
Spring 1980

Foreign Investment Arbitration and Joint Ventures

Daryl Rodney Buffenstein

Follow this and additional works at: <https://scholarship.law.unc.edu/ncilj>



Part of the [Commercial Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Daryl R. Buffenstein, *Foreign Investment Arbitration and Joint Ventures*, 5 N.C. J. INT'L L. 191 (1980).
Available at: <https://scholarship.law.unc.edu/ncilj/vol5/iss2/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Foreign Investment Arbitration and Joint Ventures

by Daryl Rodney Buffenstein*

I. Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention)¹ was opened for signature on March 18, 1966 and entered into force on October 14, 1966. The Convention established the International Centre for the Settlement of Investment Disputes (ICSID) as an ancillary organization within the World Bank Group.² The purpose behind the Convention and the establishment of ICSID was to encourage the flow of capital to less developed countries (LDCs) by providing an impartial international forum for the resolution of disputes between foreign investors and host governments. The availability of such a forum would enable these governments to demonstrate a favorable and stable attitude towards foreign investors by indicating in advance their willingness to permit investors to resort to the Centre, thus vastly improving the investment climate in areas of the world where such investment was most needed to facilitate economic development.

Prior to the formulation of the Convention, there was a lack of both convenient facilities for the settlement of disputes between states and private persons³ and of a mechanism to ensure that an agreement by a state to arbitrate would be honored.⁴ An investor who found no satisfactory

* Member, Georgia Bar, American Bar Association, International Bar Association; Associate, Kilpatrick & Cody, Georgia; B.A., Economics and Comparative African Government and Law 1972, University of Cape Town; B.L. with honors 1974, L.L.B. 1975, University of Rhodesia; L.L.M., International Business Law 1977, University of Exeter; Commonwealth Scholar 1975-76.

¹ 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter cited as the Convention]. The text, along with a complete history of the Convention, may also be found in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN AND THE FORMATION OF THE CONVENTION (1970).

² The Convention, *supra* note 1, art. 1(1).

³ The Permanent Court of Arbitration is an exception to this. In February 1962 the Secretariat of the Permanent Court issued a set of rules for settlement of international disputes between two parties of which only one is a state. Nevertheless, the non-binding nature of the proceedings provided thereby is an obvious and severe shortcoming.

⁴ *See* Memorial of the United Kingdom, Anglo-Iranian Oil Co. Case, I.C.J. Pleadings 86 (1952). The irrevocability of consent to arbitration, provided for by art. 25(1) of the Convention is probably its most outstanding feature.

redress through the exercise of local remedies in the host state was thus obliged to either abandon his claim or seek the protection of his national state, with all the attendant political uncertainties that process involves.⁵

An important reason for the success of the Convention in attracting support within the international community of states is that it approaches the problem of encouragement and protection of foreign investment on a procedural plane. Earlier attempts to formulate multilateral conventions containing substantive rules on the protection of foreign property⁶ failed to gain significant international acceptance.

That a substantial number of states have become parties to the Convention indicates that it has been well received. As of August 15, 1979, eighty states had signed the Convention, of which seventy-five had deposited instruments of ratification.⁷ Particularly conspicuous absentees from the list of signatories to the Convention are the Latin American countries *en bloc*.⁸ The non-membership of these countries may be one of the most significant detractors from the general effectiveness of the Convention as a mechanism for improving the flow of investment since these are countries where the risks of expropriation or nationalization have been especially high. Other notable absentees are India, Spain, and the countries belonging to the Council of Mutual Economic Assistance (COMECON). On the other hand, the African countries are extremely well represented, as are numerous Asian and Middle Eastern countries and the developed Western countries.⁹

⁵ The investor's state, even where its national's claim is self-evident, may be unwilling to prejudice its relations with the host state. Moreover, where it is decided that protection should be given, a plethora of problems arise, among them, the problem of inducing the host state to submit to the jurisdiction of an international tribunal.

⁶ See the Abs-Shawcross Draft Convention on Investments Abroad, April 1959, *reprinted in* 9 J.P.L. (1960), and the OECD Draft Convention on the Protection of Foreign Property, No. 23801, Oct. 12, 1967, *reprinted in* 7 I.L.M. 117 (1968). See also G. SCHWARTZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW 109-34, 153-69 (1969).

⁷ 13 ICSID ANN. REP. 3 (1978/79).

⁸ This is mainly attributable to the high premium placed on the concept of absolute sovereignty by these countries. See generally Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256 (1971).

⁹ It has been argued that while the widespread acceptance of the Convention is at least one indication of its success, the fact that few disputes have actually been registered with the Centre for arbitration demonstrates that the Convention is not widely used and has therefore not added significantly to the improvement of the investment climate in LDCs. See Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 GA. L. INT'L & COMP. L. 471, 484 (1975). It is true that the Centre has been seized with only nine arbitral disputes since its inception, see 11 ICSID ANN. REP. 32 (1976/77), 12 ICSID ANN. REP. 5 (1977/78), 13 ICSID ANN. REP. 5 (1978/79), but this may also be construed as an indication of its effectiveness since the very acceptance of the mechanisms available should provide an inducement to parties to attempt to resolve their disputes amicably. Moreover, an increasing number of bilateral investment protection agreements between states contain references to ICSID as does a steadily increasing volume of legislation in LDCs for the encouragement and regulation of foreign investments. See Provisions Relating to ICSID in International Agreements and National Investment Laws. ICSID Doc./9/Rev. 2. Perhaps the most accurate measure of the influence of the Convention would be the large number of investment contracts containing clauses consenting to the jurisdiction of the Centre which are known to have been concluded. A. BROCHES, INTERNATIONAL COMMERCIAL ARBITRATION:

The provisions of the Convention and the organization and functioning of the Centre have been commented upon and explained in a proliferation of recent literature.¹⁰ The purpose of this study is to focus on the jurisdictional articles of the Convention with reference to the jurisdiction *ratione personae* of the Centre where the non-state party to an investment agreement is a consortium or joint venture incorporated in the host state party. In view of the increasing use of the joint venture as a mechanism for investment, this is a situation likely to become increasingly prevalent. An analysis of the Convention in this light reveals potential problems of some complexity, an awareness of which may assist prospective foreign investors and their legal advisors in formulating agreements and approaches that will avoid, or at least minimize, the risk of pitfalls at the dispute settlement stage.¹¹

Section II of this paper comments on the expanding rule of joint ventures in international investment and reviews briefly some of the problems and issues inherent in such enterprises. Sections III and IV, respectively, provide a concise outline of the jurisdiction of the Centre and a discussion of the definition of corporate nationality in terms of the Convention. These sections are germane to a complete understanding of the potential jurisdictional problems involved where a joint venture is a party to an investment agreement with the host state in which it is incorporated. These potential problems are examined in Section V and certain possible interpretative solutions are canvassed. In the final section, the troublesome nationality requirement is reconsidered and the necessity of its inclusion in the Convention re-examined.

II. The Trend Towards Joint Ventures as a Mechanism for Investment

The term "joint venture"¹² has been used to describe both the situa-

DOCUMENTS AND COLLECTED PAPERS 292, 299 (1974). Mr. Broches estimated that the volume of investments covered by ICSID clauses runs into "several thousands of millions of dollars."

¹⁰ See Broches, *The Convention of the Settlement of Investment Disputes Between States and Nationals of Other States*, II RECUEIL DES COURS 331 (1972); Szasz, *A Practical Guide to the Convention on the Settlement of Investment Disputes*, 1 CORNELL INT'L L.J. 1 (1968); Szasz, *The Investment Disputes Convention—Opportunities and Pitfalls*, 5 J.L. & ECON. DEV. 23 (1970). A bibliography of the publications on the Convention is available from the Centre on request.

¹¹ In a significant number of cases involving joint ventures, the joint venture will not be a party to an investment agreement with the host state but will rather constitute the subject matter of an investment agreement between a foreign investor and the host state, in which it is agreed that a venture be established and operated by both parties to the agreement. The scope of this article is not of direct relevance to those cases. Rather, the analysis focuses on the situation where a joint venture is a party to an investment agreement with the host state, and on whether and in what circumstances the Centre will be able to exercise personal jurisdiction over such venture.

¹² "Joint venture" and "consortium" have been used interchangeably to denote the situation described in the text. See Comment, *International Joint Venture Corporations: Drafting of Control Arrangements*, 1963 DUKE L.J. 516, 516 n.2. Regarding consortia, see generally A. BOULTON, *BUSINESS CONSORTIA* (1961). On joint ventures in developing countries, see generally JOINT INTERNATIONAL BUSINESS VENTURES (W. Friedmann & G. Kalmanoff, eds. 1961); W. FRIED-

tion where two or more enterprises enter into a loose form of association, often analagous to a partnership, for the purpose of cooperation on a specific project or in a particular area of business,¹³ and that where two or more enterprises organize, cause to be incorporated, and hold shares in, a new enterprise. This paper concerns itself only with the latter type of joint venture, in particular the case where one or more foreign investor enterprises, often together with local enterprises in a capital receiving country, jointly established, own and control an enterprise incorporated in that country.

