JUDICIAL PROTECTION OF FOREIGN INVESTMENTS

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However many disagreements there may be in present-day international affairs, on one point there has been agreement even in the worst days of the « cold war » — that it is one of the chief tasks of the more highly developed countries to raise the appallingly low standard of living in the development countries [1]. This aim can be achieved only by making massive investments in these countries. Important as may be the investments made by State agencies from both Western and Communist countries, such investments can not in themselves satisfy the huge capital requirements of the development countries. It appears therefore to be essential to attract private capital in addition for the achievement of our aim. Private investors, however, naturally hesitate to make such investments as long as the receiving countries withhold the protection which, in the view of these investors, is adequate for the safeguarding of the investments from measures of nationalization or other impairments. Despite their need for capital, however, the development countries not only hesitate to grant the required protection, but indeed often make direct pronouncements against foreign private investments [2] taking the view that such investments might jeopardize the sovereignty that has often been acquired by dint of hard struggles. Many development countries, therefore, prefer investments made by international organizations or by foreign State agencies. In the latter case, however, the unbiased observer finds it somewhat difficult to understand how the sovereignty of the receiving country is any the less prejudiced [3].

This attitude on the part of the receiving countries may explain

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1. JACOBSON, *The Soviet Union, the U.N. and World Trade*, XI Western Political Quarterly (1958), p. 683; WILCOX, *The U.S. and the Challenge of the Underdeveloped Areas of the Free World*, 40 Dept. of State Bulletin (1959), p. 750-758.

2. KOUATLY, *Exposé Introductif aux Problèmes de la Nationalisation*, Journées d'Études sur les Nationalisations (Rome 4-5 May, 1957), p. 13.

3. SEIDL-HOHENVELDERN: *Communist Theories in Confiscation and Expropriation, Critical Comments*, 7 Am. J. of Comparative Law, (1958), p. 555.

why — apart from the case of complications arising from war or the threat of war — the investments of foreign States or international organizations were, in general, exposed to fewer impairments from the receiving country than were private foreign investments. In response to the efforts of private foreign investors to promote the better protection of their rights, it would be easy to suggest that this aim could be realized by participating indirectly in investments of a public character, e.g. by purchasing bonds issued by the home country of the investor or by the World Bank [4]. It must, however, not be forgotten that the greater security enjoyed by public investments is attributable, in part at least, to the fact that, alongside such public investments, are still to be found private investments, which are worse protected in law against eventual seizure by the receiving country than are the public investments. If, therefore, a receiving country desires to free itself from the necessity of making interest and amortization payments, it will naturally take the line of least resistance : in other words, it will, as a rule, encroach upon foreign private capital. Supposing, however, that, in a given country, all private foreign capital, by taking advantage of the indirect method indicated above, were to appear as an investment made by foreign public agencies, then such a country, in practice, would hardly desist from impairing such public investments also — that is, if we are to assume that the interest and amortization payments were, in its view, to exceed its capacities.

As long, however, as private and public foreign investments exist alongside one another in the same development country, such public investments will, in general, profit from the fact that the legal protection that they enjoy is at any rate better guaranteed than is the case with private investments. A foreign State and the inter-State organizations are bodies subject to international law ; they can, therefore, give to any dispute regarding the impairment of their foreign investments the character of a dispute under international law. In so far as the receiving country is willing to settle this legal dispute in the courts of international law, the International Court of Justice is available as the appropriate forum [5] either directly (action by the State) or indi-

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4. MUDDATHIR, *Die Industrialisierung der wirtschaftlich unterentwickelten afrikanischen Länder und ihre Auswirkungen auf die Weltwirtschaft* (Berlin, 1957), p. 277, does not in fact hold this extreme view, but would like to interpose a private international organization between the individual investor and the receiving country.

5. Doubts have occasionally been expressed as to whether the I.C.J. is capable of judging complicated economic questions which may arise in connection with the solution of legal problems. E.g. KOPELMANAS : *La notion de liberté économique*

rectly (the obtaining by the inter-State organization of an Advisory Opinion previously declared binding [6]).

In view of the regrettable reluctance to ratify the optional clause of the Statute of the International Court of Justice [7], even a State may, as a rule, institute proceedings before this Court against the receiving country concerned only with the latter's consent A noteworthy proposal recently put forward by British, German, Netherlands and Swiss investors [8] provides, therefore, *inter alia*, that interested countries should undertake in an inter-State treaty to submit all inter-*State* disputes [9] arising in future between them from foreign investments to an international court of arbitration [10]. This procedure would establish compulsory jurisdiction for this court of arbitration, which does not automatically exist in the case of the I.C.J. Furthermore, the procedure would be considerably simpler and hence cheaper than before the I.C.J. If, however, pending the realization of this proposal, even the rights of a *State* against the country receiving investments appear to lack adequate protection, then *de lege lata* the protection of the rights of a private foreign investor is even more problematical. It is necessary for such an investor to take first a further difficult hurdle ; he must persuade his own Foreign Office to assert his claims, for it is not the aggrieved person himself, but his home country, that acts as claimant against the receiving country. Under the constitutional law of the great majority of States, however, the aggrieved citizen has no legal claim against his home country to the granting of such protec-

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devant la justice internationale, Clunet 1954, p. 96. Although questions such as that of the adequacy of a compensation award undoubtedly also raise economic problems, we consider that the I.C.J. would be, in that respect, by no means overtaxed.

