

The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s

I. INTRODUCTION

Be wary of the man who urges an action in which he himself incurs no risk.¹

—Giovachino Setanti

Corporate and individual investors alike seek to reduce their overall risk of loss, or variability of projected outcomes, while maintaining an optimal return on their portfolios. According to the capital asset pricing model,² the total variability of any single investment is composed of both systematic or market risk³ and unsystematic or diversifiable⁴ risk. The latter, on the average, accounts for the higher proportion of total variability.

Although an investor's control over the systematic risk of an investment is negligible, that same investor can control elements of unsystematic risk. For those seeking to invest funds or resources in a foreign state, political and jurisprudential uncertainty constitute elements of unsystematic risk. Internal political actions within a foreign state may range from those imposing minor contractual disputes needing a judicial remedy to the extreme of confiscation or expropriation of property. The legal remedies available to the investor may vary from country to country, depending on the sophistication and integrity of local tribunals and judicial systems.⁵ The degree of dispersion of an investor's risk widens

1. G. SETANTI, *CENTELLAS DE VARIOS CONCEPTOS*.

2. *E.g.*, R. JOHNSON & R. MELICHER, *FINANCIAL MANAGEMENT* 417-18 (5th ed. 1982). The capital asset pricing model is a business model used to explain the relationship between the risk of a project and its required return. The model contains an equation which serves to explain this concept: $E(R_e) = R_f + [E(R_m) - R_f]B_e$. $E(R_e)$ represents the expected return on investment in common stock or equity capital; R_f is the risk-free rate; $E(R_m)$ is the expected return in the market; and B_e is the index of systematic risk associated with the firm's stock. If an investment, based upon its risk level, fails to provide a sufficient expected return, then an investor will not invest in that project. For example, if government securities, with a risk level of zero, are providing a ten percent return, then a business project with a risk level of one must provide a return higher than ten percent. Otherwise, the risk averse investor will invest in the government securities.

3. *Id.* Systematic risk measures the extent to which a firm's operating or performance measures covary or move with changes in measures of economic activity. Thus, systematic risk cannot be eliminated by diversification.

4. *Id.* Unsystematic risk is not related to the market but, instead, to the individual security. Thus, unsystematic risk may be diversified away.

5. N. DEAK & J. CELUSAK, *INTERNATIONAL BANKING* 173 (1984).

with an increase in either the probability or severity of unfavorable unsystematic events.⁶

Uncertainty over unsystematic actions may cause a private investor to forsake investing in foreign markets. As a consequence, the investor misses an opportunity for high return and diversification. In addition, the foreign state must seek funds elsewhere, probably at a higher interest rate, or sacrifice further development. If this scenario repeats itself throughout the investing community, the international economic system will be adversely impacted. Thus, it is not difficult to understand the important role that potential political events and jurisprudential concerns can play in any foreign investment decision.

Yet, a program exists which provides greater certainty in financial transactions involving foreign states. For eligible participants, the International Centre for Settlement of Investment Disputes (ICSID) remedies many of the problems caused by potential political or judicial risk. ICSID provides an impartial international forum for the resolution of disputes between foreign investors and host governments.⁷ This process "depoliticize[s] the settlement of investment disputes and provide[s] a climate of mutual confidence between investors and states favorable to increasing the flow of resources to developing countries under reasonable conditions."⁸ The two methods of dispute resolution which ICSID uses are arbitration and conciliation proceedings.

This Note first details the history and structure of ICSID. Next, it explores ICSID's three jurisdictional requirements: personal jurisdiction, consent, and subject matter jurisdiction. A discussion of the definition, or lack thereof, of "investment" under the last element follows. The Note then focuses on the intrinsic benefits of arbitration through ICSID. Finally, the Note considers Article 25(4) of the ICSID Convention, which allows a contracting state to notify ICSID of a class of disputes that it would not consider arbitrable.

II. HISTORY AND STRUCTURE OF ICSID

In the early 1960s, the International Bank for Reconstruction and Development (World Bank)⁹ laid the groundwork for ICSID in con-

6. W. KLEIN & J. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE* 191 (2d ed. 1986).

7. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 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 I.L.M. 532 (1965) [hereinafter ICSID Convention].

8. I. Shihata, Remarks at the Joint Conference on Resolving International Commercial Disputes (Oct. 24, 1985), *reprinted in* NEWS FROM ICSID, Winter 1986, at 9.

