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Recommended Citation

Stephen T. Lynch, *The International Centre for the Settlement of Investment Disputes: Selected Case Studies*, 7 Md. J. Int'l L. 306 (1982).
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol7/iss2/7>

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THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES: SELECTED CASE STUDIES

The International Centre for Settlement of Investment Disputes (Centre)¹ is a permanent international forum for resolution of disputes between foreign private investors and host governments, and is designed to encourage investments by providing flexible methods of arbitration and conciliation. The Centre also encourages investment by establishing rules which enforce prior agreements to arbitrate between parties submitting to the Centre's jurisdiction.

This note consists of three parts, each of which deals with a significant aspect of the Centre. Part I discusses the organization and jurisdiction of the Centre, as set forth in the Convention which established it. Part II examines the practical impact of the Centre by examining several cases in which the Centre has decided important issues of jurisdiction and nationalization of assets. Part III examines several of the current problems facing the Centre, which prevent more widespread acceptance of its resources.

I. ORGANIZATION AND JURISDICTION

The Centre was created by the 1966 United Nations Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Convention).² The Centre was established under the auspices of the International Bank for Reconstruction and Development (World Bank).³ Although it functions independently, the Centre continues to rely on the World Bank for several important services, such as providing staff members and consultants, administrative services and facilities, and financial support where deficits exist in its operating budget.⁴

The purpose of the Centre is to provide a forum for the settlement of investment disputes between member states and foreign private investors.⁵ The forum is established in recognition of “. . . the need for international

1. Often commentators refer to the Centre by its acronym “ICSID.”

2. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August 25, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter cited as *Convention*].

3. Schmidt, *Arbitration Under the Auspices of the International Centre for the Settlement of Investment Disputes (ICSID)—Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L.J. 92 (1976).

4. ICSID, SIXTEENTH ANNUAL REPORT 38-39 (1981-1982).

5. *Convention*, *supra* note 2, Article 1(2).

cooperation for economic development and the role of private international investment therein.”⁶

Chapter I of the Convention delineates the Centre’s organization. The Centre is divided into four separate bodies: the Administrative Council (Council), the Secretariat, the Panel of Conciliators, and the Panel of Arbitrators. The Council and Secretariat perform administrative and custodial duties, while members of the Panels normally resolve disputes. The Panel of Conciliators and the Panel of Arbitrators are the bodies of the Centre: Although parties to a dispute are entitled to appoint their own negotiators, the parties normally choose members from one of the panels. Articles 12 through 15 of the Convention provide for the selection of members of each panel. Each contracting state may designate up to four members of each panel. The Council chairman may also designate up to ten individuals to each panel. Panel members are required to be of high moral standards and leaders in legal, economic or business fields.⁷ They are expected to serve as conciliators or arbitrators if named and if available. The term of office for panel members is six years and is renewable.

Chapter I of the Convention also defines several important legal characteristics of the organization. The Centre is a full international legal personality which receives from the Contracting States immunity from legal process as well as exemption from all taxation and custom duties.⁸ In effect, the Centre is legally insulated from tampering by host states.

Chapter II of the Convention establishes the Centre’s jurisdiction. While other sections of the Convention are relatively flexible, those relating to the Centre’s jurisdiction are quite rigid. Generally, jurisdiction may extend to any legal dispute arising out of an investment between a host contracting state (host state) and a national of another contracting state.⁹ The primary grounds for jurisdiction is consent of the parties. The normal manner of consent is by means of an arbitration clause in a contract entered into by the parties. Membership in the Centre at the time the parties agree to submit to conciliation or arbitration is a prerequisite.¹⁰ If one is not a member, the conflict may be submitted to the Centre contingent on the

6. *Convention, supra* note 2, Preamble.

7. *Convention, supra* note 2, Article 14. Panel members include some of the most prestigious figures in the field of international law. For example, the United Kingdom has Elihu Lauterpacht as one panel member. The United States lists Myres Smith McDougal as a panelist. For a complete list of panelists, see ICSID, SIXTEENTH ANNUAL REPORT, *Annex 3* (1981-1982).

8. *Convention, supra* note 2, Articles 18, 20, 21, 23, 24.

9. *Convention, supra* note 2, Article 25.

10. *Id.*

grant of membership.¹¹

A constituent subdivision or agency of the host state may be a named party to the arbitration or conciliation proceeding.¹² However, two special requirements must be met: 1) the subdivision or agency must be designated to the Centre by the host state; and 2) the host state must approve the decision to engage in conciliation or arbitration.¹³ The host subdivision or agency must be approved by the host state unless it waives the approval requirement.¹⁴

A private party to the dispute must be a national of another contracting state. The party may be either a natural or juridical person.¹⁵ A natural person must further be a national of a contracting state other than the host state on the date the conciliation or arbitration is registered at the Centre. Under certain circumstances, a juridical person with the nationality of the host state may still qualify as a private party if the two parties stipulate that the juridical person should be treated as a "national of another contracting state for the purposes of the Convention" because of foreign control.¹⁶ The Convention does not define "foreign control," but it would be difficult to later challenge a stipulation agreed to by the host state of the lack of a standard.¹⁷ A further difficulty is the great deference which the Convention places on agreements between the disputing parties.

Two other essential requirements for jurisdiction are that the dispute be a "legal dispute" arising from an "investment."¹⁸ The Convention does not define either term. This lack of definition results from both a concern for flexibility as well as the inability of contracting states to agree on definitions.¹⁹

The Executive Directors of the World Bank have stated that in general a legal dispute involves a conflict of legal rights, and does not involve mere conflicts of interest.²⁰ According to Georges R. Delaume, Senior Legal Ad-

11. See Amerasinghe, *Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 5 J. MAR. L. & COM. 211, 213 (1974).

12. *Convention*, *supra* note 2, Article 25.

