Some Threats to International Investment Arbitration

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Every practitioner knows or should know that the principal function of an arbitration agreement or mechanism is preventive: as aptly pointed out by a well-known Bulgarian authority, “the preventive function is more important for the development of predictable and stable commercial relations than the remedy given by the award in an individual case.”1 And this observation applies, it is hardly necessary to add, to “commercial relations” in the widest sense of the term, and therefore to international or “transnational”2 investment relations and disputes.

By its mere existence, the arbitration clause, especially when referring to an institution like the International Centre for Settlement of Investment Disputes (ICSID), often prevents a difference of views from becoming a conflict, and once a conflict has arisen, prevents it from arriving at the procedural stage. While it is perhaps over-optimistic to state that “the best arbitration clauses are never invoked,” the fact remains that they constitute a powerful incentive for the parties to honor their contractual obligations and avoid the initiation of legal proceedings.3

Equally, if not more important, is another “positive effect”: when direct negotiation has failed and a request for arbitration has been filed, the arbitration proceedings often facilitate an amicable settlement, at least when certain conditions are fulfilled and, in particular, when the proceedings are properly conducted. “It

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1 Stalev, Business Executives and Lawyers in International Arbitration, in International Arbitration – Sixty Years on – A Look at the Future, ICC Court of Arbitration 60th Anniversary [hereinafter referred to as ICC Court of Arbitration 60th Anniversary] 93, at 100 (1984).

2 The use of the term “transnational” (often ascribed to Jessup but found earlier, e.g., in Rabel’s writings) is now sufficiently well-known, as shown by the work of the United Nations Centre for Transnational Corporations, and has certain advantages. It would not “only puzzle people needlessly,” as contended by Wegen in a valuable contribution entitled “Disputes Settlement and Arbitration,” in International Investment Disputes: Avoidance and Settlement 59, 63 (Rubin and Nelson eds. 1985).


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is one of the major purposes of arbitration—an advantage which is often under-
estimated—to encourage conciliation,"4 and this for a variety of reasons which
need not be detailed here. Suffice it to mention that the arbitral procedure enables
or compels both parties to appreciate better their respective strengths or weaknesses
and to make concessions which they might be reluctant to make or be incapable
of making in public, outside the framework of such proceedings.

These two observations are borne out by the experience of ICSID: out of the
many ICSID clauses known to have been inserted in international investment
agreements, only twenty were in fact used. Aside from two requests for concilia-
tion, these include eighteen requests for arbitration. Out of these last requests that
the Centre has received since its establishment in 1965, seven resulted in an
amicable settlement and only five so far in an award.5

Satisfactory though such figures doubtless are, some questions still remain to
be asked, e.g., whether in the first category of cases, a settlement could or should
not have been reached earlier and/or at lower cost and, in the second category,
why no friendly settlement was reached. To which, for good measure, might be
added the general (and perhaps even more impossible) question of whether or not
those parties who took part in an international arbitration case (ICSID or non-
ICSID) were satisfied with the process and, in particular, whether the “winning
side” would be inclined to repeat the experience!

Be that as it may, an arbitration mechanism can only reach its goals and, in
particular, perform either its preventive or its conciliatory function if it is well-
known to potential users and, in case of use, if it is well-handled by competent
people. Information and education are therefore essential, as is increasingly
recognized by ICSID, the ICC and national institutions.

The purpose of the present study is to try to contribute to some extent to a
better awareness of some of the difficulties or types of “arbitral behavior” which
are often met in modern international practice and which, if allowed to develop,
might seriously reduce the utility of this method of peaceful settlement of disputes
and even jeopardize the future of so remarkable a mechanism as ICSID.

Admittedly, some of the examples listed below may be considered as
“pathological” but this would be no excuse for failing to study them or to try to
discover whatever lessons they may teach us. Who would dispute that some
knowledge of the pathology of arbitration, as of the law, is indispensable to
practitioners and that, in this sense, it exercises also a useful preventive effect?

It is in this spirit and in the hope of promoting a somewhat better and more
effective use of the arbitration process that the following observations are proposed
here, incomplete and tentative as they may be. Ten years after the Helsinki

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4 Lalive, Enforcing Awards, in ICC Court of Arbitration 60th Anniversary, supra note 1, at 317.
pending. See 1985 ICSID Ann. Rep. 6–8. See, on ICSID experience, the many publications of A. Broches (e.g.,
The Experience of the International Centre for Settlement of Investment Disputes, in International Investment
Disputes: Avoidance and Settlement, supra note 2, at 75) and G.R. Delaume (e.g., ICSID Arbitration: Practical
Considerations, 1 J. Int'l Arb. 101 (1984); ICSID Arbitration Proceedings: Practical Aspects, 5 Pace L. Rev. 563
(1985)).
Conference on Security, the Final Act of which expressly recommended arbitration in a third country, i.e., in a neutral forum, as a peaceful means of eliminating disputes between nations, it is perhaps fitting that the new ICSID Review should emphasize, from a variety of viewpoints, the importance of arbitration.

