

Towards A Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA

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Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA

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I. INTRODUCTION

The means to settle disputes between states and foreign investors have changed considerably in the course of time. In the last century and in the early years of this one, such disputes were highly politicized and led to the frequent exercise of diplomatic protection, sometimes followed by the use of force.

Latin American countries in particular were exposed to abuses of diplomatic protection and, at times, to armed intervention and occupation by foreign forces dispatched by the governments of foreign investors.² The reaction of these countries found its expression in the formulation of a legal framework that would subject foreign investments to the exclusive

¹ Vice President and General Counsel, World Bank; Secretary-General, ICSID. This is an updated version (up to January 31, 1992) of a paper delivered by the author on July 31, 1985 at the International Congress on Commercial Arbitration held in Rio de Janeiro, Brazil, later published as an article in 1 *ICSID Rev.—FILJ* 1 (1986). At the time of the article's publication, only four Latin American countries had signed the ICSID Convention. The number of Latin American signatories has since more than doubled.

² An example is the famous "Jecker" claim, relating to a loan to Mexico from a Swiss-French banking firm for a nominal amount of 75 million francs, of which Mexico received less than 4 million francs. Nonpayment of 100 percent of this loan was one of the justifications used by the French government for armed intervention in Mexico in 1861-1862. See D. Shea, *The Calvo Clause* 14 (1955).

jurisdiction of the host country. This was the object of the Drago Doctrine, which aimed at forbidding the use of force for the collection of the public debt of Latin American States.³ The most famous theory advanced by the Latin American countries against the institution of diplomatic protection, however, was the Calvo Doctrine. Taking the principle of equality of states as a premise, the Calvo Doctrine denied that foreign nationals were entitled to special rights and privileges and emphasized that controversies related to the claims of such nationals against host states were to be settled exclusively under domestic law and by domestic tribunals. The intervention of the states of such foreign nationals in these controversies was simply seen as a violation of the territorial jurisdiction of the host states.⁴

The implications of this Latin American approach were thus not limited to the principle that disputes with foreign investors should be settled in accordance with the law of the host state and by using local judicial remedies. They included a rejection of any right of the investor's state to exercise diplomatic protection by the espousal of the claims of its national against the host state, unless the latter state itself agreed to international adjudication or arbitration of the dispute between the states involved. The Calvo Doctrine attempted, in other words, to formulate international law rules applicable to the relations among sovereign states. In order to relate it to the relations between a host country and foreign investors, the so-called "Calvo Clause" was devised. Consistently provided in contractual arrangements between Latin American countries and foreign investors, the Calvo Clause binds foreign investors to waive appeal to diplomatic protection, and permits them to seek redress only in the local courts and under the law of the host state.⁵

³ The basis of the Drago Doctrine is a note sent in 1902 by Foreign Minister Drago of Argentina to the United States House of Representatives. For the text of this note, see U.S. Foreign Rel. 1 (1903). See also Drago, *State Loans in their Relation to International Policy*, 1 AJIL 692 (1907).

⁴ The Calvo Doctrine has its source in a number of statements made by the Argentine diplomat and international law writer, Carlos Calvo (1824-1906) in his major work, *Le Droit international théorique et pratique* (5th ed. 1896). See also C. Calvo, *Manuel de Droit international public et privé* 134-37 (1884).

⁵ Shea, *supra* note 2, at 28.

Principles emanating from the Calvo Doctrine were embodied in the constitutions and statutes of Latin American countries and in treaties concluded among them.⁶ Such principles were restated in such inter-American instruments as the famous Decision 24 issued by the Andean Pact Commission in 1970⁷ and the 1976 Opinion on Transnational Enterprises of the Inter-American Juridical Committee.⁸ They even appeared in the 1974 U.N. Charter of Economic Rights and Duties of States⁹ in the drafting of which a leading role was played by Mexico.

⁶ *Id.* at 21-27. For examples of constitutional provisions, see Bolivia Constitut., Article 24; Honduras Constit., Article 33; Venezuela Constit., Article 127. The texts of these and other Latin American constitutions are available in *Constitutions of the Countries of the World* (A. Blaustein & G. Flanz eds. looseleaf service). See also F. Dawson & I. Head, *International Law, National Tribunals, and the Rights of Aliens* 113-22 (1974).

⁷ Approved December 31, 1970 and effective June 30, 1971. U.S. Dept. of State translation at 11 ILM 126 (1972). Article 51 of the Decision provided that "[i]n no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by states to the rights and actions of their national investors." *Id.* at 141. However, Decision 24 has been superseded and the replacement decision of the Andean Pact Commission, Decision 220 of May 11, 1987 (reprinted in 2 ICSID Rev.—FILJ 519 (1987)), leaves to member states the determination of which fora shall be made available for disputes of foreign investors. See Carl, *The New Approach to Latin American Integration and its Significance to Private Investors*, 2 ICSID Rev.—FILJ 335, 338 (1987).

⁸ "Transnational enterprises and the corporations comprising them are not persons under international law and lack *jus standi* in international courts. The American states should abstain from adhering to conventions which in any way grant those enterprises or the corporations comprising them direct access to international courts, including arbitration courts, because this would justifiably place transnational enterprises in an advantageous position over national enterprises. The questions posed by transnational enterprises could eventually be heard by international courts through agreements entered into by the states to resolve their disputes. International courts receive their competence by express consent of the states." Work Accomplished by the Inter-American Juridical Committee During its Regular Meeting Held from January 12 to February 13, 1976 at 147, OAS Doc. OEA/Ser.Q/IV.12 CJI-27 (May 1976).

⁹ Article 2(2)(c) of the Charter provides that:

[Each state has the right to] nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of sovereign equality of states and in accordance with the principle of free choice of means.

G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974). The Resolution was adopted by a large majority (120 states), but the U.S. and five West European countries voted against it, while ten other states, including Canada and Japan, abstained.

It would be a mistake, however, to overstate the value of the Calvo Doctrine in contemporary international law. From the viewpoint of the state whose nationals may have claims against another country, diplomatic protection is an established right under customary international law which cannot be unilaterally denied by any host country. A Calvo Clause may well be binding on the investor who accepts it, as upheld in the *North American Dredging Company* case decided by the United States—Mexican General Claims Commission in 1926.¹⁰ This does not, however, mean that it deprives the government of the investor of its own right to present an international claim for an injury to its own interests arising from the alleged violation of international law that resulted in an injury to its national. Such a claim may be based on denial of justice to the state's national or on other grounds.¹¹ Neither the Calvo Doctrine in its general application, nor any specific Calvo Clause, has inhibited states outside the Latin American region from the espousal of the claims of their nationals against other states, when they deemed such action necessary or appropriate. Diplomatic protection remains very much part of the realities of international life, the Calvo Doctrine notwithstanding.

¹⁰ *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, 4 R. Int'l Arb. Awards 26 (1926).

¹¹ In the *North American Dredging Company* case itself, the Claims Commission, commenting on the investor's waiver of diplomatic protection, asked whether:

Under the rules of international law may an alien lawfully make such a promise, and answered that:

The Commission holds that he may, but at the same time holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage.

Id. at 29.

See also I. Brownlie, *Principles of Public International Law* 546 (1979); L. Oppenheim, 1 *International Law* 345 (H. Lauterpacht ed., 1955); M. Sørensen, *Manual of Public International Law* 592 (1968); American Law Institute, *Restatement (Third) of Foreign Relations Law* § 713 cmt. g (1987).

II. ICSID AS A MEANS OF DEPOLITICIZATION OF INVESTMENT DISPUTES

A. *The Objectives and Main Features of ICSID*

Since the Calvo Doctrine was formulated,¹² new and significant developments have occurred. International organizations have proliferated and the classification of countries underlying Calvo's writings has lost some of its significance. Although foreign direct investments still originate mainly in the U.S. and Europe (and Japan has also become a major source in recent years), investment flows now move in all directions and appropriate international fora provide ample opportunities for the settlement of investment disputes.

The International Centre for Settlement of Investment Disputes (ICSID or the Centre), was created by the Convention on the Settlement of Investment Disputes (the ICSID Convention)¹³ to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to "depoliticize" the settlement of investment disputes.¹⁴

The arrangements made for ICSID's governing body, the Administrative Council, reflect this balance of interests. The Council consists of one representative of each Contracting State, the total number of which is at present ninety-seven. Each representative casts one vote. The ICSID Convention therefore ensures equal representation for all Contracting States. The Administrative Council, it should be noted, approves the Regulations and Rules governing the proceedings relating to investment disputes and elects the Secretary-General of ICSID.