13. *Id.*

14. *Id.*

15. *Id.* See Szasz, *A Practical Guide to the Convention on Settlement of Investment Disputes*, 1 CORNELL INT'L L.J. 1, 17-20 (1968).

16. *Convention*, *supra* note 2, Article 25.

17. Szasz, *supra* note 15, at 20.

18. *Convention*, *supra* note 2, Article 25.

19. Szasz, *supra* note 15, at 13.

20. ICSID document no. 2, *Report of the Executive Director*, 9; Amerasinghe, *Dispute Settlement Machinery in Relations Between States and Multinational Enterprises—With Particular Reference to the International Centre for Settlement of Investment Disputes*, 11 INT'L LAW. 45 (1977).

visor of the World Bank, examples of disputes within the scope of the Convention include violation of "stabilization" clauses, interpretation of the agreement, and interpretation of relevant legislation.²¹

The term "legal dispute" does not necessarily exclude factual questions. If the fact has legal significance, it can be within the Centre's jurisdiction. For example, ". . . the question of how much oil was extracted from a well, if payment between a host government and a foreign investor depended on that determination, can clearly be submitted to the Centre."²² Limitation of jurisdiction to legal disputes reflects the intent of the Executive Directors that the Centre only resolve disputes relating strictly to the framework of the parties' contractual relation.²³

The Convention also fails to define the term "investment." The comment to the Centre's Model Clause IV states that "[t]his omission is intentional. The variety of transactions between private investors and foreign public entities is such that no definition can cover them all."²⁴ The Centre, however, has clearly defined investments to include activities such as loans and joint ventures. Contracts for the sale and creation of industrial plants, and turn-key contracts are also probably included within the Centre's jurisdiction.²⁵ Clearly excluded are ordinary commercial transactions, such as the sale of goods. Cases in the middle ground, such as ones pertaining to the transfer of technology, have invited criticism by various commentators concerned with the lack of definition.²⁶

The very imprecision of the definition, however, may be useful in two ways. First, it allows the contracting parties to characterize the nature of the relationship. Thus, in a marginal case, the parties are encouraged to include a definition of what they consider to be an investment.²⁷ Secondly, as general notions of investment change, the Centre may accept expanded notions of investment.²⁸

The final jurisdictional requirement is the consent of both parties to submission of the particular dispute to the Centre. The report of the Executive Director characterizes this factor as "the cornerstone of the jurisdiction

21. GEORGES R. DELAUME, EXPERIENCE WITH ICSID, IN INTERNATIONAL ARBITRATION BETWEEN PRIVATE PARTIES AND GOVERNMENTS 223, 239 (Aksen & von Mehren eds. 1982).

22. Szasz, *supra* note 15, at 16.

23. DELAUME, *supra* note 21, at 229.

24. ICSID document no. 5, *Model Clauses*, 7-8 (1981) [hereinafter cited as *Model Clauses*].

25. See DELAUME, *supra* note 21, at 230, 231.

26. *Id.*

27. See *Model Clauses*, *supra* note 24, at 7-8.

28. See *infra* text accompanying notes 123-25.

of the Centre."²⁹ The consent requirement cannot be waived and must be submitted in writing to the Centre. If the consent is by a subdivision of a contracting state, then it must be approved by the state and documented.³⁰ The request is filed with the Secretary-General.³¹ Article 26 of the Convention provides that consent to arbitration is deemed to exclude any other remedy unless otherwise stated. Additionally, once a contracting state has given its consent to arbitration under the agreement, it is prohibited from providing diplomatic protection or bringing an international claim on behalf of the private party.³²

The Convention implicitly encourages parties to settle their disputes without resort to the Centre. Once the parties consent to jurisdiction, it is irrevocable. As will be made clear, if one party withdraws after consenting to arbitral jurisdiction, that party is still subject to the tribunal's jurisdiction.³³

There are two other important limitations on the Centre's jurisdiction. The first is a provision contained in Article 25 which allows a contracting state to exclude any class or classes of disputes from the Centre's jurisdiction. Very few states have utilized this provision; those which do use it, do so sparingly. For example, Jamaica only excludes investment disputes regarding natural resources. Saudi Arabia excludes disputes relating to oil and sovereign acts.³⁴ The second limitation, contained in Article 26, allows the contracting state to require exhaustion of local administrative or judicial remedies as a precondition for arbitration by the Centre.

The two basic dispute resolution mechanisms of the Centre are conciliation and arbitration. They are addressed by the Convention in Chapters III and IV, respectively. The basic difference between the two is that conciliation can be terminated at any time by the unilateral act of one party to the dispute, while arbitration can only be terminated bilaterally.

Conciliation is the simpler of the two proceedings. Pursuant to the Institution Rules (IR),³⁵ a request for conciliation must be filed by one or both parties to the dispute. The request must contain information regarding issues in dispute, the identity of the parties, their nationality, and their consent.³⁶ The Secretary-General has the power to reject the request if it is

29. *Report of the Executive Director*, *supra* note 20, at 18.

30. *Convention*, *supra* note 2, Article 25(3).

31. *Id.*

32. *Convention*, *supra* note 2, Article 27.

33. *Convention*, *supra* note 2, Article 25(1). *See infra* text accompanying notes 73-78.

34. DELAUME, *supra* note 21, at 233.

35. ICSID document no. 4, rev. 1, *Regulations and Rules*, 28 [hereinafter cited as *Regulations and Rules*].

36. *Id.* at 29.

outside the Centre's jurisdiction.³⁷ The Secretary-General is granted this power primarily to guard against requests where the alleged offender has clearly not consented to jurisdiction.³⁸ If an alleged offender is within the Centre's jurisdiction, the Secretary-General registers the dispute with the Centre.

