

# INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES : ITS ESTABLISHMENT AND JURISDICTIONAL CAPACITY

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## PREFACE

This study aims to investigate the establishment and the jurisdictional capacity of the International Center for Settlement of Investment Disputes (ICSID). I will discuss the jurisdictional capacity aspect with much more emphasis on the arbitration facility of the Center, given the very scarce use of the conciliation facility. I will also include the applicable law of the disputes arising between the parties. Nevertheless, the main object of my investigation is not a discussion of the applicable law of disputes but, rather, an analysis of the establishment and the jurisdictional capacity of ICSID and the Latin American reactions to it.

## 1. HISTORICAL PERSPECTIVE

There was a considerable change in the way developing countries perceived foreign private investment after the Second World War. Private foreign investors were no longer believed to be mere exploitators of natural resources. Today, a private foreign investor is welcome in many developing countries as a source of capital, commodities, technical knowledge, management skills, services, patents, etc<sup>1</sup>. While there has been such a change in the perceptions of many developing countries, a need was felt by the private foreign investors with respect to investment disputes and their settlement means: Jurisdictional capacity in international law, so that a sovereign government and a foreign investor could settle their disputes on an equal basis<sup>2</sup>. This was, actually, a considerable advancement from the traditional view that the States were the sole entities in international

law<sup>3</sup> and it found its expression in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States<sup>4</sup> in 1966.

### 1. 1. THE ROLE OF THE WORLD BANK

The establishment of an institution for the settlement of disputes between the States and foreign investors was sponsored by the World Bank. The Board of Governors of the Bank requested the Executive Directors to study the question in September 1962. The Executive Directors approached the question through regional consultative meetings of legal experts. These meetings were held in Addis Ababa, Santiago de Chile, Geneva and Bangkok in 1963 and 1964. In light of this preparatory work, the Executive Directors reported to the Board of Governors, in Septem-

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- 1) PINTO, *Settlement of Investment Disputes: The World Bank's Convention*, 13 *Howard Law Journal* 337 (Spring 1967); CHERIAN, *INVESTMENT CONTRACTS AND ARBITRATION: THE WORLD BANK'S CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES* 8 (1975).
- 2) SUTHERLAND, *The World Bank Convention On The Settlement of Investment Disputes*, 28 *The International and Comparative Law Quarterly* 372 (1979/3); CHERIAN, *supra*, at 66.
- 3) SUTHERLAND, *supra*.
- 4) *Signed on the 18th of March, 1965 and entered into force on the 14th of October, 1966, upon ratification of the twentieth Contracting-State, according to its Art. 68 (2) (hereinafter referred to as "Convention")*.

ber 1964, that it was desirable to establish such an institutional facility, but within the framework of an intergovernmental agreement. The Board of Governors acted upon this report and assigned the Executive Directors, with the assistance of a legal committee, to prepare a final Convention to be submitted to the members of the Bank. The final text was signed on March 18, 1965<sup>5</sup>.

The principle desire of the Executive Directors in submitting the present Convention to governments was to strengthen the partnership between countries in the cause of economic development. Such an institution could promote an atmosphere of mutual confidence and encourage a larger flow of private international capital into those countries that wish to attract it<sup>6</sup>. Another concern of the Bank was to reduce the likelihood of unresolved disputes between the parties and to eliminate the risk of a confrontation between the host country and the national state of the private investor<sup>7</sup>. As a development institution, the World Bank's involvement in the establishment of an international center for the settlement of investment disputes was not unusual. Unusual was the way in which the Bank solved the problem. Just like the case of the International Finance Corporation (IFC) and the International Development Association (IDA), the approach of the Bank was very unorthodox for traditional international lawyers. Instead of calling diplomatic conferences to consider the creation of the new institution and its constitutive instrument, the Executive Directors of the Bank formulated the necessary charters and presented them to member governments<sup>8</sup>.

There are two significant points in the role of the Bank: i- The Articles of Agreement of the Bank do not provide any express provisions empowering the Executive Directors to engage in this type of activity<sup>9</sup>. ii- The voting power of the World Bank members is related to their financial contribution. This is called weighted-voting formula. This formula is also reflected in the voting process of the Executive Directors. However, since poor countries were represented among the Executive Directors as well as

rich countries in the case at hand, the Executive Directors introduced a practice of seeking consensus to balance these different interests<sup>10</sup>.

The use of consultation throughout the preparation process of the Convention is another important aspect of the World Bank's role. As mentioned before, this consultation process was carried either through regular meetings of a Legal Committee or through regional consultative meetings<sup>11</sup>.

## 1. 2. THE ATTITUDES OF THE LATIN AMERICAN AND DEVELOPING COUNTRIES TOWARDS THE CONVENTION: CALVO DOCTRINE

The reaction of the developing countries to the World Bank initiative was mostly favorable except the Latin American objections at the Santiago consultative meeting. These objections were later expressed by saying "El No de Tokyo" at the annual meeting of the Bank's Board of Governors at Tokyo in September 1984, when a resolution was proposed to instruct the Executive Directors to proceed with the formulation of the Convention<sup>12</sup>.

The Latin American rejections to the Convention are based partly on socioeconomic

5) *Report of the Executive Directors accompanying the Convention, Docs. IC-SID/2 Parags. 6-8 (hereinafter referred to as "Report")*.

6) *Report, parag. 9.*

7) BROCHES, *The Convention On The Settlement of Investment Disputes Between States and Nationals of Other States*, 136 *Recueil des Cours* 342-343 (1972/II).

8) BROCHES, *Development of International Law by the International Bank for Reconstruction and Development*, (59th Annual Meeting) *Proceedings of the American Society of International Law* 34 (1965).