9. N. DEAK & J. CELUSAK, *supra* note 5, at 258-59. The World Bank was established in 1945. It is an international organization whose objective is to make or guarantee loans for productive reconstruction or development projects. The Bank is organized along corporate lines. Member nations hold all stock in the Bank and are eligible for loans.

formity with the World Bank's objective of promoting and encouraging private foreign investment.¹⁰ First, the World Bank's General Counsel prepared a Working Paper in the form of a Draft Convention.¹¹ Legal experts representing eighty-six different countries then met in the cities of Addis Ababa (December 16-20, 1963), Santiago de Chile (February 3-7, 1964), Geneva (February 17-21, 1964), and Bangkok (April 27-May 1, 1964). The questions and concerns expressed at these four regional meetings led to the draft of the ICSID Convention. Subsequent to its ratification by twenty countries,¹² the Convention entered into force on October 14, 1966.

Since the effective date of the Convention, however, only twenty-five cases have been brought before ICSID,¹³ a number that barely outnumbers the years of its existence. ICSID's relatively recent establishment, a lack of publicity, and the tendency of parties to settle amicably are the primary reasons for the low number of cases brought pursuant to the Convention.¹⁴ The 1980s have witnessed an increase in the case load of ICSID. Sixteen cases were submitted after 1981. Indeed, during 1988, the number of cases pending before ICSID peaked at eleven. Two explanations for the increase this decade are that more and more agreements now include reference to ICSID arbitration and that parties have a more extensive case history from which to draw guidance.

While ICSID administers the arbitration and/or conciliation proceedings, it does not actually conduct them. This is left to the selected Conciliation Commission or Arbitral Tribunal, whose membership consists of persons from panels which ICSID maintains in accordance with the Convention. If the parties are in agreement, they select any uneven

10. Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, at art. I(ii).

11. Working Paper in the form of a Draft Convention (June 5, 1962), *reprinted in* 2 ICSID, DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 19 (1968).

12. ICSID Convention, *supra* note 7, at art. 68(2).

13. Shihata, *Introduction by the Secretary-General*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, TWENTY-FIRST ANNUAL REPORT 4 (1988) [hereinafter ICSID, 21ST ANN. REP.].

14. It takes time for parties to begin to utilize an ICSID arbitration or conciliation clause within their international investment contracts and further time for a dispute to arise between the parties.

Baker & Ryans, *The International Centre for Settlement of Investment Disputes (ICSID)*, 10 J. WORLD TRADE L. 65, 69-70 (1976). This 1973 survey of international vice-presidents or legal counsels of United States multinational companies found a general lack of familiarity or utilization of ICSID. Out of 165 responses, only 26 firms indicated that they were *familiar* with the Convention.

Baker, *ICSID: An International Method for Handling Foreign Investment Disputes in LDC's*, FOREIGN TRADE REV. 490 (Jan.-Mar. 1987). This updated survey was distributed to the Chief Financial Officers of United States multinational companies. Surprisingly, even with the passage of time, a similar lack of knowledge of ICSID was indicated.

number of conciliators or arbitrators.¹⁵ If the parties are unable to agree, the Convention sets the number of conciliators or arbitrators at three. The parties appoint one arbitrator or conciliator each and then agree on the third who serves as president.¹⁶

The three official languages of ICSID are English, French, and Spanish,¹⁷ although parties thus far have only used the first two languages in proceedings.¹⁸ According to the heading Procedural Languages in both the Arbitration Rules and the Conciliation Rules, parties may use an unofficial language if the Tribunal or Commission, after consulting with the Secretary-General, gives its approval.¹⁹

Once a majority decides an award, it becomes binding on the parties.²⁰ By applying in writing to the Secretary-General, either party may later have this award interpreted,²¹ revised,²² or annulled,²³ through ICSID procedures. These procedures are designed to ensure ICSID's self-

See also Rule 48(4), ICSID Basic Documents: Rules of Procedure for Arbitration Proceedings, ICSID Doc./15 (1985). Rule 48(4), entitled Rendering of the Award, contributes to the lack of general knowledge of ICSID: "The Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal." Recent efforts helping to promote the facilities of the Centre include attendance at conferences and seminars by the Secretariat and publication of ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL.

15. ICSID Convention, *supra* note 7, at arts. 29(2)(a) & 37(2)(a).

16. *Id.* at arts. 29(2)(b) & 37(2)(b).

17. Regulation 34, ICSID Basic Documents: Administrative and Financial Regulations, ICSID Doc./15 (1985).

18. NEWS FROM ICSID, Winter 1988, at 6.

19. Rule 22, ICSID Basic Documents: Rules of Procedure for Arbitration Proceedings, ICSID Doc./15 (1985); Rule 21, ICSID Basic Documents: Rules of Procedure for Conciliation Proceedings, ICSID Doc./15 (1985).