6. For criticism of this hybrid solution see SEIDL-HOHENVELDERN : *Der Zugang Internationaler Organisationen zum Internationalen Gerichtshof*, Friedenswarte 54 (1957), pp. 21-24.

7. On the reasons for this attitude see SEIDL – HOHENVELDERN, in SCHWARZENBERGER Report of the Committee on the Review of the UN Charter to the 48th (New York) Conference of the International Law Association, 1958.

8. Convention on Investments Abroad, Draft of April, 1959, which is at present being considered in the O.E.C.E. as Document N° T.I.R. (59) 1, First Revision.

9. The draft provides moreover that a State, by accepting an optional clause, may also grant to private individuals the right to appeal to this court of arbitration.

10. This draft constitutes a substantial recasting and shortening of the original draft by ABS of a *Magna Carta for the protection of private property*, submitted to O.E.E.C. as Document N° C(57) 264 Scale 1 of December 23, 1957. German text with commentary, Vol. 2 of Veröffentlichungen der Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen, Internationale Konvention zum gegenseitigen Schutz privater Vermögensrechte im Ausland.

tion [11]. The often criticised decision of the I.C.J. [12] in the Nottebohm case [13] showed, moreover, that, even when the home country is willing to look after the interests of its nationals, it was nevertheless possible for this right of the home country to be contested successfully before the I.C.J. — and with not very convincing arguments. Even if the receiving State does not refuse to recognize the right of the investor's home country to defend his interests, the individual investor, as a rule, has no influence whatsoever on the manner in which his home country defends these interests. In this connection, the home country is guided, not by the interests of the individual aggrieved citizen, but by considerations of national political expediency [14]. Thus, various Western States have concluded overall compensation agreements [15] with States

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11. GECK : *Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht*, 17 Zeitschrift für ausl. öff. Recht und Völkerrecht (1956/57), p. 543, (German) Federal Constitutional Court 21.3.1957, *ibid.* 18 (1957/58), p. 121 (B. Verf. G.E. 6, 290).

DOEHRING : *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Cologne, 1959), p. 92 and p. 96, believes that in addition to the right of the State to protect its nationals there exists under international law an independent right of the individual national, to protect his own interests himself (*loc. cit.*, pp. 22-24). In my opinion this right will be hardly enforceable in practice. Views similar to those held by Doehring are also expounded by BERLIA : *Contribution à l'étude de la nature de la protection diplomatique*, Ann. Fr. Dr. Int. 1957, p. 72. Criticism of the prevailing doctrine is also expressed by CAVARÉ : *Les transformations de la Protection diplomatique*, 19 Zeitschrift für ausl. öff. Recht und V. R. (1958)—Makarov—Festschrift, p. 59.

12. Bibliography in SEIDL-HOHENVELDERN : *L'ordre public international et la fraude à la loi* (leur importance en droit international public) in Mélanges Maury. Also LANGEN : *Weschsel der Staatsangehörigkeit und Eigentumsschutz im Kriege* (Der Fall Nottebohm) in Janssen Festschrift (see infra Note 19), pp. 103-110. PARRY, *Some Considerations upon the Protection of Individuals in International Law*, Recueil des Cours de l'Académie de Droit Internetional 90 (1956-II), pp. 705-708, VAN PANHUYS. *The Role of Nationality in International Law* (Leyden 1959), pp. 156-157.

13. Liechtenstein v. Guatemala, Nottebohm Case (Second Phase), Judgment of Avril 6, 1955, I.C.J. Reports 1955, p. 4.

14. This is deplored by SÉFÉRIADÈS : *Le problème de l'accès des particuliers à des juridictions internationales*, Recueil des Cours de l'Académie de Droit International, 51 (1935, I), p. 28.

15. BINDSCHEDLER : *La Protection de la Propriété Privée en Droit International Public*, Recueil des Cours de l'Académie de Droit International, 90 (1956, II), pp. 179-306.

FOIGHEL : *Nationalization* (Copenhagen, 1957), p. 100, quotes the text of certain provisions of this nature, e.g. those of the Swedish-Hungarian Agreement of March 31, 1951, whereby Sweden authorizes Hungary to deduct a corresponding amount

of the Eastern bloc, against the conclusion of which individual aggrieved citizens had in several cases protested very emphatically [16]. These citizens held the compensation provided for in the relevant agreement to be far from representing adequate indemnification for their assets nationalized in the relevant State of the Eastern bloc. However, even if they were to prove their allegations they have, nevertheless, no claim for damages against their home country [17], which, in return for this compensation, has declared to the State of the Eastern bloc that it does not wish to assert any further claims for compensation. It is understandable, therefore, that private investors should wish to be in a position to be able to assert before international courts their claims against the country receiving the investment without the intermediary of the Foreign Office of their home country [18].

