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International Centre for Settlement of Investment Disputes

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*by Gita Gopal**

I. INTRODUCTION

The Convention on the Settlement of Investment Disputes sponsored by the World Bank came into force on October 14, 1966. The Convention established a centre for the settlement of investment disputes between states and nationals of other states.[1] As of August 1, 1981, the contracting states number 79.[2] Provisions relating to ICSID have appeared in the international agreements of 37 countries, and clauses relating to ICSID have appeared in the national investment laws of countries.[3] However, only 11 cases have been registered before the centre, and 5 of these were settled before a formal award was granted.[4] The Latin American

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[1] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Aug. 27, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (*entered into force* Oct. 14, 1966), *reprinted in* 4 INT'L LEGAL MATERIALS 532 (1965) [hereinafter cited as ICSID Convention].

[2] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, FIFTEENTH ANNUAL REPORT 5 (1981) [hereinafter cied as ICSID, 15TH ANN. REP.] Eighty-five states have signed the Convention, but only 79 have ratified it. The six signatory states yet to ratify include Australia, Barbados, Ethiopia, Israel, Paraguay, and the Solomon Islands. *Id.* at 5-6.

[3] *Id.* at 19-28.

[4] *Id.* at 30-43. Proceedings were discountinued in: Holiday Inns/Occidental Petroleum v. Government of Morocco, (ARB/72/1) (discontinued Oct. 17, 1978); Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, (ARB/74/2)(discontinued Feb. 26-27, 1977); Kaiser Bauxite Co. v. Government of Jamaica, (ARB/74/3)(discontinued Feb. 26-27, 1977); Reynolds Jamaica Mines, Ltd. and Reynolds Metals Co. v. Government of Jamaica, (ARB/74/4)(discontinued Oct. 12, 1977); Government of Gabon v. Société SERETE S.A., (ARB/76/1)(discontinued Feb. 27, 1978).

Alcoa Minerals, along with its two companion cases *Kaiser Bauxite* and *Reynolds Jamaica,* raised the issue of the Centre's jurisdiction. In all three cases the arbitral tribunal upheld its jurisdiction over the dispute. For a thorough analysis of the jurisdictional issues raised in *Alcoa Minerals* see *Developments in International Commercial Arbitration — Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica,* 17 HARV. INT'L L.J. 90 (1976).

countries have, en bloc, refused to ratify the Convention.[5] Countries like Australia, Lebanon, India and Iran have shunned the Centre, despite having participated actively in the preparatory meetings leading to the Convention.[6]

The Centre, it was hoped, would improve the investment climate in the world, and help to facilitate the flow of funds from developed to developing countries.[7] How well has the Centre played its role? Should it be termed a success or a failure? The few facts that are well known about ICSID are not enough to answer these questions. A deeper analysis seems necessary before ICSID can be classified either as a success or a failure.

II. EVALUATING ICSID'S RECORD

A starting point to this discussion is that only 11 cases have been registered at the Centre in the past 16 years. Arguably this fact should be to the Centre's credit. The rationale for this paradoxical conclusion is that the presence of ICSID has a deterrent effect on potential disputes, and operates to persuade parties to arrive at a settlement for fear that the other party may take it to the Centre.[8] *Prima facie,* it appears to be a rather dubious argument but it does gain some credibility on further thought.[9]

The two most recent cases, AMCO Asia Corp., Pan American Development Ltd. and P.T. AMCO Indonesia v. Government of Indonesia, (ARB/81/1) and Klöckner Industrie-Anlagen GmbH, Klöckner Belge, S.A. and Klöchner Handelsmaatschappij B.V. v. United Republic of Cameroon, (ARB/81/2), were registered with the Centre February 24, 1981 and April 10, 1981 respectively.

[5] *See* Szasz, *The Investment Disputes Convention and Latin America,* 11 VA. J. INT' L. 256, 258 (1971); Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation,* 9 VAND. J. TRANSNAT'L L. 793, 798 (1976). For further discussion of the Latin American position *vis á vis* ICSID see *infra* notes 55-64 and accompanying text.

[6] *See* ICSID, 15TH ANN. REP., *supra* note 2, at 5-6; *see generally,* Settlement of Investment Disputes, Consultative Meeting of Legal Experts (Bangkok, Apr. 27-May 1, 1964), Summary Record of Proceedings (July 20, 1964), *reprinted in* 2 ICSID, ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 458 [hereinafter cited as HISTORY OF THE CONVENTION]

[7] *See* Note by A. Broches, General Counsel, Transmitted to the Executive Directors: "Settlement of Disputes Between Governments and Private Parties" (Aug. 28, 1961), *reprinted in* 2 HISTORY OF THE CONVENTION 1.

[8] Also, the fact that five of the eleven cases have been settled prior to a final award suggests that the Centre may have a deterrent effect. *See supra* note 4.

[9] *Cf.* D. SMITH & L. WELLS, NEGOTIATING THIRD WORLD MINERAL AGREEMENTS: PROMISES AS PROLOGUE 123 (1976). The authors argue:

> [T]he mere presence of an arbitration mechanism may have assisted in the nonlitigious settlement of minor contract disputes. In many cases the awareness that one aggrieved party might carry an unsettled issue to cumbersome arbitration proceedings has probably meant that both parties would attempt to avoid arbitration

It can, of course, be argued that the ICSID clause was not the deterrent factor, and a mere agreement to arbitrate would have had the same effect. This argument, however, would not be very forceful. A private investment contract, containing an arbitration clause referring to ICSID would definitely be more effective than a general agreement to arbitrate, since a breach of an obligation to arbitrate under the Convention is a violation of an international treaty having serious repercussions at the international level.[10] Furthermore, no third world country (which is generally the state involved in such disputes) can afford to take such an obligation lightly, once it has ratified the convention and consented to submit the dispute to arbitration. Thus the statement cannot be dismissed perfunctorily, but nevertheless the question still remains: Is ICSID a success?

The question seems simple and deserving of a straight-forward answer. Yet this is not so. There are many extraneous factors that have to be considered.

A. Foreign Investment Climate

The first relevant issue is whether investment by foreign nationals continues to command the importance it did two decades ago. Many African and Latin American countries find negative consequences in private investment.[11] They feel private investors make excessive profits without reciprocal benefits to the state. They therefore attempt to have complete control over the investment and regulate it stringently in order to eliminate the exploitation of the national economy by the investors.[12]

The bargaining power between the parties has also changed. The private investors, confronted by newly independent states aware of their economic power, no longer dictate the investment terms in the same manner as in the past. The see-saw is gradually changing its position and especially in the case of extractive investments, the power to dictate terms lies with the states.[13] Thus the climate for private investment is very different from what it was when ICSID was conceived.