20. ICSID Convention, *supra* note 7, at art. 53.

21. *Id.* at art. 50(1). "If any dispute shall arise between the parties as to the meaning or scope of an award. . . ." *Id.*

22. Article 51(1) reads as follows:

Either party may request revision of the award . . . on the ground of discovery of some fact of such nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

Id. at art. 51(1).

23. *Id.* at art. 52(1).

Either party may request annulment of the award . . . on one or more of the following grounds:

- (a) that the tribunal was not properly constituted;
- (b) that the tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure;
- or
- (e) that the award has failed to state the reasons on which it is based.

Id.

contained operation and its autonomy. Additionally, national courts of each Contracting State must recognize and enforce such an award as if it were a final judgment of a court in that state.²⁴

Although ICSID is an autonomous organization, it still has close ties with the World Bank, as evidenced by its finances,²⁵ its leadership,²⁶ and its seat, located at the principal office of the World Bank in Washington, D.C.²⁷

III. JURISDICTION

Article 25(1) of the Convention sets forth ICSID's jurisdiction:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.²⁸

Thus, three prerequisites—personal jurisdiction, consent of the parties, and subject matter jurisdiction—must be satisfied before ICSID has proper jurisdiction.

A. Personal Jurisdiction

ICSID's personal jurisdiction requirement restricts the parties eligible for dispute resolution to a Contracting State and a foreign investor. Consequently, the reach of ICSID's jurisdictional arm does not extend

24. *Id.* at art. 54(1).

25. *Report and Financial Statements*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, TWENTIETH ANNUAL REPORT 13, 17, 18. According to the arrangement between the World Bank and ICSID, ICSID does not have any resources of its own. The World Bank provides ICSID with the services of staff members and consultants plus other administrative services and facilities, such as travel, communications, office accommodations, furniture, equipment, supplies, and printing. These expenditures do not include any reimbursement of fees and expenses by the parties to arbitration or conciliation and, also, are offset by reimbursements by ICSID from sale of publications and registration fees.

26. Res. No. Ac(17)/Res/55 of ICSID's Administrative Council (on the election of the Secretary-General); Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and Miga*, 1 AM. U.J. INT'L L. & POL'Y 97, 101 (1986).

27. ICSID Convention, *supra* note 7, at art. 2. ICSID's address and phone number are as follows:

1818 H Street, N.W.
Washington, D.C. 20433
U.S.A.
(202) 477-1234

28. *Id.* at art. 25(1).

to investment disputes between Contracting States, between individual investors, or between a Contracting State and one of its nationals.²⁹

The Convention is open for signature on behalf of any state which is a member of the Bank.³⁰ Also, the Administrative Council, by a two-thirds vote, can invite any state which is a party to the Statute of the International Court of Justice to sign the Convention.³¹ As of June 1988, ninety-seven states have become signatories to the Convention,³² and eighty-nine have ratified it.³³ Furthermore, six states have designated constituent subdivisions or agencies as competent to become parties to submitted disputes.³⁴ ICSID can thus boast not only a wide and diverse

29. Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1974-1975* BRIT. Y.B. INT'L L. 227, 229. The limited scope of personal jurisdiction can be explained. "Disputes between private individuals can be settled through municipal systems of law. Disputes between States and their own nationals fall outside the scope of an international convention intended to deal with foreign investment. Disputes between States may be settled under traditional international law." *Id.*

30. ICSID Convention, *supra* note 7, at art. 67.

31. *Id.*

32. *List of Contracting States and Signatories of the Convention* (as of June 30, 1988), ICSID, 21ST ANN. REP. 6 (1988). The following is a regional breakdown of contracting states:

Africa - People's Republic of Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, People's Republic of the Congo, Côte d'Ivoire, Gabon, The Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Tunisia, Uganda, Zaire, Zambia;

Asia - Afghanistan, Bangladesh, Japan, Republic of Korea, Nepal, Pakistan, Sri Lanka;

Western Europe - Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland;

Eastern Europe - Hungary, Romania, Yugoslavia;

Southern Pacific - Fiji, Indonesia, Malaysia, New Zealand, Papua New Guinea, Philippines, Singapore, Solomon Islands, Western Samoa;

North America - United States of America;

Central America & Caribbean - Barbados, El Salvador, Jamaica, St. Lucia, Trinidad and Tobago;

South America - Ecuador, Guyana, Paraguay; and,

Middle East - Arab Republic of Egypt, Cyprus, Israel, Jordan, Kuwait, Saudi Arabia, United Arab Emirates.

33. *Id.* at 14-15. Those states who have signed the ICSID Convention but have not yet ratified it are Australia, Belize, Costa Rica, Ethiopia, Haiti, Honduras, Thailand, and Turkey. The ICSID provisions are not in force without ratification.

