New York Convention*, Part. 1, A.4. E.g. in *Indian Organic Chemical Ltd* v. *Chemtax Fibres Inc and Others* (1979) 4 YBCA 271, an Indian court held that the relationship must not only be commercial but must also be considered as commercial by virtue of a provision of law or an operative legal principle in force in India. The agreement in issue was held *prima facie* to be commercial but did not fall within the coverage of the applicable Indian law. By contrast, in *European Grain and Shipping Ltd* v. *Bombay Extractions Ltd* (1983) 8 YBCA 371, it was held that what is commercial need not be so under any particular law specifically enacted for that purpose but that transactions should be commercial if under the general law a relationship is so regarded. For further positive developments, see L. F. Ebb, 'India Responds to the Critics of its Misadventures under the New York Convention', Int Arb Rep 11, 1996, No. 3, 17; *RM Investment and Trading Co. Pv. Ltd* v. *Boeing Co. and Another* (1997) 22 YBCA 710.

arbitration (Article II(1)). A court of a Contracting State may refuse to enforce an arbitral agreement if it finds that the said agreement is 'null and void, inoperative or incapable of being performed' (Article II(3)).[60] Finally, an award may be refused recognition and enforcement if the court at the place of enforcement, on its own initiative, finds that the subject matter of the difference is incapable of settlement by arbitration or that the recognition or enforcement of the award would be contrary to the public policy of that country (Article V(2)). This might constitute a problem because no standard was set for deciding whether a dispute is arbitrable or not; and no uniform international standard of arbitrability exists.[61]

However, the effect of the commercial declaration on the New York Convention's operation in Africa has been minimal. This may be explained by several factors. First, more African states – fifteen – are parties to the New York Convention without any declarations; and fewer still – six – entered only the reciprocity declaration.[62] No African Contracting State entered only a commercial declaration, although six entered both commercial and reciprocity declarations.[63] Therefore, whatever implications the commercial declaration might have in the recognition and enforcement of foreign arbitral awards in Africa, it has, for now, relevance only in six out of fifty-three states.[64] Indeed, outside Africa, some states have withdrawn their commercial or reciprocity declarations.[65] And, in Africa, one state is reconsidering its commercial declaration.[66]

Secondly, African states are enacting arbitration laws more favourable than the New York Convention for the recognition and enforcement of arbitral awards. Due to the adoption of the Model Law in some African jurisdictions, a trend is emerging whereby, if 'commercial' is retained in

[60] An agreement in writing under the NYC includes an arbitral clause or agreement signed by the parties or contained in an exchange of letters or telegrams. This definition may not be a problem as most third generation arbitration laws in Africa especially those adopting the Model Law, recognise the agreement in writing covered by the NYC as well as the more modern methods of business communications: see pp. 141–6.

[61] Gaja, *The New York Convention*, Part 1, B.2; see p. 158 above.

[62] The effect of the 1995 Arbitration Act on Kenya's reciprocity declaration should be noted: see note 57, p. 194 below.

[63] See p. 194 above.

[64] Even amongst the six states with both commercial and reciprocity declarations, Algeria, Nigeria and Tunisia enacted adequate legal frameworks for arbitration with an elaborate basis for interpreting the NYC.

[65] E.g. Austria (reciprocity), France (commercial) and Switzerland (reciprocity).

[66] Tunisia is reportedly proposing to withdraw the commercial declaration: Malouche, 'Tunisia', 12.

an enactment, as in Nigeria and in Egypt, it is defined by means of an inexhaustive list.[67] As Nigeria, Egypt and Tunisia have each adopted the Model Law, the definition of what might be a 'commercial' transaction in these States is elaborate.[68]

The Model Law as adopted in Zimbabwe – a Contracting State to the New York Convention with no declarations – is not confined to, or limited by, any definition of 'commercial' as in the Model Law itself. The definition of 'commercial' was specifically deleted, thereby expanding subject-matter arbitrability. The Zimbabwean 1996 Arbitration Act is applicable, subject to its provisions, to any dispute that can lawfully be arbitrated.[69] Nevertheless, the attitude of African judges in practical situations might differ from country to country. But, on the whole, the problems of the 'commercial' declaration may turn out to have only an historical significance.

The same can be said of the potential problems of the 'reciprocity' declaration. In Table 1, the African states with reciprocity declarations were indicated, as were states outside and within Africa that had withdrawn or were reconsidering their reciprocity declarations.[70] However, another factor undermining the reciprocity declaration is that the Model Law, which has proved popular with states, applies notwithstanding the place in which an arbitral award was made. Thus, the implication of the reciprocity declaration to the New York Convention is being undermined or neutralised by laws of African Contracting States which are based on Articles 35 and 36 of the Model Law, for example Nigeria and Kenya (states

[67] Whereas the definition of 'commercial' is in a footnote to Article 1(1) of the Model Law, the Nigerian and Egyptian Laws incorporated those definitions or something substantially similar as substantive provisions: see pp. 154–7.

[68] The Tunisian Arbitration Code of 1993 does not (unlike the laws of Nigeria and Egypt) enumerate illustrative items of a commercial nature. However, it provides that, in a broader sense, an arbitration is international if it concerns (implicates) international business transactions: see p. 165. The above provisions could generate generous interpretations. Nigeria and Tunisia, it may be recalled, entered both the reciprocity and commercial declarations and Egypt entered no declarations to the NYC.

[69] The Act also provides for the use of the *travaux preparatoires* of the Model Law as an interpretative aid (s. 2(3)). The same is the case in Zambia under the draft Act of 1999: see p. 151, note 46. The 1998 South African draft Act not only deleted the illustrative lists of 'commercial' from the footnote of the Model Law but also referred to some UNCITRAL documents as an interpretative aid which an arbitral tribunal or a court may consult in interpreting the Chapter implementing the NYC and the Model Law (s. 8 and Schedule 2). Significantly, too, the 1995 Arbitration Act of Kenya, the 2000 Arbitration and Conciliation Act of Uganda and the 1999 Zambian draft Arbitration Act, neither define nor are confined to 'commercial' disputes: see pp. 148–9.

[70] See pp. 193–4 and 195 above.

that have entered a reciprocity declaration to the New York Convention). In the case of Nigeria, both the New York Convention as implemented by the Arbitration and Conciliation Act 1988 and the 1988 Act itself apply. Sections 51 and 52 of the 1988 Act, however, make more favourable provisions for the recognition and enforcement of arbitral awards than the New York Convention as applicable in Nigeria. Those sections are not only consistent with the New York Convention's standards but, unlike the New York Convention which is applicable in Nigeria subject to reciprocity, those sections also apply to an arbitral award irrespective of the state in which it was made.[71]

With respect to the OHADA Uniform Arbitration Act 1999, Article 34 creates a special and directly applicable regime for the recognition and enforcement of arbitral awards even in the absence of a treaty on the subject:

> Awards made on the basis of rules different from those provided by this Uniform Act shall be recognised as binding within the member States under the conditions provided by international agreements possibly applicable and, failing which, under the same condition as those provided in this Uniform Act.

It then follows from the above provision that in OHADA member states that, for instance, are yet to join the New York Convention – Chad, Comoros Island, Congo, Equatorial Guinea, Gabon, Guinea-Bissau and Togo – it is possible to recognise and enforce arbitral awards based on Article 34 of the Uniform Arbitration Act.[72]

The above notwithstanding, so many trading nations are now parties to

[71] Asouzu, 'The Adoption of the UNCITRAL Model Law in Nigeria', 194–201. Sections 36 and 37 of the 1995 Kenyan Arbitration Act have identical implications. Article VII(1) of the NYC recognises the possibility that national laws may be more favourable than the NYC for the recognition and enforcement of foreign arbitral awards. This implication was probably not taken into account when this author's view on the effect of the Kenyan provisions above was considered by Muyanja and Chomi, 'Recognition and Enforcement of International Awards in Uganda', JIA 17, 2000, No. 1, 99, 117–8, n. 168. Also, ss. 35 and 36 of the Zimbabwean Arbitration Act apply, and Articles 35 and 36 of and Schedule 1 to the draft International Arbitration Acts of South Africa 1997 and 1998, and the 1999 Zambian draft Act, First Schedule, respectively, will apply, 'irrespective of the country in which [the award] was made'. Further, it should be noted that s. 21 of the 1998 South African draft Act provides: 'Nothing in this Chapter [Chapter 3 on the NYC] affects any other right to rely on or to enforce a foreign arbitral award, including the right conferred by article 35 of the Model Law'. See also s. 45 of the Arbitration and Conciliation Act 2000 of Uganda, to a similar effect. But, because Uganda desires to preserve her reciprocity declaration, ss. 36 and 37 of the Ugandan 2000 Act, do *not* apply 'irrespective of the country in which it [the award] was made'. Zimbabwe and South Africa, it may be noted, did not enter any declarations to the NYC. [72] See p. 187.

the New York Convention – some without entering a reciprocity declaration and, in other cases, reinforcing that stance with a more favourable arbitration law – as to render any negative implications of reciprocity practically otiose.[73]

Potential problems of 'public policy'

It appears that the issues of public policy have not yet been fully considered by African courts in enforcement proceedings. It may therefore be unhelpful to speculate, although indications are positive.[74] But, as the case law based on the New York Convention increases on the continent, it is likely that the concept may be invoked in some cases; and problems are foreseen.

Public policy is a relatively fluid concept,[75] and, over time, its meaning in a particular polity might change. The concept may further be determined and restricted by extraneous factors, for example a state's level of development and its economic, legal, religious, cultural or political characteristics.[76] The diversity and divergence in national 'mores and fundamental assumptions' may make the determination of independent, internationally acceptable public policy criteria both imperative and difficult. However, the more intractable problem is in determining and

[73] As earlier indicated, although they did not enter any declarations to the NYC, the Arbitration Act of Zimbabwe and the draft International Arbitration Act of South Africa, would apply to the recognition and enforcement of an arbitral award irrespective of the state where the award was made. Significantly, of the African states that joined the NYC in the last several years – Mali, Mauritania, Mauritius, Senegal and Zimbabwe – only Mozambique and Mauritius entered the reciprocity declaration: see Table 1, pp. 188–90 above.

[74] E.g. the Supreme Court of Senegal had affirmed the substance of lower courts' decisions and upheld an award rendered against Senegal. The latter had challenged the award under the Code of Civil Procedure on public policy grounds, namely, that the state was not permitted to enter into arbitration in domestic law: *Senegal* v. *Express-Navigation*, ICSID Rev-FILJ 3, 1988, 356, with an introductory note by B. Diokhane, *ibid*. at p. 352. See also *Office National du The et du Sucre* v. *Philippines Sugar Co. Ltd*, Court of Appeal, Casablanca, (1996) 21 YBCA 627; and *Zimbabwe Electricity Supply Authority (ZESA)* v. *Genius Joel Maposa*, Judgment of the Supreme Court of Zimbabwe, Judgment No. S.C. 114/99, 21 October and 21 December 1999, *Case Law on UNCITRAL Texts*, No. 323.

[75] Nussbaum, 'Treaties on Arbitration', 235, citing A. Nussbaum, 'Public Policy and the Political Crisis in the Conflict of Laws', YLJ 49, 1940, 1027.

[76] For the observations of the Court of Appeal of New Zealand on public policy, relying on *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1984] AC 535, 533–54 *per* Lord Watson and *Cheshire, Fifoot and Furmston's Law of Contract* (11th edn, 1986), p. 345, see *CBI* v. *Badger Chiyoda* [1990] LRC (Comm) 621, 628–9, *per* Cooke P. The passage of the book cited in the judgment is retained in the 13th edition by M. P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (London: Butterworths, 1996), p. 373.

delineating the scope and content of that independent international criteria irrespective of national concepts, standards and values.[77]

In notable instances, third generation arbitration laws in Africa have, for the avoidance of doubt, enumerated what should be regarded as being in conflict with public policy for the purposes of setting aside or refusing to enforce or recognise an arbitral award.[78] This undoubtedly makes for certainty and predictability, by covering both the procedural and substantive aspects of public policy in arbitral proceedings.

The view has been advanced by some scholars and practitioners,[79] but disputed by others,[80] that what would be used to deny recognition or enforcement to an award under the public policy defence is the violation

[77] Bockstiegel, 'Public Policy and Arbitration', 178–81. Suggestions have been made for the establishment of an international court for the enforcement of international arbitral awards (and agreements) applying truly international public policy: J. Werner, 'The Trade Explosion and Some Likely Effects on International Arbitration', JIA 14, June 1997, 5, 13–15; H. M. Holtzmann, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Hunter, Marriott and Veeder (eds), *The Internationalization of International Arbitration* (London: Graham & Trotman/Martinus Nijhoff, 1995), p. 109; S. M. Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards', *ibid*. at p. 115.

[78] New sub-paragraphs were inserted in the Model Law as adopted in Zimbabwe providing for the avoidance of doubt, and without limiting the generality of the relevant applicable sub-paragraphs of the relevant Articles, that an award is in conflict with the public policy of Zimbabwe if: (a) the making of the award was induced or effected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award (Articles 34(5) and 36(3)). For variations, see the South African draft International Arbitration Act 1998, Schedule 1, Articles 34(5) and 36(3); Bermuda International Conciliation and Arbitration Act 1993, s. 27; Singapore International Arbitration Act 1994, s. 24; Australia International Arbitration Amendment Act 1989, s. 19; Maltese Arbitration Act 1996, Article 58; and India Arbitration and Conciliation Act 1996, ss. 34(2)(b)(ii); and 48(2)(b).

[79] P. Lalive, 'Transnational (or Truly International) Public Policy in Arbitration' in Sanders (gen. ed.), *ICCA Congress Series No. 3* (Deventer: Kluwer, 1987), p. 257; G. Bernini, in *Uniform Commercial Law in the 21st Century (Proceedings of the Congress of UNCITRAL, New York, 18–22 May 1992)* (1995), pp. 223, 228; A. J. van den Berg, 'Some Practical Questions Concerning the 1958 New York Convention', *ibid*. at pp. 212, 219; J Paulsson, 'The New York Convention in the International Practice: Problems of Assimilation' in *ASA Special Series No. 9*, pp. 100, 113–16; O. Chukwumerije, 'Mandatory Rules of Law in International Commercial Arbitration', RADIC 5, 1993, 561, 576–9.

[80] The concept of 'international public policy' is very controversial as to its content, scope and nature: Lalive, *ibid*.; Chukwumerije, *ibid*.; O. Sandrock, 'How Much Freedom Should an International Arbitrator Enjoy?', Am Rev Int Arb 3, 1992, 30, 54–5; M. Sornarajah, 'The Enforcement of Foreign Arbitral Awards in Singapore', MLJ 1, 1988, lxxxvi; M. Sornarajah, 'Refusal of Enforcement by Courts of Secondary Jurisdiction', *Singapore Arbitrator*, July 1995; L. M. Singhvi, 'Obstacles to the Enforcement of Awards in India' (paper presented at an International Conference on Arbitration, New Delhi, 5–7 January 1990), pp. 1, 7.

of the 'truly international public policy' of a state as distinct from its 'domestic (national) public policy'. It was said that: 'A limitation to international public policy has a consequence that the number of matters pertaining to public policy may be smaller than those prevailing in domestic situations. Consequently, local particularities will have less influence on the international arbitral process'.[81] Some third generation arbitration laws in Africa and the OHADA Treaty expressly mention 'international public policy'.[82] And courts, both within and outside Africa, have indicated that 'the notion of public policy should be construed narrowly'.[83]

The narrow interpretation and application of the public policy concept in the New York Convention has been criticised.[84] It has been said that:

> The New York Convention . . . could mitigate the potential bias inherent in international arbitration. In particular, the Convention reintroduces broader concerns of justice by empowering local courts to deny enforcement of international [foreign] arbitral awards that are rendered contrary to 'public policy'. Unfortunately, courts in many developed countries have employed an exceedingly narrow reading of 'public policy' – indeed more narrow than the interpretation of the same language in the relevant domestic context. And, courts in developing countries, when confronted with international [foreign] arbitral awards have

[81] Van den Berg, in *Uniform Commercial Law in the 21st Century*, p. 219.

[82] E.g. Djibouti Arbitration Code 1984, Articles 21(1)(d) and 24(1)(d); Algerian Arbitration Code 1993, Article 458(17); OHADA Treaty 1993, Article 25(4). However, in the Tunisian Arbitration Code of 1993, Articles 78(2) and 81(1)(b), reference was made to 'public policy according to [i.e. in the sense of] private international law'. And, in *Office National du The et du Sucre* v. *Philippines Sugar Co. Ltd* (1996) 21 YBCA 627–9, the Court of Appeal of Casablanca referred to 'the principles of international public policy, as the dispute arises under an international commercial operation which underlies the arbitral award enforced'.

[83] E.g. *Parsons and Whittemore Overseas Co. Inc.* v. *Société Generale de l' Industrie du Papier (RAKTA)* (1976) 1 YBCA 205; *Fritz Scherk* v. *Alberto-Culver Co.* (1976) 1 YBCA 203; *Deutsche Scachtbau- und Tiefbohrgesellschaft GmbH* v. *Ras Al Khaimah National Oil Co.* [1987] 2 All ER 769, 779; *Renusagar Power Co. Ltd* v. *General Electric Company* (1995) 20 YBCA 681; and *Harris Adacom Corp.* v. *Perkom Sdn Bhd* (1994) 3 Malaya LJ 504. In *ZESA* v. *Maposa*, Judgment No. SC 114/99, *Case Law on UNCITRAL Texts*, No. 323, the Supreme Court of Zimbabwe, using comparative materials, discussed the public policy concept under Article 34 of the UNCITRAL Model Law as applicable in Zimbabwe. Whilst upholding that 'public policy' must be construed narrowly, the Court held that, where an award was based on so fundamental an error, as in the instant case, that it constituted a palpable inequity that was so far-reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it should be contrary to public policy to uphold it. Although in that case, no moral turpitude attached to the conduct of the arbitrator, the arbitral award was held to be contrary to public policy and was set aside.

[84] A. Armfelt, 'Avoiding the Arbitration Trap', *Financial Times* (London), 27 October 1992, p. 20; Sornarajah, 'The Enforcement of Foreign Arbitral Awards in Singapore', lxxxvi.

often followed the lead of the developed countries by enforcing arbitral awards. This has deprived the public policy safeguard to the private arbitral process of any real meaning, and threatens the legitimate regulatory policies of both developed and developing countries. What should be a meaningful review of arbitral awards has come to resemble a rubber stamp.[85]

The basic problem that immediately faces a judge in a jurisdiction where an award may be sought to be recognised and enforced, challenged or attacked, is to determine the real content and scope of public policy of the particular country in a given situation particularly as the reference in the New York Convention and in some national laws is to the public policy of 'that country'. As things are, this may well depend on the subjective opinion of a particular judge called upon to apply and interpret the New York Convention or the relevant law as may be appropriate. Judges may take a narrow or broad approach depending on the circumstances.

Non- or defective implementation by domestic law

A few African states, especially members of the Commonwealth, are yet to implement the New York Convention, as they are expected to.[86] In those states, 'positive legislative action' is required before courts can apply the New York Convention.[87] In some cases, too, courts of some Contracting States in Africa, when faced with an application under the New York Convention (in most cases, for the first time), have refused to recognise and enforce foreign arbitral awards on the ground that the New York Convention has not been implemented by domestic legislation.[88]

A survey of laws implementing the New York Convention in member states is being carried out by UNCITRAL in co-operation with Committee D of the International Bar Association (IBA). The project aims at determining if the New York Convention is incorporated into the legal system of Contracting States in order to have the force of law; what modifications, if any, have been made by member states in the New York Convention's uniform provisions for recognition or enforcement of awards; and which requirements for obtaining the recognition or enforcement of awards not contemplated in the New York Convention have been added in national

[85] Armfelt, *ibid*. [86] Cotran and Amissah, *Arbitration in Africa*, pp. 86 and 197.

[87] I. Achebe, 'UN Arbitration Convention: Implications for Nigeria', JWTL 8, 1974, 420, 425; Patchett, *Recognition*, p. 203.

[88] *Murmansk State Steamship Line* v. *Kano Oil Millers*, Supreme Court of Nigeria (SCN), (1982) 7 YBCA 349; *Transvaal Alloys (Proprietary) Ltd* v. *Polysius (Proprietary) Ltd and Anor*, Supreme Court of Witwatersrand, South Africa, (1983) 8 YBCA 404. Cf. *Navigation Maritime Bulgare* v. *PT Nizwar (Indonesia)*, Supreme Court of Indonesia, (1986) 11 YBCA 508.

laws. The project, which does not have as its purpose the monitoring of individual court decisions applying the New York Convention (which task is adequately covered by the ICCA's *Yearbook of Commercial Arbitration* since 1976), may lead to the preparation of a guide for the enactment of the New York Convention.[89]

However, apart from the absence of implementing legislation in some states where that is necessary, it must also be realised that, amongst those cases where the New York Convention has been implemented in Africa, there may be defective implementation that might hinder its efficient and effective interpretation and application. For example, one reason the Arbitration Project Committee of the South African Law Commission (SALC) gave for recommending the repeal of the 1977 Act which implemented the New York Convention was that the Act 'contains certain defects'.[90] Amongst the 'serious defects' identified were the following:

1. the Act's definition of foreign arbitral award;[91]
2. the failure to include an equivalent of Article II of the New York Convention regarding the enforcement of arbitration agreements;[92]

[89] *Monitoring the Legislative Implementation of the 1958 New York Convention: Progress Report* (Note by Secretariat, A/CN. 9/425 of 8 May 1996); G. Herrmann, 'Implementing Legislation: The IBA/UNCITRAL Project' in *ASA Special Series No. 9* (1996), pp. 135–44; UNCITRAL, *Report of 31st Session, 1–12 June 1998* (UN, New York), paras 232–5 and 257–9. It has been suggested that on the basis of the above Project, UNCITRAL should initiate 'Guidelines on the Implementation, Interpretation and Application of the New York Convention': Kerr, 'Concord and Conflict', 141–3. Such a Guide will be highly commendable.

[90] *Discussion Paper 69*, paras 3.10–3.15. The SALC recommended that the repealed Act should be replaced by improved legislation forming part of a single consolidated statute for international commercial arbitration: *ibid*., para. 3.19. The draft International Arbitration Acts 1997 and 1998 have their purposes giving effect to the NYC, s. 1(e).

[91] The 1977 Act defines 'Foreign Arbitral Award' as 'an award (a) made outside the Republic; or (b) the enforcement of which is not permissible in terms of the Arbitration Act, 1965 . . . but is not in conflict with the provisions of this Act' (s. 1). The SALC recommended that the definition in paragraph (a) of foreign arbitral award, should be amplified so as to make it clear that it does not extend to 'stateless' awards, thus: 'Foreign arbitral award' means 'an arbitral award made in the territory of a state other than South Africa': *Discussion Paper 69*, paras 3.31–3.37. It was also recommended that paragraph (b) should be omitted from the proposed legislation as serving no useful purpose: *ibid*., paras 3.38–3.42. These recommendations were reflected in the 1998 draft International Arbitration Act, s. 16(1)(iv).

[92] This omission was said by the SALC to be 'strange'. Nevertheless, since a procedure for the stay of proceedings will be contained in Article 8 of the Model Law recommended to be adopted in South Africa, the inclusion of provisions which would duplicate Article 8 appears to the SALC to be unnecessary: *Discussion Paper 69*, paras 3.51–3.53. The 1998 draft International Arbitration Act, which in Chapter 3, refers to the 'recognition and enforcement of foreign arbitral award', contains provisions for the recognition and enforcement of 'arbitration agreements' and 'foreign arbitral awards' (s. 17(1)) as well as indicating (in s. 17(2)) that Article 8 of the Model Law shall apply *mutatis mutandis* to arbitration agreements referred to in s. 17 (1).

3. problems with the wording of section 4 regarding the grounds on which enforcement of a foreign award may be refused;[93]
4. the unsatisfactory provisions of section 2(2) on the enforcement of awards in foreign currency;[94]
5. the Act's failure to make express provision for the recognition of foreign arbitral awards as opposed to their enforcement;[95]
6. The wording of the legislation could create the impression that the grounds on which enforcement of an award may be refused are not exhaustive and that the court therefore has a general discretion to refuse enforcement;[96] and
7. the Committee identified the potential difficulties which certain provisions of the Protection of Businesses Act 99 of 1978 constitute for the enforcement of arbitral awards in South Africa.[97]

[93] Section 2(1) of the 1977 Act provides that: 'Any foreign arbitral award may, subject to the provisions of sections 3 and 4, be made an order of court by any court.' The SALC observed that the above provision creates the impression that a South African court has a discretion whether or not to recognise the award, whereas in terms of the NYC, the court is obliged to recognise an award as binding, subject to Articles IV–VI. The rewording of the provision was, accordingly, recommended: *Discussion Paper 69*, paras 3.54–3.59. The above recommendations were reflected in the drafting and wordings of the South African draft International Arbitration Act 1998, s. 18.

[94] The 1977 Act provides that where an award expressed in a foreign currency is made an order of the court under the Act, the award is to be converted into rand (the South African currency) at the exchange rate prevailing *at the time of the award*, not the date of payment (s. 2(2)). This provision, which does not have any equivalent under the NYC, was recommended for repeal as it would *inter alia* undermine the effect of an arbitral award in foreign currency where there is a substantial disparity between the date of the award and the date of payment: *Discussion Paper 69*, paras 3.75–3.76. The South African draft International Arbitration Act 1998 has no provision equivalent to s. 2(2) of the 1977 Act.

[95] It was observed that, in the Short and Long Titles of the 1977 Act, reference is only to the 'recognition' of awards as opposed to their 'enforcement' and that the body of the Act deals only with the enforcement of awards. The recommendation was that the implementing legislation should be amended to cover 'recognition or enforcement' of arbitral awards: *Discussion Paper 69*, paras 3.60–3.64. The Long and Short Titles of the 1998 South African draft International Arbitration Act refer to the recognition and enforcement of foreign arbitral awards as well as in s. 20, containing grounds on which arbitral awards shall be granted, or may be refused, recognition and enforcement.

[96] The relevant provision was recommended for amendment in order to make for uniformity with the Model Law: *Discussion Paper 69*, paras 3.66–3.69. Section 20(1) of the South African draft International Arbitration Act 1998 contains elements of exhaustiveness. And, in s. 21, nothing in Chapter 3 (on the recognition and enforcement of awards and agreements under the NYC) affects any other right to rely on or to enforce a foreign arbitral award, including the right conferred by Article 35 of the Model Law.

[97] *Discussion Paper 69*, paras 3.78–3.84. It was recommended that references to arbitral awards in the 1978 Act should be deleted and that the Act be repealed if the proposal is accepted: *ibid*. Annexure G to the 1998 South African draft International Arbitration Act contains a Bill to amend the Protection of Businesses Act No. 99 of 1978 so as to delete certain expressions. Section 1 of the 1998 Protection of Businesses Amendment Bill deleted the expression 'arbitration award/awards' where it occurs in the 1978 Act.

With respect to Nigeria, the New York Convention was implemented by the Arbitration and Conciliation Act 1988.[98] Its section 54(1), purporting to implement the two declarations Nigeria entered to the New York Convention, provides:

> Without prejudice to sections 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an *international commercial arbitration* are sought, the Convention on the Recognition and Enforcement of Foreign [Arbitral] Awards (hereafter referred to as 'the Convention') set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting State:
>
> (a) provided that such contracting State has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention;
> (b) that the Convention shall apply only to differences arising out of legal relationship which is *contractual*.[99]

Thus, subject to its provisions, section 54(1) extends to an application based on 'any award arising out of an *international commercial arbitration*' as defined in the Act.[100] 'International commercial arbitration' as a concept under the Act, is wider than 'foreign' arbitral award, as used in the New York Convention. This encouraging development, which nevertheless appears a misimplementation of the New York Convention amidst the inelegant drafting in section 54(1), has relevance with respect to the scope of application of the New York Convention in Nigeria and to the more favourable provisions of sections 51 and 52, as preserved in section 54(1).[101]

Also, restricting the scope of application of the New York Convention to differences arising only out of *contractual* legal relationship is clearly in breach of an obligation of Nigeria which requires that the New York Convention be applicable in Nigeria to differences arising out of legal relationships, 'whether contractual or not' which are considered as commercial under the laws of Nigeria.[102]

If what seems a typographical error in section 54(1)(b) becomes an issue or a problem in an enforcement proceeding in Nigeria, one would expect counsel to persuade the court to give effect to obligations undertaken by

[98] Asouzu, 'Legal Framework', 234–5.

[99] Emphasis added. Cf. Article I(3) of the NYC: see p. 193.

[100] These terms which are defined in the Arbitration and Conciliation Act 1988 are consistent with the Model Law except for the addition of when arbitration is 'international' under the former: Asouzu, 'The Adoption of the UNCITRAL Model Law in Nigeria', 194–5.

[101] Asouzu, *ibid*. at pp. 190–201.

[102] For Nigeria's Declaration, see Brown, *Arbitration Kit*, p. 25; van den Berg, *The New York Convention*, p. 415; Gaja, *The New York Convention*, Vol. 3, Part VI, at VI.7; *Multilateral Treaties* website, note 13 above.

Nigeria when it acceded to the New York Convention. The court, although bound to apply municipal law, may lift the veil of enactment to see what international arbitral obligations were undertaken and what was implemented in the Act. This is to reveal the patent ambiguity in the Act. Due consideration could be given in that instance to the fact that the New York Convention is contained in the Second Schedule to the Act.[103] Appropriate comparisons between the New York Convention in the Act's Second Schedule, Nigeria's declaration pursuant to Article I(3) of the New York Convention and its implementation by section 54(1)(b), could be made in order to reveal the inconsistency and thus to discern and fully implement Nigeria's arbitral obligation.

It should, nevertheless, be recognised that the interpretation and application by national courts of legislation implementing treaties might remain a problem area.[104] For Commonwealth countries, no doubt this may partly be due to the influence of the dualist theory of the relationship between public international law and municipal law and the status of the former in the latter system.[105] However, the situation is that most African states inherited their legal traditions from their former colonial rulers. States formerly under British colonial rule are more at home with the dualist legal theory, as is the case in the UK.[106] But African states that were under French colonial rule would generally allow the direct application of international law in their domestic spheres.[107] Judges trained in these competing legal traditions may generally be wary of detracting from time-honoured precedents. However, in most cases, knowledgeable judges, in adhering to dualism, may genuinely not treat a treaty as a law to be applied without legislative measures expressly incorporating its provisions into domestic law.[108]

[103] *Salomon* v. *Commissioners of Customs and Excise* [1967] 2 QB 116; *Canada Packers Inc.* v. *Terra Nova Tankers Inc.*, 1 MALQR 74. Cf. *Astro Vencedor Compania SA* v. *Mabanaft GmbH (The Damianos)* [1971] 2 QB 588, 595; *Kabushiki Kaisha Ameroido Nihon* v. *Drew Chemical Corp.* (1983) 8 YBCA 394; *Kaverit Steel & Crane Ltd* v. *Kone Corp.* (1994) 17 YBCA 346.

[104] Higgins, *Problems and Process*, p. 216.

[105] Higgins, *ibid*.

[106] *A-G for Canada* v. *A-G for Ontario* [1937] AC 326, 347; *Maclaine Watson* v. *DTI* [1989] 3 All ER 523, 544–5; *R* v. *Secretary of State for the Home Department, ex parte Brind and Others* [1991] 2 WLR 588; *AIICL* v. *Ceekay Traders Ltd* (1980) 1 ALR Comm 14, 30–2 and 70; *General Sani Abacha and Others* v. *Chief Gani Fawehinmi* [2000] 6 NWLR (Pt 660) 228.

[107] *Ministry of Finance* v. *Chauvineau*, 48 ILR 213; P. F. Gonidec, 'The Relationship of International Law and National Law in Africa', RADIC 10, 1998, 244.

[108] The judgment of the SCN in the *Murmansk* case, 7 YBCA 349, was delivered by Elias C. J. N. (a former Professor of Law, and later President of the ICJ). At the time the application was made, Nigeria had acceded to the NYC. The same was the case with the Court of Appeal in *AIICL* v. *Ceekay Traders Ltd* [1980] 1 ALR Comm 14, with respect to the 1952 International Convention Relating to the Arrest of Seagoing Ships, which, although acceded to, was not implemented by municipal law in Nigeria.

In any event, the implication of some constitutions and judicial pronouncements in Africa, even if still in the minority for the time being, should be taken into account in estimating the direction of developments in this area.[109] For example, the 1996 Constitution of South Africa (as amended),[110] and the 1990 Constitution of Namibia,[111] both within the general sphere of the dualist theory, expressly recognise the role of international law.[112] And it is striking that in *AIICL* v. *Ceekay*,[113] Mr Justice Uthman Mohammed JCA was of a slightly different opinion from the majority as to the applicability of the relevant treaty to the situation in question. In his view, as Nigeria was a signatory to the 1972 International Convention Relating to the Arrest of Seagoing Ships, which was in issue in that case, the Convention had a 'very strong persuasive authority' notwithstanding that it had not been passed into law.[114] For its part, Cameroon, which inherited in part both the English and the French legal traditions, has in its Constitution continued to emphasise the supremacy of international law over incompatible national law (like most other African states that inherited the French legal tradition).[115]

Some other constitutions in Africa have generally reflected this trend, whereby international law and international agreements binding upon a state are deemed part of the municipal law and to be taken into account by national courts. The implications of these developments for those African states that are or may become parties to the New York Convention and other such arbitral treaties are obvious.

[109] Gonidec, 'International and National Law', 244. [110] Sections 39(1)(b) and 231–233.
[111] Section 144. [112] Dugard, *International Law*, pp. 339–46.
[113] [1980] 1 ALR Comm. 14.
[114] *Ibid.* at p. 77. In *Gani Fawehinmi* v. *Sani Abacha and Ors* [1996] 9 NWLR (Pt 475) 710, the Court of Appeal of Nigeria, disagreeing with court below, held that the African Charter on Human and Peoples' Rights as implemented in Nigeria (cap. 10), due to its international flavour, was in a class of its own and not inferior to the Decree of the Federal Military Government. No government will be allowed to contract out by local legislation of its international obligations. The court nevertheless observed that, without enactment into national law, a treaty is not justiciable before a municipal court. On further appeal, the SCN, in a four to three decision, observed *inter alia* that a treaty concluded by Nigeria does not become binding on Nigerian courts until enacted into law by the National Assembly in accordance with s. 12(1) of the 1979 Constitution (re-enacted in s. 12(1) of the 1999 Constitution). Where a treaty, in this case the African Charter, has been incorporated into municipal law, it becomes binding, and national courts must give effect to it like all other laws falling within the judicial powers of courts: [2000] 6 NWLR (Pt. 660) 228, *per* Ogundare JSC and Uwaifo JSC.
[115] Okoye, *International Law*, pp. 21–45; Gonidec, 'International and National Law', 244. Article 45 of the 1996 Constitution of Cameroon provides: 'Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement.'

The narrow scope of arbitration legislation

Barring a few exceptions, before 1985,[116] the recognition and enforcement of foreign arbitral awards were hardly covered in most arbitration laws in Africa. The exceptions were the arbitration laws enacted during the colonial era and immediately after the attainment of independence by African states which implemented the treaties concluded by the imperial powers and, in fewer cases still, the New York Convention. Those first and second generation arbitration laws do not also deal with international arbitration, as they are mainly oriented towards domestic commercial or non-commercial disputes.[117]

Courts may decline to apply the relevant applicable arbitration legislation for the enforcement of arbitral awards.[118] For example, under the former 1914 Arbitration Ordinance of Kenya, a majority of the Court of Appeal for Eastern Africa, in *English Navigation and Trading Co.* v. *A-G (Kenya)*[119] declined to enforce an arbitral award arising out of an arbitration to which the Crown (i.e. the colonial government of Kenya) and an English company had voluntarily submitted because the award was held to be unenforceable under the Ordinance. The award creditor, it was pointed out, should have proceeded under the Petition of Rights Ordinance 1910 to enforce the award against the Crown. But an old case decided under an outdated enactment should not be used to generalise, particularly taking into consideration that the views of the majority may also have been coloured by the prevailing notion of absolute sovereign immunity in the applicable English legal system.[120]

Admittedly, some first and second generation arbitration laws in Africa

[116] 1985 was when the Model Law was created by UNCITRAL. It has influenced arbitration enactment internationally. For its influence in Africa, see chapters 4 and 5 above.

[117] The first legislation in Africa that specifically dealt with international commercial arbitration was that of Djibouti, enacted in 1984: see p. 124.

[118] Under the common law, in the absence of statutory provision in that behalf, a foreign arbitral award can be enforced by action on the fulfilment of certain conditions: G. Ezejiofor, 'Enforcement of Arbitration Awards in Nigeria', JBL, 1981, 319–23; *Edokpolor* v. *Alfred C Toepfer Inc.* [1964] 1 ALR Comm 322–8; *Murmansk State SS Line* v. *Kano Oil Millers* [1974] 3 ALR Comm 192, 195–7; *Norske Atlas Insurance Co. Ltd* v. *London General Insurance Co. Ltd* (1927) 28 Lloyd's List LR 104, 106–7.

[119] (1924–6) 10 LR Kenya 122, Sir C. Griffin CJ (Uganda), Maxwell J (Kenya) and Alexander J (Tanganyika), relying on *Grech* v. *Board of Trade* (1923) 39 TLR 630.

[120] It is also instructive that the dissenting judge (Alexander J) was of the opinion that the arbitral award ought to have been enforced against the Crown since the latter submitted to the arbitration, was bound by the Arbitration Ordinance and took part in the proceedings: (1924–6) 10 LR Kenya 122, 126–7. Kenya has since enacted the 1995 Arbitration Act based on the Model Law and joined the NYC.

implemented the 1920s Geneva Treaties. Nevertheless, the practical utility of those treaties in Africa during the colonial era and soon thereafter was limited, even if appreciated, by their implementation. The laws implementing them were hardly invoked and case law involving their interpretation and application was even rarer, if not non-existent, in most African states. When these states gained their independence, unfortunately only a few (e.g. Ghana) revised their arbitration laws to implement the more modern New York Convention, which has a superseding effect on the Geneva Treaties. Thus, before 1988, Nigeria's Supreme Court, in response to counsel's contention that the New York Convention (to which Nigeria was already a party) should be applied to enforce an award made in Moscow (in another Contracting State) against a Nigerian company, denied the enforcement partly because the then applicable Arbitration Law (the equivalent of the repealed 1914 Arbitration Act) 'does not deal with foreign awards'.[121]

The attitude of national judges may be exacerbated by the fact that the rule of procedure for the recognition and enforcement of awards depends on that of the enforcing jurisdiction based on the New York Convention's international standards.[122] Thus, if there are no suitable national laws or procedures, courts will naturally rely on the procedure for the recognition and enforcement of foreign judgments or other domestic procedures when called upon to recognise or enforce a foreign arbitral award under the New York Convention. For the latter to function effectively and more efficiently in Contracting States, there must be in place arbitration laws that are both enabling and adequate. National laws based on the Model Law would reinforce the New York Convention satisfactorily.[123] But such laws are still very few in Africa. However, the few that have adopted the Model Law are encouraging.[124]

[121] *Murmansk* case [1974] 1 ALR Comm 3–4. The holding in the latter case should rather be seen in light of the inadequacy of the 1914 Arbitration Act (under the equivalent of which the case was decided) than due to any political pressures on the court as implied by Agyemang, 'African Courts', 31. That inadequacy was rectified by the Arbitration and Conciliation Act 1988, under which arbitral awards made in London against Nigerian parties were enforced in Nigeria: *GL Kersten and Company BV* v. *ARAMCO Nigeria Limited* [1993] FHCLR 330; *Tidewater Marine International Inc. New Orleans (formerly Tidex International)* v. *Consolidated Oil Limited, Lagos* [1996] FHCLR 324.

[122] NYC, Article III.

[123] K. T. Ungar, 'The Enforcement of Arbitral Awards under the UNCITRAL's Model Law', *Columbia Journal of Transnational Law* 25, 1987, 717; Raghavan, 'New Horizon for ADR', 5; A. I. Okekeifere, 'The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria', JIA 14, September 1997, 223; Asouzu, 'The Adoption of the UNCITRAL Model Law in Nigeria', 185.

[124] The Model Law was elaborated by UNCITRAL as a practical means of minimising some problems, which the AALCC pointed out in the conflicting application and interpretation of the NYC. It was thought that the adoption of a law patterned on the Model Law would make for a greater degree of uniformity in the substantive arbitral regime in the adopting states. UNCITRAL preferred the model law approach to

Unfamiliarity with international law and general lack of information and materials

It is a well-known fact that some judges and practitioners in national courts may be unfamiliar with the details of international instruments and the international background against which most of them were concluded. Also, judges in national courts may be divided on the practical utility of international law in the domestic sphere as well as on the extent of that law's applicability in that sphere.[125] It does happen that, if an application is made under an international instrument that stipulates a special procedure for its purposes, some national judges apply a comparable but entirely different procedure devised for domestic purposes with which, understandably, they are more familiar. This partly explains the stance of some courts when the New York Convention came before them for the first time.[126]

The unfamiliarity of some judges and practitioners with international instruments such as the New York Convention may be particularly acute in the African setting where judges, academics and research institutions might generally lack critical information and materials pertinent to the New York Convention and the international legal order. A developed and efficient judicial system, regular cases arising under the New York Convention, information on cases applying and interpreting the New York Convention and approximating its provisions in different jurisdictions are indispensable for a maximum utilisation of the New York Convention in an African (as in any) setting. This could be coupled with the teaching of arbitration and the ADR processes to students in universities, and to judges, legal practitioners and civil servants as part of continuing legal education.[127]

annexing a protocol to the NYC as the AALCC had recommended: A. A. Asouzu, *African States and International Commercial Arbitration: Practice, Participation and Institutional Development* (PhD Thesis, LSE, London, 1996), pp. 184–91. [125] Higgins, *Problems and Process*, pp. 206–7.

[126] El-Kosheri, 'Egypt', 48.

[127] In those respects, the *ICCA Yearbook of Commercial Arbitration* (published annually since 1976), which publishes, among other materials, extracts of national decisions on the NYC, and Giorgio Gaja's collections of materials relating to the negotiation, formulation and application of the NYC, are highly commendable. Whether various national judicial departments or academic institutions in Africa will regard these materials as a priority is a different question. But it has been said that: 'Unless university library budgets increase and the foreign exchange rates improve, the difficulty of gaining access to international law materials from abroad is likely to worsen. More local writing in the field would be helpful': K. Ferguson-Brown, 'Teaching Public International Law in South Africa', CILJSA 27, 1994, 52, 56. Also, in Africa, as on other continents, arbitration reform and development may not necessarily be on the priority list of politicians and policy-makers without extra pressures from interested national and international bodies.

Recognition and enforcement of foreign arbitral awards and agreements will also be facilitated in the context of the Asian–African Legal Consultative Committee (AALCC) dispute resolution scheme, which lays emphasis on the regional development of the arbitral process and institutions in developing states. Inter-institutional co-operation and exchange of information would make the pertinent procedures and information on recognition and enforcement of awards in different jurisdictions easily available to interested parties, their advisers and, most importantly, to courts in arguments presented before them.[128] Thus, the appreciation of the arbitral process and the perception of judges and legal practitioners of its nature and essence would gradually but positively change. The largely unfounded view that courts in developing states may be unsympathetic to international commercial arbitration and foreign arbitral awards may then become less prevalent.[129]

Concluding remarks

The recognition and enforcement of arbitral awards are vital aspects in the arbitral process. Thus, for a continent that desires a greater use and development of the arbitral process, there should exist at the national level adequate and enabling legal and extra-legal structures necessary for a smooth and efficient recognition and enforcement of arbitral awards and agreements. The easy recognition and enforcement of arbitral awards or agreements in Africa under the New York Convention and national laws suggest that appropriate measures should be taken to ameliorate, if not eliminate, the identified problems and obstacles that might hinder their effectiveness. This would produce a more positive attitude to the arbitral process in Africa and will inspire confidence. The New York Convention's practical efficacy will encourage commercial parties in Africa to appreciate the need generally to arbitrate instead of litigate especially in light of the other advantages of using the arbitral process in Africa.[130] Thus, due to these potentialities, the ratification of the New York Convention by African states and its implementation where necessary, would give international traders and investors more security and confidence in the commercial environment on the continent. This, if coupled with a greater publicity and knowledge of the New York Convention and its practical

[128] See pp. 96–104.
[129] Cf. M'baye, 'Commentary', 295; Paulsson, 'Third World Participation', 50, n. 80.
[130] See pp. 27–50.

utility, would go a long way towards ensuring the fullest realisation of its potential in Africa and beyond. This will ultimately facilitate and enhance commercial activities, thereby contributing to economic development and prosperity.

In summary, international arbitration should be available in all African states. It should be understood that this still permits African courts to refuse recognition or enforcement to arbitral awards as envisaged in the New York Convention. It would, most importantly, also allow for the effective recognition and enforcement of valid and well-founded arbitral awards. However, in some situations, enforcing an arbitral award that had been set aside where it was made may undermine the New York Convention and discredit the arbitral process. Equally, the absence of a mandatory setting aside procedure in a Contracting State's national law may have a comparable implication for the New York Convention.

The following Part of this book will deal with the participation of African states in the ICSID system and the practices relating thereto.

PART 4 · ICSID ARBITRATION AND CONCILIATION: THE AFRICAN EXPERIENCE

7 African states and the making of the ICSID Convention

General overview

The ICSID Convention[1] is an ingenious and a dynamic document founded on pragmatic and realistic compromises. It establishes the International Centre for Settlement of Investment Disputes (ICSID or the Centre) and contains innovative investor-protection provisions unknown or not fully developed in customary international law. The Convention appears to have met the expectations of foreign investors and host and home states, judging by the number of ratifications, the degree of its use by investors and the references to it in dispute resolution provisions in investment laws, treaties and instruments.[2]

The membership of the Convention is increasing and is geographically widespread, and encompasses states of various ideological orientations and at different stages of economic development.[3] Also, the number of investment disputes submitted to the Centre is on the rise. After the registration, in 1972, of the first case under the Convention,[4] other cases were

[1] Done at Washington DC, 18 March 1965, 1 ICSID Reports 3. Entered into force on 14 October 1966.

[2] A. R. Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment', ICSID Rev-FILJ 12, 1997, 287; see chapter 10 below.

[3] As of 21 September 2000, the total number of signatories of, and Contracting States to, the Convention stood, respectively, at 148 and 133 states; 42 out of 53 African states have signed and ratified the ICSID Convention whilst four African states have only signed: see www.worldbank.org/icsid/constate/c-states-en.htm. More Contracting States are therefore expected from Africa. The African states that have only signed or that have neither signed nor ratified the Convention will be identified in chapter 9, p. 268 below.

[4] It is remarkable that the first case to be submitted to the Centre involved Morocco, a state in Africa.

submitted to the Centre and have been greatly increasing since the 1990s. The latter development could be explained for the most part by:

1. an increasing awareness internationally of the value of arbitration and ADR methods;
2. a greater knowledge by states, investors and their advisers of the existence and practical utility of the Convention engendered by the intense and uncompromising promotional activities by the ICSID Secretariat and supporters; and
3. the rise in bilateral and multilateral trade and investment treaties and investment laws bearing references to ICSID proceedings which have been resorted to by investors in such proceedings.[5]

In addition to the above developments, there has been the publication since 1993 of the *ICSID Reports* as well as the launching in 1999 of the ICSID website at www.worldbank.org/icsid/. These factors, including learned commentaries on, and decisions rendered under, the Convention, reinforce its practical importance and relevance.[6]

Some ICSID awards are now published or are in the public domain.[7] The Convention's jurisprudence is developing; there is emerging distinct investment protection jurisprudence from a Convention that was not conceived to establish substantive law on foreign investment. Certain standards in the legal relationship between host states and foreign investors (mainly transnational corporations) are being clarified. There are, however, areas where further clarification is needed.[8]

As a practical matter, consensus appears to be emerging in Africa as to the use of arbitration for the settlement of investment disputes. If nothing else, African states have, through their membership, offered the initial opportunity for testing the practical utility and effectiveness of the Convention. It is significant that many arbitral awards and court

[5] See chapters 9–11 below.

[6] C. Schreuer, 'Commentary on the ICSID Convention: Articles 41–44', ICSID Rev-FILJ 12, 1997, 365, 472, para. 117.

[7] A convenient source for ICSID cases and materials are the ICSID Reports published by Cambridge University Press: see A. A. Asouzu, (1998) LMCLQ 299–310, for a review.

[8] As of 15 February 2001, seventy-one cases had been registered under the Convention. This is made up of sixty-eight arbitrations and three conciliations: thirty-four out of the seventy-one cases involved African states (i.e. thirty-two arbitrations and two conciliations). And, as of 27 September 2000, nine cases had been registered with the Centre under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Procedures 1979, 1 ICSID Reports 217. Those cases, although they appear on the list of cases with the ICSID Secretariat, fall outside the Convention and are not taken into account in the above calculation of cases submitted under the Convention: List of Concluded and Pending ICSID Cases, www.worldbank.org/icsid.

decisions rendered so far in connection with the Convention's proceedings involved African states. Unfortunately, no court in Africa has, as at the time of writing, had the opportunity of rendering an explicit decision with respect to any aspect of the Convention envisaging the involvement of the courts of Contracting States.[9] Nor have many ICSID proceedings been held in African cities.[10] These are equally significant in view of the number of African states that are parties to the Convention and its proceedings.

African states are not proactive in that they are mainly respondents in ICSID proceedings.[11] This may partly be explained by the fact that, in Africa, the state is a prominent participant as well as the supervisor and regulator of some economic activities, particularly foreign direct investments (FDI). Most African states are still predominantly hosts to such investments. And, due to the volatility of their economies, occasions for conflict with foreign investors may be common. In a situation where an investor has wronged a state, the latter may prefer and be satisfied with pursuing remedies in its sphere rather than initiating arbitral proceedings that would, in most cases, be held outside its jurisdiction, entailing the expenditure of substantial foreign exchange and other inconveniences.

A majority of disputes between states and foreign investors are amicably settled by negotiation, or by judicial and administrative procedures, in host states. But an investor that suffers a major wrong from a state or its instrumentality would rather opt for a delocalised and neutral forum for the resolution of any dispute. It is only the major disputes which could not be settled internally, or which it may be prudent to take out of a state's jurisdiction, that are normally resolved or settled by alternative means in the international fora. And this is dependent on there being a clause providing for ADR in the investment contract. However, emerging ICSID jurisprudence indicates that, in some cases, there need not necessarily be a distinct arbitration clause or agreement between a state and a particular investor for the Centre to be seised of a dispute, provided the state has given written consent to submit to ICSID.[12] Once an investor initiates proceedings under a valid arbitration clause, or pursuant to an instrument indicating a state's written consent, a state may defend those proceedings. But its failure to appear, co-operate or participate may, *prima facie*, not

[9] See chapter 12 below. [10] See p. 102.

[11] The only exception so far (when an African state is a claimant in an ICSID proceeding) was in *Gabon* v. *Société Serete SA*, registered on 5 October 1976: see p. 248.

[12] See chapters 10 and 11 below.

have any disruptive effect on proceedings, which may nevertheless yield a valid and enforceable award.[13]

It may be interesting to consider why, despite the acclaimed policy purpose of the ICSID Convention or, rather, the purported positive effect of its ratification, Africa, with many members, is not only the poorest continent, but also the one that receives least new FDI. This will lead to a re-examination of the real purpose of the Convention, which, arguably, has been misunderstood by some writers or policy-makers. But, before going into these issues, it will be useful to review the background to the establishment of ICSID, its avowed purpose and the extent of participation by African states during the Convention's elaboration.

The establishment of ICSID

Background

The ICSID Convention was a brainchild of the World Bank.[14] The establishment of the Centre, which started early in the 1960s, was partly as a result of the experience and difficulties encountered by the World Bank in the settlement of major investment disputes in the 1950s resulting out of incidents of nationalisation.[15] Before the elaboration of the Convention, however, some foreign investors successfully secured the insertion of arbitration clauses into their concession agreements with governments, especially in the natural resource sector. In most cases, the pitfalls of such *ad hoc* arrangements were so apparent as to make the resultant outcome look biased or ineffective to the parties concerned.[16] Unilateral withdrawals or an inability to participate in arbitral proceedings were common.[17] Attempts to secure the enforcement of arbitral awards were exacting in

[13] ICSID Convention, Article 45 and Arbitration Rules, Rule 42; *LETCO* Arbitration, 2 ICSID Reports 343; *Kaiser Bauxite Co.* v. *Jamaica*, 1 ICSID Reports 269; C. Schreuer, 'Commentary on the ICSID Convention: Articles 45–49', ICSID Rev-FILJ 13, 1998, 150–82.

[14] Mr Aron Broches (1914–97), an employee of the World Bank for many years, was reputed to be 'one of the fathers of the World Bank . . . and the father of ICSID', *News from ICSID* 14, 1997, No. 2, 3.

[15] Excerpt from Address by President Eugene R. Black to the Annual Meeting of the Board of Governors, Vienna, 19 September 1961 (Doc. 2) in *ICSID: The History of the Convention*, Vol. 2, Part 1 (1968), pp. 3–4.

[16] C. Vuylsteke, 'Foreign Investment Protection and ICSID Arbitration', Georgia JICL 42, 1974, 343.

[17] E.g. *Lena Goldfields Ltd* v. *Soviet Government*, Cornell LQ 36, 1950, 42; *Société Europeenne d'Etudes et d'Enterprises* v. *Yugoslavia*, Award of 2 July 1956, 24 ILR 761.

some cases, given their duration, the attitude of the parties and the complexities of the issues.[18]

The frustrations and uncertainties of such (failed) attempts, in most cases, led some private parties to seek the diplomatic protection of their home states. However, the political and discretionary nature of that remedy was perceived as ineffective to secure protection for a foreign investor in its host state. Nor were some substantive international decisions any more encouraging as capital-exporting states resorted to international litigation and to the mediation of international institutions in their attempts to espouse the claims of their nationals, at times to no avail.[19] Means were therefore explored to give the foreign investor the ability to proceed in its own name directly against its host state before a neutral international body. Hence, the establishment of the Centre by the 1965 Convention to improve the international investment climate.[20]

The primary purpose of the Centre is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States (Article I(2)).[21] The Centre itself neither settles nor resolves investment disputes. It only facilitates the voluntary settlement or resolution of investment disputes between Contracting States and private parties (nationals of other Contracting States) by arbitrators or conciliators appointed by the parties or on their behalf in accordance with the Convention and the applicable Rules.

The establishment of the Centre at the initiative of, and its link with, the World Bank has been seen as intricately linked with a special mandate of the Bank which would help 'to inspire confidence in the institution [the Centre]'.[22] But misgivings were also expressed during the deliberations of the Executive Directors of the World Bank with regard to the appropriateness of the World Bank setting up a mechanism for the resolution of investment disputes between the state and a private party.[23] As will be observed later in this book, from subsequent developments, these misgivings, which were also expressed in other fora during the elaboration of the

[18] For the drawn-out attempts to enforce the SEEE award, see Tribunal de grande instance of Paris, 6 July 1970, 65 ILR 46; G. R. Delaume, 'SEEE v. Yugoslavia: Epitaph or Interlude', JIA 4, 1987, No. 3, 25.

[19] E.g. *Anglo-Iranian Oil Co.* case, ICJ Reports 1952, p. 93; *Barcelona Traction, Light and Power Co. Ltd* case (*Belgium* v. *Spain*), ICJ Reports 1970, p. 3; *History of the Convention*, p. 2.

[20] 'Twenty Years of ICSID', *News from ICSID* 4, 1987, No. 1, p. 4; Vuylsteke, 'Investment Protection', 343.

[21] This purpose is relevant in appreciating Article 25(2)(b) of the Convention: see chapter 9, pp. 271–305 below.

[22] *History of the Convention*, p. 5, para. 3 (Doc. 3).

[23] See *ibid*., Docs 18–20, for a fuller debate amongst the Executive Directors.

Convention (e.g. in the Latin American and, to some extent, in the African Regional Consultative Meetings), may appear not to be entirely misplaced especially with respect to the appropriateness of the Convention for disputes involving African states.[24]

During the deliberations of the Executive Directors, questions were raised about the impartiality of a dispute settlement institution sponsored by, and affiliated with, the World Bank.[25] It was indicated that the Bank's lending activities will not compromise its impartiality and that the administrative organs of the proposed Centre – whose staff, it was then proposed, would be drawn from the World Bank and the Permanent Court of Arbitration – would not engage in conciliation or arbitration.[26] Another issue raised was with respect to the jurisdiction of the proposed Centre to resolve disputes between states and foreign investors in relation to the local remedy rule. It was said that '[n]ormally, disputes between a government and a foreign investor were dealt with first in the national courts'.[27] It was thought very unlikely that legislatures in Latin America would be willing to give general authorisation to submit those disputes to arbitration. It was further noted that the usual parties to the arbitration of investment disputes are the host government and the foreign government, the latter of which is subrogated to the rights of an indemnified investor under an investment guarantee agreement.[28] But it was conceded that broad legislative approval may not always be forthcoming to enable the executive to arbitrate; '[h]owever, the draft document', it was indicated, 'did not contemplate that that type of authorization would be given, and the absence of a blanket authorization would not defeat the purpose of the Convention'.[29] A view was also expressed that the proposal would be unnecessary duplication and that 'it was undesirable for the Bank to engage in an activity so far removed from the business of making loans'.[30]

Further points made by some Executive Directors against the Bank's sponsorship of the Centre were that the Bank's policy was biased in favour of private enterprises, which were believed to be the sole engine of

[24] The possibility of a conflict of interest and duty in the association of ICSID and the World Bank will be considered below: see pp. 338–40.

[25] *History of the Convention*, p. 8, para. 14 (Doc. 4). [26] *Ibid*., para. 15.

[27] *Ibid*., para. 6 (Doc. 14). [28] *Ibid*. [29] *Ibid*., para. 7 (Mr Broches).

[30] *Ibid*., para. 46. Cf. the views of Mr Machado, *ibid*., para. 47. During the Consultative Meetings of Legal Experts in Africa in 1963, Mr Broches, who was the Chairman of the Meeting, admitted that the proposal does not 'fall directly within its [the World Bank's] sphere of activity', but that the Bank took the initiative because it was a development institution and not just a financing mechanism (*ibid*. at p. 240).

economic development. It was pointed out that the disputes to be settled by the Centre would mainly involve those enterprises and states whose economic problems the Bank deals with. Thus, there may be a conflict of interest and duty especially at the pre-judicial stages of proceedings brought before the Centre.[31]

Those misgivings were strongly challenged by Mr Broches, the Chairman of the Consultative Meeting, on grounds that the World Bank was noted for its impartiality and neutrality and trusted by governments. The proposed Centre, it was argued, would only be an administrative organ and needed the Bank's prestige and reputation for impartiality to succeed. It was further said that conciliators or arbitrators appointed by the parties or, in their default, by the President of the Bank, would make decisions of a solely judicial nature.[32]

The participation of African states

At the time ICSID was established, most African states were independent.[33] Thus, the accusation often made against some rules of international law that developed and consolidated when African states were not yet regarded as members of the international community, may not properly be raised against the making of the Convention. As a draft, the ICSID Convention received wider deliberations and consultations.[34]

The initial positive attitude and interest shown by African states to the draft Convention enabled the Convention to enter into force soon after it was opened for signature.[35] For example, the first state to sign the Convention was African.[36] Again, an African state was the first to ratify the Convention.[37] This was in addition to other African states that signed or

[31] Cf.: 'To highlight the capitalist ideology of the [World] Bank is not to engage in explicit or implicit criticism of the institution. The Bank has never pretended to be anything other than a capitalist enterprise with a commitment to free trade, the optimization of investment flow and the support of free trade': M. Williams, *International Economic Organisations and the Third World* (New York: Harvester Wheatsheaf, 1994), p. 111.

[32] *History of the Convention*, p. 240. But, despite these explanations, some views were still expressed that the link between the Bank and the Centre was not altogether appropriate.

[33] This is a contrasting point between the ICSID Convention and other multilateral treaties on international (commercial) arbitration elaborated when many African states were yet to attain independence.

[34] Four Regional Consultative Meetings of Legal Experts were held in Africa (Addis Ababa, 1963), South America (Santiago de Chile, 1964), Europe (Geneva, 1964) and Asia (Bangkok, 1964): *History of the Convention*, pp. 184–553; *News from ICSID* 4, 1987, No. 1, 4–5.

[35] The Convention was finalised in 1964 and opened for signature on 18 March 1965.

[36] Tunisia (5 May 1965). [37] Nigeria (23 August 1965).

ratified the Convention before it entered into force in 1966. As Rosalyn Higgins confirmed in 1965: 'The draft [ICSID Convention] . . . received the support of many African states, especially Nigeria, who feel that it gives them a basis for proceedings against the excesses of private contractors'.[38] But it remains to be seen whether the belief by these states is well founded, at least judging from the turn of events four decades since the Convention was elaborated. Also, in international negotiations, mere general participation does not necessarily connote the exertion of influence on the part of negotiators enough to impact on the substantive contents of the negotiating draft as such.[39]

Nevertheless, at the Regional Meeting at Addis Ababa, twenty-nine out of the thirty-two invited African states participated and were represented by fifty distinguished delegates.[40] The general remarks of participants on the preliminary draft of the Convention were generally positive. They supported the principle embodied in the Convention and the purpose it was meant to achieve.[41] In the report to the Executive Directors of the World

[38] R. Higgins, *Conflict of Interests: International Law in a Divided World* (London: Bodley Head, 1965), p. 71. See also ICSID 'The ICSID Convention and Africa' (paper submitted by the ICSID Secretariat to the Workshop on International Arbitration: Practice and Procedure, Abuja, Nigeria, 19–23 November 1990), pp. 10–12.

[39] This is especially so where deliberations are based on a prepared draft that is closely monitored. This, understandably, would, to some extent, confine the influence of the participating states to the substantive contents of the final text. There may also be questions of the qualification and suitability of the representative of particular states in negotiations.

[40] The African states not represented were Algeria and Mauritania. Gabon sent a message to indicate that it agreed with the text of the draft Convention as it stood and, accordingly, did not think it necessary to send any delegate to the Meetings: *History of the Convention*, p. 296. African states that participated in the Meeting were: Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Dahomey, Ethiopia, Ghana, Guinea, Ivory Coast, Liberia, Libya, Malagasy Republic, Mali, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanganyika, Togo, Tunisia, Uganda, United Arab Republic (defunct Union of Egypt and Syria), Upper Volta and 'Organisation africaine et malgache de coopération économique (OAMCE) States: *ibid*. at pp. 296, 236–8. Of these states, only Ethiopia (signed in 1965) and Libya are not yet parties to the ICSID Convention. South Africa (not yet a party to the Convention) participated in the European Regional Consultative Meeting. However, the SALC had recommended that South Africa should ratify the Convention: 1998 draft International Arbitration Act, s. 1(e), chapter 4 and Schedule 4; see pp. 134–5.

[41] E.g. Mr Abdoullaye (Guinea) said: 'economic development could not be achieved without capital and . . . the developing countries would not obtain capital unless they provided adequate guarantees. Investment Codes had been promulgated by many countries, but capital required more solid guarantees. There was therefore an urgent need for an international agreement such as that proposed by the [World] Bank': see *History of the Convention*, p. 244, and the views of the United Arab Republic, Ghana, Dahomey, Malagasy Republic: *ibid*. at pp. 244–6.

Bank after a Meeting regarded as 'very successful',[42] Mr Broches said of his experience in Africa: 'I had expected a good and sympathetic discussion, but it was more constructive and more helpful and encouraging than I had dared to expect'.[43] During the Regional Meeting, the representative of Ethiopia (Mr Lemma) observed:

> [I]n principle Ethiopia favoured establishment of an international Conciliation and Arbitration Center. Ethiopian Courts were empowered to hear cases against Government Ministries and Departments, but however independent the court, the investor would always regard them as the instrument of the State. On the other hand, States might be reluctant to take action against investors because of the unfavourable impression such action might make on others. The proposed Center would therefore be of value in improving relations between investors and Governments. The draft Convention had been well prepared and avoided interference with the legal system of States.[44]

The representative of Congo Brazzaville (Mr Bouiti) noted that the draft Convention was 'a valuable basis for discussion' but reserved his position on other aspects.[45] A distinction was also made in the types of dispute that would be submitted to the proposed Centre. The representative of Cameroon (Mr Mpanjo) was of the view that disputes in the domain of foreign investment could be of two kinds: those arising in connection with the acquisition or expropriation; and those relating to possible indemnity. It was suggested that '[t]hose problems and the procedure to be adopted in settling them would have to be dealt with if full satisfaction were to be given to potential foreign investors'.[46]

Mr Benani (Morocco) felt that the basic principles embodied in the draft Convention were already included in Moroccan legislation and that the juridical status of the proposed Centre was 'too vague'.[47] He wondered whether it was intended that the Centre should be dependent on the World Bank or an autonomous institution created by the private investors and Contracting States concerned under the aegis of the World Bank or a new independent international body.[48] He would like a true balance to be established between the respective responsibilities of private investors

[42] *Ibid*. at p. 295. [43] *Ibid*. at p. 298. [44] *Ibid*. at p. 243; see p. 337.

[45] *Ibid*. at p. 246.

[46] *Ibid*. at pp. 245–6. The representative of Tunisia who insisted that the type of dispute to be submitted to the Centre should be defined from the outset supported this view. He noted that a legitimate expropriation by a government in the public interest has two parts: the expropriation and compensation. Thus, '[n]o state should be attacked for expropriation in the public interest and therefore such cases should not be submitted to the Center. In such a case, the only question that could be submitted to the Center was the adequacy of compensation': *ibid*. at p. 259. [47] *Ibid*. at p. 246. [48] *Ibid*.

and Contracting States. 'Since States would be required to make a voluntary sacrifice of certain of their sovereign rights', it was asked 'whether the World Bank could not be more closely connected with the Center'.[49]

During the discussion of the details of the draft Convention at the African Consultative Meeting, questions relating to the Centre's connections with the World Bank were also raised. It was observed that, whilst the connection of the Centre with the Bank would add to the former's prestige, the intention was nonetheless to create an independent body and it might be desirable to make the seat of the Centre transferable to another location. The fears were allayed.[50] It was said that making separate provision for the possible removal of the seat of the Centre might not be legally elegant in view of its connection with the Bank. Moreover, the connection with the Bank would not endanger the impartiality of the Centre.[51]

Dr Elias (Nigeria) indicated that, given the importance of the position, the Secretary-General of the Centre should be an independent full-time employee of the Centre from the start. If the post must be drawn from the World Bank or the Permanent Court of Arbitration, it was thought that it should be clearly understood that it would be on a very temporary basis.[52] The legal expert from Dahomey (Mr Kpognon) suggested that for the sake of economy and convenience, the position of the Secretary-General should be filled by an employee of the Bank.[53] Nevertheless, the overwhelming view was that the post should be completely independent from both the Bank and its President.[54] It was argued that '[s]ince the Chairman [of the Administrative Council] was also President of the [World] Bank it was obvious that the office of Secretary-General, and also that of the Deputy Secretary-General should be incompatible with any other employment, even employment in the Bank'.[55] The representative of Ethiopia suggested that '[i]n view of the importance for the prestige of the Centre of having a

[49] *Ibid*.

[50] *Ibid*., p. 248. The representative of Sierra Leone said that, although the link between the Bank and the Centre may enhance the latter's prestige, some countries may wish not to include the arbitration clause of the Centre due to the preponderant position of the Chairman of the Administrative Council, who is also the President of the World Bank, in the functioning of the Centre. It was suggested that some of the functions of the Chairman of the Council be transferred to some other person or body. The Chairman of the Meeting (Mr Broches) indicated that the draft Convention was drawn upon the assumption that the link with the World Bank was considered beneficial and that the President of the Bank was recognised to be a suitable person for the functions vested in him. It was also pointed out that the functions of the Chairman were not such as could influence proceedings under the auspices of the Centre (*ibid*.). [51] *Ibid*. [52] *Ibid*. at p. 251.

[53] *Ibid*. [54] *Ibid*. at pp. 251–2. [55] *Ibid*. at p. 252, per Mr Mpanjo (Cameroon).

completely independent Secretary-General and Deputy Secretary-General, the incompatibility referred to . . . should be extended to cover financial interests that might also be incompatible with those offices'.[56] It was further said that 'it would be preferable not to require the concurrence of the Chairman [of the Administrative Council] in deciding whether any particular occupation or employment was compatible with the office of the Secretary-General. Such a requirement would give a veto power to the Chairman over the Administrative Council'.[57]

The Convention leaves most of these questions open or, at the very best, flexible. It only provides that the Secretariat of the Centre shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff (Article 9). The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon nomination of the Chairman of the Council for a term of service not exceeding six years and shall be eligible for re-election.[58] After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.[59] The above offices shall be incompatible with the exercise of any political function. Neither may a holder of any of those offices hold any other employment or engage in any other occupation except with the approval of the Administrative Council.[60]

Although the World Bank and ICSID are mutually independent international institutions, their close nexus, some aspects of which are determined by the establishing Convention of ICSID, is remarkable. For example, the (limited) staff of the Centre may be in full or part-time employment of the World Bank, or on secondment.[61] The Centre's

[56] *Ibid*. at p. 252. [57] *Ibid*. at p. 253.

[58] A Deputy Secretary-General of ICSID was only elected on 30 September 1999. The first occupant of the office, Mr Antonio Parra, was previously the Legal Adviser of ICSID, ICSID: News Release, 15 October 1999. Before then, no Deputy Secretary-General was elected: A. Broches, 'ICSID Convention 1965' 18 YBCA (1993) 627, 634, para. 9.

[59] The Administrative Council is composed of one representative for each Contracting State (normally a member of the World Bank's Board of Governors) and with one vote. Decision in the Council is, except as provided, by a majority. A majority also forms the quorum for any meeting: ICSID Convention, Articles 4 and 7.

[60] ICSID Convention, Article 10(1) and (2). The Administrative Council determines the conditions of service of the Secretary-General and of any Deputy Secretary-General (*ibid.*, Article 6(1)(e)). The Council also approves arrangements with the Bank for the use of the Bank's administrative facilities and services (*ibid*., Article 6(1)(d)).

[61] The Secretary-General shall appoint the members of the staff of the Centre. Appointments may be made directly or by secondment: the Administrative and Financial Regulations, Regulation 10. The conditions of service of the members of staff of the Centre are the same as the staff of the Bank and the Secretary-General makes

Secretary-General, from time to time, doubles as the General Counsel, a (Senior) Vice-President and or an Executive Director of the World Bank.[62] All previous Secretaries-General of ICSID were staff of the Bank.[63] ICSID and the World Bank share the same office building in Washington DC.[64] In addition to making the office accommodation available to ICSID without any charge – provided the seat of the Centre remains at the Bank's headquarters – the Bank contributes to the administrative costs of ICSID.[65] And the Chairman of the Administrative Council (i.e. the President of the World Bank) carries out most of its functions under the Convention, e.g. designating ten qualified persons to each of the Panels of Arbitrators and Conciliators, appointing arbitrators or conciliators when there is default, and appointing members of the *ad hoc* committee in case of a request for annulment, on the recommendation of, or through, the Secretary-General of ICSID.

The institutional and personnel links between ICSID and the World Bank are indeed advantageous.[66] However, they may also be controversial in a changing world. The connections between both institutions render

Footnote 61 (*cont.*)
arrangement with the Bank within the framework of the general administrative arrangement approved by the Administrative Council, for the participation of the members of the ICSID Secretariat in the Staff Retirement Plan of the Bank and in other facilities and contractual arrangements established for the benefit of the Bank's staff: the Administrative and Financial Regulations, Regulation 11, 1 ICSID Reports 39.

[62] Mr Shihata retired as ICSID's Secretary-General in July 2000.

[63] Mr Tung, the successor of Mr Shihata as ICSID's Secretary-General in July 2000, was, before his election as such, a partner in the international law firm of O'Melveny & Myers, New York. Earlier in December 1999, he was appointed Vice-President and General Counsel of the World Bank. It has been indicated that the relevant Council Resolutions electing each of the Secretaries-General of ICSID so far – always a General Counsel of the World Bank at the time of his election – approved their continued employment by the Bank with the proviso that while so employed they receive no remuneration from the Centre: Broches, 'ICSID Convention', 635, para. 11.

[64] According to Article 2 of the Convention, the seat of ICSID shall be the principal office of the World Bank. The seat may be moved to another place by decision of the Administrative Council by a majority of two-thirds of its members. The principal office of the World Bank is 1818 H Street NW, Washington DC 20433, USA. ICSID shares that address, and the website earlier indicated, with the World Bank.

[65] It should nevertheless be noted that under Article 17 of the Convention if the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

[66] Shihata, *The World Bank in a Changing World*, Vol. 2, pp. 433–5.

the separate international personality concept an elaborate fiction.[67] The separate juridical personality of ICSID and the Bank neatly coincides in closeness with the distinction between 'Mr Aron Salomon' and 'Aron Salomon and Company Limited'.[68] And, apart from any question of conflict of interests and duties, it is doubtful, looking at the nature of the duties and responsibilities of the Bank's General Counsel doubling as its Vice-President, if the incumbent would have all the time and attention to devote to matters concerning ICSID especially now that the Centre has become busy – a problem which would no doubt become worse in future. Any permitted and specific delegation of authority by or on behalf of the Secretary-General to other staff of the Centre (e.g. to the Deputy) may, indeed, be practically permanent.[69] The point is that a busy, expanding and reformed ICSID deserves a Secretary-General and staff that are detached from the World Bank. This could be achieved without amending the establishing Convention.[70]

Nevertheless, in view of deliberations during the African Consultative Meeting, it is a little surprising to read in the report made to the Executive Directors of the World Bank that:

> No objections were expressed . . . to the principles underlying the draft, and when we went through the Articles it was interesting that while delegates had many comments, criticisms and suggestions none affected the substance of our present thinking. For instance, no body raised any question on whether our proposals should be given the form of an intergovernmental agreement rather than being put into effect by the Bank by administrative means. Nor was any question raised about the link between the Bank and the Center. In fact, one delegate said that the link with the Bank should be even stronger because this would give capital importing countries a greater sense of confidence.[71]

[67] The World Bank is, under its Articles of Agreement (Article VII), a distinct international legal person with accompanying privileges and immunities. ICSID is also a separate international institution having an international personality with the attendant privileges and immunities for it, its staff and those participating in its proceedings: ICSID Convention, Articles 1 and 18–24. [68] *Salomon* v. *Salomon & Co. Ltd* [1897] AC 22.

[69] Under the Administrative and Financial Regulations of ICSID, the Secretary-General may designate a member of the staff of the Centre to act for him during his absence or inability to act, if all Deputy Secretaries-General (elected from 1999) are also absent or unable to act or if the office of Deputy is vacant. If there is a simultaneous vacancy in the offices of Secretary-General and Deputy Secretary-General, the Chairman may designate a member of staff to act for the Secretary-General: the Administrative and Financial Regulations, Regulation 9.

[70] The *ex officio* role of the Bank's President under the Convention could continue unimpeded without compromising the integrity or the appearance of neutrality by ICSID. [71] *History of the Convention,* pp. 296–7, *per* Broches.

The attitude of African states during the formulation of the ICSID Convention contrasts sharply with the situation during the South American Consultative Meeting. In their general remarks, the Latin American states questioned the rationale behind the draft Convention to an extent almost amounting to an outright rejection.[72] Opposition was expressed to the draft based on principles elaborated by Calvo and Drago.[73]

The initial attitude of the Latin American states provides further evidence to buttress one assertion of this study, namely, that, in principle, African states have no doctrinaire opposition to arbitration *per se* and would be willing to contribute to its development provided their interests are or will be recognised and protected. Thus, the arbitral development policy needed for Africa should be one that not only emphasises the practical utilities and virtues of arbitration but also one that would, at the practical level, comprehensively reorientate the arbitral process permeating its virtues to the business and legal communities. These policy goals, to a great extent, informed the establishment and activities of the AALCC Regional Arbitration Centres and others established by the private sector in Africa.[74]

The ICSID Convention and policy implications for Africa

It may be argued that African states supported the ICSID Convention banking on its much-emphasised positive implications on the 'flow' of their much-needed foreign investment. One representative at the African Consultative Meeting optimistically estimated that '[i]t would be easier for the developing countries to obtain the investments they needed if all agreements contained a clause to the effect that disputes could be referred to the Center'.[75] It was further explained that what motivated the World Bank in making the proposals was:

[72] *Ibid*. at pp. 305–11; P. C. Szasz, 'The Investment Disputes Convention and Latin America', Virginia JIL 11, 1971, 256; A. F. Abbott, 'Latin America and International Arbitration Conventions: The Quandary of Non-Ratification', HILJ 17, 1976, 131; *History of the Convention*, p. 606 (Doc. 39), for the Statement of the Governor of Chile on the position of the Latin American states.

[73] See pp. 413–16 below. The Latin American states, despite their past opposition, have, in recent decades, accepted the ICSID Convention and participated in its proceedings: see pp. 447–8.

[74] See chapters 2 and 3 above.

