ICSID

ICSID, the International Centre for Settlement of Investment Disputes, is an international organization established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which entered into force on October 14, 1966.

ICSID provides facilities for conciliation and arbitration of investment disputes between States and nationals of other States in accordance with the provisions of the Convention. The Convention was sponsored by the World Bank in the belief that the availability of such facilities could promote an atmosphere of mutual confidence between States and foreign investors conducive to increasing the flow of private international capital into those countries which wish to attract it.

ICSID Review
Foreign Investment Law Journal

ICSID Review—Foreign Investment Law Journal is intended to meet the need for a publication offering under one cover material on the law and practice relating to foreign investments, including domestic laws, investment treaties, contractual trends, and the resolution of investment disputes. The views expressed in any contributions which appear in the Review are those of the individual authors and are not necessarily those of ICSID, its members, the advisory board or the editors.

Contributions

ICSID Review—Foreign Investment Law Journal welcomes the submission of contributions for consideration by the editors with a view to publication. They should be sent to:

ICSID Review
1818 H Street, N.W.
Washington, D.C. 20433
U.S.A.

ONE OF state (or a of investm which mot investment
The b category o field of na attract the resources private pai Specif a state, so signature of the foreign to as the a powers as

* Of Counsel, Court of Inter
ARTICLES

The Renegotiation of the Investment Contract

Piero Bernardini*

I. INTRODUCTION

ONE OF THE CRUCIAL ISSUES underlying contracts concluded by a state (or a state-controlled entity) with a foreign private party in the field of investment is the striking of a fair balance between the public interest which motivates the state’s intervention and the protection of the foreign investment.

The history of the two parties’ relations under the most important category of state contracts, the economic development agreement in the field of natural resources, is marked by the requirement that in order to attract the very large investment needed to develop the host state’s natural resources an adequate protection framework had to be secured for the private party’s investment.

Specifically, considering the quality of one of the contracting party—a state, sovereign in its own legal order, or a state-controlled entity whose signature of the agreement is authorized by the state—the main worry of the foreign investor was, and still is, represented by what has been referred to as the aléa de la souveraineté, the fact that the state may make use of its powers as guardian of the public interest and legislator in its own order to

* Of Counsel, Ughi e Nunziante, Rome; Member, ICSID Panel of Arbitrators; Vice-President, ICC Court of International Arbitration.
modify to its advantage the carefully negotiated contractual equilibrium. This risk appears enhanced in the case of the new generation of development agreements in the field of natural resources due to the blend of public law and private law characterizing their legal regulation. As a matter of fact, the state's power to impose amendments to or even rescind any such agreements insofar as deemed necessary for the pursuance of the public interest is a mere consequence of their public law nature.¹

II. THE FOREIGN INVESTMENT PROTECTION

The above-referred characteristics of an economic development agreement have urged the putting in place of a number of sophisticated legal devices to ensure the highest possible level of protection for the foreign investment against the mentioned *aléa de la souveraineté*.

Among such devices one may include the denationalization of the agreement, the international arbitration clause, the stabilization of the contractual regulation and the renegotiation of its terms.

A. Denationalization of the Agreement

One of the techniques by which foreign private parties have striven to protect their investment, particularly in the field of natural resources exploration and production, consisted in removing their contractual relationship from the reach of the host state's municipal law, the latter being of potential application under one of the most common rules of conflict, the one connecting the contract with the law of the place of its performance.

This result was achieved in a first phase of the parties' relations² by making the agreement subject to the general principles of law or to principles


² Such phase may be conventionally located in the years 1950s through 1970s, although some petroleum agreements still today provide for the choice-of-law technique described in the text.
of law common to the countries of which the parties are nationals or to principles of law common to civilized nations. ³

By this peculiar choice-of-law provision the foreign investor succeeded for a long period of time in denationalizing the development agreement by avoiding the application of the municipal law of the host state. The same objective was obtained through the internationalization of the agreement, by making the same subject to public international law.