The Conciliation Commission (Commission) is constituted as soon as possible after registration. The Commission acts as the conciliatory agency between the parties. It is comprised of an odd number of members and is normally chosen by the parties from the Panel of Conciliation; however, the parties may select members from outside the Panel.³⁹ The parties have 90 days from the registration date in which to reach agreement on the number and identity of the Commission.⁴⁰ If they fail to reach agreement a panel of three is chosen in the following manner: each party chooses one member, while the parties together or the Secretary-General select the third member, who cannot be a national of any state involved directly or indirectly in the dispute.⁴¹

The Rules of Procedure for Conciliation Proceedings, adopted by the Administrative Council, govern the conciliation process.⁴² They apply, however, only to "the extent the parties do not otherwise agree."⁴³ In other words, the parties can agree to any conciliation procedure, and in the absence of an agreement, the Conciliation Rules prevail.

The Commission acts like a typical administrative review board. It conducts hearings, and accepts written and oral evidence, including lay and expert testimony.⁴⁴ The Commission's effectiveness is determined strictly by the cooperation of the parties. Failure of one to appear results in the termination of proceedings.⁴⁵ If agreement between the parties is reached, the Commission draws up a report on the proceedings and registers the result. If at any time the Commission feels that there is no likelihood of agreement, it can close the hearing.⁴⁶ As of October, 1982, the Centre had received no requests for conciliation.

Arbitration is a more complex and powerful proceeding. The initial procedures are virtually the same as for conciliation. After a request is filed

37. *Convention, supra* note 2, Article 28.

38. *Regulations and Rules, supra* note 35, at 30.

39. *Convention, supra* note 2, Article 31.

40. *Id.* Article 30.

41. *Id.* Article 29.

42. *Regulations and Rules, supra* note 35, at 37-70.

43. *Id.* Introductory Note D at 41.

44. *Id.* at 60-64.

45. *Convention, supra* note 2, Article 34.

46. *Id.*

and registered, an Arbitration Tribunal (Tribunal) is selected. The selection procedure is basically the same as that of the Conciliation Commission.

The Tribunal has plenary power over disputes submitted to it and operates independently from domestic courts, including courts at the site of arbitration.⁴⁷ The Tribunal is the judge of its own competence and decides objections to its own jurisdiction.⁴⁸

The decision of the Tribunal is binding on the parties and enforceable in courts of all contracting states.⁴⁹ There is no appeal from its decision save to the Secretary-General on limited procedural and ethical grounds.⁵⁰ Failure to comply with the Tribunal's award can have at least one serious adverse result. According to Article 27(1), such failure restores the right of the claimant's contracting state to provide diplomatic protection and bring an international claim against the recalcitrant host state.

Choice of law may be agreed to by the parties either in their contract or at the time of arbitration. Barring agreement, the Tribunal applies the law of the host state and applicable rules of international law.⁵¹

As with the conciliation proceedings, the Centre has a detailed set of Arbitration Rules which govern only if the parties fail to agree on their own rules.⁵² Similarly, the Tribunal conducts hearings, accepts arguments, evidence, and presentations from both sides.⁵³ However, a party cannot unilaterally waive the jurisdiction of the tribunal or force its disbanding by failure to cooperate.⁵⁴

A majority decision must be rendered within 60 days after the proceedings close. The Tribunal, in rendering the decision, must treat every question submitted and state in writing reasons for its decision.⁵⁵ The resulting award may include damages and is binding upon the parties, unless annulled on procedural or ethical grounds.⁵⁶

The remainder of the Convention addresses the administrative aspects of the Centre's operations. For example, Chapter VI deals with the cost of

47. *Id.* Articles 53, 54.

48. *Id.* Articles 41, 50, 52.

49. *Id.* Article 54.

50. For example, a party can request annulment of an award on the grounds that the Tribunal was not properly constituted or that there was corruption on the part of a member of the Tribunal. Upon receipt of the request, Article 52 requires the Secretary-General to appoint an *ad hoc* Committee of three members from the Panel of Arbitrators. It reviews the complaint and has the power of annulment. *Id.* Article 52.

51. *Id.* Article 42.

52. *Regulations and Rules, supra* note 35, at 71-120.

53. *Id.* at 97-103.

54. *Convention, supra* note 2, Article 45.

55. *Id.* Article 48.

56. *See supra* note 50 and accompanying text.

proceedings. The Commission or Tribunal can determine its own fees within limits set by the Administrative Council.⁵⁷ The Council requires a registration fee of \$100, and as of January 1, 1981 set a maximum fee of approximately \$500 per work day. These costs are born by the parties, as are the administrative costs.⁵⁸ Chapter VII addresses the place of proceedings and grants the parties freedom to choose the place of negotiations, subject to the approval of the Commission or Tribunal.

II. IMPACT OF THE CENTRE

The Centre has had a direct impact on relatively few cases. Since the registration of the first arbitration request in December 1971,⁵⁹ a total of thirteen disputes have been registered at the Centre, and only three resulted in arbitral awards. As of December 1982, four were still pending and the remainder were discontinued or settled by the parties.⁶⁰

As Delaume points out, there are several possible reasons for the small number of cases.⁶¹ One is that disputes "rarely occur in the initial years of association between the host states and investors."⁶² As time passes, the likelihood of disputes increases and with it the likelihood of a need for arbitration. However, while this point explains the lack of cases between 1966 and 1971, it does not entirely account for the small number after 1971. A more convincing reason is that consent to the Centre's arbitration cannot be unilaterally withdrawn. Once arbitration proceedings are initiated, neither party alone can void them or ignore the tribunal's decision. As a result, the parties may be willing to compromise rather than register with the Centre. This also suggests another difficulty in accurately assessing the Centre's impact.