[75] *History of the Convention*, p. 255 *per* Mr Macaulay (Sierra Leone). In justifying the establishment of the Centre under the World Bank's auspices, the Bank's President emphasised: 'My enthusiasm for the proposal . . . is simply a reflection of my interests in exploring all possible ways in which the Bank can help to widen and deepen the flow of private capital in the developing countries. It is not the business of the Bank, nor of its

[t]he urgent need of promoting the flow of private investment to areas in need of capital. That private capital is not now moving to these areas in sufficient volume is not in dispute. Nor is there room for doubt that one of the most important impediments to the flow of private capital is the fear of investors that their investment will be exposed to political risks.[76]

The potential of private investment as well as the need for international co-operation for economic development was thus made prominent in paragraph 2 of the Convention's Preamble. Also, the first arbitral tribunal in the ICSID *Amco Asia* case referred to the Convention's Preamble for the thesis that the protection of foreign investment is coterminous with the protection of the general interest of development and of developing countries.[77] And, in the *Vacuum Salt* award, the tribunal in stating 'its understanding of the object and purpose of the Convention' relied on paragraphs 2 and 3 of the Preamble as well as on, *inter alia*, paragraphs 9, 12 and 13 of the *Report of the Executive Directors of the World Bank on the Convention*, where the Directors in submitting the Convention to governments for consideration, cited 'a larger flow of private international investment' as 'the primary purpose of the Convention', noting that the 'creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward . . . stimulating [such] flow'.[78] Finally, the ICSID Secretariat has positively stressed:

In their efforts to attract foreign investment that may be needed more now than hitherto, Contracting States in Africa – and indeed in other regions also – should find the ICSID mechanism and their membership in the Centre to be of continuing great relevance and value. By the same token, it may be hoped that the few countries in Africa that are not yet ICSID members, such as Ethiopia and Zimbabwe, may soon add joining ICSID to their other efforts to attract foreign investment.[79]

President, to tell the developing nations within the Bank's membership that they must accept private capital from abroad as a partner in their development efforts or what kind of price it is reasonable for them to pay in order to achieve such a partnership': Excerpt from the Address by the President of the World Bank to the Annual Meeting of the Bank's Board of Governors, 30 September 1963, *History of the Convention*, p. 183 (Doc. 23), where the advantages of FDI for the developing countries were outlined.

[76] *Ibid*. at p. 73, para. 5 (Doc. 15). The role of FDI to the economies of African states, the problems that investors encounter, a desire to resolve or pre-empt those problems, the reputation of the World Bank for integrity and impartiality, etc., were emphasised during the Consultative Meetings of Legal Experts (African Region) by Mr Broches, *ibid*. at pp. 239–40.

[77] 1 ICSID Reports 400, para. 23.

[78] 4 ICSID Reports 344–5, para. 39.

[79] 'The ICSID Convention and Africa', p. 12. Zimbabwe became a party to the ICSID Convention in 1994.

Probably, the belief in the developmental implications of joining the Convention has led one writer to express the rather intriguing view that (humanitarian) non-governmental organisations (NGOs) could and should be permitted to use arbitration under the Convention as 'the most practical and useful method' and as 'an effective legal remedy' against host governments for disputes arising out of food aid programmes.[80] Strikingly, the crux of that contention was demonstrated by humanitarian disasters in the variously so-called 'Third World countries', 'less developed countries' or 'the developing world', some of them in Africa.[81] According to MacKenzie:

> In turn, NGOs annually mobilize $4.5 billion for development. Indeed, development has become big business, and the NGO has become a key corporate player. In the 1990s, the NGOs' involvement in development is likely to become even greater as the current output of food aid must double in order to satisfy dramatically growing needs.[82]

It was further observed: 'International agencies (NGOs), while also the subject of domestic law, are nationals of other states and may avail themselves of certain international legal remedies'.[83] The concern conceded as giving rise to the suggestion was that:

> Despite the thousands of lives and billions of dollars at stake, international law has heretofore failed to provide [NGOs] with a means of recourse against the corrupt and sovereign state. In the context of dramatically increasing NGO participation in official foreign aid distribution, this continued inequality poses a serious threat to the integrity of foreign aid programs.[84]

These are interesting sentiments that, rather than be ignored, should be considered, and then dismissed or admitted on their merits.[85]

The heavy emphasis placed on the positive implications of the Convention on the 'flow' and direction of foreign investment may indeed be a possible explanation for the support that the Convention received in Africa. Views on this were unanimous during the African Regional Meeting of Legal Experts.[86] Nevertheless, such a belief has, to a very large

[80] G. W. Mackenzie, 'ICSID Arbitration as a Strategy for Levelling the Playing Field Between International Non-Governmental Organizations and Host States', Syracuse JICL 19, 1993, 197. [81] *Ibid*. [82] *Ibid*. at pp. 205–6 (fnn. omitted). [83] *Ibid*. at p. 211.

[84] *Ibid*. at p. 216. [85] See pp. 264–6.

[86] E.g. Mr Bigay (Central African Republic) said that his government attached great significance to the matter under discussion since the country 'was one of those which needed foreign capital': *History of the Convention*, p. 244. But Mr Gachem (Tunisia) was of the same view, noting that African states will support every effort of the World Bank to alleviate investors' fears – fears which he felt were often exaggerated. He doubted

extent, proven to be misplaced because it was based on a wrong premise.[87] Otherwise, how else would the paradox be explained that, notwithstanding the acclaimed developmental effects of joining the Convention and the latter's consolidation in Africa, the continent, which has one of the largest regional memberships of the Convention, is not only the poorest in the world but also the one that has the lowest flow of new investment into it? It is also true that the Latin American states, which strongly opposed the Convention during its elaboration and started ratifying it only in 1983,[88] attracted more investment before that date and could continue to do so now, than Africa, which has always strongly supported the Convention.[89] These stark realities may well call for a reassessment of the avowed intent of the Convention as seen in those views that confined it to 'widening and deepening' investment in countries that need it, presumably (and as constantly repeated) the developing states.

Unfortunately, the ratification of the Convention by most African states has not invariably guaranteed that investment or capital will 'flow' either in from abroad or within a host state. During the African Meeting of Legal Experts, one expert (Mr Lobel, Mali) observed that the much-emphasised optional nature of recourse to the facilities of the Centre was theoretical only.[90] As it was put:

> whether the provisions on the international plane of procedures similar to those included in all bilateral agreements would be enough to promote private investment to the extent desired. In his view, private investors fear not only the possibility of arbitrary action by a host state but also the risk of becoming involved in litigation with that state. It was suggested that a Guarantee Fund be created under the aegis of the World Bank. The Fund should be financed by a levy on all investments obtained, and used to compensate investors for losses they might suffer, the sums paid out to them being recovered from the host state in question, *ibid*. at pp. 244–5.

[87] As Walde observed, '[f]oreign investment is sometimes overrated in its contribution to economic development; only in very capital-intensive and export-oriented industries (such as petroleum or mining) it seems to exceed 5 per cent of national investment': T. W. Walde, 'A Requiem for the "New International Economic Order"' (CPMLP, University of Dundee, Professional Paper No. PP9, 1994), p. 32; and UNCTAD: *Foreign Direct Investment and Development* (New York and Geneva, 1999). [88] See p. 447 below.

[89] P. Ndegwa, 'Increasing FDI in Africa', *CTC Reporter*, No. 27, Spring 1989, p. 1; G. P. Pfeffermann and A. Madarassy, 'Trends in Private Investment in Developing Countries 1993: Statistics for 1970–91' (IFC Discussion Paper No. 16, 1992); UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development* (New York and Geneva, 1999), pp. 21–5.

[90] *History of the Convention*, p. 261, supporting the views of Mr Gachem (Tunisia), that the optional character of the Centre's jurisdiction would more and more be theoretical as investors would prior to making their investments always try to obtain from states the right to go to the Centre. He thus demanded a definition from the outset of the types of disputes to be submitted to the Centre: *ibid*. at p. 259.

The nationality of the investment was more important than that of the investor. The Convention should [accordingly] apply only in cases where the funds invested came from outside the country rather than from foreigners residing in the country out of local capital owned by them, since the aim of the Convention was to encourage the flow of such funds.[91]

The less obvious reality is that the Convention was specifically promoted by the World Bank in order to use its influence and weight to protect investments wherever they are made in a Contracting State but especially in developing Contracting States and principally by nationals of developed Contracting States, notwithstanding where the capital came from. This deduction is clear from the ICSID award in *SOABI*.[92] But the ratification of the Convention does not, as such, seem to have had any effect on the volume, direction or nature of investment which any state party has received or which its nationals have made. This trend is also visible in bilateral investment treaties (BITs), which are not intended to encourage or promote investment abroad and do not impose an obligation on nationals of their parties to invest. The main goal of a BIT is to protect foreign investments when they occur. The dual dispute resolution arrangements which BITs normally contain, covering investor-to-state and state-to-state procedures, are meant to enforce their obligations.[93]

Mere legal infrastructure and certainty, though vital, are insufficient as determinants of whether or not to invest in a particular country or continent. Nor is political risk a factor that would normally discourage a commercially viable investment option in Africa or in any other continent.[94]

[91] Mr Broches disagreed with the view that the optional nature of recourse to the Centre's facilities was *only* theoretical. He pointed out that it was not the idea of the World Bank that every investment should be subject to the Convention. If funds were not foreign in origin, the host state would be entirely justified in treating the resident investor on the same footing as its own national investor. On the other hand, there is no way the Convention can make a distinction based on the origin of funds once a host state had agreed with the investor to accept the jurisdiction of the Centre: *ibid*. at p. 261.

[92] The award decided that a locally incorporated company indirectly controlled (through share ownership) from a non-ICSID Contracting State by nationals of Contracting States has the capacity to bring a claim as 'a national of another Contracting State' under Article 25(2)(b) of the Convention: see pp. 283–93.

[93] J. W. Salacuse, 'BIT by BIT', *International Lawyer* 24, 1990, 655, 673–5; Salacuse, 'The ECT and BIT Regimes' in Walde (ed.), *The Energy Charter Treaty* (The Hague: Kluwer, 1996), pp. 321, 323–31. Cf. UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva, 1998), p. 4.

[94] Higgins, 'Pre-Conditions', 3, citing R. Brown, 'More About Houston', JENRL 2, 1984, 245, 247; S. A. B. Page and R. C. Riddell, 'FDI in Africa: Opportunities and Impediments', *CTC Reporter*, No. 27, Spring 1989, pp. 6, 8. For the changing and positive prospects of FDI in Africa, see UNCTAD, *Foreign Direct Investment in Africa: Performance and Potential* (Geneva, 1999).

Not only that, the nature of non-commercial risks to which foreign investors might be exposed in Africa is diverse and shifting. Most such risks are so tied to the very root of the socio-economic existence of most host states that, even with the adequacy and certainty of the legal infrastructure, contractual stability may not always be assured.[95]

Some African states have attracted and retained foreign investment without being party to the ICSID Convention.[96] Also, not all capital-exporting and developed states are parties to the Convention.[97] Other states in the latter group joined the Convention relatively late.[98] However, this has not altered the volume or the direction of investment among the developed states *inter se* or into those African or other states which are not yet parties to the Convention. In fact, the developed states compete with developing states to attract investors, which 'flow' more into the developed than into the developing states in any event.[99]

In any decision by any state to join the Convention, there is a consideration of the mutuality and reciprocity of benefits and obligations.[100] Yet, during its formulation, the draft Convention was presented as a charitable instrument to any developing state joining it. In the case of Africa therefore, putting forth the developmental role of foreign investment and its great need (which a ratification of the ICSID Convention would help to 'attract' or 'stimulate') as a justification for the continent's support of, or need for, the Convention may also be an admission that the Convention's aim has, to a great extent, failed where it was most needed.

[95] Higgins, 'Pre-Conditions', 3.

[96] See p. 268, note 5, for African states not yet parties to the ICSID Convention.

[97] A notable example is Canada, which has not yet signed the Convention (as of 21 September 2000). However, this non-ratification by Canada may not necessarily make much difference in view of other national and international arbitral developments involving Canada and Canadian provinces since 1986, the country's membership of the FTA with the USA (1988) and the now more important NAFTA (1992) between Canada, the USA and Mexico. Canada is an interested party in the 1994 ECT. The ICSID regime is only an option in most of these regimes.

[98] Spain signed the Convention only on 21 March 1994 and ratified it on 18 August 1994. Portugal signed the Convention on 4 August 1983 and ratified it on 2 July 1984.

[99] Muchlinski, *Multinational Enterprises*, pp. 25–33; UNCTAD, *FDI and Development*, pp. 9–15.

[100] This logic eluded the majority in the *SOABI* award when they held that an African Contracting State is liable to a locally incorporated company owned by a company incorporated in a non-Contracting State but controlled by nationals of Contracting States: see pp. 283–93.

Concluding remarks

Investors go abroad primarily to make 'attractive profits'.[101] If this possibility is absent, a prudent investor would rather stay at home. The development of their host communities is the least of their immediate priorities. Regrettably, it may take community and popular pressures to express resentment against this.[102] Nevertheless, it must be acknowledged that the non-ratification of the Convention, especially by a developing state, would definitely make it more than likely that a willing investor from a capital-exporting Contracting State would hesitate to invest there in the absence of other alternative and comparably effective dispute resolution mechanisms. Also, assuming that membership of the Convention assures the 'flow' of private investment into countries that need capital, that thesis should be critically examined against the background of other factors that might be contributing to the declining attractiveness of some states, especially in Africa, as locations for new FDI.[103] Generally, such factors include political instability, lack of transparency and reasonable consistency in policies, structural and institutional deficiencies, low income and savings, and the opening up of new trading and investment opportunities in China, Eastern Europe and the former Soviet Republics. Selflessly addressing the internally inspired problems would make for progress. Ultimately:

> By maintaining a careful balance between the interests of investors and those of host states, the Convention attempts to provide an impartial forum to resolve investment disputes. But it must always be remembered that the Convention is merely one means to an elusive end. There is no substitute for a stable, cooperative atmosphere in the host state. Its policies and political climate are the most basic considerations to an investor'. Nothing could take the place of confidence. This is the decisive factor in all foreign private investment.[104]

[101] Cf.: 'And I am convinced that those of our members who adopt as their national policy a welcome for international investment – and that means, to mince no words about it, giving foreign investors a fair opportunity to make attractive profits – will achieve their development objectives more rapidly than those who do not': Speech of President of the World Bank of 30 September 1963, in *History of the Convention*, p. 183.

[102] V. V. W. Duba, 'Multinational Companies: Make Ye Straight Their Path', SALJ 111, 1994, 178, 188–9; J. G. Frynas, *Oil in Nigeria* (Hamburg and London: LIT, 2000).

[103] Ndegwa, 'Increasing FDI in Africa', 1.

[104] W. E. Albrecht, 'Some Legal Questions Concerning the ICSID Convention', St Louis ULJ 12, 1968, 679, 686.

8 Jurisdiction ratione materiae under ICSID

Introductory remarks

According to Article 25(1) of the ICSID Convention:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

The above provision defines the 'outer limits within which parties can put it [the Centre's mechanism] into operation'.[1] The other paragraphs of Article 25 elaborate, qualify or limit some key elements of paragraph (1), covering the written consent of the parties, the nature of the dispute (*ratione materiae*) and of the parties (*ratione personae*) to ICSID proceedings. These key elements of Article 25 must be deposed in any request for arbitration or conciliation under the Convention (Articles 28 and 36) as their absence means that the Centre does not have jurisdiction. In the latter instance, if a request for arbitration or conciliation is made, it cannot be registered. However, even when the request is registered, an ICSID tribunal or commission can eventually decline jurisdiction.[2]

[1] A. Broches, 'Bilateral Investment Treaties and Arbitration of Investment Disputes' in Schultsz and van den Berg (eds), *The Art of Arbitration* (Deventer: Kluwer, 1982), pp. 63, 67; C. F. Amerasinghe, 'Jurisdiction Ratione Personae Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', BYIL 47, 1974–1975, 227, 230; C. Schreuer, 'Commentary on the ICSID Convention: Article 25', ICSID Rev-FILJ 11, 1996, 318; ICSID Rev-FILJ 12, 1997, 59–150; *Report of the Executive Directors on the Convention*, 1 ICSID Reports 23, para. 22.

[2] C. F. Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes', Indian JIL 19, 1979, 166.

The key elements of Article 25 will be considered in this chapter and in chapters 9 and 10.

Legal investment disputes

Inter-state disputes in the ICSID Convention and in bilateral investment treaties

There are normally two distinct dispute resolution provisions in bilateral investment treaties (BITs):

1. for the settlement of investment disputes between a state party to the treaty *and* a national or company of the other party (investment disputes); and
2. for the settlement of disputes between the state parties to the treaty (inter-state disputes).

Relevant to this chapter are the provisions of the ICSID Convention and of BITs relating to investment disputes. Unique in this discussion is the peculiarity of, and the limitations on, ICSID's jurisdiction (one of the regimes that could be seen in BITs since 1968).[3] The ICSID Convention is designed for legal disputes arising directly out of an investment between Contracting States and nationals of other Contracting States as defined. The Convention is not meant for ordinary commercial disputes nor does it confer jurisdiction on the Centre over disputes between private individuals *inter se*, or between two or more Contracting States, or between a state and its own national(s).[4]

Under the Convention, inter-state disputes are covered by Article 64. The latter is a compromissory clause providing that any dispute arising between Contracting States concerning the interpretation or application of the Convention which is not settled by negotiation shall be referred to the International Court of Justice (ICJ) by the application of any party to

[3] The first BIT ever concluded was in 1959, between Germany and Pakistan (in force from 28 April 1962). However, the first to include an ICSID clause for investment dispute resolution was signed in 1968, between Indonesia and The Netherlands (in force from 17 July 1971): R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (The Hague: Kluwer, 1995), p. 130. The dates when the BITs cited came into force and other details about them were derived mainly from Dolzer and Stevens, *ibid*. at pp. 267–326, as updated in ICSID, *Bilateral Investment Treaties 1959–1996: Chronological and Country Data Bibliography* (Doc. ICSID/17, May 30, 1997); UNCTAD, *BITs in the Mid-1990s*; UNCTAD, *Bilateral Investment Treaties 1959–1999* (United Nations: New York and Geneva, 2000) (Internet version only).

[4] However, see the concept of 'national of another Contracting State' under Article 25(2)(b) of the Convention: see pp. 271–3.

such dispute, unless the states concerned agree to another method of settlement.[5] In most cases, for states that are parties to the ICSID Convention and the Statute of the ICJ, or to whom the ICJ is otherwise open under its Statute, investment agreements (e.g. BITs) may constitute an implementation of Article 64 with respect 'to another method of settlement'.[6]

The ICJ, as mentioned in Article 64 of the ICSID Convention, is the principal judicial organ of the UN.[7] All members of the UN (i.e. most of the world's states) are, by virtue of that fact, automatically parties to the ICJ's Statute, which is annexed to, and forms an integral part of, the UN Charter.[8] Any state which is not a member of the UN may, however, become a party to the ICJ's Statute on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.[9] Only states may be parties in contentious cases before the ICJ.[10] The consent of disputing states, which may be expressed in several ways, is fundamental for the ICJ's jurisdiction in contentious cases.[11]

Proceedings under the ICSID Convention could, in some ways, be compared and contrasted with contentious proceedings under the ICJ Statute. The ICSID and the ICJ are, broadly speaking, international dispute resolution bodies established pursuant to their respective treaties. Proceedings of both bodies are similar only in the particular sense that they are based on the consent of the disputing parties. But an important aspect of ICSID as a public international law regime is the participation in its proceedings of a Contracting State or, where appropriate, of a constituent subdivision or agency of a Contracting State *and* a non-state party, a national of another Contracting State – an element that makes them quasi-international.

ICSID differs from the ICJ not because the former is either international or quasi-international, but because the ICJ is a continuing judicial body that has jurisdiction over, and could resolve, all legal disputes between

[5] Under Article 36(1) of the Statute of the ICJ, the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the UN or in treaties in force. Whilst Article 64 of the ICSID Convention can be used to establish the ICJ's jurisdiction, the UN Charter has no compromissory clause as such.

[6] The investment agreements in issue may also contain, in separate provisions, procedures for settling investor-to-state disputes and may refer such disputes to ICSID or other ADR regimes.

[7] UN Charter, Article 7; and ICJ Statute, Article 1.

[8] UN Charter, Articles 92 and 93(1); and ICJ Statute, Article 1.

[9] UN Charter, Article 93(2). A state, although not a UN member (e.g. Switzerland), may become a party to the ICJ Statute under the above provision.

[10] ICJ Statute, Articles 34(1) and 35.

[11] *Ibid*., Article 36(1) and (2).

states only.[12] There is no subject-matter limitation on the ICJ's jurisdiction as between consenting states.[13] On the other hand, ICSID is an administrative institution, which neither resolves nor settles disputes. It only provides facilities for the voluntary resolution or settlement of legal disputes arising directly out of an investment by *ad hoc* tribunals or commissions established under or in accordance with the constituent treaty and its accompanying rules. Each ICSID tribunal or commission is *ad hoc*, becoming *functus officio* and extinct on completing its mandate (including, where appropriate and if need be, any request for correction, completion, interpretation or revision of the award).[14]

A situation when a dispute might arise between ICSID Contracting States following ICSID *arbitration* – involving a Contracting State and a national of the other Contracting State – is under Article 27 of the Convention. Under the latter, a Contracting State whose national has consented to submit or has submitted to arbitration under the Convention with another Contracting State, undertakes not to protect its national diplomatically or to bring an international claim on its national's behalf in respect to such dispute. However, if its national is an award creditor and the other Contracting State failed to abide by and comply with the award, diplomatic protection and international adjudication will be revived. An international claim by the national state of the investor against the Contracting State award debtor, arising from the latter's non-compliance, might be covered under Article 64, as the situation will involve the interpretation or application of the Convention between those Contracting States.[15] Hence, in BITs, there are normally comprehensive state-to-state dispute settlement procedures, usually through negotiation or a combination of negotiation and consultation or *vice versa*. If negotiation fails,

[12] E.g. the ICJ's jurisdiction under Article 64 of the ICSID Convention. It is significant that being a party to the Statute of the ICJ is a qualification that a signatory state which is not a member of the World Bank (itself a specialised agency of the UN) will possess before joining the ICSID Convention: ICSID Convention, Article 67.

[13] J. Crawford, 'The ICJ, Judicial Administration and the Rule of Law', in Gardner and Wickremasinghe (ed.), *ICJ*, pp. 112, 114 n. 6.

[14] ICSID Convention, Articles 50(2) and 51(3). If an *ad hoc* committee set up under Article 52(3) of the Convention annuls an award for any of the stipulated reasons, the dispute shall, at the request of either party, be submitted to a new tribunal: ICSID Convention, Article 52(6).

[15] Under Article 53(1) of the Convention, ICSID awards are binding on the parties and subject only to the appeal or remedy allowed by the Convention. Each party shall abide by and comply with the award except if enforcement is stayed pursuant to the Convention. For discussion of Articles 53(1) and 64 of the Convention in the context of Article 36(1) and (2) of the Statute of the ICJ, see pp. 395–8 below.

the dispute shall further be submitted by either party to a binding third party procedure (e.g. *ad hoc* arbitration).[16] Disputes foreseen are those (inter-state disputes) arising out of a particular BIT, which might also include inter-state disputes arising incidentally out of an investor-to-state dispute as prescribed in the particular BIT.

In some BITs, it may be stated that the procedure for the settlement of inter-state disputes does not, except as provided, apply to a dispute (an investment dispute) instituted by a national or company of a Contracting State against another Contracting State under the ICSID Convention. As exceptions, it may be stated that such a recourse (to the inter-state procedure) is not precluded in the event that an award rendered in an arbitration (between the national of one Contracting State and the other Contracting State) is not honoured by a party (a Contracting State to the ICSID Convention and the BIT),[17] or in the event that an issue existed which related to a dispute submitted to ICSID but which was not argued or decided, e.g. when a tribunal established under an investor-to-state dispute settlement mechanism does not have jurisdiction over the dispute.[18] Such a provision may be lacking in some treaties.[19]

The nature of the legal dispute and of the investment

The jurisdiction of ICSID relates to investment disputes of a legal nature between a Contracting State and a national of another Contracting State.

[16] E.g. the 1992 BIT between Nigeria and The Netherlands, Article 12; and the 1990 BIT between Nigeria and the UK, Article 9. BITs may, instead of stipulating for *ad hoc* arbitration upon the failure of negotiations, provide for submission to the ICJ, on the agreement of the parties. Under Article 64 of the ICSID Convention requiring the submission of the dispute to the ICJ when negotiations fail, engaging in negotiations (not their success in reaching settlement) is a precondition for submitting to the ICJ.

[17] This is a reflection of Article 27(1) of the ICSID Convention.

[18] E.g. the 1986 BIT between the US and Cameroon, ICSID Rev-FILJ 1, 1986, 423, Article VIII(9), which entered into force on 6 April 1989. However, the inter-state dispute resolution provision under the Treaty (just as with most other BITs concluded between the US and other states) does not apply to a dispute arising (a) under the export credit guarantee or insurance programmes of the Export-Import Bank of the US or (b) under other official credit guarantee or insurance arrangements pursuant to which the parties have agreed to other means of settling disputes: *ibid*., Article VIII(10); see pp. 254–5.

[19] E.g. the 1982 BIT between the US and Egypt as modified by the Supplementary Protocol of 1986, ICSID Rev-FILJ 1, 1986, 432, 438–9, Article VIII (entered into force on 27 June 1992). Cf. the 1985 BIT between the US and Morocco, ICSID Rev-FILJ 1, 1986, 219, 223–4, which entered into force on 29 May 1991. The latter's inter-state dispute provisions (Article VII) are very short and different from the equivalent provisions in the BITs between the US and each of Egypt and Cameroon.

The nature of the *legal dispute* and of the *investment* is neither defined nor described in the Convention.[20]

During the elaboration of the Convention, the representative of Tanganyika (now Tanzania) (Mr Roland Brown) demanded a definition of 'dispute of a legal character' as then used in the draft Convention.[21] The reply given was that: '[L]egal character was given to a dispute when a party claimed that a legal right had been infringed and that it was not merely moral, commercial or political misbehaviour that was in question.'[22] This was reflected in *The Report of the Executive Directors* (paragraph 26), which stated that:

> The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

It has rightly been pointed out that, in the practice of ICSID tribunals, whether the dispute at issue was legal or not had never created a problem nor been seriously raised as a defence.[23] For example, in *Fedax* v. *Venezuela*,[24] the question of 'whether there [was] a legal dispute between the parties as required by Article 25(1) of the Convention' was, on the objection of Venezuela, raised and answered in a very short paragraph:[25]

> The Tribunal is satisfied that a dispute of a legal nature is involved in this case as it concerns the different views of the parties on the questions of legal rights and obligations in connection with the existence of an investment, and the effects this may have on the issue of an obligation to honor certain debt instruments consisting of six promissory notes accompanying the request for arbitration . . . which were issued by the Republic of Venezuela.[26]

The attempt made in the Executive Directors' report to identify the legal nature of a dispute under the Convention notwithstanding, the nature of

[20] However, see Amerasinghe, 'The Jurisdiction of ICSID', 169–81, for background information on the elaboration and interpretation of those aspects of the Convention.

[21] *History of the Convention*, p. 267. [22] *Ibid*., Mr Broches.

[23] Schreuer, 'Article 25', 341, para. 46.

[24] Decision on Objections to Jurisdiction, 11 July 1997, 37 ILM 1378.

[25] *Ibid*., para. 15, citing the *Report of the Executive Directors*, para. 26; and *History of the Convention*, pp. 54 and 203.

[26] *Fedax* case, *ibid*., para. 16. The jurisdiction *ratione personae* of ICSID was not in contention in the case nor was an objection to jurisdiction raised with respect thereto. Venezuela is a Contracting State while Fedax is a company established in the Netherlands Antilles having the nationality of a Contracting State other than Venezuela on the date on which the parties consented to arbitration and on the date on which the request for arbitration was registered (*ibid*., para. 17).

investment, an element central to the speciality of ICSID proceedings, was left undefined in the Convention. This was said to be due to the voluntary nature of consent under the Convention and the fact that states can, if they so desire, determine in advance what is or is not for them an investment for the purposes of the Convention.[27]

However, the dilemma is that, if the issue of consent under the Convention is emphasised, then it follows that any subject matter which parties to proceedings characterise as an investment would be taken as such notwithstanding its objective nature *and* the consideration upon which the Convention was elaborated. On the other hand, if the unilateral and potentially unlimited power of a Contracting State to determine, in advance, the nature of the subject matter of proceedings under the Convention is encouraged, then a state or group of states might render the Centre's jurisdiction useless.

Under the Convention therefore, the power of the parties to characterise a subject matter as an 'investment' is neither unlimited nor decisive.[28] Also, a Contracting State's power to determine or limit arbitrable disputes under the Convention is confined within that state's obligations thereunder. Ultimately, the decision whether or not a subject matter is an investment under the Convention, would be made by an ICSID tribunal or commission.[29]

The confines of 'investment' are difficult to determine. The concept in essence lacks a clear legal definition since it is 'an economic notion'.[30] The drafting history of the Convention would suggest that 'investment' was intended to be elastic and changing, in line with developments in the international investment environment *and* the need to make capital available to those states needing it. At the African Regional Consultative Meeting, the point was made that 'a foreign company [a national of a Contracting State] which lent money to a [Contracting] State could not be regarded as an investor'.[31] It was then asked whether 'the Convention provided for the settlement of a dispute in such a case'.[32] In reply, it was pointed out that 'in English the word "investment" would cover the type

[27] *Executive Directors' Report*, para. 27.

[28] P. C. Szasz, 'A Practical Guide to the Convention on Settlement of Investment Disputes', Cornell ILJ 1, 1968 1, 14; *ICSID Model Clauses* (Doc. ICSID/5/Rev. 2, 1 February 1993 as updated to 1995), p. 8.

[29] An ICSID arbitral tribunal or conciliation commission has the competence to decide on its jurisdiction: ICSID Convention, Articles 41(1) and 32(1).

[30] *SPP and Others* v. *Egypt*, Dissenting Opinion of 20 May 1992, 3 ICSID Reports 254.

[31] *History of the Convention,* p. 261, *per* Mr Nicayenzi, Burundi. [32] *Ibid*.

of loan referred to'.[33] But the legal expert from Tunisia (Mr Gachem), in support of an earlier similar view by the representative of Cameroon,[34] observed that the types of dispute to be submitted to the Centre should be defined from the outset. In his view, in the case of a legitimate expropriation by a government in the public interest, the action involves expropriation and compensation. He suggested that a state should not be attacked for expropriation in the public interest and such cases should not be submitted to the Centre. In that event, the only question that could be submitted to the Centre was that of the adequacy of compensation.[35] However, the Chairman of the Meeting replied that the view taken of the Convention was too narrow.[36] Mr Gachem insisted on a comprehensive definition in the Convention of 'investment' during the Meeting.[37] This was not done for reasons already noted concerning the importance of consent and the discretion of Contracting States in that determination.[38]

Actually, concerns raised by the legal expert from Tunisia seem to have been properly covered by Article 25(4) of the Convention. That Article provides *inter alia* that any Contracting State may, at the time of ratification, acceptance or approval of the Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. Some states outside Africa have, accordingly, made use of the opportunity to delimit the subject-matter jurisdiction of the Centre with respect to themselves.[39] Nevertheless, some of the notifications entered by Contracting States under that Article might have the potential of depriving the Centre of its jurisdiction with respect to a particular Contracting State due to the peculiar nature of foreseeable disputes that might arise.[40] In that event, the Convention will *prima facie* still be available to protect investments made in another Contracting State (which itself has not excluded any disputes from being submitted to the Centre) by nationals of a Contracting State

[33] *Ibid*., Mr Broches. This was later to become the main issue in *Fedax* where it was also answered affirmatively that 'investment' includes loans, in that instance, promissory notes issued by a Contracting State. The case will be discussed soon.

[34] *History of the Convention*, pp. 245–6, Mr Mpanjo. [35] *Ibid*. at p. 259.

[36] *Ibid*., Mr Broches. [37] *Ibid*. at pp. 261, 285–6. [38] See p. 241 above.

[39] *Contracting States and Measures Taken by Them for the Purposes of the Convention: Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre* (Doc. ICSID/8–D), (February 1999), pp. 1–3 (updated periodically in www.worldbank.org/ICSID) in relation to subsisting notifications by China, Jamaica, Papua New Guinea, Saudi Arabia and Turkey. However, Guyana (1987) and Israel (1991) withdrew their earlier notifications of exclusions.

[40] E.g. Saudi Arabia notified the Centre on 8 May 1980 that: '[T]he Kingdom reserves the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty to the International Centre for the Settlement of Investment Disputes whether by way of conciliation or arbitration': *ibid*. at p. 3.

(e.g. Saudi Arabia) making a subjective notification. Broches has argued that:

> Notifications under Article 25(4) neither grant nor deny jurisdiction. All they do is put investors on notice of the state's view of the acceptability *vel non* of certain type of disputes for settlement pursuant to the Convention. If the notification conveys a negative view, the investor must expect that, if asked to consent to the jurisdiction of the Centre, the host State will not give it. Should it nevertheless do so, the jurisdiction of the Centre is validly established.[41]

This argument might, on the face of it, appear controversial; it is not. Article 25(4) further provides that, upon the notification by a Contracting State to the Centre of the class or classes of disputes which the Contracting State would or would not consider submitting to the jurisdiction of the Centre, '[t]he Secretary-General [of ICSID] shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)'.

Thus, where a Contracting State decides to exclude certain disputes under Article 25(4), then notification by that State to ICSID is obligatory. Accordingly, any class or classes of dispute purported by a Contracting State to have been excluded from submission to the Centre's jurisdiction pursuant to Article 25(4) would be ineffectual without a specific notification of it or them to ICSID. The subsequent notification required from ICSID to Contracting States would enable the latter to know the extent of, and qualifications on, obligations *ratione materiae* under the Convention of the Contracting State making the notification.[42] Another implication might be that the notification to other Contracting States through the Centre could be used to impute notice – albeit remote – to their nationals, who might subsequently invest in the notifying state.[43] Additionally, the

[41] A. Broches, 'The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes by Mosche Hirsch', ICSID Rev-FILJ 10, 1995, 162, 170–1 (book review). See also Schreuer, 'Article 25', 150, paras 630–3.

[42] However, the *Report of the Executive Directors*, para. 31, indicates that such a notification by a Contracting State excluding certain disputes from consideration would not constitute a reservation to the ICSID Convention nor would a statement by a Contracting State that it would consider submitting certain class of dispute to the Centre constitute the consent needed under Article 25(1) but serves for the purposes of information only: Amerasinghe, 'Jurisdiction Rationae Personae', 225–6; *Kaiser Bauxite Co.* v. *Jamaica*, 1 ICSID Reports 304; *Alcoa Minerals of Jamaica, Inc.* v. *Jamaica* (1979) 4 YBCA 206; Schmidt, 'Arbitration Under the Auspices of ICSID' 90.

[43] In the *Jamaican Bauxite* cases (note 42) it was held that such a notification made after consent to ICSID arbitration only operates as a prospective notice to the Centre and potential future investors in undertakings concerning minerals and other natural resources in Jamaica: 1 ICSID Reports 304. Cf. the *Right of Passage Over Indian Territory* case (*Portugal* v. *India*) (*Preliminary Objections*), 24 ILR 840, 842–3; Amerasinghe, 'The Jurisdiction of ICSID', 225–6.

document containing the notification with the ICSID Secretariat is one which any interested private party could easily obtain, and the Secretariat would furnish the information.[44] In the *Fedax* case,[45] the tribunal closely examined the BIT in issue with respect to the definition of investment, to reinforce its conclusion that 'title to money' under the treaty included loans and related credit transactions, pointing out:

> It must also be noted that the Republic of Venezuela has not exercised its right under Article 25(4) of the ICSID Convention to notify the Centre of any class or classes of disputes it would or would not consider submitting to the jurisdiction of the Centre. This provision allows Contracting States to put investors on notice as to what class of disputes they would or would not consider consenting to within the broad meaning of investment under the Convention.[46]

In any event, as provided in Article 25(4), notification under the paragraph is distinct from (and does not preclude) the written consent of the parties under Article 25(1). Thus, if there is incompatibility between earlier notification and subsequent 'consent in writing' in relation to the subject matter of a particular notification, it is, in furtherance of Mr Broches' views above,[47] the subsequent written consent, and not the earlier notification, that would, *prima facie,* confer jurisdiction on the Centre.[48]

ICSID Contracting States in Africa have rarely made use of the opportunity afforded by Article 25(4). Nevertheless, there is a BIT between Romania and Sudan which provides for the submission of any dispute with respect to the amount of compensation for expropriation to ICSID.[49] But the latter does not have an identical effect to China's notification under Article 25(4). China had notified the Centre that, 'pursuant to Article 25(4) of the Convention, the Chinese Government would only

[44] ICSID has a homepage on the Internet with the relevant information.

[45] 37 ILM 1385, para. 33. [46] *Ibid*. [47] See p. 243.

[48] Amerasinghe, 'The Jurisdiction of ICSID', 226.

[49] The 1978 BIT between Romania and Sudan, Articles 4(1), ICSID, *ILW: Investment Treaties* (July 1994, Issue 4). The Treaty reportedly entered into force on 5 December 1979: UNCTAD, *BITs in the Mid-1990s*, pp. 199 and 204; UNCTAD, *BITs 1959–1999*, p. 94. However, Dolzer and Stevens, *BITs*, pp. 271, 315 and 317, recorded that the Treaty was not yet in force as of 16 December 1994. The Treaty was not included in the ICSID update of BITs as of 30 May 1997: ICSID, *BITs 1959–1996*, pp. 76–8. Apparently, it is being renegotiated as is the case with some other Romanian BITs concluded in the 1970s: Information from e-mail messages of 10 October 1997 (Amazu Asouzu) and of 17 October 1997 (Milanka Kostadinova on behalf of Margrete Stevens). See also the 1980 BIT between Cameroon and Romania, Article 5, in force since 16 December 1981, and the 1976 BIT between Egypt and Romania, Article III(1), in force since 22 January 1977, but which terminated on the entry into force of the 1994 BIT between Egypt and Romania. The latter entered into force on 3 April 1996: UNCTAD, *BITs 1959–1999*, pp. 50, 96.

consider submitting to the jurisdiction of the International Centre for the Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalisation'.[50]

Both provisions above are similar due only to the fact that the legality or validity of an expropriation for public purpose was excluded from being an arbitrable or justiciable subject matter. Otherwise, the provision in the Romania–Sudan BIT is not in accordance with Article 25(4); at least, it was not expressly or implicitly made in pursuance of Article 25(4). Also, it was not notified to ICSID, as it ought to have been, if the intention was that it should be subsumed under the latter provision.[51] Notification to the Centre by a Contracting State is a pre-condition for validity under the Convention. This is underscored by the fact that under the provision, the Secretary-General of ICSID is required 'forthwith [to] transmit such notification to all Contracting States' (Article 25(4)). Thus, even if it is possible to include such a notification in a BIT (which is doubted, for it ought to be a unilateral decision of 'any Contracting State', despite the practical impossibility of its inclusion in a treaty in relation to the negotiating position the other party to the treaty might take), it must, additionally, be expressly notified to ICSID in accordance with the Convention. Not only that, proceedings under the Convention are referred to in the Romania–Sudan BIT only after the failure of other stipulated procedures, mainly municipal.[52]

Investments in ICSID awards, laws and treaties

To date, the nature of disputes submitted to ICSID by or against African states have been varied and diverse making the discernment of any uniformity and consistency problematic in most cases. The disputes cannot

[50] This is as yet the only ratification of the Convention that is close to the 1962 UNGA Resolution on Permanent Sovereignty Over Natural Resources which excluded or purported to have excluded the arbitrability or justiciability of the validity and legality of an expropriation or nationalisation measure: see pp. 443–4. It remains to be seen what an ICSID Tribunal or Commission would do with China's notification in a practical situation.

[51] The Romania–Sudan BIT was not published by ICSID, *Contracting States and Measures Taken*, note 39, p. 242 above. Although such a publication by ICSID is not a requirement of the Convention, Regulation 22 of the ICSID Administrative and Financial Regulations authorises the Secretary-General of ICSID to publish 'appropriately' information about the operation of the Centre.

[52] This may, however, be read as a qualification of Article 26 of the Convention on the exclusivity of arbitration and the availability of local administrative or judicial remedies. But such notification to ICSID does not constitute the consent under Article 25(1) for the purposes of Article 26.

be the subject of any uniform categorisation nor are they indicative of any particular subject-matter trend.[53] They have involved activities of various natures, which evidently must have qualified as 'investments' for the purposes of the Centre's jurisdiction. At least, they were all registered by the Secretary-General of ICSID and none was contested before any arbitral tribunal as being outside the Centre's or a tribunal's mandate on the ground it was not an 'investment'.[54]

An assessment of most transactions involved would suggest that some might, on objective standards, not qualify as 'investment' under the Convention. It has been pointed out that many cases submitted to ICSID, in particular those involving civil engineering (construction) contracts, were submitted in breach of the Convention as they mainly related to factual issues in contrast with legal issues (disputes) and did not entail a contribution of capital to the host state.[55]

It is significant that some disputes submitted to the Centre involving African states related to construction projects and entailed the state paying the foreign contractor for its services.[56] Nathan strongly argued that such projects 'do not involve any transfer of foreign capital to the state concerned. Actually, money flows from the state to the foreign contractor'.[57] A

[53] ICSID Cases, Doc. ICSID/16/Rev.6 (30 September 1998), www.worldbank.org/icsid.

[54] This was acknowledged in the *Fedax* case, 37 ILM 1383, para. 25. The tribunal in the latter arbitration found jurisdiction based on a broad definition of investment under the Convention, in the applicable BIT, in the practices of ICSID and of the Contracting State party to the dispute, etc. This case will be discussed below.

[55] K. V. S. K. Nathan, 'Submission to ICSID in Breach of the Convention: Disputes in International Civil Engineering Contracts' (PhD Thesis, Queen Mary and Westfield College London, 1994). For a summary, see Nathan, 'Submissions to the ICSID in Breach of the Convention', JIA 12, 1995, No. 1, 26.

[56] According to the ICSID Secretariat: 'And the fact that the Convention does not define the term "investment" has enabled ICSID tribunals to accept jurisdiction over differences arising in connection with certain types of services and construction contracts as well as disputes relating to more traditional type of investments such as those made under concession agreements' (footnotes omitted): 'The ICSID Convention and Africa', 8.

[57] Nathan, 'Submissions to the ICSID', 28. See also J. Paulsson, 'ICSID Arbitration: The Host State's Point of View' in *Private Investments Abroad – Problems and Solutions in International Business* (New York: Matthew Bender, 1993), pp. 15–17, cited in *Discussion Paper 69*, para. 417, n. 15; *The 1998 SALC Report*, para. 4.20, n. 363. Alluding to the above views of Paulsson and Nathan, the SALC observed that: 'One answer to this is to give a broader definition to "investment" to include a contract, for example for the construction of a dam, which will potentially be of great benefit to the host state's economy. It must also be borne in mind that the construction contract will seldom be freestanding, but will normally be one of a group of inter-related contracts, at least one of which will have an investment component. A good example is a [build–operate–transfer] contract. Certainly, the main contract, the concession agreement between the concession company and the state

statement in the *SOABI* award[58] seems to support this view. In that case, the tribunal, in considering the objection of Senegal that there was no consent to submit the dispute to ICSID with respect to one of the agreements in issue, although rejecting that objection based on the other agreement, observed:

> It is clear from its text that this Article [Article 26 of the General Undertaking of 4 June 1980 between SOABI and the Government, which related to local works and stipulated the means of resolving disputes between the engineer and the contractor][59] provides for the resolution of a very particular type of dispute, one which arises between the engineer and the contractor in the course of the construction. After completion of the work, Article 26 would be functus and would not be invoked, for instance, in the case of defects discovered thereafter, contrary to the assertions of the respondent in this case. The Tribunal observes, finally, that the object of the General Undertaking was limited to construction of a building to be paid for by the client as work progressed, and could thus not be said to be an agreement concerning investments. Disputes arising thereunder could therefore not be investment disputes as required by Article 25 of the ICSID Convention.[60]

In any event, it is thought that a factual dispute is capable of being referred to ICSID if the consequence of the factual finding is the liability or otherwise of a party.[61] As the South African Law Commission (SALC) pointed out: 'The factual dispute arising from the contract will have legal consequences in deciding whether the contract has been duly performed or breached. This is a "legal dispute" relating to a conflict of rights as opposed to a mere conflict of interest and is therefore subject to the Convention'.[62] Whether or not there has been an 'investment' in the circumstance will be a separate question.

ICSID proceedings involving African states include the first dispute registered under the Convention involving a joint venture to build and

concerned will qualify as an investment contract for purposes of ICSID jurisdiction, although other forms of arbitration clause will probably have to be considered for the subsidiary contracts, where there is no state party to the contract': *Discussion Paper 69*, para. 4.18 (footnotes omitted); *The 1998 SALC Report*, paras 4.20–4.21 (footnotes omitted).

[58] Award of 25 February 1988, 2 ICSID Reports 190. [59] *Ibid*., paras 4.45–4.48.

[60] *Ibid*., paras 4.49–4.50.

[61] I am grateful to Professor James Crawford for raising this point with me. See also Schreuer, 'Article 25', 341, paras 47–8; *Discussion Paper 69*, para. 4.15, n. 9; *The 1998 SALC Report*, para. 4.18, n. 357, referring to, as 'clearly incorrect', the view that a difference over factual matters arising from a civil engineering contract would be outside ICSID's jurisdiction, as advanced by Nathan: 'Submissions to the ICSID', 41.

[62] *Discussion Paper 69*, *The 1998 SALC Report*.

operate hotels in Morocco;[63] a joint venture for the cultivation and processing of hemp and the production of fibre and textiles in Cote d'Ivoire;[64] the first ICSID arbitration brought by any government against a private party, the subject matter of which was the breach of a contract for the construction of a hospital maternity ward in Gabon;[65] an oil products distribution joint venture in the Congo;[66] the manufacture of plastic bottles in the Congo;[67] the production and marketing of liquefied natural gas in Nigeria;[68] the construction and operation of a fertiliser factory in Cameroon;[69] the construction of low-income housing units in Senegal;[70] a management contract for the operation of a cotton mill in Madagascar, which was the first time a request for conciliation was made under the Convention;[71] a forestry concession granted by the Government of

[63] *Holiday Inns SA, Occidental Petroleum Corp. et al.* v. *Government of Morocco* (Case No. ARB/72/1). Settlement agreed by the parties and the proceedings discontinued at their request: P. Lalive, 'The First "World Bank" Arbitration', 1 ICSID Reports 645, originally published in BYIL 51, 1980, 123.

[64] *Adriano Gardella SpA* v. *Government of Cote d'Ivoire* (Case No. ARB/74/1), Award of 29 August 1977, 1 ICSID Reports 283.

[65] *Government of Gabon* v. *Société Serete SA* (Case No. ARB/76/1). Settlement agreed by the parties and the proceedings discontinued at their request pursuant to Arbitration Rule 43(1).

[66] *AGIP SpA* v. *Government of the People's Republic of Congo* (Case No. ARB/77/1), Award of 30 November 1979, 1 ICSID Reports 306.

[67] *Benvenuti and Bonfant Srl* v. *Government of the People's Republic of the Congo* (Case No. ARB/77/2), Award of 8 August 1980, 1 ICSID Reports 330.

[68] *Gudalupe Gas Products Corp.* v. *Federal Military Government of Nigeria* (Case No. ARB/78/1). Settlement agreed by the parties and settlement recorded at their request in the form of an Award rendered on 22 July 1980.

[69] *Klockner Industrie-Anlagen GmbH, Klockner Belge SA and Klockner Handelmaatschappij BV* v. *United Republic of Cameroon and Société Camerounaise des Engrais* (Case No. ARB/81/2), Award of 21 October 1983, Dissenting Opinion and *ad hoc* Committee Decision, 2 ICSID Reports 3.

[70] *Société Ouest Africaine des Betons Industriels* v. *State of Senegal* (Case No. ARB/82/1), Award of 25 February 1988, 2 ICSID Reports 164.

[71] *SEDITEX Engineering Beratungsgesellschaft fur die Textilindustrie mbH* v. *Government of the Democratic Republic of Madagascar* (Case No. CONC/82/1), registered on 5 October 1982. The parties reached a settlement and the proceeding was closed on 20 June 1983, before the constitution of a conciliation commission. On 13 June 1994, the Secretary-General of ICSID registered yet another conciliation involving the same parties (Case No. CONC/94/1). That became the third request for conciliation under the Convention. A conciliation commission of three members was constituted. It drew up a report on 19 June 1996: *News from ICSID* 13, 1996, No. 2, 2. The second conciliation request under the Convention, but the first to produce a report, was *Tesoro Petroleum Corp.* v. *Government of Trinidad and Tobago* (Case No. CONC/83/1), registered on 26 August 1983. Settlement agreed by the parties and Report of the Conciliation Commission issued on 27 November 1985: Nurick and Schnably, 'The First ICSID Conciliation', 2 ICSID Reports 399, originally published in ICSID Rev-FILJ 1, 1986, 340.

Liberia;[72] a contract for the conversion, equipping and operation of fishing vessels for Guinea;[73] a tourism development project in Egypt;[74] a bauxite transportation joint venture involving Guinea;[75] a tourism and holiday resort project, which was the first ICSID case involving a developing state (Tunisia) and a natural person (a national of Saudi Arabia, another developing state) as a claimant;[76] the restructuring of an administrative and residential complex in Gabon;[77] a bank branch operation in Egypt;[78] a salt mining operation in Ghana;[79] a manufacturing and trading enterprise in Zaire;[80] a mining enterprise, which was the third ICSID arbitration in which the claimant was a natural person;[81] a gold mining operation in Burkina Faso;[82] a petroleum exploration and exploitation agreement in the Congo;[83] a textile industry enterprise in Cote

[72] *Liberia Eastern Timber Corp.* v. *Government of the Republic of Liberia* (Case No. ARB/83/2), Award of 31 March 1986 and rectification of error in Award rendered on 10 June 1986, 2 ICSID Reports 343.

[73] *Atlantic Triton Co. Ltd* v. *People's Revolutionary Republic of Guinea* (Case No. ARB/84/1), Award of 21 April 1986, 3 ICSID Reports 13.

[74] *Southern Pacific Properties (Middle East) Ltd* v. *Arab Republic of Egypt* (Case No. ARB/84/3), Award and Dissenting Opinion of 20 May 1992, 3 ICSID Reports 101.

[75] *Maritime International Nominees Establishment* v. *Government of the Republic of Guinea* (Case No. ARB/84/4), Award, 6 January 1988 and *ad hoc* Committee Decision, 22 December 1989, 4 ICSID Reports 54.

[76] *Ghaith R Pharaon* v. *Republic of Tunisia* (Case No. ARB/86/1). Settlement agreed by the parties and the proceedings discontinued at their request. An Order of 21 November 1988 was made to reflect that settlement pursuant to Arbitration Rule 43(1).

[77] *Société d'Etudes de Travaux et de Gestion SETIMEG SA* v. *Republic of Gabon* (Case No. ARB/87/1). Settlement agreed by the parties and proceedings discontinued at their request. Order of discontinuance issued on 21 January 1993.

[78] *Manufacturers Hanover Trust Co.* v. *Arab Republic of Egypt and General Authority for Investment and Free Zones* (Case No. ARB/89/1). Settlement agreed by the claimant and one of the respondents and proceedings discontinued at their request. Order of discontinuance of 24 June 1993 issued.

[79] *Vacuum Salt Products Ltd* v. *Government of the Republic of Ghana* (Case No. ARB/92/1), Award of 16 February 1994, 4 ICSID Reports 320.

[80] *American Manufacturing and Trading, Inc.* v. *Republic of Zaire* (DRC) (Case No. ARB/93/1), registered on 2 February 1993 and Award rendered on 21 February 1997, Int Arb Rep 12 (April 1997), A-1. An application for the revision of the Award was registered on 29 January 1999. Following a settlement agreed by the parties, the claimant requesed the discontinuance of the proceedings: *News from ICSID* 17, Spring 2000, 4. Order taking note of the discontinuance issued by the Tribunal on 26 July 2000 pursuant to Arbitration Rule 44.

[81] *Antoine Goetz and Others* v. *Republic of Burundi* (Case No. ARB/95/3), registered on 18 December 1995. Award embodying the parties' settlement agreement rendered on 10 February 1999.

[82] *Société d'Ivestigation de Recherche et d'Exploitation Miniere (SIREXM)* v. *Republic of Burkina Faso* (Case No. ARB/97/1), registered on 27 January 1997. Award rendered on 19 January 2000.

[83] *Société Kufpec (Congo) Ltd* v. *Republic of Congo* (Case No. ARB/97/2), registered on 27 January 1997. Proceedings discontinued at the request of the claimant. Order taking note of the discontinuance issued by the Secretary-General on 8 September 1997 pursuant to Arbitration Rule 44.

d'Ivoire;[84] a maritime registry dispute from Liberia;[85] a hotel lease and development agreement in Egypt;[86] a dispute involving the Democratic Republic of Congo relating to a gold mining concession;[87] a dispute involving Tanzania relating to a power purchase agreement;[88] a dispute involving a groundnut enterprise in the Gambia;[89] a dispute involving a cement distribution enterprise in Egypt;[90] a dispute concerning a law firm brought against the Democratic Republic of Congo;[91] two different disputes concerning the construction of sections of a highway in Morocco;[92] a dispute involving Kenya over duty-free concessions;[93] and a dispute involving the Democratic Republic of Congo concerning cobalt and copper mining concessions.[94]

In some of the above cases, ICSID tribunals made reference to the nature of the subject matter, qualifying it as investment for jurisdictional purposes. In the *SPP* award,[95] the dissenting arbitrator cited the Preamble to the Convention and the report of the Executive Directors on the Convention to indicate the considerations upon which the Convention was elaborated.[96] The Executive Directors' report (paragraph 9) noted that the *raison d'être* of the creation of an institution designed to facilitate the settlement of disputes between states and foreign investors can be a major step towards promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it. The Executive Directors believe that

[84] *Compagnie Francaise pour le Developpment des Fibres Textiles* v. *Republic of Cote d'Ivoire* (Case No. ARB/97/8) registered on 4 November 1997. Award rendered on 4 April 2000.

[85] *International Trust Co. of Liberia* v. *Republic of Liberia* (Case No. ARB/98/3), registered on 28 May 1998.

[86] *Wena Hotels Ltd* v. *Arab Republic of Egypt* (Case No. ARB/98/4), registered on 31 July 1998.

[87] *Banro American Resources, Inc. and Société Aurifere du Kivu et du Maniema SARL* v. *DRC* (Case ARB/98/7), registered on 28 October 1998. Award of 1 September 2000 declining jurisdiction.

[88] *Tanzania Electric Supply Co. Ltd* v. *Independent Power Tanzania Ltd* (Case No. ARB/98/8), registered on 7 December 1998.

[89] *Alimenta SA* v. *Republic of The Gambia* (Case No. ARB/99/5), registered on 12 July 1999.

[90] *Middle East Cement Shipping and Handling Co. SA* v. *Arab Republic of Egypt* (Case No. ARB/99/6), registered on 19 November 1999.

[91] *Patrick Mitchell* v. *DRC* (Case No. ARB/99/7), registered on 10 December 1999.

[92] *Salini Costruttori SpA and Italstrade SpA* v. *Kingdom of Morocco* (Case No. ARB/00/4), registered on 13 June 2000, and *Consortium RFCC* v. *Kingdom of Morocco* (Case No. ARB/00/6), registered on 28 June 2000.

[93] *World Duty Free Co. Ltd* v. *Republic of Kenya* (Case No. ARB/00/7), registered on 7 July 2000.

[94] *Ridgepointe Overseas Developments Ltd* v. *DRC* (Case No. ARB/00/8), registered on 27 July 2000. The status of other disputes submitted to the Centre after the above date and under the Convention involving African states and their subject matters could be viewed at www.worldbank.org/icsid.

[95] 3 ICSID Reports 101.

[96] *Ibid*. at pp. 252–3, para. 2.

adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of international investment into its territories, which is the primary purpose of the Convention (paragraph 12).[97] The arbitrator further explained the notion of 'investment' and 'investor', citing the 1974 Egyptian Law on Investment:

> The main characteristic differentiating investors from developers or promoters or the like, seems to reside in the fact of *the flow of invested capital, as an instrument for economic development, that brings the investor into the host State.* It is to be noticed that the scope *ratione materiae* of the jurisdiction of the Center is limited to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State . . . Reference to 'investment' anywhere in the Convention, should be accorded the same significance, which consists, as above mentioned, *in the flow of international capital to the host State*.[98]

In the *LETCO* award,[99] the tribunal emphasised the extensive outlay of capital provided by LETCO to develop the concession agreement. The agreement required LETCO to provide 'all capital at such times and in such amounts as may be required for the economic and profitable development of this concession'.[100] As the tribunal concluded: 'There is . . . no doubt that, based on the Concession Agreement, amounts paid out to develop the Concession, as well as other undertakings, this legal dispute has arisen directly from an "investment" as that term is used in the Convention.'[101] Earlier, the same consideration prevailed in the *Jamaican Bauxite* case.[102] There, the tribunal stated:

> It follows that the intention of the Convention was that the consent of the parties should be entitled to great weight in any determination of the Centre's jurisdiction. Moreover, it seems clear to the Tribunal that a case like the present, in which a mining company has invested substantial amount in a foreign State in reliance upon an agreement with that State, is among those contemplated by the Convention.[103]

And, in the *Cable Television* award,[104] referring to the project (i.e. the investment) 'with benefits accruing to both NIA [the host community] and Cable

[97] *Ibid*. at p. 252, para. 2 (emphasis in the award). See also the *Vacuum Salt Award*, 4 ICSID Reports 344–5, para. 39.

[98] 3 ICSID Reports 252–3 (emphasis added); *ibid*. at p. 254. Cf. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: CUP, 1994), pp. 4–8.

[99] 2 ICSID Reports 343. [100] *Ibid*. at p. 349. [101] *Ibid*. at p. 350.

[102] Schmidt, 'Arbitration Under the Auspices of the ICSID', 98–100; Muchlinski, *Multinational Enterprises*, pp. 546–7. [103] *Jamaican Bauxite* case, 1 ICSID Reports 296, 303.

[104] *Cable Television of Nevis and Cable Television of Nevis Holdings Ltd* v. *Federation of St Christopher (St Kitts) and Nevis,* Award of 13 January 1997, ICSID Rev-FILJ 13, 388, para. 6.32.

[the foreign investor]', the tribunal observed that 'the overseas investors seemingly moved large sums of money held outside to invest in Nevis in the establishment of the project'. Finally, in the *Fedax* case,[105] Venezuela argued that Fedax did not qualify as an investor as it had not made any investment 'in the territory' of Venezuela. The tribunal noted:

> While it is true in some kinds of investment listed in article 1(a) of the Agreement [the BIT in issue in the case], such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere . . . The important question is whether the funds made available are utilized by the beneficiary of the creditor, as in the case of the Republic of Venezuela, so as to finance its various governmental needs.

As seen from the above awards, 'investment' under the Convention may be broadly synonymous with direct investment, and, when a BIT is involved, as in *Fedax*, portfolio or indirect investment.

Legislation in Africa may contain definitions of investment. For example, under section 2 of the Zambia Investment Act of 1993, unless the context otherwise requires, 'foreign investment' means investment brought in by an investor from outside, and invested in Zambia; 'investment' means the contribution of capital, in cash or in kind, by an investor, to a new business enterprise, to the expansion or rehabilitation of an existing business enterprise or to the purchase of an existing business enterprise from the state; and 'investor' means any person, natural or juridical, whether a Zambian citizen or not, investing in Zambia in accordance with the provisions of the Act. And, under section 32 of the Nigeria Investment Promotion Commission Act 1995,[106] unless the context otherwise requires, 'enterprise' means an industry, undertaking, project or business to which this Act applies or an expansion of that industry, undertaking, project or business or any part of that industry, undertaking, project or business and, where there is foreign participation, means such an enterprise duly registered with the Nigerian Investment Promotion Commission. 'Capital' means all cash contributions, plant, machinery, equipment, building, spare parts, raw materials and other business assets, other than goodwill, and 'foreign capital' means convertible currency, plant, machinery, equipment, spare parts, raw materials and other busi-

[105] 37 ILM 1386, para. 41. [106] See pp. 318–26.

ness assets other than goodwill that are brought into Nigeria with no initial disbursement of Nigerian foreign exchange and are intended for the production of goods and services related to an enterprise to which the Act applies. 'Investment' means an investment made to acquire an interest in an enterprise operating within and outside the economy of Nigeria. Also, under the Act, 'foreign loan' means a loan obtained from outside Nigeria and denominated in any convertible currency.[107]

The definition of 'investment' in BITs (making reference to ICSID proceedings for investor–state disputes) can be broad and contain inexhaustive lists of varied items. For example, an 'investment' means 'every kind of asset and in particular, though not exclusively, includes . . .';[108] or, as in the BIT between the US and Egypt, 'every kind of asset, owned or controlled, and includes but is not limited to . . .' (Article 1(1)(c)).[109] The BIT between the US and Cameroon defines an 'investment' as meaning 'every kind of asset in the territory of either Party, owned or controlled directly or indirectly by nationals or companies of either Party, including equity, debt, services and investment contracts; and includes . . .' (Article 1(1)(b)).

Commenting on similar descriptions of investment in BITs, especially the one between the USSR and France, Paulsson observed:

> This broad definition goes beyond the every day meaning of the word *investment*. It would encompass a wide range of purely contractual rights – not only ones owed by the host States, but also others which might merely be affected by State action – and could thus greatly expand the scope of arbitrable disputes. It is therefore highly significant to note that this particular provision recurs in a wide range of BITs.[110]

Some BITs concluded by some African states with the former communist states, might be different in this respect, as there was generally no attempt to define exhaustively what was an investment. Their definitions may, however, call for broad interpretation, and, accordingly, the need for an

[107] The latter definitions are circular.

[108] E.g. the 1990 BIT between Nigeria and the UK, Article 1(a). Entered into force on 11 December 1990. Cf. the 1978 BIT between Sweden and Egypt. Entered into force on 29 January 1979. The latter provides that the term 'investment' shall comprise 'every kind of asset and more particularly, though not exclusively . . .' (Article 1(1)).

[109] Also, the 1976 BIT between The Netherlands and Egypt which entered into force on 1 January 1978 (but terminated on the entry into force of the treaty between Egypt and The Netherlands signed on 17 January 1996) provides that the term 'investments' shall comprise 'every kind of asset invested in accordance with the laws and regulations of either Contracting Party and more particularly, though not exclusively . . .' (Article 1(a)). The 1996 BIT entered into force on 1 January 1978.

[110] J. Paulsson, 'Arbitration Without Privity' in Walde (ed.), *The ECT*, pp. 422, 427.

early generalisation does not arise. For example, in Article VIII(1) of the 1976 BIT between Egypt and Romania,[111] 'capital investments' means 'any form of assets contributed by investors of either Contracting party to the investments, according to the respective laws and regulations of the Contracting Party on whose territory the investments are made and to the documents concerning the approval of the investments'.[112] Nevertheless, under Article 2(1) of the 1980 BIT between Cameroon and Romania, 'investment' refers to 'all assets invested or reinvested in an undertaking or business and any value added, or more specifically but not exclusively, of . . .'.

Items normally introduced by those expansive phrases, whether the treaty is with a capitalist or former communist state are, in most cases, indiscriminate, objectively unrelated and often repeated and reinforced in the same treaty. Such items may include shares or other forms of participation in companies, reinvested profit, rights to claim or other entitlements for services having financial value, the provision of services and the concession of licences and permits issued pursuant to law or any right conferred by law or contract and all permits and licences such as those required for the exploitation of natural resources, financial contributions in the form of foreign exchange, industrial and intellectual property rights, copyrights, patents, trademarks, trade names, trade secrets, know-how and goodwill; and tangible and intangible property, including rights, such as mortgages, liens and pledges, all or part of the shares or stock or other interests in a company or interests in the assets thereof, and a claim to money or a claim to performance having economic value and associated with an investment, etc.[113]

In addition, especially with BITs concluded by the US, an elaborate list of items (similar to the clauses referred to above) regarded as 'investment' will be coupled with a specific definition of 'investment disputes' but, in

[111] The Treaty entered into force on 22 January 1977 but terminated when the Treaty of 24 November 1994 between Romania and Egypt entered into force in 1996. Cf. the BIT between Egypt and Japan, 28 January 1977, in force since 14 January 1978, providing that the term 'investments' comprises 'every kind of assets including . . .' (Article 1(1)).

[112] Under Article 2(a) of the BIT between Romania and Sudan, 'Capital Investment' means 'the contribution to the achievement of an economic objective comprising all goods, services and financial means of the participants to the investment'. In both Treaties, ICSID proceedings were referred to after the exhaustion of domestic remedy and only for disputes relating to compensation for expropriation.

[113] Cf. the 1982 BIT between the US and Egypt, Article 1(1)(c) (for investment). The 1985 BIT between Morocco and US, Article 1(4), may appear more detailed in this respect than the Egypt–US Investment Treaty but in either case what is an 'investment' is open-ended.

most cases, excluding *inter alia* disputes arising under export credit guarantee insurance schemes which have special procedures for resolving disputes.[114] For example, Article VII(1) of the 1983 BIT between the US and Senegal[115] provides:

For the purposes of this Article, an investment dispute is defined as a dispute involving,

(a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party;
(b) the interpretation or application of any investment authorization granted by the competent authority of a Party to such a national or company; or
(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.[116]

Shorter versions are in Article VII(1) of the 1982 BIT between the US and Egypt providing:

For the purposes of this Article (dealing with the settlement of legal investment disputes), a legal investment dispute is defined as a dispute involving

(i) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; or
(ii) an alleged breach of any right conferred or created by this Treaty with respect to an investment.[117]

Other investment treaties and instruments adopt, more or less broad definitions of 'investments'.[118] The approach is to give 'investment' a broad definition recognising that its forms are constantly evolving in response to the creativity of investors and the rapidly changing world of international finance.[119]

[114] See p. 239 above. [115] In force since 25 October 1990.

[116] Article VII(6) of the BIT between the US and Senegal delimits investment dispute by excluding 'a dispute arising: (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States, or (b) under official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes'. To the same effect is the 1982 BIT between the US and Egypt, Article VII(6).

[117] To the same effect is the 1985 BIT between US and Morocco, Article VI(1).

[118] The MIGA Convention 1985, 24 ILM 1598, Articles 12 and 13; Canada–US FTA 1988, 27 ILM 377, Article 1611; NAFTA 1992, 32 ILM 647, Article 1139; the ECT 1994, 34 ILM 383, Article 1(6); ASEAN Treaty for the Promotion and Protection of Investments 1987, 27 ILM 612, Article 1 (some parts amended in 1996); World Bank, 'Guidelines on the Treatment of Foreign Direct Investment', 31 ILM 1371; M. K. Omalu, *NAFTA and the ECT* (The Hague: Kluwer, 1999), pp. 55–9.

[119] Salacuse, 'The ECT and BIT' in Walde (ed.), *The ECT*, p. 332.

The Fedax case

Fedax[120] was the first ICSID case in which the Centre's jurisdiction was challenged on the ground that the underlying transaction did not meet the requirement of an investment within Article 25(1).[121] Because of the potential importance of *Fedax* to investment treaties that broadly defined 'investment' (which treaties, in most cases, refer their disputes to ICSID), this case has to be examined closely, even though it did not involve an African state.[122] The case arose in the context of a BIT with similar, if not identical, provisions to BITs to which so many African states are parties.[123] The case has and will continue to have considerable practical and policy implications.[124]

The case was brought by Fedax NV (a company established and domiciled in Curacao in the Netherlands Antilles) against Venezuela. It concerned a dispute arising out of certain debt instruments (six promissory notes) issued by Venezuela to a Venezuelan corporation, Industrias

[120] 37 ILM 1378.

[121] *Ibid*., para. 25. The question has since arisen, in varying degrees, in *Tredax Hellas SA* v. *Republic of Albania*, Award of 29 April 1999, ICSID Rev-FILJ 14, 1999, 197, para. 106; *Ceskoslovenska Obchodni Banka (CSOB), AS* v. *Slovak Republic*, Decision of 24 May 1999, *ibid*. at p. 251. In both cases, the Tribunals relied on *Fedax* in determining the issue.

[122] Amongst the investment treaties mentioned in the Decision, either to distinguish or to draw an analogy from them for interpreting 'investment' under the 1991 BIT in issue in the context of the ICSID proceeding, was the MIGA Convention. The Tribunal held that the latter has some parallel with the ICSID Convention in as much as investments insured under the MIGA Convention would qualify as investments under Article 25(1), although the two systems are not identical. An investment under ICSID terms will not qualify for insurance under MIGA if it does not meet the stricter definitions of the MIGA Convention, which essentially is concerned with FDI. ICSID may cover investments which may not be direct if the circumstances so warrant: citing *ibid*., para. 27, the 1988 Operational Regulations of the MIGA as amended, ICSID Rev-FILJ 3, 1988, 360; and C. B. Lamm and A. C. Smutny, 'The Implementation of ICSID Arbitration Agreement', ICSID Rev-FILJ 11, pp. 64, 80.

[123] Other investment treaties or instruments mentioned in the Award are: the 1994 ECT, Article 1(6); the 1994 Mercosur Protocol, Article 1; the 1994 Protocol for the Promotion and Protection of Investments Made in Countries That Do Not Belong to Mercosur, Article 2; the 1984 BIT between the US and Zaire, Article 1; the Council of European Communities Position on Investment Protection Principles in the ACP States (1992); the World Bank Guidelines on the Treatment of FDI (1992); the 1994 Mexico–Columbia–Venezuela FTA, Article 17-01; the NAFTA 1992, Article 1139, and A. A. Escobar, 'Introductory Note on BITs Recently Concluded by Latin American States', ICSID Rev-FILJ 11, 1996, 86, etc: 37 ILM 1385, paras 34–7.

[124] It has to be remarked that in drafting the Decision on Jurisdiction in the case, the use made by the tribunal of published materials on the ICSID Convention or those written by individuals closely connected with the Centre and its proceedings is, so far, probably unparalleled in the Convention's jurisprudence.

Metalurgicas Van Dam CA, which later endorsed the instruments to the claimant, Fedax.[125] The latter, in its request for arbitration, invoked the 1991 BIT between the Netherlands and Venezuela.[126] Objections to the jurisdiction of the Centre and to the competence of the tribunal were initially raised and subsequently confirmed by Venezuela. The tribunal decided to suspend proceedings on the merits in order to decide the questions of jurisdiction that arose.[127] After considering the basic facts of the dispute, the ICSID Convention and the 1991 BIT as well as the written and oral arguments of the parties, the tribunal unanimously decided that the dispute was within the jurisdiction of the Centre and its competence and made orders continuing into the merits of the dispute.[128]

Having held that there was a legal dispute between the parties, as required by the Convention, and that the jurisdiction *ratione personae* was not in contention between the parties nor had an objection on that ground been raised by Venezuela,[129] the tribunal focused on the 'main jurisdiction question' raised in the case, namely, whether the dispute involved an 'investment' within the meaning of Article 25(1) of the Convention.[130]

In its objections to the Centre's jurisdiction, Venezuela had argued that the claimant company, Fedax, could not be considered to have made an investment for the purposes of the Convention because it acquired by way of endorsement the promissory notes issued by Venezuela in connection with the contract made with Industrias Metalurgicas – a Venezuelan corporation.[131] Thus, the tribunal observed: 'The interpretation of the term "investment" is therefore crucial in determining the scope of the Centre's jurisdiction under the Convention'.[132]

In the view of Venezuela, the holding of the promissory notes by Fedax did not qualify as 'investment' since the transaction did not amount to FDI involving a long-term transfer of financial resources – capital flow – from one country to another (the recipient of the investment) in order to acquire interests in a corporation, a transaction which normally entailed certain risks to potential investors.[133] Venezuela argued that the transaction

[125] *Ibid*., paras 1 and 13.
[126] *Ibid*., para. 1. The BIT was signed on 22 October 1991 and entered into force on 1 November 1993: Doc. ICSID/17, 30 May 1997, pp. 14, 71, 94.
[127] 37 ILM 1380, paras 9–14.
[128] *Ibid*., paras 15–45. The tribunal's Award of 9 March 1998 on the merits is reported in 37 ILM 1391. It does not have much significance as such with respect to jurisdictional matters.
[129] 37 ILM 1381, paras 15–17.
[130] *Ibid*., para. 18.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*., para. 19, for a summary of Venezuela's brief on its objection to jurisdiction.

would not also qualify as a portfolio investment to acquire titles to money, because, in Venezuela, this occurred when the investor acquired shares of a corporation through the Stock Exchange – a kind of investment only considered direct when the acquisition of the title was done in a primary way. Venezuela further argued that the tribunal should apply the rule of interpretation contained in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties and interpret the term 'investment' 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Under such an interpretation, in the view of Venezuela, investment in an economic context meant the laying out of money or property in business ventures so that it may produce a revenue or income, and that this particular interpretation was necessary to accommodate the definition of investments as comprising 'every kind of asset' as that phrase appeared in Article 1(a) of the 1991 BIT.[134]

The tribunal considered with 'great attention' the above arguments as well as the opposing arguments of the claimant 'in the light of Article 25(1) of the [ICSID] Convention, Article 1(a) and related provisions of the [1991 BIT] and other relevant considerations'.[135]

Considering the meaning of investment under the ICSID Convention, the tribunal referred to the numerous failed attempts to define the concept during the negotiations of the Convention, observing that it was finally decided to leave any definition of 'investment' to the consent of the parties.[136] The tribunal cited Broches for a 'most pertinent' account of those negotiations,[137] noting that, in the light of those considerations, commentators have concluded that a broad approach to the interpretation of the term in Article 25(1) was warranted,[138] that it was within the sole discretion of each Contracting State to determine the type of

[134] *Ibid*. [135] *Ibid*., para. 20.

[136] *Ibid*., para. 21, citing Schreuer, 'Article 25', 355–8; *History of the Convention*, pp. 835–7; *Report of the Executive Directors*, para. 27; Lamm and Smutny, 'Implementation', 80.

[137] *Ibid*., para. 21, n.11, citing A. Broches, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction', Columbia JTL 5, 1966, 261–80, 268 (footnote omitted) that: 'During the negotiations several definitions of "investment" were considered and rejected. It was felt in the end that a definition could be dispensed with "given the essential requirement of consent by the parties". This indicates that the requirement that the dispute must have arisen out of an "investment" may be merged into the requirement of consent to jurisdiction. Presumably, the parties' agreement that a dispute is an "investment dispute" will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling.'

[138] Citing Amerasinghe, 'The Jurisdiction of ICSID', 81.

investment disputes that it considers arbitrable in the context of ICSID,[139] and that the parties thus have a large measure of discretion to determine for themselves whether their transaction constituted an investment for the purposes of the Convention.[140]

On the argument of Venezuela that the disputed transaction was not a 'direct foreign investment' and therefore could not qualify as an investment under the Convention, the tribunal responded:

> However, the text of Article [25](1) establishes that the 'jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment'. It is apparent that the term 'directly' relates in this Article to the 'dispute' and not to the 'investment'. It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term 'investment' must be given in light of the negotiating history of the Convention. Precisely because the term 'investment' has been broadly understood in the ICSID practice and decisions, as well as in scholarly writings, it has never before been a major source of contention before ICSID Tribunals. This is the first ICSID case in which the jurisdiction of the Centre has been objected to on the ground that the underlying transaction does not meet the requirements of an investment under the Convention. On prior occasions ICSID Tribunals have examined on their own initiative the question whether an investment was involved, and on each such case have reached the conclusion that the 'investment' requirement of the Convention has been met.[141]

The tribunal considered that the broad scope of Article 25(1) and the ensuing ICSID practice and decision are sufficient, without more, to require a finding that the Centre's jurisdiction and its own competence were well founded.[142] In addition, as observed earlier by the tribunal, matters within the jurisdiction of the Centre were left to the discretion of the parties;[143]

[139] Citing G. R. Delaume, 'ICSID and the Transnational Financial Community', ICSID Rev-FILJ 1, 239–40; I. F. I. Shihata, 'The Settlement of Disputes Regarding Foreign Investments: The Role of the World Bank, With Particular Reference to ICSID and MIGA', Arab LQ 1, 1986, 265.

[140] 37 ILM 1382, paras 22–3, citing Lamm and Smutny, 'Implementation', 80.

[141] *Ibid*., paras 24–5, citing Schreuer, 'Article 25', 360; Lamm and Smutny, 'Implementation', 80; *Kaiser Bauxite* v. *Jamaica*, 1 ICSID Reports 296; *Alcoa Minerals of Jamaica, Inc.* v. *Jamaica*, 4 YBCA 206; *LETCO* v. *Liberia*, 2 ICSID Reports 346; and *SOABI* v. *Senegal*, *ibid*. at p. 165. In *AMT* v. *Zaire (DRC),* Int Arb Rep 12 (April 1997), A-1, paras 5.12–5.16, the Tribunal accepted the definition of 'investment' in a BIT between the US and the DRC as a basis for its jurisdiction. For aspects of the Award dealing respectively with the nationality qualification and consent to ICSID, see pp. 297–300 and pp. 350–2 below.

[142] 37 ILM 1384, para. 29.