34. Measures Taken by Contracting States for the Purpose of the Convention: Designation by Contracting States of Constituent Subdivisions or Agencies, ICSID Doc./8-B (1987). On May 7, 1968, the United Kingdom became the first Contracting State to designate to ICSID under Article 25(1). The list of its constituent subdivisions or agencies is as follows: Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Falkland Island (Malvinas) Dependencies, Gibraltar, Hong Kong, Montserrat,

membership, but also the largest number of signatories of any international arbitration treaty.³⁵

The Convention defines the term "national of another Contracting State" to mean any natural or judicial person.³⁶ A corporation qualifies as a judicial person and is considered a national of the state in which it is incorporated or where its headquarters are situated. Under the Convention, however, the parties may agree to treat any judicial person under foreign control which has the nationality of the Contracting State party as a national of another Contracting State.³⁷

B. Consent

Consent is governed by two requirements. First, consent must exist by the time ICSID is seized, and second, it must be in writing. The term "seized" means "to endow (a governmental agency of deliberative body [ICSID]) with the responsibility for action on a matter by placing it on an agenda."³⁸ The parties need not express their consent in a single instrument.³⁹ A bilateral investment protection agreement with the investor's home state⁴⁰ or national investment legislation⁴¹ may contain a host state's consent or it may be given consent *compromis*.⁴² Unless otherwise agreed, the consent of the parties to ICSID renders arbitration the exclusive remedy. As a condition of its consent, however, a Con-

Anguila, St. Helena, St. Helena Dependencies, Turks & Caicos Islands, and Guernsey (Bailiwick of).

The other five Contracting States and their respective constituent subdivision or agency are the following: Nigeria & NNPC (Nigerian National Petroleum Corporation), Madagascar & AKORAMA (Enterprise Nationale d'Hydrocarbure), Sudan & The General Petroleum Corporation, Guinea & MIFERGUI-NIMBA (Societe des Mines de Fer de Guinee pour l'Exploitation des Monts Nimba), and Portugal & Foreign Investment Institute.

35. Broches, *Settlement of Disputes Arising Out of Investment in Developing Countries*, 11 INT'L BUS. L. 206, 208 (1983); NEWS FROM ICSID, Summer 1988, at 2. The number of states which have either ratified or acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is seventy-seven.

36. ICSID Convention, *supra* note 7, at art. 25(2).

37. *Id.* at art. 25(2)(b). See *Holiday Inns v. Morocco*, Case ARB/72/1; AMCO Asia v. Indonesia, Case ARB/81/1; NEWS FROM ICSID, Summer 1985, at 3-6.

38. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2057 (1961).

39. Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *reprinted in* 4 I.L.M. 524, 527 ¶ 24 (1965).

40. NEWS FROM ICSID, Winter 1987, at 6. Currently there are at least 108 bilateral investment treaties containing such references to ICSID. Treaties can be found in the Centre's collection of INVESTMENT TREATIES.

41. *Id.* These laws are included in the ICSID collection, INVESTMENT LAWS OF THE WORLD.

42. *Compromis* is defined as "a formal agreement between nations submitting a dispute to arbitration and defining the terms of the submission, the powers of the tribunal to serve as arbitrator, and the procedure to be followed." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 467 (1961).

tracting State may require the other party to exhaust local administrative and judicial remedies.⁴³ All potential investors should be aware that Israel, currently the only state to do so, has elected this option.⁴⁴

C. Subject Matter Jurisdiction

As the ICSID Convention matured during the drafting process, it shed, like a snake's skin, the structural definition of an "investment." In Article IV, Section 1(3) of the Working Paper in the form of a Draft Convention, the initial rough draft of the ICSID Convention, subject matter jurisdiction was limited to claims of \$100,000 or more United States dollars, unless the parties agreed otherwise.⁴⁵ The writers of the next draft, the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, excluded any monetary limit. They believed that important questions of principle might not qualify under this limit or that the pecuniary value of an investment in dispute may not be ascertainable.⁴⁶ "Investment" was defined in a subsequent draft to be "any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years."⁴⁷

The ICSID Convention, in its final form, however, has omitted this definition for fear that a concrete meaning would limit its scope⁴⁸ and raise unnecessary jurisdictional problems. Consequently, parties to an agreement are free to define the terms between themselves. As a result of this intentional omission, the phrase from Article 25(1), "any legal dispute arising out of an investment," provides the complete basis for all ICSID jurisdiction. The words "legal dispute" limit ICSID's jurisdiction to justiciable disputes involving the existence or scope of a legal right or obligation,⁴⁹ such as non-performance, violation of "stabilization"

43. ICSID Convention, *supra* note 7, at art. 26.

44. Measures Taken by Contracting States for the Purpose of the Convention: Notification Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre, ICSID Doc./8-C (1987).