Moreover, ICSID should not be solely regarded as a mechanism for the settlement of investment disputes. Its paramount objective is to promote a climate of mutual confidence between investors and states favorable to increasing the flow of resources to developing countries under

¹² See *supra* note 4.

¹³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [the ICSID Convention]. The ICSID Convention, along with the text of the World Bank Executive Directors' Report thereon, is reprinted in 4 ILM 524 (1965).

¹⁴ See Executive Directors' Report, *supra* note 13, at para. 13. See also Broches, *The Experience of the International Centre for Settlement of Investment Disputes*, in *International Investment Disputes: Avoidance and Settlement* 75,77 (S. Rubin & R. Nelson eds., 1985); Soley, *ICSID Implementation: An Effective Alternative to International Conflict* 19 Int'l Law. 521 (1985).

reasonable conditions. Like the World Bank, with which it is closely associated, or the Multilateral Investment Guarantee Agency (MIGA or the Agency), which I will describe later, ICSID must be regarded as an instrument of international policy for the promotion of investments and of economic development. The main features of the system ICSID's founders devised for this instrument include its voluntary character, its flexibility, and its effectiveness.

1. ICSID's Voluntary Character

ICSID's facilities are available on a voluntary basis. States eligible to join ICSID (members of the World Bank and states invited to sign the ICSID Convention under its Article 67) are obviously free to decline to do so. Their decision has no bearing on their relations with the World Bank itself. Moreover, ratification of the ICSID Convention does not constitute an obligation to use the ICSID machinery. That obligation can arise only after the Contracting State concerned has specifically agreed to submit to ICSID arbitration a particular dispute or class of disputes. In other words, the decision of a state to consent to ICSID arbitration is a matter within the sole discretion of each Contracting State. Under Article 25(4) of the ICSID Convention, any Contracting State may in addition notify ICSID, either at the time of ratification or at any time thereafter, of the class or classes of disputes that it would or would not consider arbitrable under ICSID's auspices. However, only a few Contracting States have made such a notification. Saudi Arabia has indicated that it intends to exclude investment disputes relating to "oil and pertaining to acts of sovereignty" and Jamaica has excluded disputes relating to "minerals or other natural resources." Papua New Guinea has specified that "it will only consider submitting those disputes to the Centre which are fundamental to the investment itself" and Turkey has indicated that it will only consider submitting to ICSID disputes arising out of investments that have been approved in Turkey and do not relate to rights in land.¹⁵

Within this framework, parties have considerably more freedom to determine whether their transaction is suitable for ICSID arbitration than might be assumed from the limitation of the Centre's jurisdiction to investment disputes of a legal character. The ICSID Convention does not define

¹⁵ See Contracting States and Measures taken by them for the Purpose of the Convention 1, Doc. ICSID/8-D (Nov. 1991). With respect to Jamaica's declaration, see also note 37 *infra*. In addition to the declarations referred to in the text, Guyana and Israel had made, but subsequently withdrew, declarations similar to, respectively, those of Jamaica and Turkey.

the term "investment," and this lack of definition, which was deliberate, has enabled the ICSID Convention to accommodate both traditional types of investment in the form of capital contributions and new types of investment including service contracts and transfers of technology.

Disputes submitted to the Centre concerning traditional types of investment have included disputes relating to the exploitation of natural resources, such as bauxite,¹⁶ timber¹⁷ and petroleum;¹⁸ industrial investments, such as the manufacture of fibers¹⁹ and of bottles,²⁰ natural gas liquefaction,²¹ and aluminium production;²² a shrimp-farming joint venture;²³ and the construction of hotels,²⁴ tourist centers,²⁵ and urban housing.²⁶ Disputes relating to new types of "investment" have included disputes arising out of agreements for the construction of a chemical plant

¹⁶ See cases referred to *infra*, note 37.

¹⁷ Liberian Eastern Timber Corp., Letco Lumber Industry Corp. v. Liberia (ICSID Case No. ARB/83/2).

¹⁸ AGIP SpA v. Congo (ICSID Case No. ARB/77/1); Tesoro Petroleum Corp. v. Trinidad and Tobago (ICSID Case No. CONC/83/1); Occidental of Pakistan Ltd. v. Pakistan (ICSID Case No. ARB/87/4).

¹⁹ Adriano Gardella SpA v. Côte d'Ivoire (ICSID Case No. ARB/74/1).

²⁰ S.A.R.L. Benvenuti & Bonfant v. Congo (ICSID Case No. ARB/77/2). See *infra* note 39. See also Rambaud, *Premiers Enseignements des Arbitrages du C.I.R.D.I.*, 23 *Annuaire Français de Droit International* 471 (1982).

²¹ Guadalupe Gas Products Corp. v. Nigeria (ICSID Case No. ARB/78/1); Mobil Oil Corp. et al. v. New Zealand Government (ICSID Case No. ARB/87/2).

²² Swiss Aluminium Ltd. and Icelandic Aluminium Co. Ltd. v. Iceland (ICSID Case No. ARB/83/1).

²³ Asian Agriculture Products Ltd. v. Sri Lanka (ICSID Case No. ARB/87/3).

²⁴ Holiday Inns S.A., Occidental Petroleum Corp. et al. v. Morocco (ICSID Case No. ARB/72/1); Amco Asia Corp., Pan American Development Ltd. and P.T. Amco Indonesia v. Indonesia (ICSID Case No. ARB/81/1). The Holiday Inns case is reported in Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 *Brit. Y. B. Int'l L.* 123 (1980). As in the Klöckner case detailed in *infra* note 27, the Amco Asia case has witnessed two awards, one of which was partially annulled, and two annulment proceedings, the second of which is currently pending. The award that is the subject of the present second annulment proceeding is reprinted in 5 *Int'l Arb. Rep.*, No. 11 at sec. D (Nov. 1991).

²⁵ SPP (Middle East) Ltd. v. Egypt (ICSID Case No. ARB/84/3); Dr. Ghaith R. Pharaon v. Tunisia (ICSID Case No. ARB/36/1). The SPP case was previously the subject of an ICC arbitral proceeding. The ICC tribunal's award was rendered on February 16, 1983, but was subsequently successfully challenged before the Court of Appeal of Paris by the respondent. The decision of the latter court was in turn confirmed by the French Court of Cassation.

²⁶ Société Ouest Africaine des Bétons Industriels v. Senegal (ICSID Case No. ARB/82/1). The award in this case is reprinted in 6 *ICSID Rev.—FILJ* 125 (1991) with an introductory note by N. Ziadé at 119.

on a turnkey basis, coupled with a management contract,²⁷ a management contract for a cotton mill,²⁸ a contract for the equipping of vessels for fishing and training of their crews,²⁹ technical and licensing agreements for the manufacture of weapons,³⁰ and a branch operation of a bank.³¹ Most of these cases, it may be added, related to genuine contractual disputes concerning the interpretation of investment agreements or matters of performance. Only a few concerned unilateral termination of investment agreements, e.g., in the form of outright nationalization or the revocation of investment licenses.

Notably missing from the above inventory of disputes submitted to the Centre are disputes arising out of loan agreements. Parties are, of course, also free to decide not to submit their investment disputes to ICSID, and although provision for ICSID arbitration is sometimes made in transnational loans to foreign governments, it is no secret that lenders often continue to require the judicial adjudication of loan disputes before the domestic courts of New York or London.³²

2. Flexibility of the ICSID System

The rules applicable to ICSID proceedings are flexible in the sense that the parties may derogate from them in order to accommodate their particular needs. For example, most of the provisions regarding the number of arbitrators and the method for their appointment are permissive, and

²⁷ Klöckner Industrie-Anlagen GmbH, Klöckner Belge, S.A., and Klöckner Handelsmaatschappij B.V. v. Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2). See Paulsson, *The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 J. Int'l Arb. 145 (1984); Niggemann, *The ICSID Klöckner v. Cameroon Award: The Dissenting Opinion*, 1 J. Int'l Arb. 331 (1984). The claimants in this case successfully applied to have the award (rendered October 21, 1983) annulled by an ad hoc Committee constituted under the ICSID Convention, art. 52(3). Following the Committee's decision, an English translation of which appears at 1 ICSID Rev.—FILJ 89 (1986), the case was resubmitted to ICSID arbitration. The resubmission led to a second award (rendered January 26, 1988) which was then made the subject of a second annulment proceeding which, however, resulted in the upholding of the award concerned.

²⁸ SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie mbH v. Madagascar (ICSID Case No. CONC/82/1).

²⁹ Atlantic Triton Co. Ltd. v. Guinea (ICSID Case No. ARB/84/1). See *infra*, note 38 and accompanying text.