[143] *Ibid*., para. 22, citing Schreuer, 'Article 25', 357; Amerasinghe, 'The Jurisdiction of the ICSID', 181.

and, with reference to the commentators on the Convention and the history of its negotiations as to such matters,[144] the tribunal held, in connection with the promissory notes as a form of loan or credit, that loans qualify as an investment within ICSID's jurisdiction as does, in given circumstances, the purchase of bonds.[145] The tribunal said:

> Since promissory notes are evidence of a loan and a rather typical financial credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this. This conclusion, however, has to be examined next in the context of the specific consent of the parties and other provisions which are controlling in the matter.[146]

The tribunal then considered the 1991 BIT, which it took as governing the consent to arbitration by Venezuela. Under Article 9(1) of the BIT, disputes between one contracting party (Venezuela) and a national of the other contracting party (Fedax, a national of The Netherlands) concerning an obligation of the former (Venezuela) under the BIT in relation to an investment of the latter (Fedax) shall be submitted to ICSID for settlement by arbitration or conciliation.[147] It followed, according to the tribunal, that the definition of 'investment' was controlled by consent of the contracting parties, and that the particular definition stipulated in Article 1(a) of the BIT was the one that governed the jurisdiction of ICSID. According to Article 1(a): 'The term "Investment" shall comprise every kind of asset and more particularly though not exclusively . . . (ii) rights derived from shares, bonds, and other kinds of interests in companies and joint ventures; (iii) title to money, to other assets or to any performance having an economic value'.[148]

The tribunal noted that the above definition evidences that the contracting parties to the BIT intended a very broad meaning for the term

[144] *Ibid*., paras 22–3, citing *History of the Convention*, pp. 261, 474 (jurisdiction over loans); *ibid*. at p. 451 (suppliers' credits); *ibid*. at p. 542 (outstanding payments); *ibid*. at p. 661 (ownership of shares); *ibid*. at p. 500 (construction contracts); Delaume, 'ICSID and the Financial Community', 242 (footnote omitted) (transnational loans).

[145] 37 ILM 1384, para. 29.

[146] *Ibid*.

[147] By Article 9(4) of the Treaty, each party [The Netherlands and Venezuela] gives its unconditional consent to submit disputes to ICSID as indicated (*ibid*., para. 30). It should be noted that the consent of a State so expressed does not *per se* confer jurisdiction on ICSID. It has to be perfected by an 'acceptance' by an investor. In this case, it seems that Fedax's acceptance was expressed by the request for arbitration against Venezuela: see pp. 308–9; 346–50. The tribunal had earlier held that there was a legal dispute and that there was no question as to the status of the parties to the proceedings with respect to jurisdiction *ratione personae*: see pp. 256–7.

[148] *Ibid*., para. 31.

'investment' and that that was 'not at all an exceptional situation' in light of most contemporary bilateral and multilateral instruments which refer to 'every kind of assets' or to 'all assets', including the listing of examples that can qualify for coverage; claims to money and any performance having a financial value being prominent features of such listings.[149] As the tribunal asserted: 'Indeed, only very exceptionally do bilateral treaties explicitly relate the definition of the assets or transactions included in this concept to questions such as the existence of a lasting economic relation,[150] or specifically associated titles to money and similar transactions strictly to a concept of investment'.[151]

In conclusion, the tribunal was satisfied 'that loans and other credit facilities are within the jurisdiction of the Centre under both the terms of the Convention and the scope of the bilateral Agreement governing consent in this case'. With respect to the six promissory notes issued by Venezuela, the tribunal observed:

> A promissory note is by definition an instrument of credit, a written recognition that a loan has been made. In this particular case the six promissory notes in question were issued by the Republic of Venezuela in order to acknowledge its debt for the provision of services under a contract signed in 1988 with Industrias Metalurgicas Van Dam CA; Venezuela had simply received a loan for the amount of the notes for the time period specified therein and with the corresponding obligation to pay interest. The Tribunal noted that there is nothing in the nature of the foregoing transaction, namely the provision of services in return for promissory notes, that would prevent it from qualifying as an investment under the Convention and the Agreement.[152]

Concluding remarks

An expansive definition of 'investment' may have negative implications for the economic regulation and development of the host state.[153] It may also blur the line between ordinary items of international or domestic trade and notable features of FDI. What such an expansive definition would mean for proceedings under the ICSID Convention elaborated for

[149] *Ibid*., para. 34. The Tribunal observed (*ibid*., para. 33) that Venezuela did not exercise its right under Article 25(4) of the Convention: see p. 244.

[150] Citing the 1992 BIT between Denmark and Ukraine, Article 1.

[151] 37 ILM para. 34, citing the 1984 BIT between the US and Zaire (DRC), Article 1.

[152] *Ibid*., paras 37–8. See also *ibid*., paras 39–41, for the qualities of the transaction making it an investment under the Convention and under the 1991 BIT.

[153] UNCTAD, *Scope and Definition* (New York and Geneva, 1999); UNCTAD, *Trends in International Investment Agreements* (New York and Geneva, 1999), pp. 55–8; UNCTAD, *FDI and Development*.

the purpose of stimulating a greater 'flow' of international capital to those countries that need it for their own economic development, depends on the appreciation of the parties to an investment contract (if any), on the Secretary-General of ICSID in the exercise of the screening power and on ICSID tribunals or commissions in particular cases.

For those BITs stipulating ICSID as one or the only dispute resolution option, the utility of some definitions of 'investment' for ICSID proceedings may be debatable and should be treated with caution.[154] The same may be said of laws purporting to define 'investments'. With respect to the latter, their object is to delimit what transactions would be entitled to the benefits of the particular law in issue and depends very much on the subjective need and judgment of the state concerned: '[o]n the whole, such legislation is unhelpful for the purposes of interpreting the Convention'.[155]

Under the Convention, the nature of the subject matter of proceedings (i.e. what is an investment) is very important and has enormous jurisdictional implications.[156] This observation is made in light of limitations on

[154] Schreuer, 'Article 25', 362–3. Of the ECT 1994, which also stipulates ICSID arbitration as an option, it has been said of its Article 1(6) that it 'assigns the widest possible meaning to the term "investment", basically encompassing any legal right of financial value . . . This wide concept – different from the economics/business understanding of "investment" as a lasting commitment of resources for productive purposes – contributes to some of the confusion created by the Treaty, in particular with respect to the possibility of Art. 26 [providing for compulsory arbitration] to function as super-appeal procedure against domestic and arbitral litigation of all sorts of commercial disputes': T. W. Walde, 'International Investments Under the 1994 Energy Charter' (CPMLP Professional Paper No. PP17, 1995), p. 23.

[155] Amerasinghe, 'The Jurisdiction of the ICSID', 178. In *Tradex Hellas SA* v. *Republic of Albania*, Decision on Jurisdiction, 24 December 1996, ICSID Rev-FILJ 14, 161, 181–2, and Award of 29 April 1999, *ibid*. at p. 197, the tribunal held that Tradex satisfied the conditions under the 1993 Foreign Investments Law of Albania to be a 'foreign investor' but without prejudice to the question whether the consent to ICSID in Article 8 of that Law was applicable. The tribunal later observed that jurisdiction was established under the law as the claims of expropriation by Tradex against Albania were covered by the latter's consent in the above provision. On the merits, the tribunal did not consider an expropriation attributable to Albania.

[156] ICSID arbitration and conciliation on that account are unlike arbitration or conciliation under the Rules of the ICC, the LCIA, the PCA, the AAA and the AALCC Regional Centres or under the UNCITRAL Arbitration Rules, etc. Unlike under these rules when a tribunal might be seised merely by the consent or agreement of the parties, in ICSID proceedings, including under the Additional Facilities Rules, that is not the case as there are other indispensable jurisdictional requirements relating to the nature of the dispute, its subject matter and the parties which characterise their uniqueness: *Vacuum Salt* Award, 4 ICSID Reports 342–3, para. 36 (an ICSID case); *Ethyl Corp.* v. *Canada*, Award on Jurisdiction, 24 June 1998, 38 ILM 724, para. 59 (a NAFTA/UNCITRAL Arbitration Rules case).

the characterisation by parties of what is or is not an investment under the Convention.[157] But a further question may be whether such a determination could appropriately be made in a treaty between two Contracting States as was upheld in the *Fedax* case.

Critical to what is an investment under the Convention is that a subject matter must contribute to or stimulate the flow of private capital *into* the host state for the latter's economic development.[158] A definition of investment as 'every [any] kind of assets, owned or controlled' or 'claims to money or to any performance under contract having commercial [economic] value', is more appropriate for a definition of property or a proprietary or contractual right, owned or controlled (either directly or indirectly) by a national of a particular state to the treaty.[159] However, the ICSID Convention would not protect such property, contract or, proprietary or contractual right, *unless* such also constitutes an *investment* based on the consideration upon which the Convention was elaborated.[160] Otherwise, a foreign construction company employed and paid by Botswana (probably in freely usable currency) to construct a bridge might qualify as an investor. And, interestingly, some of the treaties in issue include 'services', 'a claim to money or a claim to performance having economic value' in their definitions of investments.[161] The *Fedax* case, in taking the notion of 'investment' under the Convention much further to include portfolio investments, might defeat the policy objectives of the Convention to the disadvantage of those states in need of economic development. A BIT would not so drastically detract from a multilateral treaty as to render the whole object and purpose of the latter otiose.

Thus, apart from the question whether such definitions could be made in treaties between states (entailing that the onus will be on a particular private investor relying thereon to establish its *locus standi* to proceed

[157] See p. 241 above; Amerasinghe, 'The Jurisdiction of the ICSID', 180–1.

[158] See pp. 241–55 above with footnotes.

[159] Cf. the draft Convention on the International Responsibility of States for Injuries to Aliens 1961, AJIL 55, 1961, 554, Article 10(7).

[160] It was said that: '[t]he further aim of the Convention is related to that of the World Bank Group: to promote the flow of funds from capital-exporting countries to developing countries': Vuylsteke, 'Investment Protection', 343; see pp. 250–1.

[161] Cf. Amerasinghe, 'The Jurisdiction of the ICSID', 181: 'a construction contract where the duration involved is a period of years and involves the transfer of capital resources for profit would very well qualify for inclusion as an investment. Any transfer of resources whether money, goods or services, or all three, would be an investment, depending of course on such other factors as return, financial or otherwise, profit motive, the spread out feature of return, duration and the like.' This opinion, just like the views of the SALC (see note 57, p. 246 above), is much more constrained.

under a particular treaty), there will be the further question of whether there is a legal dispute arising directly out of an *investment* as contemplated in the context of the ICSID Convention. These questions and jurisdiction *rationae personas* were affirmatively established in the *Fedax* case. The contentious issue of whether or not there was an investment in the circumstances was answered broadly in that case. Thus, in appropriate, even if exceptional, cases, a private party might rely on a treaty-protected investment for the purpose of an ICSID proceeding if, on objective criteria, the particular investment in issue is covered, and if the question of privity and other jurisdictional requirements are either taken for granted, ignored or even exist. That was what happened in the *Fedax* case, although the concept of investment would seem to have been interpreted excessively broadly by the tribunal.[162]

Finally, stressing only the contribution to or stimulation of foreign private capital for the economic development of host states may, in most cases, not fully settle or help in determining what would qualify as an investment or who is an investor under the ICSID Convention.[163] It has been argued that, for the purposes of ICSID arbitration, 'investment' encompasses an international agency's (NGO's) work within a host state.[164] As was pointed out:

> To implement its food aid projects, an international agency often must, *inter alia*, utilize expensive vehicles to deliver food and supplies, build facilities to distribute, protect, and store food stuff and equipment, accommodate its field workers with food, living quarters, and medical insurance, and supply its equipment with spare parts and regular maintenance.[165] During the Ethiopian famine of the mid-eighties [another occurred during the first quarter of the 21st century], for example, relief agencies had to purchase and maintain hundreds of long and short haul trucks and trailers to deliver food to famine victims; for internal distribution costs alone, the bill totaled in the hundreds of millions of dollars.[166]

[162] Cf. *AMT* v. *Zaire (DRC)*, Int Arb Rep 12 (April 1997), A-1, where jurisdiction was found based on the Convention and a BIT.

[163] Some features typical of operations that might be characterised as investment are listed as: a certain duration, a certain regularity of profit and return, assumption of risk usually by both sides, the commitment has to be substantial and the operation significant for the host state's development: Schreuer, 'Article 25', 372, para. 122. While citing the latter, the tribunal in the *Fedax* case held that the situation in the case satisfied the features: 37 ILM, paras 40–3.

[164] MacKenzie, 'ICSID Arbitration as a Strategy for Levelling the Playing Field', 223–4.

[165] In the footnote, it was indicated that, in 1990 alone, CARE's [an NGO] total expenses for development and emergency assistance was US$267, 753,000: MacKenzie, *ibid*.

[166] Similar illustrations from activities of aid agencies in Mozambique ('a nation shattered by fifteen years of civil war') and in Somalia were also cited: Mackenzie, *ibid*. at pp. 223–4.

Further, it was indicated that:

In addition to expending substantial amounts of capital to implement its projects, an international agency also improves the host state's productive capacity. It does so by expending capital on building roads and bridges, improving water systems, digging wells, teaching farmers proper agro-forestry techniques, planting trees, improving sanitation systems, educating children, providing financial management and credit, providing health and nutritional care, building nurseries, guaranteeing loans for individuals and small businesses, creating jobs for local citizens, helping local citizens plan and form small enterprises, training workers, providing contraception and family planning, providing immunization and disease control, rebuilding homes and farms, and constructing temporary settlement facilities. Finally, there is the important service of providing the food aid itself. By providing millions of metric tons of food aid, the international agency often becomes integral in sustaining the host state's population so that it may become viable and productive. There can be no doubt, therefore, that the international agency invests directly in the people, infrastructure, and future of the host state by expending substantial amount of capital on both short-term and long-term projects.[167]

Admittedly, the above are impressive achievements of international aid agencies which deserve our acclamation. However, in the context, it would seem that an overly simplistic view was taken of what is 'an investment' or who is 'an investor' (a national of a Contracting State) under the ICSID Convention.[168] Finally, it was further asserted that:

Because the ICSID tribunals have historically adopted an expansive construction of investment, a strict showing of return in the conventional sense may not be required. In fact, ICSID tribunals have replaced traditional ways of thinking about investment – which viewed investment as chiefly taking the form of private loans, joint ventures, and establishment agreements – with new conceptions. As a result, the number of disputes over contracts embodying traditional investments has increased. The new conception of investment is 'directly related to the expected contribution that an association between a foreign party and a State make to the economy of the State concerned'. Marking ICSID's adaptation to new investment climate, this new conception has allowed the ICSID tribunals to hear, for example, disputes arising from contracts to provide managerial services, to train sailing crews, and to construct low income housing. Representing a substantial transfer

[167] *Ibid*. at p. 224.

[168] As to the returns to the aid agency, it was said that an '[i]nternational agency realizes a return on its investment in the continued viability of its organization which hinges upon the organization's ability to successfully plan and execute a project. This success is pivotal to procure future funding from donors. CARE, for example, will not execute an operation if it does not believe that the "benefits" (which exist at several levels of abstraction) of the project will outweigh the costs': Mackenzie, *ibid*. at pp. 224–5.

of resources, therefore, an international agency's work within a host state must certainly fall within the scope of investment.[169]

In the context of the ICSID Convention, the legal and jurisdictional issues that would arise from the above line of reasoning will be enormous. There is also a moral and ethical question that bears legal implications, i.e. whether the gratuitous acts by, and philanthropic activities of, charities in Contracting States could amount to 'investment' under the Convention.[170] Although it would seem seriously doubtful even when there is a clause to that effect, this remains to be seen.

[169] *Ibid*. at p. 225.

[170] BITs may define 'company' for their purposes regardless or not of whether the entity is organised for gain (or pecuniary profit), privately or governmentally, organised with limited or unlimited liability. E.g. the 1985 US and Morocco BIT, Article 1(2); the 1983 BIT between the US and Senegal, Article 1(a); the 1982 BIT between the US and Egypt, Article 1(a); and the 1977 BIT between Egypt and Japan, Article I(4).

9 Jurisdiction ratione personae under ICSID

Contracting States in Africa

The ICSID Convention is open for signature on behalf of member states of the World Bank and any other state which is a party to the Statute of the ICJ and which the Administrative Council, by a vote of two-thirds of its members, invite to sign the Convention (Article 67).[1] The Convention is subject to ratification, acceptance or approval by the signatory states in accordance with their respective constitutional procedures.[2] It entered into force on 14 October 1966, i.e. 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval.[3] Of the twenty ratifications required for the Convention to enter into force, fifteen were African states.[4] Since then, membership of the Convention

[1] At the 11th Annual Meeting of the Council, on 29 September 1977, a Resolution was adopted inviting Seychelles to sign the Convention: ICSID, *Twelfth Annual Report, 1977/1978*, p. 32, Annex 5. Seychelles accepted that invitation and signed the Convention on 16 February 1978. She deposited the instrument of ratification on 20 March 1978 and the Convention entered into force for Seychelles on 19 April 1978. Seychelles became a member of the World Bank in 1980.

[2] ICSID Convention, Article 68(1).

[3] *Ibid*., Article 68(2).

[4] On 14 October 1966, the Contracting States and dates they deposited their instruments of ratification were: Nigeria (23 August 1965), Mauritania (11 January 1966), Ivory Coast (16 February 1966), Central African Republic (28 February 1966), Gabon (4 April 1966), Uganda (22 June 1966), United States (10 June 1966), Tunisia (22 June 1966), Congo (Brazzaville, 23 June 1966), Ghana (13 July 1966), Iceland (25 July 1966), Sierra Leone (2 August 1966), Malaysia (8 August 1966), Malawi (23 August 1966), Chad (29 August 1966), Upper Volta (29 August 1966), Malagasy Republic (6 September 1966), Dahomey (6 September 1966), Jamaica (9 September 1966) and the Netherlands (14 September 1966): see 575 UNTS 160. For all these states, the Convention entered into force on the same day, notwithstanding when their instruments of ratification were deposited.

has been on the rise.[5] Some laws implementing the Convention in African states also provide, for their purposes, that a Contracting State is one or a territory which has ratified or acceded to the Convention, or to which the Convention applies by virtue of Article 70 thereof.[6] Those laws may authorise a specified officer to notify or certify that a state or a territory is a Contracting State.[7]

Constituent subdivision or agency of a Contracting State

Article 25(1) of the Convention requires any Contracting State that so wishes, to designate to the Centre 'any constituent subdivision or agency' of that state. As in the case of 'a legal dispute' or 'investment', the Convention also does not define those concepts, which may vary in nature in national legal systems.[8] The flexibility left to states in the matter makes for clarity and predictability in situations where the pertinent provision of the Convention is complied with.

In the first place, the designation of any constituent subdivision or agency is within the sole discretion of a Contracting State. Such designation when made would raise a very strong, although not conclusive, presumption as to the fact.[9] Not only that, the Convention makes the consent of a constituent subdivision or agency of a Contracting State to submit to the jurisdiction of ICSID subject to the approval of the Contracting State that designated it, 'unless that State notifies the Centre that no such approval is required' (Article 25(3)).[10] Thus, where a Contracting State has made an unconditional designation, the constituent subdivision or

[5] As of 21 September 2000, there were 133 Contracting States and 148 signatories to the Convention. Of the Contracting States, forty-two are African states. However, four African states – Ethiopia (21 September 1965), Guinea-Bissau (4 September 1991), Namibia (26 October 1998) and Sao Tome and Principe (1 October 1999) – are signatories but are yet to become Contracting States. An updated list of Contracting States may be obtained from the ICSID Secretariat upon request, or from the Secretariat's website, www.worldbank.org/icsid. The African states that have neither signed nor ratified the Convention, as of 21 September 2000, were: Angola, Cape Verde, Djibouti, Equatorial Guinea, Eritrea, Libya and South Africa. It has been recommended that South Africa should join the Convention: see pp. 134–5.

[6] E.g. the Arbitration (International Investment Disputes) Act 1995 (Zimbabwe), s. 2; and the 1998 draft International Arbitration Act of South Africa, s. 22(iii).

[7] The 1995 Investment Act of Zimbabwe, s. 3 (Minister of Justice or any other Minister to whom the President may, from time to time, assign the administration of the Act); and the South African draft Act (Minister of Foreign Affairs), s. 25.

[8] Amerasinghe, 'Jurisdiction Rationae Personae', 233.

[9] *Ibid*. at pp. 234–5.

[10] The Contracting State must take the initiative to notify ICSID that its approval is not required.

agency would be a competent party in ICSID proceedings. But, if a designation was made subject to the approval of the Contracting State, before the constituent subdivision or agency can consent, the approval of the Contracting State that designated it must be given.[11] Where a designation was not made under Article 25(1), the jurisdiction of the Centre and the competence of the tribunal will be declined if a constituent subdivision or agency is the proper party to the agreement giving rise to the dispute. Arbitral proceedings brought in that instance against the Contracting State will be unsuccessful, as a Contracting State cannot be substituted in lieu of a constituent subdivision or agency as a party to the proceeding.[12]

The draft Convention, as at 1961, did not have any provisions on the agency or subdivisions of Contracting States. During discussions by the Executive Directors, it was questioned whether the term 'Contracting States' would cover public entities and political entities such as a state in a federation, provinces or municipalities.[13] The response was that '"Contracting States" should be limited to sovereign states. To go further would cause enormous difficulties, constitutional and otherwise . . . [T]his conclusion would imply a more limited scope for the Convention, but it was not intended to confer a sweeping jurisdiction'.[14] Nevertheless, Mr van Campenhout, an Executive Director of the World Bank, further suggested that consideration should be given to including the components of a federated state within the definition of 'Contracting State', without provision for recourse to a federal court; but that in any event, public entities should be excluded.[15]

At the Consultative Meeting of Legal Experts in Africa, the point was made by the representative of Tanganyika (now Tanzania) whether the words 'Contracting State' included statutory corporations or public companies in which the government was a shareholder.[16] It was further pointed out that: 'If quasi-governmental institutions were excluded from that term the value of the Convention would be reduced because in many countries investment agreements would be entered into with those institutions'.[17] The Chairman replied that 'the words "Contracting State" meant exactly what they said'.[18] Nevertheless, the Chairman also pointed out that the 'important question' raised was significant as regards the constituent parts of a federal or non-unitary state. It was indicated that an

[11] Amerasinghe, 'Jurisdiction Ratione Personae', at pp. 232–41.
[12] *Cable Television* case, ICSID Rev-FILJ 13, 345–52, paras 2.22–2.33.
[13] *History of the Convention*, p. 65, para. 32, *per* Mr van Campenhout.
[14] *Ibid*. *per* Mr Broches. [15] *Ibid*. at p. 66, para. 36. [16] *Ibid*. at p. 258, *per* Mr Brown.
[17] *Ibid*. [18] *Ibid*., *per* Mr Broches.

additional article would possibly be provided in which the scope of the Centre's activities was to extend to undertakings entered into between an investor and a statutory corporation, or to a region, canton or province. But such a provision should require the undertaking by the entity in question to be sanctioned by the state.[19]

In the *Cable Television* case,[20] the tribunal considered the phrase 'or any constituent subdivision or agency of a Contracting State designated by the Centre by that State' as used in Article 25(1):

> It is evident from Article 25(1) that ICSID has no jurisdiction in matters brought by or against an entity other than a contracting state unless the entity has been designated to ICSID by a contracting state as a constituent subdivision or agency of the contracting state. Furthermore, it would appear that the provision applies to an entity over which the contracting state has some measure of control, including but not limited to a colony or partially autonomous government forming part of or belonging to the state, a government statutory corporation or a company incorporated under national/local legislation in which the Government has some interest or share holding, the apparent intention being that overseas investors dealing with governments and/or Government owned or controlled enterprises have available to them independent arbitrators and rules to settle any disputes under their investment agreements rather than have to 'resort to litigation in the courts of the host state, a forum where national bias and the political pressures which attend foreign investment may result in favouritism towards the sovereign . . .'[21] In other words, a body corporate established in the Contracting State wholly or substantially owned by private citizens would not appear to qualify for designation.

Some African Contracting States have made conditional designations to ICSID (in the sense that further approval under Article 25(3) would be required) of their major commercial or public agencies.[22] Except for the *ad hoc* designation of SOCAME made by Cameroon in 1981, no African state has designated its constituent subdivision.[23] For example, Guinea designated

[19] *Ibid*. It was as a result of the view expressed by Mr Brown that an amendment giving 'political [constituent] sub-divisions or instrumentalities' of states the capacity to appear before the Centre was introduced into the discussions and adopted in the Convention: Amerasinghe, 'The Jurisdiction of the ICSID', 184–5.

[20] ICSID Rev-FILJ 13, 328, para. 2.28.

[21] Citing Schmidt, 'Arbitration Under the Auspices of ICSID', 90.

[22] *Contracting States and Measures Taken by Them for the Purpose of the Convention: Designations by Contracting States Regarding Constituent Subdivisions or Agencies (Article 25(1) and (3) of the Convention)*, ICSID/8–c, pp. 1–2 (February 1999). This document, as updated, can be viewed at www.worldbank.org/icsid.

[23] On 7 December 1981, Cameroon designated SOCAME (a joint venture company) as its constituent subdivision and approved the latter's participation in the arbitration with Klockner: 2 ICSID Reports 11; *Cable Television* case, paras 2.29–2.30. An implication of the

the Société des Mines de Fer de Guinee pour l'Exploitation des Monts Nimba;[24] Kenya designated the National Ports Authority and the National Shipping Line;[25] Madagascar designated the Enterprise Nationale d'Hydrocarbure;[26] Nigeria designated the Nigerian National Petroleum Corporation (NNPC);[27] and Sudan, the General Petroleum Corporation.[28]

BITs concluded by the US with some African states may purport to make the requisite designations in the course of defining 'Company of a Party'.[29] For example, under Article 1(3) of the 1985 BIT between the US and Morocco, the parties purported to have designated their agencies, instrumentalities or, for the US, its political subdivisions, in which they have substantial interest.[30] It has been suggested, rightly, that those provisions purporting to designate subdivisions, agencies or instrumentalities of a Contracting State, as in the above BITs, may be unenforceable in ICSID proceedings because:

> an agency or a subdivision of a Contracting State can be a party to ICSID proceedings only if: (i) the agency or subdivision has been designated to ICSID by its own State . . .; and (ii) its consent to ICSID conciliation/arbitration must be specifically approved by the State in question, unless that State notifies ICSID that no such approval is necessary . . . In order to give effect to the provision . . . these two requirements would have to be satisfied.[31]

National of another Contracting State

Introductory remarks

For the Centre to have valid jurisdiction (i.e. for a dispute to come within the scope of the Convention), in addition to elements considered

Nigeria Investment Promotion Commission Act 1995 (s. 26(2)(b)), might be that, in an appropriate situation, states in Nigeria may be taken as designated by the federal government as competent parties to the arbitration mechanisms envisaged. The tenability of this proposition and the implications thereof for the military structure of governance in Nigeria's constitutional order until 29 May 1999 will be discussed: see pp. 324–6.

[24] Designated on 16 August 1983.

[25] Designated on 20 June 1988.

[26] Designated on 8 October 1981.

[27] Designated on 11 May 1978.

[28] Designated on 19 November 1981.

[29] E.g. US–Egypt Treaty 1982, Article (1)(1)(b); US–Senegal Treaty 1983, Article 1(b); US–Zaire (DRC) Treaty 1984, Article 1(b).

[30] Article VI(3) of the BIT provides for proceedings under the ICSID Convention for 'an investment dispute' between one of the parties and a national or company of the other party.

[31] G. R. Delaume, 'ICSID and BITs', *News from ICSID* 2, 1985, No. 1, 12, 17. Cf. *ICSID Model Clauses* (Doc. ICSID/5/Rev.2, 1 February 1993 and updated up to 1995), p. 9.

earlier – a legal dispute arising directly out of an investment and a Contracting State or its subdivision or agency designated to the Centre by that State – there has to be a 'national of another Contracting State', which concept is further elaborated in Article 25(2) of the Convention.[32]

The nationality concept covers both juridical and natural persons with special rules applicable to either. In relation to a natural person, the Convention excludes from its definition a national of the state party to a dispute.[33] Otherwise, the definition covers any natural person who has the nationality of a Contracting State (other than the state party to a dispute) on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the Secretary-General registered the requisite request.[34] As it pertains to juridical persons, the Convention took into consideration that a majority of investments are made by corporate investors, most commonly through locally incorporated subsidiaries as they are often required to do by their host states. Thus, a special rule of nationality was devised in this respect for the procedural purposes of the Convention. Under Article 25(2)(b), 'national of another Contracting State' means:

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date [i.e. on the date on which the parties consented to submit such dispute to conciliation or arbitration] and which, because of *foreign control, the parties have agreed* should be treated as a national of another Contracting State for the purposes of this Convention.[35]

In the above provision, two classes of juridical persons 'nationals of another Contracting State' are defined with reference to two Contracting States, i.e. the Contracting State which is a party to the particular dispute, and the other Contracting State properly so-called, i.e. the home state of the juridical person. Also, 'juridical person' (and hence 'national of another Contracting State' under Article 25) was not intended to be limited to a privately owned company but embrace a wholly or partially government-owned company unless the latter is acting as an agent for the government or is discharging essentially

[32] The requirement of written consent under the Convention will be considered in the next chapter.

[33] ICSID Convention, Article 25(2)(a).

[34] *Ibid*. It will be seen later that an investor's request for ICSID proceeding may also amount to consent in writing to submit to ICSID: see chapters 10 and 11 below.

[35] Emphasis added to highlight words that are crucial in the following discussion.

governmental functions.[36] Of all paragraphs of Article 25, (2)(b) has proved the most controversial in practice. This is so with respect to:

1. when a corporate national of a Contracting State party to a dispute becomes a national of another Contracting State;
2. who are the 'parties' in the context of the above provision;[37]
3. the nature of 'agreement' for the purpose of the provision, and whether it is always necessary;
4. whether such an agreement can validly be stipulated in a BIT between two Contracting States; and
5. the nature and extent of the foreign control that could achieve that result.

Also, an expansive and, it seems, astute dimension might have been introduced in the interpretation of Article 25(2)(b) when coupled with an investment treaty referring to ICSID proceedings.[38]

The controversy is inherent in the very nature of Article 25(2)(b) which greatly departed from traditional principles of international law on corporate nationality.[39] An appreciation that the provision constituted such a departure – a major exception – could have served as a caution in its interpretation and application. An attempt will be made to review critically ICSID awards that have dealt with that provision to see what, if any, caution has been applied by tribunals. Subsequently, consideration will be given to BITs providing or purporting to provide for 'a national of another Contracting State' and their compatibility with the Convention.

A critique of ICSID awards on Article 25(2)(b)

The Holiday Inns, Letco and Cable Television awards

The practical controversy inherent in Article 25(2)(b) reared its head in the first arbitration registered under the Convention and has continued in

[36] *CSOB* v. *Slovak Republic*, Decision of 24 May 1999, ICSID Rev-FILJ 14, 257–8, paras 15–17. This latter element must be watched very closely; otherwise the Centre will be available for resolving disputes between two Contracting States, or one of them and the agency of the other as a 'national of another Contracting State'.

[37] The use of the word 'parties' or 'party' in the ICSID Convention and applicable Rules should be read contextually; otherwise confusion might result. The words could respectively refer to, Contracting States Parties to the Convention, or to a party – a Contracting State or a private party (national of another Contracting State) – to a dispute.

[38] E.g. *AMT* v. *Zaire (DRC)*: see p. 297.

[39] Lalive, 'First World Bank Arbitration', 140.

other ICSID arbitrations. The *Holiday Inns* case was a request for arbitration jointly made by the Swiss corporation, Holiday Inns SA Glarus (HI), and the American corporation, Occidental Petroleum Corporation (OPC), in their own names, as well as in the names and on behalf of six subsidiaries (four of which were incorporated in Morocco).[40] The request was made against Morocco.[41]

Morocco raised jurisdictional objections with respect to the four wholly owned but locally incorporated subsidiaries. It argued that ICSID had no jurisdiction over those because, among other things, Morocco never consented to treat these apparently Moroccan nationals as nationals of another Contracting State under Article 25(2)(b).[42] Morocco stressed that, as a serious departure from its sovereignty, consent should not be presumed or easily admitted. A clear and express consensus was essential and it has to be specific as to the other nationality of the locally incorporated company.[43] The claimants contended *inter alia* that what was needed was merely to show that the parties 'have agreed' to treat a juridical person, due to foreign control, 'as a national of another Contracting State'.

The tribunal decided that it had no jurisdiction over the four locally incorporated subsidiaries. Of the nature of an agreement under Article 25(2)(b), it said:

> The question arises, however, whether such an agreement must be expressed or whether it may be implied. The solution which such an agreement is intended to achieve constitutes an exception to the general rule established by the Convention, and one would expect that the parties should express themselves clearly and explicitly with respect to such a derogation. Such an agreement should therefore normally be explicit. An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here.[44]

The *Holiday Inns* award was the first, and until the *Vacuum* award,[45] considered as probably the last, to have applied caution regarding the foreign nationality of a locally incorporated subsidiary under the Convention.[46]

[40] The jurisdictional controversies in the arbitration were in relation to the four locally incorporated subsidiaries.

[41] Lalive, 'First World Bank Arbitration', 123. Pierre Lalive was the chief counsel for claimants: Lalive, *ibid*. at p. 132 n. 1. [42] Lalive, *ibid*. at pp. 138–9.

[43] *Ibid*. at p. 140. [44] *Ibid*. at p. 141. [45] See p. 293.

[46] The *Holiday Inn* award was, to a great extent, relied upon in the *Cable Television* award: see p. 277 below.

ICSID tribunals after *Holiday Inns* have adopted broad approaches, which, in most cases, are positively consistent with the operational strategies of transnational corporations.[47] Those approaches may, nevertheless, appear controversial, since they are reminiscent of unpopular decisions with respect to the nature and effect of arbitration clauses.[48]

In ICSID arbitrations, the mere insertion of an ICSID arbitration clause into an investment contract has *in itself* been used to imply foreign control or an agreement to treat a locally incorporated entity as a national of another Contracting State, thereby giving such entity *locus standi* in ICSID proceeding. This was said to be necessitated by the desire to effectuate an ICSID clause.[49]

In the *LETCO* award,[50] the tribunal observed that LETCO was clearly under French control at the time the concession was signed.[51] The control was not *only* as a result of the fact that LETCO's stock was 100 per cent owned by French nationals but, according to the tribunal, it also resulted from what appeared to be effective control by French nationals, effective in the sense that, apart from French share holding, French nationals dominated the company's decision-making structure.[52] As to whether there has to be a causal relationship between effective control and agreement to treat LETCO as a French national and, if so, how it could be proved, the tribunal relied on the foreign control by the French nationals to find an agreement.[53] As to the nature of the agreement, explicit or implicit, of Liberia to treat LETCO as a French national and, if an implied agreement is required for that purpose, the facts capable of that implication, the

[47] W. M. Tupman, 'Case Studies in the Jurisdiction of the ICSID', ICLQ 35, 1986, 813; W. Rand, R. N. Hornick and P. Friedland, 'ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction', NYUJ Int. Law & Politics 19, 1986, 33; C. B. Lamm, 'Jurisdiction of the ICSID', ICSID Rev-FILJ 6, 1991, 462, 469–73; G. R. Delaume, 'How to Draft an ICSID Arbitration Clause', ICSID Rev-FILJ 7, 1992, 168, 175–8.

[48] In the *Texaco* award, a reason advanced for applying international law was the presence of an arbitration clause in a concession: see pp. 440–1.

[49] *Klockner* v. *Cameroon et al*, Award of 21 October 1983, 2 ICSID Reports 16; *Amco Asia et al* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 394–6, para. 14; *LETCO* v. *Liberia*, Award of 31 March 1986 and Rectification of 14 May 1986, 2 ICSID Reports 351–3.

[50] *Ibid*.

[51] *Ibid*. at p. 351.

[52] *Ibid*.

[53] As the Tribunal said: 'unless circumstances clearly indicate otherwise, it must be presumed that where there exists foreign control, the agreement to treat the company in question as a foreign national is "because" of this foreign control. In the case at hand, there is no indication whatsoever that an agreement to treat LETCO as a French national resulted from anything other than the fact that it was under French control and we must therefore conclude that the necessary causal relationship exits' (*ibid*. at p. 352).

tribunal *inter alia* relied on the ICSID arbitration clause.[54] According to the Tribunal:

> When a Contracting State signs an investment agreement, containing an ICSID arbitration clause, with a foreign controlled juridical person with the same nationality as the Contracting State [i.e. the host state party to a dispute] and it does so with knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat that company as a juridical person of another Contracting State, the Contracting State could be deemed to have agreed to such treatment by having agreed to the ICSID arbitration clause. This is especially the case when the Contracting State's laws require the foreign investor to establish itself locally as a juridical person in order to carry out an investment.[55]

The above holdings, although they may appear reasonable and pragmatic on their peculiar facts, are nevertheless regrettable, because they misunderstood the nature of arbitration clauses, particularly under the ICSID Convention.

'Consent in writing' needed under Article 25(1) is different from an 'agreement' to treat a locally incorporated juridical person as 'a national of another Contracting State' due to 'foreign control' as required by Article 25(2)(b): the purpose of the first provision is to establish the Centre's basic and general jurisdiction, and the second to establish and extend that jurisdiction to the special case of a locally incorporated company that would otherwise be a national of a Contracting (host) State party to *a* dispute and, accordingly, fall outside the Convention. One provision should therefore not be confused with the other as they serve distinct even if complementary purposes. The first provision (Article 25(1)) may be invoked in an ICSID proceeding without the second provision. But the operation of the second provision is *prima facie* predicated upon the

[54] *Ibid*. at pp. 352–3. As the tribunal stated: 'Though it is not necessary to go so far in the case at hand, it could be argued with some force that the mere fact that Liberia and LETCO included an ICSID arbitration clause in the Concession Agreement constitutes an agreement to treat LETCO as a "national of another State". To conclude otherwise would be tantamount to stating that Liberia never intended to honour this part of the Concession Agreement; that Liberia, by agreeing to the ICSID clause, acted in bad faith and contrary to the tenor and purpose of the ICSID Convention' (*ibid*. at p. 352). Article 1X of the Concession Agreement in issue does not contain any such agreement: *LETCO* award, *ibid*. at p. 350.

[55] *Ibid*. at p. 353. In the *Klockner* case, it was held that: 'The ICSID Convention does not specify the manner in which the parties may express their agreement as to the existence of the conditions giving rise to the exception defined in Article 25(2)(b) *in fine*. In practice, this agreement may be manifest in the explicit acknowledgment of foreign control . . . in conjunction with the simple inclusion of an ICSID clause': 2 ICSID Reports 16.

existence of the first provision. The latter provision by itself will be unable to satisfy the requirements of the second. Thus, for the purposes of Article 25(2)(b), the basic and general jurisdictions of the Centre under Article 25(1) must be assumed to exist and must in fact exist. Also, the absence of Article 25(2)(b) elements, where they are relevant, makes Article 25(1) inoperable, thereby excluding the particular dispute from ICSID's jurisdiction.[56]

In the *Cable Television* case,[57] the request for arbitration by Cable indicated that the two Cable Corporations were incorporated in St Kitts and Nevis and were 99.9 per cent owned (and therefore controlled) by nationals of the US – a Contracting State – and that that control, combined with clause 16 (the ICSID arbitration clause) in the agreement, constituted the agreement of the parties to treat Cable as a 'national of another Contracting State' under Article 25(2)(b).[58]

Cable brought the case against St Kitts and Nevis (i.e. the Federation) instead of Nevis Island Administration (NIA) (a constituent subdivision or agency of the Federation).[59] NIA, not the Federation, was the party to the investment agreement containing clause 16. This, according to the tribunal, made the issue more complicated.[60] After indicating that the documentation which Cable attempted to present in support of its case and the flaws therein were not fatal,[61] the tribunal enquired into 'whether

[56] E.g., *Vacuum Salt* award: see p. 293. [57] ICSID Rev-FILJ, 328.

[58] *Ibid*., paras 1.02–1.03 and 5.13. The tribunal observed that cl. 16 'is the only foundation for the institution of these Arbitral proceedings' and that the clause (dated 18 September 1986) did not have any legal effect at the time of the Agreement until St Kitts and Nevis became a party to the ICSID Convention on 3 September 1995. The *Holiday Inn* award was cited to show that 'there have been other ICSID cases in which relevant states became members of ICSID after the related investment agreements containing ICSID arbitration clauses had been signed, so the present case is not an isolated case in which the host state joins ICSID after the date of the investment agreement' (*ibid*., para. 2.18). In *Holiday Inn*, the Basic Agreement was signed on 5 December 1966 but Morocco (a Contracting State party to the dispute) became a party to the Convention on 10 June 1967, and Switzerland, the national state of the foreign investor, became a Contracting State on 14 June 1968. Thus, the effective date of consent to arbitration by the parties in the case was 14 June 1968: *Cable Television* case, paras 4.09, 5.24, 6.16–6.17 and 6.34, citing the *Holiday Inn* case approvingly.

[59] The tribunal declined jurisdiction over NIA because it was not designated to ICSID by the Federation: see p. 269 above; and see pp. 323–4 below.

[60] ICSID Rev-FILJ 13, 366, para. 5.14. The tribunal had earlier decided that the Federation was not a proper party to the proceedings and was not a party to the agreement, and that there was no privity between it and Cable. As a result, there was no agreement between the Federation and Cable to arbitrate before ICSID and, consequently, no consent by the Federation to the proceedings and no date of consent for the purpose of the hearing (*ibid*., para. 3.02). [61] *Ibid*., paras 5.15–5.17; see p. 305, note 196.

the Requesting Parties [Cable] have met the requirements of Article 25(2)(b) of the Convention as to the nationality of another Contracting State and, if so, whether the parties to the arbitration have agreed that, because of such foreign control, the Requesting Party [*sic*] should be treated as a national of such Contracting State for the purposes of the Convention'.[62]

On the matter of recognition, the tribunal found that there were provisions in the agreement which inferred that Cable, although locally incorporated, was controlled by nationals of another State, for example the convertibility of local currency to US funds, the renewable concession given to Cable of a 100 per cent ten-year tax holiday, the recruitment of foreign nationals to work for Cable, customs and duty exemptions to Cable and expatriate staff:

> The presence of Clause 16 in the Agreement does give rise to the presumption that the parties thereto were treating Cable as being owned or controlled by nationals of a contracting state of the ICSID Convention outside of the Federation [of St Kitts and Nevis], notwithstanding that, at the date of the Agreement and for several years thereafter, the Federation had not acceded to the Convention. The Agreement was signed by Lee A. Bertman, as the representative of both companies and the Request is signed by the same Lee A. Bertman as President of both companies.[63]

After reviewing the participation and influence of Mr Bertman in the establishment and management of the Cable companies, the tribunal felt able to say:

> When all the foregoing is taken into account together with the statement in the Request for Arbitration, signed by the same Lee A. Bertman, as the President of both companies as indicated earlier, which statement sets out that '[t]he two corporations are 99.9 per cent owned (and therefore controlled) by nationals of the United States of America, a Contracting State', and the statement made by Counsel for the Claimants at the hearing that the principals are Mr and Mrs Bertman, it would not seem unreasonable for the Tribunal to, and it does, conclude that both the holding and operating companies are established respectively under the laws of Nevis and of the Federation and that ownership of these companies by nationals of USA has been established for the purposes of Article 25(2)(b) of the Convention.[64]

[62] *Ibid*., para. 5.17.

[63] *Ibid*., para. 5.18. Other evidence of the foreign nationality of Cable were revealed in the award: *ibid*., paras 5.19–5.21 and 6.21.

[64] *Ibid*., para. 5.22. 'Majority ownership of shares' may not necessarily be the same as or lead to 'foreign control' under Article 25(2)(b): see pp. 303–4.

The tribunal indicated that the 'agreement' with the Federation, that Cable 'being a juridical person which [has] the nationality of the Contracting State party to the dispute, because of foreign control, should be treated as a national of another Contracting State for the purposes of [the] Convention', needed to be studied.[65] It pointed out that Article 25(2)(b) of the Convention 'seems to presuppose that the host [Contracting] State must be a party to the dispute'.[66] That was not so in the instant case, as the agreement containing the ICSID arbitration clause was concluded in September 1986 between only NIA and Cable. When the Federation became a Contracting State, on 3 September 1995, that represented 'a fulfilled condition along the way towards effecting ICSID jurisdiction on matters within that state'.[67] As a Contracting State, 'there has been no consent by the Federation to either the institution of these proceedings against it and/or any other party or to the treatment of the Requesting Parties [i.e. Cable] as being under the foreign control of the United States nationals for the purposes of Article 25(2)(b) of the Convention'.[68]

Citing paragraph 33 of *Holiday Inns* award,[69] the tribunal indicated that there has been no expressed or implied agreement or consent by the Federation and, in the circumstances, the requirements of Rule 2(d)(iii) of the ICSID Rules – i.e. the agreement of the Federation and Cable to treat the latter as a national of the US for the purposes of the Convention – had not been met.[70] Jurisdiction was thus declined.

For purposes of Article 25(2)(b), the Convention presupposes and requires that there must not only be an agreement to treat a locally incorporated juridical entity, although a national of the Contracting State party to the dispute, as a national of another Contracting State,[71] but also that there must be sufficient foreign interests in the local subsidiary capable of amounting to control – whatever this might entail.[72] Thus, the

[65] *Ibid*., para. 5.23. [66] *Ibid*., para. 5.23.

[67] *Ibid*., para 5.24 citing the *Holiday Inns* award that parties may condition the effectiveness of their arbitration clauses on the occurrence of specified event, e.g. the adherence of relevant state to the Convention. [68] *Ibid*., para. 5.24. [69] See p. 274, above.

[70] ICSID Rev-FILJ 13, 370, para. 5.24. The tribunal indicated that Cable attempted to secure the relevant consent of the Federation via reference in a High Court case documentation to cl. 16. The tribunal equally rejected Cable's submission in that respect: *ibid*., paras 5.24 and 4.17.

[71] Hence, a model clause for purposes of Article 25(2)(b) is recommended by the ICSID Secretariat: *ICSID Model Clauses* (Doc. ICSID/5/Rev.2, 1 February 1993 and updated to 1995), cl. 7; *Report of the Executive Directors*, para. 30.

[72] Cf. Amerasinghe, 'The Jurisdiction of the ICSID', 220: 'However, it is conceivable that, particularly where the juridical person clearly has the nationality of the host State and

mere insertion of an ICSID clause into an investment contract indicating consent in writing without going further to satisfy the requirements of the agreement, and there being in fact sufficient foreign controlling interest(s) in a locally incorporated entity, although such may satisfy Article 25(1) in a particular circumstance, it would be insufficient for the purposes of Article 25(2)(b).

The Amco Asia award

The potentially liberal exception conceded in the *Holiday Inns* award as to the specific circumstances amounting to an implied agreement to treat a locally incorporated subsidiary as a national of another Contracting State would appear to have been found in the *Amco Asia* award, although the tribunal in the latter award denied this.[73]

In that arbitration, Indonesia raised jurisdictional objections *inter alia* with respect to PT Amco (a locally incorporated subsidiary), Amco Asia (the parent company) and Pan American (a Hong Kong company) as competent parties to the ICSID proceeding.[74] The Indonesian Government argued that PT Amco, being within the meaning of Article 25(2)(b) a 'juridical person . . . which had the nationality of the Contracting State party to the dispute' (i.e. Indonesia) at the date on which the parties consented to submit such dispute to arbitration, the jurisdiction of the Centre could have been extended over it provided that 'because of foreign control, the parties have agreed [it] should be treated as a national of another Contracting State for the purpose of the Convention'.[75] Citing the *Holiday Inns* award, Indonesia argued that it had not effectively consented that PT Amco, a national of Indonesia, should be treated as a US national (the nationality of the parent company) for the purpose of the Convention; and that no formal and express indication was found in the arbitration clause

Footnote 72 (*cont.*)
is clearly foreign such an agreement to confer jurisdiction on the Centre may be regarded as necessarily implying an agreement on foreign nationality.' Nevertheless, as was pointed out in the *Vacuum Salt* award: 'The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so': *ibid*. at pp. 342–3.

[73] Jurisdictional Decision, 25 September 1983, 1 ICSID Reports 389–409. That case, involving an Asian ICSID Contracting State, is being discussed, as is the *Cable Television* case involving a Contracting State in the West Indies, for the sake of completeness and due to their relevance to the analysis. Importantly, the *Holiday Inns* award involving Morocco – an African Contracting State – was referred to and distinguished in the *Amco Asia* case but applied in the *Cable Television* case.

[74] 1 ICSID Reports 393, paras 12–13. [75] *Ibid*., para. 12.

as to the other Contracting State in respect of which the parties would have agreed to treat PT Amco as a national.[76] Moreover, in the circumstances of the case, the lack of a clear and formal indication resulted in its ignorance of the nationality of the person who controlled PT Amco.[77] The claimants contended that Indonesia consented in writing to ICSID arbitration and that no formal requirement was provided in which the consent to treat the local juridical person involved in the dispute as a foreign person should be given.[78]

The tribunal decided in favour of the claimants on all grounds.[79] In relation to PT Amco (the locally incorporated subsidiary), the tribunal held that there was nothing in the ICSID Convention and, in particular, in Article 25 which provided for the formal precondition of a clause recording the agreement of the parties to treat a company which is legally a national of a Contracting State party to a dispute as a foreign company of another Contracting State due to the control to which it is submitted.[80] The tribunal admitted that, considering its place of incorporation, the law under which it was registered and its seat of operation, 'PT Amco had and still has the nationality of Indonesia'.[81] However, it was noted that the investment application for the establishment of PT Amco stated that it was being done to establish 'a *foreign business* in Indonesia' and that the application went further by indicating that 'the name of the business which will be established is PT Amco Indonesia'.[82] Thus, it appears obvious, according to the tribunal, that when agreeing to the application, the Indonesian Government knew perfectly that PT Amco would be under foreign control. Knowing this expressly stated fact, the Government had agreed to the application *and* to the arbitration clause in it.[83] It was, therefore, 'crystal clear' that it agreed to treat PT Amco as a national of another Contracting State for the purpose of the Convention.[84]

In reference to the decision in the *Holiday Inns* award, which in any event it regarded, correctly, as not a binding precedent, the tribunal denied that the agreement in the instant arbitration was implicit. Instead, it held that 'it [was] expressed, and clearly expressed, [that] no formal or ritual clause [was] provided for in the Convention, nor [was one] needed in order for such an agreement to be binding on the parties'.[85] In reply to the contention of the Government that it was ignorant of the nationality of the controller of PT Amco, the tribunal did not think that an objection to the

[76] *Ibid*. [77] *Ibid*. [78] *Ibid*., para. 13. [79] *Ibid*., paras 13–15. [80] *Ibid*., para. 14.
[81] *Ibid*. [82] *Ibid*. [83] Emphasis added. [84] *Ibid*. at p. 395. [85] *Ibid*. at p. 396.

binding character of the arbitration clause could be drawn, in the circumstances of the case, from the fact that the country of which the controlling shareholders of PT Amco were nationals was not expressly mentioned in the arbitration clause, nor from the fact alleged by the respondent that it did not effectively know which country this was.[86] The tribunal emphasised that there was no provision in the Convention imposing a formal indication in the arbitration clause itself of the nationality of the foreign juridical or natural persons who control the juridical person having the nationality of the Contracting State party to the dispute:

> [Indonesia] contends that the controller of PT Amco was not of American nationality, since, it alleges, Amco Asia itself was controlled by Mr Tan, a Dutch citizen residing in Hong Kong, through Pan American, a Hong Kong Company of which said Mr Tan was sole or the main shareholder. To take this argument into consideration, the Tribunal would have to admit first that for the purpose of Article 25(2)(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural person who controls the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth, or xth degree. Such reasoning is, in law, not in accord with the Convention.[87]

The tribunal noted that the concept of nationality was a classical one based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat, but that:

> [a]n exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State party to the dispute, where said juridical persons are under foreign control. But no exception to the classical concept is provided for when it comes to the nationality of the foreign controller, even supposing – which is not at all clearly stated in the Convention – that the fact that the controller is the national of one or another foreign State is to be taken into account. In fact, it could be so where for political or economical reasons, it matters for the Contracting State to know the nationality of the controller or controllers, and where it is proven that [had] the Contracting State . . . known this nationality, it would not have agreed to the arbitration clause; such a situation might possibly be met in exceptional instances, but has by no means been proved, and not even alleged, in the instant case.[88]

[86] *Ibid*.

[87] *Ibid*. Unlike in the *SOABI* award (*infra*) in which Panama (the state from which the immediate foreign control proceeded) was, by then, a non-Contracting State to the Convention, Hong Kong (through the UK then), the Netherlands, the US and Indonesia, all implicated in the *Amco Asia* arbitration, are ICSID Contracting States. This is vital in distinguishing the *Amco Asia* award and the *SOABI* award.

[88] *Ibid*.

The SOABI award

The decision in *SOABI* v. *Senegal*[89] would, in principle, appear to be in conflict with the decision in the *Amco Asia* award (even though the latter was not a binding authority for an ICSID tribunal). The *SOABI* award has extended the scope of 'foreign control' for the purposes of Article 25(2)(b) and has undercut the expectations of host Contracting States. Delaume observed that: '[The] interpretation [in *SOABI*] differs from the more restrictive view, adopted in *Amco* v. *Indonesia*, according to which the only determinative factor would be the nationality of the investor in direct control of the local company, no regard being paid to the possibility that the direct controller itself might be controlled by other interests'.[90] Subsequently, Delaume pointed out:

> [i]n the absence of any specific provision in the Convention regarding the issue of direct or indirect control, the decision of the SOABI Tribunal appears to be the correct one. It is consistent with the manner in which many investments are made and especially those involving transnational companies or group of companies, which, for various reasons, may elect to channel their investment through affiliated companies under their control . . . the view upheld in the SOABI Tribunal finds support in contractual stipulations in current use as well as in the provisions of certain bilateral investment treaties.[91]

In the *SOABI* arbitration, Senegal objected to the jurisdiction of ICSID and the competence of the tribunal on the ground that the parties had not consented to submit the dispute in a request brought by SOABI, a locally incorporated company, which was 100 per cent controlled by another company incorporated in Panama (which was a non-Contracting State at the relevant time).[92] The Panamanian company was itself predominantly

[89] Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports 164.

[90] Delaume, 'How to Draft', 177–8. Cf. 'The SOABI tribunal, presided by Dr Broches, held that even such indirect control [in that case, from a non-Contracting State] of the investing company established under local law by nationals of Contracting States was sufficient to satisfy the nationality requirement of Article 25. This decision expanded upon the holding in *Amco Asia* v. *Indonesia*, where the Tribunal held that although the nationality requirement was satisfied when the local investment company was under direct foreign control, there was no provision to extend the concept of foreign nationality to those controlling the controlling juridical person itself': Lamm, 'Jurisdiction of the ICSID', 473.

[91] Delaume, *ibid*. at p. 178 (footnotes omitted). For the avoidance of doubt, the argument advanced in the following pages concedes that direct and indirect foreign controls are *within* Article 25(2)(b) of the Convention.

[92] On 8 April 1996, Panama deposited its instrument of ratification and the Convention entered into force there on 8 May 1996. If Panama was a party to the Convention at the time the dispute giving rise to the *SOABI* award was submitted, the critique following would have been unnecessary.

controlled by nationals of Belgium (which was a Contracting State). Senegal argued that SOABI, being controlled by a Panamanian company, was not a 'national of another Contracting State' within the meaning of Article 25(2)(b) and, accordingly, did not meet the nationality requirements in Article 25.[93] SOABI admitted that it was controlled by a Panamanian company but contended that the conditions of Article 25 were fulfilled in that nationals of Contracting States controlled the Panamanian company in turn.[94]

In a unanimous decision, the tribunal held that SOABI met the nationality requirements of the Convention.[95] According to the tribunal, the arbitration clause conferred on SOABI (a national of Senegal) the right to bring ICSID arbitral proceedings. The clause showed that the parties had not intended to deny SOABI's Senegalese nationality but rather that, notwithstanding its nationality, the parties had further agreed that it would be deemed a national of another Contracting State by reason of its being controlled by foreign interests.[96] The tribunal conceded the premise of Senegal's contention that, from the structure and purpose of the Convention, the foreign interests which might serve as a basis for according foreign status to a company established under local law should be those of nationals of Contracting States.[97] However, it was stressed that an interpretation, which had the effect of limiting the protected foreign interests only to those which had immediate control over the company would be contrary to the purpose of the Convention. According to the tribunal:

> The nationality of this company (Flexa) [of Panamanian nationality], which held in 1975 all of SOABI's subscribed capital shares, could only be determinative of the nationality of the foreign interests if the Convention were concerned only with direct control of the company. However, the Tribunal cannot accept such an interpretation, which would be contrary to the purpose of Article 25(2)(b) *in fine*.[98]

[93] 2 ICSID Reports 164, para. 16. The clause in issue in the arbitration tersely provided *inter alia* that 'the Government agrees that the requirements of nationality set out in Article 25 of the IBRD Convention shall be deemed to be fulfilled' (*ibid*., para. 23).

[94] *Ibid*., para. 17.

[95] In its decision on jurisdiction, the tribunal dealt with the nationality question first and joined the contentions of the parties concerning their consent to ICSID jurisdiction to the merits.

[96] *Ibid*., paras 30–1.

[97] *Ibid*., para. 33.

[98] *Ibid*., para. 35. The point to be stressed in this book in light of the tribunal's holding is that *indirect control* by nationals of a Contracting State through Flexa which was incorporated in Panama (by then, a non-Contracting State), of SOABI, should have been disregarded to enable jurisdiction to be denied. This conclusion would have been otherwise if the *indirect* foreign control of SOABI were by nationals of a Contracting State through a company incorporated in a Contracting State. Thus, at the end of the

The purpose of the Convention was stated by the tribunal to be, on the one hand, that of reconciling the wish of states hosting foreign investments to see those investments carried out through companies established under local law, and, on the other hand, their desire to give those companies the capacity to be parties to ICSID proceedings. SOABI was seen as a 'perfect example' of this.[99] In justification, the tribunal observed that, since the legal form of a national company might be chosen by the host state, investors might be led, for reasons of their own, to invest their funds through intermediaries, while retaining the same degree of control over the national company as they would have been able to exercise as direct shareholders.[100] Thus, held the tribunal, *indirect* control by nationals of Contracting States (i.e. through a company incorporated in a non-Contracting State) of a company established under local laws (i.e. in a Contracting State party to a dispute) was sufficient to satisfy the nationality requirement of Article 25 at the date of the investment agreement.[101]

Judge M'baye disagreed with the 'unanimous decision' of the tribunal on jurisdiction, surprisingly, in the award on the merits. He opined *inter alia* that to subject states to the need to go behind the immediate control to the effective control was both inappropriate and contrary to the spirit underlying Article 25(2)(b).[102]

day, the Convention will still be dealing with both *direct and indirect foreign control* compatibly with its purpose.

[99] *Ibid*., paras 35–6. The tribunal's view ignores that Panama was not then a Contracting State. Yet, the link giving the Centre and the Tribunal jurisdiction proceeded from there.

[100] *Ibid*., para. 37. A point that will be advanced in this critique is that under the ICSID Convention, only foreign control, whether direct or indirect, by nationals of a Contracting State but proceeding from a Contracting State, would be admissible under Article 25(2)(b).

[101] *Ibid*., para. 38. Further, the tribunal inferred from the fact that Senegal had joined with the Belgians acting on behalf of SOABI in appointing arbitrators, the Government's acceptance of the Belgian nationality of the other designating party (*ibid*., para. 42). The Government and SOABI nominated by mutual agreement Judge Keba M'baye (Senegal) and Baron Jean Van Houtte (Belgium). Both parties later mutually nominated Pierre Lalive (Switzerland) as arbitrator and president of the tribunal. But Lalive declined the nomination. In view of the failure of further agreement, SOABI requested the Chairman of the Administrative Council to nominate the president of the tribunal. R. L. Bindschedler (Switzerland) was nominated and accepted the nomination as an arbitrator and as the tribunal's president (*ibid*., para. 4). Bindschedler later resigned and the Chairman of the Council eventually nominated Aron Broches (Netherlands) as arbitrator and designated him president of the tribunal, which he accepted. SOABI and the Government agreed to the composition of the tribunal (*ibid*., para. 7).

[102] *Ibid*. at pp. 287–90. The dissenting arbitrator was unable to find any evidence to support the tribunal's finding that the parties had, by jointly appointing arbitrators, agreed to treat SOABI as a national of another Contracting State (*ibid*. at pp. 290–3). However, the

Critique on the SOABI award

The *SOABI* award appears practically sensible and in keeping with the structure and strategies of multinational corporations. Such corporations normally carry out their international activities through subsidiaries operating in other jurisdictions but linked to the parent company by 'contractually based managerial control systems'.[103] However, the ICSID Convention was designed for the protection of investments made in or controlled from Contracting States, by nationals of other Contracting States. It was only to give *jus standi* to the 'subsidiary operating in other jurisdictions' (i.e. in a host Contracting State party to a dispute) but linked to the parent company by 'control systems' from a Contracting State (not involving the host Contracting State party to the dispute) that Article 25(2)(b) was devised. The *SOABI* award may have used an apparently vague area in the Convention to rewrite an essential aspect thereof. It has rightly been said that the award left a number of questions unanswered with the suggestion that '[r]ealism would militate against jurisdiction in such a case. On the other hand, the endeavour to find control of a nationality that is favourable to ICSID's jurisdiction would exclude the second level of control'.[104]

A clear reading of the Convention suggests that, if an investor is a juridical person, it must be a national of a Contracting State (other than the state party to a dispute, i.e. the respondent state) on the date of consent;[105] or controlled directly or *indirectly* by a national of another Contracting State *and* from a Contracting State to benefit from the Convention.[106] Article 25(2)(b) only defines 'juridical person' ('national of another Contracting State') as used in, and for the purpose of, Article 25(1). Article 25(2)(b) establishes and extends (within Article 25(1)) the jurisdiction of

Footnote 102 (*cont.*)
president of the tribunal in the award on the merits, immediately after the dissenting opinion, made a declaration on the tribunal's decision on jurisdiction challenging the views of the dissenting arbitrator, restated the tribunal's holdings on the nationality of the parties and questioned the authority of previous ICSID awards on the point, including the *Amco Asia* award (*ibid*. at pp. 334–5).

[103] Muchlinski, *Multinational Enterprises*, p. 80. [104] Schreuer, 'Article 25', 122, para. 562.

[105] Cf. the *AMT* v. *Zaire (DRC)* award: see p. 297

[106] E.g. ICSID Model Clause 7, in relation to Article 25(2)(b), provides: 'It is hereby *agreed* that, although the Investor is a national of the Host State, it is controlled by nationals of *names(s) of other Contracting State(s)* and shall be treated as a national of [that]/[those] State[s] for the purposes of the Convention': *ICSID Model Clauses* (Doc. ICSID/5/Rev.2, 1 February 1993 and updated to 1995), p. 10 (emphasis added). This clause was cited in the *Vacuum Salt* award, to indicate 'the better practice' of the parties making reference to foreign control in their agreement or contract: see p. 294, note 140.

ICSID (i.e. the scope of the Convention) over a locally incorporated subsidiary in a host Contracting State party to a dispute, which entity has, on the date of consent to ICSID arbitration, that host Contracting State's nationality.[107] Article 25(2)(b) does not thereby extend the Convention to a non-Contracting State and to investments made or controlled from there, even for the benefit of a Contracting State and its nationals. The policy behind Article 25(2)(b) was to cover, within the overall purposes of the Convention, the nature and business strategies of international companies and nationals of Contracting States investing in host Contracting States through a subsidiary or subsidiaries established there: 'If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment [made in Contracting States by nationals of Contracting States – the concern of the Convention] would be outside the scope of the Convention'.[108]

The situation in *SOABI* had been foreshadowed.[109] In an attempt to answer the question 'whether the juridical person [in Article 25(2)(b) should have] the nationality of another Contracting State', it was explained (and this has to be quoted extensively due to its weight and implications):

> In answering that question the tribunal or commission will really be interested in distinguishing between Contracting States and non-Contracting States . . . it is arguable that a 'control' test may be applied, if the tribunal or commission so desires, to determine nationality as between foreign nationalities. This could mean that though a juridical person is incorporated in a non-Contracting State and would otherwise have the nationality of a non-Contracting State, it may be found that the juridical person has the nationality of a Contracting State because of control by shareholders having the nationality of a Contracting State. It is conceivable, of course, that the converse may also happen, namely, that where the juridical person is incorporated in a Contracting State and would have the nationality of that State, it is found to have the nationality of a non-Contracting State because of foreign control. Whether the application of the 'control' test or any other alternative test would result in the exclusion of one nationality in favor of another, will depend on whether a tribunal or commission must apply only one of the available tests to the exclusion of all others in determining nationality or

[107] The subsidiary is incorporated under the laws of the host Contracting State, thereby making the company 'technically a national of the host state': A. Broches, 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', RdC 136, 1972, 331, 358–9. As a national of the host Contracting State, ordinarily the locally incorporated subsidiary cannot, under the Convention, be a party to an international investment dispute with its national state: ICSID Convention, Article 25(2)(a) and (b).

[108] Broches, 'The Convention', 359.

[109] Amerasinghe, 'The Jurisdiction of the ICSID', 166.

whether it can apply several criteria simultaneously with the result that more than one nationality will be established for a juridical person . . . In the event, however that a juridical person must always have only one nationality, it is possible for an adjudicating body to take the position in the case being discussed that nationality should be attributed according to that test or the several applicable tests, including the 'control' test, which will operate *in favorem jurisdictionis*.[110]

A crucial point missed in the explanation, which was also ignored in the *SOABI* award, was that the ICSID Convention neither applies to nor has implications for states nor, accordingly, to or for investments made in or controlled from states, or by nationals of states, that are *not* parties.

During the Consultative Meeting of Legal Experts, the representative of Sierra Leone suggested that there was no reason why the facilities to be established by the World Bank should be limited to Contracting States *and* nationals of Contracting States. He suggested that those facilities 'should be available also to non-contracting states. It would be easier for the developing countries to obtain the investments they need if all agreements contained a clause to the effect that disputes could be referred to the Centre. The fact that the facilities of the Centre were available to all would make for uniformity in arbitration procedures'.[111] To that suggestion, the reaction of Mr Broches was recorded thus:

> the mere institutional facilities of the Centre could be placed at the disposal of non-Contracting States. The Draft Convention, however, contained a number of rules of law binding only the States which had signed and ratified the Convention. He doubted that a host country which was a Contracting State would want to assume obligations towards an investor who was a national of a non-Contracting State whose national State would not be bound by the Convention.[112]

The Convention does not avail all investors for all disputes arising directly out of all investments no matter where made or controlled from.[113] Otherwise, an odd result of such open-endedness might be that the international responsibility of a Contracting State would be engaged due to an investment made in or controlled from a non-Contracting State by a national of another Contracting State. Thus, it will also follow that, whilst an investment made in or controlled from a non-Contracting State by a national of a Contracting State will be protected under the *SOABI* control principle (and in Amerasinghe's view),[114] an award made in a Contracting State against a national of another Contracting State pursuant to an arbitral proceeding relating to an investment made in or controlled from

[110] Amerasinghe, *ibid*. at pp. 213–14. [111] *History of the Convention*, p. 255 *per* Mr Macaulay.
[112] *Ibid*.
[113] In *SOABI*, the decisive control by the nationals of a Contracting State proceeded from a non-Contracting State. [114] See pp. 287–8 above.

a Contracting State, would not be recognised and enforced against that private party in a non-Contracting State as the latter is not a party to the Convention. Also, an ICSID arbitral award cannot be recognised and enforced on behalf of, or against, a non-Contracting State through the Convention's mechanisms for the same reason that such a state is not an ICSID Contracting State and would not become a party to an ICSID proceeding, and all the more so would not become an ICSID award debtor or creditor.[115]

A non-Contracting State is not bound by the Convention nor has it rights against, nor owe duties to, a Contracting State under the Convention.[116] Thus, a non-Contracting State would not be able to invoke the Convention against a foreign investor (a national of a Contracting State) in relation to an investment made in the former's territory. On the other hand, nationals of non-Contracting States making or controlling investments in Contracting States cannot invoke the Convention against the latter. Nor does a non-Contracting State and its courts participate in those prerogatives within the Convention appertaining only to Contracting States and their courts.[117] If an ICSID proceeding is located in a non-Contracting State, for instance, it is not thereby shielded from any potentially incompatible national arbitral regimes as would be the case if it were held in a Contracting State.[118]

[115] Unlike under the NYC, under the ICSID Convention, nationality is a relevant consideration. For the possibility of enforcing an ICSID arbitral award in a non-Contracting State, see pp. 392–3.

[116] E.g. a non-Contracting State is not bound by Article 27(1) which suspends diplomatic protection or international claims if there is consent to use ICSID arbitration or where it is pending.

[117] See pp. 401–2 below. By Article 34 of the 1969 VCLT, a treaty does not create obligations or rights for a third state without its consent. And it has not been suggested that Article 25(2)(b) has become 'a customary rule of international law, recognized as such' by states: 1969 VCLT, Articles 34–38.

[118] Instructively, '[t]he choice of a non-member country of ICSID as the venue for proceedings has been avoided in practice in all ICSID cases to date': B. P. Marchais, 'Setting Up the Initial Procedural Framework in ICSID Arbitration', *News from ICSID*, 1988, No. 1, 5, 8. However, in *Philippe Gruslin* v. *Malaysia* (Case ARB/94/1), registered on 13 January 1994, an ICSID tribunal 'met with the parties' *inter alia* in Bangkok in 1994. The tribunal's 'meeting' in Bangkok with the parties would appear strange (Thailand being only a signatory to the Convention and not yet a Contracting State). This may probably be explained by the fact that under the 1969 VCLT (Article 18), a non-Contracting State is under an obligation not to defeat the object and purpose of a treaty prior to its entry into force and, secondly, the sole arbitrator in that case was from Thailand, which may well have served the convenience of the moment. But such a meeting would have been controversial if Bangkok (in a non-Contracting State) were to have been chosen as the seat of the arbitration, which in that case was Washington DC, and still be compatible with the logic of the Convention: Discussion with Antonio R. Parra of ICSID, at ICSID Secretariat, Washington DC, 25 March 1996.

In terms of principle and policy, the Convention's facilities are unavailable for the protection of investments made in or through, or controlled from, non-Contracting States. The latter or its nationals cannot also be made to derive, or confer, any benefit from the Convention through a misconstrued control concept. The position could be otherwise for Contracting States and their nationals *per se*, since the Convention was designed to furnish them with a facility for resolving investment disputes arising out of investments made in or controlled from such states. The Convention does this by assuring such investors direct access to an international forum. The latter is only available against, or for, states that had accepted the principle of direct access to non-state parties, by becoming contracting parties to the Convention – a matter perceived as conducive to their economic development, due to the capital that would be attracted from the non-state parties, nationals of other Contracting States, afforded the protection and facility of the Convention. Accordingly, jurisdictional decisions could be made to reflect policy objectives. Jurisdiction should be declined if its acceptance would 'give rise to logical inconsistency'. This would serve to maintain and reinforce the basic integrity of the Convention and its avowed policy purpose. Otherwise an absurdity, as in *SOABI*, would reoccur.[119]

One is conscious that the suggested interpretation might limit or exclude some investments from being protected by the Convention, e.g. those located in non-Contracting States but *controlled* from within and by nationals of Contracting States, or investments made in, or located in, a Contracting State (through a subsidiary) but only directly or indirectly controlled from or within a non-Contracting State by nationals of a Contracting State, as in *SOABI*. In these situations, if an ICSID tribunal or commission declines jurisdiction, it would be neither odd nor inappropriate, as the Convention does not apply to states *erga omnes* for the benefit of Contracting States and their nationals. Otherwise, it 'would permit

[119] Thus, the problem of dual or multiple nationalities and the international protection of nationals as well as their economic interests in locally incorporated entities examined in the *Barcelona Traction* case, ICJ Reports 1970, p. 3, would appear not to have been fully resolved in Article 25(2)(b), except in its recognition that, in appropriate situations, *locus standi* could be granted to the locally incorporated entity to be a competent party in ICSID proceedings. But the critical question remains whether the essential source of the *jus standi* for the locally incorporated entity could proceed from, or be tied to, an act or connections in a non-Contracting State or to nationals of a Contracting State, for investment controlled from a non-Contracting State.

parties to use the Convention for purposes for which it was clearly not intended'.[120]

It follows then that the best option open to a state desiring that investments made in or controlled from its territory should be afforded the protection of the Convention or be relied upon by investors to avail of the protection of the Convention, so that the state would gain from the implications of that protection, is to become a Contracting State, as Panama subsequently did. And, more importantly for the *SOABI* situation, an investor that desires (eventually) to rely on the Convention's protection in a dispute situation, should be prudent by investing only in, so as to control from, Contracting States. These elements were present in the *Amco Asia* case as the ICSID Convention applies in states implicated in that arbitration.[121]

In view of the nature, scope, object and purpose of the Convention, as well as the Centre's limited facilities, 'foreign control' in Article 25(2)(b) should be confined to one exercised, *directly* or *indirectly*, and proceeding from or in a Contracting State, relating to investments made in or controlled from other Contracting States. And the 'better practice', as reflected in ICSID Model Clause 7 and in the Institution Rules, would be for parties to, at least, make some reference to foreign control in their contract or agreement. This would facilitate *inter alia* identification of the state party (or states parties) to the Convention required by Article 27(1) of the Convention to forgo giving diplomatic protection in the circumstances.[122] As Schreuer succinctly pointed out:

> On balance, the better approach would appear to be a realistic look at the true controllers thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State.[123]

[120] Broches, 'The Convention', 361. Cf. 'where the foreign control lies clearly in the hands of a national of a non-Contracting State as, for example, where there are no interests of a Contracting State involved, and it is agreed that the corporation has the nationality of a Contracting State because of foreign control, such an agreement would, it is submitted, not be respected by a tribunal or commission, because if it were respected it would permit the parties to use the Convention for purposes for which it was clearly not intended': Amerasinghe, 'The Jurisdiction of the ICSID', 219.

[121] Of Article 17 of the 1994 ECT, it has been said: 'One would expect that the test would be handled, with full agreement of the Charter Conference, quite strictly, otherwise non-contracting states which do not accept the obligations of the Treaty [or even their nationals] would enjoy the benefits, and free-loading is unlikely to be encouraged': T. W. Walde, 'International Investments Under the 1994 ECT' (CPMLP Professional Paper No. PP17, 1994), p. 27.

[122] *Vacuum Salt* award, 4 ICSID Reports 338, para. 31, n. 11.

[123] Schreuer, 'Article 25', 123, para. 563.

The same should equally be correct for control, whether direct or indirect, by nationals of a Contracting State but proceeding from a non-Contracting State.[124]

The Convention is directed at depoliticising investment disputes, as arbitration under it is one in lieu of diplomatic protection and international claims.[125] The capacity to rely on the latter procedural rights distinctly belongs only to Contracting States.[126] No state in joining the Convention could have envisaged exposing its international responsibility to another state, for or because of investments made in, or controlled from, a State that did not endorse the basic principle on which the Convention was established. That this is the case can be discerned from the implications if, in ruling on the nationality of a juridical person under Article 25(2)(b)'s control test, consideration is given to control emanating from or in a non-Contracting State. According to Amerasinghe:

> Where there are several competing nationalities, not including the nationality of the host State, and one of them is that of a non-Contracting State, if a tribunal or commission holds that the juridical person has several nationalities including that of a Contracting State so that it has jurisdiction, the host State may nevertheless be faced with a claim based on diplomatic protection brought by the non-Contracting State, because the latter is not bound by Article 27(1) of the Convention.[127]

Why a host Contracting State should be exposed to diplomatic claims from the non-Contracting State where the controlling entity was incorporated or has its seat becomes inexplicable. At the same time, the reason a host

[124] Cf. Schreuer, *ibid*. at p. 138, para. 599, observing that a specific decision was made in the course of the Convention's preparation to exclude nationals of non-Contracting States from access to the Centre and that foreign control under Article 25(2)(b) means control by nationals of another Contracting State. Control by nationals of non-Contracting States (like that by Flexa in Panama, before 8 May 1996, of SOABI in Senegal) does not qualify.

[125] The ICSID Convention, Article 27(1); *Report of Executive Directors*, para. 33; see pp. 218–19.

[126] See Amerasinghe, 'The Jurisdiction of the ICSID', 202, for what would lead to a contrary result but which did not address the question of which state has the right to act for the private foreign investor if it becomes necessary pursuant to Article 27(1) of the Convention, especially where there is an intervening non-Contracting State as in *SOABI*. It was, nevertheless, conceded that a non-Contracting State is not bound by Article 27(1): Amerasinghe, *ibid*. at p. 206. This is the case during an ICSID arbitration, and after the making, and during the recognition and enforcement, of an ICSID arbitral award.

[127] Amerasinghe, 'The Jurisdiction of the ICSID', 216–17. Cf. Schreuer, 'Article 25', 209: 'A Tribunal that is aware of an attempt by a non-State party [a national of a Contracting State] before it to enlist the diplomatic protection of a non-Contracting State to the Convention should view this action as a sign of procedural impropriety.'

Contracting State should be subjected to ICSID arbitration by a subsidiary or by the nationals of another Contracting State who *indirectly* control it from a non-Contracting State is not apparent. Will it not promote a better policy and fairly balance the usually conflicting interests of host Contracting States, foreign investors and their respective states, to deny jurisdiction in such a situation?[128] This would then permit nationals of any Contracting State that, under Article 25(2)(b), obtained their control *directly or indirectly* from a non-Contracting State to look elsewhere for remedies than from the Convention.

However, as membership of the Convention is on the rise, jurisdictional complications arising from foreign control by nationals of Contracting States and flowing from non-Contracting States, will be minimal – provided, that investors from Contracting States invest only in other Contracting States.[129]

The Vacuum Salt award

The *SOABI* award should be compared with *Vacuum Salt Products Ltd* v. *Ghana*.[130] In the latter arbitration, an ICSID tribunal declined jurisdiction over a dispute on the ground that the claimant company did not fall within the exception provided for by Article 25(2)(b). It further stated that accepting jurisdiction in the particular circumstances of the case would permit parties to use the Convention for purposes for which it was clearly not intended.[131] The tribunal was unable to:

> find . . . indications of foreign control of Vacuum Salt such as to justify regarding it as a national of an ICSID Contracting State other than Ghana. In our estimation, the drafters of the Convention, and specifically of the second clause in Article 25(2)(b), cannot have contemplated that a case such as this one would bring into play an international dispute settlement regime designed to promote greater private international investment by providing a forum for the resolution of any ensuing disputes between a State and a national of another State.[132]

[128] Cf. Schreuer, 'Articles 26 and 27', 207: 'the exclusion of diplomatic protection [under Article 27] is mandatory. In other words, it is not possible to reserve the right to diplomatic protection when submission is made to ICSID arbitration. This mandatory exclusion of diplomatic protection makes sense. A combination of arbitration and diplomatic protection would lead to undesirable results. The balance of interests between the parties would be upset if the Host State after consenting to international arbitration, remained exposed to diplomatic protection by the investor's home state. In fact, the guaranty against diplomatic protection may constitute a strong incentive for the Host State to consent to arbitration. Also, the arbitration process between the host State and the foreign investor could be severely hampered by simultaneous efforts to pursue the claim through diplomatic channels.'