The Secretary-General of ICSID has repeatedly and rightly insisted that "ICSID should not be viewed merely as a mechanism of conflict resolution" but that "its paramount objective is to promote a climate of mutual confidence between investors and States."  

It is submitted that this objective can only be attained if the said mechanism of conflict resolution is both well-understood and properly used. "Well-understood" means in particular that all interested parties take the trouble to collect enough reliable information at the right time (i.e., when negotiating and drafting an investment agreement) so as to assess the pros and cons of various settlement devices in a realistic manner (i.e., without the exaggerated hopes that some arbitration enthusiasts entertain or disseminate). "Properly used" implies that all persons involved in arbitration proceedings (parties, representatives of investors and of governments, counsel, arbitrators, etc.) not only are sufficiently informed, but also behave in the manner required by the professional and ethical standards of international arbitration, particularly in the case of investment disputes.

A common saying has it that "Arbitration is worth what the arbitrators are worth"! True as this may be, it represents but one aspect of the truth, for arbitration is also, in fact, worth what the parties, the parties' representatives and counsel are worth.

From this point of view, one must face the fact that the arbitration process sometimes leads to unsatisfactory results, e.g., fails to facilitate an amicable settlement, is conducted in a bitter and aggressive manner reminiscent of the worst type of local trials, ends in an unconvincing award or leaves both parties (including the "winner") with feelings of frustration and confusion. One important general reason for this, among others—indeed, independently from the nature and merits of the dispute—appears to be a clear lack of information on arbitration law and techniques among some at least of the participants to important investment or commercial disputes, whether State officials, businessmen, lawyers, etc.

It has been stressed that ICSID's fundamental objective was "to depoliticize the resolution of investment disputes by affording both States and investors access to a truly neutral forum." This objective and, more generally, a smooth functioning of arbitration is likely to be missed, it is submitted, in the absence of the required degree of training and sophistication in the "actors" taking part in
the proceedings. It would be tempting to try to present examples of such “technical” deficiencies or unsatisfactory handling of arbitration in clear-cut categories, according to whether they can be ascribed to investors or to governments, to parties or to counsel, to participants from industrial or from developing countries. But such a division would be misleading: experience appears to show that (doubtless with differences of degree or frequency) much the same type of human behaviour is to be found anywhere in the world, the only really relevant differences being due to the unique nature of the State. Hence it is proposed to deal with those threats to arbitration which are or may be caused by investors and governments alike and, as the occasion arises, to mention some specific difficulties which are sometimes created by States or State-controlled entities when involved in international arbitrations.

The Chairman of the Court of Arbitration of the Bulgarian Chamber of Commerce and Industry, Professor Stalev, stressed his belief that arbitral procedure could only contribute to an amicable settlement if the proceedings “are conducted fairly and in good faith by both parties.” While this seemingly unoriginal but profoundly true remark was made in the somewhat different context of trade disputes, it is quite general in application. When combined with our previous observations on the “technical” or professional qualities which participants to arbitral proceedings must possess, it leads us to summarize the position in the following concise, and convenient, formula: “arbitration is worth what the fairness and the professionalism of its actors are worth.”

It is therefore threatened by the development of a few practices, of doubtful “professional” or “ethical” character, which are likely or intended to augment the difficulties normally inherent in any international adjudication (or even to obstruct and paralyze the solution of disputes). We must face the fact that such practices, occasionally bordering on bad faith, have become more frequent in recent years, for a variety of reasons, in the case of both international trade and international investment disputes, and in particular when States or State entities are involved.

In ordinary international commercial relations, economic recession appears to have resulted everywhere, as would be expected, in more failures or refusals to

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10 My observations are not based, alone or even principally, on personal experience. The exchange of views taking place in many arbitration conferences or symposia, and in particular in the “Colloquia of arbitrators” organized regularly by the ICC Institute of International Business Law & Practice, provide a wealth of invaluable information, quite apart from publications on the subject.

11 And even so, analogies can be and have been found between the conduct of representatives of States, of State-controlled agencies, and of representatives of large business organisations.

12 This is not to deny or ignore the sometimes profound differences, mentioned, for instance, in Mahieu, Reconciling Arbitration with the Needs of Public Corporations while Preserving its Advantages, in ICC Court of Arbitration 60th Anniversary, supra note 1, at 235. For practical purposes and within the scope of the present article, no separate discussion appears called for.

13 Stalev, supra note 1.

14 See, on this question, on the practical side, the excellent presentation of Carver, The Strengths and Weaknesses of International Arbitration Involving a State as a Party: Practical Implications, in 2 Contemporary Problems in International Arbitration 176 (Queen Mary College, London, 1985), and, on substantive aspects, Hermann, id. at 149, and Professor Böckstiegel’s fundamental studies on the subject, e.g., Arbitration and State Enterprises: Survey on the National and International State of Law and Practice (1984).
perform contractual obligations, in more litigation and, in arbitration proceedings, in a definite increase of procedural objections and incidents, challenges of jurisdiction or of arbitrators, resort to dilatory tactics, appeals to State courts in various stages of the proceedings—from so-called "declarative" actions to have the judge declare the "inexistence" or invalidity of the arbitration agreement to nullify proceedings against the arbitrators' procedural orders or final award. To which list can be added, inter alia, appeals against the decision of the appointing authority, the submission of the dispute to a State court in an attempt to stay the arbitration, request for injunctions, etc., etc.!