Despite the fact that it has resolved relatively few cases, the Centre has gained a great deal of international acceptance. As of June 1982, there were 88 signatories to the Convention. And of those, 81 had ratified the Convention.⁶³ The New York Convention of 1958 is the second most popular arbitral agreement with ratification by only 59 states.⁶⁴

57. *Convention, supra* note 2, Article 60.

58. DELAUME, *supra* note 21, at 237-38.

59. ICSID, ARB 72/1 *Holiday Inns/Occidental Petroleum v. Government of Morocco*. See *infra* note 65.

60. DELAUME, *supra* note 21, at 223. Delaume only refers to two cases pending. In 1982 an additional two cases were registered.

61. *Id.*

62. *Id.*

63. ICSID, SIXTEENTH ANNUAL REPORT 3 (1981-1982).

64. DELAUME, *supra* note 21, at 224. See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, T.I.A.S. No. 6997, 330*

Several of the Centre's proceedings have dealt with important jurisdictional issues. Although the Centre's decisions have no *stare decisis* value, they provide a guideline which later tribunals are likely to consider. They also provide investors contemplating use of the Centre with a clear indication of its ability to resist host countries' attempts to undermine arbitration clauses and the Centre's power.

The Centre's first arbitration dispute was also one of its most important. Registered in December 1971, *Holiday Inns/Occidental Petroleum v. Government of Morocco*,⁶⁵ settled two important jurisdictional questions: 1) whether the Arbitration Tribunal's jurisdiction includes interim measures of protection by the host state; and 2) whether subsidiaries created after the agreement can be joint claimants in a suit against the host country.

The case stemmed from a dispute between the Moroccan government and two foreign firms: the Swiss corporation, Holiday Inns S.A., Glarus (Glarus); and the American corporation, Occidental Petroleum Corporation (OPC). The dispute concerned a joint venture in which Holiday Inns of America (HI) and OPC contracted with the Moroccan government to build and operate four Holiday Inns hotels, one each in Rabat, Marrakesh, Fez, and Tangiers. The basic agreement was signed on December 5, 1966 and included several important features: 1) the basic agreement could be supplemented as needed; 2) financing of the project was to take the form of a first mortgage loan from the Moroccan government at a low interest rate; 3) the foreign investors received foreign exchange and duty exemptions; and 4) the Moroccan government promised assistance in the acquisition of building sites at the lowest possible prices.⁶⁶ With the knowledge and consent of the Moroccan government, the two corporations decided to create separately owned subsidiaries. HI formed the Swiss subsidiary, Glarus, and OPC formed Occidental Hotels of Morocco (OHM) as an American subsidiary. HI and OPC then assigned their rights and duties under the basic agreement to the subsidiaries, but remained as guarantors. Significantly, the formation of subsidiaries and assignments was accomplished after the execution of the basic agreement. On the date of execution, Glarus was only in the process of creation, and OHM was also not officially in existence. Yet they signed the basic agreement, which included an arbitration clause referring disputes to the Centre.

A number of factors contributed to the deterioration of relations between the Moroccan government and the investors. The most important fac-

U.N.T.S. 38.

65. ICSID ARB 72/1. See, Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. Y. B. INT'L L. 123 (1980).

66. Lalive, *supra* note 65, at 126-27.

tor was the political changes which took place in Morocco in the spring of 1971.⁶⁷ Ministers promoting the agreement were replaced by less cooperative ones. They placed increasingly difficult demands on the investors. For example, the new ministers demanded free of cost 49 percent interest in each of the hotels before they would cooperate in the acquisition of building sites for the two hotels not yet constructed. They demanded that Moroccan subsidiaries be established to manage the hotels. The government also began to delay the payment of construction draws and the processing of various building authorizations. In May 1971, payments were totally stopped. The investors decided that this was a breach of the basic agreement and stopped construction on the two unfinished hotels. The Moroccan government responded that the basic agreement required that the investors continue construction with their own financing or, barring that, that the agreement should be renegotiated. Conciliation proceedings were unsuccessful, and the claimants filed a request for arbitration on December 22, 1971.

On May 12, 1972, before the Tribunal had decided the dispute, the private parties submitted a request for provisional measures. The request was in response to the Moroccan government's seizure of the construction sites of the two unfinished hotels beginning in February 1972. The government had not submitted a request for approval of such action with the Tribunal, but had instead used its own courts. It also used local courts to gain control of the two finished hotels by having a "judicial administrator" appointed for each.⁶⁸

The investors complained to the Tribunal claiming violations of general international law and Article 26 of the Convention which states, "consent of the parties to arbitration . . . [is] to the exclusion of any other remedy." The Moroccan government countered with the argument that the local courts had sole jurisdiction regarding provisional matters.

As one commentator has pointed out, the danger from the government's position was that it denied the inherent power of international tribunals to provide interim measures of protection.⁶⁹ Additionally, it undermined the legitimacy of the Centre because it was directly antithetical not only to Article 26, but to Article 47 as well. Article 47 gives the Tribunal the power to recommend any provisional measures which should be taken to protect "the respective rights of either party."

The Tribunal was aware of the danger of the government's position and did not endorse it; however, it also did not try explicitly to reverse it. The Tribunal recommended consultation between the parties to ensure that

67. *Id.* at 129.

68. *Id.* at 133-34.

69. *Id.* at 135.

the hotels retained the character of Holiday Inns. More importantly, the Tribunal confirmed its own jurisdiction and recommended provisional measures according to the terms of Article 47 of the Convention.⁷⁰ However, it did not enjoin the government from further construction or operation of the hotels.

The Moroccan government issued a second challenge to the Tribunal's jurisdiction. Morocco claimed that although it had agreed in writing to arbitration with Glarus, two factors negated that agreement:⁷¹ 1) Switzerland was not a party to the Convention on the date the basic agreement was signed on December 5, 1966; and 2) Glarus did not legally exist on the signing date, and was incorporated only on February 1, 1972.