45. Working Paper in the form of a Draft Convention (June 5, 1962), *reprinted in* 2 ICSID, DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 19, 34 (1968).

46. Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, comment to art. II (Oct. 15, 1963), *reprinted in* 2 ICSID, DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 184, 204 (1968).

47. Draft Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 30 (Sept. 11, 1964), *reprinted in* 2 ICSID, DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 610, 623 (1968).

48. Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 9 (Mar. 18, 1965) *reprinted in* 2 HISTORY OF THE CONVENTION 1069, 1078 (1968).

49. Report of the Executive Directors of the International Bank for Reconstruction

clauses, the interpretation of the agreement, and related issues of compensation.⁵⁰

Because the Convention leaves open the question of "investment," the parties are free to define it in either traditional or non-traditional terms. Traditional forms of investment have included concessions, establishment agreements, joint ventures, loans made by private financial institutions to foreign public entities, and arrangements concerning industrial property rights. Agreements which have become the subject of disputes include the following: (i) the exploitation of natural resources, such as bauxite mining,⁵¹ oil exploitation and exploration,⁵² and forestry exploitation;⁵³ (ii) industrial investments regarding the production of fibers for exports,⁵⁴ or of plastic bottles for domestic consumption,⁵⁵ liquefaction of natural gas,⁵⁶ and the production of aluminum;⁵⁷ and, (iii) tourism development in the form of construction of hotels,⁵⁸ and urban development in the form of housing construction.⁵⁹

Non-traditional forms of investment have included profit-sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing, arrangements and agreements for the transfer of know-how and technology. Illustrations of non-traditional investment include the construction of a chemical plant on a turn-key basis coupled with a management contract providing technical assistance for the operation of the plant,⁶⁰ a management contract for the operation of a cotton mill,⁶¹ a contract for the

and Development on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *reprinted in* 4 I.L.M. 524, 528 ¶ 26 (1965).

50. Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101, 116-17 (1984).

51. *Alcoa Minerals of Jamaica/Kaiser Bauxite Company/Reynolds Jamaica Mines and Reynolds Metals Company v. Jamaica*, Cases ARB/74/2, 3 & 4.

52. *AGIP S.P.A. v. People's Republic of the Congo*, Case ARB/77/1; *Tesoro Petroleum Corp. v. The Government of Trinidad and Tobago*, Case CONC/83/1.

53. *Liberian Eastern Timber Corp. (LETCO) v. The Government of the Republic of Liberia*, Case ARB/83/2.

54. *Adriano Gardella SpA v. Government of Ivory Coast*, Case ARB/74/1.

55. *Société Ltd. Benvenuti & Bonfant srl. v. People's Republic of the Congo*, Case ARB/77/2.

56. *Guadalupe v. Nigeria*, Case ARB/78/1.

57. *Swiss Aluminium Ltd. (ALUSUISSE) and Icelandic Aluminium Company Ltd. (ISAL) v. The Government of Iceland*, Case ARB/83/1.

58. *Holiday Inns/Occidental Petroleum v. The Government of Morocco*, Case ARB/72/1; *AMCO Asia Corp., Pan American Development Ltd. and P.T. Indonesia v. Indonesia*, Case ARB/81/1.

59. *Société Ouest Africaine des Bétons Industriels (SOABI) v. The State of Sénégal*, Case ARB/82/1.

60. *KLÖCKNER Industrie Anlagen GmbH v. The United Republic of Cameroon and Societe Camerounaise des Engrais (SOCAME)*, Case ARB/81/2.

61. *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. The Government of the Democratic Republic of Madagascar*, Case CONC/82/1.

conversion of vessels into fishing vessels and the training of crews,⁶² and technical and licensing agreements for the manufacturing of weapons.⁶³

Consequently, ICSID participants have embraced the notion that an investment can be in any form agreed upon by the parties. No party has objected that the transaction out of which the dispute arose was not an "investment" for the purposes of the Convention.

Yet, the definition, or lack thereof, does have its drawbacks. One commentator believes that when the parties have the power to define the terms, the party with the higher bargaining power will succeed.⁶⁴ This defeats the Convention's goal of treating the parties equally. Another commentator has stated that the terms "legal dispute," "directly," and "investment" are all sufficiently controversial to call for definitions in an interpretative section.⁶⁵

The precise nature of transactions relating to the supply of services may fall into a grey area between investment proper and commercial ventures. To avoid future controversy, ICSID recommends that the parties follow Model Clauses (section 2, paragraph 7).⁶⁶ This encourages parties to "state expressly in the instrument recording their consent that the particular transaction between them constitutes an investment for the purposes of the Convention."⁶⁷ Additionally, ICSID advises that the parties supplement the provision with a description of the particular features of the investment, such as its nature, size, and duration.⁶⁸ If an investment agreement containing an ICSID arbitration clause is intimately related to other arrangements not covered by ICSID, the Convention suggests that the parties provide for ad hoc arbitration