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by settling their difficulties in a mutually agreeable way.

Id.

[10] *But see* von Mehren & Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 537 (1981)(arguing that an arbitration agreement, whether tied to a treaty like ICSID or not, is universally understood to imply that the parties will submit to the arbitration and recognize the award as binding); *see also* Mann, *State Contracts and International Arbitration*, 42 BRIT. Y.B. INT'L L. 1, 24-29 (1967).

[11] *See* J. CHERIAN, INVESTMENT CONTRACTS AND ARBITRATION 11-12 (1975).

[12] *Id.*

[13] *See, e.g.*, Ball, *The Relations of the Multinational Corporation to the "Host" State* in GLOBAL COMPANIES 64, 66 (G. Ball ed. 1975).

B. *Arbitration on Investment Disputes*

The second issue to be considered is how often do states and private investors resort to arbitration as a method of dispute settlement? The concepts of arbitration vary from place to place.[14] The English Arbitration Act, until its latest amendment in 1979, insisted on judicial review even in international arbitration.[15] The civil law concept of arbitration does not allow judicial review except when it is against the accepted public order.[16] Common law countries generally follow the English tradition and do not allow the arbitrators to decide as *amiable compositeurs*.[17] Civil law gives the parties the freedom of choice. As one knowledgable commentator has noted, attempts to unify arbitration law and practice "have not succeeded and are not likely to succeed within a measurable space of time."[18]

Though arbitration remains a widely used method of settling investment disputes, it still has many disadvantages. Among the more important criticisms directed against arbitration, are the facts that it is both time consuming and expensive. The parties would prefer a more expeditious method of dispute settlement. The average period for an arbitration to be completed under ICSID, either by a final award or by settlement between the parties, is approximately three years.[19] To the parties, and especially to the investor, three years is a long period, particularly in cases where capital is paralyzed. Rather than freezing capital and submitting the dispute to arbitration, foreign investors may agree to a less favourable settlement. Similarly, the excessive expenditure involved in arbitration is another factor which pressures parties to arrive at an amicable settlement.[20] The arbitration clause will therefore be invariably included

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[14] For recent reports on arbitration practices around the world see the national reports in the annual volumes of *Yearbook of Commercial Arbitration*, published by International Council for Commercial Arbitration, beginning with volume one in 1976. A more thorough, yet somewhat dated survey of national arbitration practices appears in 1 P. SANDERS, INTERNATIONAL COMMERCIAL ARBITRATION (1956).

[15] Arbitration Act, 1950, 14 Gao. 6, ch. 27, *See* Schmitthoff, *The Supervisory Jurisdiction of the English Courts*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 289 (P. Sanders ed. 1967). The current statute, Arbitration Act of 1979, severely restricts judicial review of an arbitrator's award. Arbitration Act, 1979, ch. 42, *reprinted in* 18 INT'L LEGAL MATERIALS 1248 (1979); Smedresman, *The Arbitration Act*, 1979, 11 J. MAR. L. & COM. 319 (1980). The House of Lords recently endorsed the Parliamentary intent to limit judicial review of arbitration awards. *See* Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema), [1981] 2 All E.R. 1030 (H.L. 1981), *reprinted in* 20 INT'L LEGAL MATERIALS 1105 (1981).

[16] *See generally* 1 P. SANDERS, *supra* note 14, at 19.

[17] *See id.* at 21.

[18] *Id.* at 11.

[19] *See* ICSID, 15TH ANN. REP., *supra* note 2, at 30-43.

[20] *See* von Mehren & Kourides, *supra* note 10, at 549.

as a general safety device, but is resorted to by parties only when absolutely necessary.

Moreover there is a tendency, more predominant in recent times, to institutionalize in the contract itself mechanisms for change. Thus, the scope for disputes is reduced to some extent.[21] This is a realization of the fact that the bargaining power of the parties changes as circumstances change, and renegotiation of terms may become essential. Examples of such mechanisms are: Progresssive reduction of the concession areas; phase-in host country equity ownership; and Most-Favoured-Company and Most-Favoured-Country clauses.[22] These provisions have also played a role in reducing the number of disputes being referred to arbitration.

The disputes arising out of a spate of nationalizations, are now considerably less. A 1975 State Department study showed that of the 56 foreign investment disputes instituted before 1971, but unresolved by 1973, 71% involved nationalization.[23] Only 21 percent of disputes arising between 1971 and 1973 involved nationalization, and the remainder mainly dealt with the host state's concern for a greater share in the earnings or renegotiations.[24]

Countries that continue to encourage private investment do so on the basis that it is in their best interest. There is now an increased sense of cooperation between the investor and the host state.[25] The bargaining powers are now often more equal. In the case of extractive investments, greater bargaining power is in the hands of the host states.[26]Thus, the suspicious and reluctant welcome accorded to investors by host states in the past is gradually changing. The new trusting attitude also helps to reduce the number of arbitral disputes by encouraging settlement in an amicable manner.

Simpler methods are preferred (if the parties can arrive at an agreement) to the laborious process of arbitration. The process adopted in Lesotho's 1971 *Maluti Diamond Agreement* provided that disputes concerning "any expenditure sought to be deducted" would be referred to an appointed expert agreed upon by both parties, and the decision would be

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[21] *See* D. SMITH & L. WELLS, *supra* note 9, at 126-40.

[22] *Id.; see also* Smith & Wells, *Conflict Avoidance in Concession Agreements,* 17 HARV. INT'L L. J. 51, 56-65 (1976).

[23] BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T STATE, DISPUTES INVOLVING U.S. FOREIGN DIRECT INVESTMENT: JULY 1, 1971-JULY 31, 1973 at 2 (1974).

[24] *Id.; see also* Salzman, *How to Reduce and Manage the Political Risks of Investment in Less Developed Countries* in GLOBAL COMPANIES 91 (G. Ball ed. 1975).

[25] *Cf.* Smith & Wells, *supra* note 22, at 69-70 (suggesting that foreign investors are taking greater responsibility for the host country's development lest the host government take the matter into his own hands through nationalization).

[26] *See, e.g.,* Ball, *supra* note 13, at 66.

final and binding.[27] Although the question would not be as simple when the dispute involves a more complex legal issue, it does illustrate the general desire for a quick and effective remedy.