In the context of private foreign investment in less developed countries, only within the last two decades has the joint capital venture received more than scant attention. However, it is rapidly assuming a position of considerable significance both quantitatively and qualitatively in the overall flow of investment to LDCs. No precise information exists as to the extent of foreign investments made in the form of joint ventures or what percentage of the earnings from private foreign investment in LDCs is attributable to joint ventures. Nevertheless, it is apparent that joint ventures have increasingly become "the most important form of foreign investment in the developing countries of Africa, Asia and Latin America."¹⁴ Moreover, there is evidence that the most rapidly growing type of joint venture, at least for U.S. foreign investors, is the "minority joint venture," in which the foreign investor holds between ten and forty-nine percent of the equity in the joint enterprise.¹⁵ The number of joint ventures in which there are several foreign participants from different countries has also vastly increased in recent years¹⁶ and comprises investments in the many varied fields of manufacturing and raw materials. The multipartite joint venture may be a consortium of international firms incorporated in a host state for the purpose of a specific project or investment, although in a growing number of cases private local interests in that state will participate, as might the government of that state.¹⁷

MANN & J. BEGUIN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES (1971).

¹³ This closely corresponds to the contractual "joint venture" of American law, a special combination of parties without any actual partnership or corporate designation. W. FRIEDMANN & J. BEGUIN, *supra* note 12, at 22. Use of non-equity joint ventures has also increased in international trade cooperation. *Id.* at 412; see Horbaczewski, *Profitable Co-Existence: The Legal Foundation for Joint Enterprise with United States Participation in Poland*, 31 BUS. LAW. 433, 442 (1975); Lew, *Aspects of East-West Trade: A Panel*, 124 NEW L.J. 601, 603 (1974).

¹⁴ W. FRIEDMANN & J. BEGUIN, *supra* note 12, at 3.

¹⁵ Liebman, *The Tax Treatment of Joint Venture Income Under Subpart F: Some Issues and Alternatives*, 32 BUS. LAW. 341, 349 (1977).

¹⁶ W. FRIEDMANN & J. BEGUIN, *supra* note 12, at 19-21. See also Financial Times, April 4, 1977, at 6, col. 4.

¹⁷ The reasons for the increased interest in joint ventures are various, depending on the circumstances in each case. There may be purely commercial reasons, e.g., insufficient capital prompting associations with local or other partners, a desire to diversify by spreading investment capital, the availability of a partner who can provide easier access to local government or financial institutions. There also may be political reasons, e.g., a joint venture with local capital

The exact extent of participation of each "partner" to a joint venture and the profit sharing formula adopted will differ according to the circumstances.¹⁸ Of more particular relevance to this paper, however, is the question of control of joint ventures.

It has been said of the relationship between a company and its subsidiary:

To lawyers a business is or is not controlled abroad by virtue of its 100, 51, 48, or some such numerical percentage of foreign ownership in a cohesive voting bloc. To a student of industrial management, control is not an either-or proposition, but a question of infinite degrees of divisibility, depending on the nature of the decision making process and the division of authority between the head office and the foreign unit. This control may cover any or all of a variety of separate functions . . . A company can control all phases of a subsidiary's operations with merely 25 percent of the equity . . .¹⁹

These comments are obviously applicable to joint ventures. There are various devices by which equity ownership can be divorced from control²⁰ and the choice of any one or a combination of these will depend on the business and legal environment in which the venture must operate and on the respective bargaining power of the parties.²¹ The following are only a few of the devices that may be used: assignment of different classes of shares with different voting rights; division of the board of directors into two classes of directors elected or nominated by the holders of different shares; rights given to only one class of shareholders to nominate a managing director with specially defined but broad powers; and most importantly, "management" or "technical assistance" contracts entered into between the joint venture and one of the partners, granting that partner, whatever his equity share, the right to control absolutely

may lessen or delay the risk of nationalization or expropriation. In fact, the investment legislation of an increasing number of LDCs now either offers positive tax incentives for association with local capital, *see, e.g.*, Lesotho Investment Guide (Lesotho Embassy, London), or makes such association mandatory, as in the case of the Zambian copper mining industry, *see* R. BROWN & M. FABER, SOME POLICY AND LEGAL ISSUES AFFECTING MINING LEGISLATION AND AGREEMENTS IN AFRICAN COMMONWEALTH COUNTRIES (1977). Planned divestment in terms of which foreign equity participation is gradually transferred to locals in accordance with a fixed and pre-determined plan, has also recently received some attention, especially in the Andean Common Market. *See* Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYRACUSE INT'L L. & COM. 319 (1975). For the advantages of this system, *see* A. HUSCHMANN, ESSAYS IN INTERNATIONAL FINANCE 76 (1969).

¹⁸ *See generally* W. FRIEDMANN & J. BEGUIN, *supra* note 12. With regard to mineral agreements in particular, *see* Smith & Wells, *Mineral Agreements in Developing Countries: Structures and Substance*, 69 AM. J. INT'L L. 560 (1975). A concise introduction to profit sharing in joint ventures can be found in D. DE DELUPIS, FINANCE AND PROTECTION OF INVESTMENTS IN DEVELOPING COUNTRIES (1973). The present writer is indebted to the legal department of the United Africa Company International, members of which kindly made available various joint venture agreements for inspection.

¹⁹ C. KINDLEBERGER, INTERNATIONAL ECONOMICS 404 (1963).

²⁰ *See* Ross, *The Foreign Joint Venture Corporation: Some Legal and Business Considerations*, 45 DEN. L.J. 4 (1968); Comment, *supra* note 12, at 516.

²¹ *See* Abbott, *supra* note 17 (analysis of the determinants of bargaining power in similar situations).

certain spheres of the venture.²²

Although the fifty-fifty joint venture is not rare, in most cases where there are only two partners in a venture one of them will have a leading role in terms of control. The problem of control in a multipartite joint venture may be very different. Although one of the partners may legally have decisive control, in many such ventures the partners will not be willing or able to concede such a role to any particular partner, it being considered inappropriate for any single shareholder to have a majority participation and the control of the board. A working arrangement is then necessary to ensure the smooth day-to-day running of the venture.²³

Control must not be seen purely in terms of legal rights and duties, whatever form these may take. In certain industries or sectors, for example, a partner's technical superiority may give him *de facto* control over a venture in which he has a minority position in terms of equity shares and legal control.²⁴

In view of the parallel trends toward both minority and multipartite joint ventures, and the importance of the joint venture as a mechanism for investment, the following sections will examine the jurisdictional articles of the Convention for the purpose of identifying certain problems that may arise in connection with joint ventures.

III. The Jurisdiction of the Centre—A General Outline

The first stage at which jurisdictional questions might arise is that of registration of a request for conciliation or arbitration proceedings.²⁵ Such a request must contain information as to the issue in dispute, the identity of the parties, and their consent to arbitration or conciliation.²⁶ The Secretary-General is obliged to register it unless he finds, on the basis of the information contained in the request, that the dispute is "*manifestly outside* the jurisdiction of the Centre."²⁷ Registration may be refused only where jurisdiction is patently lacking, for example, where there is quite clearly no consent or the state party is not a contracting state.²⁸ Where there is any doubt whatsoever the dispute must be registered and the doubts settled at the second stage, by the commission or

²² See generally W. FRIEDMANN & J. BEGUIN, *supra* note 12, at 385; Smith & Wells, *supra* note 18, at 581.

²³ See generally W. FRIEDMANN & J. BEGUIN, *supra* note 12, at 385.

²⁴ *Id.*

²⁵ The Centre does not itself conciliate or arbitrate. These proceedings are administered by the Centre and conducted by tribunals and commissions appointed in accordance with the Convention. As the Directors' Report, ICSID DOCUMENTS, REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION (1967) [hereinafter cited as DIRECTORS' REPORT], indicates, the term "jurisdiction of the Centre" is used as a "convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings." *Id.* ¶ 22.

²⁶ The Convention, *supra* note 1, arts. 28(2) (conciliation), 36(2) (arbitration).

²⁷ *Id.* arts. 28(3), 36(3) (emphasis added).

²⁸ The Secretary-General is given this limited power to "screen" requests with a view to avoiding embarrassment to a party that had clearly not consented and to prevent the Centre's

tribunal. Tribunals and commissions are judges of their own competence and will consider and determine any objection that a dispute is not within the jurisdiction of the Centre or for any other reasons is not within their competence.²⁹ Such objection will normally be raised by the tribunal or commission on its own initiative.³⁰

The mere fact that a state has ratified the Convention does not bind that state to arbitrate or conciliate all disputes with foreign investors. Consent is in each case "the cornerstone of the jurisdiction of the Centre."³¹ However, once consent is given by both parties it is binding and cannot be unilaterally withdrawn.³² Moreover, consent to arbitration under the Convention "shall unless otherwise stated be deemed to be consent to such arbitration to the exclusion of any other remedy." A state may, however, require the exhaustion of local administrative or judicial remedies as a condition of its consent.³³ As to the form and timing of the consent, the Convention prescribes only that it must be in writing and that it must exist by the time the Centre is seized.³⁴ Thus consent need not be expressed by both parties in a single instrument and the host state's consent may be indicated in a bilateral investment protection agreement with the investor's state, or in its national investment legislation.³⁵ Equally, consent may be given in a *compromis* after the dispute has arisen. In the majority of cases consent will be given in a *clause compromissoire* in the original investment agreement between the parties. In these cases it is advisable for the parties, with foresight and careful drafting, to provide for various contingencies and options in connection with their submission to ICSID jurisdiction. In order to facilitate this the Centre has prepared a set of Model Clauses for use as part of, or in conjunction with, the consent clause.³⁶

Although the consent of the parties is the necessary prerequisite to the exercise of jurisdiction by the Centre, consent alone is not sufficient

machinery from being activated where jurisdiction is quite obviously lacking. DIRECTORS' REPORT, *supra* note 25, ¶ 20.