It is not within the scope of his article to pass judgment upon the appropriateness of this or similar choice-of-law methods ⁴ but rather to record that thanks to the intervention of the international arbitrator (according to another customary clause of economic development agreements) the objective in question has been attained, as shown by numerous awards in the field of state contracts. ⁵

B. International Arbitration

The remark just made, concerning the choice-of-law in a development agreement, confirms the great importance of international arbitration as a means of settling disputes arising under this type of agreement. The international arbitrator may play an essential role, as has been actually done, in establishing the rules on the basis of which the parties' rights and duties in the crucial field of investment are to be established, thereby adding a definite measure of protection to the foreign investor. This role is still played by international arbitration even if, following the developments which marked North-South relations in the years 1970s, the regaining by states

³ A similar clause was inserted in the standard oil concession agreement signed by Libya with the oil companies in the years 1960s. Clause 28 of this agreement reads: "This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals."

⁴ Such as the one which purports to "freeze" the host state's law on the date of conclusion of the agreement, thereby excluding the applicability of future laws and regulations.

⁵ Among such arbitral awards are those settling the disputes which had arisen in 1974 between the Libyan Government and three petroleum companies which had been made subject to measures of nationalization in 1973 (as to 51% of their concessionary rights) and 1974 (as to the balance of their rights). See British Petroleum Co. (Libya) Ltd. v. Government of Libya (awards of October 10, 1973 and August 1, 1974), 5 Y.B. Com. Arb. 143 et seq. (1980); Texaco Overseas Petroleum Co. (U.S.) and California Asiatic Oil Co. (U.S.) v. Government of Libya (award of January 19, 1977), 4 Y.B. Com. Arb. 177 (1979); Libyan American Oil Company v. Government of Libya (award of April 12, 1977), 6 Y.B. Com. Arb. 89 (1981).
of sovereignty over their national resources and the strengthening of their bargaining power has brought about a "relocalization" of the development agreements within the legal order of the host state.6

This process is marked by the wide acceptance by both third-world and industrialized states of the 1965 Washington Convention on the Settlement of Investment Disputes (the ICSID Convention). Article 42(1) of the ICSID Convention states that, in the absence of a different agreement between the parties, the arbitrator "shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." The host state's law has thus to be applied by the ICSID arbitrator in all cases where the parties have failed to agree otherwise, subject only to such law being consistent with public international law.7

C. Stabilization Clauses

Such clauses aim at stabilizing the contractual regulation by restricting the legislative power of the state to amend or abrogate the agreement. This may be achieved by providing:

(i) that the agreement takes precedence over any provisions enacted subsequent thereto by way of legislation or administration regulation, if the effect of such provisions is to the investor's prejudice,8 a result which may be reached only by conferring to the agreement the force of law, so that its provisions may not be modified by general legislation;9 or

---

6 The expression is of G. Delaume, Transnational Contracts, booklet 8, New York, 1983, at 33. See also Delaume, The Proper Law of State Contracts Revisited, 11 ICSID Rev.—FILJ 1, 11-13 (1997).
7 According to an accepted interpretation of the reference made by Article 42(1) to the rules of international law.
8 See, e.g., Kazakhstan, 1997 Model Contract for Oil & Gas (Decree 108 of January 17, 1997), Article 28.2:

Amendments and additions to legislation which cause a deterioration in the status of the Contract adopted after its conclusion shall not be applied to the Contract.

Barrows, Basic Oil Laws and Concession Contracts, Russia & NIS, Supp. 25, 1 (1997).
9 This is the pattern followed in Egypt, Qatar and other Middle Eastern countries as well as in countries of the former Soviet Union (such as the Republic of Azerbaijan, where a recent petroleum agreement was made subject as to its effectiveness to "legislation giving this Agreement the full force of law"). See infra text accompanying note 15.
(ii) that any modification of the terms and conditions of the development agreement may only be made by mutual written consent of the parties;\textsuperscript{10} or

(iii) that the law applicable to the development agreement is the law of the host state in force at the time of the conclusion of the contract, thus excluding the applicability of any future laws and regulations.