One major difficulty in an arbitration between a private investor and a state seems to be the process of getting the latter to enforce an award which is against its own interests.[28] A spirit of consent is essential if arbitration is to succeed as a method of dispute settlement. However, if this spirit of cooperation forms the relationship, then it is highly probable that the parties will arrive at a settlement rather than have their dispute arbitrated. On the other hand, if the state has decided not to cooperate, an award in favour of the investor is useless in the absence of an effective award enforcement process. The only effect of such an award is that it may be persuasive in eventually forcing the state to arrive at a settlement. Thus, once again, the private investor would resort to arbitration only as a last alternative, and on occasion, is even willing to settle for less favourable terms rather than take the dispute to arbitration. Arbitration is, therefore, regarded as a necessary evil since there is no other viable solution acceptable both to the developed as well as the developing countries.

With the general attitude toward private investment gradually changing while attitudes toward arbitration remain stagnant, the percentage of disputes being submitted to arbitration may decrease. These factors must also be taken into consideration in arriving at a conclusion about the success of ICSID.

C. *Lack of Publicity*

Another reason preventing the success of ICSID is that despite its long existence, ICSID still remains poorly publicized. A survey of major U.S. multinational corporations indicated that 15.8 percent of the respondents were familiar with ICSID.[29] The respondents stated that they had little or no information about the Centre.[30] If this is the state of affairs, then it is not surprising that only 11 cases have come before ICSID. The

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[27] D. SMITH & L. WELLS, *supra* note 9, at 124 n.6 (quoting (Lesotho) Maluti Diamond Agreement (May 6, 1971), Article 40).

[28] *See* Schacter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1 (1960); Mann, *supra* note 10, at 30-31; von Mehren & Kourides, *supra* note 10, at 537-38.

[29] Baker & Ryans, *The International Centre for Settlement of Investment Disputes (ICSID)*, 10 J. WORLD TRADE L. 65, 71 (1976). The authors surveyed the 1973 Fortune 1,000 largest corporations.

[30] The Centre addressed the publicity problem in 1981, issuing a new information brochure and holding a seminar in Paris entitled "ICSID: Principal Aspects of the Settlement of Investment Disputes—The Point of View of the Users." ICSID, 15TH ANN. REP., *supra* note 2, at 3.

fact that the awards are kept confidential also adds to the 'mystique' of the institution.[31] In the Adriano Gardella SpA v. Government of Ivory Coast arbitration, the parties have refused to publish the award despite the fact that the delegate of Ivory Cost has expressed his satisfaction at the way the arbitrarion was conducted by ICSID.[32]Extensive publicity and publication of the award would certainly help to convince potential investors of the availability of an effective method of dispute settlement.

D. Provisions of the Convention Affecting ICSID's Success

In addition to these three extraneous reasons, there are also other factors inherent in the convention rules which have probably contributed to its poor performance.

1. Article 42 — Applicable Law

Despite the fact that the rules were framed by some of the best legal minds in the world, they are sometimes vague and capable of being interpreted in various ways. This often leaves the parties in doubt as to the effect of the rules. Furthermore, since awards are often unpublished, there is no way for the parties to rely on precedents determining how rules are applied and interpreted. A classic illustration of such vagueness is one of the most important articles of the convention, Article 42. Article 42 states that in the absence of agreement between the parties as to the applicable law, "the law of the Contrasting State party to the dispute and such rules of international law as may be applicable" will apply.[33] Is international law to be applied whenever there is a conflict with the national laws? Is it to be applied when the national laws are silent on a particular issue? Or can it be applied whenever the arbitrator believes it is appropriate or applicable? The correct meaning can be fathomed by reading the documents of the legal committee preparing for the convention. But should parties to a dispute be required to wade through preparatory committee materials before they can conclude what the rules mean? After completing this task, what guarantees that the arbitrators are bound by the interpretation? In fact, just after the legal committee adopted the final form of this article, Mr. Tsai, the Chinese delegate, suggested that the wording may be slightly ambiguous and proposed an al-

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[31] The Convention provides that "[t]he Centre shall not publish the award without the consent of the parties." ICSID Convention, *supra* note 1, at art. 48(5).

[32] *See* ICSID, 15TH ANN. REP., *supra* note 1AA, at 33-34 (printing a chronology of the arbitration); *see also* 2 J. WALTER, THE INTERNATIONAL ARBITRAL PROCESS 253-54 n.38 (1979)(quoting Mr. Konan of the Ivory Coast to the effect that the ICSID award was completely satisfactory).

[33] ICSID Convention, *supra* note 1, at art. 42(1).

teration.[34] But he was overruled. Perhaps it was the only compromise acceptable to both sets of proponents, those who wished to include international law and those against the idea. Whatever the reason for the ambiguity, it definitely leaves the parties unsure as to what is the applicable law.[35]

2. Article 25 — Jurisdiction

Another factor that increases the general vagueness in the convention rules is the lack of definition of the term "investment". The Centre is to be used specifically for disputes that arise directly out of an investment.[36] What was the framers' intention in limiting the jurisdiction of the Centre to disputes arising out of an "investment", and leaving the definition of the term "investment" to differing interpretations? Is there a conflict in the two attitudes? In the first draft of the convention, the dispute was not limited to investment disputes.[37] The Rules were framed for the resolution of disputes generally. Many delegates to the preliminary meetings expressed the need for a limitation on this general statement.[38] The phrase "of a legal nature" was then added to clarify that commercial and political disputes would be kept out of the Centre's jurisdiction.[39] "Dispute" was also qualified by the term "arising directly out of an investment".[40] This was necessary to justify the connection to the World Bank.

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[34] Summary Proceedings of the Legal Committee Meeting 2-6 (Dec. 30, 1964), *reprinted in* 2 HISTORY OF THE CONVENTION, *supra* note 6, at 800-04; *see also* Memorandum of the Meeting of the Committee of the Whole 3-5 (Feb. 25, 1965), *reprinted in* 2 HISTORY OF THE CONVENTION, *supra* note 6, at 984-86 (discussion of Article 42(1)).

[35] Arons Broches, the first Secretary General of the Centre, argues that article 42(1) clearly provides that international law may be applied in specific situations. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Applicable Law and Default Procedure*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 12, 17 (P. Sanders ed. 1967); *see also* Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, [1972] 2 RECUEIL DES COURS 331, 387-395.

[36] ICSID Convention, *supra* note 1, at art. 25(1).