²⁹ The Convention, *supra* note 1, arts. 32(1), 41(1).

³⁰ ICSID Doc./4, Regulations and Rules: (D) Rules of Procedure for Arbitration Proceedings, Rule 41(2); (C) Rules of Procedure for Conciliation Proceedings, Rule 30(2).

³¹ DIRECTORS' REPORT, *supra* note 25, ¶ 23.

³² The Convention, *supra* note 1, art. 25(1).

³³ *Id.* art. 26.

³⁴ *Id.* arts. 25(1), 28(3), 36(3).

³⁵ DIRECTORS' REPORT, *supra* note 25, ¶ 24. In cases where the consent is not expressed in a single instrument there may be complications in determining mutuality of consent. See Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263, 269 (1966).

³⁶ ICSID Doc./5 (1968), Model Clauses Recording Consent to the Jurisdiction of the International Centre for the Settlement of Investment Disputes [hereinafter cited as Model Clauses]. See generally Amerasinghe, *Model Clauses for Settlement of Foreign Investment Disputes*, 28 ARB. J. 232 (1973). These clauses are especially important since, while there are certain matters regarding which agreement between the parties will not compensate for defective jurisdiction, there are many instances in which agreement can create or strengthen jurisdiction. See text accompanying note 10 *infra*. It is important that these matters are foreseen and provided for in properly drafted clauses.

to found jurisdiction since the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

With regard to the nature of the dispute, the Convention prescribes jurisdiction *ratione materiae* by providing that the dispute must be "a legal dispute arising directly out of an investment."³⁷

The Convention prescribes jurisdiction *ratione personae* by providing that one of the parties must be a contracting state (or a constituent subdivision or agency thereof) and the other party must be a "national of another Contracting State."³⁸ This latter phrase means, by virtue of the first part of article 25(2)(b),

any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration
...³⁹

The phrase also means, by virtue of the second part of article 25(2)(b),

any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.⁴⁰

This second part of article 25(2)(b) was inserted to extend the ambit of the Convention to the considerable volume of international investment carried out by enterprises incorporated in host States. The language and construction of this provision, and its relationship to the first part of article 25(2)(b), raise significant problems when considering its application to joint ventures. These will be examined in section V. That analysis will be facilitated by first examining the meaning of corporate nationality in international law and in terms of the Convention.

IV. The Concept of Corporate Nationality in the Context of the Convention

A. General

The Convention does not define or explain the concept of corporate nationality. Since the Convention is an international legal instrument, one may well ask whether the prevailing approach of international law to the question of corporate nationality will be used to interpret the Convention.⁴¹ In particular, will the controversial principles enunciated by

³⁷ The Convention, *supra* note 1, art. 25(1). The jurisdiction *ratione materiae* of the Centre cannot be examined within the limited scope of this study. See sources cited in note 10 *supra*.

³⁸ The Convention, *supra* note 1, art. 25(1).

³⁹ *Id.* art. 25(2)(b).

⁴⁰ *Id.*

⁴¹ "The process of interpretation supposes that the parties contemplate a result not incompatible with customary international law." 1 D. O'CONNELL, INTERNATIONAL LAW 261 (1970). However, this will be rebutted by evidence of a definite intention to the contrary. In this case such evidence is clearly provided by the *travaux préparatoires* of the Convention. See text accompanying note 58 *infra*.

the International Court of Justice (ICJ) in the *Barcelona Traction* case⁴² be applied to nationality questions arising under the Convention? In *Barcelona Traction* the ICJ held that incorporation (or location of principal office) was the sole criterion for determining corporate nationality. The Court expressly disapproved the theory that nationality could be predicated primarily on ownership or control or that protection could be given where the enterprise has the nationality of the defendant state.⁴³ The Convention states plainly in article 25 that the private party to the dispute must be "a national of another Contracting State" but provides an exception to this in the case of a host state juridical person agreed to be under foreign control. It is therefore tempting to conclude that this is the only exception to the *Barcelona Traction* incorporation principle that would be countenanced by the Convention.⁴⁴ It is clear, however, that such an interpretation would be incorrect.

To determine the nationality of juridical persons, the Centre may apply criteria of ownership and control or any other test.⁴⁵ Traditional sources of international law, including decisions of the ICJ, may be drawn from but are not dispositive. The jurisdiction of the Centre must be determined by reference to the Convention and its drafting history. The Preliminary Draft accepted both incorporation and control as criteria of nationality and clearly contemplated the possession of dual nationality of companies where these two criteria lead to divergent conclusions.⁴⁶ This draft included within the definition of "national of a Contracting State" both an enterprise which under the law of that state was its national, and an enterprise in which nationals of that state had a controlling interest.⁴⁷ The deletion of this definition was not intended to affirm the incorporation principle but rather to accord discretion to

⁴² *Barcelona Traction, Light and Power Company, Ltd.*, [1970] I.C.J. 3 [hereinafter cited as *Barcelona Traction*].

⁴³ [1970] I.C.J. 42, 49. Several judges expressed strong dissatisfaction with this holding. The issue is one on which the authorities are much divided. See, e.g., 2 D. O'CONNELL, *supra* note 41, at 1042-43. The *Barcelona Traction* decision has been most controversial. See, e.g., I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 480 (2d ed. 1973). It has been strongly argued that, to the extent the decision is acceptable, it should be restricted to its particular facts, i.e., as circumscribing the principles upon which a claim from diplomatic protection may be based. See Broches, *supra* note 10, at 360. See also Vuylsteke, *Foreign Investment Protection and ICSID Arbitration* 4 GA. J. INT'L & COMP. L. 343, 355-57 (1974). These considerations are said to be inapplicable under the Convention since, by virtue of article 27, the investor's national state is prohibited from bringing an international claim in the exercise of diplomatic protection unless the host state fails to abide by an award rendered against it. Broches, *supra* note 10, at 356. This assumption is not necessarily correct as this article will point out. See section VI of text *infra*.

⁴⁴ *Expressio unius est exclusio alterius*. This technical rule of construction has been referred to by tribunals in connection with the construction of treaties. See 1 D. O'CONNELL, *supra* note 41, at 253.

⁴⁵ The tests or "linking factors" that might be used are: incorporation, domicile, *siege social*, ownership and control. For a discussion of these factors, see 2 D. O'CONNELL, *supra* note 41, at 1040.

⁴⁶ Broches, *supra* note 10, at 359.

⁴⁷ *Id.*; ICSID Doc./2, at 230.

tribunals and commissions which, as judges of their own competence,⁴⁸ will attach great weight to the stipulation of the parties to the maximum extent possible under the Convention.

B. Specification of Nationality in the Consent Agreement

It is notable that the Convention itself does not require that the consent agreement specify the nationality of the investor. However, articles 38, 39 and 52(3) of the Convention establish certain exclusionary rules relating to the membership of arbitral tribunals and article 27 prevents the state of which the investor is a national from giving him diplomatic protection or bringing an international claim.⁴⁹ Moreover, the Rules of Procedure for the Institution of Conciliation and Arbitration require that the request by which proceedings are instituted must include the nationality of the investor.⁵⁰ It would therefore be advisable, in order to avoid confusion, to specify the nationality of the investor in the investment agreement, and the Model Clauses provide a clause for this purpose.⁵¹ The use of such a clause cannot remedy any fundamental disability but will be particularly advantageous in marginal situations or where there is some doubt as to nationality, for example where the investor is a dual national of two states other than the host state.⁵² The following examples will assist in clarifying this situation.

Example I: Enterprise E is incorporated in non-Contracting State Y and is owned and controlled by citizens of that State. E enters into an investment agreement with Host State and the agreement contains a consent clause submitting the ICSID jurisdiction and stating that E is a national of Contracting State X.

Here there can be no doubt that the stipulation of X nationality cannot serve to cure the obvious jurisdictional defect that E is in fact a national of a non-contracting state. The jurisdictional defect is absolute and no agreement between the parties can remedy it.⁵³

⁴⁸ The Convention, art. 32, 41.

⁴⁹ The Convention, art. 27 provides that "[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under the Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

⁵⁰ ICSID Doc./4, (B) Rules of Procedure for the Institution of Conciliation and Arbitration, Rule 2(1)(d)(i).

⁵¹ Model Clauses, *supra* note 36, ¶ 14. Clause V provides simply: "It is hereby stipulated by the parties that the Investor is a national of name of another Contracting State."

⁵² The problems posed by nationality in the context of foreign-controlled juridical persons in the host state (art. 25(2)(b)) are dealt with fully in section V of text *infra*. Note that the use of the term "enterprise" in this paper is intended to convey precisely the same meaning as that suggested by the term "juridical person."