The Tribunal rejected the government's position on several grounds. The first ground was that the critical date for ratification of the Convention by an investor's home state was the date of filing the request for arbitration. As long as the home state had ratified the Convention prior to the investor's request for arbitration, the Tribunal had jurisdiction. Jurisdiction was assured here because Switzerland had become a Contracting State in 1967, and the request for arbitration was filed in 1971.

The second ground went more to good faith. The Moroccan government had signed an agreement with Glarus fully aware that the company was a subsidiary of the main parties to the basic agreement and that on the date of signing the subsidiary was not yet a legal entity. The Tribunal concluded that, ". . . the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfillment of certain conditions, such as . . . the incorporation of the company envisaged by the agreement."⁷² Thus, the Tribunal upheld its jurisdiction.

The *Holiday Inns* arbitration was eventually discontinued when the parties reached an amicable settlement in the summer of 1978. However, it still offers an excellent example of the type of conflict which gives rise to the need for international arbitration. It also served to ensure investors that an arbitration tribunal would not succumb to technical attempts on the part of host states to defeat the Centre's jurisdiction.

The third case registered for arbitration with the Centre, *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*,⁷³ also involved a serious challenge to an arbitration tribunal's jurisdiction. In 1968, Alcoa Minerals of Jamaica, Inc. (Alcoa), an American corporation, concluded an agree-

70. *Id.* at 136.

71. *Id.* at 138-39.

72. *Id.* at 146.

73. Unpublished Decision on Jurisdiction and Competence of Arbitral Tribunal, ICSID ARB 74/2 (1975); see Schmidt, *supra* note 3.

ment with Jamaica for the mining and processing of bauxite. The agreement contained concessions from the Jamaican government, including a provision freezing taxes and royalties at the rate in effect on the date of the agreement. An arbitration clause provided for arbitration through the Centre if the parties failed to settle a dispute arising under the agreement.

In 1974, after Alcoa had begun operation of an aluminum plant and bauxite mine under the terms of the agreement, Jamaica informed Alcoa and other foreign investors that the tax on bauxite extraction would be increased. Negotiations between the foreign investors and the Jamaican government failed to resolve the dispute, and Jamaica raised the tax ninefold. Alcoa instituted arbitration proceedings at the Centre based on the claim that the tax increase was a violation of the tax freeze provision in the original agreement.

The Jamaican government was aware of the threat of arbitration under the Convention. In an effort to prevent such arbitration, one month prior to enacting the increase, the Jamaican government informed the Centre that it was making a reservation to the Centre's arbitral jurisdiction: investment disputes which involved natural resources would not be submitted to the Centre for arbitration.⁷⁴ Jamaica thereupon ignored Alcoa's request for arbitration.

Despite Jamaica's lack of cooperation, a tribunal was formed in accordance with Article 45(2) which allows *ex parte* decisions once it is established *prima facie* that the absent party consented to jurisdiction. The Tribunal faced two major jurisdictional issues: 1) whether the parties had in fact consented to arbitration; and if so, 2) whether Jamaica's subsequent reservation eliminated the Tribunal's jurisdiction.⁷⁵

The Tribunal decided the first issue in the affirmative. It based its decision on the clear meaning of Article 25 which specifies that consent must be in writing. There was clearly an ICSID arbitration agreement in the 1968 agreement. However, consent must exist when the dispute is submitted to the Centre.⁷⁶ This raised the second issue of the retroactive impact of Jamaica's reservation.

The Tribunal ruled that Jamaica's reservation did not have retroactive effect. It based its decision on Article 25. The Tribunal acknowledged that Article 24(4) allows contracting states to withdraw any class of issues from the Centre's arbitration. Upon notifying the Secretary-General, the Centre relays the withdrawal to all contracting states. The Tribunal held that this clause was superceded by Article 25(1) which states that, "When parties

74. Schmidt, *supra* note 3, at 102.

75. *Id.* at 100.

76. *Report of the Executive Director, supra* note 20, at 8.

have given their consent, no party may withdraw its consent unilaterally."⁷⁷ Any other decision would have deprived the Convention of any "practical value."⁷⁸

The Tribunal also rendered a decision regarding its subject matter jurisdiction.⁷⁹ In determining that the relationship between Jamaica and Alcoa constituted an investment, the Tribunal identified two key criteria for establishing subject matter jurisdiction. First, the Tribunal looked to the nature of the economic relationship between the two parties, and determined that Alcoa's mining operation constituted an investment in the ordinary meaning of the term.⁸⁰ The Tribunal then looked to the consent of the parties. It assumed that if the two parties agreed to the Centre's arbitration, then they understood their relationship to involve an investment. The importance of the Tribunal's reasoning is its "apparent rejection of the notion that mutual consent to arbitrate can singly satisfy the separate jurisdictional requirement of an investment. It would now seem to be firmly established that an analysis of the parties actual capital relationship is necessary in each ICSID case."⁸¹

The *Alcoa* decision can only serve to reinforce international investors' confidence in the Centre's ability to handle host states' refusal to arbitrate. As Schmidt suggests, ". . . its now a certainty that ICSID jurisdictional structure is such that host states cannot easily frustrate the advantages offered the investor by the ICSID Convention."⁸² This confidence in the Centre is evident also in the commentary of other writers, particularly Delaume.⁸³

There are several reasons for their confidence. There has been a growing acceptance of the Centre among third world countries and investors. For example, the Arab world has begun to recognize the utility of the Centre. Since 1979, Kuwait, Saudi Arabia, and the United Arab Emirates have become member States.⁸⁴ Additionally, it is estimated that the amount of international investment covered by ICSID clauses is in excess of 2 billion dollars.⁸⁵ Another reason for the confidence is the advantages which the Centre provides to private investors.⁸⁶ Under the Convention the role of lo-

77. *Convention, supra* note 2, Article 25(1).