Within the framework of the European Human Rights Convention such a possibility exists at least to a certain extent [19].. although, in

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from the overall sum if some aggrieved persons should nevertheless succeed in any way in obtaining higher compensation than intended for them in the Agreement.

16. VIÉNOT : *Nationalisations étrangères et intérêts Français* (Paris, 1953), p. 173.

17. FOIGHEL : *Nationalization* (Copenhagen, 1957), p. 101, in contrast to VIÉNOT (see supra Note 16), does at least pose the question whether such compensation should not be granted. He tends, however, to answer this question in the negative. SÉPÉRIADÈS (*loc. cit.*, p. 32), however, quotes the General Armstrong case, in which the United States compensated their own nationals because, in the opinion of these citizens, it had not satisfactorily defended their interests in arbitration proceedings with Portugal. (LA PRADELLE POLITIS : *Recueil des Arbitrages Internationaux* I, pp. 634, 648-650). On the other hand, the French Conseil d'État in its decision of October 29, 1954, Affaire Taurin et Merienne, International Law Reports 1954, p. 15 did not allow a claim of French nationals against the French State based on an alleged negligence of France when claiming compensation from a foreign State on behalf of these nationals. A return to a view which regards the Government which makes international compensation claims on behalf of one of its aggrieved nationals only as that person's trustee is also favoured by DRUCKER, *Edmund Burke's View on Expropriation*, Law Times, 11th September, 1959, pp. 85-86. DRUCKER, *loc. cit.*, refers to the example of a British law of 1819 relating to the distribution of the compensation which France had to pay at the end of the Napoleonic Wars (59 Geo. III c. 31).

18. In favour of giving private persons direct access to international tribunals, *inter alia*, the Institut de Droit International at its New York Session in 1929 (quoted in SÉPÉRIADÈS, *loc. cit.*, p. 6), as well as WEHBERG (quoted *ibid.*, p. 7 and p. 43), a motion proposed by the Hungarian Branch of the I.L.A. at its Stockholm Conference in 1924, a draft treaty submitted by LA PRADELLE to the I.L.A. at its Budapest Conference in 1934 (quoted *ibid.*, p. 114) and SOHN : *Proposals for the Establishment of a System of International Tribunals*, International Trade Arbitration (New York, 1958), pp. 63-76.

19. A private individual can only get as far as the European Human Rights Commission, but not as far as the European Court for Human Rights. On the pro-

relation to West European receiving countries, such disputes might not be of frequent occurrence.

In this context the significance of this Convention lies rather in the fact that, amongst other things, the reference to the existence of this Convention refutes the argument which is sometimes put forward against such demands of private investors : that a private individual can act as plaintiff before international courts only indirectly, that is through the intermediary of his home country, because he is not a subject of international law [20]. Perhaps even more significant in practice is the reference to the role of private plaintiffs before certain Mixed Arbitral Tribunals after the First World War. This case law also refutes, moreover, a second argument of a more practical nature against such demands. From the fact that some nationalization laws have affected many hundreds of foreign investors the conclusion is sometimes drawn that, for that reason alone, such claims can only be settled in an overall compensation agreement : otherwise a vast number of decisions in which the facts were similar would inundate the international court to which, otherwise, reference might be contemplated. The Mixed Arbitral Tribunals faced similar problems, but overcame them without great difficulty by administrative decisions or by the decision of test cases. The granting of direct international legal protection to private individuals, however, is not solely in the interest of these private individuals themselves. In the absence of such direct protection the private individual will seek to have his rights protected by his home country as an affair of State. Thus, any such dispute between private individuals and a foreign State is inevitably politicalised [21]. If, on the other hand, direct access to international courts is granted to the individual, this can at least contribute to the mitigation of such conflicts [22].

If one is prepared to recognize as justified the efforts of foreign

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tection of foreign private property within the framework of this convention see SEIDL – HOHENVELDERN : *Eigentumsschutz durch Resolutionen internationaler Organisationen* in Der Schutz des privaten Eigentums im Ausland (Festschrift Hermann Janssen), Heidelberg (1958), pp. 199-201.

20. SÉFÉRIADÈS, *loc. cit.*, p. 51, points out that from the admission of private individuals to International Courts conclusions must not necessarily be drawn as to their character as subjects of international law.

21. SÉFÉRIADÈS, *loc. cit.*, p. 25, refers to the fact that, at the time of the dispute with Greece on account of alleged damage to the financial interests of M. Pacifico, Britain simultaneously brought up other points at issue which touched more directly on Britain's national honour. They included, inter alia, the arrest of sailors from British warships. Nevertheless, according to Séfériadès, Britain showed herself more ready to come to terms in the latter affairs that in the Pacifico case.