⁵³ Note that where the host state and/or the investor's state are not members of the Centre they may wish to make a contingent submission to ICSID which would come into effect when the nonmember state becomes a member. Model Clause X provides for such contingent submission. Model Clause XII provides for an alternative dispute settlement procedure (inevitably non-binding), should the non-member not become a member before the dispute arises, as far as possible patterned on the procedure provided for under the Convention.

Example II: The facts are as above except that, although E is incorporated in Y, the holders of 75% of its share capital are individuals who are citizens of State X and reside in X.

Here, it is submitted, a stipulation that E is a national of X will assist the tribunal or commission in retaining jurisdiction. In light of the discussion above, it is clear that the Centre is entitled to assume jurisdiction on the basis of any of the various tests⁵⁴ or a combination of these and is not limited to the incorporation test. This should be so even in the absence of a stipulation as to nationality, but in marginal cases, for example if the connection with X were somewhat weaker, such stipulation would serve to bolster possible jurisdictional weaknesses. In this regard it is to be hoped that commissions and tribunals will take the widest possible view of their competence and assume jurisdiction wherever there is a tenable connection between an enterprise and a contracting state.⁵⁵

What if the host state party, having previously agreed that the investor is a national of contracting state X, now objects to jurisdiction on the grounds that the investor has more connections with non-contracting state Y and that it is therefore more appropriately a national of Y? In this situation, the host state should be estopped from denying that the investor is a national of X, providing that at the time of consent the host state was in no way misled by the investor and was fully aware of the respective connections of the latter to X and Y.

It would be quite inappropriate to allow the principle of estoppel to be invoked in situations such as Example I above, since in such a case the jurisdictional defect is absolute and would inevitably be raised by the tribunal or commission *mero motu*. Indeed, such a case would probably not proceed past the "screening power" of the Secretary-General, except for the fact that this power may be exercised only on the basis of the information contained in the request⁵⁶ and the nationality stated in the request will obviously accord with that stipulated in the agreement. In cases where the jurisdictional defect is relative, however, and where jurisdictional weaknesses are bolstered by a stipulation of nationality, it is submitted that in view of the importance of consent and on general principles of good faith, consistency, and practicability, the principle of estoppel should and will be accorded a proper place in the jurisprudence of the Centre.⁵⁷

⁵⁴ *E.g.*, incorporation, domicile, *siège social*, control.

⁵⁵ See section V of text *infra*.

⁵⁶ The Convention, arts. 28(3), 36(3).

⁵⁷ The question of the law to be applied under the Convention cannot be fully examined within the limited confines of this paper. For a fuller analysis see J. CHERIAN, *INVESTMENT CONTRACTS AND ARBITRATION* (1975). Note that ICSID tribunals are to decide disputes in accordance with such rules of law as the parties may agree upon. In the absence of such an agreement, the law to be applied is that of the host state party (including its conflict rules) and such rules of international law as may be applicable. The Convention, art. 42. There is abundant authority to support the proposition that estoppel is a general principle of international law. See Broches, *supra* note 10, at 390. Although the principle has no particular coherence in

C. *Nationality and Foreign Controlled Enterprises*

Certain problems remain regarding the relationship between the two parts of article 25(2)(b), and the fact that the word "nationality" is included in each of these provisions but defined in neither of them. Is the reference to "nationality" in article 25(2)(b) (second part) intended to convey precisely the same meaning as the reference to it in article 25(2)(b) (first part)? If so, and since it has been noted that nationality under the Convention can be predicated upon ownership and control as well as upon incorporation, is the second part of article 25(2)(b) necessary at all?

It is clear from the *travaux préparatoires* of the Convention that the second part of article 25(2)(b) was inserted to put it beyond doubt that a foreign controlled juridical person incorporated in the host state should not by mere reason of such incorporation be excluded from the Centre's jurisdiction, provided there is agreement that it should be treated as a national of another contracting state.⁵⁸ The necessity for this provision must be seen in the light of a strong concern on the part of many LDCs that states should not be internationally arraigned by their own nationals and that an enterprise incorporated in the host state should automatically be excluded from the jurisdiction *ratione personae* of the Centre, irrespective of the ownership or control of that enterprise.⁵⁹

Despite the fact, therefore, that nationality under the Convention is not limited to the incorporation test, the drafting history of article 25 strongly suggests that in the absence of the second part of article 25(2)(b) all enterprises incorporated in the host state party would have been excluded from the jurisdiction *ratione personae* of the Centre. Seen in the context of its drafting history, article 25(2)(b) (second part) is intended to permit jurisdiction to be exercised where it would not otherwise exist in terms of article 25(2)(b) (first part) because of host state nationality, but also making the exercise of jurisdiction in such a case dependent upon the additional criterion of an agreement between the parties that the enterprise will be treated as a national of another contracting state because of foreign control.

Though the word "nationality" in the phrase "nationality of the Contracting State party to the dispute" in article 25(2)(b) (second part) was inserted with the criterion of incorporation specifically in mind, this should not be the exclusive criterion for nationality in relation to this particular provision. If, according to the criteria of ownership and control, an enterprise is clearly a national of the host state though not incorporated therein, the drafting history indicates that agreement on foreign

international law, the effects and incidents of the principle not being uniform, there is no reason why it should not apply to individuals or to juridical persons. *Id.* at 390, 618.

⁵⁸ Broches, *supra* note 10, at 358-59; Masood, *Jurisdiction of International Centre for Settlement of Investment Disputes* 14 J. INDIAN L. INST. 119, 138 (1972).

⁵⁹ Broches, *supra* note 10, at 359.

control should still be necessary.⁶⁰ Where, in accordance with either the incorporation test or the ownership and control test, an enterprise is a national of the host state party, that enterprise should fall into the category of juridical persons contemplated by the second part of article 25(2)(b).

With the above considerations in mind, the personal jurisdiction of the Centre over joint ventures incorporated in host states will now be considered. This analysis will raise further difficulties presented by the nationality requirement, which will be returned to in the concluding section of this article.

V. The Jurisdiction *Ratione Personae* of the International Centre over Joint Ventures

A. "Foreign Control": *Minority Joint Ventures and the Meaning of Control*

The Convention offers no definition or explanation of the term "foreign control." A threshold question is whether foreign control is to be subjectively or objectively determined. Is it sufficient for the parties to agree to treat the host state enterprise as a national of another contracting state because of an element of foreign control which in their opinion warrants this treatment? Can mere agreement as to foreign control confer jurisdiction or must a certain degree of foreign control independently exist?

The *travaux préparatoires* of the Convention reveal that the draft contained a provision to the effect that any judicial person with host state nationality could be treated as "a national of another Contracting State" purely on the basis of an agreement by the parties to this effect.⁶¹ This provision induced the fear on the part of several LDCs that juridical person wholly owned and controlled by host state nationals could thus remove itself from the jurisdiction of host state courts and control by the host state. Host state agreement would have been necessary in order for this to occur, but the fear seems to have been that large local enterprises with dominant bargaining power might have been able to secure this consent.

In deference to these objections, the words "the parties have agreed should be treated as a national of another Contracting State" were

⁶⁰ An example of this would be an enterprise in which nationals of the host state hold 85% equity and have the business management, nationals of contracting state X hold 15% and have the technical management, while the enterprise is incorporated in any third contracting or non-contracting state. That the Convention has inherent flexibility and that the Centre can determine nationality in accordance with any of various criteria are desirable. In certain circumstances, however, it is bound to cause uncertainty. Investors would therefore be well-advised to insert an agreement-on-foreign-control stipulation into the consent clause whenever the investor enterprise, despite its incorporation in another contracting state, happens to have a certain amount of equity held by nationals of the host state.

⁶¹ Draft Convention, art. 30 (iii), ICSID Doc./2 (pt. 1) 624 (1970).

prefixed with the words "because of foreign control" in the final text.⁶² The addition of these words mandates the conclusion that "foreign control" cannot be totally subjectively determined. Where diversity of nationality is totally absent, as in the case of a company incorporated in the host state and wholly owned and controlled by host state nationals, no amount of agreement can confer jurisdiction.

Since "foreign control" must objectively exist, what meaning is to be attributed to this term? A wholly owned subsidiary of a foreign investor enterprise will obviously be subject to foreign control. A joint venture in the host state in which such foreign investor enterprise has a decisive voice in management and holds a majority equity participation would also clearly qualify. In minority or equal participation joint ventures, however, the interpretation of "foreign control" is crucial in determining the scope of the Centre's jurisdiction. As pointed out above, control is not an either-or proposition but a question of infinite degrees of divisibility. It must be determined what degree of control will, when coupled with the parties' agreement, suffice to confer jurisdiction by virtue of the second part of article 25(2)(b).