62. Atlantic Triton Company Ltd. v. The Republic of Guinea, Case ARB/84/1.

63. Colt Industries Operating Corp., Firearms Div. v. The Government of the Republic of Korea, Case ARB/84/2.

64. Gopal, *International Centre for Settlement of Investment Disputes*, 14 CASE W. RES. J. INT'L L. 591, 599 (1982).

65. G. SCHWARZENBERGER, *FOREIGN INVESTMENTS AND INTERNATIONAL LAW* 142 (1969).

66. Model Clauses Recording Consent to the Jurisdiction of the International Centre for the Settlement of Investment Disputes, ICSID Doc./5 (1981).

67. *Id.*

68. NEWS FROM ICSID, Summer 1984, at 18.

69. *Id.* at 14.

70. While ICSID is available for conciliation, all but two of the twenty-four cases have dealt with arbitration. As a result, this Note will emphasize arbitration. However, much of what is examined concerning arbitration under ICSID is likewise applicable to conciliation.

71. See Paulsson, *Third World Participation in International Investment Arbitration*, 2 ICSID REV.-FILJ 19, 63-64 (1987).

72. ICSID Convention, *supra* note 7, at arts. 37(2), 38 & 39. Delaume, *ICSID Arbitration Proceedings*, 4 INT'L TAX & BUS. LAW. 218, 220 (1986).

73. Delaume, *ICSID Arbitration Proceedings: Practical Aspects*, 5 PACE L. REV. 563, 575 n.44 (1985).

74. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, FIFTEENTH ANNUAL REPORT 30-43 (1982). *But see* Gopal, *supra*, note 63, at 594. Gopal

incorporating, to the extent necessary, the ICSID rules and designating the Secretary-General as appointing authority.⁶⁹

IV. BENEFITS OF ICSID ARBITRATION

Having established eligible parties for dispute resolution as outlined under the terms of the Convention, another query arises naturally. Why should a party choose ICSID for its arbitration proceedings?⁷⁰ For the investor, the answer is receiving a host state's irrevocable consent and the right to a binding dispute resolution, thereby avoiding litigation in that host state's courts. For the host state, the motivation is enhanced global reputation. This leads to a greater likelihood of investment for development due to investor confidence in receiving an impartial hearing. Moreover, contract prices should be lower because investors will not need to factor in the "legal risk premium" associated with a foreign judiciary.⁷¹ Arbitration allows for a unique solution to the parties' particular problem; consequently, a successful relationship can continue unimpeded. In addition, selection of arbitrators is left completely to the parties, with only a few minor requirements.⁷²

For both parties, arbitration is advantageous because it is relatively fast, inexpensive, and flexible. The average length of time for either a final award or a party settlement under ICSID is approximately two and one-half⁷³ to three years.⁷⁴ ICSID has recently introduced a pre-hearing conference to shorten this time period further.⁷⁵ ICSID's fee is based on the actual costs which its subsidized staff incurs rather than the *ad valorem* or "percentage of the total amount in dispute" system which the International Chamber of Commerce uses.⁷⁶ Also, ICSID

argues that to a party, especially an investor whose capital is frozen, three years is a long period of time.

75. Rule 21, ICSID Basic Documents: Rules of Procedure for Arbitration Proceedings, ICSID Doc./15 (1985). Under Rule 21, a pre-hearing conference between the Tribunal and the parties may be held where information may be exchanged, uncontested facts stipulated, and/or issues considered in dispute.

76. Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L LAW. 521, 524 (1985); Shihata, *Introduction by the Secretary-General*, INTERNATIONAL CENTRE FOR SETTLEMENT INVESTMENT DISPUTES, NINETEENTH ANNUAL REPORT 4 (1986). Secretary-General Shihata noted that ICSID arbitration, while cheaper than that of other institutions, can be expensive. Costs usually exceed \$100,000 (not counting the fees of counsel for the parties).