22. SÉFÉRIADÈS, *loc. cit.*, pp. 25, 28 ff.

investors to achieve an improvement of the protection of their rights, the question still remains open of how this is to be brought about in individual cases.

In this connection, under present political conditions [23] one must describe as completely utopian all proposals [24] which would seek to provide individual persons with a right of access to the I.C.J. [25]. This could be achieved only by a reform of the Charter of the United Nations. As, for example, the discussions at the Conference of the I.L.A. in Dubrovnik showed [26], the U.S.S.R. opposes any suggestion for the alteration of the Charter. This applies even to suggestions to which it would have little or no objection as such. The U.S.S.R. fears not without some reason that advantage would be taken of this opportunity to try to force through other proposals for reform as well, which would be disagreeable to the U.S.S.R. and which it could then, perhaps, only avert by use of its right of veto.

The only practical possibility available would thus be to set up a special court of arbitration which would be accessible also to private individuals. Such an arbitration clause could, for example, already be contained in the concession agreement which a private investor concludes with the country receiving the investment. The efforts of the investors will be directed rather towards incorporating such an arbitration clause in an inter-State treaty, since the home country of the person affected can then designate the infringement of the arbitration clause as a violation of international law [27].

The conclusion of such an umbrella treaty would thus prevent the State which granted the concession from pleading the anyhow highly disputable thesis [28] that the granting of the concession was its internal

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23. At the time of the League of Nations, on the other hand, this proposal then made by SÉFÉRIADÈS (*loc. cit.*, p. 112) was undoubtedly debatable.

24. American Bar Association, Special Committee on World Peace through Law, Report to the House of Delegates, 24 August 1959, p. 9.

25. According to SÉFÉRIADÈS (*loc. cit.*, pp. 46-47) the admission of individuals as plaintiffs before the Permanent Court of International Justice was seriously considered in the first discussions concerning the establishment of this Court.

26. *I.L.A.* Dubrovnik (1956) Conference Report, p. 68 ff. In the Soviet view, however, the above-mentioned proposal certainly does not belong to this category of small, harmless reform proposals.

27. In this case the question arises of how the nationality of a company is to be determined for the derivation of rights from such an agreement. Like SÉFÉRIADÈS (*loc. cit.*, p. 82) I consider the control theory to be decisive here.

28. In observations, which were, however, *obiter dicta*, the decision of the Hanseatic Court of Appeal at Bremen of August 21, 1959, in the Indonesian tobacco dispute, Aussenwirtschaftsdienst des Betriebsberaters (AWD) 1959, p. 207 held

affair — and that the same must also apply to the unilateral withdrawal of the concession, even with the infringement of an arbitration clause.

The competence of the court of arbitration could be recognized either for a certain period of time or only *ad hoc* for a particular case in dispute. In any case precautions would have to be taken to ensure that one of the parties to the dispute could not unlilaterally prevent by its attitude the reaching of an arbitral award. Somewhat different things may be understood by the setting-up of a court of arbitration in the sense of such provisions : it can either be merely agreed that, in a future dispute, any arbitrators desired are to be appointed in accordance with an exactly defined procedure, or that these arbitrators may only be

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that a State which infringes a concession agreement concluded with private *entrepreneurs* is not committing a violation of international law (p. 65 of the printed copy of this judgment). On this judgment in general SEILD-HOHENVELDERN, *AWD* 1959, pp. 272-276.

Against the unilateral modification of concessions by the State see in principle the arbitral award in the case of Czechoslovakia v. Radio Corporation of America, dated April 1, 1932, Am. J. of Inter. Law 30 (1936) 523, 531 (except the case of predominant public interests recognized as such by the court of arbitration, but then only in return for compensation) and also the case of Radio Corporation of America v. China of April 13, 1935, Am. J. of Int. Law 30 (1936), 535, 540. (Quoted by LORD MCNAIR, *The seizure of Property and Enterprises in Indonesia*, Nederlands Tijdschrift voor Internationaal Recht VI (1959), pp. 232-234 and by SCHWEBEL, *International Protection of Contractual Arrangements*, Proceedings of the American Society of International Law, 1959, p. 272).

The arbitral award between Saudi Arabia and the Aramco of 23.8.1958 confirmed the same principle and also pronounced, *inter alia*, against the interpretation of the reservation of sovereignty made in an arbitration clause in a concession agreement in such a sense as would in practice have made possible an elimination of the court of arbitration and thus a unilateral modification of the concession agreement. The arbitral award N° 2 of the Franco-Greek court of arbitration (Claim n° 27), Revue hellénique de droit international, 9 (1956), p. 198, declares that a State which had granted a private individual a concession, with the reservation of cancellation at any time in return for compensation, was acting contrary to international law when it deprived this person of the concession prematurely without compensation.