According to competent observers of the commercial scene, a new "sociological" type of arbitration has gradually appeared, an "arbitrage de gestion" in which arbitration has become a tool of management whereby an indebted company in financial trouble has an interest in being a defendant in arbitration proceedings, with the hope that such proceedings will last long enough! This is a situation, by the way, which may also involve a State. This phenomenon is closely connected with the important practical problem of the assessment of rates of interest in the arbitral award ordering the defendant to pay, and of damages aimed at compensating inflation—a problem which, generally speaking, does not appear to have yet received a satisfactory solution in arbitral practice.

It is well to remember that arbitration is based on consent and that consent is, in Jeremy Carver's apt words, a "delicate flower which requires constant nurture and encouragement."

For the reluctant defendant, it may be tempting, if only to gain time, to deny the existence or validity of his own previous consent and, should these objections fail, to question the applicability of the arbitration clause to the subject-matter of the dispute or to challenge the formal validity of the request for arbitration, or the "locus standi" of the claimant or his own, etc. The domestic case law of many countries is rich in illustrations both of the fertile imagination of defendants and of the lack of arbitral or judicial sympathy for formalistic and dilatory tactics.

In the case of State-controlled corporations or entities, similar situations may arise, with additional complications when such a body, sued in arbitration, relies upon its alleged lack of capacity under a charter or by-laws, upon the lack of powers of the signatories of the contract or upon a lack of State authorization or ratification. And this may happen, and has happened, for instance, even in circumstances (a) when the international contract containing the arbitration clause had been concluded within the scope of, pursuant to, or "under the umbrella of" a bilateral treaty between two States, and (b) when the contract had actually been performed in part for some time. When a State is directly involved as defendant

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15 E.g., Professor Bruno Oppetit, of Paris University, a leading French specialist, Vice-President and Director of Research of the ICC Institute of International Business Law & Practice, author of many publications, including a recent article, Sur le Concept d'Arbitrage, in Droit des Relations Economiques Internationales, Etudes Offertes à B. Goldman 229, 229–39 (1982).

16 According to reliable sources, this is precisely the case in an international arbitration now pending, which shall remain nameless.

17 Carver, supra note 14, at 184.
in arbitration, the above-mentioned temptation and the threat to arbitration are, in the nature of things, substantially greater.

If businessmen and investors alike, generally speaking, are unenthusiastic, to say the least, about legal methods of settlement of disputes and tend to see in arbitration a last resort, the reluctance of States to impartial third party adjudication is much more deeply ingrained and too well-known to warrant much comment here. The history of international arbitration provides a long list of cases in which a State opposed arbitration on the basis of a wide range of arguments and devices, some of which at least are bound to raise doubts as regards the professional qualifications of the government's advisers or their good faith.

An obvious example is the allegation that there is no dispute to arbitrate! Another well-known gambit is the passing of a special statute or decree, purporting to annul retroactively the arbitration agreement, e.g., within the framework of a nationalization law. Other ploys consist of the State challenging its own “capacity” or “power” to arbitrate or that of the State organs or companies which signed the instrument containing the arbitration clause or of alleging formal or substantial invalidity, e.g., because the government or minister concerned had not obtained the prior authorization or approval of the Council of State or Constitutional Court, etc., etc. It will suffice to cite here the authoritative words of Judge Kéba Mbaye, of the International Court of Justice:

For a long time the French-speaking countries of Africa, following the French example, had thought that they could avoid arbitration, by citing procedural rules forbidding them to agree to internal arbitration. Today ICSID is helping to modify this situation that was sapping the confidence of the economic partners of these countries. It is a question of pure good faith. A State must not be allowed to cite the provisions of its law in order to escape from an arbitration that it has already accepted.

Clearly, when arbitration proceedings are instituted against them, all defendants, including States and State-Controlled entities, are perfectly entitled first to scrutinize the consensual basis and validity of the request and then, depending on the result of such scrutiny, to dispute, if necessary, the validity or applicability of
an alleged agreement to arbitrate.\textsuperscript{22}

But there are limits, both of a “technical” legal nature and of an ethical nature, to the choice and use of preliminary objections or procedural obstacles which can be raised. And there is no denying that these limits are not always sufficiently perceived by State officials and by political or legal advisers—a fact which, in itself, constitutes a serious threat to arbitration, in particular to arbitration seen as a means to improve the investment climate. Too often such officials or advisers fail to realize, for instance, that a bad argument may discredit a good argument, and a good case (by a sort of procedural “Gresham’s law”).