³⁰ Colt Industries Operating Corp., Firearms Division v. Republic of Korea (ICSID Case No. ARB/84/2).

³¹ Manufacturers Hanover Trust Company v. Egypt and General Authority for Investment and Free Zones (ICSID Case No. ARB/89/1).

³² See Delaume, *ICSID and the Banker*, Int'l Fin. L. Rev. 9 (October 1983).

apply only in the absence of agreement between the parties.³³ The ICSID Arbitration Rules also provide for a preliminary procedural consultation, during which the parties may express their views on such matters as those concerning the language or languages to be used in the proceedings, the sequence of procedural events, apportionment of costs and other matters of interest to them, including the place of the proceedings.³⁴

While they are highly flexible, the ICSID rules are specific enough to ensure that a party cannot frustrate the proceedings. For example, if one of the parties refuses to cooperate in the appointment of arbitrators, the tribunal may still be constituted through the appointment of arbitrators by the Chairman of the Administrative Council. In fact, the Chairman has acted as appointing authority in the majority of ICSID proceedings either in connection with the initial appointment of arbitrators or with regard to their replacement in the event of death or resignation. In that capacity, the Chairman endeavors to consult with the parties prior to making the necessary appointment, and indeed is required to do so "as far as possible."³⁵ Even if a party fails to participate in the proceedings, the ICSID Convention ensures that the proceedings can continue³⁶ and lead to an award. In practice, there has been little occasion for these provisions to be used, in view of the high degree of state participation in the proceedings and of their frequent termination by means of amicable settlement.

³³ The only mandatory provisions of the ICSID Convention in this respect are those according to which: (i) an arbitral tribunal composed of more than a sole arbitrator must include an uneven number of arbitrators (art. 37(2)), (ii) arbitrators must possess certain basic qualities, such as independence, integrity and recognized competence in relevant fields (arts. 14(1) and 40(2)), and (iii) the majority of the arbitrators must be nationals of a state other than the Contracting State party to the dispute or whose national is a party to the dispute (art. 39). This last-mentioned provision will not, however, apply if the sole arbitrator or each individual member of the tribunal has been appointed by agreement of the parties.

³⁴ See Rule 20 of the Rules of Procedure for Arbitration Proceedings as revised on September 26, 1984, reproduced in ICSID Basic Documents 61, Doc. ICSID/15 (Jan. 1985) [hereinafter Arbitration Rules]. It may, however, be useful to recall that, in the context of ICSID arbitration, the place of the proceedings does not have the same significance that it has in regard to other types of arbitration, be it ad hoc or institutional arbitration, which remain subject to a greater or lesser extent to domestic law. In fact, in the case of ICSID, the place of arbitration is (at least so long as it is in an ICSID Contracting State) legally immaterial and its determination is one of pure convenience. The reason for this is that the ICSID rules are truly international and insulated against domestic law in Contracting States.

³⁵ ICSID Convention, *supra* note 13, at art. 38 and Arbitration Rules, *supra* note 34, at Rules 4 and 11.

³⁶ ICSID Convention, *supra* note 13, at art. 45(2).

3. Effectiveness of the ICSID System

While parties are free to decide whether to make use of the ICSID machinery, the ICSID Convention (Article 25(1)) assures both parties that once they have consented to submit disputes to ICSID conciliation or arbitration, neither party can unilaterally revoke its consent. This rule, which is indispensable to ICSID's effectiveness, has been upheld in three decisions of arbitral tribunals in connection with disputes between foreign investors and Jamaica.³⁷

The exclusivity of the ICSID system also contributes to its effectiveness. Under the ICSID Convention (Article 26), consent of the parties to ICSID arbitration is deemed to be exclusive of any other remedy, unless the parties otherwise agree. This rule has several consequences, one of which is that ICSID proceedings are insulated in all Contracting States from any form of judicial intervention or control. In its application by national courts, this principle has on several occasions led to decisions denying the authority of such courts to issue provisional or conservatory measures in the context of ICSID cases unless the parties have agreed otherwise.³⁸

The ICSID Convention furthermore assures the effectiveness of an ICSID award once it has been rendered. Article 53(1) of the ICSID Convention provides that such an award is binding on the parties, while Article 54(2) provides that a party may obtain recognition and enforcement of the award by furnishing a certified copy thereof to the competent court or other

³⁷ In 1974, in spite of a provision regarding the "stabilization" of the relevant tax system, Jamaica decided to increase significantly the taxes payable by the investors. One month before that decision was published, Jamaica notified ICSID that disputes arising out of an "investment relating to minerals or other natural resources" would not be subject to ICSID jurisdiction and sought to give to that notification retrospective effect. Immediately after the enactment of the new tax legislation, the investors affected by it instituted ICSID arbitration proceedings. The arbitral tribunal considered whether they could be deprived of jurisdiction by the ratification of Jamaica and held that the consents to ICSID arbitration given in the investment agreements could not be unilaterally withdrawn through such a notification or otherwise: *Alcoa Minerals of Jamaica, Inc. v. Jamaica* (ICSID Case No. ARB/74/2); *Kaiser Bauxite Co. v. Jamaica* (ICSID Case No. ARB/74/3); *Reynolds Jamaica Mines, Ltd., Reynolds Metals Co. v. Jamaica* (ICSID Case No. ARB/74/4). 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 (1976).

³⁸ See, e.g., *Atlantic Triton Co. Ltd. v. Guinea*, Court of Appeal, Rennes decision of October 26, 1984 24 *ILM* 340 (1985) and *Maritime International Nominees Establishment v. Guinea*, Tribunal of First Instance, Antwerp, decision of September 27, 1985, 1 *ICSID Rev.—FILJ* 380 (1986) and Tribunal of First Instance, Geneva, decision of March 13, 1986, 1 *ICSID Rev.—FILJ* 383 (1986). But by a decision of November 18, 1986 the Court of Cassation of France (reprinted in 2 *ICSID Rev.—FILJ* 182 (1987)), reversing the decision of the Court of

authority designated for the purpose by each Contracting State. This simple procedure eliminates the problems of the recognition and enforcement of foreign arbitral awards, which subsist in domestic laws and under other international conventions. Under the ICSID Convention, there is no exception to the binding character of ICSID awards and the role of the courts of Contracting States is purely to assist in the recognition of ICSID awards. This has been acknowledged by a French decision granting recognition to an ICSID award rendered against the People's Republic of the Congo.³⁹

On recognition, an ICSID award has the same force as a final judgment of a court in a Contracting State.⁴⁰ As such it can readily be enforced against an investor, if the investor refuses to comply with the terms of the award. So far, this issue has not arisen. The situation might be different if

Appeal of Rennes in the Atlantic Triton case, held that the Convention did not preclude provisional measures which could only be excluded by express consent of the parties or by implied consent resulting from the adoption of arbitration rules containing such an exclusion. The 1968 Arbitration Rules of ICSID, which contained no clear exclusion of this type, applied to the arbitration in the Atlantic Triton case. However, the revised Arbitration Rules of 1984 (*supra* note 34) provide in Rule 39(5) that "[n]othing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests."

Examples of provisions retaining the option of seeking judicial assistance for provisional measures are found primarily in financial agreements between banks and foreign governmental borrowers. A suggested text of such a provision may be found in ICSID Model Clauses cl. XVI, at 13, ICSID Doc. ICSID/5/Rev.1 (July 1981).

³⁹ S.A.R.L. Benvenuti [Benvenuti] et Bonfant v. Gouvernement de la république du Congo, Judgment of June 26, 1981, Cour d'appel, Paris, at 108 *Journal du Droit International* 843 (1981). For an English translation of the judgment, see 20 *ILM* 877 (1981). The Court stated that:

[The] provisions [of the ICSID Convention] offer a simplified procedure for recognition and enforcement (exequatur simplifié) and restrict the function of the court designated for the purposes of the Convention by each Contracting State to ascertaining the authenticity of the award certified by the Secretary-General of the International Centre for Settlement of Investment Disputes. . . .

Id. at 881.

Following recognition of the award, Congo complied with it. See 1 *News from ICSID*, No. 2 (1984) at 8. The award itself is published in English translation at 21 *ILM* 740 (1982), with a correction at 21 *ILM* 1478 (1982).

In a second ICSID case, *Société Ouest Africaine des Bétons Industriels v. Senegal*, the Paris Court of Appeal, invoking rules on sovereign immunity from execution, in December 1989 reversed a decision of the President of the *Tribunal de grande instance* of Paris granting exequatur of the award rendered in the case in early 1988. This ruling of the court, has, however, since been quashed by the French Court of Cassation. See Ziadé, *Some Recent Decisions in ICSID Cases*, 6 *ICSID Rev.—FILJ* 514 (1991).