9) BROCHES *Id.*

10) BROCHES, *Id.*; SUTHERLAND, *supra* note 2, at 375.

11) SUTHERLAND, *supra*, at 375-376.

12) SUTHERLAND, *Id.* at 376; SZASZ, *The Investment Disputes Convention and Latin America*, 11 *Virginia Journal of International Law* 257 (1971/2).

reasons such as the distrust of foreign private investors in some states, and partly on the long-standing legal ideology represented by the Calvo Doctrine.

The implications of this doctrine are twofold: First, it rejects any claim that, under international law, aliens are entitled to be treated differently from a host state's own nationals. Disputes with foreign investors should be settled in accordance with the law of the host State and by using local remedies. Second, it denies any right of diplomatic protection on the part of an alien's own government and views such a protection as contrary to the sovereignty of the host State<sup>13</sup>.

One of the two basic negative arguments advanced against the Convention by the Latin American states is derived from the first aspect of the Calvo Doctrine. Accordingly, Article 26 of the Convention violates the national treatment rule by making a remedy, beyond local remedies, available only to foreign investors<sup>14</sup>.

Such an argument deserves some discussion. Firstly, it does not take into consideration the second sentence of Article 26, which provides that, "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention". This is, literally, an exception to the rule that the ICSID arbitration is exclusive of any other remedy. Hence, Article 26 does not necessarily violate the national treatment rule<sup>15</sup>. Moreover, the present argument of the Latin American countries fails to recognize that a citizen is entitled to protect himself against his own government not only through administrative and judicial remedies, but primarily through participation in the political processes, whereas foreigners are precluded from doing so. It is, therefore, much preferable that the ultimate resort of a private foreign investor be an agreed, impartial international tribunal<sup>16</sup>. In this connection, Article 26 cannot be regarded as a distortion of the equality between the national and the alien.

The second negative argument of the Latin Americans corresponds to the second aspect of the Calvo Doctrine, pointed out above. According to this latter argument, the Convention, or rather any proceedings conducted under the Convention, are merely surrogates for foreign state intervention<sup>17</sup>. However, this is not a well founded argument. For one thing the ICSID Convention reflects several compromises intending to alleviate Latin American concerns, without severely detracting from the Convention's attractiveness to investors<sup>18</sup>. Such a compromise is seen in Article 27, where the Convention provides for the possibility of an effective waiver, by an investor, of the right to diplomatic protection by its national state with respect to matters that its national state is willing to take to the Center for arbitration. Therefore, Article 27 actually provides for a barrier to diplomatic protection, in which the Latin American countries should find a strong support for their traditional "Calvo" approach<sup>19</sup>.

13) KIRGIS, *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING*, 424 (1977); SHIHATA, *ICSID and Latin America*, 1 *News from ICSID* 2 (1984-2).

14) SZASZ *supra* note 12, at 260-261. Article 26 of the Convention provides as follows: Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting-State may require the exhaustion of local administrative or Judicial remedies as a condition of its consent to arbitration under the Convention.

15) For a recent article emphasizing this exception see, G. DELAUME, *ICSID Arbitration and the Courts*, 77 *American Journal of International Law* 784 (1983/4). Also see, SHIHATA *supra* note 13.

16) SZASZ, *supra* note 12, at 262.

17) BROCHES, *The Convention On Settlement of Investment Disputes*, *American Bar Association-Section of International and Comparative Law Bulletin* 14-15 (July 1965).

18) KIRGIS, *supra* note 13, at 424-425.

19) For further discussions see, SZASZ, *supra* note 13, at 260-261.

A final reason for the Latin American opposition to the Convention is rooted in the traditional suspicion of these countries, with respect to arbitration. Mr. Broches objects to this argument by saying that he has never heard of a bill of particulars to support it<sup>20</sup>. Mr. Szasz hopes this attitude may change, considering that arbitration is a cheaper, faster and more flexible means for dispute settlement, when compared with ordinary courts<sup>21</sup>.

Recent adherences to the Convention by the two Latin American countries, namely Paraguay<sup>22</sup> and El Salvador<sup>23</sup>, correct Mr. Szasz's anticipation. Besides these two countries, Costa Rica has also signed the Convention. However, this country has not yet deposited its Instrument of Ratification<sup>24</sup>.

Latin American countries aside, the developing countries were mostly in favor of the Convention in its preparatory stage. They appreciated the need to encourage private foreign investment, and were prepared to accept a balance between the requirement to limit, and the degree to which membership of the Convention might limit, a State's freedom of action<sup>25</sup>.

## 2. ORGANIZATION OF THE CENTER

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States establishes the International Center for Settlement of Investment Disputes (ICSID) as an autonomous international institution, whose purpose is to provide facilities for conciliation and arbitration to settle investment disputes between Contracting States and nationals of other Contracting States<sup>26</sup>. The structure of the Center is characterized by simplicity and economy consistent with the efficient discharge of its functions<sup>27</sup>. The Center has an Administrative Council and a Secretariat, and maintains a Panel of Conciliators and a Panel of Arbitrators<sup>28</sup>.

### 2. 1. ADMINISTRATIVE COUNCIL

The Administrative Council is composed of one representative from each Contracting State. The President of the World Bank is

*ex officio* Chairman of the Council but he has no vote<sup>29</sup>. The Administrative Council holds an annual meeting and other meetings, as may be determined by the Council itself or convened by the Chairman, or by the Secretary-General at the request of not less than five members of the Council. The quorum for any of its meetings is the majority of the members<sup>30</sup>. The principal functions of the Council are listed in Article 6 of the Convention. These functions are the election of the Secretary-General and any Deputy Secretary-General, the adoption of the budget of the Center and the adoption of Administrative and financial regulations; rules governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings. Action on all these matters requires a majority of the Members of the Council<sup>31</sup>.