Two recent examples, which were widely discussed at the Conference organized last March by the University of London, on “Contemporary Problems in International Arbitration” may serve to illustrate this point.

In the arbitration between the French Société Générale des Travaux de Marseille (SGTM) and a public corporation of Bangladesh, the latter government, when it realized that the arbitration was developing in an unfavorable way, took the quite unprecedented step of dissolving by decree the defendant State corporation and turning its assets (but not its liabilities, nor the arbitration undertaking!) to a new public corporation, which was eventually dissolved in its turn by decree in order to counter an arbitral procedural order.\textsuperscript{23} One may easily guess the lasting negative effect of such governmental decisions on the “image” of Bangladesh in the minds of future investors.\textsuperscript{24}

A second example, also discussed in the London Conference, involves Egypt, in the context of a particular type of multiparty arbitration resulting from industrial contracts concluded by the Arab Republic of Egypt and three other Arab States, through a joint organism created by treaty, the Arab Organization for Industrialization. In arbitral proceedings instituted in Geneva by an English company, Westland Helicopters Ltd., the three Arab States regrettably chose to default, while the Egyptian representatives raised or lodged a remarkable multitude of objections, challenges as well as appeals to the local Swiss and to the

\textsuperscript{22} See, for example, the so-called “Pyramids” case: Southern Pacific Properties Ltd. v. The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels, 22 ILM 752 (1983) (ICC case No. 3493, award of Mar. 11, 1983). This award has been annulled in République Arabe d’Egypte v. Southern Pacific Properties Limited and Southern Pacific Properties (Middle East), Judgment of July 12, 1984, Cour d’appel, Paris, 112 Journal du Droit International 129 (1985), English translation at 23 ILM 1048 (1984). The contrary results reached in this case by the arbitrators and the Paris Court show the importance that should be given by the parties to transnational arbitral agreements to ascertaining at the outset that all of them effectively consent to be bound by the arbitration clause. For another case in point, see Framatome v AEOI, supra note 20, at 58.

\textsuperscript{23} The consequences of these acts were nevertheless recognized, on technical grounds, in Switzerland, the seat of the arbitration: Judgment of May 5, 1976, Tribunal Fédéral, Switz., 102 ATF 1a 574. For a criticism of the Swiss decision, see Lalive, Arbitrage International et Ordre Public Suisse: une Surprenante Décision du Tribunal Fédéral: l’Arrêt SGTM/Bangladesh, 97 Revue de Droit Suisse (Zeitschrift für Schweizerisches Recht), No. 1, at 529 (1978) and comments on the decision in 34 Annuaire Suisse de Droit International at 387 (1985). An English translation of this decision appears in 5 Y.B. Com. Arb. 217 (1980).

\textsuperscript{24} One should in all fairness keep in mind the exceptionally difficult situation of the new State at the time and the lack of proper information and experience of its few advisers.
Egyptian courts. While there may be room for differences of opinion as to some of the complex legal problems involved, there can be no doubt that the dilatory and aggressive tactics used in that case by the defendants' advisers and counsel were hardly in keeping with normal international practice, nor were they apt—to use an understatement—to enhance the credibility or prestige of Egypt or to further that country's efforts either to attract new investment or to build up Cairo as a center for international arbitration.

It would be quite erroneous to believe, as some Western commentators apparently do, that this type of unfortunate arbitral behavior is in any way typical of governments or State-controlled entities of developing countries, just as it is quite wrong to assume—as many people all over the world are inclined to do—that investors, businessmen and lawyers of industrial countries are always well-informed about and fully conversant with the techniques of international arbitration. The fact is that all States and to some extent State entities as well find it extremely difficult and, so to speak, "against nature," to abandon a part of their authority and discretion when entering the field of transnational contractual relations.

In the case of investment, many host countries still "regard recourse to arbitration as an attack on the sovereignty of the State and on the jurisdiction of its national courts in the field of State contracts." From a juridical point of view, it is easy to retort, as has been done many times by learned commentators and arbitrators alike, that to deny the sovereign State the power to enter (in its own interest and in the very exercise of its sovereignty) into a binding commitment, e.g., to arbitrate, when it chooses to do so, would be a much more real and more serious attack on its sovereignty. To which may be added the equally obvious remark that "it is a universally accepted doctrine that no one can be judge in his own cause and all systems of law adopt it."

Moreover, it should be realized that the insistence of foreign investors on an arbitration clause, as "the sole effective guarantee of their interests in developing

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26 On this, see, for instance, Professor A. El-Kosheri (in a paper delivered in December 1984 at the ICC Institute of International Business Law & Practice) who correctly states that "all possible techniques were utilized to prevent the arbitral tribunal from adjudicating the jurisdictional issue" and who concludes, after "carefully reviewing the AOI case" that, whatever the political or other motives may have been for the defence, the tactics employed should be vigorously condemned.