[37] The Convention draft, dated June 5, 1962 provided that the Centre's jurisdiction would be limited to "disputes between Contracting States and nationals of other Contracting States. . . . " Working Paper in the Form of a Draft Convention (June 5, 1962), at 13, *reprinted in* 2 HISTORY OF THE CONVENTION, *supra* note 6, at 19, 33.

[38] *See generally* Memorandum of the Meeting of the committee of the Whole (Dec. 18, 1962), *reprinted* in 2 HISTORY OF THE CONVENTION, *supra* note 6, at 53.

[39] Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Oct. 15, 1963), art. II(1), Comment 4, *reprinted in* 2 HISTORY OF THE CONVENTION, *supra* note 6, at 202-04; *see also* Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, [1972] 2 RECUEIL DES COURS at 362-64. The final Convention limits the Centre's jurisdiction to "legal dispute[s]". ICSID Convention, *supra* note 1, at art. 25(1).

[40] Revised Draft of Convention on the Settlement of Investment Disputes Between

At the outset, the Centre was to have an administrative link to the Bank. After the qualifying terms were incorporated in a later draft, the administrative link to the Bank was discarded due to the vehement protest of many states who felt that if the connection was maintained, there might have been indirect pressure on them from the Bank to join the Centre.[41] Once this was dropped it was perhaps impossible to arrive at a consensus to do away with the investment qualification, on the grounds that the link being no more, it was not necessary to define the term 'dispute'.

The term investment was undefined for two main reasons. First, defining the term would limit the scope of the convention and simultaneously raise unnecessary jurisdictional problems.[42] Second, the freedom is given to the parties to define the term investment in every contract which includes an arbitration clause. Thus if the states desire to define the term, they are free to do so individually. However, an attempt was made to define the term, but it was impossible to arrive at a consensus.

Therefore when the convention was conceived there was no conflict. The term 'dispute' was unqualified and there was no question then of defining any qualifying term. But later due to pressure from the states, the term 'dispute' was restricted, and the word 'investment' was left undefined because it was impossible to arrive at an acceptable definition and it was not inconsistent with the thinking of the directors. Although there appears to be a conflict in restricting the definition of dispute and leaving the meaning of investment open, it is a tremendous effort to please the member states in the hope that they will be persuaded to join the ICSID. Whatever the reason, the net result is that the parties are left in doubt as to the exact meaning of the term and they must take the trouble to define the term themselves. In such situations, the party with the higher bargaining power will succeed. This also defeats the purpose of the convention which is to give the parties a dispute settlement process where they would have equality. A better alternative would be to define the term, or at least to specify transactions that would definitely be out of

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States and Nationals of Other States (Dec. 11, 1964), at art. 25(1), *reprinted in* 2 HISTORY OF THE CONVENTION, *supra* note 6, at 911, 918.

[41] Article 67 provides that the Convention

> shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

ICSID Convention, *supra* note 1, at art. 67.

[42] *See* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 9 (March 18, 1965), *reprinted in* 2 HISTORY OF THE CONVENTION 1069, 1078; Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* [1972] 2 RECUEIL DES COURS at 362.

the Centre's jurisdiction. Even a staff member of the World Bank is not certain, for example, if ordinary sales involving substantial supplier credits constitute an investment.[43] It would be advisable for the Centre to publish some guidelines to clarify the term 'investment' for arbitrators when deciding jurisdiction.

e. Article 26—Exhaustion or Alternative Remedies

Another point that is left to the discretion of the arbitrators is the clause in Article 26 which states that the contracting state may require, as a precondition to arbitration, that the private investor exhaust local administrative and judicial remedies.[44] There is nothing, however, on what effect this will have on the arbitration. Will the arbitration then be a review of the fairness of the process, or will it totally ignore the process if the investor is not satisfied with it? Questions like this will necessarily be asked by both the investor and the state. They are left totally unanswered since maximum freedom of choice is to be given to the parties. The main reason for giving the parties such immense freedom is that without this feature the states would never have agreed to join the convention.[45]

An issue worthy of consideration is whether it was essential to sacrifice the clarity of the convention for the sake of added membership. Initially, it was hoped that the Latin American countries would join the ICSID. But despite all the concessions made, they have kept away en bloc and still show no sign of ratifying the convention.[46] Countries like India, Lebanon, Spain, Australia, and most of the oil-producing countries have also remained aloof.[47] From a superficial analysis it appears that countries which have a better bargaining position have chosen not to ratify the convention. Thus it would have been better to insist on maintaining the clarity of rules rather than trying to please every state. Those countries which were genuinely interested in encouraging foreign private investment still would have joined.

Consent, as an underlying factor of the convention, has been hailed

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[43] Szasz, *A Practical Guide to the Convention on the Settlement of Investment Disputes*, 1 CORNELL INT'L L.J. 1, 15 (1968).

[44] ICSID Convention, *supra* note 1, at art. 26.

[45] *See, e.g.*, Memorandum of the Meeting of the Committee of the Whole 1-2, para. 6 (Dec. 27, 1962)(Statement of Mr. Illanes), *reprinted in* 2 HISTORY OF THE CONVENTION, *supra* note 1D, at 61-62; Memorandum of the Meeting of the Committee of the Whole 3-4, para. 12 (May 28, 1963)(Statement of Mr. Chen), *reprinted in* 2 HISTORY OF THE CONVENTION, *supra* note 6, at 88-89.

[46] *See* Szasz, *supra* note 5, at 258.

[47] See, ICSID, 15TH ANN. REP., *supra* note 2, 5-6 for a listing of member countries as of August 1, 1981.

as the strongest point of the rules.[48] But this factor seems to have been exaggerated to induce the states into joining ICSID. As a result, too much flexibility has defeated the purpose of the Centre in providing an efficient dispute settlement process.

4. Articles 53-55 — Enforcement of Awards

Another section of the convention which has been much discussed and praised is the enforcement section.[49] This section is definitely progressive and significant since it evidences a tendency towards cooperation in international law, and a gradual willingness to accept limitations on the doctrine of sovereignty. There is, however, a great deal of difference between idealistic jurisprudence and practical rules. The enforcement proceedings have not been tried on the touchstone of reality.[50] Awards have been given in only four cases, and little is known about these awards.[51]

The enforcement provisions would be more effective if the deterrent factors were stronger. ICSID being a protégé of the World Bank should have been able to utilize the Bank's influence. But again this was not possible. An administrative link with the Bank was vehemently protested against, and necessarily deleted.[52] The most vehement protest came from India which later did not ratify the convention.[53] ICSID is the only arbi-

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[48] The Report of the Executive Directors which accompanied the final Convention asserts that "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors in the Convention on the Settlement of Investment Disputes Between States and Nationals of other States 8, para. 23 (Mar. 18, 1965), *reprinted in* 2 HISTORY OF THE CONVENTION 1069, 1077.