78. Schmidt, *supra* note 3, at 103.

79. *Id.* at 98-100.

80. *Id.* at 99.

81. *Id.* at 100.

82. *Id.* at 103.

83. DELAUME, *supra* note 21, at 223.

84. *Id.* at 224.

85. ICSID, SIXTEENTH ANNUAL REPORT 5-6 (1981-1982).

86. Schmidt, *supra* note 3, at 93 n.11.

cal courts in award enforcement is greatly reduced.⁸⁷ Aside from laws of sovereign immunity, municipal courts must treat the award as if it were the final judgment of a court in that State. Additionally, arbitration through the Centre allows an investor to address a variety of investment disputes in a single litigation.⁸⁸

Confidence is further reinforced by the mechanisms which the Convention provides to ensure that contracting parties uphold the award. Under Article 54(2), a party to a tribunal's award may enforce the award in any competent court designated by each contracting state. A list of the competent courts or authorities is maintained by the Centre. At present, over 50 states have made the designation. The party enforcing the award need only present a certified copy of the award to the designated court before going after the local assets of the award debtor.⁸⁹

Article 54 provides no exceptions to the binding nature of a tribunal's award. Even the public policy of a contracting state is not a valid objection to enforcement.⁹⁰ Article 55 states, however, that this recognition does not supercede the "law in force in any Contracting State relating to immunity of that State or of any foreign state from execution."

The only municipal case to date which dealt with this issue is a French decision regarding ICSID decision number 8, *Ltd. Benvenuti & Bonfant srl. v. Government of the People's Republic of the Congo*.⁹¹ The ICSID decision arose out of a 1973 agreement between the Italian company, Benvenuti & Bonfant, and the Government of the People's Republic of the Congo creating a semi-public company, Plasco, for the manufacturing of plastic bottles. The government received a 60 percent interest in the company, Benvenuti & Bonfant a 40 percent interest. Additionally, the agreement guaranteed Benvenuti & Bonfant certain markets in the Congo. The agreement also included an ICSID arbitration clause. The bottle production plant began operation in February 1975. Beginning in October 1975, the Government nationalized Plasco in clear violation of the 1973 agreement. Most of the Italian staff of Plasco was forced to leave the Congo in February 1976. After several unsuccessful attempts at arbitration, Benvenuti & Bonfant filed a request for arbitration with the Centre on December 15, 1977. The Tribunal rendered an award in the claimants' favor on August 8, 1980.⁹²

87. *Id.* at 105.

88. *Id.* at 106.

89. DELAUME, *supra* note 21, at 250-52.

90. *Id.* at 251.

91. 21 INT'L LEGAL MATERIALS 740 (1982).

92. *Id.*

The claimant then filed for recognition of the award in the *Tribunal de grande instance* of Paris.⁹³ The court recognized the award, but subjected it to the following reservation: “. . . no measure of execution, or even a conservatory measure, can be taken to said award, on any assets located in France without prior authorizations.”⁹⁴

On appeal, the Court of Appeals of Paris overturned the decision, holding that the lower court had placed an unauthorized restriction on the execution of the ICSID award. The Court of Appeals based its decision on Article 54(2) which only authorizes the recognizing forum to ascertain the authenticity of the award. No restrictions on enforcement at that time are authorized. According to Delaume, the Court of Appeals was correct in separating issues of recognition and enforcement from subsequent measures of execution.⁹⁵

A fourth arbitration case which produced an interesting result was ICSID decision number 7, *AGIP Company v. Government of the People's Republic of the Congo*.⁹⁶ This case also involved an act of nationalization by the government of the Congo in violation of an agreement with AGIP, an Italian company. The investment agreement included an ICSID arbitration clause and a stabilization clause freezing Congolese law. The agreement also stated that “Congolese law, supplemented if necessary by any principle of international law, shall be applicable.”⁹⁷ After AGIP was nationalized, AGIP personnel instituted ICSID arbitration in October 1977. The Tribunal rendered an award in favor of AGIP in excess of 2.5 million dollars.⁹⁸

The case posed “one of the most delicate problems in the matter of protection of investments.”⁹⁹ The problem was that the nationalization action had been in accordance with revised Congolese laws. AGIP officials argued that the revised laws, which provided unreasonably low compensation for the nationalized assets, violated principles of international law which should apply to the agreement.

The Tribunal did not directly answer AGIP's contention. Rather it based the award on the grounds that “the stabilization clause, owing to the particular value conferred on it by the principle of international law in

93. The case and its appeal are reported in 20 INT'L LEGAL MATERIALS 878 (1981).

94. *Id.* at 879.

95. DELAUME, *supra* note 22, at 252.

96. 21 INT'L LEGAL MATERIALS 726 (1982).

97. *Id.* at 727.

98. *Id.* at 739.

99. Bernardini, *First Experiences in Arbitration of the International Center for Settlement of Investment Disputes*, 17 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 29, 36 (1981). An English translation of Bernardini's article was provided by the Centre.

question, takes precedence over the Congolese nationalization law."¹⁰⁰ The Tribunal did not clearly identify the "international law in question." It appears to relate, however, to the fact that the stabilization clause was freely entered into by the government and did not conflict with internationally recognized principles of sovereign legislation and regulatory powers. In any case, *AGIP* is another example of an arbitration tribunal's efforts to protect investors from breaches of contract by a host state.

In conclusion, most commentators view the Centre to be a practical success. It offers effective and fair means of reaching and enforcing arbitration decisions, and thereby encourages investment and with it the general health of the world economy.