The effectiveness of such provisions may be doubtful. A state, in fact, may not renounce sovereign prerogatives the exercise of which is instrumental to the pursuance of the country's public interest. The fundamental principle of permanent sovereignty of each state over its natural resources,\textsuperscript{11} assumes in this context a decisive relevance. The qualification of the state's sovereignty as permanent implies that its right to use the natural resources of its territory is inalienable so that it cannot be hindered or restricted by commitments conventionally undertaken vis-à-vis other states or private foreigners.\textsuperscript{12}

\textbf{D. Renegotiation}

As an alternative to a stabilization clause, the renegotiation clause may offer protection against the unilateral revocation or modification by the state of the agreement as a consequence of its public law nature. By undertaking to renegotiate in good faith the agreement in case of supervening circumstances of any kind (including a change in governmental policy), the state binds itself to conduct negotiations with the private investor instead of unilaterally altering the terms of the agreement. The lack of success of such negotiations may lead to the intervention of the international arbitrator with a view to restoring the contractual equilibrium, if so provided by the parties, or, in absence of the arbitrator's power to that effect, to determining the destiny of the agreement.

\textsuperscript{10} See, e.g., Production Sharing Contract between Pertamina and Agip S.p.A. of October 10, 1968, Article XVI.1.2.: "This Contract shall not be annulled, amended or modified in any respect except by the mutual consent in writing of the Parties hereto." Also the effectiveness of this kind of provision depends upon the relevant agreement acquiring the force of law.

\textsuperscript{11} The most authoritative instrument affirming the principle in question is the Charter of Economic Rights and Duties of States, approved by Resolution No. 3281 (XXIX) of December 12, 1974 of the United Nations General Assembly.

\textsuperscript{12} See Giardina, State Contracts: National Versus International Law, Italian J. Int'l L. 1980-81, at 164.
III. THE RENEGOTIATION OF THE INVESTMENT AGREEMENT

A. The New Approach of Natural Resources Development Agreements

Stabilization clauses are still of application in many investment agreements, under the various forms outlined above. Doubts concerning the legal effectiveness of such clauses and the state's desire to preserve its sovereign prerogatives, solemnly held to be inalienable or permanent, have brought about in the most recent phase a new approach, particularly in agreements relating to natural resources exploration and exploitation.

A typical clause reflecting the new approach may be found in the Model Exploration and Production Sharing Agreement of 1994 of Qatar, specifically in Article 34.12 under the heading "Equilibrium of the Agreement":

Whereas the financial position of the Contractor has been based, under the Agreement, on the laws and regulations in force at the Effective Date, it is agreed that, if any future law, decree or regulation affects Contractor's financial position, and in particular if the customs duties exceed ... percent during the term of the Agreement, both Parties shall enter into negotiations, in good faith, in order to reach an equitable solution that maintains the economic equilibrium of this Agreement. Failing to reach agreement on such equitable solution, the matter may be referred by either Party to arbitration pursuant to Article 31.14

Similarly, a Petroleum Production Sharing Agreement concluded on November 10, 1995 between the State Oil Company of the Azerbaijan Republic and a consortium of oil companies provides for an "Economic Stabilization" clause as follows:

The rights and interests accruing to Contractor (or its assignees) under this Agreement and its Sub-contractors under this Agreement shall not be amended, modified or reduced without the

---

13 See U.N. General Assembly Resolutions No. 1803 (XVII) of December 14, 1962 and No. 3171 (XXVIII) of December 17, 1973 affirming the permanent sovereignty of each State over its natural resources, in addition to the Resolution referred to in note 11, supra.

prior consent of Contractor. In the event that any Government Authority invokes any present or future law, treaty, intergovernmental agreement, decree or administrative order which contravenes the provisions of this Agreement or adversely or positively affects the rights or interests of Contractor hereunder, including, but not limited to, any changes in tax legislation, regulations, or administrative practice, or jurisdictional changes pertaining to the Contract Area, the terms of this Agreement shall be adjusted to re-establish the economic equilibrium of the Parties, and if the rights or interests of Contractor have been adversely affected, then the State entity shall indemnify the Contractor (and its assignees) for any disbenefit, deterioration in economic circumstances, loss or damages that ensue therefrom. The State entity shall within the full limits of its authority use its reasonable lawful endeavours to ensure that the appropriate Governmental Authorities will take appropriate measures to resolve promptly in accordance with the foregoing principles any conflict or anomaly between any such treaty, intergovernmental agreement, law, decree or administrative order and this Agreement.  