⁴⁰ ICSID Convention, *supra* note 13, at art. 54(1).

the state party to the dispute refused to comply with the award. The reason is that the ICSID Convention does not derogate from the rules of immunity from execution that may prevail in a Contracting State.⁴¹ However, it should be recalled that failure by a Contracting State to honor an ICSID award would be contrary to its obligation under the ICSID Convention to comply with the award and would expose that state to various sanctions set forth in the ICSID Convention.⁴² Second, and possibly more important than considerations of a strictly legal nature, refusal by the state involved to comply with an ICSID award could deprive it of credibility in the international business community.

It should be recalled that out of twenty-six ICSID proceedings, four of which are currently pending, only eight have ended with final awards on the merits and fourteen have been settled and/or otherwise discontinued by the parties.⁴³ This high proportion of settlements is consistent with the objectives of ICSID and should increase as a result of the availability of new procedures intended to facilitate such settlements. The ICSID Arbitration Rules, which were revised in 1984,⁴⁴ now offer a “pre-hearing conference” facility, which may be called by the Secretary-General or by the President of an ICSID arbitral tribunal, or may be requested by the parties. One of the objects of such a conference is to increase the efficiency of the ICSID machinery by permitting early identification of undisputed facts, thereby limiting the proceedings to the real areas of contention.⁴⁵

⁴¹ *Id.* at Article 55. Thus in *Liberian Eastern Timber Corp. v. Liberia*, the respondent state successfully invoked sovereign immunity from execution to have vacated attachments issued in execution of an ICSID award against it. See U.S. District Court decisions reprinted at 2 ICSID Rev.—FILJ 188 (1987) and 3 ICSID Rev.—FILJ 161 (1988).

⁴² Including the resumption of diplomatic protection (*id.* at art. 27) and the right of the Contracting State whose national is a party to the dispute to bring an international claim against the non-complying state (*id.* at art. 64).

⁴³ An ICSID brochure entitled *ICSID Cases*, Doc. ICSID/16/Rev.2 (November 15, 1991), gives information, with regard to each case, on the nature of the dispute, its outcome and the publications in which the case was reported. The same brochure also contains data regarding the composition of ICSID arbitral tribunals and conciliation commissions. This brochure is available from the Centre on request.

⁴⁴ The text of the ICSID Convention and that of the revised Regulations and Rules are consolidated into a new brochure entitled *ICSID Basic Documents*; see *supra* note 34.

⁴⁵ Arbitration Rules, *supra* note 34, at Rule 21(1) provides:

At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.

However, the conference is also intended to further promote amicable settlements following candid reappraisals by the parties of the merits of their respective claims.⁴⁶ Such settlements may take the form of agreements between the parties or be recorded in awards in accordance with the ICSID Rules.⁴⁷

The effectiveness of ICSID cannot, at any rate, be assessed only on the basis of the number of disputes that have been submitted to or settled under the auspices of that institution. When an ICSID clause provides for compulsory arbitration, it is to be assumed that the prospect of involvement in such proceedings will work as a deterrent to the actions which give rise to the institution of proceedings and as an incentive to amicable settlement through negotiations.

B. ICSID and the Calvo Doctrine

In addition to providing a mechanism for the settlement of investment disputes that is voluntary, flexible and effective, the ICSID Convention takes into account specific concerns which, in an earlier era, prompted the formulation of the Calvo Doctrine. An examination of the ICSID Convention's provisions on the exhaustion of local remedies, the application of domestic law, and diplomatic protection should show that the ICSID Convention indeed offers developing countries benefits that may not be obtained even from a wider application of the Calvo Clause.

1. Exhaustion of Local Remedies

The ICSID Convention gives investors direct access to an international forum and assures them that the refusal or abstention of the state party to a dispute to participate in the proceedings after it has given its consent cannot frustrate the arbitral process. But the ICSID Convention (Article 26) also provides that a Contracting State may, as a condition of its consent to ICSID arbitration, require prior exhaustion of local remedies. This condition may be specified in various ways. It could, for instance, be stipulated in the investment agreement, as has been done in agreements concluded by Latin American countries.

⁴⁶ *Id.* at Rule 21(2) provides:

At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

⁴⁷ *Id.* at Rule 43. This was the case in *Guadalupe Gas Products Corp. v. Nigeria* (ICSID Case No. ARB/78/1).

The *Model Clauses*, prepared by the ICSID Secretariat to assist investors and states in drafting ICSID arbitration clauses, acknowledge this option by suggesting the following language for possible insertion in an ICSID clause:

Before [name of investor] institutes an arbitration proceeding in accordance with the provisions of this Agreement, [name of the investor] must exhaust [all local remedies] [the (following) (administrative/judicial) remedies] [, unless (name of the Host State) waives that requirement in writing].⁴⁸

The condition regarding exhaustion of local remedies might also be set forth in a bilateral treaty between the country concerned and the country of the foreign investors.⁴⁹ Another way to accomplish the same objective might result from a declaration made by a Contracting State at the time of signature or ratification of the ICSID Convention that it intends to avail itself of the provisions of Article 26 and will require, as a condition of its consent to ICSID arbitration, the exhaustion of its local remedies. It should be added, however, that among the 97 Contracting States, only one (Israel) has made such a declaration and moreover has subsequently withdrawn it (in 1990).

2. *Application of Domestic Law*

The practice of Latin American countries to stipulate in investment agreements that their relationship with foreign investors will be governed by the law of the host country concerned is also compatible with the ICSID Convention. Under Article 42 of the ICSID Convention, an arbitral tribunal must decide a dispute in accordance with the rules of law agreed by the parties. In fact, many ICSID clauses in investment agreements communicated to the Secretariat provide for the application of the host state's law.⁵⁰ In the absence of a specific agreement on this matter, the ICSID Convention (Article 42(1)) explicitly stipulates that the law of the host state would apply, along with such rules of international law as may be applicable.

⁴⁸ ICSID Model Clauses, *supra* note 38, cl. XIV, at 13.

⁴⁹ This is the solution adopted in, for example, Agreement on the Mutual Promotion and Guarantee of Investments, Feb. 9, 1981, Romania-Sri Lanka, Article 7(2), 2 Investment Treaties (ICSID) Year 1981 1 (1983).

⁵⁰ See G. Delaume, *Transnational Contracts*, ch. 15, para. 15.24 (1982 updating).

3. Diplomatic Protection

As to diplomatic protection, the ICSID Convention takes a radical position. It was recognized at the time the ICSID Convention was finalized that:

When a host state consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his state to espouse his case and that state should not be permitted to do so.⁵¹

This fundamental consideration, which is another aspect of the exclusivity of the ICSID system, finds its expression in Article 27 of the ICSID Convention. That provision expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit to ICSID arbitration.⁵²

Thus, in addition to allowing for the exhaustion of local remedies in the host state and for the application of the domestic law of that state, the ICSID Convention prohibits the investor's state from espousing its national's claim, and therefore from exercising its right of diplomatic protection, as long as the matter is being or could be considered by an ICSID tribunal. These basic features of the ICSID Convention may not have been fully appreciated by Latin American countries in the past. The ICSID Convention pays considerable respect to the considerations which lie behind the Calvo Doctrine, but complements them by solutions acceptable to the investors' states. Yet, it seems that ICSID's fundamental objective to "depoliticize" the resolution of investment disputes (by affording both states and investors access to a truly neutral forum and precluding the investors' countries from intervening in the meanwhile) passed unnoticed in the negative votes cast in 1964 by all Latin American countries in respect of the formulation of the ICSID Convention.⁵³

⁵¹ Executive Directors' Report, *supra* note 13, at para. 33.

⁵² Under the ICSID Convention, *supra* note 13, at art. 27, diplomatic protection is suspended from the date of consent to ICSID arbitration (possibly subject to exhaustion of local remedies) until an award is rendered. It is only when the state party to the dispute, assuming that the award is rendered against it, fails to comply with the award, that the right of diplomatic protection is revived.

⁵³ See ICSID, 2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States—Documents Concerning the Origin and the Formulation of the Convention 606 (Doc. 39, 1968).