[129] Cf. Schreuer, 'Article 25', 91, para. 488.

[130] Award of 16 February 1994, 4 ICSID Reports 320. [131] *Ibid*., para. 54. [132] *Ibid*.

In that dispute, a Greek national owned 20 per cent of the shares of Vacuum Salt, a company incorporated in Ghana.[133] Relying on this, the claimant asserted that the company was a national of another Contracting State under Article 25(2)(b). Ghana objected to the jurisdiction of ICSID and of the tribunal on the ground that the claimant was a Ghanaian company, which was not foreign controlled and that there had been no agreement between the parties to treat the company as a national of another Contracting State (i.e. as Greek).[134]

Jurisdiction was declined over Vacuum Salt, and rightly so. The tribunal observed that, on its face, the request of the claimant was of such a nature as to attract jurisdiction under Article 25(1) because Ghana was a state party to the Convention, the dispute as pleaded in the request was a legal one arising directly out of an investment, and the written consent of the parties to submit the dispute to the Centre was recorded in paragraph 36(a) of the 1988 lease agreement.[135] The tribunal pointed out that it was agreed by all that Vacuum Salt was and had at all material times been a national of Ghana and hence could not be regarded as 'a national of another [ICSID] Contracting State' within the definition of the first clause of Article 25(2)(b).[136] The tribunal can have jurisdiction *ratione personae* in regard to Vacuum Salt 'only if in respect of it the requirements of the second clause of Article 25(2)(b) of the Convention are satisfied [as a matter of fact]' on the date of the consent, i.e. on 22 January 1988.[137] The tribunal further emphasised: 'Unless the requirements of the second clause of Article 25(2)(b) have been fulfilled the Tribunal does not have jurisdiction. The Tribunal therefore must focus on this point'.[138]

The Tribunal then considered whether there was an 'agreement' and, if so, whether the agreement constituted 'foreign control' within the meaning of Article 25(2)(b).[139] With respect to the question of 'agreement', Ghana pointed out that the parties had not referred to, let alone recited, the second clause of Article 25(2)(b). Nor did paragraph 36(a) of the 1988 lease agreement allude to it.[140] The facts and circumstances of *the Vacuum Salt* case were distinguished from the particular circumstances of those

[133] On the critical date, three banks owned by Ghana held 10 per cent each, and the remaining 50 per cent was held by private Ghanaian nationals including one company (*ibid*., para. 41). [134] *Ibid*., paras 12–13.

[135] *Ibid*., para. 26. The arbitration clause is reproduced in *ibid*., para. 2.

[136] *Ibid*., para. 28. The first clause of Article 25(2)(b) was invoked in *AMT* v. *Zaire (DRC)*: see below. [137] 4 ICSID Reports 335, paras 28 and 35. [138] *Ibid*., para. 28.

[139] *Ibid*., para. 30.

[140] *Ibid*., para. 31. The tribunal observed that the better practice as reflected in ICSID Model Clause 7 would be for the parties to make, at least, some reference to foreign control although the reported ICSID cases suggest that such has not been the practice. The

previous ICSID awards before *Vacuum Salt* that had dealt with Article 25(2)(b).[141] As the Tribunal in *Vacuum Salt* pointed out: 'The Tribunal in the particular circumstances of each of those cases concluded that the very agreement by the parties to an ICSID arbitration clause in circumstances such that ICSID jurisdiction can exist only on the basis of the second clause of Article 25(2)(b) necessarily implied their agreement to apply that clause'.[142] It was, however, noted by the tribunal that the *Vacuum Salt* case was distinguishable from those awards because 'in none of them was the issue of consent separate from that of foreign control. In each of them the objective existence of foreign control was presumed, in particular because the foreign shareholders were 100 per cent (or, in one case, 51 per cent)'.[143]

In considering the question whether 'foreign control' as used in Article 25(2)(b) existed in fact on the date of consent, the tribunal observed: 'the parties' agreement to treat Claimant [Vacuum] as a foreign national "because of foreign control" does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so'.[144] The tribunal then sought to determine whether or not the Convention limit had been exceeded, and where that limit lay in the first place.

In reviewing the writings of publicists on the Convention, the tribunal admitted that 'consistent with the *travaux préparatoires* of the Convention, the authorities are unanimous in placing great weight on the fact of the parties' consent'.[145] However, it pointed out that no detailed definition of 'foreign control' was developed either in the *travaux préparatoires* or in ICSID jurisprudence.[146] Whilst according considerable respect to the consent of the parties, which in principle is the cornerstone of the Centre's

ICSID awards cited in support were *Amco Asia et al.* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, 23 ILM 361, para. 14(ii); *Klockner* v. *Cameroon*, Decision on Jurisdiction, 21 October 1983, 10 YBCA 71, 76; and *LETCO* v. *Liberia*, award of 31 March 1986, 26 ILM 653. For ICSID Model Clause 7, see p. 286, note 106; *Vacuum Salt* award, *ibid*., para. 31, n. 11.

[141] *Ibid*., para. 31.

[142] *Vacuum Salt* award, *ibid*., para. 31.

[143] *Ibid*., para. 31. Only in *Klockner* was there 51 per cent foreign ownership.

[144] *Ibid*., para. 36 citing the *Report of the Executive Directors*, para. 25 ('While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto').

[145] *Vacuum Salt* award, 4 ICSID Reports 344, para. 37, citing the comment of Broches, in *History of the Convention*, p. 579.

[146] Citing *History of the Convention*, pp. 359, 361, 447–8 and 538; *SOABI* v. *Senegal*, Decision on Jurisdiction, 19 July 1984, para. 29, 2 ICSID Reports 180.

jurisdiction and is not lightly to be found to be ineffective,[147] the tribunal indicated:

> The acknowledged authority on the Convention states in specific regard to Article 25(2)(b) that 'any stipulation of nationality . . . based on a reasonable criterion should be accepted' and that jurisdiction should be declined 'only if [not] . . . to do so would permit parties to use the Convention for purposes for which it was clearly not intended'.[148] In like vein it has been stated that the agreement of the parties on a foreign nationality based on foreign control would raise a strong presumption that there was adequate foreign control on which to predicate a foreign nationality.[149]

It is only where such foreign control cannot be postulated on the facts, on the basis of the application of any reasonable criteria, that a tribunal would decline jurisdiction, because in such a case the parties would purport to use the Convention for purposes for which it was not intended.[150] The words 'because of foreign control' have some meaning and effect. The words are clearly intended to qualify an agreement to arbitrate and the parties are not at liberty to agree to treat any company of the host State as a foreign national: 'They may only do so "because of foreign control".'[151] In the conclusion of the tribunal, the existence of consent to an arbitration clause (such as paragraph 36(a) of the 1988 lease agreement) in circumstances such that jurisdiction could be premised only on the second clause of Article 25(2)(b) raises a 'rebuttable presumption' that the 'foreign control' criterion of the second clause of Article 25(2)(b) had been satisfied on the date of consent.[152]

From a review of the history of the allocation of responsibilities and the structure of shareholding in Vacuum Salt, the tribunal felt able to observe: 'In the end, the entire proceedings, even viewed in the light most favourable to claimant, are instinct with the sense that Mr Panagiotopulos [the Greek national said to control the local company], for all his admitted talents, was not in any sense "in charge".'[153]

The tribunal was 'constrained to conclude that the presumption from

[147] Citing the *Report of the Executive Directors*, para. 8.

[148] Citing Broches, 'The Convention', 360–1.

[149] *Vacuum Salt* award, 4 ICSID Reports 344, para. 37, citing Amerasinghe, 'Jurisdiction Rationae Personae', 264–6. But contrast with M. Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Dordrecht: Martinus Nijhoff, 1993), p. 102.

[150] *Vacuum Salt* award, *ibid*., para. 37, citing Amerasinghe, *ibid*.

[151] *Ibid*., para. 38.

[152] *Ibid*. Cf. the *Cable Television* case, see pp. 277–80.

[153] 4 ICSID Reports 350–1, para. 53 (footnote omitted). The tribunal noted that a person who had control of Vacuum Salt in any sense would have played a role in the decision to commence the ICSID arbitration. But that was not the case with Mr Panagiotopulos, 'who did not even participate in (either in support of or in opposition to) that decision' (*ibid*. at p. 350 n. 42).

the fact of consent that the requirement of the second clause of Article 25(2)(b) were satisfied in this case on 22 January is rebutted'.[154] Accepting jurisdiction in the particular circumstances of the case would permit parties to use the Convention for purposes for which it was clearly not intended.[155]

The AMT *v.* Zaire *award*

A new dimension in the interpretation of Article 25(2)(b) of the Convention, on this occasion the first clause thereof, was developed in *AMT* v. *Zaire (DRC)*.[156] Unlike the *SOABI* arbitration, the states implicated in the *AMT* v. *Zaire* arbitration were ICSID Contracting States and a BIT was invoked by the claimant.

AMT, a company incorporated in the US, of which a majority of its shareholders were nationals of the US, filed a claim for ICSID arbitration against Zaire (as it was then known). The request was brought under Article 36 of the Convention and the provisions of the 1984 BIT between the US and the DRC (then known as Zaire).[157] AMT requested the tribunal to declare *inter alia* that Zaire violated its rights recognised and protected by the BIT and was liable for compensation especially with respect to destruction and looting caused by members of the armed forces of Zaire to the properties and installations belonging to Société Industrielle Zairoise (SINZA) in which AMT owned 94 per cent of the shares.[158]

Zaire challenged the jurisdiction of ICSID and the competence of the tribunal to the effect that there was a defect in the status of AMT in that it lacked the capacity to act for SINZA; that there was no dispute between AMT and Zaire but only between SINZA (a Zairean company) and Zaire.[159] Zaire further argued *inter alia* that AMT failed to exhaust the ADR means stipulated by Article VIII of the BIT before recourse to ICSID.[160] Finally,

[154] *Vacuum Salt* award, *ibid*., para. 54. [155] *Ibid*.

[156] Award of 21 February 1997, Int Arb Rep 12, 1997, No. 4, A-1. On 29 January 1999, an application to revise this Award was registered: *News from ICSID* 16, 1999, 2. Following a settlement agreed by the parties, the claimant requested the discontinuance of the proceedings. The tribunal issued an Order taking note of the discontinuance on 26 July 2000, pursuant to Rule 44: *News from ICSID* 17, Spring 2000, 4.

[157] The BIT was signed on 3 August 1984 and entered into force on 28 July 1989.

[158] Int Arb Rep 12, A-1, paras 1.01–1.05. SINZA was engaged in industrial and commercial activities in Zaire, namely the production and sale of automotive and dry cell batteries, and the importation and resale of consumer goods and foodstuffs (*ibid*. at para. 5.03).

[159] *Ibid*., paras 3.08–3.09.

[160] The BIT requires the settlement of dispute by means of consultation between representatives of the two parties, and, failing that, by other diplomatic means. Zaire submitted that it was only after these means had failed that it would have been possible to have recourse to ICSID arbitration (*ibid*., paras 3.10 and 4.03).

Zaire contested the admissibility of AMT's request as being in violation of Zaire's Investment Code since AMT was a US company which had never made any direct investment in Zaire, whereas SINZA, the direct investor for this purpose, was a legal entity of Zairean nationality, exclusively empowered to institute arbitral proceedings under the Investment Code.[161] The tribunal summarised the submission:

> The core defence of Zaire consists in the argument that the Zaire–United States Treaty may well relate to the natural and juridical persons of the United States or Zairean nationality; and although AMT is clearly a US company, it has never made any direct investment in its name in the Republic of Zaire. According to Zaire, AMT has furnished no proof whatsoever of its direct investment. Zaire indicates that AMT has merely participated, as a stockholder, in the investment made by SINZA, a Zairean company. Zaire thereupon concludes that SINZA, being a Zairean company, cannot benefit from the Zaire–US Treaty. Deducing consequences from this observation, Zaire contends that the Centre is without competence, considering that the dispute in question is between a State and a national [of] that same State, such a dispute has never entered into the scope of application of the Convention.[162]

AMT rejected the objections raised by Zaire and submitted that it was always the direct investor in Zaire as the majority shareholder of SINZA, a company established in Zaire but *deemed* to be a legal entity of the US for the purpose of ICSID jurisdiction.[163]

The tribunal joined the preliminary objections to the merits in order to determine its competence and ICSID's jurisdiction.[164] It noted that the competence of the tribunal derived from that of the Centre; and that, by registering the request, it may be presumed that the Secretary-General, although of the view that the dispute is not manifestly outside the jurisdiction of the Centre, does not make a decision that binds the tribunal in appreciating its own jurisdiction or lack of it.[165] The tribunal applied the ICSID Convention, the applicable Arbitration Rules and the 1984 BIT to determine whether the jurisdictional requirements of Article 25(1) of the Convention were satisfied.[166] It held that there was clearly a legal dispute (*ratione materiae*).[167] On the question of whether the dispute was between a Contracting State and a national of another Contracting State (*ratione*

[161] *Ibid*., paras 3.13 and 4.04. [162] *Ibid*., para. 4.05.

[163] *Ibid*., para. 3.15 (emphasis added); see pp. 271–3. In this arbitration, there was no agreement between AMT and Zaire to treat SINZA as a national of the US. Neither was there an arbitration clause between AMT and Zaire, or between Zaire and SINZA.

[164] Int Arb Rep 12, A-1, para. 4.09. [165] *Ibid*., para. 5.01.

[166] For that part of the award dealing with the consent of the parties to ICSID (which was found to exist), see pp. 350–2. [167] Int Arb Rep 12, A-1, para. 5.06.

personae), it was observed that Zaire was a Contracting State and that the dispute was with AMT which was clearly a national of the US, another Contracting State. The criticism of Zaire relates not to the nationality of AMT but to its status or capacity to act for SINZA, regarded by Zaire as the real investor.[168]

Turning to the further elaboration of the concept of 'national of another Contracting State' under Article 25(2), the tribunal held that AMT satisfied the requirements of the first paragraph of Article 25(2)(b): 'The Tribunal finds that the dispute is brought before the Centre by AMT. It does not consider it possible to contest that AMT is not a juridical person with United States nationality . . . Zaire also recognises this fact'.[169] The tribunal disagreed with the arguments of Zaire that the dispute was not with AMT but was with SINZA, the Zairean company, which operated the industry that was destroyed and which was the object of the instant dispute.[170] In Zaire's view, the dispute should be subject to its national procedure rather than to ICSID as SINZA was a Zairean company. The fact that AMT participated in the capital of SINZA, even at 100 per cent, does not confer upon it any power to act in the place and instead of SINZA.[171]

The Tribunal noted that the object of the 1984 BIT between the US and Zaire was to promote greater economic co-operation between the parties, particularly with respect to investments by nationals and companies of each party in the territory of the other party.[172] Under Article 1(c)(ii) of the Treaty, 'investment' means every kind of investment, owned or controlled directly or indirectly, including equity, debt and service and investment contracts, and includes 'A company or shares of stock or other interests in a company or interests in the assets thereof'.[173] The tribunal concludes, whilst rejecting Zaire's argument based on AMT's incapacity as claimant:

> It is uncontested that SINZA belongs to AMT 94 per cent and that AMT, formed in the United States of America with 55 per cent of its shares owned by United States citizens, is controlled by the Americans, and hence is a US company. Thus, SINZA should be considered in terms of the perfectly clear provisions of the treaty as an investment of AMT. It follows that SINZA falls within the category of juridical person envisaged in Article 25(2) of the Convention as previously cited. It is not called into question whether, as Zaire suggests, AMT can act in the name of SINZA.

[168] *Ibid*., para. 5.08. [169] *Ibid*., para. 5.09. [170] *Ibid*., para. 5.10. [171] *Ibid*., para. 5.11.
[172] *Ibid*., para. 5.12.
[173] In Article 1(a) of the BIT, 'company' means 'any kind of juridical entity, including any corporation, association, or other organization, that is duly incorporated, constituted or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned or organized with limited or unlimited liability' (*ibid*., para. 5.13).

AMT acts in its own name and in its capacity as an American enterprise having invested in Zaire, that is to say, a national of a State party having a dispute with another State party which has welcomed his investment on its territory.[174]

One would have thought that, due to the controlling shareholding of AMT in SINZA (the locally incorporated company), the matter should have been considered by applying the foreign control test in the second clause of Article 25(2)(b). But, in that event, the Tribunal would most likely have declined jurisdiction. In that arbitration, it was not obvious whether there was an investment contract between Zaire and AMT with an ICSID arbitration clause, or between Zaire and SINZA with such a clause; and an agreement between AMT and Zaire, or between SINZA and Zaire, to treat SINZA as a national of the US due to AMT's 94 per cent shareholding, assumed to be 'foreign control'.[175] Jurisdiction was assumed based solely on the *application* made by AMT (the parent company of SINZA), a juridical person which had the nationality of a Contracting State (the US) other than the state party to the dispute (Zaire) on the date on which the parties consented to submit such dispute to arbitration by virtue of the first paragraph of Article 25(2)(b).[176] With the holding by the tribunal that there was a legal dispute, a Contracting State, a national of another Contracting State and that the shareholding of AMT in SINZA was an 'investment' under the BIT (which, in this case, constituted the instrument expressing the consent of Zaire to submit to ICSID), the tribunal was able to establish jurisdiction over the dispute. The *AMT* v. *Zaire* award is ingenious. It demonstrates the effectiveness of BITs especially in foreign (portfolio) investment protection and in international investment arbitration. The question of whether a BIT can detract from the ICSID Convention remains to be discussed in chapter 11. Significantly, as the tribunal observed, neither party to the arbitration contested the applicability of the 1984 BIT to the case.[177]

Provisions in bilateral investment treaties on 'nationals of another Contracting State'

To stem the perceived ambiguities surrounding the requirements of a juridical person, a national of a Contracting State under the Convention

[174] *Ibid*., paras 5.15–5.16. [175] From the facts, it seems none of these is present.

[176] 'Parties' in this context indicates the confusing nature of the concept in the context of the ICSID Convention. The application (request) of AMT for ICSID arbitration was its consent to that arbitration: see pp. 308–9; 346–50. This might appear intriguing.

[177] *Ibid*., para. 5.02.

(as seen in most of the awards discussed earlier) and of corporate nationality in customary international law, most investment treaties, in addition to defining the concept of natural persons (nationals or citizens) or juristic persons (or companies) of either Contracting Party, would, if ICSID arbitration or conciliation is a dispute resolution option, probably seek to clarify the concept of nationality and the nature of control, and purport to reach agreement for the purposes of the treaty and of Article 25(2)(b) of the Convention.

Although the intention of those regimes may have been to clarify inherently controversial subject matters, they are too often not free from ambiguities. Indeed, in most cases, some BITs, rather than clarify, add to the confusion and complexity. Each dispute arising under a BIT or involving its application and interpretation should therefore be examined on its facts and circumstances.

It is doubted whether a provision in a BIT (between two ICSID Contracting States) purporting to implement Article 25(2)(b) as to 'agreement' would be valid. The above provision, which provides *inter alia* 'because of foreign control, the parties have agreed . . .' requires agreement by the 'parties', i.e. in the context of Article 25, between the host Contracting State party to the dispute and the foreign investor, say, a parent company or the locally incorporated subsidiary, but not an 'agreement' between two Contracting States.[178] It has nevertheless been suggested that Contracting States, parties to BITs (as in UK and US model BITs) may conclude the requisite 'agreement', in addition to recording advance general consents to ICSID arbitration.[179]

Article 1(b) of the 1992 BIT between The Netherlands and Nigeria[180] provides that the term 'nationals' shall comprise with regard to either Contracting State:

(i) natural persons having the nationality of that Contracting State;
(ii) legal persons constituted under the law of that Contracting State; and
(iii) legal persons not constituted under the law of that Contracting State *but controlled, directly or indirectly*, by natural persons as defined in (1) or by legal persons as defined in (2) above.

The above provision would appear to have taken care of the situation in the *SOABI* arbitration as Nigeria and The Netherlands are parties to the ICSID

[178] P. Peters, 'Dispute Settlement Arrangements in Investment Treaties', NYBIL 22, 1991, 91, 144. This is apparent from the cases dealing with Article 25(2)(b) discussed earlier: see pp. 273–97.

[179] Dozler and Stevens, *BITs*, p. 142; Schreuer, 'Article 25', 89, paras 481, 505 and 536; UNCTAD, *BITs in the Mid-1990s*, pp. 98–9.

[180] Entered into force on 1 February 1994.

Convention and the BIT can only apply to covered investments, made in or controlled from Nigeria or The Netherlands, by their respective nationals. But, whether a BIT could constitute the 'agreement' to treat, for the purposes of the ICSID Convention, a locally incorporated entity as a national of another Contracting State due to foreign control, and whether control of or by a company outside ICSID Contracting States parties to a BIT, would give jurisdiction under Article 25(2)(b) remains doubtful:

> The aim of a BIT is to encourage and protect investments by investors of the two countries that are party to the treaty. Consequently, the treaty must define those investors that have a significant link with their respective countries to merit protection. In particular, the capital importing country may be reluctant to grant the benefits of a BIT to persons and companies having only a tenuous relationship with its treaty partner. To allow the treaty to benefit persons or companies that are primarily associated with third countries with which it has no treaty relationship would be, in effect, to abandon its prerogative to negotiate corresponding privileges and obligations from those countries.[181]

Further, the second limb of Article 9 (on investment dispute settlement) of the BIT between The Netherlands and Nigeria provides that a legal person which is a national of one Contracting State and which *before a dispute arises* (not the critical date in the Convention's Article 25(2)(b), which is 'on the date on which the parties consented to submit such dispute to conciliation or arbitration') is controlled by nationals of another Contracting State shall, in accordance with Article 25(2)(b) of the ICSID Convention, be treated as a national of the other Contracting State for the purposes of the Convention.[182]

The BIT between Nigeria and the UK[183] reflects the above trends in varying though significant degrees. The BIT provides that 'nationals' with regard to either Contracting State means natural persons having the nationality of that Contracting State. Whereas 'companies' means, with regard to either Contracting State, corporations, firms, associations and other legal persons incorporated or constituted under the law in force in any part of each Contracting State or in any territory to which the treaty is extended.[184] Then, Article 8(1) of the BIT (reference to ICSID) provides *inter alia* that a company which is incorporated or constituted under the laws in force in the territory of one Contracting State and in which *before*

[181] UNCTAD, *BITs in the Mid-1990s*, p. 37.
[182] This provision may be interpreted and applied in light of the *Vacuum Salt* award.
[183] Signed on 11 December 1990 and entered into force on the same day (Article 13).
[184] *Ibid*., Article 1(c) and (d).

such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting State shall, in accordance with Article 25(2)(b) of the Convention, be treated for the purposes of the Convention, as a company of the other Contracting State.

In addition to not stipulating that the critical date for determining that the locally incorporated but foreign controlled juridical person agreed to be treated as a national of another Contracting State for the purposes of the Convention is the date on which the parties consented to submit such dispute to ICSID, the above BIT also mistakenly equated majority share ownership with 'foreign control' under Article 25(2)(b). That may, indeed, possibly be the case in most cases. But, it might not always be the case, as mere ownership of the majority of shares in a company may not necessarily entail corporate control. The latter could also be achieved by means other than through majority share ownership.[185] In *Vacuum Salt* award:

> The Tribunal notes and itself confirms, that 'foreign control' within the meaning of the second clause of Article 25(2)(b) does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all of the facts and circumstances. There is no 'formula'. It stands to reason, of course, that 100 per cent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholding would virtually preclude the existence of such control. How much is 'enough', however, cannot be determined abstractly. Thus in the course of the drafting of the Convention, it was said variously that 'interests sufficiently important to be able to block major changes in the company' could amount to a 'controlling interest',[186] that 'control could in fact be acquired by persons holding only 25 per cent' of a company's capital (*ibid.* at pp. 447–8); and even that 51 per cent of the shares might not be controlling while for some purposes 15 per cent was sufficient (*ibid*. at p. 538).[187]

As the tribunal further observed:

> Nonetheless, it must be true that the smaller is the percentage of voting shares held by the asserted source of foreign control, the more one must look to other

[185] Muchlinski, *Multinational Enterprises*, pp. 184–5; Dolzer and Stevens, *BITs*, pp. 142–3; Amerasinghe, 'The Jurisdiction of the ICSID', 220–3; Final Act of the European Energy Charter Conference, Section IV, para. (3), Understandings with respect to Article 1(6), on control by an investor of a Contracting Party under the ECT, in Walde (ed.), *The ECT*, p. 613; Council Regulation (EU) No. 4064/89 as amended, Articles 3(3) and (4), OJ 1990 No. L257/13. [186] Citing *History of the Convention*, p. 447 (footnote omitted).

[187] *Vacuum Salt* award, 4 ICSID Reports 346–7, para. 43.

elements bearing on that issue. As one authority has said, 'a tribunal . . . may regard any criterion based on *management*, voting rights, shareholding *or any other reasonable theory* as being reasonable for the purpose'.[188]

Also, the UK–Nigeria BIT does not make it explicit that there should be 'foreign control' of the national company (at the critical time) before such entity in either Contracting State can be treated as a national of the other State.[189]

By contrast, the 1990 BIT between Nigeria and France[190] is terse. There is no mention of elements that would otherwise trigger Article 25(2)(b), especially 'agreement' or 'foreign control', although the ICSID Convention is referred to in Articles 8 and 9.[191] Under Article 1(2) of the BIT, 'nationals' means physical persons possessing the nationality of either France or Nigeria in accordance with the legislation of the Contracting State. And, by Article 1(3), an 'investor' is 'any national or any legal person constituted in the territory of one Contracting Party in accordance with the legislation of that Party, having its head office on the territory of that Party, or *controlled directly or indirectly* by the nationals of one Contracting Party, or by legal persons having their head office in the territory of one Contracting Party and constituted in accordance with the legislation of that Party'.[192]

In the 1977 BIT between Egypt and Japan,[193] the parties agreed in Article X(1):

> Each Contracting Party shall consent to submit any legal dispute that may arise out of investment made by a national or company of the other Contracting Party to conciliation or arbitration, in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States at the request of such national or company.

[188] *Ibid*., para. 44, citing Amerasinghe, 'Jurisdiction Rationae Personae', 264–5. In the *LETCO* award, the tribunal found foreign corporate control in 100 per cent stock ownership and in the domination of the effective corporate decision-making structure by French nationals: Schreuer, 'Article 25', 123–7. Cf. Dolzer and Stevens, *BITs*, p. 143: 'In light of this, the typical UK BIT provision must be understood as simply restricting the scope of the Contracting Parties' agreement with respect to foreign controlled locally incorporated companies to cases of majority equity ownership. In other words, these particular UK BITs do not necessarily exhaust the possibilities opened in this respect by the ICSID Convention.'

[189] Again, that provision should be interpreted and applied in light of the *Vacuum Salt* award.

[190] Entered into force on 19 August 1991.

[191] For Article 8 of the BIT, see p. 354.

[192] France and Nigeria are ICSID Contracting States.

[193] Entered into force on 14 January 1978.

The provision continues:

Any company of the *former* Contracting Party which *was or is* controlled by nationals and companies of the other Contracting Party *prior to or on* the date on which the parties to such dispute consent to submit the dispute to conciliation or arbitration shall in accordance with the provisions of Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of such other Contracting Party. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose.[194]

It is clear that the above provision, has, at least in one respect, exceeded the Convention limit. The locally incorporated but foreign controlled entity must, under Article 25(2)(b), have the nationality of the state party to the dispute 'on the date on which the parties [the host state *and* the foreign investor] consented to submit such dispute to [ICSID] conciliation or arbitration' and not *prior* to that date.[195]

Concluding remarks

A request for proceedings under the Convention has to disclose 'the agreement of the parties' under Article 25(2)(b) where appropriate. The request shall indicate with respect to the party that is a national of a Contracting State if the party is a juridical person which on the date of consent [in accordance with Article 25(1)] had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention.[196]

Article 25(2)(b) presupposes that a host Contracting State must be a

[194] Under Article I(3) and (4) of the BIT respectively, 'nationals' means, in relation to one Contracting Party, physical persons possessing the nationality of that Contracting Party; and 'companies' means corporations, partnerships, companies and other associations whether or not with limited liability, whether or not with legal personality and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations of one Contracting Party and having their seat within its territory shall be deemed companies of that Contracting Party.'

[195] Cf. Amerasinghe, 'The Jurisdiction of the ICSID', 223.

[196] Institution Rules, Rule 2(1)(d)(iii). The information must be supported by documentation (*ibid*., Rule 2(2)). In the *Cable Television* case, ICSID Rev-FILJ 13, 328, the tribunal observed that the lack of appropriate documentation at the time of filing the request was not fatal since such could be provided during the hearing, and an attempt was made by Cable to do so in its response to objection to jurisdiction by the respondent and in documentation submitted after the hearing in 1996 (*ibid*., para. 5.15).

party to *the* dispute in which it can be invoked successfully. In the *Cable Television* case,[197] the respondent opposed the request by Cable for arbitration *inter alia* on the ground that the request did not comply with the requirements of the Institutional Rules in several material particulars and that the tribunal was not competent to countenance the substitution of the Federation of St Kitts and Nevis (i.e. the Contracting State) in lieu of Nevis as a party to the proceedings.[198] Cable made the Federation (instead of Nevis) the opposing party. The tribunal held that the Federation was not a party to the agreement containing the ICSID arbitration clause and that there was no privity of contract between the Federation and Cable.[199] The tribunal pointed out that Article 25(2)(b) seems to presuppose that the host (Contracting) State must be a party to the dispute.[200] As the Federation did not consent to an ICSID arbitration and there had been no expressed or implied agreement or consent by the Federation to treat Cable as being under the foreign control of US nationals for the purposes of Article 25(2)(b), in the circumstance the requirements of Rule 2(d)(iii) – an agreement to treat Cable as a national of another Contracting State for the purposes of the Convention – had not been met.[201]

The remaining jurisdictional requirement under Article 25(1) of the ICSID Convention – that written consent, once given, may not be withdrawn – will be considered next. This will be followed, in chapter 11, by a look at associated problems of ICSID arbitration without privity especially when there is a unilateral and mandatory consent of a state submitting to ICSID.

[197] *Ibid*. at p. 328. [198] *Ibid*., paras 1.12(b) and (d) and 5.13. [199] See p. 279 above.
[200] *Ibid*., para. 5.23.
[201] *Ibid*., paras 5.14 and 5.24. The correct provision of the Institution Rules is Rule 2(1)(d)(iii).

10 Consent under the ICSID Convention

Introductory remarks

In preceding chapters in this Part, we examined the making of the ICSID Convention and some jurisdictional requirements under Article 25 – ICSID's jurisdiction *ratione materiae* and *ratione personae*. This chapter will focus on irrevocable consent in writing and how that could be established for ICSID proceedings, as well as the practice of African states with respect thereto. Consensus seems to be emerging in this area. However, there are still difficulties in relation to the use of bilateral investment treaties (BITs) or national investment codes to express the written consent of the state party, and in the possible conflict of interest and duty in the role of ICSID, the World Bank and their associates in the emerging consensus.

Under Article 25(1) of the Convention, there must be consent in writing of the disputing parties before the Centre can have jurisdiction over a dispute. The consent, if given, may not be unilaterally withdrawn. And no Contracting State shall, by the mere fact of its ratification, acceptance or approval of the Convention and without its consent, be deemed to be under any obligation to submit any particular dispute to ICSID proceedings.[1] Thus, it is often said that 'consent of parties is the cornerstone of the jurisdiction of the Centre [ICSID]'.[2] However, taken on its face value, the assertion may conceal the entire position under the Convention in practice, especially with respect to other technical jurisdictional requirements reviewed in the preceding chapters of this Part, which must be satisfied before jurisdiction could validly vest in the Centre.

True, consent is one cornerstone of the Centre's jurisdiction. But this is

[1] The last preambular paragraph to the Convention.
[2] *Report of the Executive Directors*, para. 23.

not unique to proceedings under the Convention:[3] consent is the cornerstone of *all* (non-statutory) arbitration or conciliation. The inability to appreciate this might have misled some negotiators of investment treaties or drafters of national investment codes as to the nature of those proceedings and their implications. The problems this might cause in ICSID proceedings are the subject of chapter 11.

The only formal element of consent indicated by Article 25(1) of the Convention is that it has to be in writing. The written form that would satisfy this requirement was neither stated nor defined. A valid consent in writing, it has been held, 'is not to be expressed in a solemn, ritual and unique formulation'.[4] Nor is the consent to be given on a case-by-case basis.[5] The Convention does not specify the time at which consent should be given nor does it require that the consent of both parties be expressed in a single document – the common form of doing so. However, the consent of both parties must exist at the time a request for proceedings is filed with the Secretary-General. If a request fails to show that both parties have consented, then the Secretary-General must refuse to register it.[6]

Consent in writing of both parties may be expressed in an investment agreement to refer *future* disputes to the Centre or in a *compromis* regarding an *existing* dispute.[7] Also, '[a] host State might in its investment promotion legislation (or in a BIT) offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his [its] consent by accepting the offer in writing'.[8] Consent in writing of a state – and only of a state – has in ICSID jurisprudence been found in investment laws,[9] in BITs[10] and, among other considerations, in the investment promotional literature of a host state.[11] Acceptance of any

[3] See p. 262, note 156, above.

[4] *Amco Asia* case, 1 ICSID Reports 400, para. 23; *CSOB* v. *Slovak Republic*, ICSID Rev-FILJ 14, 263, paras 33–4. Cf. *Corfu Channel* case (Preliminary Objections), ICJ Reports 1948, pp. 27–8.

[5] *SPP* v. *Arab Republic of Egypt* (the *Pyramids* case), Decision on Jurisdiction, 27 November 1985, 3 ICSID Reports 101, paras 48–50; Decision on Jurisdiction, 14 April 1988, *ibid*., paras 69 and 101.

[6] ICSID Convention, Articles 28 and 36; Amerasinghe, 'The Jurisdiction of ICSID', 224.

[7] *Report of the Executive Directors*, para. 24; Amerasinghe, *ibid*. at pp. 223–5.

[8] *Report of the Executive Directors*; *History of the Convention*, pp. 267, 274–5.

[9] *Pyramids* case, 3 ICSID Reports 131; *Tradex Hellas SA* v. *Republic of Albania*, ICSID Rev-FILJ 14, 161 and 197; A. R. Parra, 'Principles Governing Foreign Investments as Reflected in National Investment Codes', ICSID Rev-FILJ 7, 1992, 428, 446.

[10] *AAPL* v. *Sri Lanka*, 4 ICSID Reports 256, para. 18; *AMT* v. *Zaire (DRC)*, Int Arb Rep 12 (April 1997), A-1; *Fedax* v. *Republic of Venezuela*, 37 ILM 1378; *CSOB* v. *Slovak Republic*, ICSID Rev-FILJ 14, 251.

[11] *Amco Asia* case, 1 ICSID Reports 397–400.

of these (which include the institution of ICSID proceeding) by an investor satisfy the Convention's requirement of consent by both parties in the particular case.

More will be said in chapter 11 about the effectiveness of a unilateral consent expressed in investment laws and treaties by a state party to ICSID proceeding and its associated problems.

Laws and treaties referring to ICSID and other options for dispute resolution

Introductory remarks

In this book, it may not be possible to review the investment laws or treaties of all African states. And, due to the rapidity of legal reform and development in the fields of foreign investment and arbitration in Africa and internationally, a particular law which is examined in this book may, in the relevant state, either still be in force in its entirety or with amendments, or might well have been replaced with another enactment. What is significant, however, is that, even in those situations where African states have repealed or amended pre-existing laws on either arbitration or foreign investment, there are always opportunities for ADR in subsequent regimes. For example, the 1991 Zambian Investment Act was repealed by section 39(1) of the 1993 Investment Act. Section 40 of the former contained provisions for dispute resolution. The 1993 Act has no comparable express provision although section 39(2) thereof saves things or acts performed under the 1991 Act.[12]

Some legal regimes, rather than contradict or undermine the repealed or amended regimes, may further clarify and reinforce their purports or create opportunities for ADR.[13]

A few representative examples of investment laws or treaties will be cited in this book to discern a trend, which has emerged or at least is emerging with respect to the settlement of investment disputes between

[12] Sections 4 (continuation of the Investment Centre) and 37 (transitional provisions) of the 1993 Act (as amended in 1995 (Act No. 26) and 1996 (Act No. 5)). Zambia is a party to the ICSID Convention.

[13] E.g. the Egyptian Investment Code 1989, replacing a 1974 Act; the Nigeria Investment Promotion Commission Act 1995, replacing Acts of 1988 and 1989; the Ghana Investment Promotion Centre Act 1994, replacing a 1985 Code; and the Ghana Free Zone Act 1995, repealing the Industrial Free Zones Authority Decree 1978. These Laws will be discussed below.

African states and private foreign investors.[14] This trend is that arbitration is invariably an available and, in some cases, an expressed option. Also, proceedings under the ICSID Convention are not the only available dispute resolution option that might be used in an African setting. Nevertheless, ICSID is, to a great extent, an important option, often the expressly preferred option, in legal regimes.[15]

There are trends in references in investment laws and treaties concerning dispute resolution.[16] However, each instance must be considered on its own merits to determine what was actually intended. Some features in laws and treaties are as follows.

1. They may constitute a mixture of *ad hoc* or institutional forms, proceeding from the informal to the formal options and from the non-binding to the binding dispute resolution mechanisms. None initially refers to *arbitration* and, least of all, to ICSID arbitration (or conciliation) or any other form of arbitration as a first option. Express preference is normally given in the first instance to the informal methods for the amicable settlement of disputes.
2. In most cases, the investment covered may be defined in the particular regime and must have been approved by the host state.
3. Depending on the circumstances, several dispute resolution options may be stipulated in treaties and laws which pay considerable respect to the agreement of the parties in the choice of options. ICSID arbitration or conciliation may be one such option.[17]
4. Other mechanisms normally referred to as a preliminary step to or an alternative to ICSID arbitration, depending on the circumstances, are *ad hoc* arbitration under the UNCITRAL Arbitration Rules,[18] arbitration under the Rules of the International Chambers of Commerce or other

[14] A careful investigation of the continuing applicability and subsequent amendments of any law or treaty cited should not be dispensed with when necessary. What is important now is the discernment of a trend.

[15] Only a very few African states are *not* parties to the ICSID Convention: see chapter 9 above.

[16] Parra, 'Provisions on Investment Disputes', 287.

[17] The Secretary-General of ICSID may be named as a designating or an appointing authority for *ad hoc* arbitration under the UNCITRAL Arbitration Rules. E.g. under the 1993 Agreement Establishing the African Export-Import Bank, Article XVI(4); and the NAFTA, 32 ILM 605, Articles 1124 and 1126. The appointing power of the Secretary-General has been used in some cases: *Report of the Secretary-General to the 32nd Annual Meeting of the Administrative Council*, Washington DC, 6–8 October 1998, p. 2.

[18] E.g. the 1996 Treaty between South Africa and Denmark; the 1995 Treaty between South Africa and the Republic of Korea; the 1995 Treaty between South Africa and France; and the 1995 Treaty between South Africa and Canada: *The 1998 SALC Report*, para. 4.45, n. 391. All the above-mentioned South African BITs (except the one with Canada) entered into force between April and June 1997: UNCTAD, *BITs: 1959–1999*, p. 101. The BIT with Canada had not entered into force by 26 February 2001.

arbitral institutions,[19] and under the ICSID Additional Facility Rules.[20] The Additional Facility Arbitration Rules may be preferred until one or both states concerned become party to the ICSID Convention.[21]

5. Some treaties or laws may contain a general reference to any other national or international machinery for dispute resolution acceptable or agreed to by the parties or to any dispute resolution options 'within the framework of' a treaty between the host state and the home state of the foreign investor.[22]
6. In most cases, it may be a reference to the ICSID Convention only preceded by other informal means.[23]
7. Some references may or may not contain an explicit or a permissive advanced (unilateral) consent of the state concerned to refer investment disputes to *the* or *a* chosen option or may indicate that the

[19] E.g. the 1995 Treaty between South Africa and Switzerland (in force since 29 November 1997); A. R. Parra, 'Multilateral Approaches to the Settlement of Investment Disputes', *News from ICSID* 12, 1995, No. 2, p. 6; A. R. Parra, 'ICSID and Bilateral Investment Treaties', *News from ICSID* 17, 2000, No. 1, pp. 11, 12.

[20] There are Rules for Conciliation, Arbitration and Fact-Finding in the ICSID Additional Facility Rules. E.g. Article VII(3) of the 1984 Treaty between the US and the DRC and Article VII(2) of the 1983 BIT between the US and Senegal (in force) provide as preliminary steps for resolving investment disputes (i.e. as part of consultation and negotiation), use of the Fact-Finding Facility under the Additional Facility Rules. Subsequent to that is conciliation or binding arbitration under the ICSID Convention. See also the BIT between the US and Senegal, Article VII(3) and the BIT between the US and the DRC, Article VII(2). For a consideration of the Additional Facility Rules and their relationship with the Convention, see the *Fedax* case, 37 ILM 1384, paras 28 and 42; Broches, 'The "Additional Facility" of ICSID', 1979, 4 YBCA 373; P. Toriello, 'The Additional Facility of ICSID', Italian YBIL 4, 1978–9, 59.

[21] E.g. the 1995 Treaty between South Africa and Germany, Article 11(2) (in force since 10 April 1998) (providing for the settlement of 'divergencies' concerning investments between a contracting party and a national or company of the other contracting party, if it cannot be settled amicably within six months, at the request of the national or company of the other party, by arbitration under the Additional Facilities Rules until South Africa becomes an ICSID Contracting State and, after then, by arbitration under the Convention, unless the parties agree otherwise); the 1995 Treaty between South Africa and Canada, Article XIII(4) (not yet in force as of 26 February 2001) (provides for arbitration under the ICSID Convention if both states join ICSID; but, before then, arbitration under Additional Facilities Rules provided that either the disputing contracting party or the contracting party of the investor, but not both, is a party to the ICSID Convention; or an international arbitrator or *ad hoc* arbitral tribunal under the UNCITRAL Arbitration Rules). See also the 1996 BIT between Canada and Egypt, Article XIII(4) (in force). Neither Canada nor South Africa is yet an ICSID Contracting State as of 21 September 2000.

[22] *Pyramids* case, 3 ICSID Reports 152–6.

[23] Such a reference may be nothing more than a reminder to the investor that the host state has ratified the Convention and would be willing to use it or any other international procedure agreed upon, if need be; e.g. s. 17 (formerly s. 18) of the Investment Promotion Act 1991 of Malawi, ILW 5, June 1993, Issue 1.

specification of an option for resolving disputes shall constitute the consent of the government or its agencies and the investor to submit to that option.[24]

8. Some investment laws or treaties may refer to the use of national courts in the resolution of investment disputes with foreign investors. But, in most cases, opportunities for ADR exist.[25]
9. There is one Investment Code which provides that disputes arising from its application and interpretation are to be settled 'by order of the Minister of Economic Co-ordination, Planning and International Cooperation, the Minister of Finance and the Minister-Governor of *Banco Nacional da Guine-Bissau*'.[26] However, these provisions may not inspire confidence as there may be a perception of a lack of independence and impartiality in a tribunal constituted by top officials of a government that will certainly be a party (or through its agency or instrumentality) to an investment dispute.[27]
10. Some investment laws or treaties may specify, for example, ICSID as a particular regime, yet the state concerned may not have signed or ratified the Convention.[28]

[24] See chapter 11 below.

[25] E.g. the Gambia Mineral Act 1953, cap. 121, ILW 3, August 1984, pp. 25, 61, ss. 83 and 84; the Angolan Foreign Investment Law 1988, Articles 40 and 42; and the Regulations of Law No. 13/88 of 1988, Article 22, ILW 1, December 1989, Issue 3; ICSID Rev-FILJ 8, 1993, 495. Angola is yet to sign or ratify the ICSID Convention, as of 21 September 2000.

[26] Decree Law No. 2/85 of 13 June 1985 which defines the Regime Applicable to Foreign Investments in Guinea-Bissau, ILW 3, July 1987, Issue 2, 5, Article 30. Also, Article 45 of the Angolan Law of 1988 provides that any question as to the interpretation and application of the 1988 Law shall be resolved by the Council of Ministers.

[27] The provisions are, to some extent, reminiscent of the Libyan Nationalisation Laws: see note 84, p. 430 below. There seems to be a mitigating provision in Angola in that Article 22(2) of the Regulation Implementing the 1988 Law provides that indemnity for expropriation shall be fixed by an arbitration committee consisting of three members, one being a representative of the Angolan Government, another a representative of the foreign investor and the third chosen by the other two or, in the absence of an agreement over the choice, by an Angolan magistrate of recognised standing and competence.

[28] E.g. Investment Law 1992, Article 7 (Equatorial Guinea) provides for ICSID arbitration although Equatorial Guinea is not yet a party to the Convention as of 21 September 2000. The BITs to which South Africa is a party refer to the ICSID Convention, where applicable, although South Africa, at the conclusion of those treaties, was not a party to the ICSID Convention: Cotran and Amissah, *Arbitration in Africa*, p. 199. Probably, these might well be indications of future intentions: see the *Holiday Inns* case and the *Cable Television* case. E.g. Ghana's 1961 Arbitration Act implemented the NYC before its ratification by Ghana in 1968: see p. 189d.

Selective examples of laws or treaties

Namibia

Namibia is one of the very few African states yet to become a party to the ICSID Convention.[29] Section 13 of the Foreign Investment Act 1990[30] contains provision for the settlement of investment disputes by international arbitration. The facility is available only to foreign nationals 'holders of Certificate of Status Investment' granted by the Minister, for investments that 'will promote the interests of Namibia' (section 7(1)). An election of international arbitration by a foreign national must be made before the certificate is granted. As the Act provides, if a person to whom a certificate *is to be issued* under section 7 so elects,[31] the certificate shall provide that any dispute between the holder and the government with respect to compensation for expropriation or the validity or continued validity of the certificate shall be referred for settlement by international arbitration (section 13(1)). Where a certificate provides for international arbitration, it must be arbitration in accordance with the UNCITRAL Arbitration Rules in force at the time when the certificate was issued, unless the foreign national to whom the certificate is issued and the Minister reached a contrary agreement that another method should be used and the certificate so provides (section 13(2)).[32]

There is a caveat to the above provisions. If the certificate does not provide for international arbitration, in the event of a dispute, the holder may resort to any remedy available in any competent court in Namibia (section 13(4)(a)). Even in a case where a certificate does provide for international arbitration, nothing precludes the holder and the Minister from agreeing that any particular disputes shall not, as provided in the certificate, be referred to international arbitration but be determined by any competent court in Namibia (section 13(4)(b)).[33]

[29] Namibia signed the Convention on 26 October 1998. [30] ICSID Rev-FILJ 7, 1992, 212.

[31] Emphasis added.

[32] A certificate, which provides for international arbitration, shall constitute the consent of the holder and of the government to submit to the stipulated arbitration. Any award rendered in such arbitration shall be binding on the holder and on the government (s. 13(3)).

[33] The Minister may with the consent or on the application of a holder of a certificate, amend same or transfer it to any other foreign national (s. 14). Such a transfer will carry with it all the rights and obligations appertaining to the original certificate subject to any agreed amendment.

Tunisia

The 1993 Tunisian Investment Code[34] provides means for resolving disputes pertaining to specified investments. According to Article 67 of the Code, the courts of law of Tunisia are competent to investigate any dispute between foreign investors and the Tunisian state unless otherwise agreed by an arbitration clause or a clause permitting one of the parties to appeal to arbitration according to the *ad hoc* arbitration or conciliation procedures envisaged by one of the following agreements:

(a) bilateral agreements for the protection of investments signed between the Tunisian state and the state of which the investor is a national;[35]
(b) the International Convention for the Settlement of Disputes Concerning Investments Between States and the Nationals of Other States, ratified by Law No. 66–33 of 3 May 1966;
(c) the Convention Concerning the Creation of the Arab Organisation for the Guarantee of Investments approved by Decree No. 27–4 of 17 October 1972 and ratified by Law No. 72–71 of 11 November 1972; and
(d) any other international convention concluded by the government of Tunisia and legally approved.[36]

It is certain that the above provision, subject to the qualifications made for the jurisdiction of Tunisian courts, is all-embracing. The provision would require a detailed study of BITs to which Tunisia is a party, the ICSID Convention, the Arab Investment Convention or any other applicable convention to which Tunisia is a party, provided that a clause in an investment contract includes arbitration or conciliation procedure of the chosen regime. The reference in Article 67 of the Code to *ad hoc* arbitration or conciliation procedures may be confusing with respect to some of those regimes. But it could be taken as meaning that the envisaged procedure would be selected on a case-by-case basis.

Egypt

The 1974 Egyptian Investment Law was the basis for jurisdiction in the *Pyramids* case,[37] an ICSID arbitration involving Egypt and a foreign investor.[38] Article 8 of the 1974 Law *inter alia* provided:

[34] Arab LQ 11, 1996, Pt 2, 165.
[35] As of 1 January 2000, Tunisia has concluded forty-four BITs with a diversity of states, developed and developing, of which a large number (twenty-five) were in force: UNCTAD, *BITs 1959–1999*, pp. 111–12. [36] Arab LQ 11, 183.
[37] Decisions on Jurisdiction, 27 November 1985 and 14 April 1988, 3 ICSID Reports 101, 112 and 131. [38] The 1974 Law has since been repealed: see p. 318.

Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.[39]

A detailed examination of the *Pyramid*s case will be appropriate to demonstrate how the consent contained in an investment law might be used to find jurisdiction in ICSID proceedings. The *Pyramids* arbitration also has a policy implication for African states enacting investment codes and, to some extent, for states and their policy-makers negotiating investment treaties purporting to contain the unilateral (and, in most cases, the mandatory) advanced consent of a state to *a* or *the* stipulated dispute resolution option. The *Pyramids* case is of practical relevance to investors too. It is imperative for negotiators, lawmakers and investors to understand the practical implications of consent expressed in investment treaties and laws.[40]

The *Pyramids* case was initially based on arbitration instituted under the ICC Rules.[41] It involved a contract for the development of tourism in Egypt. First, a Heads of Agreement was concluded in September 1974 between SPP, Egypt (represented by the Minister of Tourism) and the Egyptian General Organization for Tourism and Hotels (EGOTH), which is a public sector enterprise under the Minister of Tourism. This Heads of Agreement, by its own terms, was entered into in accordance with certain Egyptian Laws, including the 1974 Investment Law. A second Agreement was concluded in December 1974 between SPP and EGOTH. However, under the signatures of their representatives, the words 'approved, agreed and ratified by the Minister' appeared as did the signature and the seal of the Minister. This latter Agreement, unlike the Heads of Agreement of September 1974, contained an ICC arbitration clause.

[39] *Pyramids* case, para. 70.

[40] In a subsequent case involving Egypt and another investor, the latter also relied on consent in the 1974 Law. The case was settled before a decision on merit could be given: *Manufacturers Hanover Trust Co.* v. *Arab Republic of Egypt & General Authority for Investment and Free Zones*: see p. 249, note 78; Schreuer, 'Article 25', 434, para. 269. Also, in *Gaith Pharaon* v. *Tunisia*, the claimant relied on the 1969 Tunisian Investment Code as a foundation for ICSID jurisdiction: see p. 249, note 76; Paulsson, 'Arbitration Without Privity' in Walde (ed.), *The ECT*, pp. 424–5; see chapter 11 below.

[41] For the ICC *Pyramids* award of 11 March 1983, see 3 ICSID Reports 45. The chronological history of the *Pyramids* saga and some of the relevant decisions are conveniently reproduced in *ibid*. at pp. 45–335.

Due to opposition to the project within and outside Egypt, mainly based on environmental and archaeological grounds, Egypt terminated the contract on 28 May 1978. SPP then commenced ICC arbitration against Egypt and EGOTH. Egypt vigorously objected to the jurisdiction of the ICC arguing that it was never a party to the December 1974 Agreement which contained the ICC arbitration clause. In 1983, an ICC tribunal held that Egypt was a party and liable for the breach.[42]

Egypt successfully contested the validity of the award in France,[43] successfully defended an enforcement proceeding based on the award in England,[44] but lost in the enforcement proceedings at first instance in The Netherlands.[45]

Before the setting aside and enforcement proceedings but after the ICC award had been rendered, SPP affirmed in a letter to the Minister of Tourism dated 15 August 1983 its reliance on the ICC award and then indicated that it would avail itself of the opportunity of ICSID jurisdiction open to them as a result of Article 8 of Law No. 43 of 1974 providing for the possibility of ICSID arbitration.[46] In 1984, SPP requested ICSID arbitration based on that provision as indicating the consent of Egypt to ICSID. Egypt challenged ICSID's jurisdiction over the case. After the decision of the French Supreme Court finally confirming the annulment of the ICC award on the ground that Egypt was not a party to the ICC arbitration clause, the ICSID arbitration was resumed on the question of jurisdiction.[47]

In the ICSID proceeding, the parties disagreed on the question of whether they had consented in writing to submit the dispute to the Centre in accordance with Article 25(1) of the Convention. Egypt argued that the claimants themselves had not consented to the Centre's jurisdiction, that Law No. 43 of 1974 was inapplicable to the case and that, even if

[42] *Ibid*.

[43] *Arab Republic of Egypt* v. *SPP Ltd and SPP (ME) Ltd, Cour d'appel*, Paris, *ibid*. at p. 79; *SPP Ltd and SPP (ME) Ltd* v. *Arab Republic of Egypt, Cour de cassation*, Paris, *ibid*. at p. 96.

[44] *SPP (ME) Ltd* v. *Arab Republic of Egypt and Others*, High Court and Court of Appeal (1985) 10 YBCA 504.

[45] *SPP (ME) Ltd* v. *Arab Republic of Egypt*, District Court, Amsterdam, 3 ICSID Reports 92. The latter judgment granting leave to enforce the award was rendered on the same day as the judgment of the *Cour d'appel* setting aside the award in France. The subsequent decision of the *Cour de cassation* upholding the *Cour d'appel* decision pre-empted further appeal by Egypt to the Court of Appeal of the Netherlands, where the case was earlier agreed to be suspended pending the decision of the French Supreme Court.

[46] See p. 315 above.

[47] Decisions on Jurisdiction, 27 November 1985, 3 ICSID Reports 129–30 and 14 April 1988, *ibid*. at pp. 133–4.

it were applicable, Article 8 thereof would not suffice to establish Egypt's consent to the Centre's jurisdiction, and that, in any event, the claimants' pursuit of the ICC remedy had in effect rendered their alleged consent to ICSID jurisdiction illusory under Article 26 of the Convention.[48]

Egypt maintained that while Law No. 43 of 1974 does not by itself establish ICSID jurisdiction without a separate agreement, the three dispute resolution options mentioned in the first paragraph of the Law's Article 8 were mutually exclusive.[49] The claimants argued that Egypt gave advanced consent to the Centre's jurisdiction when it enacted Law No. 43 in 1974 and that their own consent was expressed in the letter to the Minister of Tourism dated 15 August 1983 and, again, by filing their request for ICSID arbitration.[50]

The tribunal held that the claimants' pursuit of ICC remedies was not inconsistent with Law No. 43 of 1974.[51] It then sought to determine whether Law No. 43 constituted a self-executing offer by Egypt to accept the Centre's jurisdiction with respect to the dispute.[52] In a decision on jurisdiction of 14 April 1988 (delivered after the judgment of the French Supreme Court confirming the decision of the Court of Appeal that Egypt was not a party to the ICC arbitration clause), the tribunal stated the question in issue as '[w]hether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty'.[53] The tribunal held that Article 8 contained a consent by Egypt to submit disputes to the various methods prescribed therein where such methods are applicable. As to the priority of the methods, the tribunal discerned a hierarchical order in Article 8:

> Those methods begin with the most specific – an agreement between the parties as to how the dispute shall be settled – and proceed to more general bilateral treaties between the investor's State and Egypt, and finally to the most general method of dispute settlement – the multilateral Washington Convention. A specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor's State and Egypt, while such a bilateral treaty

[48] Providing: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.' The tribunal decided that the above provision did not bar the instant case: *ibid*. at pp. 121–3. [49] *Ibid*. at pp. 123–7. [50] *Ibid*. at pp. 127–8. [51] *Ibid*. at pp. 121–3.

[52] *Ibid*. at p. 128. But, since this would raise another question altogether, i.e. whether the parties have agreed on some other form of dispute resolution, the tribunal decided to stay its proceedings until a decision was given by the French Supreme Court before which Egypt was contesting the jurisdiction of the ICC over the dispute (*ibid*. at pp. 128–30). [53] *Ibid*. at p. 142.

would in turn prevail with respect to a multilateral treaty such as the Washington Convention. Art. 8 thus reflects the maxim *generalia specialibus non derogant*.[54]

Egypt further contended that a separate agreement was needed under Article 8, or alternatively that such a requirement was implicit in the phrases 'within the framework of the Convention' and 'where it [i.e. the Convention] applies'. Egypt submitted that the 'framework' of the Convention included the requirement of a separate written consent to the Centre's jurisdiction and that the phrase 'where it applies' reserved the conditions of applicability of the Convention including the requirement of a special agreement to submit to the Centre's jurisdiction.[55]

The tribunal refused to accept that interpretation so as not to destroy the logic of Article 8 and render much of it superfluous.[56] It concluded that Article 8 established a mandatory and hierarchical sequence of dispute settlement procedures and constituted an express 'consent in writing' to the Centre's jurisdiction within the meaning of Article 25(1) of the ICSID Convention in those cases (as in the instant case) where there was no other agreed method of dispute settlement and no applicable BIT.[57]

An outcome of the ICSID proceeding in the *Pyramids* saga was the enactment of the 1989 Investment Code repealing the 1974 Law.[58] Article 55 of the 1989 Law now clearly provides:

> Without prejudice to the right to resort to Egyptian Courts, investment disputes related to the implementation of the provisions of this Law may be settled in the manner to be agreed upon with the investor. The parties concerned may also agree to settle such disputes within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country; or within the framework of the Convention for Settlement of Investment Disputes between States and Nationals of Other States to which the Arab Republic of Egypt has adhered by Law No. 90 for 1971, subject to the terms and conditions, and in the instances where such agreements do apply. It may further be agreed to settle the dispute referred to above through arbitration before the Regional Center for International Commercial Arbitration in Cairo.

Nigeria and Ghana

The 1995 Investment Promotion Commission Act of Nigeria,[59] repealed, with appropriate savings, earlier cognate Acts.[60] Certain provisions of the

[54] *Ibid*. at p. 150. [55] *Ibid*. at p. 152. [56] *Ibid*. at p. 153.

[57] *Ibid*. at p. 161. Arbitrator El-Mahdi appended a strongly worded dissenting opinion to the effect *inter alia* that Article 8 could not be taken as constituting a clear, unequivocal written consent of Egypt to submit the dispute to ICSID arbitration (*ibid*. at pp. 163–88).

[58] 1989 Investment Law, ICSID Rev-FILJ 4, 1989, 376 [59] Act No. 16 of 1995, s. 30.

[60] The repealed Acts were the Industrial Development Co-ordination Committee Act 1988 and the Enterprises Promotion Act 1989. The procedure for dispute resolution between

1995 Investment Promotion Commission Act of Nigeria and the 1994 Investment Promotion Centre Act of Ghana[61] are remarkably similar, revealing their possible common philosophy.[62]

The 1995 Nigeria Act provides that, where a dispute arises between an investor and any government of the Federation in respect of an 'enterprise', all efforts shall be made through mutual discussion to reach amicable settlement (section 26(1)).[63] According to section 26(2) of the Act, any dispute between an investor and any government of the Federation in respect of an enterprise to which the 1995 Act applies which is not amicably settled, may be submitted, at the option of the aggrieved party, to arbitration as follows:

(a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act No. 11 of 1988;[64] or

foreign or domestic investors and the government in Nigeria was not expressly provided for in the repealed Acs and in earlier ones they repealed. However, there had been arbitration enactments in Nigeria since 1914. In 1988, Nigeria implemented the Model Law (Arbitration and Conciliation Act 1988). Nigeria is a party to some BITs and to the major multilateral treaties concerning arbitration and foreign investment. What is significant about the 1995 Investment Act is that it gives disputing parties wider options. Also, a distinction is made therein between a foreign investor or a Nigerian investor in order to determine the appropriate dispute resolution regime. In terms of delocalising investment disputes, that distinction is remarkable.

[61] The 1994 Ghanaian Act (s. 36) repealed with appropriate savings *inter alia* the Investment Code No. 116 of 1985.

[62] Compare ss. 1, 4, 25, 26 and 32 of the 1995 Act with, respectively, ss. 1, 3, 28, 29 and 40 of the 1994 Act and their definitions of capital, enterprise, foreign capital, foreign loan, portfolio investment, etc. The laws diverge in their definitions of 'investment' without necessarily leading to divergent results.

[63] This provision is similar to s. 29(1) of the 1994 Act of Ghana and s. 32(1) of the 1995 Ghana Free Zone Act, taking into consideration that, constitutionally, whereas Ghana is a unitary state, Nigeria is a federation of thirty-six states and the Federal Capital Territory, Abuja. However, the many incidences of military intervention in governance rendered the concept of federalism in Nigeria redundant under their regimes: B. O. Nwabueze, *Military Rule and Constitutionalism* (Ibadan: Spectrum, 1992), pp. 107–34; A. A. Asouzu, *The Impact of the Military Takeover of December 1983 on the 1979 Constitution of Nigeria* (LLB Thesis, Nigeria, 1988). Nigeria returned to a democratically elected government under a Federal Constitution on 29 May 1999.

[64] Arbitration and Conciliation Act 1988. The latter also deals with conciliation. However, the 1995 Investment Act opted only for arbitration within the Arbitration and Conciliation Act 1988. The 1994 Act of Ghana (s. 29(2)(b)), instead of using the national arbitration enactment, opted for the UNCITRAL Arbitration Rules 1976 in the relevant paragraph. That provision, unlike the provision in the Nigerian Investment Act, which relates to Nigerian investors, is not expressly restricted to Ghanaian investors. But that implication may still result from s. 29(2)(b) of the Ghanaian Act which applies to 'a foreign investor'. See also the Ghana Free Zone Act, s. 32(2)(a).

(b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal government and the country of which the investor is a national are parties;[65] or

(c) in accordance with any other national or international machinery for the settlement of investment disputes agreed upon by the parties.[66]

Where, in respect of any dispute, there is disagreement between the investor and the Federal Government of Nigeria (FGN) as to the method of dispute settlement to be adopted, the International Centre for the Settlement of Investment Disputes Rules shall apply (section 26(3)).[67]

Comments on the 1995 Investment Act

Some general comments on the apparently simple provisions of the 1995 Nigerian Investment Act would be appropriate here. First, the reference in section 26(3) to 'the International Centre for the Settlement of Investment Disputes Rules' is to the ICSID Convention and the applicable Rules where, in respect of any investment, there is a disagreement (an investment dispute) between the investor and the FGN as to the dispute settlement machinery to which section 26(2)(b) of the Act applies. The investor must be, as will soon be pointed out, a national of another ICSID Contracting State since Nigeria is a Contracting State.[68] The ICSID Institution, Arbitration and Conciliation Rules were made pursuant to, and may only operate within the framework of, the ICSID Convention.[69]

[65] This provision is identical to s. 29(2)(b) of the 1994 Investment Act and s. 32(2)(b) of the 1995 Free Zone Act (Ghana). The *Pyramids* case, 3 ICSID Reports 131, contains a helpful analysis of a similar provision. Nigeria and Ghana are each a party to many BITs and multilateral treaties concerning arbitration and foreign investment.

[66] This provision is identical to s. 29(2)(c) of the 1994 Investment Act and s. 32(2)(c) of the 1995 Free Zone Act (Ghana). Under these provisions, arbitration, *ad hoc* or institutional, under the Arbitration and Conciliation Act 1988 (for Nigeria) or the Arbitration Act 1961 (for Ghana) as well as under the Rules of arbitration institutions (e.g. the LRCICA, the Ghana Arbitration Centre, the ICC, the PCA, the LCIA and the AAA) and under the ICSID Convention, may be relevant, provided there is agreement by parties to use a particular regime.

[67] In the relevant circumstance, the 1994 Act of Ghana provides that 'the choice of the investor shall prevail' (s. 29(3)). See also the 1995 Ghana Free Zone Act, s. 32(3).

[68] Under s. 26(2)(b) of the 1995 Nigeria Investment Act or its equivalent in the 1994 Investment Act of Ghana, there may be arbitral regimes that might have the implications of ICSID arbitration without privity: see chapter 11 below. As Nigeria and Ghana are parties to BITs and multilateral investment treaties, including the ICSID Convention, each situation arising under s. 26(2)(b) or s. 26(3) of the 1995 Act and s. 29(2)(b) or s. 29(3) of the 1994 Act, should be treated on its own merit taking into consideration all relevant factors considered in this discussion.

[69] ICSID Convention, Articles 44, 33 and 6(1)(b) and (c). The January 1968 and the September 1984 versions of the relevant Rules are reprinted in 1 ICSID Reports 51–194.

Secondly, section 26(3) of the 1995 Act refers only to 'the investor' without saying whether it must be a Nigerian or a non-Nigerian investor. In the context, that provision is applicable only to a foreign investor, a national of another Contracting State to the ICSID Convention or in situations where the second clause of Article 25(2)(b) of the Convention is relevant.[70] Subject to the 1995 Act, a non-Nigerian may invest and participate in the operation of any enterprise in Nigeria (section 17). But the Act shall not apply to petroleum enterprises (as defined) and to the 'negative list', which means those sectors of investment prohibited to both foreign and Nigerian investors, i.e. production of arms, ammunition, etc; production of and dealing in narcotic drugs and psychotropic substances; production of military and paramilitary uniform and accoutrements, including those of the police, customs, immigration and prison services; and such items as the Federal Executive Council may, from time to time, determine (sections 18 and 32). Subject to the Act, a person who intends to establish an enterprise to which the Act applies shall do so (by incorporation or registration) in accordance with the Companies and Allied Matters Act 1990 (section 19). And an enterprise in which foreign participation is permitted under section 17 of the Act shall, after incorporation or registration, be registered with the Investment Promotion Commission (section 20(1)). A foreign enterprise may buy the shares of any Nigerian enterprise in any convertible foreign currency (section 21(1)).[71]

The ICSID Convention does not apply in, or to, non-Contracting States. Nor can investors from non-Contracting States make use of the Convention's facilities. Also, a natural person, a national of Nigeria and the FGN (representing the Contracting State) cannot be parties in ICSID proceedings.[72] As section 26(3) of the Act applies only where, in respect of any dispute, there is 'disagreement' between 'the investor and the Federal Government [of Nigeria]', this constitutes a qualification to section 26(2) of that Act which broadly applies to 'any dispute between an investor [Nigerian or non-Nigerian] and any Government of the Federation in respect of an enterprise to which the Act applies'. Thus, unlike subsection (2), which may generally cover a dispute between an investor and the FGN or between an investor and each state government in Nigeria, subsection (3) relates only to any dispute between *the* (foreign) investor and the FGN,

[70] For Article 25(2)(b), see pp. 271–3 above.

[71] Under the 1995 Investment Act, it is therefore possible for there to be enterprises in some sectors with 100 per cent foreign ownership as well as under foreign control as understood in Article 25(2)(b) of the ICSID Convention.

[72] ICSID Convention, Article 25(2)(a).

if there is disagreement as to the relevant dispute settlement method where section 26(2)(b) is applicable: for subsection (2)(a) would be inapplicable (restricted as it applies only 'in the case of a Nigerian investor') and subsection (2)(c) is excluded (as it presupposes that there is an agreement as to the national or international investment dispute settlement machinery to be used by the parties, the converse of which would trigger off section 26(3)).

A third comment on the 1995 Act is that an implication of section 26(2)(b), where an ICSID proceeding is opted for or is applicable to any dispute between a foreign investor ('a national of another Contracting State') and a state government of Nigeria, is that Nigeria (the Contracting State) could be deemed, subject to the following discussion, to have 'designated' that state as a subdivision or agency, as appropriate, under Article 25(1) of the Convention, to be competent to participate in ICSID proceedings:[73]

> In the case of a constituent subdivision or agency, it must be emphasized that the mere consent agreement between the entity claiming to be subdivision or agency and the investor should not be regarded as necessarily raising a presumption that such entity satisfies the requirements of the Convention. The question is whether the entity satisfies the jurisdictional requirements of the Convention so as to be able to have *locus standi* in a position which would otherwise be taken by a State. It would make nonsense of the terms of the Convention if that question could be decided even to a limited extent by the entity itself. Moreover, the Convention, as will be seen, requires designation of the entity by the State [to ICSID].[74]

Thus, relevant questions which have to be answered are: what is the position when (if) a territorial unit of a Contracting State is permitted by that State's legislation to conclude consent agreements to submit investment disputes to arbitration under the ICSID Convention (as appears to be the implication of the 1995 Investment Act)? Can this amount to a 'designation' of that unit as a subdivision or agency of the Contracting State under Article 25(1) of the Convention? Must the Contracting State concerned expressly notify ICSID of the designation, if any, or should a notification of designation *erga omnes* be presumed?[75]

[73] See pp. 268–71 above.

[74] Amerasinghe, 'The Jurisdiction of the ICSID', 186; *Cable Television* case, para. 2.22.

[75] Public or judicial notice of published enactments of governments is taken for granted. However, see Amerasinghe, 'The Jurisdiction of the ICSID', 187–8, for a helpful elaboration on the issue of the nature of notification of designations to ICSID under Article 25(1). The designations made by Contracting States are listed in *Contracting States and Measures Taken by Them for the Purpose of the Convention*, ICSID/8–c, see p. 270, note 22, as regularly updated (www.worldbank.org/icsid). As of March 2001, states in the Federation of Nigeria are not listed in the above ICSID document. Nigeria only designated its oil corporation, NNPC: see p. 271.

For the purposes of the ICSID Convention, the relevant provision of the 1995 Investment Act, if taken as a designation of states in Nigeria as the latter's constituent subdivisions or agencies (features of which they seem to have), might still fail to satisfy the Convention's requirement as it was not a designation to the Centre by Nigeria as required under Article 25(1) of the Convention.[76]

In the *Cable Television* case,[77] it was argued by the respondent against jurisdiction, that the proper party to the arbitration agreement was the Nevis Island Administration (NIA), which, as a constituent subdivision or agency of the Federation of St Kitts and Nevis, had not been designated as such to ICSID by the Federation.[78] Under the Constitution of the Federation, the island of Nevis and the NIA are established as distinct from the Federation with autonomous and distinct juridical personality and the right to contract, to sue and to be sued.[79] As the tribunal observed: 'It would therefore appear that NIA, as a juridical body, has the power to enter into the Agreement on its own and independently of the Federation. The Agreement was signed by the then Premier of Nevis who is, under the Constitution, a member of the NIA *ex officio*'.[80]

The parties named in the Agreement were the Government of Nevis on the one hand (which also had exclusive responsibility under the Constitution for the subject matter of the Agreement), and Cable Television on the other hand. But the claimant, Cable, consistently claimed that the Government of Nevis entered into the Agreement as representing the Federation. In other words, that the Federation should take the place of Nevis as a party to the Agreement.[81] Also, Cable argued that the exclusive responsibility of Nevis over the subject matter of the Agreement does not pre-empt the inherent powers in the Federation as regards such matters.[82]

Based on the Constitution and a law regulating public utilities in Nevis, the tribunal ruled that 'it is evident that the Nevis authorities consider themselves to have power constitutionally to deal with public utilities and the provision of cable television services for Nevis and it is not for this tribunal to enquire into whether they are right or wrong'.[83] It held that the concession covered by the Agreement could be granted by NIA, and that the Federation lacked standing in the matter.[84] The tribunal further held

[76] Cf. Amerasinghe, 'The Jurisdiction of the ICSID', 188.
[77] ICSID Rev-FILJ 13, 328; see pp. 277–80. [78] *Ibid*. at pp. 331–4.
[79] *Ibid*., paras 2.04–2.07. [80] *Ibid*.
[81] *Ibid*., para. 2.09. The Agreement by its provisions recognises the distinct personalities of the Federation and Nevis (*ibid*. at pp. 338–9). [82] *Ibid*. at p. 340. [83] *Ibid*. at p. 341.
[84] *Ibid*.

that, even if the obligations undertaken by Nevis under the Agreement could not be directly performed by it, the Federation cannot automatically be substituted for the Government of Nevis as the party to the Agreement nor does it mean that the Government of Nevis is a party to the Agreement purely as agent of the Federation.[85] The tribunal observed that the Contracting State for the purpose of the proceeding is the Federation since the dispute is in respect of an agreement which was performed 'within that State' and the investors are nationals of another Contracting State.[86]

In declining jurisdiction, the tribunal, in a statement with great implications for the nature and operation of Article 25(1) and (3) of the Convention, observed:

> The consent to ICSID arbitration contained in clause 16 of the Agreement can only take effect in the present case on the matter of jurisdiction of ICSID if the Contracting State, i.e., the Federation, is a party to the dispute, or, if it is not a party and the relevant party to the dispute is a constituent subdivision or agency of the Contracting State, then the relevant party must have been designated as such to ICSID by the Federation. In addition, the consent by a constituent subdivision or agency of a contracting state requires the approval of that state unless that state notifies ICSID that no such approval is required. No documentation has been furnished to the Tribunal evidencing that NIA or the Government of Nevis has been designated to ICSID by the Federation, and, in the circumstances, the request by Cable for arbitration in accordance with Clause 16 of the Agreement can only pass this stage under Article 25(1) of the Convention if the Contracting State, i.e., the Federation, can by interpretation or otherwise be substituted in the Agreement in place of the Government of Nevis as the contracting party with Cable, or by some other means qualify as a party to the ICSID arbitration.[87]

Under the 1995 Nigerian Investment Act, even if states in the Federation of Nigeria were properly designated to ICSID, which, from the submission above, may not be the case, the approval of Nigeria under Article 25(3) of the Convention ('an additional requirement for *locus standi*'), would still be necessary before any consent given by an individual state to the jurisdiction of ICSID could be valid. There is no indication in the 1995 Act or elsewhere that the FGN has informed ICSID that such approval (which may, when necessary, be given absolutely, *ad hoc*, limited as to the period of time or subject to any further conditions) is neither necessary nor required.[88]

[85] *Ibid*., para. 2.17. [86] *Ibid*., para. 2.19. [87] *Ibid*., paras 2.22 and 2.33.

[88] An ICSID tribunal or commission has the competence to rule on its jurisdiction and competence: Amerasinghe, 'The Jurisdiction of the ICSID', 186–91.

In an ICSID arbitration – for that is only what the 1995 Act allows in the context of this discussion – involving a constituent state of Nigeria, it would be prudent to ensure not only that there is a separate and approved consent by that state, but also that there is a distinct designation by Nigeria of the relevant state to ICSID.[89] Having said that, it should be mentioned that the Contracting State's rights and responsibilities as such may *prima facie* not necessarily be exposed thereby for designating and approving its constituent unit's participation in ICSID proceedings (or if notification is made to ICSID that the approval is not required).[90] The consent by a constituent subdivision or agency is not that of the designating Contracting State. If the former participates in an ICSID arbitration, it does not do so as the Contracting State. As a party to the arbitration, the subdivision or agency must respect the final and binding nature of any award and abide by and comply with the award except if stayed under the Convention (Article 53(1)). Should that subdivision or agency refuse to comply with an award, the responsibility to ensure compliance will rest on the Contracting State that designated and approved its participation in the arbitration. Subject to the Convention, a Contracting State is under an obligation to abide by and comply with (Article 53), and to recognise and enforce (Article 54), an ICSID award.[91]

The constitutional situation in Nigeria should be noted and be taken into account. Military regimes have been in power for the greater part of Nigeria's post-independence history up until 29 May 1999. Under those military regimes, there was a suspension, modification or abolition of certain provisions of the Constitution, and wide and absolute powers were conferred on the Head of the Federal Military Government (the President), which subsumed the powers of the state governments. The latter thus merely acted as agents of the Federal Military Government of Nigeria. There was no true federation or a well-balanced federal–state relationship

[89] Cf. *Cable Television* case, para. 2.27. Under the Institution Rules (Rule 2(1)), a request shall *inter alia* (b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that state pursuant to Article 25(1) of the Convention, (c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that state unless it had notified the Centre that no such approval is required. The latter information shall be supported by documentation: Institution Rules, Rule 2(2).

[90] Cf. Amerasinghe, 'The Jurisdiction of the ICSID', 191–2; Schreuer, 'Article 25', 404, paras 200–3; ICSID Rev-FILJ 12, 145, paras 620–1.