Also the Model Production Sharing Agreement of March 20, 1997 for Petroleum Exploration & Production of Turkmenistan contains a similar provision in Article 16-6:

Where present or future laws or regulations of Turkmenistan or any requirements imposed on Contractor or its subcontractors by any Turkmen authorities contain any provisions not expressly provided for under this Agreement and the implementation of which adversely affects Contractor's net economic benefits hereunder, the Parties shall introduce the necessary amendments to this Agreement to ensure that Contractor obtains the economic results anticipated under the terms and conditions of this Agreements.  

16 Id. Russia & NIS, Supp. 26, 75 (1997). Similarly, the Model Contract for Oil & Gas adopted by the Republic of Kazakhstan by Decree 108 of January 17, 1997 (see supra note 8), provides in Section 28 that in case "[a]mendments and additions to legislation ... cause a deterioration in the status of the Contract," paragraph 16 shall apply. The latter provides that the parties shall meet "and, in case consensus is reached, introduce such amendments or alterations into the Contract, which are necessary to restore the economic interest of the Parties to their status as of the moment of signing the Contract."
The above inventory of clauses reflecting the new approach is far from being exhaustive. It is sufficient, however, to reveal the basic features of the stipulations under consideration. These, with their variants, may be summarised as follows:

(i) the clause is alternative to a stabilization clause, the latter not being found any longer in the text of the agreement;
(ii) contrary to a stabilization clause, which records the state’s undertaking not to apply new laws and regulations to the private party’s detriment, an *economic stabilization* clause is more in the nature of a private law arrangement between two private-sector parties;
(iii) the clauses in question give rise; in fact, to the state’s, or the public entity’s, undertaking to compensate the private party for the economic prejudice suffered by reason of any new laws or regulations affecting certain specified contractual terms (for example, in the field of taxation) or, more generally, the terms and conditions of the agreement; and
(iv) as such, they do not infringe upon the state’s sovereign prerogatives, which remain unfettered consonant to their nature, but open the way to the renegotiation of certain terms of the agreement.

**B. Problem Areas of the Renegotiation Process**

Under a stabilization clause, in case of breach of the state's undertaking an arbitral award might order the state to refrain from applying the new laws and regulations to the private party\(^\text{17}\) or, in a more realistic alternative, to compensate the latter for the economic prejudice suffered because of the breach of the agreement by the state.\(^\text{18}\)

Although in this context the state might raise before an international arbitrator the defense regarding the inalienable character of its sovereign rights in order to void the clause of its effects, it seems that the reliance

\(^{17}\text{This was the kind of award issued by the sole arbitrator, Prof. René-Jean Dupuy, in the Texaco Calasiotic v. Government of Libya case on April 12, 1974 (see supra note 5), by ordering Libya the *restitutio in integrum* in favour of the company whose concessionary rights had been nationalized.}\)

\(^{18}\text{A similar award was issued under an ICSID arbitration on November 30, 1979 in AGIP S.p.A. v. People's Republic of the Congo (ICSID Case No. ARB/77/1), reprinted (in the English translation) in 1 ICSID Rep. 306 et seq. (1993).}\)
created in the private party by the state's promise is a sufficiently strong argument to convince the international arbitrator that the foreign investor is entitled to compensation for any damage so caused, even if the breach by the state of its stabilization commitment may not be qualified as internationally unlawful. 19

If the foregoing analysis is correct, no renegotiation of the investment agreement is produced by a stabilization clause since, as the very name indicates, the clause aims at preserving the contractual terms and conditions as originally agreed by the parties rather than modifying them in any respects (the clauses in question are sometimes significantly referred to also as clauses d’inangibilité).

Contrary to the stabilization clauses, the provision aiming at preserving the economic equilibrium of the investment agreement implies that whenever the conditions are met for its application a negotiation phase is open for the parties, such provisions not being of automatic application. This originates various problems.