The situation is changing, however. Chile, Ecuador, El Salvador, Honduras and Paraguay are now ICSID Contracting States. Some of them are also parties to investment treaties with such countries as France or the United Kingdom containing provisions for the arbitral settlement of investment disputes under ICSID's auspices.⁵⁴ In addition, Argentina, Bolivia, Costa Rica and Peru have signed though not yet ratified the ICSID Convention. Finally, Brazil has not signed the ICSID Convention, but the ICSID Secretary-General has been named the "appointing authority" of arbitrators in connection with foreign loans to Brazilian public entities whose obligations are guaranteed by Brazil.⁵⁵

III. MIGA AS A BUFFER AGAINST DIPLOMATIC INTERVENTION AND POLITICIZATION

A. Concept and Features of MIGA

The Convention Establishing the Multilateral Investment Guarantee Agency (the MIGA Convention) was opened for signature on October 11, 1985, and came into force on April 12, 1988.⁵⁶ At the date of writing, 112 countries (including 95 developing ones) have signed the MIGA Convention; of these 85 have also ratified the Convention. The countries that have signed and ratified the MIGA Convention include six Latin American countries—Argentina, Bolivia, Chile, Ecuador, El Salvador and Peru. A further seven countries from the region (Brazil, Colombia, Costa Rica, Guatemala, Honduras, Nicaragua and Uruguay) have signed but not yet ratified the MIGA Convention.

MIGA aims to stimulate the flow of resources to its developing member countries by (a) issuing guarantees for investments against non-commercial risks, and (b) carrying out a wide range of promotional activ-

⁵⁴ See Agreement for the Promotion and Protection of Investments, June 4, 1981, United Kingdom-Paraguay, Article 8, 2 Investment Treaties (ICSID) Year 1981, 71 (1983). See also Convention sur l'encouragement et la protection réciproques des investissements, Sept. 20, 1978, France-El Salvador, Article 8, 2 Investment Treaties (ICSID) Year 1978, 39 (1983).

⁵⁵ See Delaume, *supra* note 32, at 13.

⁵⁶ The Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985 [the MIGA Convention], along with the Commentary thereon, appears at 1 ICSID Rev.—FILJ 145 (1986). The MIGA Convention's formulation is described in detail in I. Shihata, MIGA and Foreign Investment 61-106 (1988).

ities.⁵⁷ Although the idea of a multilateral investment guarantee facility emerged in the 1950s and was discussed at some length in the 1960s and 1970s in the World Bank and other international fora,⁵⁸ five fundamental innovations distinguish MIGA from earlier schemes:

- (i) While previous concepts focussed exclusively on guarantee operations, MIGA provides a broader forum for international policy cooperation among capital-importing countries, capital-exporting countries and foreign investors. In this context, it is authorized to provide technical and advisory services.
- (ii) Earlier proposals focussed on investment flows from developed countries, but MIGA also takes part in the promotion of investment flows among developing countries,
- (iii) Unlike previous schemes, which envisaged an agency closely linked with the World Bank, MIGA is designed to be an autonomous institution which will operate on its own account and within its own responsibility while maintaining a

⁵⁷ See MIGA Convention, *supra* note 56, at arts. 2 and 23.

⁵⁸ The idea of a multilateral investment guarantee scheme was first studied by the then Development Assistance Group (now the Development Assistance Committee (DAC) of the Organisation for Economic Co-operation and Development, or OECD) in the late 1950s and early 1960s. In 1961, DAC requested the World Bank to prepare a report on this matter which was published in 1962. In 1964, the United Nations Conference on Trade and Development (UNCTAD) asked the World Bank to resume its efforts towards the establishment of a scheme. In the same year, the OECD transmitted to the World Bank a "Report on the Establishment of a Multilateral Investment Guarantee Corporation," setting forth the principal features of a scheme. During the following years, the initiative was discussed by the World Bank's Executive Directors on the basis of draft conventions prepared by the staff. UNCTAD in 1968 adopted a resolution endorsing the establishment of a scheme, but the World Bank suspended its work on this initiative indefinitely in 1973. At that time, many developing countries were questioning the merits of foreign investment in general, and several OECD countries were just launching their national investment guarantee programs and not interested in the simultaneous establishment of an international scheme. During the 1970s, there were also suggestions to establish regional investment guarantee schemes, notably in the Inter-American Development Bank and the European Community. While none of these initiatives succeeded, the Arab countries established in 1974 the Inter-Arab Investment Guarantee Corporation which has been in operation since then. The European Community has since resumed its study of an investment guarantee facility to operate within the framework of its cooperation with African, Pacific and Caribbean countries.

See Shihata, *supra* note 56, at ch. 1 on the previous efforts of the World Bank towards the establishment of an International Investment Insurance Agency, and Shihata, Arab Investment Guarantee Corporation—A Regional Investment Insurance Project, 6 J. World Trade L. 185 (1972) on the establishment of the Inter-Arab Investment Guarantee Corporation; see also chapter 7, *supra*, which mentions discussions in the European Community.

significant linkage with the Bank. In accordance with Articles 32(b) and 33(b) of the MIGA Convention, the President of the Bank is *ex officio* Chairman of MIGA's Board. He has also been elected by the Board as MIGA's President.

- (iv) Political oversight of and financial responsibility for MIGA is shared by both home and host countries, with the possibility being opened of the latter eventually subscribing 40 percent of the capital and having one-half of the votes. By contrast, previous proposals envisaged an agency controlled and financed only by investors' home countries.
- (v) More than in the previously conceived instruments, the MIGA Convention contains a number of safeguards which ensure the host governments' control over investment activities in their territories while requiring MIGA to work on the improvement of investment conditions and standards in agreement with these governments.

1. Operations

In general terms, MIGA's objective is to stimulate the flow of resources for productive purposes among its member countries, and, in particular, to and among its developing member countries.⁵⁹ It is meant to enhance the mutual understanding and confidence between host governments and foreign investors and to increase information, expertise and skills related to the investment process. Towards this end, MIGA issues guarantees for investments against non-commercial risk and carries out promotional activities.

Article 11 of the MIGA Convention provides for coverage of four broad categories of non-commercial risk: (a) the transfer risk resulting from host government restrictions on currency conversion and transfer; (b) the risk of loss resulting from legislative actions or administrative actions and omissions of the host government which have the effect of depriving the foreign investor of his ownership or control of, or a substantial benefit from, his investment; (c) the repudiation of government contracts in the cases where the investor has no access to a competent forum, faces unreasonable delays in such a forum or is unable to enforce a final judicial or arbitral decision issued in his favor; and (d) the armed conflict and civil unrest risk. At present the "transfer risk" is probably the most relevant from the viewpoint of investors. Cases of outright expropriation have become infrequent, and this is reflected in ICSID's experience. To be eligible, invest-

⁵⁹ MIGA Convention, *supra* note 56, at art. 2.

ments have to be new, medium- or long-term, and must be judged by the Agency to be sound investments which contribute to the development of the host country.⁶⁰

MIGA is authorized to provide coverage not only for equity interests and other forms of direct investment⁶¹ but also in respect of other medium- or long-term form of investment, including various forms of industrial cooperation such as management and service contracts, licensing and franchising agreements, turnkey contracts as well as arrangements concerning the transfer of technology and know-how where the investor assumes a stake in the performance of the venture.⁶² This enables MIGA to service several new types of investment, especially among developing member countries, which take non-equity forms. Investors, to be eligible for the Agency's guarantee, must be nationals of a member country or, in the case of juridical persons (corporate investors), must either be incorporated and have their principal place of business in a member country, or the majority of their capital must be owned by a member or members of the Agency or by their nationals.⁶³ In this context another innovative feature of the MIGA Convention should be noted: eligibility may, under certain conditions, be extended to nationals of the host country if they transfer the assets to be invested from abroad.⁶⁴ MIGA is therefore able to assist member countries in their efforts to reverse the increasingly menacing capital flight phenomenon. This feature of the MIGA Convention also emphasizes that MIGA's guarantee protection relates primarily to the transfer of funds into the host country for development purposes rather than merely to the foreign nationality of the investors.

In recognition of host government's sovereign control over the admission of foreign investment into their territories and the treatment of such

⁶⁰ *Id.* at art. 12.

⁶¹ *Id.* IMF Balance of Payments Manual 136, para. 408 (4th ed. 1977) defines foreign direct investment as "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise"; see also OECD, Detailed Benchmark Definition of Foreign Direct Investment (1983).

⁶² See MIGA Convention, *supra* note 56, at art. 12(b) and Operational Regulations of MIGA (reprinted at 3 ICSID Rev.—FILJ 364 (1988)), at para. 1.05. For a survey and discussion of the new forms of investment, see C. Oman, *New Forms of International Investment in Developing Countries* (1984).

⁶³ MIGA Convention, *supra* note 56, at art. 13(a).

