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Book Review: The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes

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disregards the fact that preliminary objections by their nature cannot be regarded a priori as a means of escaping an obligation of judicial settlement. Those addressed to jurisdiction, in particular, are intended as a means of testing whether such an obligation, extending to the case at bar, has ever been entered into. The right to make preliminary objections may be misused, but its existence is essential; and its exercise in good faith does no injury to the principle of peaceful settlement of disputes by judicial means. In fact, it constitutes an application of the underlying requirement of consent. As Pazartzis recognizes in another context (pp. 271–72), if a commitment to third-party settlement is deliberately drawn so as to contain a degree of flexibility, or even escape hatches, one must realistically accept that such were the limits of the parties' consent.

Pazartzis analyzes in too summary a fashion some case law of the PCIJ and ICJ, for example, *Ambatielos* (p. 55) and *Fisheries Jurisdiction* (pp. 168–69). This is confusing for the nonspecialist reader; moreover, the very special character of the compromissory clauses in those two cases is not brought out, which casts doubt on the generalized conclusions she seeks to base on them.

Valuable research in this field might have resulted from inquiry into the actual behavior of states in negotiating a *compromis* or compromissory clause, in giving effect to it, or in deciding not to do so. Pazartzis does not, however, seem to have discovered new material in this domain; the text relies heavily on such expressions as "il semble que" (three times on p. 224 alone) and "sans doute" (for example, on p. 241), so as to present as conclusions mere assumptions as to what considerations were likely to have weighed with negotiators.

The essential outcome of the study, which is discernible throughout, is the finding that states' readiness to accept and implement commitments to third-party settlement varies inversely with the breadth and the rigidity of the commitment, and that it takes considerable confidence by a state in the soundness of its case in any dispute for it to be willing to relinquish control of the manner of its settlement. It is not the fault of Pazartzis if this outcome of her diligence is hardly a novel observation. Hers was no doubt an excellent thesis; as a work of general use and reference, however, the utility of this book is somewhat limited.

HUGH THIRLWAY
The Hague

The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes [*sic*]. By Moshe Hirsch. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993. Pp. xiv, 259. Index. Dfl.165; $100; £66.

The International Centre for Settlement of Investment Disputes (ICSID) has been established for nearly three decades. Consequently, the publication of this study, first submitted as an LL.M. thesis to Hebrew University in 1990, is both noteworthy and appropriate.

The author's treatment of the subject is logical and well structured. Chapter 1 sets out the relevant economic and legal background with respect to international trade and investment, explaining why there was a need to establish an international mechanism for investment disputes between capital-importing states and nationals of other states. Chapter 2 gives an account of the negotiating history of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which, upon entering into force in 1966, established the ICSID mechanism. This chapter highlights the functions and distinctive features of the Centre, with special emphasis on the various methods of dispute settlement that the mechanism makes available.

Chapter 3 discusses the jurisdictional scope of the Centre, which is based on the consent of the parties. This consent may be given in investment agreements, by legislation or in bilateral treaties, and once given is irrevocable. The jurisdiction of the Centre is confined *ratione materiae* to legal disputes arising directly out of an investment, and *ratione personae* to the states and nationals of other states parties to the Convention of 1965. The author devotes much

Surrender" and the "Duty" to Appear before the International Court of Justice, 11 MICH. J. INT'L L. 912 (1990).

of the chapter to discussing the question of nationality of natural persons as determined by the law of the state of nationality (*lex patriae*), and the fact that the Centre may lack jurisdiction if the national of another state also possesses the nationality of the host state. Yet, in discussing the nationality of foreign corporations, which often are required by the host state to undergo a process of domestication, the author appears to overlook the fact that the Convention's concern is the settlement of investment disputes. Consequently, a more decisive factor on which jurisdiction of the Centre is founded is the nationality of the investor. Cases such as *Amco v. Indonesia,*[1] *Guinea v. MINE,*[2] *Klöckner v. Cameroon,*[3] *SOABI (Seutin) v. Senegal,*[4] *Letco v. Liberia*[5] —and indeed the case before the International Court of Justice between the United States and Italy in regard to *Elettronica Sicula*[6]—tend to emphasize the need to protect foreign investments, regardless of the fact that they are conducted through domestically incorporated corporations. Whatever the technical nationality of a local corporation formed by foreign investments, the consent of the host state to submit to an ICSID arbitration determines the Centre's jurisdiction. Thus, the author's restrictive interpretation of the Centre's jurisdiction in this respect seems retrogressive and contradicted by the overwhelming trend of the Centre's jurisprudence.

In chapter 4, Hirsch discusses the applicable law and arbitration rules of the arbitral system administered by the Centre, as compared with the arbitration rules adopted by the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and the UN Commission for International Trade Law (UNCITRAL), and he examines both sets of rules as regards procedural and substantive law. In my opinion, the author here exaggerates the extent to which international law may be applied to override the internal law of the host state or the law chosen by the parties.

In the concluding chapter, the author suggests a two-pronged approach to broaden the Centre's jurisdiction—both *ratione materiae,* to cover disputes other than those arising from international investments, and *ratione personae,* to enable the Centre to settle disputes other than those between states and nationals of other states. While his proposal may be attractive to some scholars, it seems too broad to attract much support from states parties to the Convention.