(i) The parties’ obligations during this phase should be precisely defined, the engagement to negotiate in good faith not implying an obligation to conclude an agreement on the revised terms; in other words, failure to agree is not a breach of contract. 20

(ii) The clause may leave open by its wording whether the objective of restoring the original equilibrium implies in the parties’ common intent that full compensation should be paid to the aggrieved party or that some consideration should also be given to the public party’s interest, particularly when the clause sets as a target the reaching of an equitable solution. 21

(iii) The crucial issue concerns the aggrieved party’s position in case of the parties’ failure to reach agreement on the revision of the contractual terms during the time-limit which the agreement should conveniently set to the initial phase of direct negotiations. This mostly will depend on whether the arbitrator’s powers in such a situation have been clearly defined.

---

19 See Giardina, supra note 12, at 167 and the authors cited therein in note 71.

20 In the award of March 24, 1982, settling the dispute between the American Independent Oil Company and the Government of the State of Kuwait, the Arbitral Tribunal considered the extent of the obligation to negotiate contemplated in Article 9 of the Supplemental Agreement concluding that “an obligation to negotiate is not an obligation to agree” (the award is published in 24 I.L.M. 976 (1982)).

21 As in the case of Qatar Model Exploration and Production Sharing Agreement of 1994. See supra note 14 and the accompanying text.
C. The Role of the International Arbitrator

The problems originated by the parties’ failure to agree on the revision of the terms of their agreement are not different from those arising out of a disagreement on the contract adaptation in case of hardship caused by a change of circumstances.22

The parties’ disagreement may relate to:

(i) the existence of the conditions set by the contract for the renegotiation, namely whether a new law or regulation adversely affects the contractor’s rights or interests (Azerbaijan), or its financial position (Qatar), or its net economic benefits (Turkmenistan), or causes a deterioration of the status, of the contract (Kazakhstan);

(ii) the terms and conditions which should be made subject to revision and the extent of such revision, in order “to re-establish the economic equilibrium of the parties” (Azerbaijan), or “to reach an equitable solution that maintains the economic equilibrium of the Agreement” (Qatar), or “to ensure that Contractor obtains the economic results anticipated” (Turkmenistan).

The parties’ disagreement regarding the conditions for the renegotiation will give rise to a dispute which may be referred to arbitration according to the relevant clause of the agreement.

The arbitrator shall determine whether and to what extent the events alleged by one of the parties meet the conditions set forth in the relevant clause of the agreement. Should the arbitrator determine that such conditions are not met, the agreement shall continue in full force and effect. Should the arbitrator’s decision be in the affirmative, three alternative solutions will be open to the arbitrator regarding the consequences to be drawn therefrom, depending also upon the parties’ demands:

(i) the arbitrator may invite the parties to attempt to negotiate once again the terms of a revised agreement based on his findings;

(ii) if such attempt is unsuccessful, or in its absence, the arbitrator may determine that only the parties, and not the arbitrator, are entitled to proceed to the revision of the agreement, in which

---

22 Legal writings on the subject of hardship are abundant. Among others, see Fontaine, Les clauses de hardship, 2 Droit et pratique du commerce international 7 (1976); van Ommerlaghe, Les clauses de force majeure et d’imprévision (hardship) dans les contrats internationaux, Revue du droit international et droit comparé, at 15 et seq. (1980); Delaume, Change of Circumstances and Force Majeure Clauses in Transnational Law, 7 Droit et pratique du commerce international 333 (1981); Rodière-Tallon, Les modifications du contrat au cours de son exécution (Paris, 1966).
case the arbitrator may declare the latter as terminated, subject to
awarding some kind of compensation to the aggrieved party
should he find that the other party failed to act in good faith
during the negotiations phase or on any other valid ground;
(iii) the arbitrator may proceed to determine the manner in which the
terms of the agreement should be revised in order to comply with
the parties' objective of restoring the contractual equilibrium and
issue an award effectuating such a revision.

While solutions (i) and (ii) above are within the arbitrator’s normal
adjudicative powers, solution (iii) poses some delicate problems regarding
the nature and extent of the arbitrator’s intervention.