⁶⁴ *Id.* at art. 13(c) which requires a decision by MIGA's Board, acting by special majority, upon a joint application of the investor and his country.

investment, Article 15 of the MIGA Convention provides that the Agency “shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover.” The approval must hence extend both to MIGA’s involvement, i.e., the issuance of a guarantee, and to the scope of MIGA’s involvement, i.e., the risks designated for cover.⁶⁵ A member government may, if it wishes, limit its use of MIGA’s services to the coverage of investments by its nationals in foreign member countries without necessarily allowing it to cover foreign investments in its own territory. In short, MIGA’s facilities, like those of ICSID, are only available where there is consent by all concerned.

In addition to its guarantee operations, MIGA carries out a variety of promotional activities such as performing research, providing information on investment opportunities to foreign investors and policy advice to member governments, and such technical assistance as may be required in this field. The MIGA Convention provides that in its promotional efforts, MIGA “shall give particular attention . . . to the importance of increasing the flow of investments among developing member countries.”⁶⁶

2. *Organization, Membership and Voting*

MIGA has full juridical personality and is both legally and financially separate from the World Bank. Like other international financial institutions, MIGA has a Council of Governors composed of one representative of each member (and his alternate), a Board of Directors elected by the Council, and a chief executive officer selected by the Board and responsible for the ordinary business of the Agency.⁶⁷

Membership in MIGA is open to all members of the World Bank and Switzerland on a voluntary basis.⁶⁸ As in the case of ICSID, every country is free to join without any effect on its position in the World Bank or any other organization.

The distribution of voting rights represents a further innovation. The management of the World Bank had originally proposed that voting power be shared on an equal basis between home countries and host countries as

⁶⁵ It may be added that under Article 13(c) of the MIGA Convention, the host government must even apply for the guarantee jointly with the investor in the case of a host country national investing funds transferred from abroad.

⁶⁶ MIGA Convention, *supra* note 56, at art. 23(c).

⁶⁷ *Id.* at art. 30.

⁶⁸ *Id.* at art. 4(a).

groups, with countries initially classifying themselves as members of one of the two groups, subject to approval of the Agency's Council.⁶⁹

During the discussions among the World Bank's Executive Directors, this proposal was challenged on the grounds that it could not be foretold how many countries of either group would join MIGA from the outset and that in view of the unpredictable relative size of each of the two groups it would be inequitable to allocate equal voting power to them before knowing the actual membership structure. However, the basic tenet of the management's proposal was generally accepted, namely that both groups should receive equal voting power when all members of the World Bank become members of MIGA.⁷⁰ In the first three years of its operations, the minority group has furthermore been guaranteed forty percent of the total votes (through supplementary votes), and all decisions have been required to be taken by the special majority of two-thirds of the total votes representing not less than fifty-five percent of subscriptions in the Agency's capital.⁷¹

3. Financing: Self-Sustenance and Joint Responsibility

MIGA is expected to meet its liabilities from premium income and other revenues such as return on its investments. Accordingly, Article 25 of the MIGA Convention directs the Agency to carry out its activities in

⁶⁹ For the text of the Convention as proposed by the management of the World Bank, see 24 ILM 688 (1985). The principle of equal representation of groups of countries which have distinct interests in the activities of the institution is reflected in most international commodity agreements. For example, the International Coffee, Cocoa and Jute Agreements (647 U.N.T.S. 3; 882 U.N.T.S. 67; UNCTAD Doc. TD/JUTE/11/Rev.1 (1983)) distinguish between member countries which are primarily exporters of the commodity concerned and those which are primarily importers; each group is allotted 1,000 votes which are then divided among the members of the group under various keys.

Under the system of weighted voting which prevails in most international lending institutions, voting rights are tied to capital subscriptions (one vote per share) while each member receives also an equal amount of membership votes. The Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, for instance, accord to each member country 250 basic votes as well as one additional vote per share held in the Bank's capital stock, each share being worth \$100,000 (Article V, Section 3(a)). *But compare*, Agreement Establishing the International Fund for Agricultural Development, June 13, 1976, 28 U.S.T. 8435, 15 ILM 922 (1976), where members are divided in 3 groups each having one third of the total votes.

⁷⁰ See MIGA Convention, *supra* note 56, at art. 39(a) and sched. A.

⁷¹ *Id.* at arts. 3(d), 39(b) and 39(d). On March 13, 1991, the Board of Directors of MIGA agreed to expand by two years the period in which non-signatory countries may subscribe to the shares initially allocated to them, and, in the meantime, to continue to adopt decisions by the special majority, if not by consensus.

accordance with sound business and prudent financial management practices. Under Article 26 of the MIGA Convention, MIGA is able to vary its premiums in accordance with the actual risks assumed under its guarantees, but such variations are based on the specifics of the investment and risks involved—and do not simply reflect a political judgment regarding the host country.

Directed to operate on a financially viable basis, MIGA, after it pays a claim, assumes such rights as the indemnified investor might have acquired against the host country as a result of the event giving rise to his claim.⁷² Such subrogation—a generally accepted principle of insurance law—provides nothing more than the assignment of an existing claim from the investor to MIGA and, substantively, gives MIGA no greater rights than had been acquired by the investor.

Disputes between MIGA and a host country with respect to such rights would normally be settled by negotiation. Failing negotiation, it is envisaged that either party to the dispute will have access to international arbitration unless both parties agree to resort first to conciliation.⁷³ However, MIGA is authorized under Article 57(b) of the MIGA Convention to enter with individual host countries into bilateral agreements on the resolution of disputes according to alternative mechanisms if such countries so request. Such agreements would supersede the dispute settlement mechanism provided in the MIGA Convention and would presumably be satisfactory to the Agency and consistent with the constitutional requirements of the country concerned. They must, however, be concluded before the Agency initiates operations in such a country.⁷⁴

The principle of self-sustenance is supported by arrangements to ensure the Agency's viability even when losses exceed reserves at a given moment. These arrangements include a combination of capital subscriptions and "sponsorship."

The Agency's initial authorized share capital is SDR 1 billion.⁷⁵ Shares are subscribed by member countries in accordance with their relative economic strength as measured in their allocation of shares in the World Bank's capital. Only ten percent of the subscriptions are paid in cash. An additional ten percent is paid in the form of non-negotiable, non-

⁷² *Id.* at art. 18.

⁷³ *Id.* at art. 57(b) and Annex II.

⁷⁴ *Id.* at art. 57(b).

⁷⁵ *See id.* at art. 5(a).

interest-bearing promissory notes to be encashed only if needed by MIGA to meet its financial obligations.⁷⁶ The rest of the subscribed capital is subject to call.⁷⁷ While developed member countries must make all payments in freely usable currencies, developing member countries may make up to twenty-five percent of the paid-in cash portion of their subscriptions in their own currencies.⁷⁸ The amount of guarantees which MIGA may issue may not now exceed one and one half times the amount of the subscribed capital plus reserves plus a portion of MIGA's reinsurance coverage (a 1.5:1 ratio).⁷⁹ Once MIGA accumulates a balanced risk portfolio and gains further experience, it might increase this ratio up to a maximum of 5:1.⁸⁰

In addition to the guarantee operations based on the Agency's capital and reserves, MIGA is able to underwrite investments sponsored by member countries as trustee for these countries, as detailed in Annex I to the MIGA Convention. Revenues from sponsorship operations are to be accumulated in a "Sponsorship Trust Fund" kept separate from the Agency's own assets, with claims and other expenses resulting from sponsorship operations paid out of this fund. Upon its depletion, remaining liabilities are to be shared only by all sponsoring countries, each in the proportion which the guarantees sponsored by it bear to the total guarantees sponsored by all countries.

The combination of capital subscription and sponsorship is another factor which distinguishes MIGA from the international investment insurance schemes previously discussed in the World Bank. These schemes relied chiefly on sponsorship by investors' home countries (with some suggesting an initial contribution from the World Bank). Yet, adoption of this concept would have made the Agency dependent to a great extent on one group of members. By contrast, MIGA relies primarily on capital subscriptions from all member countries and has the necessary independence to carry out its development mandate in the common interest of all its members.⁸¹

⁷⁶ *Id.* at art. 7(i).

⁷⁷ *Id.* at art. 7(ii).

⁷⁸ *Id.* at art. 8(a).

⁷⁹ *Id.* at art. 22(a).

⁸⁰ *Id.*

⁸¹ It should be noted that decisions with respect to sponsorship operations are also to be made by MIGA's Board or Council, as the case may be, under the Agency's normal voting structure, except that sponsoring countries and host countries of sponsored investments will receive additional votes which they may cast only for decisions related to sponsored investments. See *id.* at annex I, art. 7.

B. MIGA and Domestic Jurisdiction

As an international organization, MIGA is not addressed by the Calvo Doctrine, but it might appear in certain situations to be in a position similar to that of an investor's home state. It should be noted, however, that MIGA's institutional interests and its very composition can have a bearing on its behavior and distinguish such behavior from that of a state.