[91] Schreuer, 'Article 53', ICSID Rev-FILJ 14, 54 paras 13–14; see pp. 378–81.

in the allocation of powers.[92] It has rightly been argued that, during those military regimes, 'all contracts entered into or obligations assumed by heads of constituent sub-divisions [states or local governments] in Nigeria qualify as Federal Government contracts and in the event of an arbitration, only the joinder of the Federal Government of Nigeria would resolve issues in controversy'.[93]

The Nigerian LNG Acts

Another Nigerian Act of particular interest and importance is the LNG (Fiscal Incentives Guarantees and Assurances) Act 1990 (the 'Principal Act').[94] This Act is specific and reinforces special provisions for the Liquefied Natural Gas (LNG) Project in Nigeria.[95] Certain fiscal incentives, guarantees and assurances are given to shareholders of the NLNG Company, mainly major oil companies operating in Nigeria with their seats of management or places of incorporation in Contracting States parties to the ICSID Convention. According to the Preamble of the Second Schedule to the Principal Act (as amended):

The Federal Government of the Federal Republic of Nigeria (hereinafter referred to as 'the Government') in recognition of the magnitude of, and in consideration of the investments which shall have to be made in order to prosecute the Venture described in the shareholders' contract dated 19th May, 1989 between the Nigerian National Petroleum Corporation, Shell Gas BV, CLEAG Limited and Agip

[92] G. O. Obla, 'Nigeria: Implications of Constitution (Suspension and Modification) Decree No. 17 of 1993', *Arbitration and ADR* 2, September 1997, 21; B. O. Nwabueze, 'The Nature of a Revolutionary Military Government in Nigeria', *Lawyers' Bi-Annual* 2, October 1995, 154. For a critical perspective, see Sagay, 'Liberty and the Rule of Law', 168.

[93] Obla, 'Constitution Decree', 24. Nigeria successfully conducted a democratic election that produced a government under a supreme Constitution from 29 May 1999. The allocation of powers between the component units of the Federation and the Federal Government will, since then, depend on the 1999 Constitution.

[94] No. 39 of 1990 as amended by Nigeria LNG (Fiscal Incentives Guarantees and Assurances) (Amendment) Act No. 113 of 1993, s. 1. An amendment was made to s. 6(8) of the principal Act by substituting for 'all the ordinary shareholders of the Company' the words 'one or more of the shareholders of the Company': Act No. 113 of 1993, s. 2(a). The dispute resolution provision of the principal Act was unaffected, in a substantive sense, by the 1993 amendment. The latter has, amongst its purposes, excluding the Nigeria Liquefied Natural Gas (NLNG) Company from The Pre-Shipment Inspection of Import Act, and thereby reinforcing the general purpose of the principal Act.

[95] For a description, scope and importance of the Project, see S. Adepetun and K. Segun, 'The LNG Project', OGLTR 11, 1995, 436; C. E. Emole, 'Nigeria's LNG Venture: Fiscal Incentives, Investment Protection Schemes and ICSID Arbitration', RADIC 8, 1996, 169; Y. Omorogbe, 'Law and Investor Protection in the Nigerian Gas Industry', JENRL 14, 1996, 177.

International BV, as amended from time to time (such shareholders' contract, as so amended in this Act referred to as 'the Contract') hereby grants to the Company, its successor and to each of the shareholders from time to time (in their capacity as such), the Guarantees, Assurances and Undertakings following hereunder. These Guarantees, Assurances and Undertakings shall have effect from the date hereof and so long as the Company, or any successor thereto, is in existence and carrying on the business of liquefying and selling liquefied natural gas and natural gas liquids within and/ or outside the Federal Republic of Nigeria.[96]

The general provisions of the Principal Act have been the subject of conflicting interpretations.[97] What is immediately relevant are the far-reaching guarantees and assurances listed under the above Preamble to the Principal Act as they pertain to dispute resolution between the FGN and the shareholders of the NLNG Company. Clause 22 of the Second Schedule to the Principal Act provides:

In the event of any dispute in respect of a substantial matter arising from the provisions of this Act,[98] the aggrieved shareholder(s) in the Company *shall* issue a letter of notification to Government formally notifying [the] Government and the other shareholders of the dispute. The Government's representatives and one or more of the Company's shareholders, as the case may be, *shall* make serious efforts to resolve amicably such dispute. In the event of failure to reach amicable settlement within 90 days of the date of the letter of notification mentioned above such

[96] Act No. 39 of 1990, s. 9 and Second Schedule, as amended by s. 4 of Act No. 113 of 1993. The shareholding structure in the NLNG is 49 per cent (by the state-run NNPC); 25.6 per cent (by Anglo-Dutch Shell Oil); 15 per cent (by French Elf) and 10.4 per cent (by Italy's Agip): Adepetun and Segun, 'LNG Project', 437; Emole, 'LNG Venture', 169–170; Omorogbe, 'Law and Investor Protection', 185. The 1995 Nigeria Investment Promotion Act does not apply to 'petroleum enterprises' defined as meaning 'an enterprise which is involved in the production of crude oil or natural gas or a combination of both, but excludes *bona fide* joint venture arrangements between Government and foreign petroleum enterprises for the off-take of crude oil or natural gas or a combination of both' (ss. 18 and 32). The NLNG Company is a joint venture. The NNPC, which is implicated in the LNG project, has been designated as competent to participate in ICSID proceedings, although the approval of Nigeria under Article 25(3) of the Convention remains relevant in that respect: see pp. 270–1.

[97] In favour of the Act's purport are V. C. Igbokwe, 'Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes', JIA 14, March 1997, 99; Emole, 'Nigeria's LNG Venture' 169; and N. Ikeyi, 'The Export Processing Zones and Foreign Investment Promotion in Nigeria', JAL 42, 1998, 223, 229 n. 42. Against the Act's purport is Omorogbe, 'Law and Investor Protection', 177.

[98] Determining and disagreeing on what is or is not 'substantial matter' arising from the Act may itself constitute a negotiable or arbitrable dispute. Matters of substance are not defined, nor are the criteria for identifying them mentioned in the Act.

dispute *may* be submitted to arbitration before the International Centre for the Settlement of Investment Disputes.[99]

The first (obligatory) step of clause 22 – notification of a dispute – presupposes that only one or more shareholder(s) of the NLNG Company could be the 'aggrieved party' in order to trigger off the second (yet obligatory) step of that clause – that of making serious efforts to resolve the dispute amicably, upon its notification.[100] What is not immediately clear is whether, if and when there is a failure to reach amicable settlement of the dispute 'within 90 days of the date of the letter of notification', clause 22 could also operate as a self-executing mandatory consent of either Nigeria or the shareholder(s) to resort to ICSID under the third and final step.[101]

The phrase used in the clause is that, if there is a failure to reach an amicable settlement, 'such dispute *may* be submitted to arbitration before the ICSID'.[102] It is not clear which party may initiate the arbitral proceeding upon the failure of negotiations although the context would strongly suggest that it will be the aggrieved party (one or more of the shareholders of the NLNG Company) who may, in that case, be dissatisfied with the attempted settlement. The dissatisfied party might, out of prudence, decide to take the matter no further.

Nevertheless, in light of the ICSID Convention, clause 22 is, to some extent, exceedingly ambiguous. Under the Convention, the joint consent of the disputing parties must be present before a request for arbitration (the only process allowed by the Act) is registered.[103] But, as the *Pyramids*, *AAPL*, *AMT* and *Fedax* cases demonstrate, a request for arbitration may itself constitute the consent of the investor-claimant where there is an instrument already expressing the state's consent to submit to ICSID.[104] The reference in the Act that 'such dispute *may* be submitted to arbitration before

[99] Emphasis added. The Government also affirms in cl. 21 of the Second Schedule to the Act its recognition of the shareholders' right to prompt, adequate and effective compensation in the event of expropriation of tangible or proprietary rights or interference with contract rights.

[100] For the content and implications of the duty to negotiate see *Lac Lanoux* Arbitration (*France* v. *Spain*), 24 ILR 101, 127–8; *Aminoil* award, 66 ILR 518, paras 23–4 and 70; the *North Sea Continental Shelf* cases, ICJ Reports 1969, paras 85–7; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226, para. 99.

[101] Cf. the *Pyramids* case, 3 ICSID Reports 131; *ABB Power Plants Ltd* v. *Electricity Commission of NSW* (1995) 35 NSWLR 596. The obligation to negotiate or where no settlement was reached as a result of the negotiation does not preclude the jurisdiction of an adjudicatory body, if there is an appropriate basis for jurisdiction: *Aegean Sea Continental Shelf* case (*Greece* v. *Turkey*), ICJ Reports 1978, p. 3, para. 29; Merrills, *International Dispute Settlement,* pp. 17–21.

[102] Emphasis added.

[103] ICSID Convention, Article 36(2).

[104] See pp. 308–9 above and see pp. 346–50 below.

the ICSID' does not seem to imply any compulsion on the part of either disputing party, in particular the potential respondent.

In the *Aegean Sea Continental Shelf* case,[105] Greece brought a unilateral application before the ICJ against Turkey, using as a basis for the Court's jurisdiction a joint communiqué between the two states issued after a meeting between their Prime Ministers at Brussels in 1975. According to the communiqué: 'They [the Prime Ministers of Greece and Turkey] decided that those problems [regarding relations between their countries] should be resolved peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at the Hague'.[106]

It was argued by Greece that the above passage directly conferred jurisdiction on the Court, committed the parties to concluding any implementing agreement needed and, in the event of refusal by one of them to conclude such an agreement, permitted the other to refer the dispute unilaterally to the Court. On its part, Turkey maintained that the communiqué did not 'amount to an agreement under international law', adding that, if there were an agreement, it would need to be ratified at least on the part of Turkey, and that, in any event, it did not comprise any undertaking to resort to the Court without a special agreement (*compromis*) or amount to an agreement by one state to submit to the jurisdiction of the Court upon the unilateral application of the other.[107] The Court had to consider the meaning of the communiqué within the context of the meeting in which it was issued.[108]

Having regard to the terms of the communiqué and the circumstances in which it was issued, the Court found nothing to justify the conclusion that Turkey was prepared to envision any other reference to the Court than a joint submission of the dispute. The Court further found confirmation that Greece and Turkey did not undertake any unconditional commitment to refer their dispute to the Court. In conclusion, the Court pointed out that the communiqué did not constitute an immediate and unqualified commitment on the part of Greece and Turkey to accept the submission of the dispute to the Court unilaterally by application and thus did not furnish a valid basis for its jurisdiction.[109]

[105] ICJ Reports 1978, p. 3. [106] *Ibid*., para. 97. [107] *Ibid*., paras 95–9.
[108] *Ibid*., paras 100–8.
[109] *Ibid*., paras 106–8. Johnson observes that the case 'demonstrates once again how hazardous it is to institute proceedings in the ICJ by way of unilateral application': D. H. N. Johnson, 'The ICJ Declines Jurisdiction Again', *Australian YBIL* 7, 1976–7, 309, 330.

Within the context of the 1990 Nigerian LNG Act, it would seem that, in the event of a failure to reach amicable settlement within 90 days of notifying the government and other shareholders of the dispute, the government may not be able to refuse or be permitted unreasonably to refuse to consent to ICSID arbitration, if an aggrieved party (one or more of the shareholders) makes a request accordingly.[110] In other words, a strong argument could be made that the operation of the third step of clause 22 of the Second Schedule to the Act and recourse to ICSID arbitration by the aggrieved party is at the option of that party and predicated on the presence or absence of an amicable settlement of the dispute within 90 days since its notification. Practically, it could be maintained that clause 22, taken in that context, will be capable of immediately vesting jurisdiction in ICSID at the discretion of the aggrieved shareholder(s) once there is a failure of settlement *and* a request for arbitration. Failure to reach an amicable settlement within the stipulated time will, in that situation, be taken as a fulfilment of the condition precedent for ICSID jurisdiction to vest.

In *Qatar* v. *Bahrain*,[111] on a unilateral institution of proceedings before the ICJ, a binding international agreement was found in documents partly providing that, failing the use of good offices, either 'the two parties might submit the dispute to the Court' or 'the parties may submit the matter to the ICJ'. The Court held that there was no need for a joint separate agreement between the parties as a condition precedent to submitting the dispute.[112] According to the Court, the words 'the parties may submit the matter to the ICJ' suggested in their natural meaning that the parties have a right or option to seise the Court, and that the right was to come into being as soon as the period established for mediation had ended. The provision only made sense, therefore, on the basis that each party had a right of unilateral seisin.[113]

[110] Under cl. 6 of the Second Schedule to the Act, the FGN undertakes to take such executive, legislative and other actions as may be necessary so as effectively to grant, fulfil and perfect the guarantees, assurances and undertakings contained therein. In order to afford the degree of security required to enable the company's investments to be made, the FGN further agrees to ensure that the guarantees, assurances and undertakings shall not be suspended, modified or revoked during the life of the venture except with the mutual agreement of the Government and the shareholders of the company. See also cll. 1 and 2 of the Second Schedule to the 1990 Act; Ikeyi, 'EPZ', 229 n. 42

[111] 102 ILR 1.

[112] For a critical comment, see E. Lauterpacht, '"Partial" Judgments and the Inherent Jurisdiction of the ICJ' in Lowe and Fitzmaurice (eds), *Fifty Years of the ICJ* (Cambridge: CUP, 1996), p. 465. For a helpful decision, see *ABB Power Plants* v. *Electricity Commission of NSW* (1995) 35 NSWLR 596.

[113] In his Dissenting Opinion, Judge Oda was of the view that neither the 1987 Exchange of Letters nor the 1990 Minutes could be deemed to constitute a basis for the jurisdiction

Bowett observed that 'the Court's finding of jurisdiction, in these circumstances, may be surprising'.[114] And, whilst citing the Separate Opinion of Vice-President Schwebel that the Court's judgment was 'novel and disquieting', Elihu Lauterpacht noted that, in other respects, 'the judgment, though still undeniably novel, may well be seen as a further step along the path of the gradual erosion of specific consent as the basis of the Court's jurisdiction'.[115] Extreme caution should therefore be exercised:

> The considerable freedom allowed by the [ICSID] Convention for instruments of consent does not mean that legal caution may be completely abandoned. For example, the consent to the jurisdiction of the Centre must be expressed unambiguously and in a manner which does not require further action by the 'consenting' party. Thus legislative or charter provisions, which may ostensibly appear to be a general consent to submission of certain types of disputes to the Centre, may merely constitute an authorization for some appropriate organ of the state or the investor to submit to the jurisdiction of the Centre. Hence, even when such a provision contains an obligation to agree to submit, the view may be taken that this obligation is merely an internal matter, without external effect until the competent organ has taken the necessary steps. Furthermore, when consent is expressed in diverse instruments, it is only where the language coincides that the consent is both effective and irrevocable. Thus, an investment promotion law might provide for the submission of any dispute relating to or arising out of the application of that legislation, while the investor may have agreed to submit any dispute arising out of the particular instrument under which his investment was made. When an actual dispute arises, it may be found to come within the terms of one instrument, but not the latter.[116]

Tanzania

The 1990 Tanzanian Investment Code lists many dispute resolution mechanisms with express preference for *arbitration* within them.[117] The stipulated mechanisms apply only in relation to an 'approved enterprise' of a foreign investor but only after mutual discussions for the purposes of amicable settlement have been held to no avail. The Code also indicates that

of the Court under Article 36(1) of its Statute in the event of a unilateral application as they only envisaged the conclusion of a special agreement between the parties.

[114] D. W. Bowett, 'The Conduct of International Litigation' in Gardner and Wickremasinghe (eds), *The ICJ* (British Institute of International and Comparative Law, 1997), pp. 1, 3 n. 5.

[115] Lauterpacht, 'Partial Judgments', 467.

[116] Amerasinghe, 'The Jurisdiction of the ICSID', 224–5.

[117] ICSID Rev-FILJ 6, 1991, 293, 304. This law applies only to mainland Tanzania: C. M. Peter, 'Promotion and Protection of Foreign Investments in Tanzania', *ibid*. at p. 42. Zanzibar has a separate investment regime with a dispute resolution provision that has been described as 'the weakest part of the otherwise thorough-going legislation': C. M. Peter, 'The 1986 Investment Protection Act of Zanzibar', ICSID Rev–FILJ 3, 1988, 338, 350.

any of those mechanisms may be specified when an enterprise is approved. Such a specification *shall* constitute consent of the parties (the government or any of its agencies *and* the investor) to use the stipulated option.[118] According to section 29(2), the mechanisms stipulated are *arbitration*:

(a) in accordance with the rules and procedure for arbitration under the ICSID Convention; or
(b) within the framework of any bilateral or multilateral agreement on investment protection to which the government and the country of which the investor is a national are parties; or
(c) in accordance with any other international machinery for the settlement of investment disputes agreed by the parties.[119]

The formula in the Tanzanian Code is broad in scope. It constitutes alternatives provided that, in any particular regime, only arbitration is used. Paragraph (a) of section 29(2) is clear: it refers only to arbitration under the ICSID Convention; conciliation under that Convention is unavailable as an option. The option in paragraph (b) may entail a look at the various investment treaties to which Tanzania is a party, arguably excluding the ICSID Convention.[120] The last alternative in paragraph (c) may mean any international (not national) arbitral system, both *ad hoc* and institutional, provided parties agreed to use that mechanism, e.g. the AALCC Regional Centres, the ICC, the LCIA, the AAA and the PCA, or *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

Uganda

The Ugandan Investment Code 1991[121] closely follows the 1990 Tanzanian Investment Code.[122] According to the 1991 Ugandan Code, a dispute

[118] Section 29(3) of the Tanzanian Code (emphasis added).

[119] The provisions of the Code could be compared with those of the Ghanaian Investment Act 1994 (s. 29(2)(a)–(c)) or the 1995 Nigerian Investment Act (s. 26(2)(a)–(c)), which listed many options with express preference for arbitration within those options. However, s. 29(3) of the 1994 Act of Ghana provides that where, in respect of any dispute, there is disagreement between the investor and the government as to the method of dispute settlement to be adopted, the choice of the investor shall prevail. The 1995 Act of Nigeria by contrast provides that, where there is disagreement, 'the ICSID Rules shall apply' (s. 26(3)).

[120] Tanzania is a party to the 1993 COMESA Treaty, 33 ILM 1067. Tanzania has concluded BITs, respectively, with The Netherlands, 14 April 1970, in force since 28 July 1972; Switzerland, 3 May 1965, in force since 16 September 1965; Germany, 30 January 1965, in force since 12 July 1968; UK, 7 January 1994, in force since 19 August 1996. Tanzanian BITs with Egypt (1997), Republic of Korea (1998) and Denmark (1999) are not yet in force as of 1 January 2000: UNCTAD, *BITs 1959–1999*, p. 109.

[121] ILW 10, June 1992, Issue 2, s. 30.

[122] Compare the Tanzanian Code, s. 29(2) and the Ugandan Code, s. 30(2).

between a foreign investor and the Ugandan Investment Authority or the government in respect of a licensed business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with the following methods as may be mutually agreed by the parties:

(a) in accordance with the rules of procedure for arbitration under the ICSID Convention, or
(b) within the framework of any bilateral or multilateral agreement on investment protection to which the government and the country of which the investor is a national are parties;[123] or
(c) in accordance with any other international machinery for the settlement of investment disputes (section 30(2)).[124]

The comments on section 29(2) of the Tanzanian Code are applicable *mutatis mutandis* to section 30(2) of the 1991 Ugandan Code.[125] Under each Code, there is no definitive consent or offer by Tanzania or Uganda, which will instigate a particular mechanism for arbitration upon acceptance by an investor. A specific agreement including a choice of a dispute resolution mechanism or options between the host state or its agent and the investor (as approved) will still be needed for that implication to result.[126]

Nevertheless, the Ugandan Code has a distinctive feature entailing the involvement of the national court where the parties to a dispute do not agree on the mode of or forum for arbitration. In that event, the party aggrieved by a compulsory acquisition or possession or the amount of compensation payable, or in respect of any other matter relating to the business enterprise, may apply to the High Court for the determination of any of the following:

(a) his interest or right;
(b) the legality of the taking of the possession or the acquisition of the property, interest or right; or
(c) the amount of compensation to which he is entitled and the prompt payment of that compensation; and

[123] Uganda is a party to COMESA and has concluded BITs with Egypt (1995, not yet in force as of January 2000); Germany (1966, in force since 19 August 1968); The Netherlands (1970, not yet in force as of January 2000); Switzerland (1971, in force since 8 May 1972); United Kingdom (1998, in force 24 April 1998) and Italy 1997 (not yet in force).

[124] The licence in respect of an enterprise may specify the particular mode of arbitration to be resorted to in the case of a dispute relating to that enterprise and that specification shall constitute the consent of the government, the Authority or their respective agents and the investor to submit to that mode and forum of arbitration: 1991 Investment Code, s. 30 (3).

[125] Also, s. 29(3) of the Tanzanian Code is similar, if not identical, to s. 30(3) of the Ugandan Code.

[126] Schreuer, 'Article 25', 436, paras 273 and 281.

(d) any other matter in dispute relating to the business enterprise (section 30(4)).

Under the above provision, when the government and an investor are unable to agree on the mode of or forum for arbitration (an unlikely event in view of the options listed in the Code) and a dispute arises, if a claim is brought in a forum other than the High Court, i.e. if the procedure of the Code has not been exhausted, the government might, in an appropriate situation, raise a jurisdictional objection based on the Code (that the stipulated remedy has not been exhausted). That provision reserving residual powers in the High Court where there is no agreement on the mode of or forum for arbitration may constitute a limitation on the available option for arbitration. It is an act of a government wishing to preserve its judicial sovereignty. But that does not exhaust the matter. If there is a denial of justice in the High Court, an investor could pursue available international remedies, including, it is suggested, international arbitration.[127] Where arbitration is a stipulated or agreed option, any aggrieved investor may, immediately a dispute arises, institute an arbitral proceeding in any appropriate forum. It is then for the arbitral tribunal to decide on its own jurisdiction and competence, a power widely recognised in treaties, arbitration laws and institutional rules.[128]

Cameroon

The Cameroonian Code appears to be similar to the 1990 Tanzanian Investment Code in that priority is given to 'mutual discussion to reach an amicable settlement'.[129] Thereafter, some dispute resolution options are listed from which the parties may choose. As with the Ugandan Code, the Cameroonian and Tanzanian Codes relate to disputes between the government and foreign investors with respect to approved enterprise (Tanzania), approved undertakings (Cameroon) or licensed business enterprises (Uganda).

Under the Investment Code of Cameroon 1990,[130] 'approved undertakings' may, for the settlement of their individual or collective disputes, apply to the competent court in Cameroon (section 44). And any enterprise that is subjected to 'administrative excesses' may, after exhausting

[127] For ways in which a national court could engage the international responsibility of its state, see *Robert Azinian* v. *United Mexican States* (Case No. ARB (AF)/97/2), ICSID Rev-FILJ 14, 1999, 538. Cf. C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge: Grotius Publication, 1990); S. M. Schwebel and J. G. Wetter, 'Arbitration and the Exhaustion of Local Remedies', AJIL 60, 1966, 484. [128] See pp. 433–5 below.

[129] Tanzanian Code, s. 29(1). [130] ILW 2, June 1992, Issue 2.

amicable conciliation procedures, appeal to the Administrative Chamber of the Supreme Court (section 46). However, in disputes involving the state and an approved undertaking, there is an element of delocalisation after avenues for amicably settling the dispute have been exhausted.

By section 45(1) of the Code, in any such dispute (which cannot be amicably settled) between an approved undertaking and Cameroon in connection with the validity and interpretation of the approval document, with the non-respect of guarantees provided for in Part II of the Code and with the undertaking implicit in the objective of the investment programme which were a determining factor for placement under one of the schedules in Part III of the Code, the approved undertaking shall be entitled to request that such dispute be conclusively settled in accordance with an *arbitration* or *conciliation* procedure derived from *one* of the following mechanisms:

(a) a procedure expressly agreed upon by the parties;
(b) agreements relating to the protection of investments between Cameroon and the state of which the natural person or corporate body concerned in the enterprise approved as investor is a national;[131]
(c) proceedings before the ICC;
(d) proceedings under the ICSID Convention;
(e) the additional mechanism approved by the board of directors of the International Centre for the Settlement of Investment Disputes, if the person or body concerned does not fulfil the conditions of nationality laid down in Article 25 of the ICSID Convention.[132]

Foreign natural persons or corporate bodies holding shares in an approved or unapproved company governed by Cameroonian law may have recourse to any of the options above (section 45(2)). However, the choice of any such option must be expressly stated either at the time of the legal formation of the enterprise or in the application for the approval of the enterprise concerned. In the latter case, the arbitration or conciliation procedure chosen shall be mentioned in the approval document (section 45(3)).[133]

[131] Cameroon has concluded at least seven BITs which are in force. The 1997 BIT with China is not yet in force as of 1 January 2000: UNCTAD, *BITs 1959–1999*, pp. 36–7.

[132] This last option must be a reference to arbitration or conciliation under the ICSID Additional Facility Rules.

[133] Disputes in relation to the revocation of the licence of an enterprise in the Industrial Free Zones may be appealed to a court of first instance in Cameroon or to arbitration under the rules of the (as yet non-existent) 'International Arbitration Association': 1990 Ordinance Establishing the Free Zone Regime, ILW 2, 15, June 1992, Issue 2, Article 27(f).

Botswana

In relation to Botswana, a potential unilateral consent in writing to submit investment disputes to ICSID is implicit in specific legislation which *inter alia* implemented the Convention. Section 10 of the 1970 Settlement of Investment Disputes Act authorises an (unnamed) minister to enter into agreements with nationals of any other Contracting State providing for the submission to the jurisdiction of ICSID for the settlement by conciliation or arbitration of any existing or future legal dispute between Botswana and any such national arising directly out of an investment. However, any investment agreement entered by a minister on behalf of Botswana and a foreign investor in pursuance of the above provision must comply with section 11 of the Act (and, of course, the Convention) to be valid and binding. Section 11 provides:

> Any national of any other State which is a party to the Convention may submit to the Centre, for settlement by conciliation or arbitration in pursuance of the Convention, any legal dispute with Botswana, provided that such foreign national has within one year after the commencement of this Act [the commencement date was 14 December 1970] or within one year after the making of the investment, whichever is the later, filed with the Minister a consent in writing to the like submission to the Centre by Botswana of any such legal dispute.[134]

The above provision is sensible. It would make for certainty as to the potential disputing parties (especially the identity of the investor) and the Centre's *prima facie* jurisdiction over such a dispute. This is unlike the situation when a state only gives its unilateral (and mandatory) advanced consent in writing constituting an open offer to any investor from a particular state without also eliciting a corresponding duty from the particular investor to, at least, give its consent in writing except, if need be, by the investor's subsequent letter to the state when a dispute is imminent or request for ICSID proceedings, as in the *Pyramids* saga.[135]

Ethiopia and COMESA

The 1992 Investment Proclamation of Ethiopia[136] provides that investment disputes involving a foreign investor *or* the state may be settled in accordance with the choice made by the agreement of the parties

[134] Botswana concluded an Investment Guarantee Agreement of 12 January 1968 with the US which entered into force on the same day: ILW 1, 98, July 1994, Issue 4. Botswana also concluded BITs with Malaysia (1997) and Switzerland (1998). None of the latter is in force as of 1 January 2000: UNCTAD, *BITs 1959–1999*, p. 34.

[135] The problems of ICSID arbitration without privity will be considered in the next chapter.

[136] ILW 2, June 1993, Issue 3, Article 39(1).

concerned. However, without prejudice to this, disputes arising out of foreign investment may be settled in accordance with international dispute settlement procedures which are accepted by Ethiopia or to which Ethiopia is a party (Article 39(2)).

It is significant that, as of 12 March 2001, Ethiopia is a party to neither the 1958 New York Convention or the 1965 ICSID Convention.[137] Ethiopia was sovereign when both conventions were negotiated being probably the oldest independent African state. Ethiopia was also among the first to sign the ICSID Convention,[138] which it is yet, however, to ratify. Nevertheless, Ethiopia's ratification of both treaties is a possibility as its priorities change with the increasing awareness of those treaties' importance and the integrative tendencies in Eastern and Southern Africa involving Ethiopia.

The COMESA Treaty is of particular relevance here. The Treaty entered into force in 1994,[139] thereby replacing the 1981 Treaty Establishing the PTA for Eastern and Southern African States.[140] The COMESA Treaty establishes a comprehensive regime for the protection and promotion of foreign investment in member states.[141] Under Article 162 of the Treaty, the States concerned agreed to take the necessary measures to accede to multilateral agreements on investment dispute resolution and guarantee arrangements as a means of creating a conducive climate for investment promotion. To that end, they undertook to accede to the ICSID Convention 1965, the MIGA Convention 1985 and any other multilateral agreement

[137] Ethiopia concluded BITs with Italy (1994), Germany (1964), Kuwait (1996), China (1998), Switzerland (1988), Malaysia (1998) and Yemen (1999). Only the BITs with Italy and Switzerland are in force as of 1 January 2000. [138] That was done on 21 September 1965.

[139] 33 ILM 1067; www.comesa.int.

[140] 21 ILM 479. The PTA was a first step towards establishing a Common Market and an Economic Community for Eastern and Southern African States (*ibid*., Article 1). Its membership was opened to the following twenty-one Eastern and Southern African states: Angola, Botswana, Burundi, Comoros, DRC (Zaire), Djibouti, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Rwanda, Seychelles, Somalia, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe (*ibid*., Article 2).

[141] Angola, Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Botswana and South Africa may become members of the Common Market upon fulfilling conditions determined by the latter's Authority. Tanzania's intention of pulling out of COMESA was mooted in 2000. Mozambique and Lesotho had withdrawn their membership of COMESA joining the South African Development Community (SADC) established in 1992, 32 ILM 116; www.sadc-online.com. It is notable that SADC members are also Angola, Botswana, DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe, all of which, one way or another, are implicated in the COMESA.

designed to promote or protect investment. In addition to the foreign investment and arbitration treaties expressly mentioned, 'any other multilateral agreement' referred to above must include the New York Convention.[142] Some states in the region, including Ethiopia, ought, as members of COMESA, to reconsider their positions with respect to the ICSID Convention or the New York Convention or both, which they are yet to join.[143]

Concluding remarks

Most investment and arbitration laws enacted of late in Africa have confirmed the trend and the emerging consensus apparent in investment dispute resolution identified earlier in this chapter.[144] But the genuine conviction of some states enacting those laws in the trend, and their balanced appreciation of the implications of those laws as enacted, merit careful examination. Most of the laws may have been enacted in the normal course of carefully conceived national legislative exercises or by the practical need to attract foreign investment or, indeed, to comply with expectations and policies of international creditors. In this connection, the influence of the World Bank, the IMF, their associates and creditor states in securing the substantive content and direction of these legal developments and trends should not be underestimated.[145]

As mentioned above, the personnel and institutional links between ICSID and the World Bank were seen as beneficial for the reputation and prestige of ICSID despite reservations expressed both within and outside the Bank concerning them.[146] Apart from those links, do the contemporary activities

[142] See chapter 6 above. The aspect of the Cotonou Agreement 2000 (replacing the Lomé Convention) between the EU and seventy-seven ACP states, dealing with investment and private sector development supports (Articles 74–78), would lead to a comparable implication, amongst the ACP states that are yet to conclude any BITs or multilateral agreements on foreign investment and arbitration.

[143] A majority of African states that are not yet parties to the ICSID Convention and the NYC are within COMESA membership. For ICSID Convention, the non-Contracting COMESA states as of 21 September 2000 were: Angola, Djibouti, Eritrea, Ethiopia, Namibia and South Africa. However, Ethiopia (1965) and Namibia (1998) have signed the Convention and the SALC had recommended that South Africa should accede to the ICSID Convention. For the NYC, the non-contracting COMESA states, as of 12 March 2001, were Angola, Burundi, Comoros, Eritrea, Ethiopia, Malawi, Namibia, Rwanda, Somalia, Sudan and Zambia.

[144] See pp. 309–10 above.

[145] J. Faundez, 'Legal Technical Assistance' in Faundez (ed.), *Good Government and Law* (1997), p. 1; W. Reno, 'African Weak States and Commercial Alliances', *African Affairs* 96, 1997, 165.

[146] See pp. 219–28 above.

of both institutions involving their member states, which might reinforce those reservations, raise the question whether they would not permit institutional interests and duties to collide. The question may arise in connection with the assistance which the Bank and its affiliates render to their borrowing and indebted member states and in the legal technical assistance to their developing member states. These activities, apart from lacking a clear focus, may overlap with, and have a bearing on, ICSID proceedings.[147]

In revealing contributions by informed insiders, the nature and extent of legal technical assistance, which the Bank gives to its developing member states, especially those seeking investment or borrowing from the Bank, were ably and clearly described.[148] According to Shihata:

> In some instances, a change of legislation is made a condition for the presentation of a loan to the Bank's Board, or for the effectiveness of the loan agreement. While this approach ensures that the legislative changes take place without delay, it does not always ensure that sufficient deliberations have taken place to achieve appropriate legislative changes. Laws drafted too quickly may not be understood or supported by those who must implement them or be governed by them. Moreover, because they may be poorly drafted, they would likely become subject to frequent amendments with adverse effects on their policy objectives.[149]

Proceeding from the development-oriented mandate of the World Bank and of law as an instrument of economic development, the Bank's role in providing legal technical assistance was justified and defended, especially that assistance said to be most pertinent to the Bank and to its members that need and 'request' it:

[147] Cf. the UN Secretary-General: 'Technical assistance as it was originally conceived was designed to close the technical capacity gap between industrial and developing countries by accelerating the transfer of knowledge, skills and expertise, thereby building national capacity. In some cases this has been done but, in many others, technical assistance has had precisely the opposite effect, reining in rather than unleashing national capacity': *The Causes of Conflict in Africa*, para. 91.

[148] Shihata, 'Legal Framework for Development: Role of the World Bank in LTA', IBL 23, 1995, 360; Shihata, *The World Bank in a Changing World*, Vol. II, pp. 127–82 and 513–27; A. N. Vorkink, *The World Bank and Legal Technical Assistance* (Washington DC: World Bank, 1997).

[149] Shihata, 'Legal Framework', 368. Further, Shihata pointed out: 'The multitude of funding sources has not always been a blessing. It has resulted in some instances in bizarre situations in which laws drafted with the assistance of different donors for the same country contain inconsistent legal concepts and terms. A country may receive different pieces of legislation, such as a civil code, or a commercial code, based on very different foreign legal systems depending on the source of funding of the outside experts who prepared them. While, separately, each piece of legislation may be valuable, together they may lack coherence and logic. They may overlap and they may fail to address key issues' (*ibid*.).

[An] area of the Bank's assistance to the judiciary is assisting [member] countries in making alternative dispute resolution mechanisms available, with a view to reducing the caseloads of courts and helping in the expeditious settlement of disputes. The establishment of alternative dispute resolution mechanisms has proved to be particularly valuable for countries trying to attract foreign investment. In this connection the World Bank has also assisted several countries in promulgating arbitration laws and in establishing or improving arbitration facilities.[150]

Most activities of the World Bank, an institution referred to 'as the preeminent source of the continent's [Africa's] economic data and studies',[151] may be controversial even if inspired by altruistic motives.

The ICSID Convention is unquestionably an important contribution to international law by the World Bank outside its day-to-day operations.[152] ICSID could be perceived as a facilitator of the Bank's policy objectives in the economic development sphere. But the overlapping nature of their operations in respect of national legislative policies may, in principle, be objectionable as it could lead to conflict of interest and duty.[153] These operations constitute an intrusion by the Bank into the political affairs of developing member states in breach of the Bank's Articles of Agreement.[154] These may be severe in the area of dispute resolution involving the ICSID Convention and in granting or in refusing to grant loans to states. This may be particularly so in the African setting, taking into account the already controversial institutional and personnel links between the Bank and ICSID, since a majority of African states are regular borrowers from, and debtors to, the Bank (and its close affiliates), and since most of those states are parties to the ICSID Convention and, in its proceedings so far, are mainly respondents.[155]

[150] Shihata, *ibid*. at p. 365. Shihata further said: 'In addition to all their other activities, the staff [of the ICSID Secretariat] have also recently come to play an active role in the World Bank's technical assistance work on arbitration and investment legislation': Shihata, 'Showcase on How to Carry Out an ICSID Arbitration' (ABA Committee on International Commercial Arbitration, Washington DC, 29 April 1993), p. 11.

[151] Schatz, 'The Bank's Misconception in Africa', 240.

[152] A. Broches, 'Development of International Law by the IBRD', PASIC 59, 1965, 33.

[153] As Faundez ('LTA', 3) observed: 'in practice, the distinction between the direction of legal reform – a political choice – and the role of external legal advisers – a technical function – is not always easy to make.' [154] See p. 399

[155] Using the denial of loan or other financial pressures by the World Bank as an arbitral sanction against an ICSID Contracting State that refuses to abide by and comply with an ICSID Award, will, in principle, be questioned: see pp. 399–401.

11 The problems of ICSID arbitration without privity

Introductory remarks

As was demonstrated in the last chapter, investment laws and treaties may refer to various procedures for dispute resolution. Investment codes may provide for the use of dispute resolution options within the framework of bilateral and multilateral treaties between a host state and the home state of a foreign investor. One dispute resolution option that is usually implicitly or explicitly referred to is use of the ICSID Convention.

Unlike the multi-purpose Friendship, Commerce and Navigation (FCN) treaties concluded mainly by the developed States *inter se*, bilateral investment treaties (BITs) are directed at the protection and encouragement of foreign investments and are mostly concluded between developed states and developing states.[1] BITs inaugurated an era when specific provisions were made in treaties for private investors, nationals of their respective parties.[2] Most BITs, apart from referring to ICSID as a or the dispute resolution option, may seek to implement, complement, supplement, clarify or extend the ICSID Convention between their parties, for the benefit of those parties and their respective nationals. This is particularly so with respect to the Convention's jurisdictional requirements. In that context, the validity of BITs may, in some cases, be questionable.

Finally, BITs (and multilateral trade and investment treaties too) may purport to express the advanced (and, at times, mandatory or permissive) consent of each state party to submit to ICSID or to other dispute resolution

[1] The above statement must further be qualified as the US concluded FCN treaties with developing states, e.g. Togo and Iran. And many developing states have concluded BITs *inter se*, e.g. Egypt and Tunisia, and Uganda and Egypt.

[2] Vandevelde, 'Arbitration Provisions in the BITs and the ECT' in Walde (ed.), *The ECT*, p. 409; Dolzer and Stevens, *BITs*, pp. 10–13; UNCTAD, *BITs in the Mid-1990s*, pp. 8–10.

mechanisms, investment disputes with nationals of the other state party. Investment laws may also express or purport to express the unilateral consent of the enacting state, but rarely that of both the state *and* the investor, to submit to a specific dispute resolution mechanism.

A possible practical implication of a unilateral and advanced mandatory consent of a state when given in an investment law or treaty is that an investor could allege a dispute with a state so expressing the consent and can institute proceedings even if the underlying investment is not supported by an investment contract and a dispute resolution clause. How this apparent impossibility could be achieved, its effectiveness and the problems it might constitute, especially for ICSID proceedings, are worthy of closer scrutiny.

This chapter takes a critical look at the concept of 'arbitration without privity' arising out of the consent that a state might express in a law or treaty referring to ICSID. This is a matter which might also arise in other contexts or under other dispute resolution regimes but is particularly important and complex in the context of ICSID proceedings due to the special jurisdictional requirements – some of them mandatory – under the Convention. Central to this discussion is an enquiry into the substantive relevance of investment treaties to private foreign investors in ICSID proceedings taking into account that only states are parties to the relevant treaties.

Can a private party derive enforceable rights under bilateral investment treaties?

A question may arise whether a third (private) party may, for the purposes of an international system, benefit from acts of sovereign states (i.e. their investment treaty provision implementing, on the part of those states, the provisions of a multilateral treaty, in this case the ICSID Convention)?[3] The question is important because the observation has been made that 'third parties' in contemplation in pertinent international law discourse are usually other states and only rarely individuals: 'The issue of third parties

[3] For a consideration of the issue in a broader context, see Chinkin, *Third Parties*, chapter 5. A related question is whether a private party could rely on such a treaty before the court of the contracting parties or that of a third state: *US* v. *Noriega and Others*, 99 ILR 174–6, 187–90; Chinkin, *ibid*. at pp. 123–9; J. H. Jackson, 'The Status of Treaties in Domestic Legal Systems: A Policy Analysis', AJIL 86, 1992, 310; C. M. Vazquez, 'Treaty-Based Rights and Remedies of Individuals', Columbia LR 92, 1992, 1082; F. L. Kirgis, 'International Agreements and US Law', *ASIL Insight*, June 1997, p. 1.

being individuals has seldom arisen simply because of the resistance to change of the old view that individuals did not have full personality in international law. International law recognized that treaties might create rights in third parties, which are States'.[4]

Conferring benefits or rights on private parties in treaties would appear possible if, as suggested by Mann, the private party agrees with any of those states to use the facilities provided and actually incorporated a corresponding clause in the investment contract with that state.[5] Such a clause would then probably establish an effective link between, on the one hand, the treaty provisions entered into by the two states (on behalf of their respective nationals) and, on the other hand, the investment contract concluded by one of those states and a private party, a national of the other state party to the treaty. However, to be clear, this does not then carry with it the implication that such an investment contract is itself *the* treaty – for a non-governmental person and a state cannot create a treaty relationship in contemporary international law.[6] It only means that, in an appropriate case, such an investor could rely on or benefit from the interpretation and application of the treaty in relation to covered investments. As Chinkin pertinently argued:

> There is a debate as to whether States accept obligations for the protection of individuals or whether individuals are the recipients of rights which they can enforce. Whatever view is preferred, where a State has entered into a treaty on behalf of an individual, or a group of individuals, it is self-evident that those individuals have an interest in its performance or non-performance.[7]

Sornarajah added his voice to the view that there must be an investment contract with an arbitration clause between the foreign private investor and its host state for the dispute resolution provision in a treaty between that state and the home state of the investor to come into operation on behalf of the private investor:

> An effective provision on arbitration should create a compulsory obligation to arbitrate disputes arising from the foreign investment contract and vest that right directly in the foreign investor. The right is created not in the contracting state but its national. For the right to be utilized, there must also be an arbitration clause in the contract which is concluded by the national. If not, the treaty protection will not be triggered. What the treaty seeks to protect is the obligation to arbitrate, undertaken in the contract between the foreign investor and the host state.

[4] M. Sornarajah, 'Power and Justice in Foreign Investment Arbitration', JIA 14, September 1997, 103, 133; and F. Mann, 'British Treaties for the Promotion and Protection of Investments', BYIL 52, 1981, 241; Chinkin, *Third Parties*, p. 121.

[5] Mann, *ibid*. at p. 248. [6] See pp. 439–40 below. [7] Chinkin, *Third Parties*, p. 14.

Where, despite the existence of such an arbitration clause, the state refuses to submit a dispute between it and the foreign investor to arbitration, there is a violation of the treaty provision owed to the home state of the foreign investor. Thus, the treaty provisions operate indirectly in that the obligation relating to the arbitration of the dispute is immediately owed to the foreign investor but its breach creates responsibility to the home state of the foreign investor and not to the foreign investor. If the arbitration could proceed unilaterally, there would be no violation of the treaty.[8]

It was suggested by the Permanent Court of International Justice (PCIJ) in the *Danzig Railway Officials* case,[9] that private parties may derive rights from a declaration made to implement an unincorporated treaty if the latter, the 1921 Polish–Danzig Agreement, was concluded for the private parties' benefits.[10] Poland had argued that, as an international agreement, the treaty created rights and obligations between the contracting parties only and that, failing its incorporation into Polish national law, it could not create direct rights or obligations for the private parties concerned.[11] On the other hand, Danzig submitted that the 1921 Agreement, although an international agreement in form, was in substance intended by the contracting parties to constitute a legal relationship (a contract of service) between the Polish Railway Administration and its employees making the claims.[12]

The Court decided that whether the Agreement created the legal relationship asserted would depend decisively on the intentions of the contracting parties. In considering the juridical effect of the Agreement in relation to the railway officials' claims, the Court said:

> It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen* [the Agreement of 1921], being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the Contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*.[13]

[8] Sornarajah, *International Law*, pp. 266–7. [9] (1928) PCIJ Series B, No. 15, at 3.

[10] See also the Memorandum of Sir Hersch Lauterpacht prepared for the UN, in Harris, *Cases and Materials on International Law* (5th edn, London: Sweet & Maxwell, 1998), pp. 140–2; I. Brownlie, *Principles of Public International Law* (5th edn, Oxford: Clarendon Press, 1995), pp. 558–9; Shaw, *International Law*, pp. 183–4; *Steiner and Gross* v. *Polish State*, (1927–8) 4 AD 291. [11] (1928) PCIJ Series B, No. 15, p. 17. [12] *Ibid*.

[13] *Ibid*. at pp. 17–18. The Court concluded that the wording and general tenor of the 1921 Agreement indicated that its provisions were directly applicable as between the private

Although the PCIJ suggested that national courts may, depending on the intentions of the contracting parties and the provisions of a treaty, apply treaty rights to private persons directly, it must also be acknowledged that the direct effect of a treaty in the legal order of a party may depend on how that state or group of states deals with the effect of a treaty in the domestic sphere. The applicable rules may differ greatly.[14] But, in the legal order of the EU, by acts of member states as interpreted and applied by the European Court of Justice, matters have gone much further due to the supranationality of the EU legal order and the position of the individual *vis-à-vis* governments and other private actors therein. The supremacy of the EU's legal order and the universal direct effect of certain norms facilitate compliance and enforcement.[15]

In international dispute resolution, there are regimes open to private parties (individuals and companies) as well as to states and their agencies or constituent subdivisions, even though the non-state parties may not have been parties in their creation. For example, the Iran–US Claims Tribunal – an important international development arising out of the good offices of, and mediation by, an African state – is a dispute resolution body open to Iran and the US *inter se* and private parties, nationals of either state,[16] pursuant to the Claims Settlement Declaration, to which both states are parties:

> [T]he [Algiers] Accords manifest a written agreement between Iran and the United States to participate in binding arbitration of claims brought not only by the other, but also by nationals of the other, even though such nationals were not parties to the Accords. In this sense, the Accords embody a written offer by each state party to the nationals of the other state party to arbitrate certain claims. This offer could be accepted in writing by individual claimants by filing Statements of Claim prior to January 19, 1982.[17]

parties and the Polish Administration, the Agreement having entered into full force and effect as prescribed. For a view in favour of the case, see Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958), pp. 173–6; and against the latter views, Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp. 337–8.

[14] Muchlinski, *Multinational Enterprises*, pp. 634–7.

[15] *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR 1; *Van Duyn* v. *Home Office* (Case 41/74) [1974] ECR 1337; *Defrenne* v. *SABENA* (Case 43/75) [1976] ECR 455; T. Hartley, *The Foundations of European Community Law* (4th edn, Oxford: OUP, 1998), pp. 185–232.

[16] A majority of the Iran–US Claims Tribunal held that the Algiers Declarations did not provide for jurisdiction by the Tribunal over claims by Iran against US citizens: *Iran* v. *US*, Case A/2, (1982–3) 1 Iran–US CTR 101.

[17] Caron, 'Iran–US Claims Tribunal' 104, 148, citing *inter alia* G. Delaume, 'ICSID Arbitration: Practical Considerations', JIA 1, 1984, 101–4, relative to the acceptance by a national of a Contracting State of a unilateral consent of a Contracting State contained

ICSID proceedings can only involve a Contracting State and a national of another Contracting State as defined. The private party is not a party to the Convention, which contains Contracting States' obligations only.[18] Equally, BITs are contracts involving two states that may provide a benefit and an option for private parties of either party's nationality. Arguments could then be advanced, as in English contract law, that a third (private) party on whose behalf the contract (BIT) was made could, in its own right, enforce a term thereof.[19]

Finally, private or public parties benefit from the New York Convention before Contracting States' courts in the recognition and enforcement of arbitral agreements and awards.[20] In that connection, it must be observed that national courts may or may not require the specific incorporation of a treaty into the legal order to be enforceable at that level on behalf of a private applicant.[21]

This chapter focuses on the direct access by a private party to an international forum based on a treaty provision.

Consent in writing to ICSID: unilateral and mutual?

All said, the essence of the ICSID Convention is to place a state and a private party on a level of procedural equality. Investment treaties add substantive elements to the procedural facilities of the Convention if any

Footnote 17 (*cont.*)
in a BIT, for the purposes of ICSID arbitration. For the 1981 Algiers Declarations, the establishment of the Iran–US Claims Tribunal, its status, Rules, activities and jurisdiction, see 20 ILM 230; G. H. Aldrich, *The Jurisprudence of the Iran–US Claims Tribunal* (Oxford: Clarendon Press, 1996); W. Mapp, *The Iran–US Claims Tribunal* (Manchester: MUP, 1993); A. Avanessian, *Iran–US Claims Tribunal in Action* (London: Graham and Trotman/Nijhoff, 1993); R. Khan, *The Iran–US Claims Tribunal* (Dordrecht: Martinus Nijhoff, 1990); J. A. Westberg, *International Transactions and Claims Involving Government Parties* (Washington DC: International Law Institute, 1991); M. Mohebi, *The International Law Character of the Iran–United States Claims Tribunal (*The Hague: Kluwer, 1998); Collier and Lowe, *Settlement of International Disputes*, pp. 73–83. [18] See pp. 401–2 below.

[19] Cf. *Beswick* v. *Beswick* [1967] 2 All ER 1197; *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Commission No. 242, 1996, Cmnd 3329); and Chinkin, *Third Parties*, p. 14. The Contracts (Rights of Third Parties) Act 1999 (UK) makes provision for the enforcement of contractual terms by third parties and allows the latter to be treated as a party to an arbitration agreement in writing as regards dispute between himself and the promisor relating to the enforcement of the substantive terms of the contract (s. 8). After 11 May 2000, the Act applies unless the parties to a contract agree to exclude its provisions. Also, in *US* v. *Noriega and Others*, 99 ILR 143, 175, it was indicated that a treaty will be construed as creating enforceable private rights only if it expressly or impliedly provides a private right of action.

[20] Cf.: 'In essence, the New York Convention places the coercive power of many of the world's courts at the disposal of private parties so that they may remove actions to, and ultimately implement the decisions of, their private legal systems': Caron, 'Iran–US Claims Tribunal', 153. [21] See pp. 205–6 above.

such treaty opted for ICSID proceedings, and (in the views of Mann and Sornarajah) if an ICSID clause expressing consent to those proceedings existed in a contract between an investor, a national of a Contracting State, and an ICSID Contracting State party to the investment treaty. For it is intended that the standards agreed in any such treaty would benefit the nationals or companies from both states on whose behalf they were partly concluded. As Broches submitted:

> The treaties establish rights and obligations of the Contracting Parties in respect of investments made by the nationals of one party in the territory of the other but, in addition, acknowledge their impact on the relationships between the former and the latter and concern themselves with disputes arising between them.[22]

For the application of the ICSID Convention to the relationship of a Contracting State and a national of another Contracting State, it may be argued, in furtherance of the views of Mann and Sornarajah, that parties to investment contracts or disputes must *simultaneously and mutually* indicate their respective consents in single documents. In other words, there should be an agreement or the 'meeting of minds' of the parties to submit investment disputes to ICSID.[23] However, the stance of Mann and Sornarajah does not appear to be in accord with the practice of investment laws, BITs and multilateral treaties referring to ICSID and expressing the unilateral consent of states.

The conclusion of an agreement to arbitrate future or existing disputes is admittedly the normal practice.[24] A clear reading of Article 25(1) of the ICSID Convention also suggests that unilateral and separate consent by any party to a dispute (either a state or a private party) could be admissible even if not valid as such to confer jurisdiction on ICSID. Undeniably, the consent in writing needed to vest the ICSID with jurisdiction under Article 25(1) is that of '[t]he parties to the dispute'.[25] However, other than its written form, the *time* when those parties would indicate consent, and the *nature* such consent might take, was left open by the Convention. Nor does the Convention expressly require that the consent in writing of the parties be expressed in a single document – which is the most usual and prudent option.[26]

[22] Broches, 'BITs and Arbitration', 72.

[23] T. W. Walde, 'International Investment under the 1994 ECT' (CPMPL Professional Paper No. PP. 17, 1995), p. 17; *Baron* v. *Sunderland Corp.* [1966] 2 QB 56, 60; *Tote Bookmakers Ltd* v. *Development & Property Holdings Co. Ltd* [1985] 1 Ch 261. For a contrary decision, see *Pittalis and Others* v. *Sherefettin* [1986] 2 WLR 1003, 1007–8.

[24] *Tradex Hellas* v. *Republic of Albania*, ICSID Rev-FILJ 14, 161, 186–7.

[25] Mann, 'British Treaties', 249; Sornarajah, 'Power and Justice', 132–4.

[26] Hence, the need for ICSID to elaborate and suggest model clauses on the written consent of the parties: *ICSID Model Clauses* (Doc. ICSID/5/Rev.2, February 1993 and updated to 1995), cll. 1 and 2.

In concluding investment treaties, two or more states may reach agreement on the substantive and procedural rules applicable in their relationships as well as what treatment their respective nationals would receive in their various territories. Such a treaty may, in consequence thereof, express the consent of each state to use ICSID or any other mechanisms for the resolution of investment disputes with nationals of the other state.[27] A state may also express its consent in relevant legislation. Such an expression of consent, on its own, is insufficient to confer jurisdiction on ICSID.[28] According to Schreuer:

> An ICSID clause in a treaty is only the first step towards consent between the parties. The offer must be accepted in writing by the investor . . . The perfected consent is an agreement between the host State and the investor. In the same vein a provision in the host State's domestic legislation referring to dispute settlement under the Convention is transformed into consent between the parties only upon its acceptance by the investor. An investment agreement between the host State and the investor containing a consent clause is neither a treaty nor simply a contract under domestic law.[29]

In the *Tradex* case,[30] the tribunal, after observing that consent by written agreement is the usual method of submission to ICSID, considered the matter as established and requiring no further reasoning.

Subsequent to the 'acceptance by the investor' – whatever this might entail – there does not need to be any further mutual agreement *per se* between a Contracting State and a national of another Contracting State for the Centre's jurisdiction to vest.[31] Once the other jurisdictional requirements of the Convention are satisfied or are not in issue or are assumed to exist, consent of a state – and only of a state – which, as such, would not lead to compulsory arbitration or conciliation under the

[27] In the *Fedax* case (Jurisdiction), 37 ILM 1384, para. 30, the tribunal had to consider the 1991 BIT between The Netherlands and Venezuela, 'which is the specific bilateral investment treaty governing the consent to arbitration by the latter Contracting Party [Venezuela]. Under Article 9(1) of this Agreement, disputes between one Contracting Party and a national of the other Contracting Party, "concerning an obligation of the former under this Agreement in relation to an investment of the latter" shall be submitted to ICSID for settlement by arbitration or conciliation. In Article 9(4), each Party "gives its unconditional consent" to such submission of disputes.' See also p. 260 above.

[28] *AMT* v. *Zaire (DRC)*; see pp. 350–2. Cf. Sornarajah', Power and Justice', 130: 'There can be no legal significance attached to these statements in the international sphere unless something more is done to convert them into a legally significant form.'

[29] Schreuer, 'Article 25', 475–6, para. 375.

[30] ICSID Rev-FILJ 14, 161, 187.

[31] Paulsson, 'Arbitration Without Privity', 429; Walde, 'Investment Arbitration Under the ECT', 436.

Convention, could be given in an investment treaty or law. Proceedings by a private party may be instituted under the Convention pursuant to an investment treaty or law expressing a mandatory consent by the state even though the private party is not privy to the treaty or the law, nor has the private party indicated a separate consent in writing in a contract with that host Contracting State submitting to ICSID.[32] In that event, what is fundamental for jurisdiction is, *simpliciter*, whether there is a subsisting *consent in writing* by the Contracting State and the national of another Contracting State, parties to a dispute, to submit to ICSID. A written agreement to submit to ICSID as well as a contract containing an ICSID clause, are expressions of consent in writing. But *consent in writing* under Article 25(1) need not necessarily flow from an investment contract or due to a written agreement between the parties to the dispute.[33] This is also vital in determining the date of a valid written consent to submit to ICSID.[34]

As some investment treaties and laws purport to constitute definitive consent of each contracting or enacting state to ICSID proceedings by their explicitness, it is unlikely that any further specific agreement between the state and a concerned investor would be necessary or attainable if the provision is appropriately invoked by the investor for the Centre's proceedings. This prospect of a Contracting State's consent *erga omnes* (i.e. to all investors, whether known or unknown, nationals of the other Contracting State party to the BIT) may, in some situations, be overwhelming and would lead to complexities. Its implications are several and may be unknowable until after a dispute has arisen.[35]

Thus, a state may offer in a national law or an investment treaty consent which, subject to the conditions to which it was given, if any, when immediately or subsequently accepted by an investor in writing, would instigate

[32] According to Broches: 'If the investor wants to institute proceedings he will see to it that his consent is duly recorded and notified in writing to the host State. The matter becomes more complicated when the latter wants to institute proceedings against the investor, relying on a clause in a treaty': Broches, 'BITs and Arbitration', 67.

[33] It is remarkable that under Articles 25(1), 26 and 27(1) of the Convention, there is only a need for 'consent'. By contrast, under Article 25(2)(b), there is a need for 'consent' and a specific need for an 'agreement'.

[34] Under the Institution Rules, the 'date of consent' means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted': Rule 2(3); Schreuer, 'Article 25', 455, paras 320–1.

[35] This instance may be compared to Botswana's Settlement of Investment Disputes Act 1970, ss. 10 and 11 (see p. 336 above), where consents of the investor and of Botswana are secured at the time of the investment or within one year of the making of the investment.

the entire mechanism of the Convention. An acceptance of the offer, which, in our case, is a form of consent in writing under Article 25(1), has been satisfied by a request for ICSID arbitration by the investor.[36]

Illustrative cases and investment treaties[37]

In *AAPL* v. *Sri Lanka*,[38] the request for arbitration was made pursuant to the ICSID Convention and Article 8(1) of the 1980 BIT between the UK and Sri Lanka.[39] Although the jurisdiction of ICSID or the competence of the tribunal was not challenged, the tribunal in the arbitration felt able to observe:

> The present case is the first instance in which the Centre has been seized by an arbitration request exclusively based on a treaty provision and not in implementation of a freely negotiated arbitration agreement directly concluded between the parties among whom the dispute has arisen.[40]

A more illuminating ICSID award on the issue was rendered in *AMT* v. *Zaire (DRC)*.[41] AMT's request for arbitration was made under the ICSID

[36] See pp. 308–9 and the ICSID cases mentioned there. The Secretary-General of ICSID must send a copy of such request to the other party against whom proceedings are brought. ICSID Convention, Articles 28(1) and 36(1); Institution Rules, Rule 6. Under Article 1121 of NAFTA and Article 26(4) of the ECT, a disputing investor must also 'consent in writing' to arbitration when a claim is being submitted. It is for the avoidance of doubt that consent is given to submit to arbitration. It consummates the earlier consent given by a state in the treaty. Thus, an award may not subsequently be challenged for lack of consent of a party: Walde, 'Investment Arbitration Under the ECT', 429.

[37] The *Pyramids* case has been examined to illustrate consent expressed by a state in a national law and its acceptance by an investor: see pp. 314–18. An aspect of the case is considered here: see pp. 354–5.

[38] 4 ICSID Reports 245.

[39] The Treaty entered into force on 18 December 1980. It was extended to Hong Kong by virtue of an Exchange of Notes with effect from 14 January 1981. Article 8(1) of the Treaty provides: 'Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes . . . for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Dispute Between States and Nationals of the Other States opened for signature at Washington on 18 March 1965 any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former': 4 ICSID Reports 245, paras 1–2; Dolzer and Stevens, *BITs*, p. 136.

[40] 4 ICSID Reports 256, para. 18. It has been observed that the tribunal did not comment on the provision in Article 8(3) of the BIT which subordinated the right of a party to institute proceedings against the host state to that party 'having also consented': Broches, 'ICSID Convention', 644, para. 37 n. 14.

[41] Int Arb Rep 12 (April 1997), A-1. An application was registered on 29 January 1999 for the revision of the Award: *News from ICSID* 16, Winter 1999, 2. However the parties reached a settlement and an Order discontinuing the proceedings was made by the tribunal: see p. 249, note 80.

Convention and the 1984 BIT between the US and Zaire.[42] In light of the consent of Zaire and the US in the BIT,[43] the tribunal sought to determine whether that amounted to the consent of AMT and Zaire to submit the dispute to ICSID:

The first question that comes to mind is this: Is it necessary, in the present case that there must be consent between the State (Zaire) and the national (AMT) of another State (USA), to submit the dispute to the Centre? The bilateral Treaty does not suffice since it provides that the disputes of the type to be considered by the tribunal must be justiciable before ICSID. In other words, does the consent of the United States creates an obligation for its nationals? Should there not be, in addition to that consent, also the consent by AMT itself relating to a specific dispute? Can the United States impose upon its national the passage of consent to ICSID? Or, better still, in the absence of AMT's consent, will the Treaty signed by the United States of America and Zaire suffice to take its place?[44]

The tribunal answered the above questions in the negative, noting that BITs do not dispense with the need for the consent of the parties to a dispute; that it could indicate the consent of a state which needs to be accompanied with that of the private party to satisfy the Convention:

The requirement of the consent of the parties does not disappear with the existence of the Treaty. The Convention envisages an exchange of consensus between the parties. When Article 25 [of the Convention] states in paragraph 1 that 'the parties' must have consented in writing to submit the dispute to the Centre, it does not speak of the States or more precisely, it speaks of a State and a national of another State. It appears therefore that the two States cannot, by virtue of Article 25 of the Convention, compel any of their nationals to appear before the Centre, this is a power that the Convention has not granted to the States.[45]

Citing the provision containing the consents of Zaire and the US which gives the parties the option to agree with the private party on another dispute resolution means, the tribunal pointed out that:

[42] It was not indicated anywhere in the Award that there was a previous contract between AMT and Zaire which contained an ICSID arbitration clause. Neither party contested the applicability or otherwise of the 1984 Treaty to the case. For other aspects of the Award, see p. 297.

[43] Article VII(2)(a) of the BIT provides: 'Each Party hereby consents to submit investment disputes to the International Centre for the Settlement of Investment Disputes (Centre) for settlement by conciliation or binding arbitration.' The above provision is further clarified by Article VII(3), which provides *inter alia*: 'If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute settlement procedures upon which the parties to the dispute may have previously agreed': Int Arb Rep 12 (April 1997), A1, para. 5.19. [44] *Ibid*., para. 517. [45] *Ibid*., para. 5.18.

It appears clearly that if Zaire and the United States agree that the disputes of the type which is submitted to the Tribunal could be brought before ICSID, they have thus, each on its part, accepted the competence of ICSID to be eventually proceeded against by a national of the other co-contracting State. But this acceptance is not automatic for all disputes, the Parties in question (that is to say, a State and a national of another State), remains masters of the procedure of their choice which they may deem appropriate to apply in order to resolve an emerging dispute. This is the way it is necessary to understand the meaning of Article VII, paragraph 3, *in fine*, and sub-paragraph (a) of paragraph (4) of the same Article.[46]

The final part of Article VII, paragraph 4, cited earlier, further states: 'If the parties to the dispute disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the procedure desired by the national or company concerned shall be followed'.[47] The tribunal, noting that a right to choose is recognised for the national of the other Contracting State,[48] concluded:

It seems that upon reading this provision of the Treaty, it cannot be contended that consent of the parties to come before ICSID simply results from a pre-existing agreement by the United States and Zaire. It is therefore necessary to show that there has also been an agreement between the parties, or in the absence of this agreement, it would have been necessary to apply Article VII, paragraph 4 *in fine* which confers upon a national of the other State the power to compel the State party to the dispute to appear before the Centre. This is very much the case before us. In the present case, it happens that AMT (the national envisaged in paragraph 4) has opted for proceeding before ICSID. AMT has expressed its choice without any equivocation; this willingness together with that of Zaire expressed in the Treaty, creates the consent necessary to validate the assumption of jurisdiction by the Centre.[49]

Some other BITs to which African states are parties might accommodate the interpretation in the above cases if and when invoked in ICSID proceedings.[50] For example, Article 9 of the 1977 Treaty between Egypt and the Belgo-Luxembourg Economic Union[51] provides:

[46] *Ibid*., para. 5.20. Article VII(4)(a) of the BIT provides that, once the national or company concerned has so consented, either party may institute proceedings before the Centre or Additional Facility at any time after six months from the date upon which the dispute arose, provided: (i) the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedures previously approved by the parties to the dispute; and (ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the party to the dispute (*ibid*., para. 5.12). [47] *Ibid*. [48] *Ibid*., para. 5.22.

[49] *Ibid*., paras 5.36–5.37. [50] Broches, 'BITs and Arbitration', 66.

[51] Entered into force on 20 September 1978.

Each Contracting Party hereby irrevocably and anticipatorily gives its consent to submit to conciliation and arbitration any dispute relating to a measure contrary to this Agreement, pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965, at the initiative of a national or legal person of the other Contracting Party, who considers himself to have been affected by such a measure. This consent implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted.

Also, Article 9 of the BIT between Nigeria and the Netherlands provides:

Each Contracting Party hereby consents to submit any legal dispute arising between that Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for the Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington 18 March 1965.

The 1990 Treaty between the UK and Nigeria is more exhaustive in this respect. It has in Article 8(1) a consent provision broadly similar to Article 9 of the Nigeria–Netherlands Treaty ('Each Contracting Party hereby consents to submit . . .') which further indicates *inter alia*:

If any such dispute should arise and agreement cannot be reached within three months between the parties to the dispute through pursuit of local remedies or otherwise, then, *if the national or company affected also consents in writing to submit the dispute to the Centre* for settlement by conciliation or arbitration under the Convention, *either party may institute proceedings* by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention.[52]

It has been said that:

Some BITs specifically provide for the giving of consent by the investor. Under these clauses, once the investor has accepted the offer contained in the BIT, either party may start proceedings. British treaties provide for the reciprocal expression of consent and for access by both parties to the Centre.[53]

This view seems to overlook the fact that, for a state to initiate ICSID proceedings, the consent of the investor is essential. If that consent is refused or is not forthcoming, any request for proceedings will not be registered

[52] Emphasis added. The provision would seem to suggest that the consent in writing to submit the dispute to ICSID and the request instituting proceedings before the Centre are distinct. But the latter act may, in some cases, encompass the former, at least in the view of the awards earlier noted.

[53] Schreuer, 'Article 25', 450, para. 306.

and, if registered, an ICSID tribunal can still decline jurisdiction; unless the contention is that there was a previous acceptance by the investor, i.e. before a dispute, of the offer by the state in a treaty or law, or that once a dispute arises, the investor would, in good faith, give its consent at the state's request, which may not necessarily be the case. By contrast, if the investor wishes to proceed against a state which had expressed consent in an investment treaty or law, a request by the investor to ICSID, say, for arbitration, is the acceptance of the offer.[54]

The Nigeria–France Treaty may ultimately have the same implication as the above treaties despite the fact that its drafting pattern and length differ. Its Article 8 provides: 'if [any investment] dispute is not [amicably] settled within a period of six months from the date at which it occurred by one or other of the parties, it *shall* be submitted at the request of *either party* to the arbitration of [ICSID]'.[55] At least, under this Treaty, once there is the requisite consent of the parties to the dispute, which includes a request for arbitration, it is clearer that a State may proceed against an investor (and *vice versa*) than under the treaties between Nigeria, the Netherlands and the UK. If the Nigeria–France Treaty is taken as expressing the advanced and mandatory consent of either state to submit to ICSID, then, like the treaties between Nigeria, the Netherlands and the UK, it may be more difficult for a state to initiate proceedings against an investor than the latter against the former.[56]

Each case must be considered on its own facts and circumstances. In the *Pyramids* case,[57] in relation to an advanced consent expressed in an investment law,[58] Egypt contended that Article 8 of the 1974 Law which prescribed that disputes shall *inter alia* be settled within the framework of the ICSID Convention meant that a further specific agreement with the investor was needed to validly vest the Centre with jurisdiction. In support of this contention, Egypt cited Article 6 (the dispute resolution provision) of the 1978 BIT with Sweden,[59] which provides:

[54] Broches cautiously suggested that 'provisions of [such] kind [in BITs], subject to the conditions stated therein and subject further to their compatibility with the Convention, *will* enable the investor to institute proceedings against the host State before the Centre, and *may* entitle the host State to avail itself of the same remedy against the investor': 'BITs and Arbitration', 66; see pp. 308–9 and 346–50 above.

[55] Emphasis added.

[56] Cf. Dolzer and Stevens, *BITs*, pp. 134–5, for expression of reservations about the state easily bringing proceedings against an investor under the provision.

[57] 3 ICSID Reports 131. [58] See p. 315 above.

[59] Entered into force on 29 January 1979.

In the event of a dispute arising between a national or a company of one Contracting State and the other Contracting State in connection with an investment on the territory of that other Contracting State, it shall *upon the agreement by both parties to the dispute* be submitted for *arbitration* to the International Centre for the Settlement of Investment Disputes established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States dated March 18, 1965.[60]

Egypt then argued that since Article 8 of the 1974 Law cannot override the requirement of 'agreement by both parties' in its Treaty with Sweden, it cannot displace the Convention's requirement of 'consent in writing'. The tribunal indicated that '[t]he question, however, is not whether Article 8 [of the Law] can displace the requirement for a "consent in writing", but whether Article 8 is itself a legally sufficient manifestation of such consent'.[61] As the tribunal argued:

It is true that both the Convention and the Swedish treaty require separate manifestations of consent to establish the Centre's jurisdiction. But the Convention and the Swedish treaty articulate this requirement differently: the Convention requires a 'consent in writing' whereas the Swedish treaty requires 'the agreement by both parties'. Thus, the 'frameworks' of both [the] Swedish [Treaty] and the Convention are different. As indicated in the Report of the Executive Directors [that accompanied the Convention],[62] the drafters of the Convention, which entered into force eight years prior to the enactment of Article 8, anticipated that a State might unilaterally give advance 'consent in writing' to the Centre's jurisdiction through investment legislation. On the other hand, such unilateral legislation clearly could not constitute the 'agreement of both parties' required by the Swedish treaty, which was entered into four years after Article 8 was enacted. The fact that Article 8 of Law No. 43 is not the kind of manifestation of consent envisioned by the framework of the Swedish treaty does not mean that it is not a 'consent in writing' within the framework of the Convention.[63]

A provision such as that in the 1978 Swedish–Egyptian Treaty '[d]oes not, of course, constitute consent to arbitration [or conciliation] by the States concerned as required by Article 25(1) . . . Nor does it impose a legal obligation on these States to give such consent'.[64] It follows then that some references to ICSID in investment treaties and laws may 'fall short' of the type of 'consent in writing' required under Article 25(1) of the Convention.[65]

[60] *Pyramids* case, 3 ICSID Reports 154, para. 97 (emphasis in the original).
[61] *Ibid*., para. 97.
[62] Alluding to para. 24 of the *Executive Directors' Report* cited in the *Pyramids* case, *ibid*., para. 70. [63] *Ibid*., para. 98. [64] Broches, 'BITs and Arbitration', 65.
[65] Broches, *ibid*.; Sornarajah, *International Law*, pp. 267–8; Muchlinski, *Multinational Enterprises*, p. 559; Dolzer and Stevens, *BITs*, pp. 131–4; Schreuer, 'Article 25', 442, para. 288.

Another type of treaty in that category is the one between Kenya and the Netherlands.[66] Its Article 10 provides that the contracting party in whose territory a national of the other contracting party makes or intends to make an investment 'shall give sympathetic consideration to a request on the part of such national to submit, for conciliation or arbitration, to the Centre . . . any dispute that may arise in connection with the investment'.[67] The latter, while failing to satisfy the requirement of consent in writing under the ICSID Convention, 'clearly implies an obligation not to withhold consent unreasonably'.[68]

A BIT may indeed contain the appropriate mandatory consent to confer jurisdiction on ICSID but cannot do so if it is not yet in force between the parties. A request for arbitration made prior to the treaty's entry into force will be incapable of establishing ICSID's jurisdiction.[69] In the interpretation and application of investment treaties and laws in the context of this discussion, it is crucial to take each as a special case since they may show a diversity in scope, content, duration, implementation, enforcement and in drafting patterns.[70] Which then leads to the envisaged problems of BITs in ICSID proceedings.

The implications of 'unequal' BITs for ICSID proceedings[71]

The emerging trend

A large number of disputes to be instituted under the ICSID Convention could be brought under provisions in investment laws or treaties. Indications are that this is a growing trend.[72] It would then be possible

[66] Signed on 11 September 1970 and entered into force on 11 June 1979.

[67] Cited in Broches, 'BITs and Arbitration', 65.

[68] *Ibid*.; Schreuer, 'Article 25', 447–8, paras 298–9.

[69] *Tradex Hellas* v. *Albania*, ICSID Rev-FILJ 14, 168–78.

[70] Cf. R. van Rooij, 'Remarks' in W. P. Heere (ed.), *Contemporary International Law Issues: Conflict and Convergence* (The Hague, 1995 ASIL/NVIR Proceedings, 1996), pp. 119, 121.

[71] For the concept and significance of unequal treaties, see W. Morvay, EPIL 7, 1984, 514.

[72] Parra, 'ICSID and BITs', 11; D. Rivkin, 'Growing Investor–State Arbitration', *Arbitration and ADR* 5, September 2000, 1. In 1999, it was reported: 'Of 28 cases currently pending before ICSID, more than two thirds were brought under consents set forth in treaties': *Report of Secretary-General to Administrative Council* (Washington DC, 28–30 September 1999), p. 2. Two years before, it was reported: '18 arbitration cases have been submitted to the Centre by investors lacking such prior contractual relations with the host States and relying for the State's consent on provisions in an investment law or in a treaty of the State': Parra, 'Provisions on the Settlement of Investment Disputes', 361–2. Reporting in 1996, it was indicated that there were ten cases pending before the Centre of which six were initiated pursuant to provisions providing for ICSID arbitration in a pre-existing investment law or treaty: *Report of the Secretary-General to the Administrative Council* (Washington DC, 1–3 October 1996), p. 1.

that, in some cases, the conclusion of an investment treaty by two or more states or the enactment of a law by a state, might instigate the whole institutional mechanisms of the Convention: the request for arbitration or conciliation, its registration, the constitution of a tribunal or commission and the entire proceedings up to the rendering of an award and its eventual enforcement, if need be. In that context, neither the co-operation, willingness nor participation of a respondent party is necessary once a request is made by one party *and* is registered by the Secretary-General.[73]

Through those investment treaties or laws providing for advanced and mandatory consent to ICSID, the ground has been laid for an investor to pursue a Contracting State as far as ICSID even if there was no investment contract containing an ICSID clause. This possibility is reinforced by the fact that in most of those treaties or laws (e.g. the Treaty between Nigeria and the UK) it may be stated that the consent in writing of the national or company must be given before a proceeding can be instituted or, as in the Egypt–Belgo-Luxembourg Treaty, that proceedings will be submitted to the Centre at the initiative of the investor, or that the private party instituting the proceedings should have the option to choose whether to use arbitration or conciliation and under what regime.[74] Paulsson graphically illustrated the emerging situation and its implications:

> It is commonplace to say of arbitration that it is consensual. A claimant initiates arbitration because it has agreed with the defendant that any dispute between them will be thus resolved. Either party could have commenced proceedings as a claimant; once arbitration has started, the defendant can make a counterclaim. This is the arbitration world as we know it today. Hundreds of thousands of international contracts are subject to this basic framework, more or less dependable in individual cases. But explorers have set out to discover a new territory for international arbitration outside the basic framework. They have already landed on a few islands, and they have prepared maps showing a vast continent beyond. This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant, and where the tables could not be turned; the defendant could not have initiated the arbitration, nor is it certain of being able even to bring a counterclaim.[75]

The revocation of unilateral consent by a host state

There are serious complexities, or at least mild confusion, in that 'new territory'.[76] For example, can a host state revoke a unilateral consent given in an investment law or in a treaty?

[73] ICSID Convention, Articles 28, 36 and 45.

[74] Nigeria–UK BIT, Article 8; the *Pyramids* case, 3 ICSID Reports 156, para. 102; the Investment Act of Ghana 1994, s. 29(3); the Investment Act of Nigeria 1995, s. 26(3); the ECT 1994, 34 ILM 399–401, Article 26(4); the NAFTA 1992, 32 ILM 644, Article 1122.

[75] Paulsson, 'Arbitration Without Privity', 422–3.

[76] *Ibid*. at p. 423.

As to national law, revocation of consent contained therein is always possible, as the consent is the sole act of the state making it. In short, it is a mere offer. Under most legal systems, an offer could be revoked before its valid acceptance.[77] Thus, it has been said: 'Unlike a treaty, Law No. 43 [the investment law of Egypt in issue in the *Pyramids* case] is not the result of negotiations between two or more States, but rather the result of a unilateral act by a single State'.[78]

There may, however, be a question of estoppel if a national law was subsequently repealed or prejudicially amended to pre-empt an imminent proceeding especially where an investment transaction was negotiated and made and the agreement on dispute resolution procedure, if any, reached, on the basis or in the light of the offer sought to be retracted.[79] Also, the offer may have been validly accepted (including, with respect to the ICSID Convention, a timely institution of proceedings) before the purported revocation or amendment of the law containing it.[80] Under Article 25(1) of the Convention, once an arbitration clause has been inserted, agreed upon or expressed based on such a law or otherwise, it becomes irrevocable by the unilateral act of either party. Even if there was a purported revocation or amendment of the law, or if, indeed, a valid, mutual and independently existing clause is unilaterally revoked or amended, this does not, *per se*, divest ICSID or its tribunal or commission of jurisdiction.[81] Herein, then, lies the strategic importance of concluding a specific agreement with a host Contracting State even if there was a specific law purporting to evince the consent of that state to submit to ICSID.[82]

With respect to the revocation of a consent in bilateral or other investment treaties, this has to be seen in the context of provisions in particular treaties dealing with, as well as rules generally applicable to treaties,

[77] Cf. *Routledge* v. *Grant* (1828) 130 ER 920; *Shuey* v. *US*, 92 US 73 (1875).