### 2. 2. SECRETARIAT

The Secretariat<sup>32</sup> consists of a Secretary-General, one or more Deputy Secretaries-General and a staff. The Secretary-General and each Deputy Secretary-General are elected by the Administrative Council by a two-thirds majority of the members upon the nomina-

20) Mr. Broches was the General Counsel of the World Bank during the preparations of the Convention. See, BROCHES, *supra* note 17, at 15.

21) SZASZ, *supra* note 12, at 263.

22) Paraguay deposited its Instrument of Ratification on January 7, 1983, and became the first Latin American State to adhere to the Convention. See 83-1 ICSID Newsletter 1 (January 1983).

23) El Salvador deposited its Instrument of Ratification on March 6, 1984. See, 1 News from ICSID 1 (1984-1).

24) The number of Contracting States now stands at 85. See, 1 News from ICSID 1 (1984-1).

25) See, SUTHERLAND, *supra* note 2 at 376-377.

26) Report parag. 15.

27) Report, parag. 18.

28) Convention, Art. 3.

29) Convention, Arts. 4 and \*5.

30) Convention, Art. 7.

31) Report, parag. 19.

tion of the Chairman. The Secretary-General is the legal representative and principal officer of the Center. He is responsible for its administration, including the appointment of staff. The Secretary-General also performs as registrar and has the power to authenticate arbitral awards. In addition, the Secretary-General has the power to refuse the registration of a request for conciliation and arbitration proceedings<sup>33</sup>.

### 2. 3. PANELS

The Center has a Panel of Conciliators and a Panel of Arbitrators<sup>34</sup>. Each Contracting-State and the Chairman appoint qualified persons to the Panels. Contracting-States may designate to each Panel four persons who may but need not be its nationals. The Chairman may designate ten persons of different nationality to each Panel. These persons shall be persons of high moral character, and they must be recognizably competent in the fields of law, commerce, industry or finance, so that they can be relied upon to exercise independent judgement.

### 3. JURISDICTION OF THE CENTER

ICSID is not *per se* engaged in conciliation or arbitration. Therefore, it does not have jurisdictional powers in the generally accepted sense of the term<sup>35</sup>. Why does the Convention speak of jurisdiction then? An answer to this question is found in the Report of the Executive Directors, which accompanies the Convention. According to this report, the term "jurisdiction of the Center" is used in the Convention as a convenient expression meaning the limits within which the provisions of the Convention will apply and the facilities of the Center will be available for conciliation and arbitration proceedings<sup>36</sup>. There is also precedent to justify the use of the term "jurisdiction". In the case of the Hague Permanent Court of Arbitration, which is no more a court than the Center, the term jurisdiction is used. Like the Center, the Hague Permanent Court of Arbitration is essentially an administrative frame-

work within which arbitral proceedings may be conducted before *ad hoc* tribunals<sup>37</sup>.

Jurisdiction of the Center should be analyzed with respect to consent, the nature of the dispute, and the nature of the parties.

### 3. 1. AN ANALYSIS OF THE JURISDICTION OF ICSID

#### 3. 1. 1. CONSENT

##### 3. 1. 1. 1. IN GENERAL

Consent of the parties is the cornerstone of the jurisdiction of the Center. Consent to jurisdiction must be in writing and, once given, cannot be withdrawn unilaterally<sup>38</sup>.

The consent of the parties must exist when the parties file their requests by the Secretary-General, but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, or in a compromise regarding a dispute that has already arisen<sup>39</sup>.

Consent must be given in writing<sup>40</sup>. "While a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25 (1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation"<sup>41</sup>. It is important, however, that consent be expressed unambiguously and without quali-

32) *Convention, Arts. 12-16.*

33) *See, infra 3.1.1.1.*

34) *Convention, Arts. 12-16.*

35) *BROCHES, supra note 7, at 351.*

36) *Report, parag. 22.*

37) *BROCHES, The Convention On The Settlement Of Investment Disputes: Some Observations On Jurisdiction, 5 Columbia Journal of Transnational Law 265-266 (1966/2).*

38) *Report, parag. 23; This clear language refutes the Latin American argument advanced against the Convention that it introduced compulsory arbitration, see, BROCHES, supra note 17, at 14.*

39) *Report, parag. 24.*

40) *Convention, Art. 25 (1).*

41) *AMCO Asia et. al. v. the Republic of Indonesia, 23 ILM 351, 368 (1984).*

fication. As an aid to achieve this end, ICSID has suggested model clauses for submission of consent<sup>42</sup>.

The Secretary-General is given the power to refuse the registration of a request for conciliation or arbitration proceedings, and thereby to prevent their institution if, on the basis of the information furnished by the applicant, he finds that the dispute is manifestly outside the jurisdiction of the Center. This is called the "screening-power" of the Secretary-General<sup>43</sup>.

The consents of the parties may be subject to conditions. There is no contrary obligation in the Convention. There are no limits to the conditions that the parties can agree to, provided that they are not in conflict with any mandatory provisions of the Convention or with the Rules and Regulations of the Center. If these conditions are not fulfilled, then the Center will not have jurisdiction<sup>44</sup>.

A few other legal characteristics of the consent are given<sup>45</sup>: The date of the consent to the jurisdiction of the Center fixes the rights and obligations of the parties to a dispute. Thus, no subsequent amendment to the Convention or to the Conciliation or Arbitration rules is applied to a proceeding initiated pursuant to an earlier consent<sup>46</sup>.