[49] As of August 1, 1981, India still is not a signatory to the Convention. ICSID, 15TH ANN. REP., *supra* note 2, at 5.

[50] 20 INT'L LEGAL MATERIALS 877 (No. 4, July 1981); Judgment of ___, ___, Cour d'Appel, Paris ___. This judgment, concerning the recognition and enforcement of an award in the context of ICSID, reveals the advantages of an ICSID award.

[51] Awards have been granted in the following four cases: Adriano Gardella SpA v. Government of Ivory Coast, (ARB/74/1)(award rendered Aug. 29, 1977, corrected Oct. 13, 1977); AGIP SpA v. Government of the People's Republic of the Congo, (ARB/77/1)(award rendered Nov. 30, 1979); Société Ltd. Benvenuti & Bonfant Srl v. Government of the People's Republic of the Congo, (ARB/77/2)(award rendered Aug. 7-8, 1980); Guadalupe Gas Products Corp. v. Federal Military Government of Nigeria, (ARB/78/1)(award embodying the parties' settlement rendered July 22, 1980). None of the awards had been published at this writing. However, at the time of publication, the awards of AGIF, SpA and Benvenuti & Bonfant appear in 21 INT'L LEGAL MATERIALS 726, 740 (No. 4, July 1982).

[52] *See* ICSID Convention, *supra* note 1, at art. 67. For text of Article 67 see *supra* note 41.

[53] ICSID Convention, *supra* note 1, at arts. 53-55. For a discussion of the enforcement provisions of the Convention see Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* [1972] 2 RECUEIL DES COURS at 396-405; Vuylsteke, *Foreign Investment Protections and ICSID Arbitration,* 4 GA. J. INT'L

tral institution with the advantage of having the World Bank as its godfather. It would have been difficult to arrive at a consensus on what role the Bank would play, but it would have been possible as in the case of the enforcement articles. Although this would not have cured the whole problem, it would have a greater deterrent effect than any other provision.

III. ICSID IN THE THIRD WORLD

Another factor contributing to the paucity of cases and to the general lack of efficacy of the Centre is that many important capital importing States have refused to join the Centre.

A. *Latin America*

None of the Latin American countries have ratified the convention.[54] This is significant since a 1974 American State Department study showed that of the 143 foreign investment disputes registered between July, 1971 and July, 1973, 69 percent (84) were in Latin America.[55]

The basis of the Latin American countries' objection to the convention is the 'Calvo Clause'.[56] The doctrine underlying the clause expounds the theory that no state should intervene in any way whatsoever in the affairs of another state.[57] This was the consequence of years of exploitation and intervention by colonialist states in the affairs of the third world nations.[58] It forbids any foreign state from interfering in the affairs of the Latin American states on the pretext of protecting its nationals. The doctrine also states that aliens should be given the same status as citizens.[59]

It is evident that the purpose of the Convention, which is to provide a special centre for arbitration between states and aliens, is antithetical to the main philosophy of the Calvo Clause; it gives foreign investors a legal status different from that of the investors of the same nationality.

& COMP. L. 343, 357-60 (1974); West, *Award Enforcement Provisions of the World Bank Convention*, 23 Arb. J. (n.s.) 38 (1968).

[54] *See* Press Release No. 57 (Sept. 9, 1964) (Statement of Felix Ruiz, Governor for Chile), *reprinted in* 2 HISTORY OF THE CONVENTION, *supra* note 6, at 606.

[55] BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T STATE, *supra* note 23, at 1.

[56] *See* Szasz, *supra* note 1C, at 260-63; *Developments in International Commercial Arbitration — Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131, 139, (1976). For the suggestion that the Latin American resistance to arbitration of investment disputes may be weakening, see Aksen, *Commercial Arbitration with Latin America: A Practical Assessment* in REFERENCE MANUAL ON DOING BUSINESS IN LATIN AMERICA 112 (1979).

[57] Note, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L.F. 289, 289 n.2 (19__) (citing C. CALVO, INTERNACIONAL TEORICO Y PRACTICO 22 (1868)).

[58] *Id.* at 289.

[59] *Id.* at 290.

The Calvo Clause lives on, for in December 1970, the Andean Foreign Investment Code was adopted by Chile, Peru, Columbia, Equador and Bolivia.[60] Article 51 of the Code states:

> No investment relating to investment or transfers of technology may contain any provision which would remove potential conflicts or controversies from the national jurisdiction and competence of the receiving country or which would permit a state to be subjugated to the rights and causes of action of its nationals who are investors.[61]

Argentina has also separately incorporated this as law.[62] The Venenzualian Constitution contains an article to the same effect.[63]

An argument against the position of Latin American countries is that, '[w]hile an agreement by a State to submit to international arbitration admittedly implied some limitation of national sovereignty, one of the essential attributes of sovereignty was the capacity to accept limitations on it, which is what happened whenever a state entered into an international agreement.'[64] Latin American suspicion of the Centre seems unfounded, and there is no means of meeting their objections without detracting from the basic purpose for which ICSID was created.

B. Libya — A Hypothetical Analysis

Libya is another country which has chosen not to ratify the convention.[65] This is in conformity with the other oil-producing countries of the Middle East and probably the decision owes itself to their relatively

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[60] Andean Foreign Investment Code, *done* Dec. 30, 1970, *reprinted in* 11 INT'L LEGAL MATERIALS 126 (1971). For commentary on the Code see Dañino, The Andean Code After Five Years, 8 LAW. AM. 635 (1976); Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972). For a thorough review of Latin American law regarding foreign investment disputes see Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Factfinding*, 7 LAW & POL'Y INT'L BUS. 813 (1975) and Rogers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 1 (1978).

[61] Adean Foreign Investment Code, *supra* note 60, at art. 51.

[62] Foreign Investments Law, art. 1 (Aug. 13, 1976), *reprinted in* 15 INT'L LEGAL MATERIALS 1364, 1367 (1976). The article provides that "[f]oreign investors . . . shall have the same rights and obligations that the Constitutions and laws grant to national investors . . . . " *Id.* For a discussion of the scope of the law see McKinnis, *The Argentine Foreign Investment Law of 1976*, 17 COLUM. J. TRANSNAT'L L. 357 (1978).