[78] *Pyramids* case, 3 ICSID Reports 142, para. 59.

[79] Cf. *Watson* v. *Canada Permanent Trust Co.* (1972) 27 DLR (3d) 735 (Supreme Court of British Columbia); *Mountford* v. *Scott* [1975] 1 All ER 198. While a host state may change its laws and policies, changes may adversely affect the stability of its investment climate and the credibility of its government: UNCTAD, *BITs in the Mid-1990s*, p. 36.

[80] *Pyramids* case, 3 ICSID Reports 123–4, paras 64–6.

[81] Under the Convention, a tribunal or commission has the competence to decide on its own jurisdiction (Articles 32(1) and 41(1)). And, an amendment of the Convention or a notice of exclusion or denunciation thereof does not have a retrospective effect once there is a valid consent in writing (Articles 66(2) and 72).

[82] Schreuer, 'Article 25', 437, paras 277 and 389. Cf. Parra, 'Provisions on Investment Disputes', 320: 'until the consent to arbitration becomes mutual, that is, until the investor consents, the State may, by repeal or amendment of the investment law, withdraw its consent to arbitration.'

their termination, revocation, alteration or amendment.[83] Unlike a national law, a treaty is an agreement between at least two states. Accordingly, it will be more difficult, although still possible, to withdraw a host state's consent contained in a treaty than one contained in a national law. If a unilateral revocation of consent to submit to ICSID expressed in a BIT is exercised by a state, that would amount to a breach of that treaty, thereby leading to an inter-state dispute.[84] The claimant state may also argue that it is envisioned that the BIT was concluded for the benefit of its nationals. The crux of the contention, however, will be that the investment arbitration provision including the expression of consent, if any, by either state to submit a dispute to the Centre is in *a* treaty and that the purported revocation or withdrawal is a direct injury to the claimant state. These responses would amount to attempts by the claimant state to enforce an international obligation owed to it or an exercise of its sovereign right of diplomatic protection (essentially highly discretionary and political matters) necessitated by the treaty's breach. As Sornarajah argued:

> What the investment treaty creates is a right in a State to insist that a dispute with a national is taken to arbitration. Where the other State does not do this by agreeing to arbitrate in a written instrument and thereby creating jurisdiction in the Centre, State responsibility arises from the breach of the treaty provision. The responsibility is to the other State not to the national of the State.[85]

On the other hand, it could be argued that the right to investment arbitration to which that consent related is neither owed to nor does it benefit that Contracting State (the national state of the private party) *per se*. Then, should the non-state party, on its own, wish to rely on or move to enforce the treaty in a situation of alleged breach or termination (which in itself, in most treaties concluded by the US, could be defined as 'an investment dispute'),[86] the question of privity might arise.[87] Herein, again, lies the need for a specific dispute resolution agreement with a state even if the

[83] 1969 VCLT, 8 ILM 679.

[84] Schreuer, 'Article 25', 449, paras 303 and 407. The Contracting State's claim would be based on the inter-state dispute resolution procedure agreed upon under a particular treaty or, as may be appropriate, through a reference to the ICJ under Article 36 of its Statute or under Article 64 of the ICSID Convention.

[85] Sornarajah, 'Power and Justice', 133; Schreuer, 'Article 25', 447, para. 297; Dozler and Stevens, *BITs*, p. 134.

[86] See pp. 254–5 above.

[87] Dolzer and Stevens, *BITs*, p. 146, have argued that such a provision enables an investor not only to engage in international arbitration proceedings directly against the host state but also in effect explicitly authorises the investor to invoke the substantive provisions of the BIT.

latter's consent to submit to a particular forum has been expressed or purported to be expressed otherwise.[88]

More interesting and challenging is the situation where the private party had accepted the unilateral offer expressed in the BIT or in a national law before its subsequent termination or revocation by the State.[89] Subject to, and in furtherance of, the ICSID Convention,[90] the jurisdictional requirement of consent in writing is consummated, and the purported termination or revocation will not avail.[91] If, however, the purported termination or revocation of a treaty is, for example, *before* an ICSID proceeding is instituted (assumed as the only act of acceptance or consent in writing by the private party), the inter-state dispute procedure in that treaty will pre-empt the investor–state dispute resolution procedure it contains.[92] It would be expected that, even if a request is registered by the Secretary-General as not being manifestly outside the jurisdiction of ICSID in that case, a tribunal could still decline jurisdiction. Otherwise, a timely request for arbitration could be made by a private party, registered and the jurisdiction of ICSID and of a tribunal be established, based on a subsisting, valid and mandatory consent expressed by a state in an investment law or a treaty.

[88] Regarding Article 26 of the ECT, it has been pointed out: 'These precedents provide for a pre-arranged, valid and apparently irrevocable consent, converted into an arbitral agreement by the matching arbitration request of the investor. They do, however, not provide for overriding a contractually negotiated arbitration. Rather, where no arbitration was agreed, the investor could sue the government before an arbitral tribunal regulated by the BIT or the investment law': Walde, 'Investment Arbitration Under the ECT', 445.

[89] For the situation when the treaty continues in force despite its expiration, revocation or termination, see note 92.

[90] ICSID Convention, Articles 25(1) and (4) and 72.

[91] The acceptance of an offer by the institution of proceedings by the investor based on a national law or on a treaty provision, demonstrates the lopsidedness, yet the effectiveness, of an advanced mandatory consent when expressed by a state in such instruments.

[92] The duration or effect of some BITs may far exceed their expiration or purported termination, thereby continuing to afford protection to covered investments made prior to the expiration or purported termination. Some BITs may provide that they remain in force for a fixed period (e.g. twelve years) within which there is no provision for termination, or that, after the fixed term, either party can terminate it by giving notice within a certain period. Otherwise, the treaty may continue in force indefinitely or for an additional fixed period (e.g. twenty years) after termination. For such provisions, any purported termination may be submitted to the inter-State dispute settlement procedure invariably contained in BITs: UNCTAD, *BITs in the Mid-1990s*, pp. 44–5; Dolzer and Stevens, *BITs*, pp. 44–7.

Implication of ICSID proceedings without privity

An implication of finding ICSID's jurisdiction based on a unilateral advanced consent of a state contained in legislation or in a treaty might be that the state and the private party to the dispute would have missed the first opportunity specifically to agree on certain essential optional aspects of proceedings under the Convention and the applicable rules: for example, on the number and method of appointing arbitrators or conciliators;[93] on the choice of the substantive applicable law;[94] on whether the tribunal or commission can decide *ex aequo et bono*;[95] on treating a locally incorporated juridical person of the host state party to a dispute as a national of another Contracting State because of foreign control;[96] the variability of the intertemporal rule in Article 44 or 33 of the Convention with respect to Arbitration or Conciliation Rules as may be appropriate;[97] the availability of provisional measures under the 1984 Arbitration Rules;[98] the exclusivity of arbitration under the Convention;[99] and the fees or expenses of the commission or tribunal as well as their apportionment, etc.[100] In that connection, it has been observed:

> [T]he ICSID system affords parties much freedom to tailor the regime to meet their particular needs. The options available include such cost-cutting alternatives as having a sole arbitrator should the circumstances of the case allow this. However, actual use of these options is dependent on the agreement of the parties [the host Contracting State and a foreign private party, national of another Contracting State]. In cases where there is no contract between the parties, and recourse to ICSID must instead be founded on any applicable legislative or treaty provisions, this means, because of the general nature and terms of the provisions, that an occasion to agree on optional matters will normally only present itself after a dispute has arisen, just when agreement on any matter may be most difficult to get. The implications of this may go beyond mere cost considerations.[101]

[93] ICSID Convention, Articles 29 and 37. In the absence of agreement, the internal appointment mechanisms of the Convention will apply (*ibid*., Articles 37(2)(b) and 38; Articles 29(2)(b) and 30).

[94] *Ibid*., Article 42(1). In the absence of a choice by the parties, the Convention contains residual rules for determining the applicable substantive law (Article 42(1), second sentence); *AAPL* v. *Sri Lanka*, 4 ICSID Reports 256, paras 18–20.

[95] ICSID Convention, Article 42(3). Explicit agreement of the parties is always required.

[96] *Ibid*., Article 25(2)(b).

[97] Schreuer, 'Articles 41 and 44', 539–42.

[98] ICSID Convention, Article 47; and ICSID Arbitration Rules, 26 September 1984, Rule 39(5), 1 ICSID Reports 157 and 171.

[99] ICSID Convention, Article 26.

[100] *Ibid*., Articles 60(2) and 61(2).

[101] Shihata, *The World Bank in a Changing World*, Vol. 11, p. 452 citing Broches, (1993) 13 YBCA 627–717 but actually in (1993) 18 YBCA pp. 627–715.

Concluding remarks

Compulsory arbitration at the option of an investor has been seen as a reflection of the nature of investment protection, a cardinal, if not the sole, aim of BITs and other investment treaties influenced by or derived from BITs.[102] The scheme gives arbitrators (and judges) '[a]n important role in the interpretation of the substantive provisions of the treaty'.[103] Furthermore, such an 'asymmetric right' given to an investor, it has been pointed out, should be understood rather as an instrument of enhancing treaty compliance and enforcement using private agents.[104] It has been argued that '[u]nder the [US] BITs, any dispute involving the interpretation or application of an investment agreement is enforceable by the investor under the investor-to-state disputes provision. And, because a violation of the investment agreement would violate the BIT itself, any such violation also would be subject to arbitration under the state-to-state dispute procedure.'[105] Finally, Walde has robustly argued:

> There is nothing particularly new about using private agents to enforce law; the history of law started this way and modern competition, consumer protection, environmental and many, if not most areas of economic law rely to a large extent on individuals and companies litigating against infringements. Private interest is mobilized to identify and sanction breaches. What is new is that this key instrument of achieving compliance is employed in international law and against states. It signifies a conspicuous climb-down of states – i.e. governmental bureaucracies – from their superior position of sovereignty when confronting private litigants on the equal level of an arbitral tribunal.[106]

That states should not be permitted or encouraged to defy obligations undertaken with, or on behalf of, private persons is a positive and an uncontested proposition. But, where a state had, for example, given an advanced mandatory consent, in an investment treaty or in a national law, to ICSID proceedings, can that state bring a claim or counterclaim against an investor based on that treaty or law? And, what if the investor refuses to give its consent at the request of the state in that circumstance?

[102] Walde, 'Investment Arbitration Under the ECT', 429.
[103] Parra, 'Multilateral Approaches', pp. 6–7.
[104] Walde, 'Investment Arbitration Under the ECT', 429.
[105] Vandevelde, 'The Development and Expansion of BITs', PASIL 86, 532, 538.
[106] Walde, 'Investment Arbitration Under the ECT', 437 (footnote omitted). Cf. Paulsson, 'Arbitration Without Privity', 441: 'The possibility of direct action – international arbitration without privity – allows the true complainant to face the true defendant. This has the immense merit of clarity and realism; these, and not eloquent proclamations, are the prerequisites of confidence in the legal process.'

Does the private party (who, significantly, is not a party thereto) thereby breach the BIT? Would there then still be a valid 'consent in writing' of the parties to the dispute to satisfy the jurisdictional requirements of Article 25(1) of the Convention if the investor refuses to accept (i.e. to give its consent)?[107] Could the Secretary-General of ICSID register a request by a state in that situation? Can the investor be compelled to give its consent, or, rather, could the ICSID Secretary-General be enjoined to perform his or her duty under the Convention irrespective of the consent of the investor?[108]

Interestingly, before the ICSID Secretary-General registers a request for arbitration or conciliation, either from a state or a national of another Contracting State, the request shall contain information concerning the issues in dispute, the identity of the party and their *consent* to arbitration or conciliation.[109] In other words, before a request can be registered, the written consent in writing of both parties to a dispute must be present.[110] A request should be registered, unless the Secretary-General finds, *on the basis of the information contained in the request*, that the dispute is manifestly outside the jurisdiction of the Centre.[111] Broches, who, amongst other things, was a former Secretary-General of ICSID, has significantly said:

> While the Contracting Parties to the [bilateral investment] treaty may explicitly or by implication have agreed that either side to an investment dispute may bring that dispute before the Centre, the investor's consent is still required by the

[107] It has been observed: 'a BIT is an agreement between two countries and only the countries are bound by it; although the BIT may contain the contracting parties' consent to arbitration, it generally does not contain the consent of the investor. The host country thus cannot invoke the investor-to-State dispute provision without some act of consent by the investor. For this reason, the investor can control the choice of mechanism simply by a selective withholding of consent': UNCTAD, *BITs in the 1990s*, p. 96, and Broches, 'BITs and Arbitration', 66–7; Vandervelde, 'Arbitration Provisions in the BITs and the ECT', 416. For problems of enforcing arbitral awards arising out of arbitration without privity, see Sornarajah, 'Power and Justice', 139; Werner, 'Trade Explosion', 15 n. 19.

[108] The Secretary-General of ICSID enjoys immunity from legal process with respect to acts performed by the office-holder in the exercise of the functions of that office except where the immunity is waived by the Centre: ICSID Convention, Article 21(a); A. R. Parra, 'ICSID and Immunity of Arbitrators' in J. Lew (ed.), *The Immunity of Arbitrators* (Lloyd's Press of London, 1990), p. 105.

[109] Emphasis added.

[110] ICSID Convention, Articles 28(2) and 36(2).

[111] *Ibid*., Articles 28(3) and 36(3) (emphasis added). The screening power of the Secretary-General of ICSID is neither decisive nor final, as an ICSID tribunal or commission has the power to decide on its own competence: ICSID Convention, Articles 41 and 32; *Report of the Executive Directors*, para. 38; A. R. Parra, 'The Screening Power of the Secretary-General', *News from ICSID* 2, 1985, No. 2, 10; *AMT* v. *DRC*, Int Arb Rep 12, A-1, para. 5.01.

Convention and if he refuses to give it, the jurisdiction of the Centre is defeated.[112]

Would a BIT with asymmetrical implications not be restrictive and oppressively and restrictively one-sided?[113] Can a BIT have the effect of defeating the effective execution, the express provisions and the object and purpose of a multilateral treaty, in this case by impeding access to ICSID for one of the disputing parties as envisaged by the Convention?[114]

An essential ingredient of an arbitration clause is that it gives either party the (unqualified) right to refer a dispute to arbitration.[115] There are, however, arbitration agreements or clauses conferring unilateral rights on a party to request arbitration.[116] It has been cautioned that: 'While such a one-sided approach to ICSID's jurisdiction is technically possible, it is not in the interest of the host State to grant access to the Centre to investors without obtaining reciprocal rights'.[117]

When does the modification of a multilateral treaty by two state parties entail consequences for its object and purpose? The ICSID Convention, it must be noted, has no provisions either expressly prohibiting or permitting the modification of its provisions by two Contracting States. However, the Convention has an explicit and rigorous regime for its amendment.[118]

[112] Broches, 'BITs and Arbitration', 68. As an ICSID tribunal pointed out: 'It appears therefore that the two States [parties to a BIT] cannot, by virtue of Article 25 of the Convention, compel any of their nationals to appear before the Centre; this is a power that the Convention has not granted to the States': *AMT* v. *DRC*, Int Arb Rep 12, A-1, para. 5.18.

[113] For penetratingly critical remarks on the asymmetry in BITs, see Alvarez, 'A Remark', 552–5; Salacuse, 'The ECT and BIT', 330; Sornarajah, 'Compensation for Nationalization' in Walde (ed.), *The ECT*, pp. 400–2. Cf. P. M. Norton, 'Back to the Future: Expropriation and the ECT' in Walde, *ibid*. at p. 378.

[114] Peters, 'Dispute Settlement Arrangements', 139–40.

[115] *Baron* v. *Sunderland* [1966] 2 QB 56, 60; *Tote Bookmakers Ltd* v. *Development & Property Holdings Co. Ltd* [1985] 1 Ch 261.

[116] *Pittalis and Others* v. *Sherefettin* [1986] 2 WLR 1003, 1007–9; *Woolf* v. *Collis Removal Service* [1948] 1 KB 11, 17; *Barni* v. *London General Insurance Co. Ltd* [1933] 45 Lloyd's List LR 68. For the US position, see L. A. Niddam, 'Unilateral Arbitration Clauses in Commercial Arbitration', ADRLJ 5, 1996, 147. It should be noted that the *Pittalis* case refused to follow *Baron* and also overruled the *Tote Bookmaker* case. Nevertheless, the context of these cases (except *Baron*) is not wholly apposite with a situation where the agreement is concluded between two states for the benefit of a third (private) party that eventually would assert the right to investment arbitration: *Pittalis* case, *ibid*. at pp. 1017–18. This point was reinforced when it was hinted in *Pittalis* that there would be no arbitration unless both parties to the dispute (mutually) agree to arbitrate. Thus, they are entitled, if they so choose, to confer a unilateral right to insist on arbitration by only one party: *ibid*. at pp. 1009, 1021–22.

[117] Schreuer, 'Article 25', 450, para 305.

[118] Any Contracting State may make a proposal for amendment. The text of that proposal will then be communicated by that state to the Secretary-General not less than ninety days before the meeting of the Administrative Council at which the amendment is to

The absence in the Convention of provisions for its modification does not, however, mean that any modification thereto by Contracting States is or will be permitted.

Article 41(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT) makes provision for regulating the modification of a multilateral treaty by two or more parties to it. The 1969 VCLT allows two states to a multilateral treaty (such as the ICSID Convention) to modify the treaty *inter se* so long as the possibility for such a modification is provided for or not expressly prohibited by the treaty *and*:

(i) the modification does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and
(ii) the modification does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.[119]

It is thought that a modification that would have the effect of impeding access to ICSID by a potential party, particularly a Contracting State, apart from being contrary to the principle of procedural equality, would contradict the basic rationale of the ICSID Convention as a whole. The implication, validity and efficacy of BITs modifying or derogating from the ICSID Convention to suit particular states has to be tested by the standards of the 1969 VCLT as well as by the general scheme and context of the ICSID Convention. Also, a BIT that might have the implication of modifying or amending a provision, the derogation from which is incompatible with the effective execution of the ICSID Convention as a whole would rarely

be considered. The Secretary-General is to send the proposal to all members of the Council, i.e. to each Contracting State (Articles 65 and 4(1)). For an amendment to be carried, it needs a two-thirds majority of the Council and a subsequent ratification, acceptance or approval of all Contracting States. Each amendment shall then enter into force thirty days after dispatch by the World Bank of a notification to Contracting States that *all* Contracting States have ratified, accepted or approved the amendment (Article 66(1)). An amendment does not retroactively operate to prejudice consent to the jurisdiction of the Centre given before the date the amendment enters into force (Article 66(2)).

[119] The 1969 VCLT, which entered into force in 1980, applies also to any treaty which is the constituent instrument of an international organisation and one adopted within an international organisation (Article 5); see p. 77, note 115. However, the VCLT applies only to those treaties concluded by states after its entry into force (Article 4). On its face therefore, the VCLT may be said not to apply to the ICSID Convention, which entered into force in 1966. But this will ignore the fact that the VCLT preserves the operation of customary international law, is a progressive development of the law and is largely a codification of customary international law. Accordingly, it has implications for treaties between non-parties and those made prior to its entry into force: Brownlie, *Principles*, pp. 607–8; M. Dixon, *Textbook on International Law* (3rd edn, London: Blackstone, 1996), pp. 53–4.

pass the test of validity set by the 1969 VCLT and by the ICSID Convention. If a national law purports to have such an implication in relation to the ICSID Convention, under Article 27 of the 1969 VCLT, a party may not invoke its municipal law as a justification for its failure to perform a treaty.[120]

The ICSID Convention, as complemented by or linked with investment treaties and laws expressing unilateral, advanced and mandatory consent of states, is permeated with many traps and latent implications and complications which may ensnare unwary states which enter into such treaties and enact such laws simply as mechanisms for attracting investments that would not otherwise come.[121] And, when an investment according to the Convention does come, if the investor subsequently commits a major wrong against the host,[122] the injured state can neither invoke the treaty nor the law to satisfy the jurisdictional requirements of the Convention against the investor if the latter does not also consent to ICSID proceeding.[123]

A question may then arise whether the host Contracting State could bring a claim against the investor's home Contracting State under Article 64 of the ICSID Convention or more appropriately, but uncertainly, under the inter-state dispute resolution provision in a particular treaty, for the wrong committed by the investor?[124] As an UNCTAD study pointed out:

[120] This is also a rule of general international law: Brownlie, *ibid*., pp. 34–6.

[121] The secrecy surrounding the negotiations and the very existence of some BITs and the lack of knowledge concerning their full implications are glaring especially in many developing states. The prohibitive costs of international collections containing those treaties make their acquisition virtually impossible in some cases. These reinforce the asymmetry in those treaties.

[122] It is assumed that, as in the *AAPL*, the *Pyramids*, the *AMT* and similar cases, there is as yet no ICSID clause or agreement between the state and the investor expressing their consent in writing, except the relevant provision of the investment treaty (or law) expressing only the consent of the state.

[123] Cf.: 'Once an investment is made ("post-investment" phase), i.e. once an investor has committed its capital and assumed the considerable political risk of such exposure, the protection intensity afforded by the treaty increases significantly': Walde, 'Investment Arbitration Under the ECT', 438. For the means of balancing the scales by securing the investor's prior consent, which are as yet to be uniformly reflected in treaty practice, see Schreuer, 'Article 25', 451, para. 308.

[124] The issue of privity, vicarious and international responsibility may be included in the focus of contentions in such a situation. However, it should be noted that, although BITs, on their faces, create reciprocal rights and obligations for the contracting parties, they exclusively relate to the obligations of the host state for the treatment of the investors. BITs do not prescribe corresponding home country obligations (other than as contracting parties to the treaty *per se*), or investor obligations to the host state: UNCTAD, *BITs in the Mid-1990s*, p. 7. This is an element of imbalance in BITs.

The goal for a developing country in concluding a BIT, then, is to maximize its benefits in the form of increased flows of FDI, while minimizing its costs in the form of obligations and commitments that may prove burdensome or expensive in the future or may impinge on its development efforts. The achievement of this goal requires a clear understanding of the consequences of assuming particular BIT obligations so that the costs and benefits of each specific obligation can be weighed. The task of achieving this balance can be particularly difficult for developing countries that are not capital-exporting countries.[125]

In the next chapter, the key issues involved in the use of the ICSID Convention in the recognition and enforcement of arbitral awards concerning African states will be given consideration. The chapter will contain observations from discussions on the ICSID Convention and African states.

[125] UNCTAD, *ibid*.

12 Recognising and enforcing ICSID awards

The ICSID Convention: a special mechanism

The ICSID Convention has a special mechanism for the recognition and enforcement of arbitral awards rendered in its proceedings. As previous chapters in this Part show, proceedings under the Convention are special and limited by the parties and the subject matter. An ICSID award is also in its own class. It is unlike any other *ad hoc* or institutional arbitral award normally covered by the New York Convention on the recognition and enforcement of foreign arbitral awards. The New York Convention is inappropriate for awards rendered under the ICSID Convention due to the latter's peculiarity.[1] This is notwithstanding that, under the New York Convention, the definition of 'arbitral awards' includes *ad hoc* and institutional awards.[2] The New York Convention is a general treaty for the recognition and enforcement of arbitral awards and agreements but allows for the speciality of the ICSID Convention and the latter's enforcement mechanisms.[3] This chapter is concerned with the enforcement of awards rendered pursuant to the ICSID Convention.

[1] For suggestion that, exceptionally, a party to an ICSID award may rely on the NYC for its enforcement in a state that is party to the NYC but not to the ICSID Convention, and for the enforcement of non-pecuniary obligations which are impossible under Article 54 of the ICSID Convention, see C. Schreuer, 'Commentary on the ICSID Convention: Article 54', ICSID Rev-FILJ 14, 1999, 71, 75, para. 5. As exceptional as this may be, attempting to enforce an ICSID award under the NYC might be complex, since the award will be exposed to defences available under Article V of the NYC, including public policy and arbitrability and, where appropriate, the commercial and reciprocity declarations. The attempt may also have implications for the exclusive and self-contained nature of the ICSID regime. [2] NYC, Article I(2).

[3] *Ibid*., Article VII(1). The enforcement of awards rendered under the ICSID Arbitration (Additional Facility) Rules is a separate question: 1 ICSID Reports 249. The latter is expected to be done through the NYC and any applicable national regime. Hence

Designations by African Contracting States under Article 54(2)

Each Contracting State shall recognise an ICSID award as binding and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgment of a court in that state (Article 54(1)). A party seeking recognition or enforcement of an ICSID award in a Contracting State shall furnish to a competent court or other authority, which the state shall have designated for this purpose, a copy of the award certified by the Secretary-General of ICSID. For the above purpose, each Contracting State is required to notify the Secretary-General of the designation of the competent court or other authority and of any subsequent changes thereto (Article 54(2)).

Many African Contracting States have made the requisite designations of the competent court or authority as required by Article 54(2). The bodies designated by these states are predominantly courts. However, a few states have designated competent authorities other than courts.[4] Most of these designations of courts or competent authorities in Africa have been and, for a long time, will remain dormant, as it is unlikely that ICSID awards will be sought to be recognised or enforced in an African jurisdiction in the near future.[5]

A limited role for the national court or authority

The function of a court or authority designated by Contracting States under Article 54(2) is primarily limited to that of ascertaining the authenticity of the signature of the Secretary-General of ICSID on an award.

proceedings under those Rules must be held only in states that are parties to the NYC where the award shall also be made (Articles 20 and 21(3)). As the Additional Facility Rules are outside the Convention, the latter is inapplicable at any stage thereof: Additional Facility Rules, Article 3; Schreuer, 'Commentary', 78–82, paras 12–22.

[4] Doc. ICSID/8–E, *Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention* (February 1999), pp. 1–6, www.worldbank.org/icsid. Zimbabwe and Uganda, although Contracting States, are not yet listed in Doc. ICSID/8–E as of 1999. In Zimbabwe, a 1995 Law, and in Uganda, the 2000 Arbitration and Conciliation Act, respectively designate the High Court for the purpose of enforcing ICSID awards: see p. 376. South Africa (not yet a Contracting State as at the time of writing) also designates the High Court for the purpose: the 1998 South African draft International Arbitration Act, s. 24(2). Zimbabwe and Uganda (and South Africa, when it becomes a Contracting State) need to notify ICSID of the courts for the purposes of Article 54(2). ICSID, although it might have notice of these laws, will not include them on the above list without a specific notice by the Contracting State.

[5] See pp. 386–7 on the non-utilisation of African courts to recognise and enforce ICSID awards.

A further requirement in most laws enacted to implement the Convention in some African states is one showing that the award sought to be recognised and enforced is final (in the sense that it is not subject to an application for annulment or otherwise suspended from being enforced). Other requirements consistent with the Convention may be foreseeable in a particular Contracting State, as procedures for enforcing and executing ICSID awards are subsumed under procedures for the enforcement and execution of court judgments, which might differ in Contracting States.

Domestic legislative implementation

The ICSID Convention expects each Contracting State to take such legislative or other measures as may be necessary to make the Convention effective in that state (Article 69). Thus, some African Contracting States have enacted specific legislation implementing the Convention in their legal orders, thereby ensuring that their designated courts or authorities shall carry out the obligations undertaken when called upon. Those laws sometimes append the ICSID Convention as a schedule. Most are expressly intended to implement the Convention in the enacting state. Also, arbitration laws in Africa may apply to international (commercial) arbitration 'without prejudice to the provisions of the international conventions' to which the enacting state is a party. African states with such laws include those states which are, or are about to become, ICSID Contracting States.[6]

In 1996, the South African Law Commission (SALC) recommended that South Africa should accede to the ICSID Convention.[7] Each of the 1997 and 1998 draft International Arbitration Acts had as its purpose *inter alia* 'to provide for the settlement of certain international investment disputes' and the purpose of giving effect to the obligations of South Africa under the ICSID Convention, the English text of which is Schedule 4 thereof. The Model Law, which is Schedule 1 to both draft Acts, applies to international commercial arbitration subject to any agreement in force between South Africa and any other state or states.[8]

[6] E.g. Egyptian Arbitration Law 1994, Article 1; Tunisian Arbitration Code 1993, Article 47. The draft International Arbitration Act 1998 of South Africa (not yet a Contracting State) has a similar provision (Schedule 1, Article 1 (1)).

[7] *Discussion Paper 69*, chapter 4; *The 1998 SALC Report*, chapter 4.

[8] The draft Acts of 1997 and 1998, Schedule 1, Article 1(1). Nothing in the Arbitration Act 42 of 1965 or in Chapters 2 and 3 of the draft Act applies to a dispute within the jurisdiction of the Centre or to an award made under the Convention: the 1997 draft Act, s. 14(2); and the 1998 draft Act, s. 23(2). The 1998 draft Act when enacted will enter into force on a date fixed by the President by proclamation in the *Gazette.* Different dates may be proclaimed for different Chapters (s. 28(2) and (3)).

Not all African Contracting States have enacted laws relating to the ICSID Convention.[9] This may be explicable on many grounds: it may not be necessary in some Contracting States to enact such a law before the Convention is applicable at the national level. In other African Contracting States, however, it may be essential to enact the Convention into national law before courts or authorities could apply its provisions. Laws are enacted in those States not only to comply with the expectations of making the Convention effective but due to the dictates of the divergent approaches of states to the domestic status of international law (in this respect, the ICSID Convention).[10] Also, non-enactment of the Convention, where enactment is necessary, may be due to inertia or lack of time on the part of law-makers, though this excuse is one that will become less convincing as the years go by.

An examination of the features of laws in Africa relating to the ICSID Convention indicates a willingness on Contracting States to fulfil their international obligations. However, most of those laws might remain on the statute books without being invoked. Some of the laws enacted in common law jurisdictions in Africa are more elaborate in their content than those enacted in jurisdictions influenced by the French legislative policy and the civil law.[11]

Some laws are enacted to ratify or to implement the ICSID Convention,[12] or to implement aspects of the Convention, particularly those dealing

[9] *Contracting States and Measures Taken by Them for the Purpose of the Convention*, Doc. ICSID/8–F (February 1999), for the legislative or other measures relating to the Convention pursuant to Article 69, www.worldbank.org/icsid.

[10] See pp. 205–6 above.

[11] E.g. Law No. 65-237 of 26 June 1965 and Decree No. 65-238 of 28 June 1965 (Cote d'Ivoire); Law No. 65.135 of 30 July 1965 (Mauritania); Law No. 19/65 of 20 December 1965 (Gabon); Law No. 69/65 of 30 December 1965 (Congo); Law No. 6 of 8 January 1966 and Decree No. 15/PR of 21 January 1966 (Chad); Law No. 17/Pres/Dev.T.AET of 31 March 1966 (Burkina Faso); Law No. 66-33 of 3 May 1966 (Tunisia); Ordinance No. 36/PR/MFAE of 26 August 1966 and Decree No. 445/PR/MFAEP of 2 December 1967 (Benin); Royal Decree No. 564-68 of 31 October 1966 (Morocco); Order No. 32 of 24 July 1967 (Togo); Law No. 68-06 of 12 February 1968 (Niger); Law No. 12/AN/68 of 28 September 1968 and Law No. 409 of 28 September 1968 (Guinea); Decree-Law No. 90 of 7 November 1971 (Egypt); Decree No. 09/P-CMLN Promulgating Order No. 77-63/CMLN of 11 November 1977 (Mali); Decree No. 78/0073/PR of 28 October 1978 (Comoros); Decree No. 20/79 of 16 July 1979 (Rwanda); Law No. 66/LF/13 of 30 August 1966, Law No. 66/DF/454 of 30 August 1966 and Law No. 75-18 of 8 December 1975 (Cameroon).

[12] E.g. the Laws cited in note 11 above; The Long Title of the Investment Disputes Convention Act 1970, cap. 182, of Zambia, indicates that it 'gives effect to the Convention on the Settlement of Investment Dispute between States and Nationals of Other States'. See also the Kenyan Investment Dispute Convention Act 1966, Long Title; the Arbitration (International Investment Disputes) Act 1995 of Zimbabwe, Preamble; the 1998 draft International Arbitration Act of South Africa, Long Title, s. 1(e) and Schedule 4.

with the recognition and enforcement of arbitral awards.[13] Furthermore, there may be peculiar provisions in laws implementing aspects of the Convention. For example, the 1970 Settlement of Investment Disputes Act of Botswana[14] provides that awards rendered pursuant to the ICSID Convention shall be recognised as binding and the pecuniary obligations imposed by such awards shall be enforced as if such awards were judgments of the High Court that have become final by appeal or the expiration of time for appeal (section 7).[15] The Botswana Act has provisions not often seen in other such laws, for example: designating the Registrar of the High Court as the competent authority to recognise and enforce arbitral awards (section 8); providing that the Minister (presumably, of Justice or External Affairs) may make procedural rules relating to the recognition and enforcement of awards for the purposes of its sections 7 and 8; stipulating the procedure for submission to the jurisdiction of the Centre (section 11); authorising the Minister to enter into agreements with nationals of other Contracting states for submission of disputes to the Centre (section 10);[16] providing for the payment of Botswana's share to the expenditure of the Centre (section 5); designating the representatives and alternates on the Administrative Council of ICSID (section 3); designating persons to serve on ICSID panels of arbitrators and conciliators (section 4); and providing for the privileges and immunities of the Centre (section 6).

Also, the 1995 Investment Disputes Act of Zimbabwe (section 9(1)) implemented, with certain qualifications in subsection (2) thereof, Articles 18–24 of the ICSID Convention dealing with the status, immunities and privileges of the Centre and of members of its Council and Secretariat and of persons concerned with conciliation or arbitration under the Convention. Section 10 of the 1995 Act deals with the contributions of Zimbabwe to the expenses of the Centre under the Convention. The Minister of Justice may by instrument give notice that a state or territory is a Contracting State for the purposes of the Act (sections 2 and 3).

[13] E.g. the Investment Dispute (Enforcement of Awards) Act 1969 of Mauritius Long Title, s.2; the Zambian Act of 1970, s. 2; the Zimbabwean Act of 1995, Preamble and s. 2; Law No. 75-18 of 8 December 1975 (Cameroon), Articles 1 and 2; the 1998 draft Act (South Africa), Long Title and s. 22(i); the 2000 Arbitration and Conciliation Act of Uganda, ss. 46–48.

[14] ILW 1, July 1992, Issue 4.

[15] Also, the Kenyan Act 1966 provides that an award rendered pursuant to the Convention and not stayed pursuant thereto shall be binding in Kenya, and the pecuniary obligations imposed by it may be enforced as if it were a final decree of the High Court (s. 4). The 1998 South African draft Act provides that an award (as defined) may be enforced by entry as a final judgment of the High Court in terms of the award (s. 24(1)).

[16] See p. 336 above.

By contrast, section 23(1) of the 1998 South African draft International Arbitration Act implemented only Articles 18 and 20–24 of the Convention (concerning the status, immunities and privileges of ICSID) and Chapters II to VII of the Convention (i.e. Articles 25–63 of the Convention, dealing with ICSID's jurisdiction, conciliation and arbitration procedures and the cost and place of proceedings) in South Africa. The SALC did not follow the 1995 Zimbabwe Act in implementing Article 19 and other provisions of the Convention, which were deemed unnecessary in light of the implementation by South Africa of Articles 20–24 and Chapters II to VII of the Convention.[17] A certificate signed by the Minister of Foreign Affairs stating that a particular state is, or was at the time specified, a Contracting State to the Convention shall *prima facie* be proof of that fact (section 25).[18]

Some implementing laws in Africa provide expressly that the laws bind the government that enacted them and that every award rendered pursuant to the Convention shall be binding on the parties (even though they need not necessarily do so as the Convention and awards made thereunder are binding international obligations for Contracting States).[19] Other laws may, however, contain important qualifications to this apparently absolute stipulation.[20] The Zambian Act of 1970 (like the Mauritius Act of 1969) provides that every award shall be binding on the parties (section 3). The Act binds the 'Republic'. However, this is subject to the limitation that it shall not bind 'so as to make an award enforceable against the Republic in a manner in which a judgment would not be enforceable against the Republic' (section 8). A similar provision is in section 10(1) of the 1995 Zimbabwean Investment Disputes Act, and section 10(2) provides: 'For the avoidance of doubt, nothing contained in this Act or in the Convention shall be construed as derogating from the law in force in Zimbabwe relating to the immunity of the State [of Zimbabwe] or of any foreign State from execution.'[21]

[17] *The 1998 SALC Report*, paras 4.61–4.74.

[18] A Contracting State is identically defined in s. 22(iii) of the 1998 draft Act and in s. 2 of the 1995 Zimbabwean Investment Act 1995: see p. 268 above. To determine whether a state is, formally, a Contracting State is readily done from information easily obtainable from the ICSID Secretariat, or from that Secretariat's website. However, what is a 'Contracting State' might also arise as a jurisdictional question in the context of particular circumstances, e.g. whether or not the ICSID Convention is applicable or has been extended to a particular territory at the critical time.

[19] The 1998 South Africa draft Act, s. 4. Such provisions may nevertheless have immense domestic and international repercussions relative to the efficiency of proceedings and the effectiveness of arbitral awards under the Convention.

[20] E.g. the Malawi Investment Disputes (Enforcement of Awards) Act 1966, ss. 7 and 3; the Mauritius Act of 1969, ss. 8 and 3; the 1995 Investment Act of Zimbabwe, s. 10.

[21] These provisions reflect Articles 54(3) and 55 of the Convention: see pp. 378–84.

The Zimbabwean Act's unique provision is one providing for a stay of proceedings begun in the High Court if the subject matter of the litigation ought to have been arbitrated or conciliated under the Convention. According to section 7:

> If any proceedings are instituted in any court in regard to any matter which, under the Convention, is required to be submitted to the Centre for conciliation or arbitration, any party to the proceedings may apply to the Court to stay the proceedings, and the court, unless satisfied that the matter is not required to be submitted to the Centre under the Convention, shall make an order staying the proceedings.[22]

The SALC considered that a provision similar to section 8 of the 1979 New Zealand implementing law or section 7 of the 1995 Zimbabwean implementing law[23] 'is not only unnecessary but also inappropriate. The [South African] court has no jurisdiction to consider the matter until ICSID declines jurisdiction'.[24] This assessment is correct in light of the implementing law recommended by the SALC, should South Africa become a Contracting State.[25] However, with respect to Zimbabwe and New Zealand, the stance of the SALC overlooks the fact that, if a party institutes an action before a court in a Contracting State regarding a subject matter which should have been submitted to ICSID, the national court may have to make a *prima facie* determination, i.e. without going into the merits of the dispute, on an application by a respondent or on its own motion, that there is an ICSID clause implicated in the proceeding in order to stay it in favour of ICSID's jurisdiction. A provision of that kind is particularly appropriate and necessary in states such as Zimbabwe and New Zealand, which require treaties to be domestically implemented to be enforceable by their courts. Unlike the 1998 draft International Arbitration Act of South Africa, the 1979 and 1995 Acts respectively of

[22] The tenor of the provision is apparent from Articles 25(1) and 26 of the Convention. For the comparative importance of more or less similar provisions in other jurisdictions, see the Arbitration (International Investment Disputes) Act 1966 (UK), s. 3(2), as amended by the Arbitration Act 1996, s. 107(1) and Schedule 3, para. 24; *MINE* v. *Guinea*, US District Court, District of Columbia, 12 January 1981, 4 ICSID Reports 3, reversed in the US Court of Appeal, District of Columbia, 12 November 1982, *ibid*. at p. 8; Delaume, 'ICSID Arbitration and the Courts', AJIL 77, 1983, 784–5, cited approvingly in *A-G (New Zealand)* v. *Mobil Oil of New Zealand Ltd*, High Court of Wellington, 1 July 1987, 4 ICSID Reports 117, 125–6, while considering s. 8 of the New Zealand Arbitration (International Investment Disputes) Act 1979. [23] *Ibid*. [24] *The SALC 1998 Report*, para. 4.74.

[25] The 1998 draft Act, s. 23(1) providing that Articles 18, 20–24 and Chapters II–VII of the Convention have the force of law in South Africa.

New Zealand and Zimbabwe did not implement Chapters II to VII of the Convention.[26]

Also, the Zimbabwean Act makes explicit provision for the privilege, in subsequent proceedings before any court, arbitrator or tribunal, of any offer, admissions, statement made in the course of a conciliation or any reports prepared or recommendations made by the Conciliation Commission for the purposes of those conciliation proceedings, unless the other party to the conciliation proceedings has agreed to the use of such evidence (section 8).

The procedures and requirements for the recognition and enforcement of ICSID awards are normally provided for in the implementing laws of Commonwealth African states (i.e. largely, the former colonies of the UK in Africa). Registration of an award is made when the competent enforcing authority or court is satisfied as to the veracity of the sworn statement accompanying the application for registration.[27] The application to the competent authority for the recognition and enforcement may be required to be made within a stipulated time limit, in most cases within 6 years of the date of the award or within such longer period thereafter as a competent enforcing authority or court may in its discretion allow.[28] It has pertinently been observed by the SALC that:

As there is an obligation to recognise the award [rendered pursuant to the Convention] a formal application to the court for its enforcement seems inappropriate and an administrative procedure for its registration to enable enforcement seems more appropriate. Consideration will have to be given to the provision of

[26] *The 1998 SALC Report*, para. 4.72, n. 412, mentioning the proposed s. 4 of the New Zealand Law Commission (NZLC R20 232) on which the South African draft Act, s. 23(1), was based. These were compared with the Australian International Arbitration Act of 1974, s. 32, which only refers to Chapters II–VII of the Convention and the New Zealand Arbitration (International Investment Disputes) Act of 1979, s. 10(1), which only refers to Articles 18 and 20–24. The Zimbabwean Act 1995 implemented Articles 18–24 of the Convention (s. 9(1)). Its purported implementation of Article 19 of the Convention is, admittedly, useless as there is nothing to implement in that provision, which states: 'To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.'

[27] The Mauritius Act of 1969, s. 4(4); the Zambian Act of 1970, s. 4(3) and (4); the Zimbabwean Act 1995, ss. 4 and 6; the 2000 Arbitration and Conciliation Act of Uganda, s. 47.

[28] The Mauritius and Malawi Acts, s. 4(1). The Zambian and Ugandan Acts do not expressly stipulate any duration but respectively provide for the making of Rules of Court for carrying them into effect: Zambian Act, s. 6; 2000 Arbitration and Conciliation Act of Uganda, ss. 47(4) and 48(2).

suitable High Court Rules to give effect to s. 24 of the Draft Bill and article 54 of the Convention.[29]

The effect of the registration is to give the award, from the date of registration, the same force and effect as a final judgment of a court and to make the pecuniary obligations imposed thereunder enforceable.[30] The effect of registration or non-registration of an ICSID award is most explicit in the laws of Zimbabwe and Uganda. For example, section 5 of the 1995 Investment Disputes Convention Act of Zimbabwe provides, subject to subsection (2) that:

(a) a registered award shall be of the same effect for the purposes of execution;
(b) proceedings may be taken on a registered award;
(c) the sum for which an award is registered shall bear interest; and
(d) the High Court shall have the same control over the execution of a registered award;

as if the award were a judgment of the High Court.[31]

An application to register an award may be accompanied with documents establishing the award's authenticity and finality. Such application shall be accompanied by a copy of the award certified by the Secretary-General of ICSID and a sworn statement to the effect that no application is pending under Article 52 of the Convention (annulment) and that enforcement of the award has not been stayed.[32]

In addition to the above, the Malawi Act stipulates further unique requirements to accompany the application for registration, drawing a

[29] *The 1998 SALC Report*, para. 4.71. This observation was based on a written comment by C. B. Lamm, furnished in response to a request by the Project Committee of the SALC. Section 24(1) of the Bill provides: 'An award may be enforced by entry as a final judgment of the High Court in terms of the award.'

[30] The Mauritius and Zambian Acts, s. 5; Malawi Act 1966, s. 5(a). The Zambian, Ugandan and Zimbabwean Acts, however, each provide that, if, at the date of the application for registration, the pecuniary obligations imposed by the award have been partly satisfied, the award shall be registered only in respect of the balance, and if those obligations have been wholly satisfied, the award shall not be registered: s. 4(4) (Zambia); s. 4 (Zimbabwe); s. 47(3) (Uganda).

[31] Section 48(1) (Uganda). A registered award under the Zimbabwean Act has the same effect as a final judgment of the High Court as constituting *res judicata* (s. 5(2)). No court shall entertain any proceedings for: (a) the recovery of any amount payable under an award; or (b) the enforcement of any obligation imposed by an award; unless the award is registered (s. 6).

[32] Certified translations in the appropriate language(s) are to be supplied if necessary; the Mauritius and the Malawi Acts, s. 4(2) and (3), respectively; the Zambian Act, s. 4(2) and (5).

distinction between when an award is sought to be enforced against a private party or against the government.[33] Accompanying the application, if an award is sought to be enforced against a private party, there must be a statement of the property which it is proposed, should be the subject of proceedings for enforcement (section 4(2)(c)).[34] However, where the court is satisfied in relation to an award of the truth of the sworn statement made in accordance with section 4(2) *and* the government is a party *and* there is property in Malawi which can properly be the subject of execution proceedings, the court shall direct registration of the award (section 4(4)).[35]

For its part, Nigeria enacted the ICSID (Enforcement of Awards) Act 1967, which provides in section 1(1):

> Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for the Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre aforesaid, if filed in the Supreme Court [of Nigeria] by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court [of Nigeria], and the award shall be enforceable accordingly.[36]

At least one attempt to implement the Convention in Africa is inelegant. The Arbitration (International Investment Disputes) Act 1966 of Swaziland tied itself to the Arbitration (International Investment Disputes) Act 1966

[33] The Malawi Act expressly provides for the execution of an award against the government when assets are in Malawi. Under the Act (which binds the government), every award is binding on the parties (ss. 7 and 3). Schreuer has, however, pointed out that, as a central function of investment arbitration is allaying investors' fear about the objectivity and effectiveness of the host state's judicial system, it is unlikely that investors will put their faith into measures of forced execution of awards against a recalcitrant host state in their own courts: Schreuer, 'Commentary on the ICSID Convention: Article 55', ICSID Rev-FILJ 14, 1999, 117, 154, para. 100.

[34] Where any document is in a foreign language, the applicant must produce translations certified as correct in such a manner as may be approved by the court (s. 4(3)).

[35] When an award is registered, the award shall, as from the date of registration, have the same effect as a judgment of the High Court so far as relates to the enforcement in Malawi of pecuniary obligations imposed by the award (s. 5(a)). The reasonable costs of and incidental to the registration of the award (including the costs of obtaining a certified copy thereof and of the application for registration) shall be recovered in the like manner as if they were sums payable under the award (s. 5(b)). The Chief Justice may make rules of court prescribing the procedure to be followed and fees to be paid in proceedings under the Act (s. 6).

[36] ICSID (Enforcement of Awards) Act, Cap. 189, *Laws of Nigeria*, vol. 10 (rev. edn, 1990), s. 1(1). The Chief Justice of Nigeria may make rules of court or may adapt any rule of court necessary to give effect to the section (*ibid*., s. 1(2)). The Act has effect throughout the Federation of Nigeria (*ibid*., s. 2).

of the UK.[37] The latter thereby applies by reference to Swaziland, except for a few superficial modifications and adaptations specified in the Schedule to the Swazi Act. Also, the 1889 Interpretation Act of the UK is applicable to the interpretation of the 1966 Swazi Act.

It is thought that the way the UK Acts were adopted in Swaziland was unnecessarily circuitous. One is compelled under the present regime to study the 1966 and the 1889 UK Acts *and* the modifications and adaptations to the former in the Swazi Act to understand the legal position in Swaziland. The UK Acts should have been copied with the necessary modifications or adaptations as Swazi laws if that was the intention.[38]

National court decisions: some key issues

The distinct nature of procedures

The recognition *and* enforcement of ICSID awards by execution are distinct but interrelated procedures.[39] In *Benvenuti and Bonfant SRL* v. *Congo*,[40] an applicant was granted *exequatur* by the *Tribunal de grande instance* of Paris subject to the condition that it would obtain prior authorisation from the court for any measures of execution or safeguarding measures in order to ensure the immunity of sovereign or public assets. The applicant objected to this condition and applied to the tribunal, which had made the order for its modification. The court held that it was not immediately possible to determine which assets or funds were immune from execution. In the absence of a prior enquiry, it was inappropriate to allow a situation to develop which might infringe the sovereignty of a foreign state by the imposition of a degree of constraint contrary to any notion of courtesy (comity) and international independence. The applicant appealed.[41]

[37] The latter Act implemented the ICSID Convention in the UK.

[38] It is well known that many Commonwealth countries refer to, or copy, UK legislative prototypes in their law reform and development. The point, however, is that the Swazi law in issue lacks ingenuity. The need for its re-examination is compelling with the enactment of the 1996 Arbitration Act in the UK with implications for the 1966 UK implementing Act. There is also a new Interpretation Act – of 1978 – in the UK. Tying a twentieth-century law to a nineteenth-century interpretation is most inappropriate in the twenty-first century.

[39] G. R. Delaume, 'Arbitration with Governments: "Domestic" v. "International"', *International Lawyer* 17, 1983, 687, 694–6.

[40] *Tribunal de grande instance*, Paris, 1 ICSID Reports 368.

[41] Court of Appeal of Paris, 1 ICSID Reports 369.

It was argued that part of the order under appeal made it practically impossible to enforce the award, that under Article 54(2) of the ICSID Convention[42] the judge at first instance could only ascertain the authenticity of the award but that he had confused two different stages, that relating to obtaining *exequatur* with that relating to actual execution.[43] Benvenuti and Bonfant contended that the judge at first instance should not have become involved in this second stage, to which the question of the immunity from execution of foreign states related. It requested the deletion of that part of the order.

The Court of Appeal allowed the appeal and amended the order of the first instance court, holding that:

- Article 54 laid down a simplified procedure for obtaining an exequatur for awards rendered within the framework of the Convention and limited the function of municipal courts to ensuring that the document before them was a copy of an award properly certified by the Secretary-General of ICSID;[44]
- Article 55 provided that nothing in Article 54 was to be construed as limiting the immunity from execution enjoyed by a foreign state. An order granting exequatur from an arbitral award did not however constitute a measure of execution but simply a preliminary measure prior to measures of execution;[45]
- the judge at first instance had therefore exceeded his competence under Article 54 by becoming involved in examining the question of immunity from execution of a foreign state, which was only relevant at the second stage, during actual execution of the award.[46]

But, in *Senegal* v. *SOABI*, the President of the Paris *Tribunal de grande instance* recognised and ordered, in accordance with Article 54, enforcement of the ICSID award rendered against Senegal in the *SOABI* arbitration.[47] However, the Paris Court of Appeal,[48] contrary to its decision in the *Benvenuti* case discussed above,[49] quashed the order recognising the award on the ground that recognition and enforcement of the award in France was contrary to international public policy because SOABI had not demonstrated that the enforcement would be made in such a way as not to conflict with the immunity from execution of Senegal.[50]

[42] Providing *inter alia* that a party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority, which shall have been designated for this purpose by that state, a copy of the award certified by the Secretary-General of ICSID. [43] 1 ICSID Reports 370. [44] *Ibid*. at p. 371.
[45] *Ibid*. [46] *Ibid*. at pp. 371–2. [47] For the award, see 2 ICSID Reports 164.
[48] Court of Appeal of Paris, *ibid*. at p. 337. [49] See pp. 378–9 above.
[50] 2 ICSID Reports 337, 340.

This decision attracted negative responses from scholars and practitioners. It was criticised as based on confusion between recognition of ICSID award and the immunity of a Contracting State from execution. What the Court of Appeal did was said to amount to a misunderstanding of the Convention.[51] The Court of Appeal's decision was eventually reversed by the *Cour de cassation*.[52] The latter court noted that the ICSID Convention established in Articles 53 and 54 an autonomous and simple system for the recognition and enforcement of awards which excluded the system provided for in the Code of Civil Procedure in relation to international arbitration.[53] It was acknowledged by the Court that 'a foreign state which has consented to arbitration under the ICSID Convention has thereby agreed that the award may be granted recognition (*exequatur*) which, as such, does not constitute a measure of execution that might raise issues pertaining to the immunity from execution of the state concerned'.[54]

The obligation under international law to recognise an ICSID award

According to Article 54(1) of the Convention:

> Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal court and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

From the opening words of the above provision that 'each Contracting State shall . . .', the obligation imposed extends to any Contracting State. The obligation is not dependent on the relevant Contracting State being a party to a dispute giving rise to an award or on the dispute involving one of its nationals.

In *LETCO* v. *Liberia*,[55] an ICSID award rendered against Liberia[56] was, on an *ex parte* motion, recognised and ordered to be enforced in the US. The District Court ordered that the award be filed 'in the same manner and with the same force and effect as if it were a final judgment of this Court'.[57] Subsequently, a writ of execution was issued, but Liberia moved

[51] E. Gaillard, 'The Enforcement of ICSID Awards in France: The Decision of the Paris Court of Appeal in the *SOABI* Case', ICSID Rev-FILJ 5, 1990, 69; G. R. Delaume, 'Court of Cassation Decision in *SOABI (SEUTIN)* v. *Senegal*, June 11, 1991', 30 ILM 1167.

[52] Decision of the *Cour de cassation*, 2 ICSID Reports 341; Delaume, *ibid*. at p. 1169.

[53] *Ibid*. at p. 341; Delaume, *ibid*. at p. 1170. [54] *Ibid*.; Delaume, *ibid*. at p. 1169.

[55] US District Court, SDNY, 2 ICSID Reports 383, per District Judge Keenan.

[56] For the award, see *ibid*. at p. 346. [57] *LETCO* case, *ibid*. at p. 384.

to vacate the judgment or, in the alternative, to vacate the execution on its property located in the US under the Foreign Sovereign Immunities Act (FSIA). It argued that the execution would violate its immunity from execution, which was not waived by agreeing to arbitrate. LETCO opposed Liberia's motion.[58]

The court observed that, under Article 54, the US as a signatory Contracting State must carry out the treaty obligation of recognising and enforcing the pecuniary obligations of the award as if it were a final judgment of a court of the US. It was noted that what called for determination was whether or not Liberia expressly or impliedly waived its immunity and whether the property, which LETCO sought to execute the judgment upon, was used for a commercial activity in the US.[59] The court ruled that it had subject-matter jurisdiction to direct the entry of judgment against Liberia in terms of the award since the latter, as a Contracting State, waived its immunity from the enforcement:

> Liberia, as a signatory [Party] to the [ICSID] Convention, waived its sovereign immunity in the United States with respect to the enforcement [recognition] of any arbitration award entered pursuant to the Convention. When it entered into the concession contract with LETCO, with its specific provision that any dispute thereunder be settled by arbitration under the rules of ICSID and its enforcement provision thereunder, it invoked the provision contained in Article 54 of the Convention which requires enforcement of such an award by Contracting States. That action, and reading the treaty as a whole, leaves little doubt that the signatories [Parties] to the Convention intended that awards made pursuant to its provisions be given full faith and credit in their respective jurisdictions subject to such rights as are reserved by signatories [Parties] thereunder.[60]

The defence of sovereign immunity from execution preserved

However, the treaty obligation in Article 54(1) is neither binding on non-Contracting States to the Convention nor on their courts. Moreover, the recognition of an ICSID award and its execution are distinct. Whilst, under the Convention, there is no immunity from the former, the plea may avail a Contracting State during the latter.[61]

In relation to Contracting States, Article 54 is subject to Article 55, i.e. Article 54 operates subject to 'such rights as are reserved by signatories [Parties] thereunder'.[62] According to Article 55: 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State

[58] *LETCO* case, *ibid*. at p. 385, per District Judge Weinfield. [59] *Ibid*. at p. 387.
[60] *Ibid*. at pp. 387–8. [61] Delaume, 'Arbitration with Governments', 695.
[62] 2 ICSID Reports pp. 387–8.

relating to immunity of that State or any foreign State from execution'.[63] An ICSID award may be recognised and an order for its enforcement entered in terms of the award but its *execution* (say, by attachment against the property or assets of a state award debtor) is subject to any defence of sovereign immunity from execution in a Contracting State wherein the execution is sought.

In the *LETCO* case,[64] Liberia's motion to vacate the judgment granting recognition and enforcement was denied; but its motion to vacate execution against its property or assets (tonnage and registration fees and taxes collected by the agent of Liberia) in the US was granted, due to a plea of sovereign immunity from execution. Liberia argued that the assets were sovereign and not commercial and thereby immune from execution; they were not property used for commercial activity.[65] LETCO admitted that the registry fees and tonnage taxes were moneys due to Liberia but asserted that a portion of that amount was retained for operating and administrative expenses as well as profits by the US nationals who rendered services in collecting the funds. The latter portion was said to reflect commercial activities within the FSIA.[66] The judge was unpersuaded by this seemingly ingenious contention.[67] Liberia's motion to vacate execution upon such funds was thus granted but not against any properties [of Liberia], which are used for commercial activities.[68]

Further to the decisions of the District Courts of the Southern District of New York, another suit was brought in the US District of Columbia by LETCO with respect to the ICSID award.[69] That attempt to execute the

[63] Also, Article 54(3) provides that the execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought. Delaume pointed out that, because the Convention surrenders measures of execution to domestic rules of immunity, it would be possible that, just like other arbitral awards, ICSID awards would be subject to different treatment in Contracting States: Delaume, 'Arbitration with Governments', 696.

[64] *LETCO* case, 2 ICSID Reports 385.

[65] *Ibid*. at p. 388.

[66] LETCO conceded that, if, instead of employing US corporations or citizens to collect the fees and taxes, Liberia had engaged personnel of the Liberian Consulate in the US, taxes so collected would be beyond the reach of execution: *LETCO* case, *ibid*. at pp. 388–9.

[67] *Ibid*. at p. 389.

[68] *Ibid*. In France, the *Cour de cassation* decided in *Eurodif Corp.* v. *Iran*, 23 ILM 1062, 1069–70, that a state is not entitled to sovereign immunity from execution when the activity from which the claim arises is of an economic or commercial nature and the assets subject to execution relate to that activity. See also *Procureur de la Republique* v. *SA Ipitrade International*, *Tribunal de grande instance* of Paris, 65 ILR 75; *Procureur de la Republique and Others* v. *Liamco and Others*, Tribunal de grande instance of Paris, *ibid*. at p. 78; *Philippine Embassy Bank Account* case, *ibid*. at p. 146 (Germany); *Alcom Ltd* v. *Colombia and Others* [1984] 1 AC 580 (HL); *Kramer Italo Ltd* v. *Belgium*, 103 ILR 299 (Nigeria).

[69] *LETCO* case, US District Court, DC, 2 ICSID Reports 390, per District Judge Harris.

award also failed due to another successful plea of sovereign immunity from execution by Liberia founded on a different ground. LETCO moved to attach the bank accounts used for the functioning of the Liberian Embassy and the Central Bank.[70] Liberia applied for a restraining order and an injunction.

The court held that the bank accounts of the Embassy (wherever they may be in the US) used or intended to be used for the purposes of the diplomatic mission were immune from attachment under the 1961 Vienna Convention on Diplomatic Immunity (VCDI). For otherwise, held the court, it would hamper the efficient functioning of the mission, in breach of the US's treaty obligations. The court also noted that, under the FSIA, no exception applied to deprive the bank accounts of their grant of immunity. In this connection, it was argued by LETCO that a portion of the bank accounts was being used for commercial activity in the US and thus not entitled to immunity. The court, after reviewing the legislative history of the FSIA, noted that the concept of 'commercial activity' should be defined narrowly because 'sovereign immunity remains the rule rather than the exception . . . and because courts should be cautious when addressing areas that affect the affairs of foreign governments'.[71] The Embassy accounts in issue were earmarked for the performance of public or governmental functions unique to an embassy such as payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with the diplomatic and consular activities necessary to the proper functioning of the Embassy. It was 'presumed' by the court that some portion of the funds in the accounts might be used for commercial activities in connection with the running of the Embassy such as the purchase of goods or services from private entities and, accordingly, ought not to be immune from attachment.[72] Nevertheless, the court declined to order, on LETCO's contention, that if any portion of a bank account was being used for a commercial activity then the entire account lost immunity. On the contrary, said the court, following the narrow definition of 'commercial activity', funds used for commercial activities which are 'incidental' or 'auxiliary' would not cause the entire bank account to lose its mantle of sovereign immunity:[73]

> Indeed, a diplomatic mission would undergo a severe hardship if a civil judgment creditor were permitted to freeze bank accounts used for the purposes of a

[70] During the hearing, *LETCO* conceded that the bank accounts of the Central Bank of Liberia were immune from attachment under the FSIA. Thus, only the attachment of the Embassy accounts was contested: *LETCO* case, *ibid*. at p. 393 n. 5.

[71] *Ibid*. at pp. 393–5. [72] *Ibid*. at p. 395. [73] *Ibid*. at p. 395.

diplomatic mission for an indefinite period of time until exhaustive discovery has taken place to determine the precise portion of the bank account used for commercial activities [citing Articles 24, 29 and 31(c)(2) of the VCDI]. Such a scenario would practically gut one of the purposes behind immunity: to afford deference to the governmental affairs of foreign states. In addition, requiring diplomats to segregate funds of a public character from commercial activity funds to avoid the risk of attachment is not the solution. Courts, let alone diplomats, have difficulties determining whether funds are public or commercial in nature.[74]

Pursuit of the assets of associated entities

The jurisdiction of ICSID extends to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that state), and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre.[75] As it relates to a designated constituent subdivision or agency of a Contracting State, its consent to ICSID's jurisdiction will require the approval of that state unless the latter notifies ICSID that no such approval is required.[76] An award rendered against the subdivision or agency following its participation in ICSID proceeding is not one against the Contracting State.[77]

In one case an award creditor, seeking to execute an ICSID arbitral award against an African state, pursued an entity or agency connected with that state although the pursued entity was neither a party to the dispute nor to the ICSID award. In *Benvenuti & Bonfant SRL* v. *Banque Commerciale Congolaise (BCC)*,[78] the issue was whether a state bank was liable for an award rendered against the state. Benvenuti and Bonfant sought enforcement, not directly against the assets or property of Congo (the direct loser in the ICSID arbitration),[79] but against a Congolese bank which was said to be controlled by Congo. The Court of Appeal of Paris granted Benvenuti and Bonfant unconditional *exequatur* in 1981.[80] In order to obtain payment of the award, Benvenuti and Bonfant obtained an attachment order over funds held by a French bank on behalf of BCC. In an unreported judgment of 12 March 1985, the Court of Appeal held that the attachment was void.[81]

Benvenuti and Bonfant then appealed, arguing that the court was wrong to have held that the Congolese bank would not be liable for the payment of the award since it had been made against Congo, of which BCC

[74] *Ibid*. at pp. 395–6. [75] See p. 235 above. [76] See pp. 268–71 above. [77] See p. 325 above.

[78] France, *Cours de Cassation*, 1 ICSID Reports 373–5. The Bank was not a subdivision or agency of the award debtor. [79] For the award, see 1 ICSID Reports 330.

[80] *Ibid*. at p. 369. [81] Noted in *ibid*. at p. 374.

was not an emanation. Benvenuti and Bonfant further argued that foreign state-owned bodies, even if they were endowed with a legal personality distinct from that of the state upon which they depended, were to be assimilated to those states. Such bodies were to be treated as part of the foreign state concerned whenever the foreign state in question controls them. Consequently, by failing to examine whether Congo controlled BCC, the judgment under appeal lacked a proper legal basis.

The appeal was dismissed. It was held that the control exercised by the state was insufficient to enable entities dependent on it to be considered as its emanations and, therefore, to be held liable for its debts where those entities and their assets were distinct from the state.[82] Congo subsequently satisfied the award debt.[83]

Immunity from execution under Article 55 of the Convention relates to 'immunity of that State or of any foreign State from execution' in accordance with the law in force in any Contracting State. An implication of the decisions earlier considered would be that, in executing an ICSID award, a Contracting State is distinct from its designated and authorised agency unless the latter is under the extensive control of the former, or there would otherwise be an abuse of the corporate form, or injustice or fraud would result from insulating the property of the agency from attachment. Thus Article 55 covers only the immunity from execution of the state and of an extensively controlled agency where the acts of the latter were a manifestation of the former.[84]

Under the Convention, submission to the jurisdiction of ICSID *is distinct* from measures of recognition and execution of a resultant award.[85]

[82] Citing *Hercarire International Inc.* v. *Argentina*, 821 F 2d 559 (11th Cir. 1987); *De Letelier* v. *Republic of Chile*, 748 F 2d 790, 794 (2nd Cir. 1984) cert. denied 471 US 1125 (1985), that the instrumentality of a foreign state enjoys a presumption of separate juridical existence which may be overcome upon showing that there has been some abuse of corporate form. The fact that the state owns 100 per cent of the shares in the corporate entity was insufficient to overcome the presumption in the absence of a showing that the state exercised such extensive control over the instrumentality as to warrant findings of principal–agent relationships or if fraud or injustice would result from insulating the property of the entity from attachment in aid of execution.

[83] Schreuer, 'Article 54', 92, para. 52.

[84] Cf.: 'The immunities of the sovereign and of the entity are of an entirely different character': *Kuwait Airways Corp.* v. *Iraqi Airways Co.* [1995] 1 WLR 1147, 1171–2, per Lord Mustill.

[85] Cf. *Alcom Ltd* v. *Republic of Colombia* [1984] 1 AC 580, 598; Vienna Convention on Diplomatic Relations 1961, Article 32(4); Draft Articles on Jurisdictional Immunities of States and their Properties, 30 ILM 1554–65, Articles 7(1) and 18(2). For a rather controversial view that a state which has consented to arbitration should be taken to have waived its immunity from jurisdiction and from execution, see K. I. Vibhute,

Waiver of immunity of a Contracting State from jurisdiction does not arise under the ICSID Convention, as it is implicit, if not explicit, in Article 25(1) that written consent once given by a party may not be withdrawn unilaterally.[86] In relation to immunity from execution, Article 55 of the Convention prevails.

Non-utilisation of African courts

A few observations will be appropriate from the above review of cases dealing with the recognition and enforcement of ICSID awards. First, all the applications discussed above were made against African states generally as respondents in ICSID arbitration. Secondly, none of the applications was made before any court in Africa. Accordingly, African courts have not yet been afforded the opportunity to contribute to the emerging jurisprudence in this area. The greatest contribution of African states to this aspect of the Convention is, ironically, in resisting, in other jurisdictions, the recognition, enforcement and execution of ICSID awards rendered against them. In so doing and through the defence advanced in such proceedings, important aspects of the ICSID Convention are much better understood. Some problems and traps in the ICSID regime are being exposed, making a call for an amending Protocol to the Convention appropriate.

National proceedings for the recognition and enforcement of ICSID awards had taken place only in two ICSID Contracting States (the US and France), out of 133 Contracting States (as of 21 September 2000). It has been pointed out that foreign investors have more confidence in and prefer courts in Europe and the US for the enforcement of their awards, rather than African courts, as the latter could be under political pressure by African governments.[87]

That assertion may well be so. However, in more than one respect, this argument overlooks decisive points in issue.[88] An award creditor has the autonomy to decide where to look for the award debtor's assets. This decision will depend on a number of other largely variable factors, including

Footnote 85 (*cont.*)
'Waiver of State Immunity by an Agreement to Arbitrate and International Commercial Arbitration', JBL, November 1998, 550. For a more accepted view, i.e. that lack of immunity from suit does not necessarily entail lack of immunity from execution, see G. M. Badr, *State Immunity: An Analytical and Prognostic View* (The Hague: Martinus Nijhoff, 1984), pp. 107–51; Schreuer, 'Article 55', 125, para. 20; H. Fox, 'States and the Undertaking to Arbitrate', ICLQ 37, 1988, 1.

[86] Cf. Draft Articles on Jurisdictional Immunities, *ibid*. at p. 1567, Articles 7(1) and 17.

[87] Agyemang, 'African Courts', 35–6.

[88] See pp. 35–41 above.

a perception of the lack of independence or impartiality in the potentially competent enforcing courts. An assertion such as the one under review should have been based on more solid grounds. A better explanation for the assertion could be that African states have valuable and convertible assets outside Africa and mainly in the home states of many foreign investors. It is anecdotal and would be self-defeating if assets were, in some cases, in Africa. Also, African states are rarely award creditors; and, in the rare situations when they are award (or judgment) creditors, those states have also been led by other considerations to pursue their debtors within and outside Africa. More fundamentally, according to Armfelt, international arbitration is premised on a distrust of developing countries and their courts.[89] Unfortunately, these considerations were not addressed before a firm even if hasty conclusion was reached as to the attitude of Western award creditors when they wish to enforce their awards against African governmental parties. Nevertheless, assuming that an award debtor's assets are in Africa only, is the suggestion that an award creditor would abandon its credit because it was afraid about how African courts will decide really a serious suggestion?

A related point was also made that '[s]ome Western courts may also be unsuitable, at least from the point of view of host African states, for enforcing awards because they could be overly sympathetic to the claims of award creditors'.[90] That might as well constitute a cogent explanation for the preference for Western courts by Western foreign award creditors to enforce their awards. But the point that those courts are 'overly sympathetic' to claims of (Western) award creditors would seem uncertain and, in most cases, unsupported.[91]

[89] Armfelt, 'Avoiding the Arbitration Trap', *Financial Times* (London), 27 October 1992, p. 20.

[90] Agyemang, 'African Courts', 42.

[91] For judgments of Western courts denying enforcement to awards rendered in favour of Western investors, see *Libya* v. *Liamco*, decision of Swiss Federal Supreme Court, 62 ILR 228; *Liamco* v. *Libya*, US District Court, DC, *ibid*. at p. 220; *Procureur de la Republique* v. *Société Liamco*, decision of *Tribunal de grande instance*, Paris, 65 ILR 78; *Egypt* v. *SPP et al.*, Court of Appeal of Paris, 23 ILM 1048, affirmed by French Supreme Court in *SPP et al.* v. *Egypt*, 26 ILM 1004; *AOI et al.* v. *Westland Helicopter et al.*, judgments, respectively, of Court of Justice of Geneva and of the Swiss Federal Supreme Court, 80 ILR 622–666; *LETCO* cases, US District Courts (SDNY and DC), 2 ICSID Reports pp. 385 and 390, respectively; *Shaheen Natural Resources Inc.* v. *Sonatrach*, decision of a New York court, 10 YBCA 540. However, see *Liamco* v. *Libya*, decision of Svea Court of Appeals, Sweden, 62 ILR 225, recognition and enforcement of award granted on behalf of an investor but coupled with Dissenting Opinions; *SPP* v. *Egypt*, District Court of Amsterdam, 24 ILM 1040, leave to enforce an award granted at the request of SPP. The Dutch Court held, contrary to the decision of the French courts, that Egypt was bound by the arbitration agreement. In *Chromalloy Aeroservices* case, US District Court, DC, 35 ILM 1359, an arbitral award made

Solutions to the immunity from execution problem

Waiver of immunity from execution in an investment contract

In view of the problem of sovereign immunity from execution when pleaded by African states award debtors and the near impossibility of realising ICSID awards through the plain provisions of the Convention, attempts have been made and systematised to reduce the perceived negative effects of Article 55. It has been suggested that foreign investors should insist on procuring express waivers of immunity from execution in their contracts with governments.[92] Clause 15 of the ICSID Model Clauses, which is a sample of such waiver clause, provides: 'The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement'.[93]

Article 55, which is being undermined, is part of a multilateral treaty. It is arguable that the immunity of Contracting States from execution in relation to ICSID arbitral awards cannot be waived in a contract between a Contracting State and a private party except to the extent permissible under the relevant law and procedure of a Contracting State.[94] In relation to the execution of an ICSID award against a Contracting State, the

Footnote 91 (*cont.*)
in Egypt against the latter but subsequently annulled by a Cairo court, was, controversially, recognised and enforced in the US (and subsequently in France) on behalf of a US company. However, in *Baker Marine* v. *Chevron*, 14 Int Arb Rep (August 1999), D-1, awards made in Nigeria on behalf of Nigerian and American companies were set aside in Nigeria and denied enforcement in the US. An equivalent result was achieved in *Spier* v. *Calzaturificio Tecnica SpA*, 71 F Supp 2d 279 (SDNY 1999) with respect to an award made and annulled in Italy.

[92] Van den Berg, 'Recent Problems', 451; G. R. Delaume, 'Contractual Waivers of Sovereign Immunity: Some Practical Considerations', ICSID Rev-FILJ 5, 1990, 232, 253. Article 1(2) of the PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State provides: 'Agreement by a party to arbitration under these Rules constitutes a waiver of any right to sovereign immunity from jurisdiction, in respect of the dispute in question, to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.' As earlier noted, immunity from jurisdiction does not constitute a problem in ICSID proceedings due to Article 25(1) and, to some extent, under Article 26 of the Convention.

[93] Doc. ICSID/5/Rev.2, 1 February 1993, updated to 1995.

[94] E.g. the UK State Immunities Act 1978, s. 13(3); the Singapore State Immunity Act 1979, s. 15(3); the Pakistani State Immunities Ordinance 1981, s. 14(3); the Canadian State Immunity Act 1982, ss. 10 and 11; the South African Foreign States Immunities Act 87 of 1981, s. 14(2). These laws and more are reprinted in Badr, *State Immunity*, Appendices. South Africa and Canada, although expected to, are yet to ratify the ICSID Convention.

validity and efficacy of the ICSID Model Clause and of any clause incorporating it or one similar to it can only be tested by the relevant law of a Contracting State.[95]

There is a fundamental question of international policy at issue, i.e. an investment contract between a state and a private party cannot *per se* provide for waiver or abridgment of any national law on sovereign immunity except to the extent allowed therein; nor can an investment contract abridge a treaty except to the extent therein permissible. A strategic advantage of the ICSID Convention is that in relation to its mandatory provisions, except to the extent allowed, Contracting States cannot unilaterally use their legislation to curtail or annul those provisions; all the less so can a contract between a private party (a non-party to the Convention) and a Contracting State.[96] The rules relating to immunity from *execution* with respect to a sovereign state or its property are in a potentially sensitive area. They raise questions referred to by the House of Lords as 'of outstanding legal importance not only nationally but also internationally', especially in the reciprocal relationship of sovereign states.[97] Those rules are, to some extent, necessary to maintain the balance of international comity, and to forestall, on a reciprocal basis, the impingement of essential community-based and diplomatic functions

[95] As Agyemang rightly observed: 'It could be argued that this defence [sovereign immunity from execution under the ICSID Convention] is a potential weakness in the ICSID enforcement machinery because, depending on the law of sovereign immunity of the forum of enforcement [execution], States can rely on it as a defence against the enforcement [execution] of an award': Agyemang, 'African Courts', 37. In the *LETCO* cases, 2 ICSID Reports 385 and 390, respectively, US courts relied on the relevant applicable US law on sovereign immunities to order the vacation of attachments issued in execution against assets of Liberia pursuant to an ICSID award. However, no commentator on those cases has yet attributed those decisions to any extraneous political considerations. Cf. Agyemang, *ibid*. at p. 38, for the contention that the above defence is a loophole 'which some African courts could, under pressure from African Governments, exploit to deny enforcement to [ICSID] awards'.

[96] A unilateral termination by a Contracting State of an investment agreement containing an ICSID arbitration clause would be futile to defeat the Centre's jurisdiction and a tribunal's competence under Article 25(1). Even when a Contracting State excludes the application of the Convention to territories for whose international relations that state is responsible or denounces the Convention, such 'shall not affect the rights or obligations under the Convention of that State or of any constituent subdivision or agencies or of any national of that State [or of another Contracting State or its nationals, subdivisions or agencies] arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depository [the World Bank]': ICSID Convention, Articles 70–73. An amendment to the Convention shall not operate to defeat rights and obligations arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment (Article 66(2)).

[97] *Alcom Ltd* v. *Colombia* [1984] 1 AC 580, 597, 605–6.

peculiar to sovereigns.[98] However, a private party award creditor against a state should also be furnished with the facilities to realise the fruits of its toil.[99]

More states becoming parties to the Convention or amending the Convention

The ends sought by the ICSID model waiver clause can efficiently be fulfilled:

1. by presenting persuasive arguments for Contracting States to enact laws compatible with the Convention yet favourable to the recognition and execution of ICSID awards in their territories (this being a treaty obligation on a state, albeit limited during execution); or by encouraging more States to ratify the Convention so that sufficient ground could be covered for an award's recognition and execution; or
2. by promoting a Protocol to the Convention or elaborating a specific regime which would facilitate the desired purpose of the easier recognition and execution of ICSID awards.[100]

Enforcing ICSID awards against a private party

Another potential weakness in the enforcement mechanism of the ICSID Convention is that it does not seem to contemplate that a private party may refuse to comply with an award that was rendered against it, if at all. Thus, the Convention does not expressly say what would happen in that event. During the consideration of the first draft of what was to become the ICSID Convention, an Executive Director of the World Bank observed that the General Counsel's draft on the enforcement of award was 'somewhat one-sided'.[101] He pointed out that, under the said draft, if an award was made against a state and the latter refused to comply with it, the national state of the private party would at the request of the latter be in a position to protect it diplomatically or to bring an international claim on its behalf. This provision was thought to be proper but unbalanced. It

[98] This partly explains why the ICSID Convention does not avail a private party with the defence of immunity from execution.

[99] It is significant that a non-commercial risk covered by the MIGA Convention is any repudiation or breach by the host government of a contract with the holder of a guarantee, when the decision of a judicial or arbitral forum resorted to by a guarantee holder cannot be enforced: MIGA Convention, 24 ILM 1598, Article 11(a)(iii)(c). Like the ICSID Convention, only a very few African states are *not* parties to the MIGA Convention.

[100] Asouzu, 'African States and Enforcement of Awards', 45–6.