Once consent to arbitration is given, it is deemed to be at the exclusion of any other remedy. However, a Contracting-State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration<sup>47</sup>. This provision in the Convention does not intend to modify the rules of international law regarding the exhaustion of local remedies. It also explicitly recognizes the right of a state to require the prior exhaustion of local remedies<sup>48</sup>. Nonetheless, once a Contracting-State fails to require the exhaustion of local remedies, this State cannot resist arbitration under the auspices of the Center<sup>49</sup>.

### 3. 1. 1. 2. THE RULE OF ABSTENTION AND MINE V. GUINEA CASE

Article 26 of the ICSID Convention provides that ICSID arbitration is exclusive of

any other remedy, unless otherwise provided. Hence, the domestic courts must abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration. If a court in a Contracting-State suspects that a claim already before it may fall under ICSID's exclusive jurisdiction, the court must refrain from further consideration of the matter. Furthermore, it must refer the parties to ICSID to seek a ruling on the subject<sup>50</sup>. Local courts can only hear the case if ICSID determines that it lacks jurisdiction<sup>51</sup>.

This obligation of the local courts to stay the proceedings, pending a definitive ruling by ICSID, is referred to as the "rule of abstention"<sup>52</sup>. This principle is essential to the proper implementation of the Convention and

42) *ICSID Model Clauses, Doc. ICSID/5/Rev. 1 at 5.*

43) *Report, parag. 20.*

44) *AMERASINGHE, Submissions To The Jurisdiction Of The International Center For Settlement Of Investment Disputes, 5 Journal of Maritime Law and Commerce 217-218 (1974/2).*

45) *SZASZ A Practical Guide To The Convention On Settlement Of Investment Disputes, 1 Cornell International Law Journal 23-24 (Spring 1968).*

46) *See, Convention, Arts. 33, 44 and 66 (2).*

47) *Convention, Art. 26.*

48) *Report, parag. 32.*

49) *For further discussions of the exhaustion of local remedies rule, see, MANN, State Contracts and International Arbitration, 42 British Yearbook Of International Law 31-36 (1967), and SCHWEBEL and WETTER, Arbitration and the Exhaustion of Local Remedies, 60 American Journal of International Law 484-501 (1966).*

50) *DELAUME, supra note 16, at 785.*

51) *See, SHIFMAN, Maritime International Nominees Establishment v. Republic of Guinea: Effect On U.S. Jurisdiction of An Agreement By a Foreign Sovereign Before the International Center For the Settlement Of Investment Disputes, 16 George Washington Journal Of International Law and Economics 460-461 (1981-82).*

52) *DELAUME, supra note 16, at 785.*

finds its sanction in Article 64 of the ICSID Convention, which mainly provides that any dispute between the Contracting-States, concerning the interpretation or application of the Convention, is to be referred to the International Court of Justice<sup>53</sup>. Since the rule of abstention is directly relevant to the "interpretation" or "application" of the Convention, failure by a domestic court to comply with the rule may expose its own state to the type of international claim that is referred to in Article 64.<sup>54</sup>

*Maritime International Nominees Establishment v. The Republic of Guinea (MINE v. Guinea)*<sup>55</sup> is a case which touched upon issues concerning the rule of abstention. *MINE v. Guinea* involved an action brought into the United States courts by MINE<sup>56</sup> against Guinea. MINE and Guinea had agreed to submit investment disputes to ICSID arbitration. Notwithstanding their submission to ICSID and upon a petition filed by MINE, the District Court for the District of Columbia held that consent to ICSID arbitration constituted a waiver of immunity for the purposes of the U.S. Foreign Sovereign Immunities Act (FSIA)<sup>57</sup>, on the basis of which jurisdiction could be retained. This decision was reversed on appeal on November 12, 1982. However, the judgement of the Court of Appeals simply holds that consent to ICSID does not constitute a waiver of immunity within the meaning of the FSIA. Hence, the Court did not consider it necessary to rule on the question whether a court should, when an alleged ICSID clause is brought to the attention of the Court, stay the proceedings and refer the parties to ICSID-so that it can be determined whether the clause satisfies the requirements of the Convention<sup>58</sup>.

There is, therefore, a lack of consideration for the purposes of the ICSID Convention, and the international character of ICSID arbitration, in the decision of the Court of Appeals. The Court should have taken into account certain basic features of the Convention, which are characteristic of the ICSID machinery, and should have complied with the rule of abstention<sup>59</sup>.

### 3. 1. 2. JURISDICTION RATIONE MATERIAE

Article 25 (1) of the Convention requires that the jurisdiction of the Center extend to any legal dispute arising directly out of an investment between a Contracting-State and a national of another Contracting-State. This provision is, therefore, stating two requirements with respect to the nature of a dispute: It must be a "legal dispute" and it must be related to an "investment".

#### 3. 1. 2. 1. LEGAL DISPUTE

The meaning of a dispute was defined in the *Mavrommatis Palestine Concessions Case* by the Permanent Court of International Justice<sup>60</sup>. Accordingly, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. However, in order to invoke the jurisdiction of the Center, a dispute must be qualified as a "legal" one. The prominent idea in the International Court of Justice has generally been that only a dispute about legal rights and obligations qualifies as a legal dispute<sup>61</sup>. The reason why the expression "legal dispute" was used, is to make clear that while conflicts of rights are within the

53) *Id.*

54) *Id.*

55) See, 20 ILM 669 (1981); 21 ILM, 1355 (1982) and as amended 22 ILM 86 (1983); Also see, DELAUME, *supra*, at 786-796 and SHIFMAN, *supra*, note 49, at 451.

56) MINE is a Liechtenstein company considered by the parties for the purposes of the ICSID clause as being a Swiss company.