27 See Kadiki, Commentary, in ICC Court of Arbitration 60th Anniversary, supra note 1, at 197.

countries"\(^{30}\) while particularly understandable, for obvious reasons, when contracting with a State\(^{31}\) is but an aspect of a general and common phenomenon which has been observed for centuries in international commercial relations between individuals or companies, i.e., the reluctance of each party to accept the jurisdiction of the courts of the other party and, with it, a number of practical disadvantages and a certain inferiority (quite apart from the degree of independence and objectivity of the foreign court). This general reluctance of both parties and their concern for equality in the settlement of disputes would in itself suffice to explain the success of international arbitration. Who could be surprised that the same concern should also be felt in transnational relations and, in particular, when they relate to investments?

But it stands to reason that the root of the problem is not legal or even rational, but political; this is not the place to refer again to historical considerations, such as those which are summed up by Dr. Shihata\(^{32}\) with regard to Latin-American countries and their attachment to the Calvo doctrine, considerations which often explain a State's reluctance or refusal to undertake arbitration commitments, even though such a refusal may be clearly adverse to the State's interest, and result, for instance, in fewer investments or contracts, or in higher prices being charged by the foreign party, by way of self-insurance against "non-commercial risks."

What needs rather to be emphasized is that the geographical expansion and the improvement of the arbitration process are or may be threatened by certain common fallacies, too often repeated, sometimes without any attempt at critical or independent judgment, by speakers and writers—today in particular, but not exclusively, in the Third World. A good example is the untenable assertion that international arbitration is "a Western idea," because of the unassailable fact that industrial countries have so far made a much greater use of arbitration methods and techniques in their international relations than developing countries.

This plainly does not justify any reluctance or refusal to use the same techniques, just as the fact that motorcars or airplanes were first used in a few industrial countries could hardly suffice to motivate a refusal to drive or to fly! More seriously, any lawyer with some knowledge of history of comparative law should be aware\(^{33}\) that the concept of arbitration has long been known and recognized by Chinese and Islamic civilizations, for instance.

Another "political" threat on the development of international arbitration needs only a passing reference: the somewhat exploded idea or myth that international arbitration is "a one-way street serving the interests of industrialized

\(^{30}\) In the words of Judge Khaled Kadiki, supra note 28.

\(^{31}\) See, e.g., the pointed observations of Jiménez de Árêchaga, Commentary, in ICC Court of Arbitration 60th Anniversary, supra note 1, at 207 and Kadiki, supra note 28, at 199. The latter stresses the "psychological and political uneasiness of foreign parties vis-à-vis the internal jurisdiction of the State party."

\(^{32}\) See Shihata, supra note 7, at 1-5.

\(^{33}\) Especially after reading, for instance, René David's writings on the subject, and in particular his admirable treatise on L'Arbitrage dans le Commerce International (1981).
countries": this is "a great mistake," as ably demonstrated by Jan Paulsson in a thorough and persuasive study of recent (notably ICC) practice.\textsuperscript{34}

The real problem, in this connection, would seem to lie in a lack of familiarity and expertise in arbitration matters and the resulting latent suspicion, among developing countries, towards international arbitration. It may easily be understood by reference, for instance, to absolute conceptions of "sovereignty," already mentioned, and to the underlying hostility of all States, including Western countries.\textsuperscript{35} A more practical explanation is the hesitation of some States to venture "into an arena for which they are not (or do not feel) adequately prepared," as rightly observed by Dr. Zaki Mustafa in an excellent and convincing presentation of "Public Corporations as Parties to Arbitration: An Arab Perspective."\textsuperscript{36}

The author bases his demonstration, inter alia, on \textit{Turriff Construction U.K. Ltd. v. The Sudan Government}.\textsuperscript{37} He shows that the apprehensions of some Arab States "about exposing their young fragile public corporations to foreign arbitration" do relate to "real problems,"\textsuperscript{38} as exemplified by the conduct of the Turriff case by the Sudan Government. Lack of space unfortunately prevents quoting in full Dr. Mustafa's excellent concrete suggestions—with which the present writer wholeheartedly agrees—in order to "help overcome some of these problems."\textsuperscript{39}

In light of Dr. Mustafa's analysis, three observations appear to be called for. First, the lack of expertise in developing countries regarding international arbitration is rapidly disappearing, as evidenced, for instance, by the example of Algeria, whose national companies are known to have acquired a great deal of experience and skill in arbitration techniques, sometimes with the assistance of expensive American law firms, and are now more than a match for many foreign investors.

\textsuperscript{34} Paulsson, \textsc{Le Tiers Monde dans l'Arbitrage Commercial International, Revue de l'Arbitrage} 3 (1983). \textit{See also} ICSID 1984 \textsc{Ann. Rep.} 8–9.

\textsuperscript{35} See Haug, Commentary, in \textsc{ICC's Court of Arbitration 60th Anniversary, supra} note 1, at 203, 204–05, who rightly notes several reasons why "a State or a State enterprise may be reluctant to accept commercial arbitration as the mechanism for resolving legal disputes," including the fear that "commercially trained arbitrators may be less than responsive to the application of public national or international restrictions on commerce. "Similarly, foreign parties, and investors, may be reluctant to accept as arbitrators State officials, diplomats, etc. or international officials, who may be "less than responsive" to the need of preserving security and the binding force of commitments in transnational transactions.