III. CURRENT PROBLEMS

The Centre currently faces several problems. The first problem involves the failure of several regional groups to accept the Centre as a viable settlement option. As of June 1982, only three Latin American countries had joined the Centre: Paraguay and Costa Rica in 1981, and El Salvador in 1982.¹⁰¹ Only one country in the Eastern Bloc, Romania, is a contracting party.¹⁰² In the Arab world, only seven countries have ratified the Convention. Most notably, Iraq, Iran, Syria, and Libya have not joined the Centre.¹⁰³ There are various explanations for the absence of each group, but commentators address only the absence of Latin American countries.¹⁰⁴

Latin American countries have a history of refusing membership in international arbitration conventions.¹⁰⁵ This reluctance to recognize international arbitration conventions stems from a deep distrust of foreign private investors. As one commentator notes, "private-state arbitrations are widely viewed in Latin America as attempts by foreign interests to bring pressure on Latin states that amounts to an affront to local sovereignty."¹⁰⁶ The philosophical basis for this bias stems from the Calvo doctrine, the basic tenet of which is that the private foreign investor is bound by local laws, even if international law is violated.¹⁰⁷

100. *Id.* at 39.

101. ICSID, SIXTEENTH ANNUAL REPORT 5-6 (1981-1982).

102. *Id.*

103. *Id.*

104. See, e.g., Rogers, *Of Missionaries, Fanatics and Lawyers*, 72 AM. J. INT'L L. 1 (1978); Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131. (1976).

105. Abbott, *supra* note 104, at 134-35.

106. *Id.* at 136-37.

107. *Id.* at 137; see generally, D. SHEA, THE CALVO CLAUSE (1955).

Attempts have been made to assuage Latin American fears and gain acceptance of the Centre; however, Latin American resistance has remained firm. In 1964, at the Tokyo meeting of the Bank-Fund Board, the Latin Bloc remained dedicated to the Calvo doctrine.¹⁰⁸ In 1974, Secretary of State Kissinger proposed at the Hemisphere meeting that the American nations take at least a preliminary step toward resolving the ideological impasse, but this suggestion was refused.¹⁰⁹ In fact, Latin American nations have attempted to internationalize the Calvo doctrine by including it in the United Nations General Assembly Resolution on Economic Rights and Duties of States.¹¹⁰

A certain ICSID rule may also account for Latin American intransigence.¹¹¹ Article 42(1) states that in the absence of an agreement on choice of law, the arbitral tribunal should apply the law of the host state and the applicable rules of international law. The implication that international law supercedes conflicting domestic law was not refuted by the *AGIP* decision.¹¹²

Given the historic strength of opposition to foreign arbitration, recent ratification of the Convention by Paraguay, Costa Rica and El Salvador is a positive sign.¹¹³ Another positive indication is Peru's resolution of the Marcona dispute without resort to the Calvo Clause.¹¹⁴ It is doubtful, however, that the Centre can do much to alter the remaining Latin American resistance.

In view of the bias against the United States, and the Centre's identification with the industrialized world, it will be many years before the ingrained hostility is removed. The greatest impetus to acceptance of the Centre is the demand of foreign investors for the inclusion of ICSID arbitration clauses in investment contracts. This is just the sort of demand which raises Latin American fears of manipulation. Latin American acceptance will probably only come when it is apparent that the Convention is not a tool of the industrialized world and can benefit the host state.

There has been little written regarding the failure of the Eastern Bloc nations to endorse the Convention. Several plausible reasons exist, the first of which is the presence of an ideological bias against the United States and

108. Rogers, *supra* note 104, at 4.

109. *Id.*

110. *Id.* at 5.

111. Abbott, *supra* note 104, at 139.

112. ICSID, SIXTEENTH ANNUAL REPORT 5-6 (1981-1982).

113. Rogers, *supra* note 104, at 7; see also Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474 (1977).

114. Huerta, *Peruvian Nationalizations and the Peruvian-American Compensation Agreements*, 10 N.Y.U.J. INT'L L. & POL. 1, 42 (1977).

the West. A corollary reason is the resistance of Eastern Bloc countries to influence from Western private investors. Perhaps a third reason is that the Eastern Bloc has had little to gain from ratification of the Convention. Eastern Bloc countries have no "private investors" who invest in other nations, so they have no private interests to protect. Their state interest is already well protected by international law; the Convention would be used primarily as a weapon against them. Additionally, the Bloc has a reputation as a good investment risk. While there has been no need in the past to ratify the Convention in order to encourage investment, the situation may change for Eastern Bloc countries with weakening economies.

Among Arab nations there is less uniformity. Egypt, Morocco, Sudan and Tunisia were among the first countries to ratify the Convention.¹¹⁵ Until 1979, the only other Arab nation to ratify the Convention was Jordan. Since 1979, three Arab nations have joined the Centre: Kuwait, Saudi Arabia, and the United Arab Emirates.¹¹⁶ As Delaume points out, the recent ratification of the Convention by three major oil producers is easily explained. "It shows that these countries, which are great importers of technology and foreign investment, are themselves, engaged in huge investments abroad with regard to which reference to ICSID may be, and should increasingly become, particularly attractive."¹¹⁷ The major oil exporting nations currently not members generally have a strong anti-Western bias, good credit ratings, and no need to join. It will be interesting, as oil revenues ebb, to see if such countries as Iraq and Iran attempt to join the Centre in order to attract private foreign investors.

A second problem which the Centre faces represents a more immediate threat to its success. It concerns a 1981 United States District Court decision, *Maritime International Nominees Establishment v. The Republic of Guinea*.¹¹⁸ The case arose from a dispute between Maritime International Nominees Establishment (MINE), a Liechtenstein corporation, and Guinea regarding a mining agreement. Despite the presence of an ICSID arbitration clause in the agreement, Guinea refused to arbitrate when a major dispute over bauxite extraction arose. For an unknown reason, rather than beginning arbitration under the Convention, in 1978 MINE came before the District Court for the District of Columbia seeking an order to compel arbitration pursuant to the United States Arbitration Act.¹¹⁹ The District

115. ICSID SIXTEENTH ANNUAL REPORT 5-6 (1981-1982).

116. *Id.*

117. DELAUME, *supra* note 21, at 224.

118. 505 F. Supp. 141 (D.D.C. 1981). The suit for enforcement before the ICSID appears at 20 INT'L LEGAL MATERIALS 669 (1981).