57) See, 15 ILM 1388 (1976).

58) For the brief summary of the case, see, ICSID Newsletter, *supra*, note 22, at 2-3.

59) For a detailed recent discussion, see DELAUME, *supra*, note 16, at 792-796.

60) Judgement No. 2, 1924. See, HUDSON, 1 WORLD COURT REPORTS 301 (1922-1926).

61) See, AMERASINGHE, *The Jurisdiction Of The International Center For The Settlement Of Investment Disputes*, 19 Indian Journal Of International Law 173 (1979/2).

jurisdiction of the Center, mere conflicts of interests 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<sup>62</sup>. Nevertheless, there is good authority for believing that -in the absence of an express exclusion in the Convention itself- a dispute, which is otherwise legal, would not cease to be legal for the purposes of the Center's jurisdiction on account of political significance, motivation or implications or other political associations or elements<sup>63</sup>.

### 3. 1. 2. 2. INVESTMENT

Neither the Convention nor the Legislative History of the Convention defines the term "investment". The agreement of the parties is seen to be *prima facie* determinative in this connection. As I pointed out earlier under 3. 1. 1. 1., the consent of the parties is regarded as the cornerstone of the jurisdiction of the Center<sup>64</sup>. Therefore, an agreement between the parties on whether a transaction is an investment creates a strong presumption that the transaction is an investment<sup>65</sup>.

The ICSID Convention was drafted at a time when most investments were made in the form of concessions, joint ventures or loans made by private financial institutions to foreign public entities and, to a certain extent, of arrangement concerning industrial property rights. However, new forms of association between states and foreign investors have appeared since then. Typical examples are profit sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing arrangements, and arrangements for the transfer of know-how of technology. Thus, the traditional notion of investment as capital is progressively being substituted by an economic concept of investment. The progressive reception of that concept can only give new meaning to the Convention and widen its scope<sup>66</sup>.

### 3. 1. 3. JURISDICTION RATIONE PERSONAE

A legal dispute arising directly out of an investment, falls within the jurisdiction of the Center if one of the parties is a Contracting-State and the other party is a national of another Contracting-State<sup>67</sup>. Therefore, the facilities of the Center are not available for disputes between private parties or for disputes between States. It is now relevant to consider the nature of the parties in some detail.

#### 3. 1. 3. 1. THE STATE PARTY

One of the parties to an investment dispute submitted to the Center must be a Contracting-State or any constituent subdivision or agency of a Contracting-State designated to the Center by that State. A non-Contracting-State cannot be a party to proceedings before the Center<sup>68</sup>. The term "Contracting-State" is not defined in the Convention, but Article 68 provides that the Convention enters into force for each State thirty days after the deposit of ratification, acceptance or approval of the Convention. Therefore, a State becomes a Contracting-State thirty days after it has deposited its instrument of ratification, acceptance or approval<sup>69</sup>. This requirement will then be satisfied at the time the request is filed<sup>70</sup>.

It has been stated that the term "constituent-subdivisions" covers a fair range of subdivisions; not only municipalities and local government bodies but also semi-autonomous dependencies, provinces or federated

62) *Report* parag. 26.

63) *AMERASINGHE*, *supra* note 58, at 174.

64) *Report*, parag. 27.

65) *AMERASINGHE*, *supra* note 42, at 223.

66) *DELAUME*, *supra* note 16, at 795.

67) *Convention*, Art. 25 (1).

68) *AMERASINGHE*, *Jurisdiction Ratione Personae Under The Convention On The Settlement Of Investment Disputes Between States and Nationals Of Other States*, 47 *The British Yearbook Of International Law* 230, (1974-1975).

69) *Id.* at 231.

70) *Id.*

States in non-unitary States, and the local government bodies in such subdivisions<sup>71</sup>.

As for the term "agencies", it is submitted that the intention was to cover as wide a range of entities as possible. However, it is probably necessary that the entity be acting on behalf of the government of the State concerned or of its constituent subdivisions<sup>72</sup>.

Article 25 (1) of the Convention provides that constituent subdivisions and agencies shall be designated to the Center by the Contracting-States. This provision seems to reduce the necessity of trying to find definitions for these entities, because any such designation by a Contracting-State would raise a presumption of fact. However, according to the Convention, commissions and tribunals are judges of their own competence and, therefore, they have the power to decide whether a designated body falls within the terms of the Convention, since such a decision is not a matter of agreement between the actual parties<sup>73</sup>.

The consent given by a constituent subdivision or agency of a Contracting-State requires the approval of that State unless that State notifies the Center that no such approval is required<sup>74</sup>.

### 3. 1. 3. 2. THE PARTY WHO IS A NATIONAL OF ANOTHER CONTRACTING STATE

Article 25 (2) of the Convention, which provides that the non-State party to the dispute be a national of another Contracting-State, distinguishes between natural and juridical persons. Before going into some more detailed discussion of these two, it should be noted that the role of nationality in the above connection is to serve as a means of bringing the private party within the jurisdictional pale of the Center. In the field of diplomatic protection, however, the purpose of nationality is to establish an adequate link between the private party and the State giving protection in order to enable the latter to espouse his claim<sup>75</sup>.

### 3. 1. 3. 2. 1. NATURAL PERSONS

With respect to natural persons, the Convention requires that the nationality criterion be met on two different dates: First, on the date on which the parties consent to submit their disputes to conciliation or arbitration. Second, on the date on which the request was registered by the Secretary-General<sup>76</sup>. If a natural person has the nationality of the Contracting-State party to the dispute on one of these two dates, then he is not eligible to be a party in proceedings under the auspices of the Center. Having the nationality of another State together with the nationality of the Contracting-State does not change this outcome. This ineligibility cannot be cured even if the State party to the dispute gives its consent<sup>77</sup>. The reasons for this latter requirement are that the Convention establishes international mechanisms for the settlement of disputes between host States and private foreign investors, and that there is no reason to have these international procedures as substitute for domestic procedures in the settlement of disputes between States and their own nationals<sup>78</sup>.