For the application of the principle *pacta sunt servanda* also towards private concessionnaires whose concession agreements have a *quasi* international law character, see especially VERDROSS : *Die Sicherung von ausländischen Privatrechten aus Abkommen zur wirtschaftlichen Entwicklung mit Schiedsklausel* 18, Zeitschrift für aus. öff. Recht u. VR (1958), p. 636-651, especially 645 ; VERDROSS, *The Status of Foreign Private Interests stemming from Economic Development Agreements with Arbitration Clauses*, Öster. Zeitschrift für öff. Recht IX (1959), p. 449-462 ; VERDROSS : *Völkerrecht* (1959), p. 291, as well as WORTLEY : *Expropriation in Public International Law* (Cambridge 1959), p. 57, and DAHM : *Völkerrecht* (1958) I, p. 513, note 9.

selected from lists of arbitrators laid down beforehand. Furthermore, certain persons can be appointed as arbitrators in the agreement itself. One could also provide for a procedure for the appointment of a permanent bench of judges, in other words adopt a system similar to the Statute of the International Court of Justice. The more the arbitration clause leaves the appointment of the arbitrators to the future action of the parties to the agreement, the greater the temptation is for them to frustrate the functioning of the court of arbitration by procedural tricks (e.g. non-appointment of the arbitrator to be designated by the relevant side). The draft of a model arbitration agreement [29], worked out by the International Law Commission of the United Nations, certainly shows suitable ways of preventing this. This draft relates only to disputes between States, but its essential rules can also be applied here by analogy. At least in my opinion there is no reason why the President of the I.C.J. should not appoint a missing arbitrator in such cases also [30].

Ratione materiae the competence of the court of arbitration ought to be limited to disputes wich arise from any kind of impairment of foreign investments, in other words not merely from their seizure without compensation. On the other hand, however, it might be going too far to declare the court of arbitration competent for all disputes which

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29. Am. Journal of International Law, 53 (1959) *Off. Doc.*, pp. 239 ff. I believe that from the point of view of legal technique (I shall leave aside here the political aspects) the version chosen there would also have made possible a solution of the conflict concerning the Franco-Tunisian arbitration tribunal, which DREYFUS, *le Conseil Arbitral Franco-Tunisien*, Ann. Fr. Dr. Int. 1957, p. 185, described as insoluble. In this case the Tunisian members refused to take part in the arbitration tribunal at all, even before this tribunal had commenced its work in practice.

30. The I.L.C. draft also provides for steps such as appeals to the I.C.J., steps which can only be taken by States. These could obviously not be applied in any procedure involving private litigants. On the other hand, there would be no objection from the standpoint of the Statute of the I.C.J. to the entrusting of the task provided for here to the President of the I.C.J. It does not seem impossible in practice, either, that the President of the I.C.J. would undertake the appointment of arbitrators (ROSENNE : *The International Court of Justice* (Leyden, 1957), pp. 506, 511). The fact that in the first phase of the Anglo-Iranian Oil dispute in 1952 the Vice-President of the I.C.J. refused to appoint an arbitrator between the Company and the Iranian Government, as provided in Art. 22 of the concession agreement of the Anglo-Iranian Oil Company dated April 29 1933, is not attributable to objections on principle to the performance of such tasks, but to the fact that the President of the I.C.J. (in this case — because the President was a British national — the Vice-President as his deputy) did not regard himself in this respect as successor-at-law of the President of the Permanent Court of International Justice, who was entrusted with this task in the provision mentioned (ROSENNE, *loc. cit.*, p. 507).

may arise between a State and aliens. Aliens could, therefore, not appeal to this court of arbitration if, for example, they consider deliveries by State enterprises to be defective, or a ban on performance of a film made by them to be unjustified. As soon, in fact, as the juridiction of the court of arbitration is restricted as to the subject matter, the question arises of who is to decide whether a concrete state of affairs is covered at all by the declaration of a State that it recognizes the jurisdiction of the court of arbitration for foreign investments. Who is to decide if a State denies that a certain investment is a foreign investment at all — perhaps with the argument that at the time of the investment the relevant area still belonged to the colonial empire of the investor ? The I.L.C. draft provides that the decision of such disputes shall be submitted to the I.C.J. That is, however, possible only where *both* parties to the dispute are States. In our case, therefore, there is no other way out but to formulate the juridiction clause for the court of arbitration in such broad terms that it must meet even when only one side asserts that the case falls within its jurisdiction. Once convened the court of arbitration, however, will of course be at liberty to declare itself as having no jurisdiction if it deems such assertion to be unfounded.

Contrary to the view of Séfériadès [31], I am against granting the home country of the plaintiff the right to forbid the plaintiff to continue the proceedings [32]. The greater security sought after for private investments would thereby be lost — just as would the depoliticalization of such disputes. These objections also apply to the further proposal [33] to give the home country of the private plaintiff the right to intervene in the suit alongside the latter.

A condition of appeal to the court of arbitration ought, on the other hand, to be the exhaustion of the successive stages of appeal under the municipal law of the relevant State [34]. Such a requirement corresponds to logic and to procedural economy [35], and furthermore to general

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31. SÉFÉRIADÈS, *loc. cit.*, p. 90.

32. SÉFÉRIADÈS refers in this connection to the example of Art. 4, para. 2 of the XII Hague Convention of 1907 on the Establishment of an International Prize Court.