[101] *History of the Convention*, para. 31 (Doc. 13), *per* Mr Krishna Moorthi.

was therefore proposed that there should 'be a balancing provision that where an arbitral award was made in favour of a state, the state of which the individual party was a national must give its fellow state all possible assistance within the scope of its national law to carry out the award'.[102] The response to this particular issue appears not to have addressed its crux or proffered any innovative solution, despite an admission that the draft provision in issue 'was in fact an innovation'.[103] At best, the question was left open:

> Under international law it was generally understood that a State always has the right, and according to some, the duty, to press a claim for the protection of its nationals which it considered an essential interest. Section 5 [the draft provision in issue] excluded the exercise of this right, because the private individual would have direct access to an international body for the adjudication of his claim. Since the exclusion of the national State was based on the assumption that the other State would perform certain obligations, there would be no justification for the exclusion if the latter did not live up to its obligations. The counterpart, if a private party did not comply with its obligations, would be that the State which had obtained an award in its favour could proceed to enforce it against the private party. If the private party owned property within the jurisdiction of the State which had obtained an award in its favour, the State could enforce the award in the courts under its own law. If the private party had no assets or insufficient assets in the jurisdiction of the winning State, the question would be whether the award could be readily enforced in the courts of the private party's home State, short of re-litigating the claim. Or the private party's assets might lie neither in its own country nor in the host state, but in a third country.[104]

As the Convention grants a non-state party direct access to an international forum to contest and/or to press, in its own name, a claim by or against a sovereign state because the private party's national state is a contracting party, a logical and innovative solution could have been to implicate that state if the private party proves recalcitrant or fails to perform its own obligations under the facilities furnished. An African Contracting State, host to an investment, would reject the assumption of obligation under the Convention towards an investor who is from a non-Contracting State or for investment made in or controlled from a non-Contracting State which, as such, is not bound by the Convention. The contrary will be the case if the investor is from, or the investment was made in, or controlled from, a state that is bound by the Convention.[105]

[102] *Ibid.* [103] *Ibid.*, para. 37. [104] *Ibid.*, *per* Mr Broches.

[105] This statement is made in light of contentions by Senegal and holdings of the majority in the *SOABI* award: see pp. 283–5.

Should not the Contracting State of which the private party is a national be held vicariously responsible in such an event, since another Contracting State's refusal to abide by and comply with an award reactivates the rights of the national state of the award creditor to protect it against the non-complying Contracting State?[106] Or is it unforeseeable that an award may be rendered against a private party which then proves unwilling to comply voluntarily?[107] Nevertheless, it has ingeniously been argued that:

> On recognition, an [ICSID] award has the same force as a final judgment of a court in a Contracting State [Article 54(1) of the Convention]. As such it can readily be enforced against an investor, if the investor refuses to comply with the terms of the award. So far, this has not arisen. The situation might be different if the State party to the dispute refused to comply with the award. The reason is that the Convention does not derogate from the rules of immunity from execution that may prevail in a Contracting State [Article 55]. Under the circumstance, it is possible that an award could be executed against the assets of the State (or of one of its subdivisions or agencies) party to the dispute in certain Contracting States and not in other Contracting States.[108]

The above position, it is respectfully suggested, neither detracts from nor answers the misgivings earlier expressed. Certainly, the ICSID Convention neither binds nor applies in non-Contracting States; nor does it apply to investments made in, or controlled from, such a state.[109] Then, what would happen if, for example, a national of a Contracting State who is an award debtor shifts its potentially attachable assets to a non-Contracting State 'in a twinkle of a telex' and before an ICSID award could be executed? Does the fact that this has not yet arisen in practice mean that it might not or could not arise?

During the preliminary discussions among the Executive Directors, the Director for the Spanish Government pointed out that: 'The problems involved in the enforcement of awards needed to be clarified; and the

[106] See pp. 394–8 below.

[107] In the view of the Executive Director for the Nordic Governments (Miss Brun), the draft Convention established equality between the parties in regard to the procedures leading up to an arbitral award but was less effective in doing so in regard to the recognition and execution of such an award. A more adequate measure of equality in this respect was called for: *History of the Convention*, para. 19 (Doc. 14). This might be viewed in light of the plea of immunity from execution available only to Contracting States.

[108] I. F. I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes', ICSID Rev-FILJ 1, 1986, 1, 9 (updated to January 1992 as an ICSID publication).

[109] Due to the special nature of the ICSID Convention, the New York Convention is inappropriate for the recognition and enforcement of ICSID awards.

countries parties to the agreement ought to establish internal rules of law to enforce awards within [their] territories. Further attention needed to be given also to the question of enforcement [of arbitral awards] outside the territories of the Contracting States'.[110] The General Counsel's suggestion was to achieve a balance as between the Contracting State which might lose, and the Contracting State which might win.[111] For this, it was further suggested that efforts should be made to ensure 'that the awards of a tribunal set up under this Convention would be enforceable in all member States'.[112] This could be achieved by providing for an undertaking by states to give effect to such an award, either by the Convention imposing an obligation on member states to have their national legislation modified to carry out such an undertaking or by the host state refusing to sign an arbitration agreement with an investor under whose national law an award in favour of the host government could not be enforced.[113]

These suggestions are of little help to the problem, as they are beside the point. The crux of the problem is not simply whether an award can be enforced in a private party's national state. This is certainly possible since such a state is *and* must be a party to the Convention for the private party to benefit from its provision in the first place. A more relevant question is whether an ICSID award can be rendered against a private party and, if so, what are the means of enforcing that award when the assets of that award debtor are outside a Contracting State, or where the assets in a Contracting State are insufficient to satisfy the award or have been transferred to a third party.[114]

Many disputes under the Convention involved African states and transnational corporations (TNCs).[115] The structures and strategies of TNCs

[110] *History of the Convention*, para. 2(e) (Doc. 5). On the *Mareva* (freezing) injunction meant to restrain a defendant from removing assets out of jurisdiction pending trial, see L. Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford: Clarendon Press, 1994), pp. 15, 189–225; S. J. Bushell, 'Freezing Assets', IBL 28, January 2000, 3. However, the nature and reach of this remedy may not have been fully worked out in some jurisdictions. And, like most equitable remedies, it is discretionary. Most importantly, consent to arbitration under the ICSID Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy (Article 26).

[111] *History of the Convention*, para. 37 (Doc. 13). [112] *Ibid*. [113] *Ibid*.

[114] Note Schreuer's suggestion that exceptionally the NYC may be invoked to enforce an ICSID award in a non-Contracting State to the ICSID Convention which is a party to the NYC. Subject to cautions earlier indicated (see p. 368, note 1), this may particularly be so as under the NYC – unlike under the ICSID Convention – nationalities of parties to arbitration are irrelevant for former's applicability.

[115] The only exceptions so far when disputes were between natural persons and African states were in *Ghaith R Pharaon* v. *Tunisia* (Case No. ARB/86/1) and in *Antoine Goetz and Others* v. *Burundi* (Case ARB/95/3).

ought to have compelled the inclusion of some rules, *ex abundanti cautela*, covering the contingencies referred to above. The business and organisational structures of the TNC informed the innovative provisions of the Convention by stretching ('developing') international law.[116] No such innovation was exercised, despite arguments for its exercise, to include express provisions for the enforcement and execution of awards against private business organisations in the circumstances referred to above. Thus, contrary to the assurances that 'the Convention is an extremely well balanced instrument', the dominant, if not the exclusive, 'assumption [is] that the Convention is to be a tool in the hands of the [foreign] investor against host State' as the investor 'is in many cases much more vulnerable than the host State'.[117]

Sanctions for non-compliance with ICSID awards

The Preamble to the ICSID Convention recognises that mutual consent by the parties to submit investment disputes to conciliation or to arbitration through the facilities of the Convention constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators and that any arbitral award be complied with.[118] There are legal and extra-legal sanctions for non-compliance by a party with a resultant ICSID award.[119]

Article 27

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under the Convention unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute (Article 27). The latter complements Article 26, which provides for the *prima facie* exclusivity of consent to ICSID arbitration.[120] Both provisions are pertinent to ICSID arbitration (not conciliation), and establish

[116] E.g. Article 25(2)(b) on the nationality of a locally incorporated subsidiary of a parent company. This provision was further extended in the *SOABI* award, thereby exposing the liability of an African Contracting State for an investment controlled from a non-Contracting State by nationals of Contracting States: see pp. 283–93. As was cautioned during the drafting of the Convention: 'the Convention should not stretch international law too far in order to make things easier for the investor': *History of the Convention*, p. 256, *per* Mr Elias (Nigeria).

[117] Cf. Vuylsteke, 'Investment Protection', 357.

[118] Preamble to the Convention, para. 7.

[119] Parties to conciliation proceedings are only required to give their most serious consideration to the recommendations of the conciliation commission (Article 34(1)).

[120] See p. 317, note 48 above.

and protect its self-contained, delocalised and exclusive nature as well as its effectiveness and neutrality.[121] Thus, unless otherwise stated (e.g. by a Contracting State insisting on the exhaustion of local remedies), valid consent to arbitration under the Convention excludes national and international remedies that might be open to the disputing parties, including arbitration under any other system or regime. And, under Article 27, the inter-state remedies of diplomatic protection and international claim available to Contracting States are mandatorily excluded once there is a valid consent to use arbitration – unless there is a failure by a Contracting State to comply with an award rendered against it in the arbitration with a national of another Contracting State.

The failure by a Contracting State to abide by and comply with an arbitral award rendered against it in an ICSID arbitration (which is a breach of a distinct international obligation under Article 53(1)) will reactivate the international remedies of diplomatic protection and international claim belonging to and exercisable by the Contracting State of the private party's nationality which were suspended by granting direct access to ICSID arbitration (also an international remedy) for the private party.[122] On the other hand, 'Any solicitation of diplomatic protection prior to the non-performance of an award, by an investor who has consented to ICSID arbitration, is clearly contrary to the spirit of the Convention. It is also a violation of Art. 26, which excludes any other remedy where consent to arbitration has been given.'[123]

Articles 53 and 54

According to Article 53(1) of the Convention, an ICSID award is binding on the parties and is not subject to appeal or any remedy except those provided for in the Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the Convention.[124] Article 53(1) could be read to be applicable to any 'party' – whether a Contracting State (or its duly

[121] Schreuer, 'Article 25', 205.

[122] A Contracting State may require the exhaustion of the local remedies available under its municipal law as a condition of its consent to ICSID arbitration (Article 26). This rule of admissibility is consistent with general international law. If local remedies are not required to be exhausted, e.g. because there was a direct injury caused by one state to another by the violation of its obligation under the ICSID Convention, or because the rule was excluded in an inter-state agreement (the *ELSI* case, ICJ Reports 1989, p. 15), or if local remedies are unavailable or are ineffective, or if there is a denial of justice in the course of exhausting the available local remedies, resort can be had to an international remedy.

[123] Schreuer, *ibid*. at p. 209.

[124] Schreuer, 'Article 53', 48–70.

designated and authorised subdivision or agency) or a private party national of another Contracting State.[125] For these parties, an ICSID award is binding, final and subject only to the Convention's self-contained and post-award remedies.[126] The nature of the sanction which a violation of Article 53(1) would give rise to, suggests that the provision is also relevant to a Contracting State when there is a default (whether by that Contracting State or its subdivision or agency) by not abiding by and complying with an ICSID award: for the Contracting state party to an arbitration, non-compliance with an ICSID award rendered against it amounts to a breach of a treaty obligation; and if the award was rendered against its designated and authorised subdivision or agency, the Contracting State has to ensure compliance at the expense of engaging its international responsibility under the Convention.[127]

Since failure to abide by and comply with an arbitral award by a Contracting State is a breach of, and will revive, the international remedies under Article 27, a Contracting State whose national is an unsatisfied award creditor could interpose diplomatically or bring an international claim before the ICJ against the defaulting Contracting State under Article 64 of the Convention or under any other agreed inter-state forum.[128]

Apart from the Article 27 situation *per se*, since the obligation to abide by and comply with the terms of an ICSID award is a treaty provision,[129] non-compliance *per se* constitutes sufficient basis for the jurisdiction of the ICJ with respect to Contracting States that recognise, in advance, the compulsory jurisdiction of the Court.[130] Article 36(2) of the Statute of the ICJ provides that state parties may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation; or
(d) the nature or extent of the reparation to be made for the breach of an international obligation.[131]

[125] For the meaning of 'party' or 'parties' in the ICSID Convention, see p. 273, note 37.
[126] See p. 93 above.
[127] *MINE* v. *Guinea*, 4 ICSID Reports 115–16, para. 25; A. R. Parra, 'The Rights and Duties of ICSID Arbitrators', *News from ICSID*, 1996, No. 1, 4.
[128] See pp. 238–9 above; Schreuer, 'Articles 26 and 27', 222.
[129] ICSID Convention, Preamble and Article 53(1).
[130] Broches, 'ICSID Convention', 700, para. 217. [131] See pp. 237–9 above.

It was once observed that reliance upon a Contracting State's immunity from execution would be contrary to its obligation under the Convention to comply with the award and would expose that state to various sanctions set forth in the Convention including the non-legal sanctions considered below.[132] Probably due to the *LETCO* cases,[133] the above paragraph in Shihata's 1986 paper was slightly rephrased in the 1992 version:

> However, it should be recalled that failure by a Contracting State to honor an ICSID award would be contrary to its obligation under the ICSID Convention to comply with the award and would expose that State to various sanctions.[134]

Subsequently, Shihata elaborated:

> Execution of the award is, however, governed by the law of the enforcement forum, including its rules on sovereign immunity from execution. But if a State fails to honor an award rendered against it the State will be in violation of its treaty obligation under the Convention to comply with the award; the right of espousal of the other party's home State, previously suspended under the Convention, will revive; and the defaulting State will find itself exposed to the possibility of proceedings against it in the International Court of Justice under Article 64 of the Convention.[135]

The above statement by Shihata is correct in so far as the 'failure to honor' or 'to comply' with ICSID award was not as a result of a successful plea of sovereign immunity from execution,[136] or due to any applicable law of a Contracting State (as preserved by Articles 55 and 54(3) of the ICSID Convention),[137] or due to the application of other conventions that might be applicable.[138] As Schreuer observed:

[132] Shihata, 'Greater Depoliticization of Investment Disputes', 9–12; see pp. 399–401.

[133] See pp. 380–4 above.

[134] Shihata, 'Greater Depoliticization of Investment Disputes', 12.

[135] Shihata, 'Showcase on ICSID Arbitration', 4–5. A narrower and, arguably, incorrect view, was taken that: 'Because a state's entry of a plea of immunity from execution would expose that state to sanction pursuant to the ICSID Convention, ICSID arbitration is unique among all other forms of commercial and international arbitration and, therefore, is much more effective': MacKenzie, 'ICSID Arbitration as a Strategy for Levelling the Playing Field', 219 (footnote omitted). Equally in the latter category is Delaume's view: 'In particular, it is clear that if a Contracting state party to a dispute invoked immunity from execution, either in its own court or the courts of another contracting state, in order to frustrate enforcement of an award, that state would violate its obligation to comply with the award': Delaume, 'State Contracts and Transnational Arbitration', AJIL 75, 1981, 784, 818.

[136] As Liberia did in the *LETCO* cases pursuant to Article 55 of the ICSID Convention.

[137] E.g. the UK State Immunity Act 1978; the US FSIA 1976 as amended; the Australian States Immunities Act 1985, etc.

[138] E.g. the Vienna Convention on Diplomatic Relations invoked in one of the *LETCO* cases, 3 ICSID Reports 390.

A successful invocation of State immunity does not alter the fact that non-compliance with an award is a violation of the Convention. State immunity is a procedural bar to measures of execution against a recalcitrant party. It does not affect in any matter the award debtor's obligation under Art. 53 to abide by and comply with the award (History, Vol. II, p. 763). Refusal to comply with the award and reliance on State immunity leads to the revival of the right to diplomatic protection under Art. 27(1) and may lead to the submission of the dispute to the International Court of Justice in accordance with Art. 64.[139]

This certainly must be equally correct, as a Contracting State award debtor may, depending on the circumstances, successfully plead immunity from execution and still abide by and comply with ICSID award.

By contrast, if an investor in an ICSID proceeding ever becomes the award debtor and is unable to comply with the award, the situation will be 'different in the sense that, not being a party to the Convention, his obligation cannot be implemented on the public international level but calls for action on the municipal level which is provided by Art. 54'.[140] The latter provision, it must be recalled, deals with the obligation of Contracting States to recognise and enforce ICSID awards.[141] Article 54 can be invoked by or against the investor or the state party to ICSID arbitration if and when an award is made against that party and it refuses to comply with it.

The nature of some sanctions for non-compliance with an ICSID arbitral award seems not to contemplate that a private party will be exposed to them, at least as regards an international claim before the ICJ, since the latter is open only to states in contentious proceedings. Because it is a non-party to the ICSID Convention, a national of a Contracting State is also third party to the Convention. It has only a procedural right to invoke the Convention in its favour but no substantive obligations under it, unlike a Contracting State with rights and obligations under the Convention.[142] The fact, nevertheless, is that it seems not to have been contemplated – and the Convention seems to have assumed – that an ICSID arbitral award will not be rendered against a private party and that, even when it is so rendered, the private party will, in good faith, voluntarily comply with the award. The only means under the Convention for realising an arbitral award against a recalcitrant private party award debtor, if at all, is through a Contracting State's court subject to the identified pitfall.[143]

[139] Schreuer, 'Article 55', 121, para. 7. [140] Broches, 'ICSID Convention', 700, para. 217.
[141] See pp. 380–1 above. [142] See pp. 401–2 below. [143] See pp. 390–4 above.

Non-legal sanctions

Unlike the legal and extra-legal sanctions, the non-legal sanctions for non-compliance with ICSID arbitral awards are not stipulated in the Convention. However, in relation to a Contracting State's refusal to comply with an ICSID award, those sanctions exist in the deprivation of credibility in the international business community for the non-complying state.[144] Redfern and Hunter also observed:

> The most powerful pressure that may be brought to bear on a party who fails or refuses to perform an award involves sanctions of a financial nature. If a continuing trade relationship exists between the parties, it may be in the interests of the loser to perform the award, since by failing to do so he risks losing further business with the winner. In such a case the successful party will quickly make this clear to the other party. In ICSID arbitration, *a losing party which is a State may fear not being able to obtain further loans from the World Bank*. Similarly, in the construction field, a State which gains a reputation for permitting its ministries or agencies to ignore awards unjustifiably, risks a refusal by reputable international contractors to tender for projects within its territory.[145]

Pragmatic as they may appear, the impact of the recommended sanctions, if applied to African countries, are obvious given their economic and financial states as well as their levels of development. As they relate to ICSID awards, the sanctions are profoundly inappropriate, exceedingly unnecessary and legally unjustifiable. They are also questionable in principle and by virtue of the nature and provisions of the ICSID Convention and its promotion by the World Bank. The World Bank and ICSID have to act within their respective constituent instruments. For the Bank, its Articles of Agreement entrust it with specific functions and responsibilities concerned with economic growth, reconstruction and development and prohibit it from interfering in the political affairs of member states or being influenced by political or non-economic considerations.[146]

[144] Shihata, 'Greater Depoliticization of Investment Disputes', 9; *MINE* v. *Guinea*, 4 ICSID Reports 115–16.

[145] Redfern and Hunter, *International Arbitration* (2nd edn), p. 418 (emphasis added). The passage containing the above quotation has been redrafted to: 'Similarly, but less explicitly, debtor states that end up as losing parties in ICSID arbitrations may feel (rightly or wrongly) that refusal to perform an award voluntarily may adversely affect their credit worthiness at the World Bank': Redfern and Hunter, *International Arbitration* (3rd edn), p. 445.

[146] Article III, s. 5(b); Shihata, 'Environment, Economic Development and Human Rights: A Triangular Relationship', PASIL 82, 1988, 41, 42.

The ICSID Convention has a mechanism for the realisation of its arbitral awards.[147] Accordingly, less emphasis, if any, should be placed on use of force, self-help and economic and financial pressures as arbitral sanctions.[148] This is particularly so because of the Convention's peculiar nature and mission.[149] Such sanctions, it may be recalled, brought diplomatic protection into disrepute.[150] And the economic nationalism of the 1960s and a greater part of the 1970s had its roots in memories of past unfortunate events in international economic relations. Although those events belonged to an era of 'gunboat diplomacy', their recession cannot be taken for granted. Furthermore, as the Group of Eminent Persons cautioned:

> Trade or financial sanctions, particularly when applied by powerful countries against weaker ones, may prove effective in the short run, but will inevitably generate feelings of frustration and create unstable conditions for the future. In general, they should be ruled out. We strongly feel that in any case no attempts should be made to use international agencies as channels for exerting pressures.[151]

It would be rather more persuasive and efficient to present balanced and cogent arguments sufficient to make compliance with an arbitral award of a duly conducted arbitration based on a valid arbitration agreement the norm in disputes. This is especially so for ICSID awards.

On the other hand, it is regrettable that a state party to an arbitration, which was duly conducted and based on a valid arbitration agreement or consent, would decline to comply with its outcome or otherwise attempt to undermine the process before an award is made. There is little point belonging to, or remaining in, an international system (joined with a view to some perceived benefits), if it was not intended to reciprocate the expected obligations undertaken 'when the chips are down'. It is indeed wrong for a Contracting State to undermine the ICSID regime by non-compliance with an arbitral award rendered against it, and for which it has no defence under the Convention. Such a negative attitude amounts to an international legal wrong for which, nevertheless, there are

[147] See pp. 380–1 above.

[148] Cf. Shaw, *International Law* (3rd edn, Cambridge: Grotius, 1991), p. 697: 'It is probably universally accepted today that it is not lawful to have resort to force merely to save material possessions abroad.' This assertion was reaffirmed in Shaw's 4th edition although with more certainty and firmness following the dropping of 'probably' in the above statement: Shaw, *International Law* (4th edn), p. 793.

[149] It has been indicated, quoting information from Mr Parra of ICSID, that the World Bank is unlikely to resort to stronger sanctions such as refusing further loans, because it seeks to maintain a reputation for even-handed dealings with Member States: *The 1998 SALC Report*, para. 4.49.

[150] See pp. 413–16 below.

[151] 13 ILM 828.

sanctions under the Convention.[152] But, self-help is a cruder form of arbitral sanction than those more effective and civilised forms allowed by the Convention. Not only that, self-help might compromise the guarded exclusivity of arbitration under the ICSID Convention and defeat the latter's aim of achieving 'a greater depoliticization of investment disputes'. It will escalate tensions and raise serious questions, concerning the links between the World Bank and ICSID and their implications for the latter's separate international legal status and its proceedings.

Observations on ICSID and African states

ICSID proceedings are international by virtue of ICSID's establishment by treaty, the nature of the parties and of the subject matter of those proceedings.[153] During the Consultative Meetings of Legal Experts from Africa with Mr Broches, the expert from the then Tanganyika (Mr Brown) observed that it was not clear whether the fact that an ICSID tribunal will apply international law meant that an investor will press a claim on the same basis as the state of nationality would have been entitled to do. According to him, 'Municipal courts often applied international law in deciding claims, but that did not make them "international" claims'.[154] Broches replied: 'by giving the investor the right to go before a tribunal, and by providing for the surrender of the right of diplomatic protection, the Convention implied that the investor would have the same right as his Government would have had if it had come before the tribunal on his behalf'.[155]

ICSID proceedings could also be regarded as quasi-international due to the participation in those proceedings of private actors (non-parties to the Convention) *and* sovereign states (parties to the Convention). A private party that might participate in an ICSID proceeding does not thereby have comparable rights and identical obligations as its national state as such, or have those rights attaching to or incumbent upon a Contracting State under the Convention. For example, the right to resort to diplomatic protection or to bring an international claim;[156] the law to be applied in the

[152] It is inconsistent with the integrity of a sovereign state to acquire the dubious reputation of a repeated and recalcitrant award and judgment debtor. Cf. *Fedax* case (Merits), 37 ILM 1397, para. 36: 'the settlement which the Republic of Venezuela has made possible is fully consistent with its good standing in the international financial community and honors a long tradition of observance of international agreements.'

[153] The delocalised nature of the procedure under the Convention is also relevant: ICSID Convention, Articles 44, 33 and 6 (1)(b) and (c).

[154] *History of the Convention*, p. 259.

[155] *Ibid*.

[156] See p. 394 above.

absence of agreement on the point;[157] the obligation on the courts of a Contracting State to recognise an ICSID award;[158] designating, changing and notifying the competent court or other authority for the purposes of the recognition and enforcement of ICSID awards;[159] a plea of immunity from execution and the governing law thereof;[160] signing, ratifying, accepting or approving the Convention (Articles 67 and 68); bringing cases to the ICJ for inter-state disputes concerning the Convention's interpretation or application;[161] proposing and participating in amending the Convention;[162] taking legislative measures to implement the Convention (Articles 69–70); denouncing or withdrawing from the Convention (Article 71); receiving requisite notices or notifications under the Convention (Article 75) regarding signature, ratification, acceptance, approval, date of entry into force of the Convention with respect to any particular Contracting State, exclusions from territorial application and effective date of any amendment and denunciations of the Convention.

The nature of proceedings under the Convention is contrary to the proposition that every arbitration is a national arbitration.[163] The ICSID regime belongs to the public international legal order because it is rooted in a treaty to which only states are and can be parties. But that fact is not coincidental with saying that tribunals established under the system could only apply international law or could neither consider nor apply municipal law and the principles derived therefrom.[164] By contrast, in inter-state disputes, the presumption is in favour of the application of international law. The provisions of the ICSID Convention, which sought to balance finely the usually conflicting interests of the host state, the foreign investor and its home state, made the Convention an ingenious dispute resolution option.[165] This, as well as the fact that the Convention proceeded from the World Bank, should have been a much better explanation for its warm support by African states, which would ordinarily appreciate good rela-

[157] See note 164, below. [158] See pp. 380–1 above. [159] See p. 369 above.
[160] See pp. 381–41 above. [161] See pp. 236–9 above. [162] See pp. 364–5, note 118 above.
[163] See p. 158 above.

[164] In ICSID proceedings, what is primary in the first instance is the autonomous decision of the parties to a dispute as to the applicable substantive law. In the absence of their 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 (Article 42): I. F. I. Shihata and A. R. Parra, 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration Under the ICSID Convention', ICSID Rev-FILJ 9, 1994, 183; G. Elombi, 'ICSID Awards and the Denial of Host State Laws', JIA 11, 1994, No. 3, 61; O. Chukwumerije, 'International Law and Article 42 of the ICSID Arbitration', JIA 14, September 1997, 79.

[165] Shihata, *The World Bank in a Changing World*, Vol. 11, pp. 450–1.

tions with the Bank. This is especially so taking into consideration that, at the time the Convention was drafted, there was a clear divide as to the appropriate procedure for investment dispute resolution.[166] Thus, the Convention, to a large extent, confined itself to the modest ambition of providing a voluntary procedural option whilst emphasising that that option was an exception to what would otherwise be the normal rule – a successful attempt to balance the competing views and conflicting interests.[167] The Convention avoided the controversial area of substantive rules regulating foreign investment.[168] The sensitive issue of state sovereignty was given careful consideration whilst assuring the investor direct access to an international body that was effective and largely delocalised. The latter balancing act is apparent in those provisions of the Convention dealing with the exclusivity of consent to ICSID arbitration,[169] the waiver of diplomatic protection and international claim,[170] the applicable substantive law,[171] and the recognition and enforcement of ICSID award and its execution in or against a Contracting State.[172]

The procedural options in the Convention are accessible to both the state party and the non-state party on a footing of procedural equality – fundamental in dispute resolution. A state may bring a claim and counterclaim against or defend same from an investor.[173] It is the 'recognition of the principle that a non-State party, a private investor, might have direct access, in his own name and without requiring the espousal of his cause by his national government, to a State party before an international forum'[174] which constitutes one of the most innovative aspects of the Convention. States endorse same by joining the Convention without repudiating their corresponding rights under the Convention to approach that body against a non-state party, if need be.[175] Can a Contracting State be deemed to have renounced this fundamental opportunity by concluding a BIT expressing mandatory and advance consent to ICSID especially when, as the Preamble to the Convention indicates, no state shall, by the mere fact of ratifying, accepting or approving the Convention and

[166] See pp. 428–41 below.
[167] ICSID Convention, Preamble (para. 4); Broches, 'ICSID Convention', 630.
[168] *History of the Convention*, p. 6, para. 6 (Doc. 3). [169] See pp. 394–5 above.
[170] See pp. 394–5 above. [171] See p. 402, note 164 above. [172] See pp. 380–4 above.
[173] It was earlier observed that some BITs might derogate from this fundamental opportunity envisaged by the Convention: see pp. 363–4 above.
[174] *History of the Convention*, p. 241.
[175] E.g. the Convention provides that any Contracting State or any national of a Contracting State wishing to institute arbitration or conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party (Articles 36(1) and 28(1)).

without its consent in writing, be deemed to be under any obligation to submit any particular legal dispute arising directly out of an investment under the Convention?[176]

A logical and practically convenient *quid pro quo* for granting a private party direct access to an international jurisdiction on a footing of procedural equality with a state is that any other international remedy is suspended once consent has been expressed to ICSID arbitration. The consent of the parties (the Contracting State party to a dispute and a national of another Contracting State as defined) to ICSID arbitration, shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy (Article 26). No Contracting State shall thus give diplomatic protection or bring an international claim in respect of a dispute that one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under the Convention. However, this waiver of diplomatic protection and international claim is restored if the Contracting State party to a dispute has failed to comply with the award rendered against it in such dispute.[177]

Through the practice of African states with respect to the Convention, as a practical matter, there seems to be an emerging consensus in the resolution of investment disputes, although not without in-built ambiguities and asymmetries. Nevertheless, it does appear unfortunate that, despite the contributions of those states to the elaboration of the Convention and their policy measures to give practical relevance to the regime, not many arbitrators and conciliators from Africa have been appointed and designated to ICSID tribunals or commissions, even by African governments.[178] The reasons may not be hard to find. For example it has been submitted – and this should be quoted extensively – that:

> There is some concern in developing countries over the selection of arbitrators by the ICSID. As with the ICC, it is feared that the exercise of the appointing authority by the ICSID will more likely result in the selection of an umpire with a 'systemic', not a personal, bias in favour of Western legal concepts and the positions

[176] ICSID Convention, Preamble, paras 7 and 8. Once a valid written consent is given, it becomes irrevocable: see p. 307. Cf.: 'Every international agreement signified the acceptance in one form or another of a limitation of national sovereignty. The proposed Convention was intended to give internationally binding effect to the limitation of sovereignty inherent in an agreement by a State pursuant to the Convention to submit a dispute with a foreign investor to arbitration': *History of the Convention*, pp. 241–2, *per* Mr Broches.

[177] See pp. 394–6 above.

[178] It is significant too that the first ICSID proceeding to have taken place in an African city was in October 1998: see p. 102, note 87. Yet, during the same time, African states were predominantly respondents in such proceedings held outside Africa.

of [transnational enterprises]. It has been suggested that the ICSID roster of personalities contains little reference to legal experts generally representing the developing countries' position in the relevant areas of international business law (Such a gap is also obviously due to the organizational and financial weakness of the developing countries, institutions devoted to international legal research as compared to Western countries' institutions). Developing countries are consequently under-represented in the often decisive communication processes of the international community.[179]

The general lack of ICSID arbitrators and conciliators from developing states has been attributed to other factors. For example, a number of developing Contracting States have not yet designated persons to serve on the panel of arbitrators or conciliators; and some Contracting States have only designated public officials for that purpose.[180] It was pointed out that '[s]uch public officials, regardless of their qualifications, may not always be appropriate candidates [for appointment] and at any rate may not have the time to serve as arbitrators'.[181] Nevertheless, Shihata's explanation of the general lack of developing states' arbitrators and conciliators in ICSID proceedings – that most designated persons are busy public officials – may, in some cases, appear unconvincing. It, indeed, may amount to prejudging the predisposition and availability of potential candidates. Such potential designees are *a priori* also deemed incapable of being 'relied upon to exercise independent judgment', a disqualifying feature under the Convention.[182] And a designated person (who need not be a national of the designating state) might not sit as an arbitrator or conciliator in a dispute involving its state of nationality or the state that made the designation. Furthermore, parties to disputes reserve the right to appoint persons whose names appeared on the panels or from outside the panels.

All these give grave cause for concern and are matters worthy of serious attention, especially by African states. Nevertheless, the concern only

[179] Walde, 'Negotiation for Dispute Settlement', 56–7 (footnotes omitted).

[180] The latter could be explained partly by the fact that, in some developing states, the public officers that are in a position to make the requisite designations may put forth their own names or those of their close or trusted associates notwithstanding merits. This matter is not peculiar to designations by Contracting States to ICSID panels only.

[181] I. F. I. Shihata, 'Some Remarks on the Obstacles Facing ICSID's Proceedings and International Arbitration in General' (ICSID/AAA/ICC Third Joint Colloquium, Paris, 24 October 1985), p. 4.

[182] ICSID Convention, Article 14(1), providing that persons designated to serve on the panels shall be persons of high moral character and recognised competence in the fields 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.

reinforces the need to develop the arbitral process in Africa, providing the administrative and infrastructural facilities for its effective and efficient conduct. There is an urgent and compelling need in Africa to develop expertise in international trade and investment dispute resolution generally, as well as inculcating in governments and policy-makers the need to give due consideration to resources already available. This is particularly so in appointing arbitrators and conciliators generally and in the regular designation of 'appropriate' candidates to pertinent dispute resolution panels.

With respect to ICSID, the importance of both panels is underscored by the fact that, despite the autonomy of parties to appoint arbitrators and conciliators outside a panel, most tribunals constituted so far included at least one panel member.[183] And, in the exercise of the default power to appoint ICSID conciliators or arbitrators or the members of the *ad hoc* committee, the President of the World Bank as the Chairman of the Administrative Council must make the appointment from the appropriate panel.[184] A notice of registration of arbitration or conciliation under the Convention shall be accompanied by a list of the members of the panels.[185]

Under the Convention, each Contracting State may designate to each panel four persons who may be (but need not be) its nationals.[186] A person may serve on both Panels.[187] Panel members shall serve for renewable periods of six years,[188] and shall continue in office until their successors have been designated.[189] All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification was received.[190]

A close look at the 'List of Designations' on file with ICSID reveals that not all African Contracting States have designated persons to those panels. It is notable that some designations by African states are incomplete,

[183] Parra, 'Rights and Duties of ICSID Arbitrators', 6; M. Marchais, 'Composition of ICSID Tribunals', *News from ICSID* 4, 1987, No. 2, pp. 5–7.

[184] ICSID Convention, Articles 30–31, 38, 40, 52(3), and 13(2); Arbitration Rules, Rules 4 and 52. [185] Institution Rules, Rule 7(e).

[186] ICSID Convention, Article 13(1). The Chairman of the Administrative Council may designate ten persons, each having a different nationality, to each panel (Article 13(2)). In making the appointment, the Chairman shall, in addition to the qualities mentioned in Articles 12–14, pay due regard to the importance of assuring representation on the panels of the principal legal systems of the world and of the main forms of economic activity: ICSID Convention, Article 14(2).

[187] *Ibid*., Article 16(1). [188] *Ibid*., Article 15(1). [189] *Ibid*., Article 15(3).

[190] *Ibid*., Article 16(3).

'inappropriate' or obsolete, and that some designations may have expired with time. Only a few designations of African states are current or relatively so.[191] There is a need for African states to monitor their international obligations, and not just those under the ICSID Convention.

In relation to the appointment of ICSID arbitrators and conciliators, suggestions by Shihata are pertinent and worthy of serious consideration:

> In the case of ICSID, the States parties to a dispute have an effective remedy at their disposal, namely to participate actively in the appointment of arbitrators. Most of the provisions of the ICSID Convention regarding the number of arbitrators and the method for their appointment are permissive and the parties are free to make their own arrangements.[192]

It should be pointed out that, if a unilateral and mandatory consent is expressed in advance in an investment treaty or law by a Contracting State and accepted by the investor, participation in the above opportunity to choose the number of arbitrators and the method for their appointment may have been lost when most needed.[193]

Also, choosing African cities as venues for arbitration and conciliation would serve many useful ends for parties to disputes and for the Contracting States in Africa. Many African cities are also ready to serve as 'neutral third venues' for disputing parties from within and outside the continent. That ambiguous concept may, at times, be employed in arbitral circles to limit the venues to certain cities located in the industrialised world. This book firmly asserts differently. Arbitral and other developments in Africa can only reinforce Africa's standing as a venue for international arbitration.

In sum, the substantive fairness, balance and purpose of ICSID proceedings would be enhanced by 'an increasingly diversified representation of nationalities in ICSID tribunals'.[194] Thus, more qualified Africans could be

[191] *Members of the Panel of Conciliators and of Arbitrators*, Doc. ICSID/10 (March 2001), pp. 8–48; www.worldbank.org/icsid. The latter is regularly updated as Contracting States notify their designations.

[192] Shihata, 'Remarks on the Obstacles', p. 3. Shihata further concedes: 'In many developing countries, there is no dearth of persons having the qualifications required by the Convention to act as arbitrators. ICSID must, therefore, continue its efforts to convince these countries to give renewed attention to the exercise of their right of designation in order to supply a roster of candidates particularly suited to serve as arbitrators on ICSID tribunals' (*ibid*. at pp. 4–5). This point is normally stressed in the reports of ICSID Secretary-General to the annual meetings of the Administrative Council. As earlier noted, parties to ICSID proceedings may appoint a person outside the panels subject to that person having the requisite qualities.

[193] See p. 361 above.

[194] Shihata, 'Remarks on the Obstacles', p. 4.

considered for appointment as ICSID arbitrators and conciliators, as tribunal presidents (by the parties as well as by the Chairman of the Administrative Council through the default appointing power), as members of the Chairman's panel of arbitrators and conciliators and as members of *ad hoc* committees.

PART 5 · CONCLUSION

13 Lack of growth and development of arbitration in Africa

Introductory remarks

The general response of most developing states to international arbitration partly stemmed from their general attitude towards aspects of customary international law which, they argued, did not fit into an expanded world community. Diplomatic protection and arbitration of investment disputes are procedures that could lead to controversies when they involve states and nationals of states of varied backgrounds and at differing stages of economic development. Both procedures also implicate the political functions of states and call for the application of substantive rules of state responsibility, which developing states argue generally weigh against their interests. Much of customary international law on diplomatic protection and the principles of arbitration developed in the past practice of European states and might still operate, to some extent, in their favour.[1]

The substantive rules of state responsibility and their procedural outlets are not always reconcilable with the pressing needs and interests of states that joined the international community after the Second World War.[2] As Castaneda observed:

> [The underdeveloped nations] do not accept compulsory submission to rules in the formulation of which their needs and interests were not taken into account, but

[1] R. P. Anand, *New States and International Law* (Delhi: Vikas Publishing, 1972); Okoye, *International Law*, pp. 177–84; S. N. Gaha-Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law', AJIL 55, 1961, 866; A. A. Fatouros, 'International Law and the Third World', Virginia LR 50, 1964, 783; U. O. Umozurike, 'International Law and Colonialism in Africa: A Critique', EALR 3, 1970, 47.

[2] Asante, 'Perspectives', 331; Anand, *New States and International Law.*

rather, on the contrary, were created by the practice and in response to the needs of their probable adversaries.[3]

In response, Lalive argued:

> Rejecting the institution for having developed, more or first of all, in Western Europe would be about as intelligent as rejecting the use of the railway or the airplanes because they were not developed or used to begin with in the Antarctic or the Sahara.[4]

The point, however, is that no matter where and when developed, aeroplanes and trains are rarely operated without regulation, quality control and precautions meant to safeguard the interests and safety of their users and of the wider public. It cannot be disputed that, since the first aeroplanes and trains were invented, they have been subject to subsequent developments necessitated by their importance and use. The same should be so for the arbitral process both in formal and in normative terms. Most importantly, the 'new states' never challenged the whole body of international law which existed before their statehood as 'to do so would mean rejecting many rules which operate to their advantage'.[5] They only want to eradicate from contemporary international law the entrenched European interests that worked against their interests and to develop an international law of protection, welfare, co-operation and development.[6]

The experiences of developing states generally in arbitration pertaining to investments in natural resources and public works left much to be desired. It partly led to a feeling of suspicion, general lack of confidence, hostility and opposition to the arbitral process.[7] These feelings gave rise to the idea of arbitration as an alien system of justice devised to subvert the institutions and interests of developing states.[8] The reaction to arbitration was also rooted in the economic history of Latin American states in their dealings with Europe and North America. A brief look at that history will

[3] J. Castaneda, 'The Underdeveloped Nations and the Development of International Law', *International Organization* 15, 1961, 38, 41.

[4] P. Lalive, 'Enforcing Awards' in *60 Years of ICC Arbitration*, p. 351.

[5] Malanczuk, *Akehurst's International Law*, p. 29.

[6] Anand, *New States and International Law*; R. P. Anand, *Confrontation or Cooperation: International Law and the Developing Countries* (Dordrecht: Martinus Nijhoff, 1987); Okoye, *International Law*, p. 178; Malanczuk, *Akehurst's International Law*, p. 29–30; Shaw, *International Law*, pp. 33–5.

[7] G. Herrmann, 'Overcoming Regional Differences' in Sanders (gen. ed.), *ICCA Congress Series No. 4* (1989), pp. 291–2.

[8] El-Ahdab, 'Why Create the Arab Association for International Arbitration', JIA 9, 1992, No. 1, 29; N. Ziade, 'ICSID and Arab Countries', *News from ICSID* 5, 1988, No. 2, 5.

facilitate an appreciation of the attitude of African states after independence from alien rule.

The influence of Latin America on Africa

That hostility and opposition to arbitration as a method of resolving investment disputes are not rooted in Africa but in Latin America is not surprising:

> It is there, after all, that foreign investors have faced independent, less developed countries since the early 1800. While most other regions [Africa and Asia] were still colonies, foreign investments in Latin America were subject to international law and diplomacy.[9]

The Latin American states developed theories in opposition to foreign investment and to the procedural outlets for its protection: arbitration and diplomatic protection. The legal theories were the Calvo and Drago doctrines.[10] Both subsequently influenced the policies of other developing regions.

The Calvo doctrine, premised on the sovereign equality and territorial jurisdiction of states, was a counterpoint to the Western doctrine of international minimum standards argued to be applicable to aliens and their properties abroad.[11] By the Western view, although an alien enters a host state subject to that state's territorial jurisdiction and laws, international law stipulated a minimum standard of treatment which states must accord to aliens and their properties. If the treatment which a state accords to its own nationals falls below that minimum, the latter standard shall prevail. Its breach with respect to an alien will expose the defaulting state to responsibility, thereby leading the alien's national state to exercise

[9] C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley: University of California Press, 1985), p. 18.

[10] D. R. Shea, *The Calvo Clause: A Problem of Inter-America and International Law and Diplomacy* (University of Minnesota Press, 1955); L. M. Drago, 'State Loans in their Relations in International Policy', AJIL 1, 1907, 692. The immediate cause of the Drago Declaration (then the Argentine Minister for Foreign Affairs) was the joint naval bombardment of Venezuela by Britain, Italy and Germany in 1902, 'on the erroneously supposed ground that they were seeking to collect unpaid bonds held by their [respective] citizens': E. M. Borchard, 'Calvo and Drago Doctrines', in E. R. A. Seligman (ed.), *Encyclopaedia of the Social Sciences* (1930), Vol. III, pp. 153, 155.

[11] 'Correspondence Between Mexico and US Over the Expropriation by Mexico of Agrarian Properties Owned by American Citizens 1938', AJIL 32, 1938 (Supp.), 181–207; Shea, *The Calvo Clause*, p. 20; S. K. B. Asante, 'International Law and Foreign Investment: A Reappraisal', ICLQ 37, 1988, 588, 590.

its *inherent right* to interpose diplomatically where there is a denial of justice in the course of exhausting local remedies or when there is no effective local remedy for the alien to exhaust.[12]

The political disorder, social instability and economic conditions in the nascent Latin American republics of the nineteenth century were such that occasions for injuries to resident aliens and their interests were common. Hence, the increased call for diplomatic interposition for their protection.[13] Subsequently, frequency and acquiescence conferred on the practice the status of custom, which Western states exercised in their relationship with Latin America 'as a matter of legal right'.[14] An injury done to an alien by a foreign state became one to the alien's national state since, by the prevailing notion, an individual has no personality in international law.[15]

The Latin American states, with different economic backgrounds, culture and experiences, resisted the international minimum standards and their procedural outlets. They saw those standards as means of Western interference in their domestic affairs. It was to neutralise diplomatic protection and to eschew its abuses, that the Calvo doctrine was elaborated.[16] Calvo was of the view that a sovereign state was not responsible for acts of individuals and was entitled by the principle of equality of states to complete freedom from interference in any form, whether diplomatically or by armed intervention, by other states.[17] Aliens cannot claim or be granted a more extended protection than that granted to nationals. Aliens are subject to national law and, in dispute situations, to the exclusive jurisdiction of national courts. The host state will accord to them the same treatment as its nationals.[18]

The Calvo doctrine is wider and more penetrating than the Drago doctrine and the 1907 Convention Limiting the Employment of Force for the Recovery of Contract Debts (the Porter Convention).[19] Article 1 of the latter provides:

[12] Lipson, *Standing Guard*, pp. 8–9; Jessup, *Modern Law of Nations*; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: Banks, 1915); C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928); F. S. Dunn, *The Diplomatic Protection of Americans in Mexico* (Columbia University Press, 1933). [13] Shea, *The Calvo Clause*, pp. 9–10. [14] *Ibid*. at p. 10.

[15] *Case of the Mavrommatis Palestine Concessions (Greece* v. *United Kingdom)*, PCIJ Series A, No. 2, at 12 (1924); *Panevezys–Saldutiskis Railway* case (*Estonia* v. *Lithuania*), PCIJ Series A/B, No. 76, at 16 (1939). [16] Shihata, 'Depoliticization of Investment Disputes', 1–3.

[17] Shihata, *ibid*.; Shea, *The Calvo Clause*, pp. 11–13. [18] Shea, *ibid*. at pp. 29–39.

[19] AJIL 2, 1908 (Supp.), 81; G. W. Scott, 'Hague Convention Restricting the Use of Force to Recover on Contract Claims', AJIL 2, 1908, 78.

The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after arbitration, fails to submit to award.

The Drago doctrine, it may be recalled, postulated the exclusion of force in collecting public debts. This was endorsed by the Porter Convention, which conditioned that exclusion of force on resort to, and willingness by, the debtor state to use arbitration and to abide by its outcome. By contrast, the Calvo doctrine went beyond that. By a qualified prohibition on the use of force and in permitting arbitration, the Porter Convention, contrary to the Drago doctrine which inspired it, permitted the use of force in the enforcement of public and contractual debts when arbitration was rejected or an award was rendered but not complied with by the debtor state.[20] It was in an attempt to exclude intervention – whether by force or diplomatically – that the Calvo doctrine was elaborated and often relied upon by Latin American states.[21] The doctrine aimed at excluding diplomatic protection by prescribing that aliens should only use local remedies. However, by insisting on the exclusivity of the national court's jurisdiction in any event, the doctrine impliedly excluded submission to arbitration. Its implication was to ensure the exclusive jurisdiction of the national court over, and, to some extent, the sole application of national law to, investment contracts.[22]

The Calvo doctrine, as the main legal device used to preclude diplomatic protection and arbitration, was, in its novelty, development and elaboration, unique to Latin America. As the doctrine was being developed, imperial powers were busy determining the political map of Africa culminating in the Berlin Conference of 1884–5.[23] Nevertheless, with the independence of African and Asian states, mainly after 1950, due to their

[20] The Porter Convention was the first multilateral treaty involving obligatory arbitration, and constituted, in the first instance, a check on the use of force in inter-state relations: Scott, 'Hague Convention', 78; Borchard, 'Calvo and Drago Doctrines', 156. Arbitration under the Porter Convention is pursuant to the 1907 Convention on the Pacific Settlement of International Disputes.

[21] Shea, *The Calvo Clause*, pp. 16–21; *North American Dredging Co. of Texas* v. *United Mexican State*, AJIL 20, 1926, 800, 803–4.

[22] The ICSID Convention seeks to accommodate and balance these conflicting interests particularly in Articles 26, 27 and 42: see pp. 402–3.

[23] T. Pakenham, *The Scramble for Africa* (London: Abacus, 1991); Griffith, *African Inheritance*, pp. 34–45.

immediate colonial experiences, the views and thinking of the Latin American states in international economic relations, to a great extent, appealed to them. The same problems which the Latin American states experienced in the nineteenth century sprouted and confronted these 'new states' in the decades after 1945, for example the problems constituted by the presence of foreign nationals and capital in developing economies and the antinomy between the reception of investment and its regulation in the face of other national policy objectives.[24]

With the emergence of independent African and Asian states desirous of economic and social development, there was a replay of another round of economic nationalism, this time encompassing a greater number of states and expressed with much vehemence. The views and positions of these states converged at the international level (with the support of the then Socialist Bloc) in some UN General Assembly resolutions adopted after 1960.[25] Of the latter, the 1974 Charter of Economic Rights and Duties of States (CERDS) was probably the most important. CERDS reflected the notable tenets of the Calvo doctrine, was supported by all the then independent African states and was also the first major concerted opposition to investment arbitration in which African states played a key role.[26]

It would assist in explaining past developments, and in formulating coherent present and future policies, to look closely at some factors that might have exacerbated the misgivings of African states about international arbitration and could have contributed to its stunted development and growth on the continent.

The disenchantment with and suspicion of arbitration in Africa

In addition to the influence of the Latin American states, the above attitude might be due to the imbalance in the international arbitral order and its reinforcement. This dates from before colonial rule in Africa and

[24] Cf.: 'The historical origins of Africa's anti-market orientation are not hard to discern. After almost a century of colonial depredations, African nations understandably if erroneously viewed open trade and foreign capital as a threat to national sovereignty': J. Sachs, 'Growth in Africa', *Economist*, 29 June 1996, pp. 25–6. This view should have commenced from the point that, with respect to Africa, the transatlantic slave trade and slavery and their abolition were pivotal to the development of international trade and the emergence of capitalism.

[25] The relevant resolutions will be considered later in this chapter.

[26] Interestingly, before 1974, some African states had participated in creating and sustaining the ICSID Convention: see chapter 7 above.

has continued, to some extent, thereafter. A review of these factors is always pertinent.[27]

Arbitration associated with obnoxious practices

The first contact which Africa had with modern arbitration, although at its rudimentary stage, was during the colonial era. Arbitration was to become a preferred mechanism for the protection of Western commercial interests when colonialism receded and the use of force for investment dispute resolution became incompatible with norms of international law and diplomatic protection was discredited due to its abuse.[28]

During the colonial era, the use of arbitration in commercial relations between the state and foreign private parties was much less prominent, especially in the investment sector. At that time, colonies were generally juridically inseparable from imperial countries. Also, most commercial houses, companies, private traders or investors in the colonies were mainly nationals of, or belonged to, the colonising powers and were, in most cases, along with the Christian missionaries, agents or precursors of colonial administration.[29]

Disputes between commercial parties were then arbitrated as were those among parties of the same national, legal, economic, racial and cultural backgrounds. Most of the disputes were, indeed, litigated. It was perfectly understandable and expected if disputes were resolved in venues in metropolitan countries, which were the economic capitals.[30] Colonial administrators largely enacted the first generation arbitration laws in African states during this era.[31] It was then felt that the traditional methods of dispute resolution in the colonies were, in terms of their structure and nature, inadequate and inappropriate for disputes arising out of the commercial transactions introduced by the imperial powers

[27] Sornarajah, 'Power and Justice', 103; Armfelt, 'Avoiding the Arbitration Trap', 20; Asante, 'Perspectives', 331; Sornarajah, *International Commercial Arbitration: The Problems of State Contracts* (Singapore: Longman, 1990), pp. 5–48, 90–101; Sornarajah, *The Pursuit of Nationalised Property* (Dordrecht: Martinus Nijhoff, 1986); M. Benchikh, 'Relations Between TNCs and the Developing Countries' in I*ndustry 2000 – New Perspectives, Collected Background Papers* (UNIDO Secretariat, 1980), pp. 147, 162–73.

[28] Sornarajah, 'Power and Justice', 103.

[29] Ifemesia, 'The "Civilising" Mission' in Kalu (ed.), *The History of Christianity in West Africa* (London: Longman, 1980), p. 81; Ghai and McAuslan, *Public Law and Political Change in Kenya* (London: OUP, 1970), pp. 4–12; Pieterse, *White on Black*, pp. 53–7; 76–82; Pakenham, *The Scramble*, pp. 342–6.

[30] E.g. until recently, the Privy Council of the House of Lords was the court of last resort for some states in the British Commonwealth. This is still so in relation to some other states in the Commonwealth.

[31] See pp. 119–23 above.

subsequent to, and following the abolition of, the slave trade.[32] The abolition of that trade was necessary to encourage 'legitimate' trade.[33] Arbitration laws were enacted by the colonial powers as one of several means of making the colonies 'amenable' to the legitimate business activities of their nationals.

Thus, Western ideas of arbitration as introduced into Africa were historically associated with, and made possible by, what most Africans and others genuinely believe to be heinous crimes committed in the continent in previous centuries: the slave trade, slavery and colonisation. The abolition of the slave trade and slavery, both in Africa and in Europe (mainly due to the industrial revolution and the activities of humanitarian organisations), created the economic stimuli and political conditions which made arbitration an option for commercial disputes settlement in the colonial economy; for trade in commodities replaced the trade in slaves.[34] Hence, a legal framework for resolving commercial disputes became desirable and a necessity in the new economic environment.

After the abolition of the slave trade and the general end of imperialism in Africa, legitimate trade and investment continued; hence, the inevitability of arbitration in the new commercial and political environment. The independence of African states, most of them won after armed or verbal conflicts or both, were to change the arbitral scenario. Political independence added new dimensions to the use of arbitration and facilitated disputes. Most commercial and investment disputes now mainly involved the emergent states, their agencies or nationals (mostly economically nationalistic) and traders or investors who were mainly from the departing colonising powers. The roots of future conflict sprouted.[35]

Developments and trends in trade and arbitration during colonialism

During the colonial period and after independence, trading relations in Africa were unidirectional. The colonial economies were generally linked with the metropolis. The colonies and their 'subjects' were the producers and suppliers (sellers) of primary products and raw materials to the

[32] Asouzu, 'Legal Framework', 214–27.

[33] Dike, *Trade and Politics in the Niger Delta 1830–1885* (Oxford: Clarendon Press, 1956); Daaku, *Trade and Politics on the Gold Coast 1600–1720* (Oxford: Clarendon Press, 1970); Ofonagoro, *Trade and Imperialism in Southern Nigeria 1881–1929* (New York: Nok Publishers, 1979); Olaniyan, *Economic History of West Africa* (Akure, Nigeria: Olaniyan, 1971), pp. 25–79.

[34] Onwubiko, *History of West Africa*, Book 1, p. 288.

[35] Dezalay and Garth, *Dealing in Virtue*, pp. 85–6. It is striking that the influential advocates of *lex mercatoria* appeared essentially from the 1960s: Lord Mustill, 'The New Lex Mercatoria', 86.

metropolitan countries and their nationals (the buyers), for mainly manufactured goods. These trading activities were usually controlled by and channelled through commodity associations and exchanges in the metropolis. The abolition of the slave trade did not significantly change the commercial situation. It correspondingly witnessed a great transformation, adaptation and expansion of international trade to the benefit of European traders. Only a small minority of the African aristocracy ('the merchant princes') engaged in the new trade and any challenge to the European monopoly was visited with adverse consequences such as conquest and deportation into exile.[36]

Arbitration flourishes where trade and investment flourish; its use, development and growth are generally stunted in places where these activities are minimal or non-existent. And, since trade and investment are the main vehicles which carry arbitration, there developed in the imperial countries the earliest forms of institutional arbitration.[37]

The commodity associations and exchanges maintained closely controlled mechanisms for the settlement of disputes arising in their particular sectors. Disputes brought under their rules were, by the then colonial political set-up, mainly domestic in dimension, and jurisdiction was derived to a great extent from standard form contracts that were association-specific. The predominant adjudicatory functions dealt with questions relating to the quality and condition of commodities. Arbitral awards were mainly unreasoned and enforceable largely by an association's internal mechanisms and sanctions.[38] At times, the adjudication of the exchanges and associations may be less than satisfactory. An AALCC report noted:

In some cases, there has been a tie up between the seller from the [Asian–African] region and the overseas buyers, which has led the seller to accept terms as to

[36] A. Oyowe, 'Are Africans Culturally Hindered in Enterprise and Commercial Activity?', *Courier*, May–June 1996, No. 157, 62–3; J. D. Fage, *A History of Africa* (2nd edn, London: Unwin Hyman, 1988), pp. 271–5 and 350.

[37] Lord Tangley, 'International Arbitration Today', ICLQ 15, 1966, 719, 721. Cf.: 'Certainly England had the advantages of the British Empire and historical dominance of shipping, but this system also attracted much of the rest of the world to London to have disputes resolved according to English law as applied to English contracts': Dezalay and Garth, *Dealing in Virtue*, p. 132.

[38] D. Kirby-Johnson, *International Commodity Arbitration* (Lloyd's of London Press, 1991); Dezalay and Garth, *Dealing in Virtue*, pp. 129–34; S. Mentschikoff, 'Commercial Arbitration', Columbia LR 61, 1961, 846, 852–4; M. Kerr, 'Commercial Dispute Resolution: The Changing Scene' in Bos and Brownlie (eds), *Liber Amicorum for Lord Wilberforce* (Oxford: Clarendon Press, 1987), pp. 111, 113.

arbitration unfavourable to him. Even after this phase came to an end, the weaker bargaining position of these countries as sellers conduced to the same end.[39]

At present, a comparable clause will be held to be unfair and invalid.[40]

Other than the commodity associations and exchanges, it was during the colonisation of much of Africa that most major arbitral institutions, chambers of commerce were inaugurated and other arbitral developments took place and were consolidated.[41] For example, the London Court of Arbitration, as it was then known, was created in 1903 through the joint efforts of the Corporation of the City of London and the London Chamber of Commerce. It was an outgrowth of the London Chamber of Arbitration founded in 1892.[42] No African state attended the First (1899) and Second (1907) Hague Peace Conferences on the Pacific Settlement of International Disputes.[43] The Permanent Court of Arbitration, an intergovernmental institution, was an outcome of the First Hague Peace Conference and was established pursuant to the 1899 Convention on the Pacific Settlement of International Disputes. The Arbitration Institute of the Stockholm Chamber of Commerce was established in 1917.

[39] AALCC, *Report of the 13th Session Held in Lagos, 18–25 January 1972*, pp. 58–9. During an earlier AALCC Session, the delegate of Ceylon (Sri Lanka) observed: 'These model contracts are on the whole considered satisfactory, but are not without some unsatisfactory features. They have been drafted by Trade Associations of Overseas Buyers, who have naturally been more concerned in protecting the interests of the members of their Associations than those of the sellers, and there is a feeling that they are somewhat more favourable to the buyers than seller . . . they invariably lay down that arbitration in case of disputes is to be governed by the rules of the buyers' trade association, and that the arbitrators must also be members of that trade association': AALCC, *Report of the 12th Session Held in Colombo, 18–27 January 1971*, p. 75.

[40] E.g. in Germany, an arbitration clause in a sales contract incorporated by reference in the seller's general terms and conditions and which provided that, where the parties failed to agree on the choice of arbitrators, the choice will be made by an organisation that represented the seller's interest, was held to be null and void. The court noted that, under the clause, the buyer's right to an impartial award was not assured: V. Triebel, 'Reform of German Arbitration', *Arbitration and ADR 2*, February 1997, 20–1.

[41] Asante, 'Perspectives', 331.

[42] UNCITRAL YB, 3, 198, para. 24. That Court was given its current name, the LCIA, only in 1981, to reflect the increasingly international nature and dimension of its work and composition. It used to be under the joint supervision of the representatives of the Chartered Institute of Arbitrators (itself formed in London in 1915), the City of London and the London Chamber of Commerce and Industry: B. W. Vigrass, 'The LCIA' in *Seminar on International Arbitration and Investments in the Afro-Asian Region, Cairo, 1988*, pp. 387–400; A. Winstanley, 'The Origin and Development of the LCIA', *LCIA Newsletter* 3, November 1998, 7. The LCIA Secretariat is located at The International Dispute Resolution Centre, Breams Buildings, Chancery Lane, London: *LCIA Newsletter* 4, 1999, No. 4, 1.

[43] Malanczuk, *Akehurst's International Law*, pp. 22–3; A. Eyffinger, *The 1899 Hague Peace Conference* (The Hague: Kluwer, 1999).

After the First World War, further notable arbitral developments took place. In 1919, the International Chamber of Commerce was established in Paris under French law. It was essentially a national chamber of commerce but with an International Court of Arbitration founded in 1923 to take charge of its dispute resolution functions.[44] The American Arbitration Association, another private national arbitral institution, was founded in 1926.[45] Also, two arbitration treaties were concluded during that period under the auspices of the League of Nations: the 1923 Protocol of Arbitration Clauses and the 1927 Convention on the Execution of Foreign Arbitral Awards. The application of these Geneva Treaties to any African state was largely a colonial legacy. After the Second World War, due to their defects, the 1958 New York Convention was elaborated.[46]

Ignorance and lack of information and materials

One reason for a general lack of development in, and interest about, arbitration in Africa is a lack of knowledge on, and information about, the process, its attributes and potentials.[47] As Sempasa observed:

> Without sufficient information on how the arbitral process benefits them immediately, African lawyers and their governments are understandably unwilling to get too involved in a process which they perceive as largely benefitting the trading entities of the West.[48]

A wider diffusion of information on, and knowledge about, arbitration law, practice and facilities would contribute immensely to the development and use of the process in Africa.[49] There had been no concerted and institutionalised attempt to create and propagate that awareness in most African states. The little arbitration that has been conducted was done, as noted earlier, largely under the aegis of trade associations and commodity exchanges outside Africa. There was a psychological reluctance on the part of foreign parties to use facilities of domestic arbitral institutions and chambers of commerce where available.[50] In most cases, the jurisdictional bases of the domestic institutions and chambers were generally

[44] WAR 3, 1992, 3071; ICC Rules of Arbitration, Article 1 with Appendices I and II (Statutes and the Internal Rules of the ICC International Court). [45] WAR 4A, 1992, 5647.

[46] See pp. 180–6. More African states participated in creating the ICSID Convention: see pp. 221–8.

[47] D. B. Straus, 'Why International Commercial Arbitration is Lagging in Latin America: Problems and Cures', Arb J 33, 1978, 21. The latter, although written with Latin America in mind, is relevant to the development of arbitration in Africa.

[48] Sempasa, 'Obstacles', 393 (footnotes omitted). [49] See p. 58 above.

[50] Oyekunle, 'Importance of Arbitration', 18.

insufficiently developed to achieve the satisfactory resolution of complex disputes of an international nature.[51] There was, up until 1980, no arbitration institution devoted to propagating and promoting arbitration law and practice in Africa.[52]

Due to this lack of viable alternative dispute resolution institutions, the predisposition was to resort to arbitral bodies outside Africa. Not surprisingly, a recommendation of Ion Nestor to UNCITRAL was that the establishment of new arbitration centres where they are lacking would greatly enhance effective commercial arbitration.[53] Commentators subsequently concurred:

> Perhaps one of the greatest obstacles to the growth of international commercial arbitration has arisen from the difficulties involved in relying upon arbitration tribunals beyond the boundaries of one's country. If dependable arbitration facilities are available within one's own country, a serious initial impediment would be removed. Therefore, domestic arbitration facilities should be in existence in all trading countries. We must also have strong and vigorous national arbitration bodies which not only provide facilities for settlement of disputes by arbitration but also propagate the advantages of arbitration and provide information and guidance for the purpose to interested parties.[54]

Added to external handicaps hindering the development and growth of arbitration in Africa, are certain attributes of the process, which restrict its wider dissemination. This factor, which is not peculiar to Africa, is, however, aggravated by other factors probably peculiar to Africa and other developing regions. As a private process, arbitral proceedings could take place without notice to those not immediately connected with the

[51] As Dr Sen of the AALCC said: 'National institutions or chambers of commerce providing facilities for arbitration were not many in [the Asian–African] region and even where they existed they were primarily geared to providing facilities for settling disputes between local parties and as such it was difficult to attract a foreign party to avail of the facilities of such national institutions for settling disputes of an international character': Sen, 'Keynote Address' in *Regional Seminar on International Commercial Arbitration: Reports and Other Documents, 12–14 March 1984*, p. 42.

[52] The CRCICA was established in 1979. It is significant that at the time an arbitral institution was established for Asia by the then Economic Commission for Asia and the Far East (ECAFE), now, the Economic and Social Commission for Asia and Pacific (ESCAP), none was established nor did any exist in Africa: AALCC, *Report of the 15th Session Held at Tokyo, 7–14 January 1974*, p. 119. [53] See p. 58 above.

[54] B. Ram, 'Welcome Address' in *Regional Seminar on International Commercial Arbitration, New Delhi, 12–14 March 1984*, pp. 23, 25; and Straus, 'Why Arbitration is Lagging', 22–3; Tiewul and Tsegah, 'Arbitration', 418; McLaughlin, 'Arbitration and Developing Countries', 232. For a review of the suggestion that what is needed is not establishing *arbitral institutions* everywhere in the world but choosing *places of arbitration* closer to the centre of gravity of the transaction or dispute: see pp. 106–8.

disputes, their subject matters or the parties. Reinforcing its private nature in this respect is the fact that a large number of arbitral awards remain unpublished. In most arbitral systems, publication is an exception to the rule and only done with the consent of both parties to the dispute.[55] Knowledge of arbitral awards and proceedings may, nevertheless, be gained during the enforcement and setting aside of awards when they occur since both are only possible either because a party has refused voluntarily to comply with an award rendered against it or has alleged that the award is not binding by contesting its validity.[56]

In domestic transactions in Africa, arbitration, where it is used, is practised irregularly and usually as part and parcel of standard legal practice. Arbitration is normally seen, though erroneously, as the exclusive preserve of lawyers and as an extension of courtroom litigation. The reported court cases on the law and practice of arbitration in Africa show that recourse to arbitration is still modest even in domestic transactions. Statistical data may be harder to come by due to the privacy of arbitral proceedings and the confidentiality of most awards. However, a majority of court cases arising out of arbitration and reported in the *African Law Reports (Commercial Series)* and other notable law reports in Africa related mainly to the insurance industry or dealt with the enforcement of arbitral agreements.[57]

Unlike the judgments of courts, which are widely reported, freely traded and extensively discussed in Africa, occasions for wider circulation of, critical comments on, and the exposition of, arbitral awards are much more limited and, in most cases, non-existent. These factors are aggravated in the African setting where reference materials, such as dispute

[55] See pp. 48–9 above. Occasionally, there may be incidents of unauthorised publication or leaked awards, whereby a party might wish to make details of the dispute and the resultant award known to a wider audience than necessary. This undermines a value of arbitration.

[56] In *Television New Zealand* v. *Langley Production and Anor* [2000] 2 NZLR 250, the High Court of New Zealand held that confidentiality in relation to arbitration does not automatically extend to court processes with respect to the enforcement or setting aside of an arbitral award.

[57] The occasions when arbitral matters go to court are mainly when the normal and internal mechanisms of arbitration have failed and the support or control of the court is necessary, e.g. to enforce the agreement or the award, to appoint an arbitrator because one of the parties is unwilling or has refused to do so, or to contest the validity of an award; Sanders, *Quo Vadis Arbitration?*, pp. 15–16. Thus, reported court cases arising out of arbitration may not necessarily be accurate indicia of the incidence of arbitration. Also, the lack of evidence and reports of the incidence of arbitration may be an accurate indication that, indeed, none has occurred or that those that occurred followed the normal and internal rules of the process.

resolution journals, yearbooks, reports and special schools where arbitration is taught as an independent subject, are generally lacking. All these factors, to varying degrees, exacerbate the general ignorance of the value and attributes of the process of arbitration on the continent.

The unfair imbalance in arbitration

Of the arbitration institutions established before 1945, none is as influential and as well known as the ICC. Thus, all strictures as well as glories rightly belonged to it. The ICC is a household name in international business circles and has featured or appeared in some contested litigation arising out of international commercial arbitration in some jurisdictions.[58] Its long history, the quality of its adjudication, the direction of trade as well as the nature of the political association between Africa and Europe, ensured that some commercial contracts concluded by parties and standard forms used in particular trades or industries in these regions stipulate that any disputes arising shall be submitted to the arbitration of the ICC in Paris. Due to the lack of alternative and well-developed dispute resolution institutions in Africa, the European parties, who invariably have a stronger bargaining power and who normally proffer the draft contracts, insist on including clauses relating to arbitration institutions well known to them as a condition of entering into transactions.[59] This may be oppressive and unfair especially when rules written into standard and other contracts are not readily available to contracting parties from Africa. Opting for such clauses might have some implications not contemplated by an ignorant party.[60]

Doctrines existed or were developed in England linking the choice of the venue for arbitration with the determination of the applicable law where the parties did not make the choice themselves – a frequent

[58] Cf. WAR 3, 1992, 3072: 'Despite its international name and reputation, the ICC is primarily a West European institution.' This is an American perspective on the ICC. A European perspective may well be different.

[59] Cotran and Amissah (eds), *Arbitration in Africa*, pp. 136–7.

[60] Oyekunle, 'Importance of Arbitration', 18–19; A. Kassis, 'The Questionable Validity of Arbitration and Awards Under the Rules of the ICC', JIA 6, 1989, No. 2, 79; A. A. Asouzu, 'The Arbitration and Conciliation Decree (Cap 19) as a Legal Framework for Institutional Arbitration', *Lawyers Bi-Annual* 2, 1995, 1, 18–20. Under the ICC Rules of Arbitration, the [ICC] Court shall fix the place of arbitration unless agreed upon by the parties (Article 14(1)). And, the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law it determines to be appropriate taking into account the provisions of the contract and the relevant trade usages (Article 17(1) and (2)).

occurrence.[61] In most cases, standard form contracts are used to achieve the same end.[62] Sir Michael Kerr confirmed that, with the notable exception of the standard marine insurance policy first issued by Lloyds, the great majority have not only traditionally provided expressly that the governing law was to be English but also that any dispute was to be arbitrated in England.[63] Deshpande was critical of the practice, observing that it favours the traditional arbitral venues and the economically stronger parties to the detriment of economically weaker parties who incur risk and expense participating in arbitration held in venues unconnected with the proper law.[64]

Developing states, particularly those in Africa, are not regularly selected as venues for international arbitral proceedings either by arbitral institutions, or by the disputing parties (including Africans) or by arbitrators, who are mainly not from developing states and who consider their schedules, personal convenience and comfort when asked to make a choice of venue. Demoralising arguments may also be advanced and repeated to the effect that the legal frameworks for arbitration and foreign investment are poorly developed in developing states and that their courts are lacking in a tradition of independence and impartiality.[65] When a positive arbitral development occurs in a developing state, it may be glossed over.

[61] *Tzortzis* v. *Monark Line A/B* [1968] 1 WLR 406. Cf. *Compagnie d'Armement Maritime SA* v. *Compagnie Tunisinne de Navigation SA* [1971] AC 572; *Benidai Trading Co. Ltd* v. *Gouws and Gouws (Pty) Ltd* [1977] 3 SA 1020 (T); *CILEV* v. *Chivelli and Timber Import-Export (Ghana) Ltd* [1968] 1 ALR Comm 329.

[62] Model contracts may contain clauses such as: '(a) That the arbitral tribunal is to be a body situate in the buyer's country, to which the buyer is sometimes connected; (b) That the arbitration is to be conducted in the buyer's country; (c) That the law applicable is to be the law of the buyer's country': AALCC, *Report of the 13th Session Held in Lagos, 18–25 January 1972*, p. 59.

[63] Kerr, 'Commercial Dispute Resolution', 113–14.

[64] V. S. Deshpande, 'A Prognosis and Remedies', JIA 7, 1990, No.1, 5, 8. This makes the choice of the place of arbitration and of the applicable substantive law important during contract negotiations.

[65] For erstwhile arguments advanced against selecting venues in developing states as places of arbitration and new developments and perspectives, see pp. 105–8. The procedural data of ICSID cases gleaned from the Annual Reports of ICSID, *News from ICSID*, or reports of such cases, show that no such hearings were, as of early 1994, held in any developing state. They were mostly held at Washington DC, Paris, London, Geneva, Vienna, The Hague, Copenhagen and Auckland. The first such proceeding held in a developing state's city was in July 1994: see p. 102, note 87, above. And, in the *Cable Television* case, registered on 14 November 1995, an ICSID tribunal composed of two Barbadians (one was the tribunal's president) and a Guyanese held its first session with the parties in Barbados. This was the first ICSID tribunal to have three arbitrators from developing states: ICSID Rev-FILJ 13, 328. No doubt, these positive trends will continue as more cases are submitted to ICSID from all parts of the world.

Also, the cost of arbitrating in cities in developed states are exorbitant for parties from developing states especially when administrative fees are determined by the amount in dispute and required to be pre-paid within a stipulated duration.[66] It entails a great drain on capital needed for development into traditional arbitral venues:

> In the case of a lengthy arbitration, the selection of a developed [state's] forum can impose large costs on the parties in terms of paying for the hearing room, housing of lawyers, parties and arbitrators, over and above the already high costs of lawyers who charge at the market rates of European capitals or the United States. These costs have to be paid as the matter progresses, which may put a strain on a party that lacks easy access to large quantities of foreign exchange.[67]

This state of affairs operates to the prejudice of parties from developing states.[68] Most of them, due to the state of their economies, find it difficult to secure the necessary foreign exchange for timely and effective representation, whether as claimants or respondents, in far-off fora.[69] And, at times, threats of expensive and protracted arbitration in far-off venues have been made in order to blackmail weaker and poorer parties into acceding to inequitable concessions.[70] That prospect, as well as the possibility of a negative arbitral award with its often considerable visibility, loss of face and reputation, have been advanced as effective means of avoiding disputes and protecting foreign investors.[71]

However, whilst not espousing uncontrolled and unmotivated unilateral invocation of sovereign powers against investors – domestic and foreign – the use of protracted and expensive arbitration and the prospects of 'a negative arbitral award' as pressures against any party, despite the obvious mistrust they betray, undermine the acknowledged objectives of arbitration. These have been succinctly stated in the 1996 UK Arbitration Act as obtaining the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense (section 1(a)). The arbitral tribunal is expected to protect, promote and

[66] Yatim, 'Settlement of Commercial Disputes', cxxvii, cxxi.
[67] Armfelt, 'Avoiding the Arbitration Trap', 20; see pp. 102–4.
[68] Amissah, 'ACP–EEC Rules', 180–1.
[69] It was mentioned that the inability to secure foreign exchange makes arbitration in foreign countries 'a practical impossibility': Yatim, 'The Regional Centre for Arbitration', lxxxi; AALCC, *Reports of the 12th Session Held in Colombo, 18–27 January 1971*, pp. 120–1.
[70] Simmonds and Hill, *Commercial Arbitration in Asia and the Pacific*, p. 8, Document 11(ii).
[71] E.g. Walde, 'Investment Arbitration Under the ECT', 432; C. A. Jaslow, 'Practical Considerations in Drafting a Joint Venture Agreement with China', AJCL 31, 1983, 209, 229.

enforce these aims at the expense of jeopardising its continuity and any award.[72]

It is also well known that not many lawyers and other qualified persons from Africa have represented parties in major international arbitration.[73] What obtains in the existing international arbitral order is rather a generally cyclical trend, whereby a person from a developed state will, in one instance, sit as an arbitrator in a forum outside Africa in a dispute involving an African state and, in another instance, reappear and argue a case, or act as a consultant for an African state, in Paris, London, Geneva or elsewhere in Europe. The rules and practice of the game are fossilised as the diversity of perspectives compatible with economic development objectives and imperatives diminishes. As a result, a few arbitral institutions became dominant due to the lack of alternative and viable dispute resolution fora in Africa. In such a situation, the dominant institutions and actors will reinforce their dominance.[74] There are rarely opportunities for the few qualified scholars or practitioners from African and other developing states to sit as arbitrators to the extent that arbitrators from developed states have done, to establish a balance in this area. In most major disputes requiring a tribunal of three, it is even rarer to see Africans sitting as chairmen or presidents.[75] The regional imbalance in the

[72] 1996 UK Arbitration Act, s. 33(1). The latter is a mandatory provision the violation of which may jeopardise the award if attacked by a party (*ibid*., ss. 67 and 68). The parties may also revoke the authority of the arbitral tribunal or apply to the court to remove it (*ibid*., ss. 23 and 24). More or less similar principles may be seen in the South African domestic Arbitration Bill 1999, cll. 1(a), 20, 21, 27, 33 and 49; ICC Rules of Arbitration, Articles 7, 12 and 35; and LCIA Rules, Articles 10, 14 and 32.2. Cf. where a clause of an arbitral system requiring a disproportionately high filing fee was held unconscionable and unenforceable: see note 83, p. 101 above.

[73] A reasonable number of lawyers in some African countries, e.g. Egypt, Nigeria, Ghana, etc, had represented parties before international arbitral tribunals.

[74] For the view that in arbitration there are 'highly skilled arbitrators who, as is widely known, represent a sort of privileged caste, and who have turned arbitration into a very special oligarchic business': Ceccon, 'UNCITRAL Notes', 68.