Considering that an arbitrator normally lacks the power to rewrite the
parties' agreement, the arbitration clause should expressly confer such
power and determine the manner for its exercise as well as the limits of the
arbitrator's authority in that regard. This means that the reference to arbi-
tration in case of failure by the parties to agree on the terms of the revi-
sion will not be sufficient to imply such a power. The same conclusion
will apply, for even stronger reasons, in the absence of such reference, the
presence of an arbitration clause not allowing per se to conclude that the
arbitrator has the power to intervene to modify the agreement in lieu of the
parties.

Even when such a power is expressly conferred, it may be doubted that
it has an adjudicatory nature. The distinction between the function of
settling a dispute in a jurisdictional framework and that of filling a gap in
the contract or determining an element thereof or adapting the same to
changing circumstances in a contractual framework is well-known to
various civil-law systems, the distinction arising from Roman law.

---

interesting and important question which frequently arises in arbitration proceedings concerned
with long-term contracts clearly embedded in a municipal system of law is whether an arbitrator
has the power to impose the agreement which the parties were unable to reach."
24 As in the Qatar Model Exploration and Production Sharing Agreement of 1994. See
supra note 14 and the accompanying text.
25 As is the case of the other agreements cited in notes 14-16, supra.
26 See Oppenrt, L'adaptation des contrats internationaux aux changements de circon-
27 In case of determination of a contractual element one refers in Italy to the intervention
of an arbitratore, which has no adjudicatory powers but merely provides a contractual element
which the parties have left undetermined.
The recognition of the different nature of the two types of intervention has led the ICC to establish in 1978 Rules for Regulation of Contractual Relations providing for a procedure for the binding adjustment of contracts through the intervention of a third person. ICC itself has indicated that the adaptation procedure is "clearly of a contractual nature" and that in its view the decision of the third person "is inserted into the contract and is binding on the parties as the contract," so that it may not be considered as equivalent to an award.\footnote{Adaptation of Contracts, ICC Publication No. 326 (1978), at 8.}

The reference to this procedure is therefore to be accompanied by a parallel reference to arbitration as a means of settling disputes by a binding award rendered in a jurisdictional framework, "since the two clauses do not serve the same purpose."\footnote{Id. at 9. For a wider reference to ICC Publication, see W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration 693 (2nd ed., 1990).}

The issue whether contract adaptation falls within a jurisdictional function, and is therefore still arbitration, is important to determine which means of recourse are available against the third person's decision and whether the same may be enforced like an award.\footnote{See Peter, Arbitration and Renegotiation Clauses, 3 J. Int'l. Arb. No. 2, 29 et seq. (1986); van Den Berg, The New York Arbitration Convention of 1958 (1981), at 46: "...decisions which are not considered as the result of arbitration proper in the country of origin must be deemed not to come within the purview of the New York Convention and cannot be enforced as a foreign arbitral award under it." A different view is expressed by the present writer in the text above.}

The distinction between the two types of the third person's intervention rests on an investigation into the circumstances of the case, including the rules of the applicable legal system.

The evolution is certainly in the direction of considering that the arbitrator's role, particularly in contracts of long duration, embraces more and more functions which do not strictly partake of a purely jurisdictional nature but aim at regulating a contractual element with a view of securing the stability of the contract.\footnote{See R. David, L'arbitrage dans le commerce international 563 et seq. (1982).} The parties' intent to confer this additional task on the arbitrator and the respect in the performance of such task of the essential requirements of any jurisdictional process, namely the right of the parties to be heard and the third person's impartiality, are all elements which should permit the conclusion that the activity of the arbitrator, whatever the role and power assigned to the arbitrator by the parties,
should receive a unitary consideration so that its decision may take the form of an award with all the resulting attributes, including enforceability.

D. The Role of the ICSID Arbitrator

The issue, however, remains open whenever an ICSID arbitrator is requested to perform the specific function to adapt the contractual terms and conditions to the changed circumstances.

This is so because of the particular requirement, set by Article 25(1) of the ICSID Convention for an ICSID arbitrator’s jurisdiction, that the dispute should be “legal.”