33. SÉFÉRIADÈS, *loc. cit.*, p.p. 91, 92, refering to the convention mentioned supra note 32.

34. In this sense, too, the Resolution of the Institut de Droit International of 1927, quoted by SÉFÉRIADÈS, *loc. cit.*, p. 67.

35. SÉFÉRIADÈS (*loc. cit.*, p. 70) advocates some limitation of these rules by fixing a time-limit for the rendering of the final decision on such local remedies. If no such decision is rendered during this period the plaintiff should be allowed to institute proceedings before the international tribunal. I would, however, not be ready to accept this proposal without further examination.

customary international law. The application of this rule is however restricted by other rules of international law, especially also by the general principles of law, as, for example the prohibition of an abuse of law [36]. If, for instance, a State were to create arbitrary new « stages of appeal », in order to remove the otherwise already fulfilled condition of appeal to the court of arbitration, exhaustion of such municipal legal remedies would not be required. Whether such a state of affairs exists or not should be left to the judgment of the court of arbitration. It may, of course, also be agreed between the State and the investor, that the court of arbitration can also be appealed to before the exhaustion of the municipal remedies.

This brings us to the question of the law to be applied by these courts of arbitration. The chief source of law will, of course, be the rules of law which are cited explicitly or by reference in an agreement which may have been concluded between the State and the investor. By such agreements, of course, rules otherwise applicable to such disputes (international treaty law, customary international law, general principles of law, etc.) may also be derogated. These sources of law to be applied by the I.C.J. and international courts of arbitration therefore hold good to that extent only subsidiarly. However, it would be a different matter if such an agreement between the State and the investor were to violate obligations under international law which the relevant State has undertaken towards other States. As long as the agreement between the State and the investor is not regarded as a treaty, the court of arbitration, as an international court, would, in such a case, have to give preference to every rule of international law over such an agreement.

Now, a more recent theory [37] considers concession agreements between a State and a private foreign company under certain conditions (inclusion of provisions regarding an international arbitration procedure, etc.) as agreement *quasi* concluded under international law. If one were to carry this comparison through to such an extent that such agreements were completely on the same level with inter-State treaties [38],

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36. Contrary to J. D. ROULET : *Le caractère artificiel de la théorie de l' abus de droit en droit international public* (Neuchâtel, 1958), I share the opinion of KISS, *L'abus de droit en droit International* (Paris, 1953) that the prohibition of the abuse of law is a general principle of law applicable in international law. Cf. my review of Roulet's book in Öster. Zeitschrift für öff. Recht. 10 (1959/60) p. 553.

37. VERDROSS : see supra Note 28; VERDROSS : *Völkerrecht* (Vienna, 1959), p. 291 ; similarly SOUBEYROL : *La condition juridique des pipe-lines en droit international*, Ann. Fr. Dr. Int., 1958, p. 163.

38. It is certainly not completely clear whether Verdross would be prepared to go as far as this. Cf. VERDROSS : 18 Zeitschr. f. ausl. öff. Recht u. VR (1958), p. 638, 645.

the general rules regarding conflicting State treaties with different parties would be applicable [39] to the relationship of such a concession agreement to a contrary previous treaty of the same State with another State ; i.e. in the relationship between the State and the concessionnaire the concession agreement would be binding and would, therefore, also have to be taken by the court of arbitration as a basis for the judgment of the case.

The relationship of the agreement between the State and the concessionaire on the one hand, to general international law on the other hand may lead, moreover, to a difficult intertemporal conflict of laws. An agreement between the State and the foreign private individual ought to have priority over a previous treaty which this State has concluded with the home country of the alien. What would be the legal position, however, if a State concludes a concession agreement with an alien, then nationalizes the concessionnaire's enterprise contrary to the agreement, but thereupon concludes an overall compensation agreement with the home country of the alien, which, in accordance with the wishes of both States, is also to settle the claims of the concessionnaire [40], but is regarded by the latter as unsatisfactory ? From the standpoint of the greatest possible protection of private foreign investments it would seem logical that the agreement between the State and the concessionnaire could not be modified to the disadvantage of the latter by a subsequent treaty between his home country and the State granting the concession [41]. It remains uncertain, however, whether a court of arbitration under international law would really consider this subsequent treaty to be inapplicable to this situation. The question of the standing of the agreement between the State and the concessionnaire also arises here. Even if one puts this agreement on the same level with a State treaty, there still remains the question whether, the agreements with the concessionnaire on the one hand and his home country on the other hand are actually incompatible agreements with different parties within the meaning of the general rules of international law [42]. Is it not rather a case here of two agreements with the same party, which are to be judged according to the rules of *lex posterior* ? In practice the acceptance of the first alternative might not always signify a complete victory for the concessionnaire. The court of arbitration might in this case, indeed, decide in his favour. If he has means at his disposal which

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39. Verdross : *Völkerrecht* (Vienna, 1959), p. 96.