\textsuperscript{36} Mustafa, \textsc{Public Corporations as Parties to Arbitration, in ICC Court of Arbitration 60th Anniversary, supra} note 1, at 245. \textit{See also}, in the same volume, the very interesting contributions of Professor A. Mahiou (\textit{supra} note 12), Judge Këba M'Baye (\textit{supra} note 21), and Judge K.M. Kadiki (\textit{supra} note 28).

\textsuperscript{37} \textit{Turriff Construction U.K. Ltd. v. The Sudan Government (U.K. v. Sudan)}, 10 \textit{Neth. Int'l L. Rev.} 200 (1970) (Perm. Ct. Arb. 1970). Mustafa, \textit{supra} note 36, at 248 also mentions the Aramco arbitration, Saudi Arabia v. Arabian American Oil Company (Aramco), 271 L.R. 117 (1958), which, I submit, belongs to a totally different category. This cannot be demonstrated here for it would largely overstep the limits of the present study, but it will suffice to state that: (a) the Saudi Government was extremely ably defended in the said arbitration and (b) it accepted and carried out an unfavourable award with perfect good grace, in a manner which could serve as a model to many (notwithstanding the following reaction, understandable but excessive, in the form of the Council of Ministers' Decree No. 58, of February 1963, 3 ILM 45 (1964)).

\textsuperscript{38} Mustafa, \textit{supra} note 36, at 246.

\textsuperscript{39} \textit{Id.} at 251–252. As to Dr. Mustafa's suggestions (ii) and (v), in particular, which are of utmost importance for the future progress of international arbitration, see text immediately following.
Second, the legitimate request and proposals to resort more frequently and systematically to arbitrators from developing countries are beginning to be heard and put into effect, although such proposals inevitably require time and meet practical limits.\textsuperscript{40}

Third, it should be kept in mind that a number of the difficulties which are met by the States or the public corporations of developing countries are in fact not “specific” at all, inasmuch as they are everywhere inherent in the situation and machinery of the State and in the status and limitations of a public corporation, as shown in the lucid analysis of Jeremy Carver\textsuperscript{41}.

The fact is that, for all its superior authority and sovereign power, the modern State—whether already industrialized or “developing”—suffers from a number of handicaps with regard to the conduct of international arbitration proceedings, much more than the large transnational corporation (which is not exempt, by the way and contrary to popular belief, from similar weaknesses!). Some of these handicaps have recently been well-described by an experienced English practitioner: “awkwardness of a State’s representation,” weight of political considerations, limited experience of government lawyers in this type of commercial arbitration, and problems of effective communication between State representatives and lawyers.\textsuperscript{42}

To this list should be added at least one factor, often passed over in tactful silence: a government’s great difficulty in obtaining independent and objective information on the dispute and the arbitration, owing to the number of intermediaries involved, to the human desire to bring “good news” rather than “bad news” and to a natural instinct of officials of a State or State-controlled entity (an instinct not unknown, to be sure, in large commercial companies) to avoid, play down or cover up their personal responsibilities! It is submitted that, in ICSID arbitration as in other cases, a number of instances could easily be found when—while the superior authorities of the State or of the corporation remained in blissful ignorance—such “human factors” led to unduly protracted proceedings or prevented a timely amicable settlement.\textsuperscript{43}

Another “handicap,” which may also be viewed to some extent as a “threat” to future expansion of international arbitration, is the inherent and natural

\textsuperscript{40} See Lalive, supra note 4, at 350-51, who, concurring with Dr. Mustafa on the need for more information and permanent training, notes, however, the “unpleasant” reality that “in many States of the world, freedom of expression and judicial independence are reduced or are even non-existent, a fact which has inevitable consequences in the field of arbitration (for example on the choice of its place and the choice of the arbitrators) . . . .” Id. at 351.

\textsuperscript{41} Carver, supra note 14. See also, on the fact that public corporations are under the guardianship of the State, the study of Professor Mahiou, supra note 12.

\textsuperscript{42} Carver, supra note 14, at 180.

\textsuperscript{43} We therefore venture to disagree, for once, with G.R. Delaume, ICSID Arbitration, in ICC Court of Arbitration 60th Anniversary, supra note 1, at 225, 226, who writes optimistically that, with the exception of the Bernventi-Bonfant v. Congo Case (Award of Aug. 8, 1980), “in the majority of cases, it does not appear that the decisional process of public entities caused significant delays in the conduct of ICSID proceedings.” We share the view of Professor Mahiou who underlines the fact “that public enterprises are subject to the guardianship of the State that is liable to interfere to a greater or lesser extent and to influence the course of the proceedings by complicating it and holding it up.” Mahiou, supra note 12, at 243 [emphasis added].
difficulty of a State (and mutatis mutandis a State-controlled entity) to accept a
basic tenet of arbitral procedure, i.e., the principle of equality of the parties.44