See also Delaume, *The ICSID and the Banker*, INT'L FIN. L. REV. 9, 12 (1983); Insert in ICSID Basic Documents, ICSID Doc./15 (1985). A \$100 non-refundable registration fee is required at the time of submission of an arbitration or conciliation request. The administrative expenses include the following: (1) \$250 per day for the time spent by the Secretary assigned to a Tribunal of Committee, (2) travel and subsistence expenses of the Secretary, and (3) cost of interpreters, reporters, and rental space. The arbitrators and conciliators' fees are set at Special Drawing Rights (SDR) 600 per eight hour day, plus travel and subsistence expenses. SDR are based on exchange rates for the U.S.,

requests advance payments only to cover expected expenditures for periods of three to six months, whereas other dispute resolution institutions normally require an advance payment to cover full administrative charges.⁷⁷

V. ARTICLE 25(4)

A. Notification by Contracting States

ICSID's acceptance by various states is directly attributable to the articles of its Convention. These articles satisfy the needs of both developed and less developed countries, thus allowing ICSID to reach its present level of membership. Article 25(4) is a good illustration. Under its provisions, "[a]ny Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre."⁷⁸The Secretary-General must then inform all Contracting States of the notification.⁷⁹ Currently, only the following four states have such notification: Jamaica, Saudi Arabia, Papua New Guinea, and Israel.⁸⁰

Jamaica, the first to use Article 25(4), excluded any disputes "arising directly out of an investment relating to minerals or other natural resources."⁸¹ Papua New Guinea has specified that "it will only consider submitting those disputes to the Centre which are fundamental to the investment itself."⁸² Saudi Arabia "reserve[d] the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty" to ICSID.⁸³ Israel has declared that it "shall consider submitting to the Centre only disputes related to an approved investment under one of the Israeli Laws for the Encouragement of Capital Investments."⁸⁴ Guyana did have a notification similar to Jamaica's until recently.⁸⁵ It notified the Secretariat of the Centre on October 23, 1987, however, that upon careful reconsideration of the matter, it "has decided to

West German, British, French, and Japanese currencies. With the U.S. dollar equivalent of the SDR at 1.3, these fees are approximately \$780.

77. Insert in ICSID Basic Documents, ICSID Doc./15 (Jan. 1985).

78. ICSID Convention, *supra* note 7, at art. 25(4).

79. *Id.*

80. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and Miga*, 1 ICSID REV-FILJ 1, 5:5 (1986).

81. Measures Taken by Contracting States for the Purpose of the Convention, *supra* note 44. Notification on May 8, 1974.

82. *Id.* Notification on Sept. 14, 1978.

83. *Id.* Notification on May 8, 1980.

84. *Id.* Notification on June 22, 1983.

85. *Id.* Notification on July 8, 1974.

withdraw the . . . notification and hereby does so.”⁸⁶ This notification stated that “[h]ereafter the Government of Guyana will, in accordance with Article 25 of the said Convention, refer to the Centre legal disputes to which that Article applies and which the parties to the dispute consent in writing to submit to the Centre.”⁸⁷

B. Interpretation of Article

The landmark case in the area of notification is *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*.⁸⁸ In 1968, Alcoa Minerals of Jamaica, Inc. (Alcoa), an American corporation, agreed to construct an alumina refining plant in Jamaica.⁸⁹ In return, the government granted the corporation tax concessions and long-term leases for the mining of bauxite.⁹⁰ Six years later, Jamaica imposed new taxes.⁹¹ Alcoa then sought arbitration pursuant to the ICSID arbitration clause of its agreement with the government. This clause provided that ICSID would arbitrate any disputes which the parties failed to settle amicably. Jamaica, however, had notified ICSID earlier that year that this class of dispute would not be subject to jurisdiction. Deeming this notification to work both prospectively and retrospectively, the government refused to appear at arbitration, considering the matter not subject to ICSID arbitration.⁹² The arbitration tribunal ruled that notification can only operate prospectively⁹³ and that the initial consent of Jamaica was unconditional and unqualified. Thus, according to the ICSID Convention, consent could not be unilaterally withdrawn. Because the terms of a written consent already in effect cannot be altered by Article 25(4), Georges R. Delaume, former Senior Legal Advisor of ICSID, has suggested that “care should be taken to draft the consent clause only as broadly as the parties intend the eventual scope of ICSID authority to be.”⁹⁴

86. NEWS FROM ICSID, Winter 1988, at 10. *But see* Measures Taken by Contracting States for the Purpose of the Convention, *supra* note 44, which states that Guyana on Sept. 29, 1987 notified ICSID of its withdrawal of its earlier notification.

87. Measures Taken by Contracting States for the Purpose of the Convention, *supra* note 44. On October 30, 1987, one week after Guyana's notification, ICSID fulfilled the requirement of transmitting it to all Contracting States as set forth in Article 25(4)'s second sentence.

88. Case ARB/74/2.

89. For a thorough discussion of this case, see Schmidt, *Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L.J. 90, 93 (1976).

90. *Id.* at 93.

91. *Id.* at 94.

92. *Id.* at 95.

93. *Id.* at 103.