[75] Asante, 'Perspectives', 337–8; Kemicha, 'Future Perspectives', 227–9; A. Agyemang, 'African States and ICSID Arbitration', CILJSA 21, 1988, 177; Agyemang, 'African States and ICC Arbitration', Lesotho LJ 5, 1989, 217; Amoussou-Guenou, 'Arbitration in Sub-Saharan Africa', 62; ICC, 'News from the Court and Its Secretariat: 1995 Statistical Report', *ICC Bulletin* 7, 1996, No. 1, 3. Cf. A. S. El-Kosheri, 'ICSID Arbitration and Developing Countries', ICSID Rev-FILJ 8, 1993, 104, 112, where it was observed 'that within the ICSID system the role played by persons from developing countries is gradually expanding'. The latter assertion, if made with reference to ICSID arbitrators and conciliators, was rarely supported by facts in the account when made. At the relevant time, only one arbitrator from Africa (El-Kosheri from Egypt) has served as president of an ICSID tribunal. Probably the assertion is an aspiration for the future.

appointment of arbitrators has partly been explained with reference to the chosen arbitral seat: '[A]rab parties often tend to favour the nomination of non-Arab arbitrators, whom they feel are more likely to be familiar with the law of the place of arbitration, which is very often in Western countries'.[76]

The governments of most African and other developing states may not be assisting matters by their patterns of appointment or in their non-participation in appointing arbitrators as well as in their choice of counsel and venues. The problem is admittedly aggravated by the relatively limited pool of qualified and experienced Africans available for appointment as arbitrators, conciliators or counsel. Nevertheless, it is not expected that countries such as Switzerland, the UK, the US, France and the Netherlands will readily appoint a qualified and experienced African as arbitrator, conciliator or counsel, even in a minor arbitration. But the general situation does need to be changed.

It is not implied by the above observations that an arbitrator who is an African will invariably render an award in favour of an African party or be more favourably disposed to that party in arbitration. Nor is it the contention that an African counsel would be more prone to argue a case for African, than for non-African, parties, or that non-Africans, either as arbitrators or counsel, would not objectively assess contentious matters involving African parties. The crucial point is only one of substantive and effective participation by Africans in international arbitration as arbitrators, representatives of parties or otherwise.

Conflicts of interests and views

In transactions involved in the pursuit of economic development, because of the divergent interests and goals of the parties concerned, disputes are inevitable. For a developing state, due to the implications of those transactions to their economic development and because their private sectors may not be sufficiently developed, those transactions may assume a public, rather than a private, character. By contrast, a foreign private investor or trader motivated mainly by commercial interests may only see in those transactions the implications of ordinary contract. These conflicting perspectives may lead to disputes.[77]

[76] Kemicha, 'Future Perspectives', 227. [77] See pp. 28–32 above.

Developing states' perspectives

Conflicts are most evident when considering which procedure and law are to be applied in the resolution of disputes arising out of the transactions just mentioned. The developing states would prefer their own courts to resolve such disputes and for their own laws to apply.[78] Developing states, and indeed most states, lay emphasis on their independence, sovereignty and territorial integrity. Some states view arbitration in far-off venues as a challenge to their sovereignty and control of economic activities within their domain. Accordingly, most developing states may resist appearing or be reluctant to appear in private arbitral proceedings or before such institutions outside their jurisdictions. Submission to those proceedings and institutions may be viewed as humiliating.[79] There is a perception that the interests of developing states would not be sufficiently protected before private arbitral tribunals.[80] It has been said that:

> International arbitration converts disputes with significant legal, regulatory and policy dimensions into purely private contractual disagreements. Courts, whose duty it is to administer justice pursuant to law and policy, are replaced with private panels that often see their mission as merely to settle disagreements in accordance with 'general' legal principles and prevailing business practices that favour transnational corporations. This type of private justice inevitably ignores the legitimate regulatory interests of concerned states.[81]

Despite their conclusion of investment and trade contracts with arbitration clauses, most developing states and their agencies show a general reluctance to use arbitration. Unilateral withdrawals from arbitral proceedings or non-submission to or participation in such proceedings were

[78] Cf.: 'Indeed developing countries tend to insist on the application of their law for political reasons, as a means to underline their sovereignty and the adequacy of their legal system': Sacerdoti, 'State Contracts and International Law: A Reappraisal', Italian YBIL 7, 1986–7, 26, 35.

[79] Yatim, 'The Regional Centre for Arbitration', lxxxi (footnotes omitted). Cf.: '[H]olding the proceedings abroad is not likely to be an acceptable proposition to a sovereign contracting entity. But it should be borne in mind that it is possible to conduct any of these proceedings at a situs within the territory of the contracting sovereign or the developing country agency': R. Layton, 'Changing Attitudes Toward Dispute Resolution in Latin America', JIA 10, 1993, No. 2, 123, 136.

[80] Sornarajah, 'Power and Justice', 103.

[81] Armfelt, 'Avoiding the Arbitration Trap', 20. Cf.: 'International arbitration, if truly independent, will protect the legitimate interests of the host state more effectively than its national courts can do, if only because the award of the arbitral tribunal has a better chance of international recognition': Peters and Schrijver, 'Latin America and International Regulation of Foreign Investment: Changing Perceptions', NILR 39, 1992, 355, 382.

common. For instance, following the Libyan nationalisation measures of 1971 and 1973, the affected oil companies, in accordance with their concessions and Libyan petroleum law, submitted the disputes to *ad hoc* arbitration and nominated arbitrators for those proceedings. However, Libya rejected the request for arbitration and neither nominated arbitrators nor participated in subsequent proceedings. The companies subsequently availed themselves of default provisions of the arbitration clauses requiring the President of the ICJ to appoint a sole arbitrator if the parties disagreed, or if one of them defaulted in appointing an arbitrator. Libya's only response in the three proceedings was the Memorandum of Objections to jurisdiction filed with the ICJ President for the purposes of the *Texaco* arbitration.[82] In that Memorandum, Libya submitted that nationalisation was an act of sovereignty which could not be judged by jurisdictions other than those of the state concerned.[83] The Law of 1971, nationalising assets of British Petroleum (BP), made no provision for arbitration. Instead, it provided that '[c]ompensation shall be determined by a Committee to be formed by the Minister of Petroleum'.[84]

Influenced by the Calvo doctrine, it was common, for instance, for an African state or its agency in the resultant dispute to insist that its court shall settle the case, or that the arbitration agreement should be interpreted in accordance with its laws. There were regular claims, in other states, of sovereign immunities from jurisdiction, in an effort to avoid arbitral or related legal proceedings.[85] Many ICC arbitral proceedings and

[82] 53 ILR 389.

[83] Also, in opposing the publication of the *BP* Award, the Libyan Ministry of Petroleum Resources wrote: '[W]e consider such nationalisation an absolute sovereign right of the state, to be exercised according to its discretion, and may not be subject to adjudication in any court of law, let alone an arbitration proceedings': 53 ILR 297 n. 1. See also the *Liamco* Award, 62 ILR 140, 165, for a Circular Letter of 8 December 1973, by the Libyan Minister of Petroleum to oil companies whose assets were nationalised, declining to submit to arbitration, as well as the arguments of Iran in the *Anglo-Iranian Oil Co.* case, ICJ Reports 1951, p. 89.

[84] Article 5(a)–(c), 11 ILM 380. All or a majority of members of the Committee were officers of Libya. The Law was considered in the *BP* Award, 53 ILR 302–5, 313–4. See also Laws No. 66 of 1973 (Decree of Nationalisation of 1 September 1973), No. 10 of 1974 (applicable only to Liamco) and No. 11 of 1974 (Decrees of Nationalisation of 11 February 1974, applicable *inter alia* to Texaco (American Overseas Oil Company)) discussed in the *Texaco* Award (Merits), *ibid*. at pp. 422–6; the *Liamco* Award, 62 ILR pp. 160–4.

[85] *MINE* v. *Guinea*, US District Court, DC, 4 ICSID Reports 3, reversed by the US Court of Appeal, DC, *ibid*. at p. 8; *Société Algerienne de Commerce Alco and Others* v. *SEMPAC and Others*, Court of Cassation, 65 ILR 73; *Verlinden BV* v. *Central Bank of Nigeria*, 63 ILR 390; *National American Corp.* v. *Nigeria*, 420 F Supp 954 (SDNY 1976); *Trendtex Trading Corp.* v. *Central Bank of Nigeria* [1976] 1 WLR 868. In *Ipitrade International SA* v. *Nigeria*, US District Court, DC, 63 ILR 196, 198, an implicit waiver of immunity from jurisdiction due to an arbitration

awards were successfully challenged in Egypt, by the latter or its organisations, due to Article 502(3) of the Egyptian Code of Civil Procedure, which required that arbitrators should be identified in the arbitration agreement or in a separate agreement. That provision was used to challenge appointments made by external bodies, e.g. an arbitral institution or the court, on behalf of the parties.[86]

The enforcement of arbitral awards (where one was eventually rendered), in Africa and elsewhere, against African states and private enterprises, may be an uphill task. This may be for the following reasons:

1. During the colonial era or after independence in some countries, a government *fiat* under the Petitions of Rights Act may be needed to enforce arbitral awards.[87]
2. The relevant treaty has not yet been ratified and implemented under a legal order, as it ought to have been.[88]
3. The legal framework for the enforcement of awards has not been instituted, as governments may be sceptical of arbitration and do not regard it as a priority matter in their development strategies, or because courts are hostile to enforcing arbitral awards involving foreign parties which were, as in most cases, rendered abroad.[89]
4. Sovereign immunity from jurisdiction or execution, or the act of state doctrine, was successfully pleaded before courts outside Africa.[90]

In the *Texaco* arbitration,[91] Libya raised the further objection that, as a sovereign state, it was not a party to the concession in issue and was, accordingly, an inappropriate party for arbitration. Libya argued that the arbitral proceedings were instituted against 'the Libyan Arab Republic',

agreement was found. The waiver cannot be revoked by unilateral withdrawal. See also *Liamco* v. *Libya*, US District Court, DC, 62 ILR 220; *Hunt* v. *Mobil Oil Corp*., 550 F 2d 68, 73 (2nd Cir. 1977), cert. denied 434 US 984; Delaume, 'Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies', ICSID Rev-FILJ 8, 1993, 29.

[86] El-Kosheri, 'Some Particular Aspects of the Egyptian Official Attitudes Towards International Commercial Arbitration', *L'Egyptian Contemporaine* 76, 1985, No. 400, 5. Article 502(3) of the Code has been repealed by the 1994 Law on Arbitration: see pp. 128–9. [87] See p. 207 above. [88] *Ibid*. at p. 201.

[89] Cf.: 'In Africa, the governmental authorities and, in consequence, the judges, are hostile to international arbitration and no distinction is made between that and foreign arbitration. In addition, as everybody knows, in fact arbitration is seldom freely agreed to by developing countries. It is often included in contracts of adhesion the signature of which is essential to the survival of these countries. Rendered abroad by foreigners, what is more, imposed, arbitration will only gradually obtain total third world recognition': M'baye, 'Commentary', 295.

[90] *Libya* v. *Liamco*, Swiss Federal Supreme Court, 62 ILR 228; *Liamco* v. *Libya*, US District Court, DC, *ibid*. at p. 220. Cf. *Liamco* v. *Libya*, Svea Court of Appeals, *ibid*. at p. 225.

[91] 53 ILR 389, para. 23.

whereas 'the Minister of Petroleum [of Libya] concluded the deeds of concession'. The sole arbitrator rightly overruled this objection based on 'the unity of the state' concept, by which the conduct of any state organ acting as such would be attributed to that state.[92] The notion was, however, extended to an absurd degree in the *Pyramids* arbitration.[93] In the latter, despite its vigorous protests, Egypt was held by an ICC tribunal to be a party to an arbitration agreement between a foreign company and an Egyptian state agency. The relevant Egyptian minister had, as a statutory supervisory authority of the agency, approved the investment agreement containing the ICC clause, which bore on its last page the phrase 'approved, agreed and ratified'.[94] The ICC award was subsequently annulled in Paris on the ground that Egypt was never a party to the arbitration agreement.[95]

The negative reactions were not mitigated by the perception of international arbitration by some Western scholars and practitioners as solely a mechanism for the protection of foreign private investors and traders against 'Third World countries' and their courts.[96] This only reinforced the fear expressed by developing states that their interests would not be effectively and adequately protected in the arbitral process. Many controversial arbitral awards rendered against African states and other developing states added to those fears. This should not be a surprise, as major arbitrations involving these states were conducted in one European city or another and before arbitrators (and counsel) selected from an elite group of lawyers or other professionals largely from Western states, most of them leading publicists who invariably relied on and applied legal and economic policy concepts developed in their various national systems with which they were most familiar.[97]

Furthermore, developing countries are in principle opposed to investment arbitration that is unbalanced.[98] It has been maintained that the

[92] *Ibid*. In so holding, the sole arbitrator was not implying that all state corporations are to be assimilated to the state, merely that central government officers such as the Minister of Petroleum Resources of Libya who concluded the concession in issue, are to be.

[93] *SPP (Middle East) and Another* v. *Egypt and Another*, 22 ILM 752. [94] See p. 315 above.

[95] 23 ILM 1048 and 26 ILM 1004. For a similar situation, again involving Egypt, see *Westland Helicopters Ltd and Others* v. *Egypt and Others,* ICC Interim Award, 5 March 1984, 80 ILR 595–622. The latter award was subsequently annulled in Switzerland in relation to Egypt: *ibid*. at pp. 622–66.

[96] Armfelt observed that international arbitration is premised on a distrust of developing countries and their courts: Armfelt, 'Avoiding the Arbitration Trap', 20.

[97] Wilner, 'Acceptance of Arbitration', 283; T. W. Walde, 'Third World Mineral Development', JENRL 2, 1984, 282, 296–7; Oyekunle, 'Importance of Arbitration', 24.

[98] M. K. Nawaz, 'Nationalization of Foreign Oil Companies', Indian JIL 14, 1974, 70; Sornarajah, 'Power and Justice', 103.

general validity of a nationalisation law is unquestionable, since an investment contract, not being a treaty, partakes of the character of a contract under municipal law. That law can terminate the contract and destroy the arbitration clause it contains.[99] The idea that an arbitration clause and the substantive contract exist independently of each other[100] is considered as illogical and a fiction with respect to state contracts.[101]

In this controversial area, it must first be pointed out that the notion that a *clause* in a *contract* can survive the latter's destruction is an affront to logic and common sense. It is unrealistic to put contractual clauses in such watertight compartments. The concept, taken on its face value, may constitute a subversion of the contractual foundation of arbitration. Nevertheless, this leads to an imponderable: what then is the essence of the arbitration clause in relation to disputes arising out of, or in connection with, a contract containing it? The dilemma really is in trying to justify or explain the contradiction involved in, on the one hand, the survival of a phoenix-like clause despite the destruction of its foundation, and, on the other hand, the efficacy and survival of arbitration.

The separability doctrine reconsidered

The doctrine of the separability (autonomy) of the arbitration clause is based on the proposition that if parties agree in a contract that disputes arising in relation to that contract are to be submitted to arbitration, then that consent extends to a dispute subsequent to the termination of the contract, including a dispute concerning the termination or purported termination by one of the parties or by performance or by some intervening event. Succinctly put: 'It means that the arbitration clause in a contract is considered to be separate from the main contract of which it forms part and, as such, survives the termination of that contract'.[102]

[99] Nawaz, 'Nationalization of Foreign Oil Companies', 79–80.

[100] E.g. Schwebel, *International Arbitration*, pp. 1–60; Redfern and Hunter, *International Arbitration*, paras 3-31 to 3-34; 5-30 to 5-38; *Elf Aquitaine Iran* v. *NIOC*, Preliminary Award, 14 January 1982, 96 ILR 251. The notion enabled the sole arbitrators in the three Libyan oil arbitrations to assert their jurisdictions after the annulment of the concessions by Libya: *Texaco*, Preliminary Award, 53 ILR 389, paras 9–19; *BP* Award, *ibid*. at pp. 327, 354, 356; *Liamco* Award, 62 ILR 140, 178–80.

[101] M. Sornarajah, 'The Climate of International Arbitration', JIA 8, 1991, No. 2, 47, 58. Cf.: 'The mandatory force of the arbitration clause cannot be dissociated from that of the substantive contractual commitments': *Westland Helicopters* Award, 80 ILR 595, 610.

[102] Redfern and Hunter, *International Arbitration*, para. 3-31, observing, earlier in the paragraph that the concept, 'which is now widely accepted, is both interesting in theory and useful in practice.' According to the 1996 DAC Report on the English Arbitration Bill, the principle of separability 'is regarded internationally as highly desirable': *Arbitration International* 13, 284, para. 43.

The doctrine forms part of the third generation arbitration laws in Africa.[103]

The separability of an arbitration clause from the contract containing it enables the arbitral tribunal to rule on its competence and jurisdiction.[104] The latter makes for effectiveness in the arbitral process and avoids delays that might arise if the court were to be approached each time the question of arbitral jurisdiction is raised.[105]

Thus, the main contract can be declared to be at an end or illegal, null and void, yet the power of the arbitral tribunal to so pronounce is preserved.[106] For example, if a contract with Utopia, governed by Utopian law and containing an arbitration clause is subsequently terminated by that law, the arbitral tribunal should so find. The question whether the contract has been terminated falls within the tribunal's jurisdiction. This can be done only if the arbitral tribunal's source of authority – the arbitration clause – is held to be independent of the substantive terms of the terminated contract.[107] If, on the other hand, the contract is not governed by

[103] Model Law, Article 16(1); the Algerian Arbitration Code 1993, Article 458(1); the Djibouti Code 1984, Articles 3 and 11; Tunisian Code 1993, Article 61; Arbitration and Conciliation Act 1988 of Nigeria, s. 12(1); Egyptian Arbitration Law 1994, Articles 22(1) and 23; Kenyan Arbitration Act 1995, s. 17; Zambian draft Arbitration Act 1999, First Sch., Article 16(1); Zimbabwean Arbitration Act 1996, Schedule 1, Article 16(1); South African draft International Arbitration Acts 1997 and 1998, Schedule 1, Article 16(1), respectively; Ugandan Arbitration and Conciliation Act 2000, s. 17(1); OHADA Uniform Arbitration Act 1999, Article 4.

[104] Park, 'Bridging the Gap', 46–7, 53–5.

[105] With respect to the jurisdiction of an arbitral tribunal to rule on its competence, laws may allow the court to review the arbitral jurisdictional ruling only *after* the making of an award, i.e. during an application to set aside or enforce an arbitral award, e.g., Arbitration and Conciliation Act 1988 of Nigeria s. 12(4); Egyptian Law on Arbitration 1994, Article 22; Arbitration and Conciliation Act of India, s. 16. By contrast, some laws and the Model Law allow the court to rule on the issue of arbitral jurisdiction *before* an award is made: the Model Law, Articles 16(3), 35 and 36; OHADA Uniform Arbitration Act 1999, Article 11; the UK Arbitration Act 1996, ss. 30(2), 31, 66(3), 67 and 68, subject to waiver under s. 73; Sander, *Quo Vadis Arbitration*, pp. 108–12. Common to both approaches are that the arbitral tribunal is the judge of its competence and any decision of the arbitral tribunal in that respect is neither final nor conclusive: *Christopher Brown* v. *Genosschaft Osterreichischer Waldbesistzer* [1954] 1 QB 8; *Fung Sang Trading Ltd* v. *Kai Sun Sea Products and Food Co. Ltd* [1992] 1 HKLR 40, 49–50.

[106] Park, 'Bridging the Gap', 54–5. The competence of the arbitral tribunal to rule on its competence may extend to declaring on the existence (or the non-existence), scope or validity of the arbitration clause or of the separate arbitration agreement: UNCITRAL Arbitration Rules, Article 21; AAA International Arbitration Rules, Article 15(1); ICC Rules, Article 6(2) and (4); LCIA Rules, Article 23.1; PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State 1993, Article 21; the Model Law, Article 16(1); the UK Arbitration Act 1996, s. 30(1).

[107] *Paul Smith Ltd* v. *H & S International Ltd* [1991] 2 Lloyd's LR 127; *Harbour Assurance (UK) Ltd* v. *Kansa General International Insurance Co. Ltd* [1992] 1 Lloyd's LR 81; [1993] 1 Lloyd's LR 455;

the law of Utopia, but by some other law, the issue would be what that law says about the purported termination.[108]

Either the separability and competence-competence concepts are accepted based on practical justice and the effectiveness of the arbitral process, or that arbitration is jettisoned, particularly in state contracts.[109] Between these options, there is practically no middle ground. Otherwise, community expectations will be compromised.[110]

It will facilitate a balanced appreciation of the issues to consider the perspectives of foreign investors, Western scholars, practitioners and governments, on dispute resolution involving investment transactions with developing states.

J. Hill, 'The Scope of the Doctrine of Separability', LMCLQ, 1992, 306. Arbitration is merely a procedure for resolving disputes arising out of the substantive commercial contract: *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] AC 827, 848–50 and *Royal Exchange Assurance* v. *Benthworth Finance Nigeria Ltd* [1976] 1 ALR Comm 72, 83–4, where a distinction was made between two obligations characteristic of commercial contracts: one regarded as '[t]he source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done.' The primary obligations of a contract are within the sole decision of the parties, and the court may enforce them. Breaches of primary obligations give rise to the second type of obligations – the substituted or secondary obligations – on the part of the party in default. It was earlier indicated that arbitration clauses do not come into operation until a party to a contract claims that a primary obligation has not been observed. Thus, for the unperformed primary obligations of the party in default, there are substituted by operation of law the secondary obligations.

[108] Cf. *Metliss* v. *National Bank of Greece* [1957] 2 All ER 1, affirmed in [1957] 3 WLR 1056 (HL), where the *status* of a corporation incorporated under Greek law which was later amalgamated under that law with another corporation (with assets in England) forming thereby a new amalgamated corporation, as well as the status of the latter were determined in accordance with Greek law (*lex loci*). However, the *obligations* of the amalgamated corporation in England for a guarantee given by the former corporation, was decided in accordance with English law (the proper law of the contract). Also, the proper law did not recognise the moratorium granted by the Greek law to the former corporation. I am grateful to Professor James Crawford for drawing my attention to this case.

[109] For justifications based on practical necessity and effectiveness, despite the apparent illogicality of the concept of separability, see J. Paulsson, 'The Contribution of English and American Legislation', in Kemicha (ed.), *Proceedings of the 3rd Euro-Arab Arbitration Congress* (London: Graham and Trotman, 1991), pp. 104, 109; *Texaco* Award, 53 ILR 389, para. 11.

[110] This point is not relevant for ICSID proceedings, particularly arbitration, if there is effective written consent to the Centre's jurisdiction. Also, the ICSID tribunal or commission is the judge of its own competence: Schreuer, 'Article 25', 488–9; Schreuer, 'Articles 41–44', 365; *Kaiser Bauxite Co.* v. *Jamaica*, 1 ICSID Reports 296; ICSID Convention, Articles 25(1), 45(2), 32 and 41.

Developed states' perspectives

The 'capital-exporting states' and their nationals prefer delocalised methods of dispute resolution particularly in respect of developing states. An investor weighs the economic implications of an investment climate. The investor wants security and stability to be able to fulfil its primary motives – profit making, access to raw materials or cheap labour – at minimum cost or risk. Investors cherish reasonable certainty and predictability if the long-term planning characteristics of major investment decisions are to be attainable. Investors loathe litigating in courts of developing states since most investors usually do not have confidence in the fairness and independence of those courts, particularly if disputes involve the host state. International companies would rather prefer to litigate with other non-state actors and foreign governments in the companies' national courts. Doak Bishop explains that this may be due to the shared view of justice in commercial disputes between those courts and companies, the desire of the latter to secure 'home town justice', as well as their fears that foreign courts or arbitrators may have a substantially different view of commercial justice.[111] However, most US companies, due to the peculiar complexities and costs of litigating in their country, 'are less likely to object to international arbitration as the lesser of evils'.[112]

Investors would also prefer that their relationships with host developing states, which, in any event, are based in the territories of those states, are removed from those fora once major disputes arise.[113] They vigorously resist the application of the laws of developing states to the investment contracts, as that would enable those states to rely on their municipal laws to evade their international responsibilities, if there is, for instance, an expropriation or nationalisation.[114] In an attempt to achieve this end,

[111] R. D. Bishop, 'The US Perspectives Towards International Arbitration with Latin American Parties' (unpublished), p. 8.

[112] Bishop, *ibid*. at p. 9. For some reservations about litigating in the US, see Rooij, 'Remarks' in Heere (ed.), *Contemporary International Law*, pp. 119–22.

[113] The desire to insulate foreign investors from aspects of local law constitutes a motivating force for BITs, see Vascianne, 'BIT and Civil Strife', 339, n. 23; Peters and Schrijver, 'Latin America', 368–83; P. Peters, 'Exhaustion of Local Remedies: Ignored in Most BITs', NILR 44, 1997, 233. On the other hand, '[B]ITs contains scarcely a word about the many duties toward the host state that TNCs or multinationals owe': Alvarez, 'A Remark', 554–5. For an elaboration on the rights and duties of the TNC, see G. Ossman, 'The Rights and Duties of Transnational Corporations Under International Economic Law', ICCLR 4, 1996, 139.

[114] *Texaco* Award, 53 ILR 415, 456.

foreign investors and their home states rely on varied methods often devised by erudite scholars and practitioners.[115]

Most such scholars and practitioners advanced and repeated the view that there are universal and obligatory rules of international law derived from state responsibility which apply to investments abroad. They argued for an international minimum standard of protection for investments and other property rights abroad. They insisted, as an aspect of that, on the internationalisation of investment contracts and the delocalisation of investment disputes.[116] If there is an expropriation or nationalisation, they would generally insist on the applicability of the Hull formula for the payment of prompt, adequate and effective compensation.[117] Those scholars and practitioners have a committed belief that public international law, when applicable to investment contracts, would secure contractual stability and predictability, admitting, however, that public international law itself approves of a conditional taking by a state.

Central to this is the question of how to raise a non-state actor to the status of a state so that public international law and its remedies can apply directly to it, or how to enable a non-state entity to plead public international law directly against a sovereign state.[118] Views were thus canvassed for the recognition of the private corporation as a substantive international personality,[119] the ultimate purpose being to 'insulate the investment agreement from the operation of the law of the host [developing] state'.[120] Those views and devices could be relied upon either singly or cumulatively and, to some extent, might have contributed in dampening the enthusiasm of developing states in international arbitration.

[115] For a review, see Muchlinski, *Multinational Enterprises*, pp. 493–533.

[116] Jessup, *Modern Law of Nations*; Lord McNair, 'The General Principles of Law Recognized by Civilized Nations', BYIL 33, 1957, 1; R. Y. Jennings, 'State Contracts in International Law', BYIL 37, 1961, 156; R. B. Lillich, 'The Diplomatic Protection of Nationals Abroad', AJIL 69, 1975, 359; C. T. Curtis, 'The Legal Security of Economic Development Agreements', HILJ 29, 1988, 317; P. M. Norton, 'A Law of the Future or Law of the Past? Modern Tribunals and the International Law of Expropriation', AJIL 85, 1991, 474; Norton, 'Expropriation and the ECT' in Walde (ed.), *The ECT*, p. 365.

[117] For a critique, see Sornarajah, 'Compensation for Nationalization', *ibid*. at p. 386.

[118] Toope, *Mixed International Arbitration*, pp. 78–97.

[119] Jessup, *Modern Law of Nations*.

[120] S. K. B. Asante, 'Stability of Contractual Relations in the Transnational Investment Process', ICLQ 28, 1979, 401, 405. Cf: 'Whether justified or not, such a removal may have adverse consequences. It may affect the willingness of a State to submit disputes to a system of adjudication perceived as biased against its interest, disparaging of its own institutions and, last but perhaps not the least, imposing an excessive drain on its foreign exchange resources': G. R. Delaume, 'The Pyramids Stand – The Pharaoh's Can Rest in Peace', ICSID Rev-FILJ 8, 1993, 231, 262 (footnote omitted).

The earliest stance was the view that the laws of developing states were insufficient or inadequate to regulate investment contracts (as some laws at that time may well have been).[121] To make up for the perceived gaps in those laws, and to insulate themselves from those laws, foreign companies advocated, and arbitral tribunals applied, the uncertain and unpredictable general principles of law as set out in the Statute of the ICJ.[122]

The reliance on the unsophisticated nature of the laws of host developing states to justify their non-application was later abandoned especially after the independence of these states and as their laws were reformed and developed. In its place were devised the unsupported and unsupportable propositions that an investment contract, especially with a developing state, is an Economic Development Agreement (EDA).[123] According to this view point, an EDA is, at least, using some of the criteria expressly mentioned in *Sapphire* and *Texaco* awards – an agreement covering a particularly broad subject matter, which helps the host developing Contracting State to realise its economic and social progress, entailing heavy capital investment by a foreign private party with whom it was concluded, mostly for a long duration and possessing stabilisation, applicable law and arbitration clauses. EDA are said to attract the objective application of international law or other non-national norms.[124] That proposition has been widely and coherently examined and unanimously rejected, and rightly so.[125]

Subsequently, it was explained that an investment contract, also called

[121] *Petroleum Development Co. Ltd* v. *Sheikh of Abu Dhabi*, Award of 28 August 1951, 18 ILR 144, 149; *Ruler of Qatar* v. *International Marine Oil Co. Ltd*, Award of June 1953, 20 ILR 534, 544–5; *ARAMCO* v. *Saudi Arabia*, Award of 23 August 1958, 27 ILR 117, 168–9.

[122] In the *Texaco* Award, 53 ILR 420, a criterion invoked by the sole arbitrator to internationalise the contract was the reference made therein to general principles of law.

[123] *Revere Copper & Brass Inc.* v. *OPIC*, 56 ILR 258, 271–7; Curtis, 'Legal Security of EDA'; J. N. Hyde, 'EDA', RdC 105, 1962, 265, 282; R. B. Lillich, 'The Law Governing Disputes Under EDA: Reexamining the Concept of "Internationalization"' in Lillich and Brower (eds), *International Arbitration in the 21st Century: Towards 'Judicialization or Uniformity'?* (New York: Transnational, 1994), p. 61; T. J. Farer, 'EDAs: A Functional Analysis', Columbia JTL 10, 1971, 200; M. Bourquin, 'Arbitration and EDA', *Business Lawyer* 15, 1960, 860.

[124] The sole arbitrators in the *Liamco* and *BP* awards more or less identified those features in the concessions in issue but were unable to characterise them as EDAs with the ascribed implications: *Liamco* Award, 62 ILR 140, 169–76.

[125] *Klockner* Award, excerpts in J. Paulsson, 'The ICSID Klocker v. Cameroon Award: The Duties of Partners in North–South EDAs', JIA 1, 1984, 145, 157; *Amoco IFC* v. *Iran*, ICTR 15, 1987, 189, paras 148–56; Toope, *Mixed International Arbitration*, pp. 81–90; E. Paasivirta, *Participation of States in International Contracts and Arbitral Settlement of Disputes* (Helsinki: Finnish Lawyers' Co., 1990), pp. 93–104; Chukwumerije, *Choice of Law*, pp. 155–8; D. W. Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach', BYIL 59, 1988, 49; S. Pogany, 'EDA', ICSID Rev-FILJ 7, 1992, 1; F. R.

a 'quasi-international contract', created a *lex contractus*, which was self-contained and based on *pacta sunt servanda*, without any pre-existing legal order.[126] That intriguing view must be dismissed with brevity, as a 'contract without law' is distinctly and inherently contradictory.[127] On the other hand, a concession or an investment agreement has been equated to a treaty with all that such a characterisation implies.[128] Thus, Curtis has written that: 'A significant part of public international law is devoted to the interpretation and effects of treaties, which are contractual agreements. Many of the rules of treaty law can be applied to economic development agreements'.[129] It was also maintained that an investment contract is an instrument of international character having the same binding force as a treaty.[130]

Internationalisation of investment contracts reconsidered

An investment contract between a state and a private person is neither a treaty nor does it have the implications of a treaty.[131] True, a treaty is an 'international agreement'.[132] But, mere appellation is insufficient. Indeed,

Teson, 'State Contracts and Oil Expropriations: The Aminoil–Kuwait Arbitration', Virginia JIL 24, 1984, 322, 332. For a view that the EDA 'is a concept in judicial retreat', see Lillich, 'Law Governing Disputes Under EDA', 93.

[126] A. Verdross, 'Quasi-International Agreements and International Economic Transactions', YBWA, 1964, 230. In the *Texaco* Award, 53 ILR 420, para. 31, that theory was alluded to but rejected.

[127] Sacerdoti, 'State Contracts', 37; Asante, 'Stability', 405–6; D. W. Bowett, 'Claims Between States and Private Entities: The Twilight Zone of International Law', CULR 35, 1986, 929, 930; *ARAMCO* Award, 27 ILR 117, 165; *Amin Raseed Shipping Corp.* v. *Kuwait Insurance Co.* [1983] 2 All ER 884, 891.

[128] See *Texaco* Award, 53 ILR 420, 447–9; *BP* Award, *ibid*. at pp. 332–4, and the contentions of ARAMCO in the arbitration with Saudi Arabi, 27 ILR 117, 162.

[129] Curtis, 'Legal Security of EDAs', 344. Walde and Ndi exercised caution in expressing the view that 'International law, in particular the law of treaties, being state-to-state law is at most applicable by analogy, with due account of the significant differences between state contracts with private investors and intergovernmental agreements. International law principles which could apply in these circumstances are those relating to state responsibility for injury to foreign nationals': T. W. Waelde and G. Ndi, 'Stablizing International Investment Commitments: International Law Versus Contract Interpretation', Texas ILJ 31, 1996, 215, 242. Cf. *ARAMCO* Award, 27 ILR 117, 165.

[130] S. M. Schwebel, 'International Protection of Contractual Arrangement', PASIL 53, 1959, 266.

[131] *Anglo-Iranian Oil Co.* (Jurisdiction), ICJ Reports 1952, pp. 93, 111–13; *Aramco* Award, 27 ILR 117, 166; *Amco Asia* Award, 1 ICSID Reports 463, para. 184; Bowett, 'State Contracts with Aliens', 54; Malanczuk, *Akehurst's International Law*, pp. 38–9.

[132] 1969 VCLT, Article 2(1)(a). Paasivirta repeated, probably for emphasis, that the VCLT (Article 1) applies only between states, not between states and individuals: 'The ECT and Investment Contracts: Towards Security of Contracts' in Walde (ed.), *The ECT*, pp. 349, 351 n. 5.

a state and a private person, and states *inter se*, could conclude international agreements, which are not treaties because not subject to international law.[133] The phrase 'international agreement' may also be relevant to an ordinary sales agreement between nationals of Zambia and Switzerland, or by two nationals or residents of Libya over a subject matter located in the US.[134] It would be absurd to conclude from the fact that these are 'international agreements' that they too are treaties or analogous to treaties in the international legal order. Treaties 'bear a close resemblance to contracts in a superficial sense in that the parties create binding obligations for themselves, but they have a nature of their own which reflects the character of the international system'.[135] In contemporary international law, for an international agreement to constitute or to have the implications of a treaty, it must have a reciprocal intergovernmental foundation and be governed by international law.[136]

Investment contracts may contain clauses, for example an arbitration clause, which might still be invoked to achieve internationalisation.[137] The insertion of an arbitration clause into an investment contract has been used to indicate that the parties intended the application of a non-national rule or, at least, a negative intention to reject the exclusive application of national law in regulating their substantive rights and obligations.[138] Also, in considering the law applicable to the arbitration, among other things, it was indicated that the procedure for the appointment of the sole arbitrator, and in particular a provision in an arbitration clause that the appointment should be through an application by a willing party to the President of the ICJ, 'strengthens the presumption

[133] YBILC, 2, 1962, 32

[134] Cf. UNCITRAL Model Law criteria for 'international': see pp. 163–6 above.

[135] Shaw, *International Law*, p. 74.

[136] The 1969 VCLT is also applicable to any treaty which is the constituent instrument of an international organisation (Article 5), and it saves international agreements under customary international law (Article 3). There is a 1986 Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, 25 ILM 543 (not yet in force).

[137] For features of traditional concessions which were subsequently invoked in the *Texaco* and *Sapphire* awards as indicia of internationalisation, see McNair, 'General Principles', 1; Hyde, 'EDAs', 282–3; and Curtis, 'Legal Security of EDAs', 320–1.

[138] *Sapphire* Award, 35 ILR 136, 170–2, relied upon in the *Texaco* Award, 53 ILR 420, 454–5, para. 44, holding that: '[i]t is therefore unquestionable that the reference to international arbitration is sufficient to internationalise a contract, in other words, to situate it within a specific legal order – the order of the international law of contracts'. For critique, see A. A. Fatourous, 'International Law and Internationalized Contract', AJIL 74, 1980, 134; Sornorajah, 'The Myth of International Contract Law', JWTL 15, 1981, 187.

that the parties intended that any possible arbitration between them should be governed by international law' and 'under the aegis of the United Nations'.[139]

The considerations applied in these awards to determine the substantive and procedural applicable laws were clearly based on a misunderstanding of the nature and effect of an arbitration clause as well as the particular purpose of the default provisions under which the sole arbitrators were designated in those cases.[140] In the Libyan oil arbitrations, the designations of sole arbitrators pursuant to the default provisions in the concessions were necessitated by Libya's unwillingness to nominate arbitrators to the respective panels within the stipulated time.[141] The main purpose of a default clause in an arbitration agreement is to preclude an unwilling party delaying, hindering or frustrating the constitution of the arbitral tribunal, which is an indispensable step in any arbitration. That clause as such is rarely of any relevance in determining the applicable law. In this connection, it is striking that the BP and Liamco concessions were substantially identical to the one in the Texaco arbitration, and that the sole arbitrators in the three arbitrations were similarly appointed. However, no determinations on the applicable law flowed from those considerations in any of those other arbitrations.[142] In its treatment of the applicable law, the *Texaco* award could justifiably be considered as 'extreme'.[143] The award puzzled developing states and further dampened their interest in the international arbitral process in matters of state contracts.[144]

[139] *Texaco* Award, *ibid*. at pp. 434–5, citing the *Sapphire* Award, where the designation of the sole arbitrator by the President of the Swiss Federal Tribunal (in an arbitration whose seat was fixed in Lausanne) was considered as implying that the arbitration was subject to the judicial sovereignty of Vaud.

[140] G. R. Delaume, 'The Proper Law of State Contract Revisited', ICSID Rev-FILJ 12, 1997, 1, 6–7. Using judges of the ICJ as appointing authorities in commercial arbitration has been criticised in the context of dispute resolution under the former Lomé Convention. Reservations expressed, to some extent, appear to be intended to have a wider scope: Paulsson, 'Arbitration Without Privity', 432. Many commercial arbitration institutions in and outside Africa can act as an appointing authority in such cases especially under the UNCITRAL Arbitration Rules or where agreed by the parties.

[141] See p. 430 above.

[142] *BP* Award, 53 ILR 297, 308–11, 327–9; *Liamco* Award, 62 ILR 140, 171–80.

[143] Delaume, 'Proper Law', 6.

[144] The same could be said of the award of the remedy of *restitutio in integrum* and the treatment of the legal nature and effect of a stabilisation clause in the award. It is significant that Libya has not yet ratified or is delaying ratifying the ICSID Convention and the NYC. By contrast, Libya is a party to many arbitral treaties among the Arab League states (see pp. 177–8, note 2 above) and is a party (since 1996) to the Hague Convention of 1907 on Pacific Settlement of Disputes. Libya has appeared and brought cases, on many occasions, before the ICJ.

Response to economic imbalance and domination

The period following the political independence of most developing states was characterised by economic conflicts with the developed states.[145] As most developing states were colonised, they saw in their political independence an avenue for expressing their desires for a more effective management and control of their economies, natural resources and wealth. This became necessary partly because concessions granted to companies during the colonial era were 'patently unequal'.[146]

With the initiative and support of the Organisation of Petroleum Exporting Countries (OPEC), those states played a more active and decisive role in contractual relationships with foreign oil corporations. In 1968, OPEC issued guidelines to serve as a basis for the petroleum policy of member countries.[147] One of those guidelines related to dispute settlement and emphasised the exclusivity of national courts' jurisdiction in matters concerning the exploitation and development of the hydrocarbon resources of member states. These were justified in the exercise of permanent sovereignty over natural resources.

Assertion of permanent sovereignty over natural resources and the demand for a new international economic order

The doctrine of permanent sovereignty was formulated in the UN General Assembly as an aspect of economic self-determination, and applied to the natural resources sector. It was later extended to all economic activities and wealth within a state.[148] The doctrine was elaborated and reaffirmed in subsequent General Assembly resolutions.[149] Voting in the UN General

[145] Higgins, *Conflict of Interests*, pp. 49–98.

[146] S. K. B. Asante, 'Restructuring Transnational Mineral Agreements', AJIL 73, 1979, 335, 338–9.

[147] Resolution XV1 90, 7 ILM 1183–4.

[148] GA Resolutions 523 (V1) of 12 January 1952; 626 (VII) of 21 December 1952; I. Brownlie, 'Legal Status of Natural Resources in International Law', RdC 162, 1979, Pt 1, 245, 255, 311; Brownlie, *Principles*, p. 542; N. Schrijver, *Sovereignty Over Natural Resources* (Cambridge: CUP, 1997), pp. 33–119; J. N. Hyde, 'Permanent Sovereignty Over Natural Wealth and Resources', AJIL 50, 1956, 854; *East Timor* case (*Portugal* v. *Australia*), ICJ Reports 1995, pp. 90, 139–223. Cf. *Aminoil* Award, 24 March 1982, 21 ILM 976, 1021–2.

[149] E.g. GA Resolution 1803 (XVII) of 14 December 1962, ILM 2, p. 223; GA Resolution 2158 (XXI) adopted on 25 November 1966, 6 ILM 147; GA Resolution 3016 (XXVII) passed on 18 December 1972, 12 ILM 226. No African state voted against this resolution. Liberia and South Africa abstained, while the Central African Republic, the Gambia, Guinea and Malawi were absent; GA Resolution 3171 (XXVIII) of 17 December 1973, 13 ILM 238; The Declaration on the Establishment of an NIEO, GA Resolution 3201 (S-VI) of 1 May 1974 adopted without a vote, *ibid*. at p. 715; Programme of Action on the Establishment of an NIEO, GA Resolution 3202 (S-VI) of 1 May 1974 adopted without a vote, *ibid*. at p. 720;

Assembly is based on the sovereign equality of states; and developing states enjoy numerical superiority there.

Resolution 1803 of 1962 recognised the sovereign right of a state to nationalise and a duty to pay compensation in accordance with national rules and international law, and provided for dispute settlement relating to *compensation* by arbitration or international adjudication after the exhaustion of local remedies. Furthermore, Article 8 thereof partly provided that '[f]oreign investment agreement *freely entered into by, or between sovereign states* shall be observed in good faith' (emphasis added).

Resolution 1803 was a pragmatic compromise which coupled the sovereign right to nationalise with the international minimum standards favoured by Western states.[150] States and arbitrators of different ideological backgrounds and orientations thus broadly supported the Resolution, unlike the 1974 CERDS.[151] Article 4 of Resolution 1803 dealing with the taking of property, compensation and dispute resolution provided:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In any such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by Sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

The above, it must be observed, did not provide that disputes relating to foreign investment transactions or the validity and legality of nationalisation measures were covered. Article 4 was only restricted to disputes pertaining to compensation when nationalisation, expropriation or requisition on the stated conditions occur. The Resolution assumed the

The CERDS, GA Resolution 3281 (XXIX) of 12 December 1974, adopted by a vote of 120 in favour to six against, with ten abstentions, 14 ILM 251.

[150] S. M. Schwebel, 'The Story of the UN's Declaration on Permanent Sovereignty Over Natural Resources', ABA J 49, May 1963, 463.

[151] Resolution 1803 of 1962 was adopted by a vote of eighty-seven in favour, two against, with twelve abstentions. Most of African and Latin American states supported the Resolution. However, Ghana, the former Soviet Union, Eastern European states, France and South Africa did not support the Resolution: R. F. Meagher, *An International Redistribution of Wealth and Power* (New York: Pergamon Press, 1979), p. 51; O. Udokang, *Succession of New States to International Treaties* (Dobbs Ferry: Oceana, 1972), p. 48 n. 86; Schwebel, 'The Story of the UN's Declaration', 463. The support of the Resolution in arbitral awards will be noted, see p. 445, note 158 above.

non-arbitrability and the non-justiciability of the taking itself.[152] Although the conditional nature of the taking permitted by the Resolution might suggest otherwise, 'public utility, security or the national interest' is normally within sovereign appreciation.[153]

The oil boycott embarked upon by Arab states in 1973 led to the empowerment of the developing states, some of them major oil exporters. Due to the shift in bargaining power resulting from the embargo, the emphasis on the right of a state to exercise permanent sovereignty over its natural resources and wealth, the unimpaired disposal thereof and control over other economic activities in its territory, were intensified. There were concerted demands for a 'new international economic order' (NIEO) that would lead to the equitable redistribution of economic resources taking into consideration the disadvantaged positions of the poorer states.

By 1974, the *Calvo doctrine* was, in a sense, universalised by the CERDS. The latter was supported by more than one region of what is inappropriately known as the 'Third World'.[154] There was a belief that the traditional rules regulating international economic relations were inadequate and unrepresentative of the expanded world community.[155] The CERDS was meant to be an international treaty prescribing legally binding rules.[156] Its implications were, in most respects, severe and more extensive on international economic affairs than previous resolutions of the General Assembly. It also marked a second turning point for the wider challenge to investment arbitration by developing states.

As expected, the industrialised states did not receive the CERDS warmly.[157] Arbitral awards, some of them rendered by sole arbitrators in

[152] It was earlier noted that, under the ICSID Convention, a Contracting State has the power to notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the ICSID. China made a notification to ICSID under Article 25(4) of the Convention, which is similar in implications to Article 4 of the 1962 Resolution: see pp. 244–5 above.

[153] Cf. *Liamco* Award, 62 ILR 140, 194; *Liamco* v. *Libya*, *ibid*. at p. 220; *Hunt* v. *Mobil Oil Corp.*, 550 F 2d 68 (2nd Cir. 1977) cert. denied, 434 US 984.

[154] All the then independent African states (except South Africa which was unrepresented) concertedly supported the CERDS, particularly those aspects of it dealing with the regulation of foreign investment and dispute resolution, see 14 ILM 251.

[155] A. Akinsanya and A. Davies, 'Third World Quest for a NIEO: An Overview', ICLQ 33, 1984, 208; A. Rosental, 'The CERDS and the NIEO', Virginia JIL 16, 1976, 309, 315–16.

[156] Rosental, *ibid*. at p. 316.

[157] The Western states and Japan vigorously opposed the NIEO demand. They entered reservations to the principal declarations containing that demand, see 13 ILM 744–66. It is, nevertheless, significant that the former Soviet Union and China (permanent members of the UN Security Council), Australia, New Zealand and Sweden voted in favour of the CERDS.

uncontested proceedings, gave conflicting views on the status and effect of the CERDS but generally refused to accord it a binding quality.[158] Scholars and practitioners argued that General Assembly resolutions are not legally binding even though their implications might be far reaching.[159]

Article 2 of the CERDS subjected all foreign investments to national jurisdiction abolishing thereby any duty to grant preferential treatments to investors. Like the Calvo doctrine, it emphasised the national standard of treatment advocated by most developing states and currently in vogue in international economic law.[160] It asserted the scope and fullness of the permanent sovereignty elaborated in Article 2(1) thereof, as extending to all natural wealth and economic activities. The CERDS permitted nationalisation without subjecting its exercise to any preconditions, although coupling it with a duty to pay 'appropriate' (no longer 'prompt, adequate and effective') compensation, the amount of which depended on the nationalising state's discretion. In any case where the question of compensation was concerned, it shall be settled under domestic law and by domestic tribunals, 'unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means'. There was no reference to international law preconditions for nationalisation nor was international law mentioned as a standard as in Resolution 1803 of 1962.[161] Most importantly, in the settlement of

[158] *Texaco* Award, 53 ILR 483–95; *Liamco* Award, 62 ILR 187–9; *Aminoil* Award, 21 ILM 1031–3; *Amco IFC* v. *Iran*, 27 ILM 1344, para. 116; *SEDCO Inc.* v. *NIOC and Iran*, 10 Iran–US CTR, 185–7. Some of these awards were more positive about the 1962 Resolution than they were of the CERDS.

[159] Higgins, *Conflict of Interests*, pp. 53–4; C. Brower and J. B. Tepe, 'The CERDS: A Reflection or Rejection of International Law?', *International Lawyer* 9, 1975, 295; G. W. Haight, 'The NIEO and the CERDS', *ibid*. at p. 591. Others argued that those Resolutions changed the applicable international law rules, representing a comprehensive series of norm-creating statements on a new international law of co-operation in the sphere of economic rights and duties: R. C. A. White, 'The NIEO', ICLQ 24, 1975, 542, 552; E. Arechaga, 'International Law in the Past Third of a Century', RdC 159, 1978, Pt 1, 1, 297–301; K. Hossain (ed.), *Legal Aspects of the NIEO* (London: Pinter, 1980). Brownlie, *Principles,* pp. 14–15, 545–6, argued that the Resolutions have evidential significance on the development of customary international law. Cf. Judge Lauterpacht in the *South West Africa* (Voting Procedure) case, ICJ Reports 1955, pp. 67, 120: 'Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly.'

[160] UNCTAD, *National Treatment* (New York and Geneva, 1999).

[161] Cf. Schwebel, 'The Story of the Declaration', 463.

disputes, primacy, if not exclusivity, was accorded to the national jurisdiction, substantively and procedurally.[162] Unlike the 1962 Resolution, it was not conceded by the CERDS that 'upon agreement by sovereign state *and other parties concerned*, settlement of a dispute should be made through arbitration or international adjudication'. Arbitration *per se* or any other international dispute resolution mechanism was not specifically mentioned in the relevant provisions of the CERDS. Again, the latter never contemplated the confrontation of a non-state party and a state since the proviso in Article 2(2)(c) operated only 'on the basis of the sovereign equality of States'.

Nevertheless, another reading of Article 2(2)(c) of the CERDS may appear to be consistent with the obligation to submit to arbitration if agreed upon in questions pertaining to the *compensation* to be paid for nationalisation. Admittedly, there was a clear and mandatory duty to submit to domestic law and domestic tribunals in the first instance. However, an agreement to act otherwise will negative this duty, thereby providing 'other peaceful means [to be] sought only on the basis of sovereign equality of states and in accordance with the principle of free choice of means'. One such peaceful means may be conciliation or arbitration *between two states* in exercise of their right of diplomatic protection. Another might be proceedings under the ICSID Convention between a Contracting State and a national of another Contracting State. The ICSID Convention was already in force before the 1974 CERDS was agreed. Submission to the jurisdiction of ICSID which, on its face value, covers '*any* legal dispute arising directly out of an investment' (i.e. not just compensation for nationalisation or expropriation) depends on the irrevocable written consent of both a Contracting State (or where appropriate, its agency or subdivision) *and* a national of another Contracting State. Article 64 of the Convention is a compromissory clause for submitting inter-state disputes arising out of the interpretation or application of the Convention to

[162] However, the first incursion into the 1962 position was by Resolution 3171 of 17 December 1973, which affirmed in Article 3 that: 'The application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which might arise should be settled in accordance with the national legislation of each State carrying out such measures': 13 ILM 238. All the then independent African states adopted this Resolution. See also Resolution 88 (X11) of the UNCTAD Trade and Development Board on Permanent Sovereignty Over Natural Resources, 19 October 1972, 11 ILM 1474. The latter Resolution was adopted by a vote of thirty-nine in favour, two against, with twenty-three abstentions which included these African states: Gabon, Rwanda, Senegal and Zaire (DRC).

negotiations followed by reference to the ICJ in the absence of a contrary agreement by the Contracting States concerned.[163]

But the CERDS was directly opposed to the ICSID Convention in that the former does not contemplate the confrontation of a sovereign state and a private party within its narrower scope of disputes relating to compensation. The jurisdiction *ratione personae* and *ratione materiae* of ICSID are *prima facie* wider than those contemplated by the CERDS. ICSID arbitration is also in lieu of diplomatic protection or international claim. A private person that confronts a Contracting State before an ICSID tribunal does so by virtue only of being 'a national of another Contracting State', which includes a national of the state party to a dispute which, due to foreign control, has been agreed to be treated as a national of another Contracting State.[164] The title of non-state parties to proceed before ICSID is therefore derivative, in that a national state has agreed in the Convention not to exercise its right of diplomatic protection or to bring an international claim once an arbitration is commenced or agreed upon by the parties concerned. A great compromise was made in this area by all concerned. Thus, had the CERDS received the unanimous approval of states, its implications would have been pervasive in the international legal system.[165]

Concluding remarks

It is significant that, when the CERDS was adopted, a majority of African states were parties to the ICSID Convention.[166] Also, by then, two arbitrations involving African states had been registered under the Convention.[167] By contrast, no Latin American state signed or ratified the ICSID Convention as of 1974; the first Latin American state to ratify the Convention was Paraguay in 1983 (a decade after the adoption of the CERDS). Since then, other states in that region have done so,[168] and others

[163] See pp. 236–9 above.

[164] See pp. 271–3 above.

[165] Brownlie, *Principles*, p. 546, observed that, had Article 2 of the CERDS brought about a change in the customary rule, 'whatever this might be', the US and its associates (those that voted against the CERDS – all parties to the ICSID Convention) will not be bound since they persistently objected to the CERDS.

[166] www.worldbank.org/icsid. As was shown (see note 40, p. 222 above), most, if not all, of those states also participated in drafting the Convention.

[167] *Holiday Inns* v. *Morocco* and *Adriano Gardella SpA* v. *Cote d'Ivoire*: see pp. 248–9 above.

[168] E.g. Argentina (1994), Bolivia (1995), Chile (1991), Costa Rica (1993), Colombia (1997), Ecuador (1986), El Salvador (1984), Honduras (1989), Nicaragua (1995), Peru (1993), Uruguay (2000) and Venezuela (1995).

are expected to follow.[169] That notwithstanding, it is significant too that no investment dispute involving any Latin American state was registered under the Convention until 22 March 1996, with the registration of the first arbitration involving a state in that region.[170] Since then, other disputes arising from Latin America have been registered with the Centre both under the Convention and under the ICSID Additional Facility Rules.[171] It has been argued, rather convincingly, that the ICSID Convention, far from contradicting the ideals espoused by Latin American states (i.e. the Calvo doctrine), pays considerable respect to the considerations which lie behind them, but complements them by solutions acceptable to the investors' states.[172]

What the status and implications of the CERDS were in the decades after its adoption, at least from the practice and policies of African states, would continue to engage the critical re-assessment of scholars taking into consideration the nature of the contemporary international political economy.[173] Nevertheless, it is significant that the development of arbitration institutions in Africa was contemporaneous with the elaboration of the CERDS.[174] Other dispute resolution developments in Africa since then have been equally remarkable.

[169] The Convention has been signed by Guatemala (1995): see www.worldbank.org/icsid. In addition to other arbitral developments in the region generally, Argentina (the national state of Carlos Calvo) and other Latin American states have concluded BITs with the US and other Western states containing provisions for arbitration. Mexico is a party to NAFTA and other arbitral treaties (e.g. the 1975 Inter-American Convention and the NYC), although not yet a party to the ICSID Convention. Mexico has also adopted the UNCITRAL Model Law as modified in its 1993 Arbitration Law.

[170] That was *Compania del Desarrollo de Santa Elena SA* v. *Costa Rica* (Case ARB/96/1): from discussions with Mr Parra, of ICSID at the ICSID Secretariat, Washington DC, 25 March 1996. The award in the above case was rendered on 17 February 2000. However, the first ICSID arbitration involving a Contracting State from Latin America to have yielded an award was the *Fedax* case: see p. 256.

[171] In addition to cases mentioned above involving Costa Rica and Venezuela (the latter more than once), other cases so far involve (and, at times more than once) the following Latin American states as respondents: Argentina, Chile, Paraguay, Peru, Mexico: ICSID Cases, Doc. ICSID/16/Rev.6 (30 September 1998) and www.worldbank.org/icsid.

[172] Shihata, 'ICSID and Latin America', *News from ICSID* 1, 1984, No. 2, 2–3.

[173] Walde, 'Requiem for the NIEO'; Panel Discussion, PASIL 86, 1992, 532; Norton, 'Expropriation and the ECT' in Walde (ed.), *The ECT*, p. 365. Cf. Sornarajah, 'Compensation for Nationalization', *ibid*. at p. 386; S. K. Chatterjee, 'The CERDS: An Evaluation', ICLQ 40, 1991, 669.

[174] See chapter 2 above.

General concluding remarks

The competing preferences of participants in international commercial transactions have been assessed. The factors that might be considered before selecting mechanisms for settling international trade and investment disputes in Africa were also examined. Arbitration was indicated as an option of necessity and convenience.[1] The misgivings and difficulties of developing states concerning the international commercial arbitral process were critically reviewed.[2] Those identified are relevant to states in all regions of Africa which have participated or may participate in the international commercial arbitral process. At the national, regional or international levels, the problems of those states in arbitration and, until 1984, the condition of their arbitration laws and their efforts at arbitral reform and development display common trends arising out of shared concerns and experiences.[3] Thus, if arbitration is to perform an effective and a universal role, some defects and imbalances in the process must be courageously addressed and corrected.

African states are especially unhappy that most arbitration in which they or their private and public commercial agencies are involved are held outside the continent. Although contracts may have been negotiated and concluded within an African state, with the subject matter situated or to be performed there, parties from the industrially developed states always insist on arbitral proceedings taking place in venues outside Africa. They may also insist on the application of laws alien to the legal order of the *lex loci contractus*, the *lex situs* and, in most cases, the *lex loci solutionis*. Arguments for the application of uncertain and unpredictable non-national norms are common and, in some cases, may be supported by arbitrators.

[1] See chapter 1 above. [2] See chapter 13 above. [3] See chapters 1, 4 to 6 and 12 above.

However, as this book asserts, if the alleged reason or the real fear – that the legal framework for commercial arbitration and foreign investment in these states are hardly developed – were valid in the formative years of these states, that is generally no longer the situation. The lack of infrastructure appropriate for dispute resolution in African states is also overstated. It may be pointed out that foreign consultants, experts and advisers invited by governments and international organisations to work in Africa regularly secure flights to these states, mostly to their capital cities; those consultants, experts or advisers spend their many peaceful nights at good hotels with hospitable environments; and some foreign and local businesses thrive even in tense political environments in some African states and benefit from the prevailing situations.[4] However, when there is a dispute giving rise to arbitration or conciliation, even in a less charged climate, it will be taken elsewhere outside the continent for resolution since it is said to be 'international'. The time is more than ripe for the colonially inspired and demoralising contentions proffered to perpetuate the unfair asymmetry and *status quo* in the international commercial arbitral process to be modified, or even abandoned, while African states continue to strive towards attaining arbitral perfection, if possible. Thus:

> Arbitral institutions to the extent that they are competent and arbitral parties from outside of Africa should be amenable to conducting arbitrations in African cities. The perceived logistical and infra-structural difficulties in Africa are grossly exaggerated. Africa had been able to host some of the most elaborate international conferences, and servicing an arbitration should not pose a serious problem.[5]

Reinforcing and facilitating the above is the fact that many African states are becoming attractive and hospitable for the arbitral process.[6] The legal situations in some (and, in due course, in most) of these states are positively and wholly different from what they were during the colonial era. Most of the new ADR laws in Africa either were influenced by, or represent express adoption of, the model dispute resolution regimes elaborated by

[4] Reno, 'African Weak States', 165, discussing the use made by rulers of weak African states of commercial ties and alliances with creditor states and non-state actors to maintain and reinforce their authority, thereby generating profits in global markets. See also Musah and Fayemi (eds), *Mercenaries: An African Security Dilemma* (London: Pluto, 2000), arguing that the mercenary industry adds a destabilising factor into African conflicts not only by the impoverishment and impunity that the trade brings but also because mercenarism is at the base of arms proliferation, the narcotic business, banditry and gross human rights abuses in Africa.

[5] Asante, 'Perspectives', 350.

[6] Asouzu, 'Guest Editorial', 343; Asouzu, '*Arbitration in Africa*', 373; Goodman-Everard, '*Arbitration in Africa*', 457, reviewing Cotran and Amissah (eds), *Arbitration in Africa*.

UNCITRAL or are following the OHADA uniform regime. Party autonomy within the limits of natural justice and public policy is being accorded a respected position. Interventions by the court in the arbitral process are being limited to only those that are absolutely necessary to make the arbitral process effective or to maintain its integrity as a fair and just dispute resolution mechanism.[7] Comprehensive and internationally accepted provisions relating to the challenge, recognition and enforcement of arbitral awards are being enacted. International arbitral treaties are being expressly implemented in arbitration laws of several African states, which also recognise the legality of institutional arbitration.[8] Thus, there are functional dispute resolution institutions in Africa administering and facilitating ADR under internationally approved rules.[9] The AALCC Regional Centres have broad-based dispute resolution functions determined by the peculiar problems normally encountered by Asian and African states in, and their shared concerns about, international commercial arbitration. Those Centres will provide an adequate, relatively inexpensive and fair procedure for the settlement of international commercial disputes within the region. The Centres are recognised as independent international arbitral institutions. They have separate legal personalities in the national legal orders of their host states as well as the accompanying privileges and immunities necessary for the efficient and effective performance of their functions. The latter are being carried out under the internationally prescribed, comprehensive and flexible UNCITRAL Arbitration Rules (with certain specified administrative modifications and adaptations). These Rules guarantee party autonomy, procedural diversity, efficacy and neutrality as well as arbitrator independence and impartiality. Submitting disputes to the Centres – and

[7] But, in this respect, it was pointed out that the 1993 Law of Tunisia (Article 78(6)) and the 1999 Law of Madagascar (Article 462(6)) are exceptional: see pp. 140–1, note 1 above.

[8] E.g. in Africa, Djibouti, Algeria, Egypt, Nigeria, Tunisia, Kenya, Uganda, Zimbabwe, Madagascar and, subject to the OHADA Treaty and Uniform Arbitration Act, Cote d' Ivoire, Senegal and Togo, recently enacted comprehensive statutes on international (commercial) arbitration. It is expected that more modern arbitration laws will soon be enacted in South Africa, Namibia, Lesotho, Malawi, Mozambique, Ghana, Mauritius and in Zambia. The trend is rapidly continuing.

[9] The examination of the development of arbitral institutions in developing states, their status and functions, formed the core of chapters 2 and 3. Since the establishment of the AALCC Regional Centres, new and thriving arbitration institutions have been established in Africa. These institutions have comprehensive rules that met international standards. They have also established panels of international arbitrators and conciliators and are updated regularly. It is expected that other viable dispute resolution institutions will develop.

the emerging ones that adopted rules patterned to, or influenced by, the UNCITRAL Arbitration Rules – even if the region or the country where they are located are the same as the place or region of an investment or the place of performance of an international contract, will not necessarily be prejudicial to a (foreign) party with a well-founded case. Such a submission would be and is consistent with convenience and maximum economy – desirable attributes of arbitration. Thus, most of the reasons (or, rather, excuses) often proffered for the preference of venues outside these states for international arbitral proceedings can no longer stand and could, accordingly, be courageously jettisoned.

Holding arbitral proceedings in African cities will also have educational, social and promotional roles – a point which some would dismiss as not in line with the imperatives of businesses that need and use arbitration and the ADR processes. But it is necessary to attend to 'the social and commercial implications of transnational arbitration'.[10] It is in the overall interest of businesses, both private and public, that there should exist in any state alternative mechanisms for objectively and fairly resolving commercial disputes and that there are also personnel and institutions which are able to service those mechanisms.[11] These are fundamental elements that have, admittedly, eluded African states as well as a large part of the developing world for a long time. But the diversity and availability of viable options – personnel and institutional alike – would enable disputing parties to make informed choices. The continued concentration of major arbitral matters outside Africa and its exclusive monopoly by a few individuals and institutions, deprive a large population of interested persons of the opportunities necessary to participate in, be exposed to and contribute to the development of the process. These factors are inimical to the socio-economic development and prosperity of African states and their nationals, and hinder the universality of arbitration whilst bolstering the alien origins of the process. Diversified participation would greatly enhance the image of arbitration and permeate it with a more universally democratic outlook than is presently the case. It will ultimately minimise costs for disputing parties whilst furnishing

[10] Park, 'National Legal Systems', 620.

[11] Arbitration is seen as a service industry and the customers are expected to go to the provider of the best service: A. Plantey, 'Is a General Policy of International arbitration Possible?', ICC Bulletin 7, May 1996, 15; J. Najar, 'The Insider View: Companies' Needs in Arbitration', *Arbitration International* 12, 1996, 359. Cf. R. C. Dreyfuss, 'Forum for the Future: The Role of Specialized Courts in Resolving Business Disputes', Brooklyn LR 61, 1995, No. 1, 1.

foreign investors and traders with the security and protection so desirable and essential to their activities in Africa, as well as facilitating economic development. The scheme advanced would further advance the virtues and intricacies of arbitration and the ADR processes to business and legal circles and compel the provision of better facilities for the conduct of such proceedings in African cities. This way, with time, a high degree of proficiency will be achieved.

On the other hand, African states, interested individuals and private organisations on the continent are expected to continue in their endeavours to provide the non-legal factors that would facilitate the holding of arbitration on the continent, making the process more efficient and effective. In attempting to emerge as serious venues for international arbitration, establishing a legal framework conducive to arbitration is only one step in the process. There are other non-legal and extra-legal requirements that are also conducive to both international and domestic arbitration. These include: frequent international and domestic flights and other transportation networks at affordable fares; good telecommunications systems; a constant power supply; good libraries with current legal and other dispute resolution materials and journals; a supportive body of trained personnel to serve as arbitrators or conciliators, representatives of parties, advisers, experts and assistants; the ability of parties to choose arbitrators, conciliators or their representatives from anywhere; hotels with modern recreational, telecommunications and conference facilities; and national institutions or professional groups primarily devoted to the collection, discussion and dissemination of ideas, opinions, information and knowledge on arbitration law and practice. To this list may be added, amongst others, political stability and a viable commercial centre with a generally friendly and enabling environment.[12]

Nevertheless, it must always be remembered that some arbitrators and draftsmen had or appeared to have disregarded or paid less attention to the root cause of Latin American states' attitudes toward international commercial arbitration in earlier centuries.[13] It has been said that: 'Modern arbitrators seemed unwilling to give up the notions of foreign

[12] Redfern and Hunter, *International Arbitration*, paras 6-13 to 6-28; K. Iwasaki, 'Selection of Situs: Criteria and Priorities', *Arbitration International* 2, 1986, 57.

[13] Asante, 'International Law', 588; Layton, 'Changing Attitudes', 123; Straus, 'Why Arbitration is Lagging', 21; Szasz, 'Investment Dispute Convention', 256; Shihata, 'Greater Depoliticization of Investment Disputes', 1; B. G. Rinker, 'The Future of Arbitration in Latin America: A Study of its Regional Development', CWRILJ 8, 1976, 480; L. M. Summers, 'Arbitration and Latin America', CWILJ 3, 1972, 1; Summers, 'Private Versus State Arbitration in Latin America', CWILJ 4, 1973, 121.

investment protection devised in a past age of protectorates and oil sheikhs, simply because they are more comfortable with the ideas devised by their predecessors imposing a system of property protection'.[14] An arbitral award or proceeding which does not take into consideration all the circumstances and institutions of the parties involved in a dispute may be exposed to the charge of bias. This is exactly the impression an objective observer might be left with on reading most of the awards or views examined earlier in this book. When a developing state is involved in the proceeding, such awards or views will be incompatible with the aspirations of that state to develop in a world of cutthroat competition. Such awards and views will harden the negative perceptions of such states of arbitration, increase the feeling of hostility and reinforce the belief that the process is indeed a device for the continued economic exploitation and domination after the termination of gunboat diplomacy and colonial rule. This will then lead the international community into another quagmire, as was the case in Latin America in the nineteenth century. Thus, the rather rigid impression and, some would suggest, mentality that international arbitration is only a protective device against parties from the 'Third World' and their 'untrustworthy' courts should be de-emphasised.[15] The emphasis should be placed on the other potential strengths of the arbitral process in achieving justice, fairness and finality in international business litigation *and* its contributions to economic development.

Modern arbitration, which in its origin, philosophy and culture is a distinctively Western device (and some may still contest this), is now facing unparalleled changes and new challenges.[16] Arbitration is also spreading to other places outside the Western hemisphere and will accordingly come under new and constructive influences. As a result, arbitration will become more complex, sophisticated and international. It cannot, perhaps, be otherwise.[17] As has been pointed out:

> [A]rbitration is not a beautiful and cruel goddess, which one must simply admire. On the contrary, arbitration consists of proceedings which may and must be

[14] Sornarajah, 'ICSID Involvement in Asian Foreign Investment Disputes', Asian YBIL 4, 69, 80.

[15] Sornarajah, 'Climate of International Arbitration', 47; Sornarajah, 'Power and Justice', 103; Armfelt, 'Avoiding the Arbitration Trap', 20.

[16] In the customs of many societies, there are procedures for the settlement of disputes which, in their nature, purpose and philosophy, do not approximate or parallel imported arbitration.

[17] Mustill, 'International Arbitration in a Changing World', JCI Arb 60, 1994, 43; Al-Baharna, 'International Commercial Arbitration in a Changing World', 144; Wetter, 'Internationalization of International Arbitration', 85.

improved. Developing countries should consequently not be discouraged from adjusting it [arbitration] to their needs, so that it renders the service which is expected from it.[18]

The pitfalls of international commercial arbitration as presently practised and the practical difficulties especially for parties from developing states which make them generally dissatisfied with the process, deserve an open and frank discussion because of the importance of the matter. These matters should be seriously addressed.

All said, the future of arbitration in Africa is bright. Facilitating this requires an appreciation of the urgent need for further development and the consolidation of some of the current arbitral developments on the continent. Developments should encompass all the levels – national, regional and international – at which African states encounter problems or difficulties in the process. For arbitration to be consolidated on the continent, in addition to the legislative reassessment of arbitration laws and the accession to arbitration treaties by African states, a few other steps need to be taken.

There is a compelling and urgent need to train and develop arbitrators and conciliators from African states with internationalist outlooks. This process can be started by introducing commercial arbitration and conciliation as independent subjects in more universities and other related institutions in Africa.[19] The stunted growth and development of the arbitral process in Africa can be attributed in part to ignorance and lack of information, materials and knowledge of the process and its potential in dispute resolution.[20] There is also a need for increased publicity of arbitration, not only through the authorised publication of reasoned awards but also through the organisation of public lectures, seminars and workshops. There should, in addition, be an increase in the provision of the administrative facilities necessary for the conduct of both domestic and international arbitration. This will further facilitate the creation of the

[18] M. Rubino-Sammartano, 'Developing Countries *vis-à-vis* International Arbitration', JIA 13, 1996, No. 1, 21, 27.

[19] The faculties of law at the University of Nigeria, Enugu Campus and at the University of Stellenbosch, South Africa, have standard courses on international commercial arbitration at the postgraduate level. In most other institutions in Africa that have come to the author's attention, arbitration may not be on offer in the academic programme or may be taught as a component part of courses on estate management, engineering, international trade law or international economic law or is being proposed to be introduced as a separate course in the programme.

[20] Sempasa, 'Obstacles', 387; McLaughlin, 'Arbitration and Developing Countries', 211; Straus, 'Why Arbitration is Lagging', 21; Wilner, 'Acceptance of Arbitration', 283.

much-needed awareness of the nature and value of the process. The *practice* of arbitration would then develop along with the *law* of arbitration in Africa.

In the alternative or additionally, public international law should be taught as a compulsory subject in all universities in Africa (at the undergraduate level), and possibly to judges and civil servants. As aptly observed by Judge Schwebel:

> International law is intermixed not only with the international transactions with which the private practitioner these days is so often concerned, it is part of the fabric of the international movement of people and goods and money and ideas; copyrights and trade marks derive their international validity through treaties; the World Trade Organization is a creation of the treaty process; the most-favoured nation clause is a clause found in numerous treaties; loans of the World Bank and the International Monetary Fund, and the activities of the International Labour Organization and the World Health Organization – all are rooted in treaty authorizations and structures. International organizations – most notably, the United Nations and its Specialized Agencies – are established by treaty and in turn they spawn treaties. Where (increasingly, how) fishermen can fish in the seas is regulated by international treaty, by international law. The quality of the very air we breathe is increasingly affected for the better by international treaty law.[21]

In terms of the source cited and the wide-ranging illustrations given, it is certain that the above was not meant to be exhaustive. However, the crux of the message is clear. Accordingly, a wider teaching and study of these subjects would, amongst other things, correct or justify prejudices founded on some prevailing notions, and add new information and knowledge to assist development of the system. International commercial arbitration and public international law are so important in the political and economic development of African states that they should be given more attention than at present.

As arbitration is an incident of trade and investment, there is a need for increased trade and investment in and within Africa coupled with an intensification of the economic integration of the continent. Arbitration is more likely to thrive where commercial activities are booming.[22] It is only through trade and investment that arbitration clauses can be introduced into contracts in Africa, for trade and investment are the 'vehicles' that carry arbitration. Thus, eventually and inevitably, the arbitration rules of both the new and the traditional arbitration institutions will be adopted in contracts; arbitration laws and investment codes will be

[21] Schwebel, 'A Celebration of the NYC', 83–4. [22] Werner, 'The Trade Explosion', 5.

applied, tested and reformed; treaties (bilateral and multilateral) will be invoked, interpreted and applied; and, invariably, arbitrators and conciliators, both from Africa and from other continents, will and should be appointed or designated.

Greater independence and efficiency of national judiciaries in Africa are highly desirable and necessary for commercial arbitration. Both of these virtues are not *per se* incompatible with the arbitral process; indeed, they will make arbitration, where and when chosen, a more attractive, efficient, effective and fairer means of dispute resolution. For an arbitration clause in a contract is not an agreement to opt out of the court process in any event. The national court's involvement or intervention in the process is indispensable to control, assist and support the process. Also, the network of treaties relating to the arbitral process would not be effectively enforced or applied without the involvement of a Contracting State's national judicial authority with appropriate powers. The point being pressed for here is that whilst the national judiciary should intervene and be allowed to intervene in the arbitral process on specific grounds, the resolution of the merits of commercial disputes in Africa should be reserved to arbitration.[23] Hence, the need for independent and efficient national judiciaries and the development of the law as well as the practice of arbitration in Africa. Arbitration and ADR may well then serve as facilitators of commercial activities and as instruments of economic development and prosperity in Africa.

[23] Proceedings under the ICSID Convention, discussed in chapters 7 to 12, have a self-contained control mechanism in Article 52. Nevertheless, courts of Contracting States are relevant in other respects.

Appendix

State	Dates of independence	Former colonial rulers
Algeria	3 July 1962	France
Angola	11 November 1975	Portugal
Benin (formerly Dahomey)	1 August 1960	France
Botswana (formerly Bechuanaland)	30 September 1966	United Kingdom
Burkina Faso (formerly Upper Volta)	5 August 1960	France
Burundi (formerly Urundi)	1 July 1962	Germany; Belgium
Cameroon	1 January 1960	Germany; France/ United Kingdom
Cape Verde Islands	5 July 1975	Portugal
Central African Republic (formerly Oubangui-Chari)	13 August 1960	France
Chad	11 August 1960	France
Comoros Islands	6 July 1975	France
Congo (formerly Congo Brazzaville)	15 August 1960	France
Congo, Democratic Republic (Zaire) (formerly Congo-Kinshasa)	30 June 1960	Belgium
Cote d'Ivoire (formerly Ivory Coast)	7 August 1960	France
Djibouti (formerly the French Territory of Afars and Issas)	27 June 1977	France
Egypt	28 February 1922	United Kingdom
Equatorial Guinea (formerly Spanish Guinea)	12 October 1968	Spain
Eritrea (formerly a province of Ethiopia)	23 May 1993	No colonial ruler
Ethiopia (formerly Abyssinia)		No colonial ruler
Gabon	17 August 1960	France
Gambia	18 February 1965	United Kingdom
Ghana (formerly Gold Coast)	6 March 1957	United Kingdom
Guinea	2 October 1958	France

State	Dates of independence	Former colonial rulers
Guinea-Bissau (formerly Portuguese Guinea)	10 September 1974	Portugal
Kenya	12 December 1963	United Kingdom
Lesotho (formerly Basutoland)	4 October 1966	United Kingdom
Liberia	26 July 1847	No colonial ruler
Libya	24 December 1951	Italy
Madagascar	26 June 1960	France
Malawi (formerly Nyasaland)	6 July 1964	United Kingdom
Mali (formerly Sudan)	22 September 1960	France
Mauritania	28 November 1960	France
Mauritius	12 March 1968	France/United Kingdom
Morocco	2 March 1956	France
Mozambique (formerly Portuguese East Africa)	25 June 1975	Portugal
Namibia (formerly South West Africa)	21 March 1990	Germany, South Africa
Niger	3 August 1960	France
Nigeria	1 October 1960	United Kingdom
Rwanda (formerly Ruanda)	1 July 1962	Germany; Belgium
Sao Tome and Principe	12 July 1975	Portugal
Senegal	20 August 1960	France
Seychelles	29 June 1976	France/United Kingdom
Sierra Leone	27 April 1961	United Kingdom
Somalia	1 July 1960	United Kingdom/ Italy
South Africa	11 December 1931	United Kingdom
Sudan	1 January 1956	Egypt/United Kingdom
Swaziland	6 September 1968	United Kingdom
Tanzania (formerly United Republic of Tanganyika and Zanzibar)	9 December 1961	Germany; United Kingdom
Togo (formerly Togoland)	27 April 1960	Germany; United Kingdom; France
Tunisia	20 March 1956	France
Uganda	9 October 1962	United Kingdom
Zambia (formerly Northern Rhodesia)	24 October 1964	United Kingdom
Zimbabwe (formerly Southern Rhodesia)	18 April 1980	United Kingdom

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