It has been said that, in international transactions, the modern State was ill at
ease in the role of contracting party or contractual partner, and that its "dual
capacity" was the source of many conflicts and of some arbitration procedures.
Similarly, in arbitration proceedings, the State often finds it hard to adjust to the
"rules of the game": it sometimes expects or even requests, directly or indirectly,
certain procedural privileges, including extension or disregard of time-limits,
derogation of ordinary rules of evidence, etc. One of the arbitrator's delicate tasks
is to reconcile here a need for some flexibility (justified by some of the considera-
tions mentioned above about the particular mechanism of State administration
or State-controlled entities)45 with the fundamental equality of the parties and
elementary requirements of justice.

The danger should not be underestimated that foreign investors may come
to distrust an arbitration mechanism or set of rules which would allow such a
fundamental principle to be disregarded or weakened by some arbitrators, perhaps
exceedingly sensitive to the sovereignty of the State and the "Raison d'Etat" or
because of lack of independence or courage. Obviously, the converse danger must
be taken into consideration (and it seems to have received more coverage in
doctrinal writings) and States' or public corporations' misgivings or fears should
not be ignored either. Both play an important role in the question of the choice
of arbitrators.46

From the preceding observations, the conclusion would appear to stand out
that, when the parties to a dispute have consented to arbitration, the difficulties,
far from being over, may well be said to begin! True it is that Article 25 of the
Washington Convention of March 18, 1965, which confirmed an existing cus-
tomary rule, forbids any party which has given its consent "to withdraw it
unilaterally."47

There are a significant and disturbing number of cases—ICSID, ICC and
others—in which a State or State-controlled entity has resorted to various
techniques to water down or undermine its commitment to arbitrate. A typical
device is the contention that such commitment, being a derogation (sic) from the
sovereignty of the State, should be construed restrictively: it was used, character-
istically, in both the very first and the last (or last but one) of the ICSID arbitration

44 This customary rule of arbitration law, which underlies all texts relating to arbitration, is expressly
recognized for instance by article 15 of the UNCITRAL Arbitration Rules (G.A. Res. 31/98, 31 U.N. GAOR
Supp. (No. 17), U.N. Doc. A/31/17 (1976)) and undoubtedly constitutes a "fundamental rule of procedure" in
the sense of Article 52 of the ICSID Convention (Convention on the Settlement of Investment Disputes between
45 Cf. Mahiou, supra note 12, at 243.
46 See supra note 35.
47 ICSID Convention, supra note 44, at art. 25.
The many other exceptions or gambits available, sometimes to both investors and States or State entities, have been mentioned above and need not be recalled. Also a matter for concern, of course, are awards given in default of appearance of one defendant party: but this number is hopefully decreasing with the gradual realization that the policy of the “empty chair” is counter-productive.

Finally, and leaving the domain of arbitral procedure, one should remember that, if and when all procedural objections (whether dilatory or not) fail to prevent the arbitrators from examining the merits of the dispute, the defending party, and particularly the State-controlled company, may use, and sometimes abuse, the ultimate and effective weapon of “force majeure.” There is little doubt that “the question whether an act of State can be a force majeure defence for a State-controlled corporation” is one of the most fundamental issues of the present time and one where much progress remains to be made, and much clarification must take place, if stable and secure international relations are to develop and if a “favorable investment climate” is to be obtained.

Since the abuse, if not the use, of the “force majeure” defense, and the relative juridical confusion and insecurity which still prevail in the matter may thus be considered a threat to international arbitration (seen, let it be repeated, as a means of eliminating and preventing disputes, to paraphrase the language of Helsinki), a passing mention was perhaps justified.

One comment, however, should be added: there appears to exist, at least among some Western commentators, a fairly widespread belief that the “force majeure” argument is exclusively used or abused (sometimes with the help of innocent Western arbitrators or judges) by public corporations of communist or developing countries.

This seems a dangerous over-simplification, based on insufficient evidence. In a recent ICC case, for instance, an Asian public corporation fell victim to non-performance by a French State-controlled company and of a “force majeure” defense, after an extraordinary series of manipulations by both the company and its “guardian” State. One can only hope that such admittedly pathological cases, when they are better known, will serve as a warning to future contracting parties everywhere, in the “South” and in the “North”!

The present picture would be seriously incomplete, and perhaps unbalanced,

48 In the Holiday Inns v. Morocco case (ARB/72/1), the argument was raised, among many other objections, by Morocco: cf. Lalive, The First “World Bank” Arbitration (Holiday Inns v. Morocco): Some Legal Problems, in 51 Brit. Y.B. Int’l L. 123 (1980). In the AMCO case (AMCO Asia v. Republic of Indonesia, ARB/81/1), the respondent had argued in favour of restrictive interpretation since its consent to ICSID arbitration constituted a limitation to the State’s sovereignty. The Tribunal held that the agreement to arbitrate “is not to be construed restrictively, nor as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties . . . .” 1 News from ICSID, No. 2, at 5 (1984).