In the *travaux préparatoires* and subsequent legal literature there is little discussion concerning the extent or degree of control which, when coupled with agreement, will be sufficient to give the Centre jurisdiction. It seems to have been assumed that in most cases the foreign control would be majority control.⁶³ As shown above, however, equity shares are often an inaccurate measure of control over an enterprise, and this was echoed by one of the legal experts formulating the Convention.⁶⁴ There are numerous devices by which equity ownership can be disassociated from control and, in these circumstances, the lack of definition as to what constitutes "foreign control" frees the parties to agree to treat as such "any objectively verifiable financial or administrative situation."⁶⁵ Tribunals and commissions, as judges of their own competence,⁶⁶ have considerable discretion and it is to be hoped that they will exercise it so that, provided there is at least an element of "control," jurisdiction will not be declined.⁶⁷ "Control," for the purposes of the Convention, may constitute something less than the ability to block changes instigated by the non-foreign partner. To decide otherwise would be to deny investors the protection of the Convention in circumstances in which one overall

⁶² This change was made at the suggestion of the U.S. legal expert, but without sufficient explanatory discussion. See ICSID Doc./2 (pt. 2) 837 (1970).

⁶³ But see Szasz, *supra* note 10, at 23, 24, where the author recognizes this problem.

⁶⁴ See the Eighth Session of the Consultative Meeting of Legal Experts on Feb. 7, 1964, ICSID Doc./2 (pt. 1) 359 (1970).

⁶⁵ See Masood, *supra* note 58, at 139.

⁶⁶ Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature March 15, 1965, arts. 32(1) and 41(1), 17 U.S.T. 1270, T.I.A.S. No. 6090.

⁶⁷ This question, like other problems discussed *infra* in connection with multipartite joint ventures, has not yet arisen in the disputes that have been registered with the Centre.

aim of the Convention—the flow of resources in the form of capital, know-how and facilities to LDCs—is being satisfied. Control is both a question of law and of fact; it is to be expected that in borderline cases the total situation will be analyzed to determine whether sufficient “control” exists.

Where the host state has agreed, because of foreign control, to treat a joint venture organized under its laws as a national of another contracting state, it will probably be estopped from denying that the control exercised by the foreign partners to the venture is sufficient to confer jurisdiction.⁶⁸ It is for the tribunals and commissions, then, to judge whether the control is sufficient. They may be expected to judge their competence in a liberal manner, attaching great weight to the overall purpose of the Convention and the consensual nature of that instrument.

Nevertheless, where the foreign investor feels that the venture in which he is involved represents a marginal situation in terms of the foreign control criterion (*e.g.*, he has a marketing agreement, only twenty percent equity and a minority or no voice in management), it may be advisable for him to enter into a separate agreement with the host government in which the latter consents to submit to ICSID any disputes arising out of the agreement between it and the joint venture. This expedient of a separate “guarantee” agreement would render agreement on foreign control superfluous and cut through the potential jurisdictional tangles which could otherwise ensue.

B. Foreign Control: Multipartite Joint Ventures and Choice of Nationality

The wording of the second part of article 25(2)(b) may give rise to further and more complex problems in cases concerning multipartite joint ventures, particularly where the foreign share of a joint venture is held by two or more enterprises which have different nationalities.

There is no requirement in the Convention itself that the agreement on foreign control must identify the country whose nationals exercise that control or that the control must be exercised by nationals of only one particular state. However, the Model Clauses recommend that the agreement on foreign control identify the nationality of the controlling interest, “especially so if such control is exercised by nationals of several foreign countries—in which case there may be an advantage in identifying only one of these or perhaps in mentioning some or all.”⁶⁹ This is wise counsel since nationality is dispositive of a variety of important questions such as eligibility for membership of arbitral tribunals and re-

⁶⁸ Of course, where the foreign investor has minimal control the host state will probably not consent to ICSID jurisdiction.

⁶⁹ The Model Clauses provide: “It is hereby agreed, that although name of investor is a national of the Host it is controlled by nationals of name(s) of other Contracting State(s) and shall be treated as a national of (that)/(those) State(s) for the purposes of the Convention.” Model Clauses, *supra* note 36, ¶ 16, Clause VI.

strictions on the state of which the investor is a national. Moreover, the Rules of Procedure for the Institution of Proceedings provide that the request for registration of a dispute must contain, in the case of a foreign controlled host state juridical person, data on the agreement on foreign control⁷⁰ supported by documentation.⁷¹

Article 25(2)(b) poses no intractable problems where there are several foreign partners in a joint venture, even where these partners are nationals of different states, providing these states are contracting states. The situation becomes more complex where some or all of the foreign interest is held by foreign investors who are nationals of non-contracting states.⁷² Some hypothetical examples may serve to illustrate a number of potential problems concerning the operation of the second part of article 25(2)(b) in this connection and in relation to foreign control in general.

Example III. JV is an enterprise incorporated in Host State pursuant to an agreement between A, B and C (foreign enterprises being nationals of States X, Y, and Z respectively) and L (one or more private businessmen in Host State). A, B and C each hold 30% of the equity and L holds the remaining 10%. A, B and C are represented on the board of directors. However, B has effective managerial control pursuant to a 'management contract' between it and JV, and C has control of the technical operations of the venture by virtue of a 'technical services contract' between it and JV, but both Y and Z are non-Contracting States. A has a marketing agreement with JV and X is a Contracting State. The investment agreement between JV and Host contains a consent clause in which the parties agree to submit any disputes arising out of the investment contract to ICSID. The consent clause also contains the following stipula-

⁷⁰ ICSID Doc./4, (B) Rules of Procedure for the Institution of Conciliation and Arbitration. Rule 2(1)(d)(iii).

⁷¹ *Id.* Rule 2(2).

⁷² This is of potential significance despite the fact that the Western industrialized countries are so well represented on the ICSID membership list. Note that the Convention applies to investments in contracting states made by nationals of other contracting states whether or not the latter are less developed or developed countries. The Centre is thus available for the settlement of disputes arising from so-called "transatlantic investments." See Brandon, 6 *Dirroto Negli Scambi, Internazionali* No. 4,397, 404 (Dec. 1967).

As economic development progresses it is most likely that investments by "less developed countries" in other less developed countries will assume an increasing proportion of the volume of international investment. The LDCs of the Middle East are an example of countries which have become capital exporters. For a case study of a joint venture in a LDC which has itself promoted and become a partner in yet another joint ventures, see W. FRIEDMANN & J. BEGUIN, *supra* note 12, at 151-66. In this context, the absence from the membership list of the Latin American countries becomes even more significant.

In addition, it has been observed that the Eastern bloc socialist countries are also not contracting states. In view of the trend towards East-West economic cooperation, the ramifications of increased East-West trade might be felt in the North-South arena. Multipartite joint ventures in LDCs in which Western and Eastern trading interests participate are perhaps more in the realm of practical possibility than of wild conjecture. Westinghouse Corp., for example, was negotiating a multi-million-dollar joint venture for the exploitation of uranium deposits in Somalia, in which an East European "business concern" was to participate. *Int'l Herald Tribune*, May 28-29, 1977, at 2, col. 4.

Note that an entity, in order to qualify as a "national of another Contracting State" for the purposes of article 25 need not be a privately owned enterprises. A government-owned corporation is said to qualify so long as it is not discharging "an essentially government function" or acting directly "as an agent for the government." See Broches, *supra* note 10, at 354-55.

tion: "It is hereby agreed that, although JV is a national of the Host, it is controlled by nationals of X State and shall be treated as a national of that State for the purpose of the Convention."

Example IV. The facts are as in Example III except that B and C (being incorporated in non-Contracting States Y and Z respectively and being wholly owned and controlled by shareholders who are nationals of those States) are the only foreign partners in JV, so that the respective equity holdings are B, 45%; C, 45%; L, 10%. The agreement on foreign control is precisely the same as Example III, attributing X nationality to the foreign partners.

These examples raise several questions. In Example IV, it might at first glance appear that the Centre would be able to exercise jurisdiction *ratione personae* over JV. The second part of article 25(2)(b) provides only that the parties may, because of foreign control, agree to treat an enterprise which is a national of the host as a national of another contracting state and is completely silent on the question of nationality of the controlling interest. Strictly speaking, therefore, the provision places no restrictions on the choice of foreign nationality based on foreign control.⁷³ It has been contended, however, that the legal policy implicit in the jurisdictional articles of the Convention prohibits unreasonable choices of nationality.⁷⁴ It is submitted that this is the only satisfactory way in which article 25(2)(b) can be interpreted. To assume jurisdiction where the foreign investors exercising the control have no connection whatsoever with the state whose nationals they purport to be would be to permit use of the Convention in circumstances in which it was clearly not intended to apply. Therefore, not only must the nationality chosen be that of a contracting state, but the choice of that particular contracting state nationality must be a reasonable one in the circumstances. In accordance with these principles the choice of nationality in Example IV is obviously an unreasonable one and will not serve to found jurisdiction.

The situation envisaged by Example III is less clear cut and it raises more difficult questions. Here one of the foreign partners is in fact a national of a contracting state but it would seem that this should not automatically make the choice of that partner's nationality a reasonable one. It must, therefore, initially be determined whether A's influence is sufficient to satisfy the "control" criterion in article 25(2)(b). Is the effect any different, however, where this "control" is only a small part of the total foreign influence on the locally incorporated enterprise in terms of aggregate foreign shareholdings, business, and technical management and where, if each foreign party's "control" is looked at in isolation, that of the non-contracting state nationals appears greater?

On the one hand, to assume jurisdiction *ratione personae* over JV in Example III would be to assume jurisdiction over the interests of nationals of non-contracting states, albeit not over those nationals themselves.