### 3. 1. 3. 2. 2. JURIDICAL PERSONS

In the case of juridical persons, the Convention requires that the nationality criterion be met on the date on which the parties consented to submit their dispute to conciliation or arbitration. If the juridical person has the nationality of the Contracting-State party to the dispute on this certain date, the parties must have agreed that because of foreign control, this person should be treated as a national of another Contracting-State<sup>79</sup>. This requirement of the Convention is more flexible when compared with the one required

71) *Id.* at 233.

72) *Id.*

73) *Id.* at 234.

74) *Convention*, Art. 25 (3).

75) *AMERASINGHE*, *supra* note 43, at 198.

76) *Convention*, Art. 25 (2) (a).

77) *Report*, parag. 29.

78) *AMERASINGHE*, *supra* note 43, at 200.

79) *Convention*, Art. 25 (2) (b).

for natural persons. Thus, a juridical person, who had the nationality of the State party to the dispute, would be eligible to be a party to proceedings under the auspices of the Center if that State had agreed to treat it as a national of another Contracting-State because of foreign control<sup>80</sup>. Such a provision in the Convention was the result of a compelling reason. Usually host states require that foreign investors carry on their business within the host state territories through a company organized under their law. If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would have remained outside the scope of the Convention<sup>81</sup>.

The nationality of juridical persons is not defined in the Convention<sup>82</sup>. During the preparatory work for the Convention, it was preferred to give the greatest possible latitude to the parties to decide under which circumstances a company could be treated as a national of another Contracting-State. It is submitted, however, that the Convention implicitly assumes incorporation as a criterion of nationality. Nevertheless, in order to avoid uncertainty or unpleasant surprises in the case of a challenge to the jurisdiction of the Center, it is advised that, if the company is not incorporated under the laws of a Contracting-State, the parties should stipulate the nationality in connection with a conciliation or arbitration clause. Accordingly, the Commission or Tribunal should favor giving effect to the agreement between the parties by adopting a more functional approach, which would give effect to economic realities such as ownership and control<sup>83</sup>.

### 3. 2. A SUCCESSFUL DEMONSTRATION OF THE CENTER'S JURISDICTIONAL POWER: ALCOA MINERALS DECISION

Alcoa Minerals of Jamaica Inc. v. Government of Jamaica<sup>84</sup> is a case where a three-man ICSID arbitral tribunal unanimously asserted jurisdiction over an investment dispute by effecting an agreement to arbitrate, despite the host state's failure to attend the

proceedings and its attempt to withdraw its consent to ICSID arbitration.

#### 3. 2. 1. FACTS OF THE CASE<sup>85</sup>

In 1968, Alcoa an American corporation, entered into a 25 year agreement with the Government of Jamaica by which it undertook to construct an alumina refining plant in Jamaica, in return for the grant of tax concessions - i.e. in the form of "no further tax" clause on the agreement- and long-term leases for the mining of bauxite. An arbitration clause provided for ICSID arbitration of any dispute arising under the agreement. While Alcoa was proceeding to fulfill the provisions of the Agreement, in 1974, Jamaica, announcing that government revenue from the extraction of bauxite was not sufficient for her, imposed a new tax on bauxite mining by the Bauxite Act. The Act brought a ninefold increase in the taxes payable on Alcoa's mining operations. Alcoa acted to initiate ICSID arbitration, considering the given situation to be a violation of the "no further tax" clause in the 1968 agreement.

Jamaica had become a party to the ICSID Convention without reservation, like the United States in 1966. Jamaica, however, noti-

80) Report, parag. 30.

81) BROCHES, *supra* note 7, at 358-359.

82) For a very detailed discussion of this subject, see AMERASINGHE, *supra* note 58, at 208-225.

83) BROCHES, *supra* note 7, at 360-361.

84) According to the Article 48 (5) of the Convention, the Center shall not publish the award without the consent of the parties. The Alcoa Minerals is a decision not published by the Center. Thus, for the purposes of the present subsection, I made extensive use of the article titled "Arbitration Under The Auspices Of The International Center For Settlement Of Investment Disputes: Implication Of The Decision On Jurisdiction In Alcoa Minerals Of Jamaica, Inc. v. Government Of Jamaica", written by JOHN T. SCHMIDT in 17 *Harvard International Law Journal* 90-109 (1976).

85) See *supra*.

fied ICSID, shortly before the enactment of the Bauxite Act in 1974, that investment disputes arising at any time and involving natural resources would not be submitted to ICSID and, consequently, she did not respond to Alcoa's request for arbitration.

### 3. 2. 2. DECISION OF THE TRIBUNAL WITH RESPECT TO JURISDICTION<sup>86</sup>

In the *Alcoa Minerals v. Jamaica* case, the *ratione personae* jurisdiction requirement was easily satisfied since both the United States and Jamaica were Contracting Parties, and there was not any question that Alcoa Mineral was a Delaware corporation organized under the United States law<sup>87</sup>. Thus, the Tribunal moved to investigate two important issues: Whether the dispute fell within the subject matter of ICSID jurisdiction, and whether Jamaica's notification to ICSID had the effect of withdrawing natural resources investment disputes from the scope of Jamaica's prior consent to arbitration.