119. 9 U.S.C. § 1 (1976).

Court ordered arbitration before the American Arbitration Association (AAA), rather than the Centre. The AAA granted MINE an arbitration award of 25 million dollars and the 1981 decision arose from an attempt to enforce that award.

The problem with the decision is that the Court held that it ". . . had the authority in view of the alleged unwillingness of Guinea to submit to ICSID arbitration, to refer the parties to arbitration, . . . under the rules of the American Arbitration Association for which the parties had not bargained."¹²⁰ In essence, the court disregarded an acknowledged and valid ICSID arbitration clause. This was a clear violation of U.S. obligations under the Convention.

The case has been appealed, and the United States has intervened. In its amicus brief the government's interpretation is that ". . . the United States believes that cases (such as this one) which fall within ICSID's exclusive jurisdiction must be stayed to allow the party alleging ICSID's unavailability to seek a jurisdictional ruling from ICSID."¹²¹ The government recommends a "rule of abstention," even if the court has an independent basis of jurisdiction. Only after the Centre has determined that it lacks jurisdiction, should the U.S. court impose jurisdiction.

The failure of the Court of Appeals to follow the government's position would set a damaging precedent. By allowing municipal courts to exercise discretion in deciding whether to review a dispute ostensibly under the Centre's jurisdiction, the overall reliability of the Centre's arbitration system is jeopardized. Particularly in view of the fact that the District Court based its jurisdiction on Guinea's reluctance to submit to ICSID's jurisdiction. The damaging effect is magnified by the fact that the challenge to the Centre's authority is from a United States court.

A third and less threatening problem facing the Centre concerns the jurisdictional difficulties created by the Convention's failure to define the term "investment."¹²² New forms of investment such as profit sharing, service contracts, technology transfers and management contracts account for an increasing percentage of association between private investors and host states, but may not be covered by the Convention. As Delaume points out, an "economic" concept of investment has replaced the more traditional notion of investment as capital.¹²³

While the Convention appears flexible enough to incorporate these modern notions of investment, problems may still arise. For example, al-

120. DELAUME, *supra* note 21, at 14-15.

121. *Id.* at 15.

122. *See supra* text accompanying notes 24-28.

123. DELAUME, *TRANSNATIONAL CONTRACTS*, §§ 15.14, 15.15 (1982).

though many domestic investment laws refer to ICSID arbitration and modern notions of investment, the definitions are not always uniform. Choice of law could have a significant impact on the Centre's jurisdiction and lead to further disputes.¹²⁴ A greater problem arises out of the parties' failure to specify the exact nature of their relationship and of the investment. ICSID Model Clauses have been provided to encourage more precise drafting.¹²⁵ Still, most clauses known to the ICSID Secretariat do not state that the underlying relationship is an investment for the purposes of Article 25(1) of the Convention. Delaume suggests that failure to clarify the nature of the relationship can only lead to needless disputes at a later date. While not an insuperable problem, it is one which could complicate future Centre arbitration.

One possible solution to this difficulty may be what has come to be known as the Centre's "Additional Facility."¹²⁶ Established on September 27, 1978 by the Administrative Council, the Additional Facility authorizes the Secretariat to administer requests for arbitration and conciliation which fall outside the original jurisdiction of the Convention. In particular, the Additional Facility is empowered to consider requests dealing with disputes that do not arise directly out of an investment. Thus, if a new form of investment does not qualify as an investment for the purposes of the Convention, arbitration is still available through use of the Additional Facility.

It is unlikely that many parties will resort to this option, however. Article 3 of the Additional Facilities Rules specifically states that the Convention, with its legal protection of the arbitral award, does not apply to these proceedings.¹²⁷ Awards are not protected from national law and are governed by the law of the forum.

The successful resolution of the three problems discussed above will not guarantee the continued success of the Centre. Several aspects of the problems, particularly the absence of many Latin American countries from participation in the Centre, are beyond the scope of the Centre's influence. The negative impact of these problems should be kept in perspective, however. It is not unreasonable to predict that, despite its difficulties, the Centre has the potential for becoming one of the most successful international arbitration forums in history.

124. *Id.*

125. Model Clause IV states: "the parties hereto hereby agree that, for the purposes of Article 25(1) of the Convention, the dispute [any dispute in relation to or arising out of this Agreement] is a legal dispute arising directly out of an investment." *Model Clauses, supra* note 24.

126. See ICSID document no. 11, *ICSID Additional Facility* (1979).

127. *Id.* at 4.

CONCLUSION

The Convention fills the need of private investors and developing countries for a fair, reliable, and widely-accepted dispute settlement forum. Although other arbitral agencies exist, none offer the legal and practical advantages of the Convention.¹²⁸ Perhaps the most attractive and useful aspect of the Convention is its power to enforce an arbitral decision once parties consent to jurisdiction. The Convention currently faces several problems, including the lack of acceptance by Latin America and the ambiguity of its references to investments. It remains true, nevertheless, that ". . . the most likely effect of the Convention will be to better secure the good faith performance of investment agreements."¹²⁹

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128. See, e.g., Schmidt, *supra* note 3, at 108; Comment, *United States Enforcement of Arbitral Awards Against Sovereign States: Implications of the ICSID Convention*, 17 HARV. J. INT'L L. 404 (1976).

129. Schmidt, *supra* note 3, at 108.