For the investor's home country, the interest in the protection of the economic welfare of its nationals investing abroad competes with a multiplicity of other state interests. The decisions of such country on the exercise of diplomatic protection will therefore tend to reflect a host of political considerations, including those unrelated to the merits of the investor's case.⁸² In fact, the cases which gave rise to the Calvo Doctrine were characterized in several instances by the use of diplomatic protection as a pretext for a home country's intervention in the affairs of the host country for different purposes. MIGA, on the other hand, has only one institutional objective: the promotion of greater flows of foreign investment. It is explicitly prohibited from interfering in the political affairs of its members.⁸³ In the absence of such political interest, it can be expected to focus on the merits of the claim to which it has been subrogated.

MIGA has a financial interest in the recoupment from the host country of a payment which it has made to an insured investor. However, in its pursuit of this interest, MIGA must be mindful of the fact that its risks will be located in developing countries. Its interest in financial survival therefore requires MIGA to abstain from experiments which could jeopardize its good relations with its developing member countries. In addition, the control of MIGA is exercised collectively by many countries so that it must act in the common interest of all of its members, as reflected in the MIGA Convention. In particular, since control is shared by capital-exporting and capital-importing countries on an ultimately equal basis, the Agency can be anticipated to strike a proper balance in its approach between the interests and expectations of both groups. MIGA's management and staff are also composed of nationals of both capital-importing and capital-exporting countries.⁸⁴ Both the control exercised by its members and its internal decision-making processes help to prevent MIGA from pursuing divisive

⁸² Compare Martin, *Multilateral Investment Insurance: the OECD Proposal*, 8 *Harv. Int'l L.J.* 280, 318 (1966).

⁸³ MIGA Convention, *supra* note 56, at art. 34.

⁸⁴ Compare *id.*, at art. 33(d).

policies. The abuse of diplomatic protection of which states have often been accused cannot therefore extend to MIGA even if its intervention is to be assimilated to the fundamentally different concept of diplomatic protection. A more detailed discussion of some of the issues raised by the MIGA Convention will further explain this point.

1. Subrogation, International Arbitration and Host Countries' Sovereignty

Under the MIGA Convention, the Agency, upon paying or agreeing to pay a claim to an insured investor, succeeds to the investor's rights against the host country; disputes between MIGA and a host country with respect to such rights may ultimately be submitted to international arbitration.⁸⁵ As explained earlier, the Calvo Doctrine as well as Latin American constitutions and several subregional agreements⁸⁶ reflect reservations against subrogation and international arbitration with respect to foreign investment.

The rationale behind the prohibition of subrogation under these instruments is apparent: investment disputes should not be allowed to give rise to political confrontations between governments. In accordance with this rationale, the principle of subrogation is not challenged as such, it is only the subrogation of a sovereign state to the claims of private foreign nationals that many Latin American countries refuse in principle. One may note in this context that at least twenty-eight "executive agreements" concluded by the United States with Latin American and Caribbean countries recognize, with some variations in detail, the subrogation of the U.S. Overseas Private Investment Corporation (OPIC) to the rights of indemnified U.S. investors.⁸⁷ There is no reason why an international institution such as MIGA should be accorded less favorable treatment.

A dispute involving MIGA is basically a conflict between an international organization and a member country of that organization. The submission to international arbitration of disputes of this type is established in international practice and is, for instance, embodied in the World Bank's

⁸⁵ *Id.* at arts. 18 and 57(b).

⁸⁶ See *supra* notes 6 and 7.

⁸⁷ See, e.g., Agreement relating to investment guaranties, July 29, 1960, United States—Chile, 405 U.N.T.S. 127; Agreement relating to the guaranty of private investments, Dec. 22, 1959, United States—Argentina 411 U.N.T.S. 41; Agreement relating to investment guaranties, Nov. 26 and 29, 1962, United States—Venezuela, 474 U.N.T.S. 107; Investment Guaranty Agreement, Feb. 6, 1965, United States—Brazil, 719 U.N.T.S. 3.

General Conditions Applicable to Loan and Guarantee Agreements,⁸⁸ as well as those of the regional development banks, including the Inter-American Development Bank. In the case of the only other existing multilateral investment insurance program, the Inter-Arab Investment Guarantee Corporation, disputes between that agency, acting as a subrogee, and any of its members are also referred to international conciliation and arbitration.⁸⁹ As the private investor will not be a party to the arbitration proceedings between MIGA and a host government, the envisaged arbitration by no means contravenes the several Latin American instruments which refuse to give foreign corporations direct access to international tribunals.⁹⁰

Furthermore, the MIGA Convention refers to arbitration, in an annex, as a mechanism which may be used only in the unlikely event that a dispute between the Agency and the host country cannot be resolved through negotiation or conciliation. It also gives the host country and the Agency the option to agree on alternative methods of settlement of disputes.⁹¹ Through the exercise of this option, MIGA may, prior to undertaking operations in a given country, enter into a bilateral agreement with it, thereby adjusting the dispute settlement mechanism to the peculiar legal and political situation of such a country. For instance, it may agree to exhaust local remedies in the host country as a condition precedent or as an alternative to resorting to arbitration under Annex II to the Convention. The issue of international arbitration has been resolved in the OPIC agreements between most Latin American countries and the United States.⁹² For stronger reasons, suitable solutions should not be difficult to reach in agreements between an international organization such as MIGA and its member states.

⁸⁸ IBRD, General Conditions Applicable to Loan and Guarantee Agreements, Article X (Jan. 1, 1985).

⁸⁹ See Article 35 (1) and annex to the Convention Establishing the Inter-Arab Investment Guarantee Corporation, published by that Corporation in Arabic and English. See also Shihata in J. World Trade L., *supra* note 58, at 201.

⁹⁰ The 1979 Constitution of Peru is an example for a new trend. Article 136 of this Constitution provides that "[t]he State and persons under public law can submit disputes stemming from agreements with foreigners to judicial or arbitral tribunals constituted in accordance with international agreements to which Peru is a party."

⁹¹ MIGA Convention, *supra* note 56, at art. 57(b).

⁹² Differing in details, some of these agreements provide for the prior exhaustion of local remedies and confine international arbitration to "questions of public international law."

2. Discrimination Against Host Countries' National Investors

One of the main tenets associated with the Calvo Doctrine is that foreign investors should not be granted any treatment more favorable than that granted to national investors.⁹³ As MIGA focusses on foreign investment, it could be argued that it accords foreign investors a protection which is not otherwise available to local investors, thereby discriminating against the latter.

Unlike a typical local investor, foreign investors usually convert their freely usable currencies into that of the host country and must therefore rely on their ability to repatriate their capital and transfer their profits. As noted above, MIGA's protection attaches to this peculiar situation of the investors rather than to their nationality: to the extent that they transfer assets from abroad, local investors can also qualify for coverage. The investment must be foreign but not necessarily the investor. By contrast, Decision 220 of the Andean Pact Commission guarantees foreign investors, and foreign investors only, repatriation of the invested capital, including capital gains.⁹⁴

This justification for the distinction between foreign and local investment extends to other risk coverages offered by MIGA, notably the risks of expropriation and of breach of government contract. MIGA's guarantee does not accord a foreign investor legal protection against the occurrence of an expropriatory action or of a violation by the host government of its contractual obligations; it just guarantees him adequate compensation in a freely usable currency for a loss sustained as a result of such actions. From the viewpoint of the investor, MIGA's guarantee is not different from the guarantee available under a national investment guarantee program⁹⁵ or by a private political risk insurer.⁹⁶ Latin American countries have not objected to national or private political risk insurance covering investment in their territories. On the contrary, most Latin American countries have, as explained earlier, manifested their approval through the conclusion of agreements with the United States facilitating OPIC's operations.

⁹³ See Decision 220 of the Andean Pact Commission, *supra* note 7, at art. 33.

⁹⁴ *Id.* at arts. 7 and 15.

⁹⁵ At present almost all OECD countries, as well as Korea and India, operate such a program. For a survey, see OECD, *Investing in Developing Countries* (5th ed. 1983).

⁹⁶ Private political risk coverage is available from Lloyd's of London and U.S. underwriters. See Svensk, *The Role of Private Sector Insurance, in Managing International Political Risk: Strategies and Techniques* 114 (F. Ghadar et al. eds., 1983).