[63] Constitución art. 127 (Venez.), *reprinted in* 4 A. PEASLEE, CONSTITUTIONS OF NATIONS 1309 (rev. 3d ed. 1970).

[64] Settlement of Investment Disputes, Consultative Meeting of Legal Experts (Santiago, Feb. 3-7, 1964), Summary Record of Proceedings 4 (June 12, 1964), (Statement of Mr. Broches, Chairman), *reprinted in* 2 HISTORY OF THE CONVENTION 298, 303.

[65] As of August 1, 1981 Libya has not signed the Convention. ICSID, 15TH ANN. REP., *supra* note 2, at 6.

higher bargaining powers. Libya's reasons for not joining ICSID cannot be fathomed from the documents of the preparatory meeting of African nations held in Addis Ababa since the only comment of the two Libyan delegates was an opening remark that Libya would cooperate.[66] The reason, therefore, for its non-ratification of the convention must be found elsewhere. An interesting study in this case would be to consider the ad hoc arbitration between Texaco Overseas Petroleum Company (TOPCO) and Libya[67] and hypothesize what the result would have been had the dispute been brought to the Centre.

In the arbitration between TOPCO and Libya, Libya claimed that there was neither any dispute nor any breach of contract between the Minister of Petroleum, and the company.[68] Libya therefore refused to participate in the arbitration, except for a memorandum submitted to the President of the International Court of Justice.[69] According to the provisions of the contract if the parties could not agree on the constitution of a tribunal, the dispute would be appointed by the President of the International Court of Justice.[70] The company thus took the matter to the Court, and the President appointed Professor René-Jean Depuy as the sole arbitrator. The arbitrator then proceeded to determine the dispute, and the final award was given on January 19, 1977.[71] The arbitrator held Libya in breach of contract and ordered the state to perform its obligation under the agreement.[72]

Assuming arguendo, that Libya had ratified the convention and that

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[66] Settlement of Investment Disputes, Consultative Meeting of Legal Experts (Addis Ababa, Dec. 16-20, 1963), Summary Recors of Proceedings 9 (Apr. 30, 1964)(Statement of Mr. Lamin), *reprinted in* 2 HISTORY OF THE CONVENTION 236, 247.

[67] Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 53 I.L.R. 389, 393 (1979) (Depuy, Arb.)(Preliminary Award), 53 I.L.R. 389, 422 (1979)(Depuy, Arb.)(Award on the Merits), *reprinted in* 17 INT'L LEGAL MATERIALS 1 (1978) [hereinafter cited as *TOPCO*].

Robert von Mehren and P. Nicholas Kourides, counsel for *TOPCO* in the arbitration, have written the definitive article on the *TOPCO* arbitration. *See* von Mehren & Kourides, *supra* note 10; *see also* Casenote, *Petroleum Concessions in International Arbitration*, 18 COLUM. J. TRANSNAT'L L. 257 (1979); Lalive, *Un Grand Arbitrage Pétrolier entre un Gouvernement et Deux Sociétés Privées Étrangères*, 104 J. DU DROIT INT'L 319 (1977).

[68] 53 I.L.R. at 415-16 (Preliminary Award).

[69] The Memorandum of the Libyan Government accompanied a letter dated July 26, 1974 sent by the Libyan Government to the President of the International Court of Justice. *See* 53 I.L.R. at 415-19 (Preliminary Award)(discussing the various arguments raised in the Libyan Memorandum); *see also* von Mehren & Kourides, *supra* note 10, at 489; Casenote *supra* note 67, at 263.

[70] G Deeds of Concession, cl. 28(3), *reprinted in* 53 I.L.R. at 403 (Preliminary Award) and von Mehren & Kourides, *supra* note 10, at 481.

[71] 53 I.L.R. 422, 511 (Depuy, Arb.) (Award on the Merits), *reprinted in* 17 INT'L LEGAL MATERIALS 1 (1978).

[72] *Id.* at 511.

the concession had contained the necessary arbitration clause, let us try to evaluate whether the award would have been significantly different. Libya would have denied the centre jurisdiction on the grounds that there was no dispute. However, under the ICSID rules a party cannot frustrate arbitral proceedings once consent is given.[73] Therefore, like in the TOPCO award, the arbitration would have gone on.

The makeup of the ICSID tribunal has changed many times. ICSID rules provide that in the case of a disagreement or inability to nominate the arbitrators, either of the parties may request the Chairman of ICSID to nominate the arbitrator.[74] In this case since the parties could not have agreed upon the nomination of the sole arbitrator, the Chairman would have been requested to form the tribunal by the Company. In the event of disagreement, ICSID provides for a three-man tribunal.[75] There TOPCO would have chosen its arbitrator. Libya would have been informed of their choice and if Libya still refused to nominate an arbitrator within 90 days after the dispatch of the notice of registration of the request, then the Chairman would nominate the arbitrator for Libya.[76]

It is therefore possible that Libya would have had some advanage under ICSID rules. Instead of a sole arbitrator rendering the award, the ICSID award would have been the result of the collective wisdom of the three arbitrators, among whom would have been included a member from the third world. When one compares the radically different reasonings and conclusions of the two sole arbitrators in the TOPCO and the British Petroleum cases, the impact of a broader representation on the tribunal is clearly foreseeable.[77] In both cases the facts were identical. Yet one issue

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[73] The Convention provides that once consent is given "no party may withdraw its consent unilaterally" ICSID Convention, *supra* note 1, at art. 25(1).

[74] *Id.* at art. 38.

[75] *Id.* at art. 37(2)(b).

[76] *Id.* at art. 38. This scenario was played out in the *Alcoa Minerals* arbitration before the Centre. Alcoa Minerals chose Mr. Elihu Lauterpacht who later resigned and was replaced by Sir Michael Kerr. The Government of Jamaica failed to nominate an arbitrator, and the Chairman nominated Mr. Fuad Rouhani of Iran to represent Jamaica and Mr. Jorgen Trolle as the President of the tripartite board. *See* ICSID, 15TH ANN. REP., *supra* note 2, at 34-35. Mr. Trolle is currently the President of the new Danish Arbitration Center. *See* Pedersen, *International Arbitration in Denmark,* 14 CASE W. RES. J. INT'L L. 259 (1982)(outlining the development and procedures of the Danish international arabitration center).