#### 3. 2. 2. 1. RATIONE MATERIAE JURISDICTION IN THE CASE

It was not difficult for the Tribunal to find that there existed a legal dispute in the *Alcoa Minerals* case. As it is clearly seen from the facts of the case, the general question at issue was the extent of the legal rights and obligations of the parties under the 1968 Agreement<sup>88</sup>.

The finding that the case concerned an investment did not create much difficulty. The Tribunal reasoned that, where a mining company has invested substantial amounts in a foreign state, relying upon an agreement with that State, there existed an investment according to the Convention. Moreover, there was not any attempt by the parties to define the term "investment". Hence, the Tribunal concluded that it had subject matter jurisdiction.

#### 3. 2. 2. 2. CONSENT TO ARBITRATE

ICSID Convention does not introduce compulsory arbitration. Contracting-States are not under any obligation to submit any

particular dispute to conciliation or arbitration by the mere fact of their ratification, acceptance or approval of the Convention<sup>89</sup>. The consents of both parties form the cornerstone of the jurisdiction of the Center<sup>90</sup>. Thus, the Tribunal in *Alcoa Minerals* had to determine whether Alcoa and Jamaica had given mutual consent to ICSID Arbitration. One of the ways consent may be manifested is by an arbitration clause in an investment agreement, which refers investment disputes to ICSID. Accordingly, Alcoa Tribunal found that the arbitration clause in Alcoa's 1968 Agreement with Jamaica satisfied the requirement of written mutual consent to arbitrate. However, the key question in the case was whether the Jamaican notification of 1974 affected the prior agreement to arbitrate. In this connection the Tribunal applied, without limitation, the last sentence of Article 25 (1), which read "when the parties have given their consent, no party may withdraw its consent unilaterally". According to the Tribunal, the written consent in the *Alcoa* case was contained in the arbitration clause between the Government and Alcoa, and this consent, once given, could not be withdrawn. The notification of the Jamaican Government only operated for the future by way of information to the Center and potential future investors in undertakings concerning minerals and other natural sources of Jamaica.

#### 3. 2. 3. AN EVALUATION

I think one of the novel features of the ICSID Convention, the one with respect to its jurisdiction, is exhibited in the decision of the *Alcoa* Tribunal. The Convention confers certain rights and obligations on a private individual who has entered into an agreement with a host State to have recourse to arbitration and conciliation under the auspices of the Center. As Mr. Schmidt also poin-

86) *Id.*

87) *Id.* at footnote 23.

88) See, 3.1.2.1. for the definition of a "legal dispute".

89) Convention, Preamble, parag. 7.

90) See, 3.1.1.

ted out, the Alcoa decision reinforced ICSID's jurisdictional structure, that does not let host-states frustrate advantages offered to the investor by the Convention<sup>91</sup>.

### 3. 3. THE USE OF CONCILIATION AS A FACILITY

There have been only two requests for the institution of conciliation proceedings since the time ICSID was established. Interesting is that the first request was registered in 1982, to wit, eighteen years after the Center was established<sup>92</sup>. The proceedings were discontinued in this case by June 20, 1983, because of the amicable settlement of the parties<sup>93</sup>. A sole conciliator was appointed in January 1984 for the second conciliation case<sup>94</sup>.

These figures indicate a reluctance on the part of member countries and private parties to refer their disputes to the ICSID conciliation procedure. This is hard to understand, since the sole conciliator or the conciliation commission can only make recommendations that are, obviously, non-binding<sup>95</sup>. Moreover, neither party to a conciliation proceeding is entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission<sup>96</sup>.

In this connection, it has been stated, on one hand that there is strong prejudice towards conciliation procedure in business circles and, on the other hand, that conciliation is a growing resort in multinational codes, i. e. UNCITRAL Conciliation rules<sup>97</sup>. UNCITRAL Conciliation Rules were adopted by a General Assembly Resolution of the United Nations<sup>98</sup>.

The present look of the conciliation facility of the ICSID is not very promising. However, I believe, publicity would draw attention to this way of settling investment disputes.

### 3. 4. WIDENING THE SCOPE OF THE ICSID CONVENTION

Since the day of establishment, 16 arbitration cases<sup>99</sup> and two conciliation cases were registered by the Secretary-General of the Center. However, it is submitted that the number of cases brought before ICSID for dispute settlement should not be seen as the decisive means for ICSID's role in the field of international dispute settlement. Much more important are the number of cases actually settled by amicable agreement. It is believed that, because of the binding character of submissions to the ICSID machinery and of the effectiveness of ICSID awards, ICSID can provide a powerful incentive toward the amicable settlement of investment disputes<sup>100</sup>.

While this is the case, some recent developments tend to widen the scope of the ICSID Convention.

91) SCHMIDT, *supra* note 81 at 103.

92) *La SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. The Government of the Democratic Republic of Madagascar*. See, (83-2) ICSID Newsletter 3 (July 1983).

93) *Id.* at 1.

94) *Tesoro Petroleum Corporation v. the Government of Trinidad and Tobago*. Request is registered by the Secretary-General on August 26, 1983. See, 1 News from ICSID 2 (1984-1).

95) Convention, Art. 34.

96) Convention, Art. 35.

97) Remarks made by ARON BROCHES at a Panel Discussion on "Avoidance and Settlement of International Investment Disputes" at the Seventy-Eighth Annual Meeting of the American Society of International Law on Thursday, April 12, 1984.

98) United Nations General Assembly Resolution No. 35/52, 10 December 1980. See, 20 ILM 300 (1981).

99) For a complete list of arbitration cases, see, ICSID Fifteenth Annual Report, 30 (1980-1981) and 1 News from ICSID 2 (1984-1).