40. See supra note 16.

41. The reasons for this would be similar to those which lead to the rejection of the proposals by Séfériadès mentioned above.

42. See supra note 39.

enable him to enforce compliance with the arbitral award by his own efforts, or if the opposite party voluntarily respects the arbitral award, no further problems arise. If, however, the concessionnaire cannot enforce compliance with the arbitral award, he has no possibility of appealing to the protection of his home country, which, in relation to the State granting the concession, has both hands tied by the overall compensation agreement. A similar dilemma arises in connection with the question of whether a State could plead before the court of arbitration that its agreement with the foreign investor need no longer be fully observed on the grounds of the general legal principle of *clausula rebus sic stantibus*. If the general principles of law are to be applied only subsidiarily alongside the agreement, recourse to the clausula would be out of the question. This result would certainly satisfy the foreign investor ; however, it is rather surprising to the international lawyer.

If an agreement concerning a certain investment explicitly provides that the latter is to be subject to a domestic law designated therein, it does not yet follow — at least not according to prevailing doctrine — that this reference petrifies the law concerned [43], in other words, is only willing to accept it as it was at the time of the conclusion of the agreement [44]. From the standpoint of the greatest possible protection of investments, such « petrification » might well be welcomed. However, it would only be recognized by a court of arbitration if it were explicitly stipulated by agreement.

As a subsidiarily applicable source of law, the generally recognized principles of law will in practice play the largest part [45]. Unfortunately, international practice varies considerably as to what is to be understood more precisely thereby. This question cannot be gone into in

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43. SEIDL-HOHENVELDEN : *Internationales Konfiskations- und Enteignungsrecht* (Tübingen, 1952), p. 85 with many references to agreements between private parties.

44. Compare, however, the doubts of DOMKE : *American Protection against Foreign Expropriation in the light of the Suez Crisis*, 105, University of Pennsylvania Law Review (1957), p. 1041, as to whether the French law of June 1, 1957, J.O. June 3-4, 1957, promulgated with reference to Art. 16 of the Suez Convention of February 22, 1866, which partly placed the Suez Canal Company under French company law, could effectively alter the status of the Company after the nationalization. Similar doubts are also expressed by RAUSCHNING : *Rechtspobleme der Suezkanalkrise*, Jahrbuch für Int. Recht 7 (1957), p. 273. For other reasons the aforesaid law is also criticized by CASSONI : *La Nationalizzazione della Compagnia Universale del Canale Marittimo di Suez*, Rivista del Diritto Commerciale, LV (1957), p. 253-256.

45. LORD MCNAIR : *The General Principles of Law recognized by Civilized Nations*, Brit. Yearbook of Int. Law, 1957, p. 19.

further detail here. It may, however, be pointed out that at present vigorous efforts are being made to give this vague concept a more precisely defined substance [46].

A further important source of law would, of course, be the judicial practice of each such court of arbitration. Compared with courts of arbitration constituted by different arbitrators in each case, a court with a fixed number of judges would offer a greater guarantee of consistent judicial practice [47].

The vaguer the rules are which judges have to apply in the judgment of a case, the greater the importance, of course, which attaches to the choice of these judges. Litvinov once said that « only an angel could be impartial in the judicial handling of Russian affairs » [48]. Here too, where the interests of the investors and of the investment-receiving countries are so sharply opposed, it will be difficult to find really neutral outside arbitrators. If their appointment is entrusted to the President of the I.C.J., the latter will certainly not have undertaken an easy task, even though perhaps not completely impossible. In the appointment of a permanent bench of judges similar problems would indeed arise, but perhaps a certain balance can be achieved more readily here. Moreover, a bench of judges composed of representatives of different legal systems could more easily give a generally satisfactory substance to the concept of the « generally recognized principles of law ».

The danger certainly exists that States would accede to an agreement on the setting-up of such a court only in order to be able to cooperate in the appointment of judges. This danger could be obviated by stipulating that only such States could exercise this right as have recognized the jurisdiction of the court for all disputes between them arising from foreign investments.

The creation of a permanent bench of judges also raises other problems. Might not one of the judges be completely unacceptable to one party for personal or technical reasons ? [49] The proposal to let such a

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46. SCHLESINGER, *Research on the General Principles of Law recognized by Civilized Nations*, 51 Am. J. of Int. Law (1957), p. 734-753 ; SEIDL – HOHENVELDERN : *Die Rolle der Rechtsvergleichung im Völkerrecht*, Verdross Festschrift (Vienna, 1960) p. 253-61.

47. SÉFÉRIADÈS (*loc. cit.*, p. 112) with reference to the partly diametrically opposite judicial practice of the several Mixed Arbitral Tribunals (*ibid.* pp. 36, 37).

48. CALVEZ : *Droit International et Souveraineté en U.R.S.S.* (Paris, 1953) p. 257.

49. This problem can certainly also arise with courts of arbitration composed *ad hoc*, although it might be considered more unusual in that case. Nevertheless the Anglo-Saudi Arabian court of arbitration constituted by the treaty of July 30, 1954 for the solution of the dispute over the Buraimi Oasis foundered on the fact that Britain doubted the impartiality of the Saudi Arabian arbitrator. For further

court sit in different chambers postpones this problem rather than solves it. There would be nothing for it but to let the court itself decide on such objections.