94. Delaume, *ICSID Arbitration in Practice*, 2 INT'L TAX & BUS. LAW. 58, 61 (1984).

The *Alcoa* ruling, therefore, shields investors who have contracted from any subsequent change in a country's consent to the jurisdiction of ICSID. Yet even with this protection, nationals of another Contracting State, when considering upcoming investment options, must remain alert to any possible future notification.

C. Value of Article

In light of Guyana's recent withdrawal of its previous notification, a review of the purpose and usefulness of Article 25(4) is timely. A key attribute of this article is its flexibility for states. As discussed earlier, the definition of "investment" is not static. Under Article 25(4), if the current interpretation of "investment" does not fit a state's needs, the state can elect to have a class of disputes eliminated from ICSID jurisdiction. Furthermore, even though a Contracting State has notified ICSID, this does not preclude it from subsequently consenting on an ad hoc basis to ICSID arbitration on that subject.⁹⁵

Is Article 25(4) necessary? Few states use it; only five out of a possible eighty-nine states have elected to notify ICSID during its twenty-two year existence. Nor has any state used it recently; over five years have elapsed since any Contracting State has notified ICSID of investments it would *not* consider submitting to ICSID's jurisdiction. Perhaps the other states are not aware of the provision; this is unlikely, however, considering that the states, as signatories, presumably know the Convention's contents. Additionally, the Secretary-General informs every state of any Article 25(4) notification.

Alternatively, the Contracting States may truly have no need, now or in the future, for the article. If this is true, Article 25(4) may be a superfluous appendage to the ICSID Convention. If desired, a sole Contracting State may propose an amendment to the Convention seeking to have the article repealed.⁹⁶ Article 66(1) requires the Administrative Council to then vote on the proposed amendment.⁹⁷ The Administrative Council is composed of one representative from each Contracting State.⁹⁸ Proposed amendments require a two-thirds majority before they can be circulated for ratification, acceptance, or approval by the Contracting States.⁹⁹

Support for amending the Convention may be found by examining the class or classes of disputes which these states have deemed unsuitable

95. Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 35 INT'L & COMP. L.Q. 813, 816 n.17 (1986).

96. ICSID Convention, *supra* note 7, at art. 65.

97. *Id.* at art. 66.

98. *Id.* at art. 4(1).

99. *Id.* at art. 66(1).

for ICSID arbitration. Both Jamaica and Saudi Arabia exclude natural resources, a traditional form of investment. As today's forms of investment broaden in scope, the emphasis given to natural resources will undoubtedly lessen.

For those states favoring the repeal of Article 25(4), a potentially insurmountable problem arises. Article 66(1) mandates that *all* Contracting States must ratify, accept, or approve the amendment before it can enter into force.¹⁰⁰ Understandably, Jamaica, Saudi Arabia, Papua New Guinea, or Israel may be wary of any change in the status quo. Nevertheless, Article 66(2) provides that "no amendment shall affect the rights and obligations under this Convention of any Contracting State . . . arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment."¹⁰¹ Still, having Conventional Amendments which require the highest threshold possible effectively eliminates amending all but the least controversial elements. Correctional evolution must come from elsewhere.

Finally, Contracting States may know about the provision and may approve of it, although they currently have no need for it. The world market may dictate that a Contracting State acquiesce to the policies of investors in order to compete for development funds. If conditions vacillate, however, a Contracting State may acquire the leverage over investors to selectively exclude investments of its own choice. Regardless of the business environment, a nation rarely relinquishes its sovereignty without receiving something in exchange. Clearly, if Article 25(4) were to be eliminated, investors would gain all and sacrifice nothing. Furthermore, loss of notification would serve as a disincentive for those states considering membership in ICSID.

VI. CONCLUSION

While ICSID cannot eliminate political risk, it has proven to be an effective means for arbitrating a select group of disputes that arise as a result of such risk. By limiting the class of participants and the subject matter to which it applies, it fills a niche not stressed by other international dispute resolution forums. With an ever increasing case load and heightened publicity, ICSID stands to become more widely utilized in the next decade.

As discussed above, the subject matter jurisdiction of ICSID is flexible. The parties themselves control the meaning to be given the term "investment," a power restricted only by their own resourcefulness.

100. *Id.*

101. *Id.* at art. 66(2).

Article 25(4), however, impedes this open construction. Yet, given the realities of the Contracting State/investor relationship, notification will likely remain. To the investor, ICSID acts as insurance which minimizes the risk of foreign investment. To the Contracting State, Article 25(4) is likewise a form of insurance which guards that nation's sovereignty.

Under the Convention, Contracting States have the right to amend their consent to ICSID jurisdiction. Under the Convention, Contracting States also have the right to amend the Convention itself. Neither of these rights should be exercised lightly. Both Contracting States and investors should, however, be aware that these options, while not always viable, do exist.

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