The term “legal dispute” is not defined by the ICSID Convention. The Report of the Executive Directors submitted to member governments on March 18, 1965 upon the formulation of the ICSID Convention states (in paragraph 26) what was intended:

The expression “legal dispute” has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interest are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

As noted by an authoritative commentator, formerly Senior Legal Adviser at ICSID:

Reference to the “legal” nature of a dispute limits the scope of ICSID arbitration to a review of the respective rights and obligations of the parties as set forth in an...agreement, in light of the laws and regulations relevant to that agreement. Examples of “legal disputes” are those concerning non-performance...[and] the interpretation of the agreement....In contrast, disputes regarding conflicts of interest between the parties, such as those involving the desirability of renegotiating the entire agreement or

---

32 See ICSID Convention, Article 25(1): “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State....”
certain of its terms, would normally fall outside of the scope of the Convention.\footnote{Delaume, ICSID Arbitration: Practical Considerations, 1 J. Int'l Arb. No. 2, 101, 116-17 (1984).}

Should the parties fail to agree about the occurrence of the conditions for a revision of the contractual terms as provided in their agreement, their disagreement will give rise to a dispute which will certainly be a legal one to the extent that it will concern the parties' respective rights and obligations and, possibly, the interpretation of the relevant clause of the agreement. Likewise, a legal dispute will arise if, failing a consensual revision of the terms of the agreements, one party claims that the latter should continue according to its original terms and the other that it should be declared as terminated.\footnote{A request which may be accompanied by a damage claim should it be alleged that the reaching of an agreement on the revision of the contractual terms was prevented by the other party's bad faith behavior.}

Yet whenever the parties have failed to provide for a direct revision of the terms of their agreement without fault by either side, the arbitrator would have to intervene in order to perform a function which, for the reasons outlined above, may hardly be characterized as the settlement of a legal dispute.

Should the ICSID Convention be the agreed mechanism for the settlement of disputes arising under the agreement, it would be therefore advisable to entrust the particular function of contract adaptation to a third person under a specific provision of the agreement, outside the sphere of application of the Convention. This solution will have the advantage of leaving wide flexibility to the parties to draft a provision tailored to the specific requirements of the process of contractual revision, including whether the contract performance should be suspended, which should be the revision criteria, whether the third person should be entrusted with the power to act \textit{ex aequo et bono}, whether the decision should have binding force and retroactive effects.

Even if the parties' disagreement on the contractual revision may not give rise to a legal dispute in terms of the ICSID Convention, it will nevertheless still amount to a dispute capable of settlement by a decision which, for the reasons mentioned above,\footnote{See text supra pp. 12-13.} may still be characterized as an award.
As such, the third person's decision may be susceptible of enforcement according to the provisions of the New York Convention of 1958, the latter only requiring that the award has "become binding on the parties."\textsuperscript{36}

The suggested solution will have the further advantage of avoiding any problems of jurisdiction of an ICSID arbitrator to intervene in the contract adaptation process, thereby eliminating the risk that in the absence of a power to that effect the ICSID arbitrator will only be able to decide whether the contract should be declared as terminated.

The ICSID Convention will remain applicable in all other respects, thus permitting the parties to avail themselves of this valuable and effective instrument of disputes settlement (and, quite frequently, also of disputes avoidance) in the highly sensitive field of investment.

\textsuperscript{36} New York Convention of 1958, Article V(1)(c). It is based on this consideration that the Italian Supreme Court has held that the Convention is applicable also to a decision under an arbitragio irrituale notwithstanding its purely contractual nature (judgment of the United Chambers of September 18, 1978 n. 4167, 15 Rivista di Diritto Internazionale Privato e Processuale 524 (1979); see also judgment of the United Chambers of July 6, 1982 n. 4039, 19 Rivista di Diritto Internazionale Privato e Processuale 854 (1983); contra, German Bundesgerichtshof, judgment of October 8, 1981, 8 Y.B. Com. Arb. 366 et seq. (1983). About the distinction in Italy between arbitragio rituale and arbitragio irrituale, see G. Bernini, Italy in International Handbook of Commercial Arbitration (ICCA ed.).