⁷³ See Amerasinghe, *supra* note 36, at 232, 245.

⁷⁴ Amerasinghe, *Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 5 J. MAR. L. & COM. 211, 229, 230 (1974); Broches, *supra* note 10, at 337, 359, 361.

This is open to the objections mentioned above in connection with Example IV. On the other hand, to decline jurisdiction would deny protection to the interests of a national of a contracting state. The arguments against the exercise of jurisdiction over nationals of non-contracting states are not all applicable where the issue is the exercise of jurisdiction over a national of the host in which nationals of non-contracting states have an interest. In the former case, the non-contracting state of which the party is a national is by definition not bound by article 27 and is therefore not restricted from giving diplomatic protection or bringing an international claim. This point will be elaborated on in the concluding section of this paper. In the latter case there is no risk of this happening, since the foreign controlled juridical person is by definition a national of the host state party to the dispute and customary international law does not yet countenance the protection of shareholders in such cases.⁷⁵

Where nationals of contracting states clearly control the joint venture, the mere fact that nationals of non-contracting states have large equity holdings in the venture, and even some control, should not be a bar to jurisdiction. In such a case, the choice of nationality based on foreign control is clearly reasonable. Where control is shared equally by the foreign partners but none of them acting alone would have overall control, it is not possible to predict the outcome with certainty. On the specific facts of Example III, however, where B and C have collectively, and even separately, more control than A, it is probable that a tribunal would hold the choice of X nationality unreasonable. Again, however, it is submitted that the host state party may be estopped from objecting to jurisdiction on the grounds that the choice of nationality was unreasonable, since it was itself a party to that choice.

These jurisdictional tangles may be obviated if B and C avoid classification as nationals of non-contracting states by, prior to the agreement between JV and host, arranging for their incorporation in state X or another contracting state. On the other hand, even if B and C are incorporated in non-contracting states, there may be some connecting factor with a contracting state, such as residence of a large percentage of shareholders, which would enable them to stipulate that they are nationals of the latter. As shown in section IV, the Centre is at liberty to accept a relatively loose bond in satisfaction of the criterion of nationality under the Convention and is by no means restricted to the principles enun-

⁷⁵ In *Barcelona Traction*, [1970] I.C.J. at 48, the court rejected the applicability to the facts before it of a theory that protection could be exercised where a corporation has the nationality of the very state responsible for the acts complained of. The tenor of the court's reasoning clearly suggested that shareholders could only receive protection where the corporation has ceased to exist in law. I. BROWNIE, *supra* note 43, at 480. But note that several judges expressly supported this form of protection. *Id.* at 481. Moreover, protection of shareholders "at international law" is recognized in the practice of certain countries. 2 D. O'CONNELL, *supra* note 43, at 1043-44.

ated by the ICJ of the *Barcelona Traction* case.⁷⁶

In the exact circumstances envisaged by Example III, however, it would again be advisable for A to take the precaution of entering into a separate agreement with the host in which the host agrees to submit to ICSID any disputes arising out of the agreement between it and JV. This expedient should be effective provided the host state consents to it; it is no real disadvantage that JV will be dependent on A to institute proceedings. The Convention does not require that the dispute arise directly out of an investment transacted solely between the parties to the dispute. The use of the word "directly" in article 25(1) is clearly designed to circumscribe the relationship between the dispute and the investment, not the relationship of the party to the dispute with the investment. It is the nationality of the person party to the consent agreement that is relevant, not the nationality of the investment.

C. Changes in Identity of the Parties and Changes in Ownership and Control within a Party

Changes in equity ownership of and control over joint ventures are not infrequent, whether due to commercial expediency, a program of planned and gradual divestment, or any other reason. May such changes retroactively taint the stipulation in the consent agreement concerning "nationality" and "foreign control" so as to deprive the parties of the benefit of jurisdiction which would have existed had no changes taken place? The situation where the identity of the investor party to the agreement changes must be carefully distinguished from that where there are changes of interest or control in that investor party.

(i) *Change in Identity of a Party*: Model Clause VII was drafted to meet the contingency of a change in identity of the parties by providing explicitly for the inclusion of successors in interest within the jurisdictional provision, thus binding the successor to the same extent as its predecessor and assuring that the other party remains reciprocally bound.⁷⁷ However, recognizing the possibility that a successor might be unable to be a party to a proceeding before the Centre, for example if it is a national of the host state or of a non-contracting state, the Clause provides further for a preclusion of transfers in interest (absent the consent of the other party) that would destroy the jurisdiction of the Centre. The Clause would also apply to a transfer by the host government of its

⁷⁶ [1970] I.C.J. 1. The court effectively held that incorporation (or location of principal office) is the sole criterion for corporate nationality.

⁷⁷ Model Clauses, *supra* note 36, ¶ 17. Clause VII provides as follows: "It is hereby agreed that the consent to jurisdiction of the Centre expressed in citation of basic clause above shall equally bind any successor (in interest) to the name of constituent subdivision or agency and to the Investor to the extent that the Centre can assume jurisdiction over a dispute between such successor and the other party (and that neither party to this agreement shall, without written consent of the other, transfer its interest in this agreement to a successor with respect to whom the Centre could not exercise such jurisdiction)."

interest under the investment agreement to local host state nationals. Such a transfer is a practical possibility since it is generally considered desirable from an economic development viewpoint for host state nationals to participate in local investments, particularly those involving secondary industries. As capital markets in LDCs broaden with more successful mobilization of domestic savings, host governments will, in many cases, be keen to transfer their interests to private parties so that scarce public funds can be channelled elsewhere. In light of this possibility, it may be advisable for investors, in addition to stipulating for mutual consent to transfers in interest which may destroy jurisdiction, to bargain for a further addition providing that, should such a transfer in interest to local host state nationals occur, the host state will, notwithstanding such change, guarantee the foreign investor's interest by further legal instrument against government interference. Such guarantee would be subject to ICSID jurisdiction; the host state government would thus remain a party and jurisdiction would be preserved.

(ii) *Changes in Ownership and/or Control within a Party*: A different situation is that where, although a joint venture incorporated in a host state continues to be the foreign investor party to an investment agreement with the host state, there are changes in ownership or control of that joint venture. The language of the first part of article 25(2)(b), regarding enterprises which are nationals of contracting states other than the host state, is unambiguous. So long as the juridical person had the nationality of another contracting state on the date on which the parties consented to submit such dispute to conciliation or arbitration,⁷⁸ the Centre will have jurisdiction. Any changes in nationality after the date of consent are irrelevant.⁷⁹ The following example shows that this principle is easily applied and will facilitate analysis of the more complex case of host state juridical persons agreed to be under foreign control.

Example V: Enterprise A, a national of Contracting State X, enters into an investment agreement with the government of Contracting State H, which agreement contains a clause consenting to ICSID arbitration. Subsequent to the date of consent but prior to any dispute arising, A becomes a national of non-Contracting State Y.

Clearly, when the dispute arises the Centre will have jurisdiction *ratione personae*. Had A transferred its interest in the investment agreement to B, a national of non-contracting state Y, jurisdiction would have been destroyed. However, when the particular party to the agreement had, at the date of consent, the nationality of a contracting state other than the contracting state party to the agreement, jurisdiction over that party is

⁷⁸ Art. 25(2)(b). ICSID Doc./4, Regulations and Rules, (B): Rule 2(1)(d)(i), provides that requests for the institution of proceedings must indicate nationality as at the *date of consent* (emphasis supplied).

⁷⁹ " 'Date of consent' means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties do not act on the same day, it means the day on which the second party acted." ICSID Doc./4, Regulations and Rules, (B): Rule 2(3).

assured irrespective of subsequent changes in nationality. Now assume that A's claim to X nationality was based on the fact that it was incorporated in X, had its *siege social* there, and that over 50% of the equity in A was held by X nationals, the remainder being held by B enterprise. After the date of consent but before a dispute arises B acquires all equity in A held by X nationals and A moves its active headquarters to state Y. Jurisdiction is assured because there is no change in identity (the legal entity A is still the party to the agreement) and the fact that A could be held to have changed nationality is irrelevant.

In such circumstances, no matter how hypothetical they may be, the distinction between identity and nationality can result in substance being surrendered to form. Nevertheless, the wording of the first part of article 25(2)(b) leaves no room for argument. Subsequent changes of capital structure or control of an enterprise may affect nationality but, as long as the identity of the parties does not change, changes in nationality after the date of consent are irrelevant.

To the extent that the matter is mentioned in the literature interpreting and discussing the Convention, there is universal agreement that only the date of consent is relevant in determining the nationality of juridical persons for jurisdictional purposes.⁸⁰ In the case of foreign controlled host state juridical persons, it also appears that post-consent changes in nationality and control are deprived of jurisdictional significance. An example may be useful to analyze the possible absurdities which would result from a formalistic application of this nationality requirement.