[77] *Compare TOPCO,* 53 I.L.R. 393 (Depuy, Arb.) (Preliminary Award) *and TOPCO,* 53 I.L.R. 422 (Depuy, Arb.)(Award on the Merits), *reprinted in* 17 INT'L LEGAL MATERIALS 1 WITH BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic, 53 I.L.R. 297 (1979)(Lagergren, Arb.)(Award on the Merits) [hereinafter cited as *BP*] For a graphic comparison of these two apparently identical cases see van de Berg, *Comparative Table TOPCO v. LIBYA AND BP v. Libya,* 5 Y.B. COM. ARB. 161 (1980)(International Council for Commercial Arbitration).

It has been suggested that the disparate results in *TOPCO* and *BP* may be attributed,

discussed by the two arbitrators clearly illustrates the point. Both the companies requested the arbitrators to order the states to perform their obligations under the contract.[78] Mr. Depuy in the TOPCO arbitration decided that *restritutio integrum* would be the principal remedy in that case.[79] He found that it was a principle in Libyan law supported by international law and practice. In support of the latter proposition he mentioned the *Chorzow* case, the *Mavrommatis*-case, the *Anglo-Iranian Oil Co.* cause, and the Barcelona Traction case.[80]

In the British-Petroleum (BP) case the arbitrator found that *restitutio in integrum* was not available as a remedy.[81] He determined that under Libyan law no conclusive opinion could be formed since the argument presented by the claimant was not sufficient to warrant such an opinion. But the surprising departure from Mr. Depuy's reasonings occurs when the arbitrator discusses the standing of the remedy under international law. He refers to most of the cases mentioned in the TOPCO case, and concludes that in none of these cases was such a remedy awarded.[82] As a result, he concluded that *restitutio in integrum* was not supported by international case law and practice, and the only remedy available was damages.[83] Similarly Mr. Depuy decided in the TOPCO arbitration that despite the nationalization by Libya, the concession still remained binding on the parties.[84] The arbitrator in the BP case felt that nationalization terminates the concession.[85] In an ICSID tribunal, the fact that there would be three arbitrators could have been in Libya's favour.

Similarly in the TOPCO arbitration Mr. Depuy does not discuss the effect of Libya's default. The ICSID Convention on the other hand specifically provides that the "failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions."[86] This is the only 'jus co ans' of the Centre's rules and cannot be altered even by the parties' agreement.[87]

As far as procedural rules and applicable substantive law are con-

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at least partially, to the differing modes of issue presentation adopted by counsel in each case. *See* von Mehren & Kourides, *supra* note 10, at 490.

[78] *TOPCO*, 53 I.L.R. at 437; *BP* I.L.R. at 323.

[79] *TOPCO*, 53 I.L.R. at 507-08.

[80] *See id.* at 497-501. The arbitrator also found support for *restitution in integrum* in the writings of international legal scholars. *Id.* at 501-07.

[81] *BP*, 53 I.L.R. at 348.

[82] *Id.* at 334-48.

[83] *Id.* at 355.

[84] *TOPCO*, 53 I.L.R. at 462.

[85] *BP*, 53 I.L.R. at 354.

[86] ICSID Convention, *supra* note 1, at art. 45(1).

[87] The use of the imperative "shall not" and the lack of the ubiquitous phrase "except as the parties otherwise agree" indicates that the parties may not alter the effect of Article 45(1).

cerned, Libya would have been in a similar position even under the ICSID rules. In the case of the procedural rules, ICSID arbitrators also have the power to decide any procedural issue not covered by the convention rules.[88] Hence it is most likely that the ICSID tribunal would have followed a similar procedure where the convention rules were silent. In the area of applicable law, the agreement of the parties would be honoured in both the tribunals.

A difference could have arisen in the provisions of the award. It is likely that an ICSID tribunal would only grant monetary damages. It is equally likely that the counsel for TOPCO would have only asked for damages and not *restitutio in integrum*, since the Convention has a specific provision to enforce the pecuniary obligations of an award which are binding on every state.[89]

Furthermore, even if the award was limited to monetary damages, Libya would have refused to comply with the award on the ground that the ICSID rules provide the doctrine of 'sovereignty' as a defence against execution.[90] In this respect, Libya would have been at a greater disadvantage since such a refusal would be considered a breach of treaty obligations, and Libya could not have disregarded the ICSID award with the same impunity as it did in the TOPCO award.[91]

Thus in an ICSID tribunal, the only way Libya's interests woud have been better protected is that there would have been a three-man tribunal which may have involved more discussion among the arbitrators before the award was given. But from Libya's point of view, this must be an acceptable sacrifice to avoid the binding obligations of the enforcement provisions of the convention. The enforcement provisions appear to be the factors which keep Libya from joining the ICSID.

C. *Summary*

A general analysis of the viewpoints of the various countries discussed, and others like Spain, Lebanon, and Saudi Arabia supports three basic conclusions:

1. Most capital-importing states which have chosen to keep away from ICSID seem to be countries with superior bargaining powers in relation to private investors.
2. The countries are aware that ICSID membership may enhance their status in the eyes of private investors, but know that they have resources

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[88] ICSID Convention, *supra* note 1, at art. 44.

[89] ICSID Convention, *supra* note 1, at art. 54.

[90] ICSID Convention, *supra* note 1, at art. 55. *See* Report of the Executive Directors, *supra* note 41, at 1083.

[91] Libya and *TOPCO* reached a post-award settlement on September 25, 1977. *See* von Mehren & Kourides, *supra* note 10, at 546 n.274 (and authorities cited therein).

like oil and minerals which induce investors to do business with them even though they have not ratified the convention; and
3. Since joining ICSID is not essential for economic reasons, these countries will not join the Centre and take on burdensome obligations which they will then be compelled to fulfill.

To these third world countries, ICSID is a superfluous institution which they do not really need, and therefore, modifying ICSID rules in an attempt to persuade them to ratify the convention may be an exercise in futility. But the omission of these countries, as well as others, has produced a dilution of the Centre's potential.

IV. ALTERNATIVES TO ICSID

The Centre has definitely not failed. It has made slow and gradual progress. It was the unfounded optimism of the Bank Directors that paved the way for the feeling that the Centre has been a failure. Though ICSID started to function in 1966, the first dispute was registered in 1972,[92] the next in 1974.[93] Since then nine disputes have been registered in the last seven years.[94] With more publicity and a few more satisfactory awards like the one in the dispute involving the Ivory Coast, more confidence will be engendered in the process.

