INTRODUCTION

I must confess that I accepted this topic with some misgivings. Issues relating to the identity of the investor are rather multifarious; they are too intertwined to lend themselves to easy dissection, especially in 15 minutes or so; and above all, they are not as hotly controversial as those that my fellow-panellists are discussing. I feel rather like the middle of an inside-out sandwich: I’m the bread between the meat. However, there are some interesting and important issues even here, which I will attempt at least to outline.

I am going to allude, rather frequently, to the Washington Convention that established ICSID. And in particular to the pertinent parts of Art. 25, which is the principal jurisdictional provision. There are of course other

1 I am obliged to Dr. Freya Baetens, LLM, Assistant Professor of Public International Law in the University of Leiden for research assistance in the preparation of this paper.
2 I have not amended this paper to take account of developments subsequent to the Conference.

2 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, which the parties to the dispute consent in writing to submit to conciliation or arbitration. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) ‘National of another Contracting State’ means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does
investment dispute-settlement systems; but the International Centre for the Settlement of Investment Disputes is the busiest of such systems, and is in many respects the model. Having said that, I would add that that many of the problems seem to be due to the fact that the Washington Convention is, with the considerable benefit of hindsight, rather too unsophisticated to provide clear answers to the many issues that arise in relation to the identity of the investor. Now, let me be clear. The Convention is a considerable achievement, and I doubt whether any of us could have done better if we were the negotiators in, and leading up to, 1965. Nevertheless, with 20:20 hindsight there seem to be two weaknesses. The first is that the Convention is premised on a rather simplistic model of who is a foreign investor. The basic idea is that a single foreign person, corporate or individual, puts money or money’s worth into an enterprise in a foreign country. One person, with one nationality. This is a bit of a caricature, I concede. But still, as we shall see, most of the complexities of layers and fragmentation of ownership and control were simply not addressed, and subsequently they have created some difficult conundrums. The second defect is that the model of how consent to arbitration is given mostly does not correspond with current reality. What the negotiators mostly had in mind was consent to arbitration being negotiated and given face to face, as with traditional arbitration. This is what happens in, say, a concession agreement. But what generally happens today is that the host State’s consent to arbitration is given in advance by legislation, or even more commonly, a treaty, and the consent is perfected by the investor’s instituting proceedings, maybe much later.³ The host State will not have any idea of the precise identity or characteristic of the investor: as has been aptly said, there is consent without privity.

Of course, it is always possible, in concluding an investment treaty, for parties to stipulate e.g. that they will not arbitrate with companies that are not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

³ This is not to say that the draftsmen of the Convention did not envisage such possibilities: it is just that they did not foresee that they, and particularly the treaty route, would be the main route to ICSID arbitration.