Example VI: JV is incorporated in Host State. A, B, and C (foreign enterprises being nationals of States X, Y and Z respectively) and L (one or more private businessman in Host State) are the shareholders. State X and, of course, Host, are Contracting States, but States Y and Z are non-Contracting States. A holds 70% equity while B, C and L hold 10% each. Voting rights are proportional to equity shares held. In 1978 JV and Host enter into an agreement by which JV is to mine and refine certain minerals. The agreement contains a consent clause submitting disputes to ICSID and a stipulation that "although JV is a national of Host it is controlled by nationals of State X and shall be treated as a national of State X for the purposes of the Convention." In 1980 A becomes a national of State Y. In 1982 A transfers half its equity in JV to B and half to C so that the ratio is now B, 45%; C, 45%; L, 10%. In 1984, B and C each transfer almost all their equity to L so that the new ratio is B, 2 1/2%; C, 2 1/2%; L, 95%. In 1986 a dispute arises between JV and Host over the mining agreement.

According to the propositions discussed above, the Centre will have jurisdiction whenever the dispute arises since nationality is frozen at the date of consent, at which time X nationality was chosen and was a reasonable choice. All subsequent changes in nationality and control are irrelevant.

⁸⁰ Szasz, *supra* note 10, at 20; Firth, *The Law Governing Contracts in Arbitration under the World Bank Convention*, 1 N.Y.U. J. INT'L L. & POL. 253, 257 n.15 (1968); Amerasinghe, *supra* note 74, at 229-230; BROCHES, *supra* note 10, at 358.

Jurisdiction is not destroyed through a change in identity of the investor party since JV is at all times the entity party to the agreement with host. To take this analysis to its ultimate conclusion, even if at the time of a request for registration of a dispute JV is wholly owned and controlled by L, jurisdiction nonetheless exists, in the exact circumstances which were sought to be avoided by the inclusion of the words "because of foreign control." It is inconceivable that such a situation should be consistent with the "legislative intent" behind the Convention. The proposition that for *all* juridical persons the nationality requirement is frozen as at the date of consent is therefore inadequate.

The second part of article 25(2)(b) contemplates two separate nationality requirements for two separate entities: the nationality of the locally incorporated juridical person and that of the controlling interest. In these circumstances consideration of only one identity causes confusion. To make coherent logic out of the provision with a view to the situations in which it could plausibly be applicable, it is crucial to consider separately the nationality and identity of the host state juridical person and the nationality and identity of the controlling interest.

For the second part of article 25(2)(b) to apply it is necessary that the juridical person concerned must in fact have been a national of the host state, and that post-consent changes in the nationality of that same juridical person would be deprived of significance by the wording of the provision. The provision makes no express mention of and places no restrictions upon the nationality of the controlling interest. As explained above, however, the article must be understood as implicitly requiring that the stipulated nationality must constitute a reasonable choice as of the date of consent.

Since the nationality of the controlling interest is of importance, it is logical to hold, in harmony with the general requirements regarding nationality of juridical persons which are nationals of other contracting states, that post-consent changes in the nationality of the controlling interest should be irrelevant but that total transfers of this interest to nationals of non-contracting states, and *a fortiori* to host state nationals, will destroy jurisdiction. It is submitted that this proposition calls for no more distortion of the second part of article 25(2)(b) than does the proposition that the article requires the agreement on foreign control to be based upon a reasonable choice of nationality. This latter proposition is logically essential and well supported.⁸¹ Both propositions merely give effect to the view that, when considering host state corporate nationals subject to "foreign control," significance must be attached to the nationality of the controlling interest since that nationality is transposed onto the host state juridical person. The wording of the second part of article 25(2)(b) easily accommodates an interpretation consistent with both of these propositions.

⁸¹ See note 74 *supra*.

Applying this interpretation to the facts of Example VI, if a dispute were to arise in 1979, the Centre would clearly have jurisdiction since the agreement on foreign control is based on a reasonable choice of nationality. If a dispute were to arise in 1981, the fact that A has become a national of a non-contracting state would be irrelevant and the Centre would nonetheless assume jurisdiction. However, the transfer of A's interest to nationals of non-contracting states (B and C) in 1982 will result in the Centre being unable to assume jurisdiction *ratione personae* over JV with regard to disputes arising after this date.

It is submitted that this interpretation is necessary if the device sanctioned by the second part of article 25(2)(b) to bring foreign-controlled host state nationals within the scope of the Convention is not to be used for purposes for which it was clearly not intended. It may therefore be expected that tribunals and commissions will adopt this approach and treat the two categories of juridical persons provided for by article 25(2)(b) with logical consistency.

Throughout this section, approaches to interpretation have been suggested which are in accordance with the text of the Convention in the context of its drafting history. The exclusion of nationals of non-contracting states from the ambit of the Convention is well entrenched in both the text and the preparatory work and in clear cut cases it cannot be ignored. On the other hand, where the text of the Convention is silent, there are strong reasons for the adoption of a lenient approach to the presence of nationals of non-contracting states despite the legal policy implicit in the jurisdictional articles. These reasons will be fully examined in the concluding section of this article.

VI. Conclusions and Overview

The World Bank Convention is a significant milestone towards the protection and encouragement of foreign investment in developing countries. Foreign investors will gain considerable advantages by using it and the facilities of the International Centre to the fullest permissible extent.

The foregoing analysis demonstrates that the rapidly increasing number of foreign investors using the joint venture as a mechanism for their business activities in developing countries will need to consider a number of potential problems and issues and carefully structure their agreements to ensure that these are arbitrable under the auspices of the Centre.

The text of the Convention itself offers little definitional guidance with respect to many of the operative terms employed in article 25. This article has attempted to analyze these terms with a view to the situations in which they might conceivably be applicable, suggesting certain approaches which are consistent with the fundamental principles of the Convention as evidenced by its text and its drafting history.

The lack of definition arguably avoids restrictive criteria that would

too narrowly circumscribe the scope of the Convention, freeing the parties to mold their own definitions within the confines of the Convention.⁸² With respect to certain issues, such as nationality and foreign control, the agreement of the parties may cure jurisdictional weaknesses that would otherwise exist. However, such agreement is not all-controlling. The determination of the exact limits beyond which such agreement will no longer remedy jurisdictional defects causes some difficulty. What is needed, therefore, are not hard and fast definitions but general yet comprehensive guidelines regarding the scope of the Convention. The Directors' Report is no substitute for these. ICSID awards are not published without the consent of the parties⁸³ and are therefore generally unavailable, but it would be useful if the principles evolved and interpretations adopted in decided disputes were made available for the guidance of prospective users of the Centre.

There are certain situations, apart from the lack of definition, with which the jurisdictional provisions as presently drafted are ill-equipped to deal. This is strikingly illustrated by the problems that could arise with regard to the exercise of personal jurisdiction over multipartite joint ventures incorporated in host states. Where nationals of non-contracting states have a sizeable interest in such ventures, or where there are changes in ownership and control, article 25 provides no ready answers. The conclusion is inescapable that insufficient thought, if any, was given to the case of these joint ventures at the formulative stages of the Convention.⁸⁴ In view of the trend towards joint ventures as a mechanism for investment, these are problems with which the Centre is likely to be confronted in the future.

At the root of many of the problems examined in this paper is one of the fundamental principles upon which the Convention is based—that of the limitation of this instrument to contracting states and nationals of these states. The exclusion of non-contracting states and their nationals from the jurisdiction of the Centre is so axiomatic, so well-entrenched in the text of the Convention and the *travaux préparatoires* thereof, that it might be considered both an exercise in futility and a legal heresy to challenge it. Certainly the reasons for the exclusion of non-contracting states are obvious and compelling. Such states would, by definition, not be bound to submit disputes to the Centre even after they had consented to do so. The irrevocability of consent mandated by article 25(1), one of the most remarkable features of the Convention, would be rendered meaningless. Moreover, such states could ignore an award given against them with virtual impunity, since they would not be bound by article

⁸² But see G. SCHWARZENBERGER, *supra* note 6, at 142, who considers the lack of definition a disadvantage.

⁸³ Art. 48(5).

⁸⁴ This was recognized by at least one of the legal experts and by the Chairman of the Consultative Meetings considering the Preliminary Draft of the Convention. ICSID Doc./2 (part 1) 395.

54(1). In effect, an investor who entered into an ICSID arbitration agreement with a non-contracting state would be in no better position than he would have been had the Convention not existed.⁸⁵

The exclusion of nationals of non-contracting states from the jurisdiction of the Centre, however, is worthy of further examination. To fully understand this exclusion, it may be helpful to emphasize the rationale behind the nationality requirement. The Convention is a delicate balance of widely differing interests and has been drafted with what has been referred to as "remarkable ingenuity."⁸⁶ It rests upon the *quid pro quo* that, in return for the irrevocability of consent and the consequent right to bind host states to arbitration or conciliation, investors must forfeit, by virtue of article 27, the possibility of being afforded diplomatic protection by their own states, unless and until the host state party refuses to recognize an award. This balance would, it is argued, be upset if non-contracting state nationals could bind contracting states to proceedings, since the latter would have no guarantee that the national state of the investor would not put forward an international claim in the exercise of diplomatic protection.⁸⁷ However, the implicit recognition by the Convention of both incorporation and control as criteria of corporate nationality and of dual nationality of enterprises where these criteria lead to divergent conclusions reveals an interesting anomaly. Where a contracting state is the national state of an investor enterprise according to the ownership and control criterion, but a non-contracting state is its national state according to the *Barcelona Traction* incorporation principle, the contracting state is effectively prevented by article 27(1) from bringing an international claim against the host state party to the agreement with the enterprise, but the non-contracting state is, by definition, subject to no such restriction.⁸⁸

Fortunately, this problem is largely illusory since it appears to be an established principle of international law that "where a state and an alien agree to arbitrate disputes relating to a contract in terms that indi-

⁸⁵ See section I *supra*. On September 27, 1978, the Administrative Council of the Centre authorized the Secretariat to administer certain proceedings which fall outside the Convention. This "Additional Facility" is available to non-contracting states and their nationals who would wish to use the facilities of the Centre to settle their disputes. See ICSID: Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings, ICSID Doc./11 (1979). While such a facility must be warmly welcomed as yet another improvement in the international investment climate, the discussion of the jurisdictional provisions of the Convention undertaken in this study remains highly pertinent.