C. *The Alleviation of Political Confrontations Through MIGA*

Not only is MIGA compatible with the objective of the Calvo Doctrine, it may even further such objective in a more effective manner than that achieved by a typical Calvo Clause. By providing guarantees against political risks, MIGA rolls over these risks, and the losses resulting from them, from the investor and the economy of his home country to an international institution and thus reduces or even eliminates the potential of a conflict between the investor's home country and the host country.⁹⁷

1. *MIGA's Stake in Conflict Avoidance and the Amicable Settlement of Disputes*

MIGA's viability and continuity depend in no small part on the good terms it must establish with its capital-importing member countries. It has every incentive to alleviate and, whenever possible, avoid conflicts with these countries. From the beginning, the MIGA initiative aimed at the creation of "a synergism of cooperation" between capital-exporting and capital-importing countries.⁹⁸ MIGA's operations, much as the discussions which led to agreement on the text of its Convention, are generally based on the consensus of both groups of countries. As every conflict with a member country might weaken this consensus, it is natural that MIGA should try to avoid conflict and, when it arises, to facilitate its amicable settlement. In fact, the MIGA Convention (Article 23(b)(i)) goes a step further and directs MIGA to encourage the amicable settlement of disputes between investors and host countries, as such disputes constitute the seeds of conflicts between the Agency and its capital-importing members.

2. *MIGA's Contribution to Conflict Avoidance*

While the aforementioned institutional imperatives require MIGA to avoid and alleviate conflicts with host countries, its contractual obligations and its very business require it to pay justified claims. If MIGA failed to do so, it could not sell its guarantees to investors and would be stripped of revenues. The competing pressures force MIGA to underwrite risks with a

⁹⁷ Compare Meron, *The World Bank and Insurance*, 47 *Brit. Y.B. Int'l L.* 301, 312 (1974-1975): "[T]he very raison d'être of the establishment of a multilateral insurance agency was to make subrogation into a non-political, technical, non-confrontation issue"; Martin, *supra* note 82, at 318-19 (1967): "With an international Agency it is more likely that the claim will be treated as the legal issue that it should be."

⁹⁸ Compare Address of World Bank President A. W. Clausen, 1981 Joint Annual Meetings of The World Bank and International Monetary Fund Summary Proceedings 15, 23 (1982).

view to the avoidance of claims and, where claims of guaranteed investors are justified, to assess and settle them on their legal merits and, in turn, seek recovery on the same basis.

The origins of an investment conflict can often be traced to the investment terms and conditions. If these turn out to be unfair to either party or if they lack the flexibility to be smoothly adjusted to changing circumstances, a party, especially a host government, might later feel tempted to remedy the arrangement by unilateral action. Also, if a project runs into financial or technical difficulties, a host government might interfere in order to protect its interests or those of its nationals. MIGA therefore carefully screens every investment project to make sure it is economically sound, will contribute to the development of the host country and is consistent with its laws and declared development objectives.⁹⁹ It can be expected to deny coverage when it finds deficiencies in the investment arrangement. The MIGA Convention (Article 15) provides a second safeguard against conflicts with respect to guaranteed investment by requiring the host government's approval for both the issuance of MIGA's guarantee and the risks designated for cover.

3. MIGA's Facilitation of Amicable Settlements

Where a conflict arises nevertheless, MIGA may become involved in the process in a way that will place it in a unique position to facilitate an amicable settlement. If an investor files a claim, MIGA will have to assess this claim and possibly defend itself against it. In doing this, MIGA will find itself in a similar position to that of a host government when confronted with the investor's demands. In many cases, however, MIGA will be in a better position to assess the investor's claim. MIGA's assessment, based on the broad information available to it and its worldwide experience, is likely to moderate the conflicting claims of the investor and his host country and increase the likelihood of a settlement.

Another way in which MIGA may induce host governments and investors to arrive at amicable settlements is the alleviation of the financial burden of such settlements on the governments. For example, MIGA might accept the local currency of the host country on a temporary basis and pay the investor out of its own funds in freely usable currency. MIGA might then, under an agreement with the host country, sell the local currency to the World Bank or other international institutions, to companies importing goods from the host country or to the host government itself

⁹⁹ MIGA Convention, *supra* note 56, at art. 12(d).

over a period of time and recover its position accordingly. MIGA might also finance the settlement by paying the investor in cash and accepting debt instruments from the government as recoupment. As a variant of this approach, MIGA could persuade the investor to accept installments rather than insisting on a cash payment by backing the government's commitments with its guarantee. Finally, where the views of the investor and the host government with respect to an adequate compensation cannot be completely reconciled, MIGA might pay all or part of the difference and in this way facilitate a settlement. In view of its developmental mandate and institutional interests, MIGA can be anticipated to use its potential for the facilitation of amicable settlements at least as actively as some of the national agencies, especially OPIC, have successfully done.¹⁰⁰

IV. CONCLUSION

Abuses of diplomatic protection in the last century led some developing countries to insist that disputes with foreign investors be settled exclusively before their domestic courts and according to their domestic law. By virtue of the Calvo Clause, Latin American countries required foreign investors to waive appeal to diplomatic protection by their states. Such a clause has, however, been deemed by other countries inapplicable to the government of the foreign investor, on the basis that diplomatic protection, being a state's right under customary international law, can only be waived by the state itself. The Calvo Doctrine, though an understandable reaction to past abuses, therefore did not succeed in preventing political intervention by the states of foreign investors in defense of their interests. Nor did it put a halt to the espousal by such states of the claims of their investors before international tribunals. Moreover, as developing countries, especially in the Latin American region, became hard pressed to obtain funds from abroad, they found themselves accepting, in the context of investment disputes, the jurisdiction of domestic courts of foreign states, including those of their creditors, in spite of conflicting provisions in their own legislation. On both counts, the Calvo Doctrine has proved to be an inadequate re-

¹⁰⁰ According to unpublished figures obtained from OPIC, that Corporation had by 1986 settled claims in the total amount of \$96 million by paying compensation in cash to the investor while accepting installments from the host government; and claims totalling some \$292 million, by persuading investors to accept host government commitments backed by OPIC guarantees or by a combination of cash payment and guarantees.

sponse to the present needs of those developing countries which, mainly for historical reasons, still attach great importance to it.

New international instruments have meanwhile developed whereby developing countries can attain their objective of encouraging foreign financial flows while avoiding the politicization of investment disputes and the espousal by foreign states of the claims of their nationals in the exercise of their own right of diplomatic protection. ICSID, operating since 1966, affords to its members the benefits of submitting an investment dispute between a member and the national of another member to a forum of their choice which operates under truly international rules approved by a Council where all members have the same voting power. Resort to ICSID precludes the investor's state from exercising diplomatic protection or instituting an international claim unless the host state fails to comply with the award rendered in such dispute. The latter state may also request the investor to exhaust first the local remedies. And an ICSID tribunal would apply the domestic law of the host state, and such rules of international law as may be applicable, unless the state itself agrees with the investor that the tribunal would apply other rules of law or decide the dispute *ex aequo et bono*. In all these respects, the ICSID machinery seems to provide developing countries with a response which, compared to the Calvo Doctrine, is both more adequate in the depoliticization of disputes and more effective in the encouragement of foreign investment, without inviting the abuses of diplomatic protection. It should also be more reassuring, from the viewpoint of these countries, than the acceptance of the jurisdiction of the courts of another state, which seems to be the pattern in recent financial agreements between foreign banks and Latin American States. Resort to ICSID becomes all the more appealing in view of its relatively low cost and the inherent safeguards which ensure the integrity of its facilities.

Likewise, MIGA's mandate, its character as an international organization, and its own internal dynamics bring it to work for the avoidance of disputes between foreign investors and their host countries and for the facilitation of the amicable settlement of such disputes when they arise. MIGA's involvement will ensure that matters are discussed with host countries on the basis of legal and economic criteria only. Under Article 34 of the MIGA Convention, "the Agency, its President and Staff shall not interfere in the political affairs of any member," "shall not be influenced in their decisions by the political character of the member or members concerned" and "considerations relevant to their decisions shall be weighed impartially in order to achieve the purposes" of the MIGA Convention.

An investor covered by MIGA's guarantee would rather resort to the Agency requesting its prompt compensation than invoke the lengthy and uncertain process of diplomatic protection by his state. MIGA also has a vested interest in the improvement of investment conditions and in developing smooth relationships between investors and their host governments. The depoliticization of investment disputes should be a necessary by-product of its day-to-day activities.

ICSID and MIGA thus represent modern responses which enable developing countries to encourage larger flows of foreign investments for the purposes of their development, and also protect them from the intervention of the usually more powerful states of the investors. If properly used, these modern instruments may well represent much more adequate tools than the politically appealing, but often counterproductive, insistence on traditional attitudes which find their justification more in the unfortunate experiences of the past than in the realities of the present and the requirements of the future.

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