In order to make the decision of such a court appear acceptable to a defendant State, it might well be necessary to copy the institution of the judge *ad hoc* from the Statute of the I.C.J. [50]. The principle of the « par conditio » of the parties, which must govern the whole proceedings, would entail that the private party, too, would have to be entitled to this right [51].

As a middle course between the creation of a permanent bench of judges and the completely free choice of the arbitrators in each case, there would appear to be the possibility of drawing up a list of arbitrators from which, in case of need, the arbitrators could be nominated. This would in practice be so similar to the system of the Permanent Court of Arbitration [52] that one might wonder whether, in this case, such an idea could not be realized within the framework of the Permanent Court of Arbitration. This would however presuppose an alteration of the Statute of this Court, as, like the I.C.J., the Permanent Court of Arbitration is at present competent only for disputes between States [53]. Moreover, not only persons of recognized experience in

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details on this see GOY : *L'affaire de l'oasis de Buraimi*, Ann. Fr. Dr. Int., 1957, p. 188 ff.

50. SÉFÉRIADÈS (*loc. cit.*, pp. 15-16) is opposed to the institution of the « judge *ad hoc* ». The balance between the parties could be achieved just as well by requiring each permanent judge to declare himself biassed if his home country or a national of that country acts as a party in a legal dispute. That is indeed correct, but leaves out of account the psychologically very important circumstance that a State might be considerably more willing to accept a judgment unfavourable to itself if a judge of its choice took part in the reaching of that judgment. The minority vote possibly cast by this judge *ad hoc* constitutes a welcome salve to the national sensitivity of the losing State.

51. Advisory opinion of the I.C.J. of October 23, 1956 on the judgment of the Administrative Tribunal of the I.L.O. concerning claims against UNESCO, *I.C.J. Reports* 1956, p. 86.—in this connection SEIDL-HOHENVELDERN : Friedenswarte 54 (1954), pp. 22-24 ; minority vote of the Italian member on Decision N° 170 of the Franco-Italian Conciliation Commission of 5.7.1954, Ousset Claim. Recueil des Décisions de la Commission de Conciliation Franco-Italienne instituée en exécution de l'art. 83 du traité de Paix avec l'Italie, V, 36, 55) ; SEIDL-HOHENVELDERN : *General principles of Law as applied by the Conciliation Commissions established under the Peace Treaty with Italy of 1947*, Am. J. of Int. Law 53 (1959), p. 864.

52. The Permanent Court of Arbitration was set up by the Convention for the Pacific Settlement of International Disputes dated 18 October 18, 1907, German Reichsgesetzblatt 1910, pp. 5 ff.

53. SÉFÉRIADÈS, *loc. cit.*, p. 41.

questions of international law but also leading experts in the business world would have to be included in the list of arbitrators. The procedure for the composition of this Court of Arbitration is also very cumbersome and does not offer as much security against the bad faith of a party to the dispute as the I.L.C. draft. Amendments of the Statute would not be impossible as such, since no right of veto exists here. It would nevertheless be doubtful whether the present members of the Permanent Court of Arbitration would be ready to accept such a revision.

Complete freedom concerning the choice of arbitrators in each particular case imposes the least degree of commitments and costs [54] on the parties. Despite some advantages of the other solution, it has therefore the best pospects of being accepted.

As regards the procedure — whether before this permanent bench of judges or before arbitrators — it should be as simple as possible. The « par conditio » of the parties must be preserved, even if one of the parties is not a State but a private individual. After a single exchange of written pleadings an oral hearing should be provided for. A third-party intervention need not be provided for, since the decision adjudicates only between the parties to the dispute. It seems superfluous to incorporate a possibility of issuing interim injunctions, since even such measures by the I.C.J. were not obeyed in practice [55]. Finally, the problem of sanctions had best also remain open. Measures of execution, which exist only on paper, might indeed in practice have no deterrent effect but would render the acceptance of such an agreement politically more difficult. Nevertheless, even without explicit provisions for sanctions the decisions in such affairs might carry a certain weight, for, if the fact becomes known that an independent court of arbitration has held that a State has treated foreign investors unjustly, this will understandably have a deterrent effect in these circles. As, however, the development countries are dependent on further investments, fair treatment of foreign investors is, in the long run, also in the interest of such countries.

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54. Like the judges of the I.C.J. permanent judges might well not be allowed to perform any other activity. They would then have to be paid correspondingly.

55. Ford : *The Anglo-Iranian Oil Dispute of 1951-1952* (Berkeley, 1954), pp. 89-95, strongly deplores the fact that no better fate befell the interim injunction of the I.C.J. of July 5, 1951 in the Anglo-Iranian oil dispute (I.C.J. Reports, 1951, p. 90).