49 See the Westland case, supra note 25.

50 Hermann, supra note 14, at 151. It is noteworthy that the author concluded his presentation of recent practice with the pessimistic comment that, in the present state of the law, he saw little chance of an award being obtained in favour of a private claimant.

51 See Helsinki Final Act, supra note 6.
if it failed to mention another “threat,” of a purely professional nature, which the attitude of certain practitioners does or could create for the success of international arbitration and the attainment of its goals, the foremost of which, as we know, is the amicable settlement of disputes. For both the arbitrators’ and the parties’ advisers—but principally, of course, for the former—a comparative law approach, a cultural open-mindedness and an international outlook are absolutely essential and form an integral and necessary part, it is submitted, of the arbitrator’s neutrality.\footnote{These views are developed by the present writer in two studies, Enforcing Awards, supra note 4, and On Neutrality of the Arbitrator and of the Place of Arbitration, in Swiss Essays on International Arbitration 23 (1984).} In the words of René David: “Arbitration will hardly be regarded by a party as a suitable way of solving the case, if it is to be administered by an arbitrator who is imbued with the ways of thinking and the prejudices of another culture.”\footnote{David, David on Arbitration in the International Trade, in The Art of Arbitration – Liber Amicorum Peters Sanders 92 (1982). See also David, L’Arbitrage comme une Solution d’Avenir pour le Droit International, in Colloque 1983 at 401 (Académie de Droit International de La Haye, 1984).}

It has been contended sometimes that “by dint of belonging to a certain hemisphere or a certain system,” an arbitrator, even of total integrity, would necessarily be biased, in particular against Third World parties!\footnote{See, for example, the Algerian statement cited, apparently with approval, by Professor Mahiou, supra note 12, at 242–43.} Such sweeping generalizations, apart from their strange “determinist” tendency, are hardly convincing: true it is that the arbitrator’s “social environment” is often important, especially when he belongs to a country having either a State religion or an official State ideology. “The presumed effect of a social environment should be much less important, in the nature of things, where the arbitrator lives in a ‘pluralistic society,’ where different political or economic philosophies or views are permitted.”\footnote{Lalive, On Neutrality of the Arbitrator and of the Place of Arbitration, supra note 52, at 27.} Finally, such assumption fails to take into account the existence of something called “objectivity,” a quality which may and should be developed by education and training.

With regard to lawyers and parties’ advisers, a much more comparative and international education is called for, not only with regard to “traditional” fields like public and private international law, foreign and comparative law, but also in the specific methods and skills of international arbitration. A constant complaint of modern arbitrators relates to the tendency of too many counsel merely to transpose, into arbitration proceedings, their own national methods, recipes or prejudices, or the aggressive tactics known in their local courts, with extraordinary legal “parochialism” and total disregard for the specific needs of transnational arbitration and what may be called “arbitral diplomacy.”

In conclusion, the preceding remarks, incomplete and less than adequate though they may be, should suffice, it is hoped, to underline the present writer’s strong belief—hardly surprising, perhaps, in a professor—that the key, and only key, to a successful future of international arbitration (seen, again, as a means to
an end) lies in education. This fact is very well brought out by Dr. Zaki Mustafa in his study previously cited, but—contrary to a common belief—such education is needed the whole world over and not only in developing countries! It might even be argued that the need is greater for those practitioners who complacently imagine that they have nothing more to learn than for those who are fortunate enough to realize their need for more information and training! On this point alone, we beg to disagree with Dr. Mustafa when he writes: "Looking at the curricula of law schools in the Third World, one can hardly find any law school which accords arbitration anything approaching the importance which it deserves."57

The same holds true, by and large, for the law schools of the so-called "developed world" and not only with regard to international arbitration, but also for such basic fields as public international law, private international law and comparative law. This was the sad but unanimous conclusion of the Institut de Droit International at its Athens session, which noted with regret that "in many countries law is still taught essentially or even exclusively along the lines of national considerations and methods" and that the teaching of the various "international" matters is "often quantitatively and qualitatively inadequate to meet the demands of our times."58

While this gloomy but totally realistic diagnosis undoubtedly remains true, some comfort may, however, be found in a few recent attempts which have been made in the right direction. To name but a few, excellent work appears to have been done, for instance, by the International Development Law Institute (IDLI) in Rome and the ICC Institute of International Business Law and Practice in Paris, notwithstanding insufficient means, and, 1985, Queen Mary College, in the University of London, decided, at Professor Roy Goode’s initiative, to establish a School of International Arbitration. Lastly, there is every reason to believe that—while, of course, not devoted primarily to the settlement of investment disputes—the publication by ICSID of a "Foreign Investment Law Journal" will also be a valuable contribution to a better international understanding.

56 See Mustafa, supra note 36.
57 Mustafa, supra note 36, at 252.
58 Inst. of Int’l. L. Y.B., Part II, at 205 (Session of Athens, 1979).