A. Conciliation

One more point is relevant. Is there an alternative to the Centre? Would the Centre have been more successful if it had been created only as an institution for conciliation? Thus far there have been no disputes brought to the Centre for conciliation. Since the Centre is primarily for arbitration, it is rarely thought of as a center for conciliation. A conciliation centre would definitely have had a larger membership, because the controversial points, like the applicable law and the enforcement proceedings would have been absent.[95] There would have been more recourse to

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[92] Holiday Inns/Occidental Petroleum v. Government of Morocco, (ARB/72/1) was registered January 13, 1972. ICSID, 15TH ANN. REP. 30 (1981).

[93] Adriano Gardella SpA v. Government of Ivory Coast, (ARB/74/1) was registered March 6, 1974. ICSID, 15TH ANN. REP. 33 (1981).

[94] *See* ICSID, 15TH ANN. REP. 30-43 (giving a complete chronology of the disputes registered with the Centre as of June 30, 1981).

[95] Conciliation procedures under ICSID aim at achieving "agreement between [the parties] upon mutually acceptable terms." ICSID Convention, *supra* note 1, at art. 34(1). Choice of law questions are irrelevant to the conciliation process and furthermore, the parties are not bound by the settlement terms reached by the Conciliation Commission. As one commentator has noted, "Conciliators may recommend, arbitrators must decide. The Convention imposes a duty on parties to conciliation proceedings to 'give their most serious

the Centre, for the dispute-settlement process of conciliation not binding. In statistical terms, the Centre would definitely have been more successful, but the question would arise whether the purpose of the Bank would have been fulfilled by a mere conciliation Centre.

The purpose of the Centre is to improve the investment climate and to encourage private investment by giving investors an efficient and effective Centre to bring their disputes.[96] Would a conciliation Centre have effected this purpose? Arguably not. A conciliation, can by definition, be conducted if both parties take part in the entire procedure. The process cannot go forward without the cooperation of the state from the beginning to the end since the decision must be acceptable to both parties. In the three arbitral disputes with Jamaica that were brought to the Centre, conciliation would not have been possible in any of them because Jamaica refused to accept the jurisdiction of the Centre.[97] Thus a conciliation Centre would not provide the guarantee that an Arbitration Centre provides, and therefore the purpose of the directors would not be fulfilled by such institution.

B. Insurance

Another alternative to the Centre is an international insurance agency.[98] This would give the private investors the necessary guarantee that they would not lose the invested money as a result of the unilateral actions of the state. In turn private investors would be encouraged to invest more in developing countries. The purpose of the Bank would be satisfied here. An international insurance agency unlike the arbitration Centre, would be much more expensive, and the states would be unwilling to bear any expenses on this account. In arbitration, the cost of appointing and the fees paid to the arbitrators or conciliators is borne by the respective parties, and the cost accruing to the Centre is very slight.[99] Moreover this type of an institution would not help to improve the investment climate but only guarantee the losses to the investors. Thus this

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consideration to [the Conciliation Commission's] recommendations' (Article 34), while parties to arbitration proceedings 'shall abide by and comply with the terms of the award" (Article 53(1))." Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, [1972] 2 RECUEIL DES COURS at 337.

[96] *See supra* note 7 and accompanying text.

[97] *See supra* note 4 and authorities cited therein.

[98] The structure and role of such an investment insurance agency, though beyond the scope of this article, are deserving of further study. The Overseas Private Investment Corporation (OPIC) may provide an interesting model for such an international insurance agency. *See* D. SMITH & L. WELLS, *supra* note 9, at 143. For a recent discussion of OPIC see Lipman, *Overseas Private Investment Corporations Current Authority and Program*, 5 N.C.J. INT'L L. & COM. REG. 337 (1980).

[99] *See* ICSID Convention, *supra* note 1, at arts. 59-61.

also would not serve the primary purpose for which the Centre was instituted.

V. Conclusion

1. The advantages that ICSID rules hold for the private investor as well as the state should be *publicised* in a better manner, so that there is no paucity of materials about ICSID.

2. ICSID should propose a few amendments to the convention rules:

(a) to *reduce* the *vagueness* of the rules;
(b) to *reduce* the lengthy and complicated *procedure* to be followed in each dispute;
(c) to *cutdown* the amount of *freedom* that is given to the parties, especially to create proper and acceptable procedural rules so that the freedom given to the parties to form their own procedural rules may be deleted.

3. Provisions allowing each dispute to be arbitrated where it arises should be incorporated. The same rules may be maintained, but a change of this type would not only help to cut down the expenses for the parties involved, but would also increase the confidence the states would have in the dispute-settlement process. It would not affect the Convention in any other way but at the same time it may act as an incentive for non-members to ratify the Convention. Most of the state-members would have national arbitration centres and arrangements could be made with these institutions to make use of their facilities.

4. It would be beneficial if the Administrative Council arrived at a consensus as to the influence that the Bank could exert on its members in forcing them to enforce an award against themselves, at least with respect to the pecuniary obligations.

5. The Centre should be thrown open to disputes between parties even if the state party is a non-ratifier of the convention. (This has to be limited to the state party, because in the case of the private investor, it will be difficult to get his state to accept the enforcement obligations on his behalf). Once the state consents to the arbitration, the Convention should be regarded as binding on it, in the particular dispute to which consent has been given. The Administrative Council should also consider the possibility of widening the jurisdiction to legal disputes *other* than those rising directly out of an investment. The Additional Facility Rules, recently introduced, allow the use of the Centre's facilities to parties or disputes falling outside the Centre's jurisdiction, but do not bind the parties to follow the Centre's rules.[100]

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[100] ICSID Rules Governing the Additional Facility for the Administration of Proceed-

These are some of the changes that can be made to the present form. It may take some time before the Administrative Council can arrive at a consensus, but nevertheless it would definitely be worth pursuing.

The time to give up hope is not yet here. In international law, history will attest to the fact that 15 years is not long enough for a new idea to be accepted. ICSID is far from perfect, but it is certainly a big step forward in enhancing the climate for private foreign investments. Allowed more time, and the right type of encouragement the Centre may still live up to the dream that its creators envisaged.

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ings by the Secretariat (Additional Facility Rules) (1978), *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION 110 (C. Schmitthoff ed. 1980). For commentary on the Additional Facility Rules see Broches, *The 'Additional Facility' of the Investment Disputes (ICSID)*, 4 Y.B. COM. ARB. 373 (1979) (International Council for Commercial Arbitration).