The monograph includes useful appendices, which set out (1) the full text of the ICSID Convention, the Report of the Executive Directors on the Convention and the ICSID Arbitration Rules; (2) a list of contracting states and signatories to the Convention as of October 15, 1991; (3) the current Schedule of Fees; (4) a useful bibliography; and (5) a brief index. As an editorial matter, while Hirsch consistently refers to the "Centre" in its official spelling throughout the text, the spelling is changed to "Center" on the front and back covers.

Hirsch's monograph is worth reading, in part for its novel proposals. Readers will, however, require some patience and insight to understand certain points on which the author is less than clear. Let me mention several points about which I have some concern or differences with the author.

First, the author appears to me to start off on the wrong foot in the introductory chapter, when he divides the legal regulation of international transactions into three main levels, namely, private, national and international. He identifies the private level mainly as the "contractual level," in that it "determines the rights and obligations of the parties alone." Certainly, to the extent that the parties are free to conclude a contract and to choose the applicable law and method of dispute settlement, the terms of the contract are binding upon them. But this freedom of contract is not unlimited; it is subject to limits imposed by the mandatory rules of the forum state, while its interpretation is guided by trade usage and custom. And what the author calls the private level can blur into the national level when

[1] 23 ILM 351 (1984); *see also* resubmitted case, 27 ILM 1281 (1988).

[2] Guinea v. Maritime International Nominees Establishment, 26 ILM 382 (1987). *See also* MINE v. Guinea (Annulment Decision), 5 ICSID REV. 95 (1990).

[3] 10 Y.B. COM. ARB. 71 (1985); *see also* Annulment Decision, 11 Y.B. COM. ARB. 162 (1986).

[4] 30 ILM 1167 (1991).

[5] 26 ILM 647 (1987).

[6] Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 1989 ICJ REP. 15 (July 20).

one of the contracting parties is a state or a department of government, or into the international level when an international agency concludes a contract with a transnational corporation. Consequently, Hirsch's trilogy of levels of legal regulation of international transactions appears misleading. Indeed, in his conclusions, he adds two other categories: a level of international economics and one of international arbitration.

Of course, Hirsch is correct that legal norms and relevant dispute settlement mechanisms have been developed to deal with at least three different "dimensions" or "domains" of international trade, by (1) the private sector independently of any governmental authority, as exemplified by the ICC and its INCOTERMS ("interpretation of commercial terms," or standardized shipping terms); (2) governmental authorities at local, city, county, state and national or federal levels; and (3) intergovernmental entities, such as the GATT, the World Bank and the IMF. In truth, international trade is regulated not only by governmental and intergovernmental authorities at various levels, but also by the private sector itself. Indeed, the framers of the ICSID Convention recognized that there are two parallel hierarchies of legal systems regulating international trade and investments: one national and the other international. They also recognized that the international system must be final and conclusive with regard to adjudication and other methods of conflict resolution, but not necessarily so with regard to enforcement or execution of an arbitral award.

My second concern relates to the author's treatment of the jurisdiction of the Centre based on nationality. His criticisms of the practice of the Centre seem unfounded in light of the long line of cases consistently upholding the Centre's jurisdiction under Article 25(2)(b) concerning "any juridical person . . . which, because of foreign control, the parties [to the dispute] have agreed should be treated as a national of another Contracting State for the purposes of the Convention."

A third concern is that the author appears to overlook one salient and unique feature of the Convention, which permits nationals of one contracting state to proceed directly against another contracting state without necessarily exhausting local remedies or achieving the espousal of their claim by the capital-exporting state. The case law of the Centre, both in the first and final instances and in annulment proceedings, reflects the growing popularity of the ICSID system. The increasing reliance on it by states is evidenced by the rising number of signatories and parties to the 1965 Convention. The fact that ICSID has thus far dealt with only a small number of cases does not indicate a lack of success. On the contrary, far fewer cases involving investment disputes have been settled by other arbitral systems, whether ad hoc or permanent, outside the ICSID Convention.

I might also note that the parties to an investment dispute have a spectrum of options as to the choice of applicable law, failing which an ICSID tribunal will be guided by Article 42 of the Convention in its choice of the rules of applicable law. The stabilization clause is valid only insofar as the host state has consented to the choice of law, as is, on the agreed date. This does not prevent the host state from revising or updating its law; however, subsequent amendments will not apply to an investment agreement with such a clause, unless nonapplication impairs the permanent sovereignty of the host state over its natural resources. Just as an English Parliament cannot bind its successor under the doctrine of parliamentary supremacy, so the freezing effect of such a clause will melt if it contravenes a mandatory rule of the host state or a peremptory norm of international law.

Finally, I do not believe that the author's conclusions are warranted by international practice. While thoughtful, they seem far removed from the realities of international life.

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Rechtlicher Schutz archäologischen Kulturguts. Regelungen im innerstaatlichen Recht, im Europa- und Völkerrecht sowie Möglichkeiten zu ihrer Verbesserung. By Frank Fechner. Berlin: Duncker & Humblot, 1991. Pp. 131. DM 48.

As Professor Fechner's book on the legal protection of archaeological cultural property indicates, a legal debate about the protection of cultural property is in full swing.