100) Statements made by H. GOLSONG in 83-2 ICSID Newsletter 1 (July 1983).

### 3.4.1. BILATERAL INVESTMENT TREATIES

The large majority of recent bilateral investment promotion and protection treaties provide for dispute settlement procedures based on ICSID. The prototype bilateral investment treaty, advanced by the United States government in January 1982, in order to improve the worldwide climate for private investment and capital flows, provides for ICSID arbitration as a mechanism of settling investment disputes. Thus, the United States is including an ICSID clause in every BIT<sup>101</sup>.

However, while there is an extensive submission to ICSID arbitration in the BITs, entered into by the industrialized countries such as France, the United Kingdom and the United States, it is stated that there is no German bilateral treaty submitting the issue to ICSID as a forum<sup>102</sup>.

### 3.4.2. ADDITIONAL FACILITY

On September 27, 1978, the Administrative Council of the Center authorized the Secretariat to administer, at the request of the parties concerned, certain proceedings between States and nationals of other States which fall outside the scope of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The scope within which, and the terms on which, the Secretariat may administer these proceedings, which would, of course, not be governed by the provisions of the Convention, are set out in the "Additional Facility Rules"<sup>103</sup>.

When the Additional Facility was established in 1978, the Administrative Council decided to review its operation, after the initial five-year period in order to decide, in light of the experience gained, whether to continue the Additional Facility or to terminate it for the future. In a working paper prepared for this purpose, the former Secretary-General of the Center suggested that the Additional Facility has lost most of its *raison d'être*, and that it should be abolished<sup>104</sup>. The subject was on the Agenda of the Administrative Council at its September 1983 meeting,

and the Council resolved to continue the Additional Facility until its next annual meeting in September 1984<sup>105</sup>. However, on April 30, 1984, the new Secretary-General of the Center addressed a report to the Administrative Council in which he recommended that the Additional Facility be continued<sup>106</sup>. At its Eighteenth Annual Meeting on September 26, 1984, the Council agreed unanimously to continue indefinitely the Additional Facility<sup>107</sup>.

### 4. APPLICABLE LAW

The Law applicable to the merits of a dispute is dealt with in a single article of the Convention. According the first sentence of Article 42 (1), "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties" This provision is a firm confirmation of the parties' unlimited autonomy as to the applicable law, and makes their choice binding on the Tribunal<sup>108</sup>. Whatever the law selected by the parties to be applicable may be, the Tribunal is bound to respect this choice<sup>109</sup>. In the absence of such an agreement between the parties, the Tribunal applies 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. Thus, the Tribunal is clearly called upon to take account of both national

101) For further information, see, *Developing a Model Bilateral Investment Treaty*, 15 *Law and Policy in International Business* 273 (1983).

102) Remarks made by GERHARD WEGEN, see, *supra* note 94, at the same Panel Discussion.

103) See, 21 *ILM* 1445 (1982).

104) See, (83-2) *ICSID Newsletter* 6 (July 1983).

105) See, *Additional Facility*, 1 *News from ICSID* 4 (1984-1).

106) 1 *News from ICSID* 13 (1984-2).

107) See, *American Bar Association Section of International Law and Practice Committee on International Commercial Arbitration Newsletter*, at 9 (January 1985).

108) BROCHES, *supra* note 7, at 389.

109) CHERIAN, *supra* note 1, at 76.

and international law. The Tribunal will first look at the law of the host State and apply it to the merits of the dispute. Then the result will be tested against international law. This is not confirming or denying the validity of the host State's law. It is merely stopping its application if it violates international law. In this sense, international law is hierarchically superior to national law<sup>110</sup>. If the parties are not satisfied with this automatic provision in the second sentence of Article 42 (1), they should record their agreement to use another legal system or a combination of legal systems. There are several alternatives for that purpose<sup>111</sup>.

Article 42 (2) provides that the Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law. Hence, the Convention requires that a decision be reached by the Tribunal in every arbitration submitted to its consideration. The Tribunal may not confess an inability to come to a decision because the available legal rules are insufficient, uncertain or lacking in clarity<sup>112</sup>.

The Convention also provides that the Arbitral Tribunal may decide a matter *ex aequo et bono*; that is to say, in accordance with what is just and equitable, if the parties so agree<sup>113</sup>. This is a complete resemblance to the second paragraph of Article 38 of the Statute of International Court of Justice. It provides an alternative basis for arbitration, if the parties to an investment dispute wish to avoid a decision based on pure rules of law<sup>114</sup>.

## CONCLUSION

The International Center for Settlement of Investment Disputes is one of the most important institutional arbitration centers, although resort to its facilities has been meager during the twenty years since its establishment. The extensive literature about the Center is increasingly attracting more attention to its functions.

Resorting to ICSID jurisdiction has some advantages: Its facilities are cheaper than those of the traditional arbitration centers. The ICSID Convention offers an easy procedure through very flexible provisions. The way the arbitration and the conciliation panels are set up assures their impartiality.

It should also be noted that ICSID Jurisdiction is provided on voluntary basis and that there is theoretically no place for compulsory jurisdiction. However, once the consent is given, it can not be withdrawn unilaterally and binds the consenting party like a compulsory jurisdiction clause.

The ICSID Convention treats states and individuals equally. The state sovereignty plays no role once the state consents to the Center's jurisdiction. This is a very important factor in encouraging private investors to use ICSID facilities.

110) BROCHES *supra* note 7, at 390-392; CHERIAN, *supra* at 89.

111) AMERASINGHE, *supra* note 42, at 238.

112) CHERIAN, *supra* note 1, at 84-85.

113) Convention, Art. 42 (3).

114) CHERIAN, *supra* note 1, at 87-88.