Since the users of the Additional Facility will be non-contracting states and their nationals, the remarkable features of the Convention which make that instrument such an important addition to the international legal order will by definition not apply. See ICSID Doc./11, art. 3.

⁸⁶ G. SCHWARZENBERGER, *supra* note 6, at 142.

⁸⁷ Broches, *supra* note 10, at 356, 374.

⁸⁸ In *Barcelona Traction*, the I.C.J. warned that "adoption of the theory of the diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create . . . confusion and insecurity." [1970] I.C.J., *supra* note 42, at 49. Ironically, art. 27 itself could be ineffective in preventing a similar result under the Convention. In fact, it is the "exhaustion principle" that would prevent this result. See text *infra*.

cate that this is to be the exclusive remedy, then that remedy must be exhausted before an international claim can be maintained."⁸⁹ The arbitral remedy is for this purpose the equivalent of local remedies.⁹⁰

This principle, however, exposes a paradox that strikes at the very core of the rationale for the exclusion of nationals of non-contracting states. If an investor having only the nationality of a non-contracting state entered into an agreement with a contracting state and such agreement were arbitrable by ICSID, it is extremely unlikely that a claim by the investor's state against the host state would succeed unless and until the latter had failed to abide by and comply with the award rendered. Indeed, such failure, by virtue of article 27(1) itself, removes the restriction on contracting states from giving diplomatic protection or bringing an international claim.⁹¹

Interpreted in this manner, article 27(1) appears merely declaratory of the existing situation at customary international law. It has been intimated, however, that the justification for this article is to be found in the contention that where a host state, in defiance of a submission clause, refuses to arbitrate at all, the investor could, in the absence of article 27(1), instantaneously invoke the protection of his national State.⁹²

This argument is not convincing. Article 45(2) deals with the contingency of a refusal of one of the parties to arbitrate and ensures that an award will be given.⁹³ In view of this, it is unlikely that even the most ill-advised investor would abandon this machinery to seek the protection of his national state, or that all but the most vindictive of states would seek to bring an international claim before the procedures set in motion by the Convention had been completed and an award obtained and not complied with. Even if the non-contracting state of which the investor is a national does attempt to bring an international claim directly after the refusal of the host state to honor its agreement with the investor to arbitrate, before article 45(2) has been utilized, this attempt will not succeed. The fact that the article 45(2) procedure exists, and that ICSID arbitration constitutes a complete institutional system, mandates this conclusion. The failure of the investor party to avail himself of article 45(2) and request an award despite the non-appearance of the host state party must surely be held to mean that the arbitral remedy has not been fully exhausted.⁹⁴ It is therefore submitted that the exclusion of nationals of

⁸⁹ D. O'CONNELL, *supra* note 41, at 1059.

⁹⁰ Schwebel & Wetter, *Arbitration and the Exhaustion of Local Remedies*, 60 AM. J. INT'L L. 484 (1966).

⁹¹ Art. 27(1). See note 49 *supra*.

⁹² Broches, *supra* note 10, at 374-75.

⁹³ Art. 45(2) provides as follows: "If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so."

⁹⁴ The argument that the investor's state could immediately maintain a successful claim

non-contracting states cannot be adequately justified by reference to the question of diplomatic protection.⁹⁵

The nationality requirement has been defended on a more substantial ground. Article 54(1) enjoins contracting states to recognize an award rendered pursuant to the Convention as if it were final judgment of a court in that state. It has been argued that, in the absence of the nationality requirement, the assurance provided by his article that host states will be able to enforce awards in their favor could be frustrated if the national state of the investor, where frequently his principal assets will be located, is not a contracting state, and thus not bound to recognize and enforce such awards.⁹⁶ This possibility exists. Yet, even assuming that such non-contracting states are not bound by some other treaty obligation to recognize such awards, this is a slender justification for the nationality requirement. More often than not the investor will, in addition, have assets in at least one contracting state and perhaps in the host

based on diplomatic protection when the host state refuses to participate in arbitral proceedings is erroneous.

Broches, *supra* note 10, at 374 (quoting D. O'CONNELL, *supra* note 41, at 990) (emphasis supplied by author) cites O'Connell in support of this argument, as follows:

Where a governmental contract contains an arbitration clause and the Contracting State refuses to arbitrate, the latter is guilty of a denial of justice, just as much as if it obstructed the contractor in his resort to the municipal law remedies contemplated in the contractual relationship. Hence the private contractor may *instantly invoke* the protection of his State

However, this passage from O'Connell continues directly with the words:

[O]r, *if the contract lays down sufficient guidance* as to the machinery of arbitration . . . he may proceed to arbitration in the absence of the State and obtain an award.

D. O'CONNELL, *supra* note 41, at 990 (emphasis supplied). It is implied from the passage as a whole, therefore, that the first part of it, as quoted by Broches, contemplates the situation where there is no guidance as to the machinery of arbitration—indeed, no machinery at all. The latter part of the passage is thus intended to reflect the situation where machinery does exist. It is submitted that in this case protection may only be invoked if the refusing state ignores the *award*, not merely the proceeding. Moreover, the sentences quoted above from O'Connell must be seen in the context in which they were made. They were to stress that the arbitral remedy is the equivalent of local remedies, so that when there is an arbitral remedy and this is frustrated by the non-cooperation of the state the investor is not additionally required to exhaust local remedies. *See also* Z. KRONFOL, PROTECTION OF FOREIGN INVESTMENT 126 (1972) (emphasis supplied): "If the private investor . . . seeks and fails to obtain the proceeding called for in his agreement, he is under no obligation to exhaust local remedies. He is free, rather, to pursue the resources open to him under international law." With respect to ICSID arbitration there is no reason whatsoever why an investor should fail to obtain the proceeding. Article 45(2) sees to that. D. O'CONNELL, *supra* note 41, at 1058 (quoting Lauterpacht, J., in the *Norwegian Loans Case*, [1957] I.C.J. 9, at 39), states that "it is for the plaintiff State to prove that there are no effective remedies to which recourse may be had." This would obviously be impossible if art. 45(2) had not been utilized by the investor. *See* note 93 *supra*.

⁹⁵ If the investor could instantly invoke the protection of his state and the host state refused to involve itself in the proceedings (though as has been shown above, this argument is untenable), it must surely then be conceded that the potential conflict under art. 27(1), where an enterprise has dual nationality, would be insoluble. This itself makes the rationale of diplomatic protection, upon which the principle of exclusion of nationals of non-contracting states is squarely placed, a much less effective one.

⁹⁶ Broches, *supra* note 10, at 356. Art. 54(1) provides that "[e]ach Contracting State shall recognize an award rendered, pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."

state itself. Moreover, it must be remembered that host states are always at liberty to refuse to consent to ICSID arbitration when the investment agreement is negotiated. To refuse to allow them to consent to ICSID arbitration with a national of a non-contracting state on the grounds that they may obtain an award in their favor against an investor whose assets are located only in his national state, which might refuse to enforce such award, is an insufficient justification for the nationality requirement, especially in view of the potential problems this requirement poses.

In view of the foregoing considerations, the exclusion of nationals of non-contracting states from the jurisdiction of the Centre is regrettable. This feature of the Convention may be seen as an unfortunate by-product of the inevitable political bargaining process in negotiating the final draft rather than as a well reasoned necessity based upon sound legal policy. This is not in any way to underrate the "remarkable ingenuity"⁹⁷ with which the Convention has been drafted, or the inestimable value of its contribution to a more secure and conducive climate for foreign investment and economic development, but merely to caution that problems of interpretation in connection with this aspect of the nationality requirement are likely to arise.

The temptation to urge an amendment to the Convention to give the Centre jurisdiction over nationals of non-contracting states must be tempered by an understanding of the formidable task that faced the formulators of the Convention in producing an instrument that attracted such a broad membership in the first place. No matter how logical and compelling the reasons for amendment may be, it would be naive to expect that such amendment would be readily adopted by every contracting state.⁹⁸ For the foreseeable future, then, the nationality issue must be coped with as best as possible. One may express hope, indeed confidence, that in situations such as those discussed in this article, a liberal approach will be adopted to the fullest extent possible within the confines of the Convention.

⁹⁷ G. SCHWARZENBERGER, *supra* note 6, at 142.

⁹⁸ The procedure for amending the Convention is specified in art. 66(1):

If the Administrative Council shall so decide by a majority of two thirds of its members, the proposed amendments shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary [sic] of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.