PRIVATE VERSUS STATE ARBITRATION IN LATIN AMERICA

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In a previous article in this Journal[1] I attempted to analyze the development and the rather deplorable status of international arbitration in Latin America.

I had hoped in this second article to discuss the role of private versus state arbitration in Latin America—a type of arbitration that is becoming more generally accepted throughout the world.[2] Somewhat to my surprise and chagrin I discovered that, generally speaking, there is little interest in private versus state arbitration in Latin America.

It would be misleading and unfair to the reader to spin out a lengthy article describing a virtually non-existing procedure. It may nevertheless be interesting to add a few notes to make the former article current; to review briefly the outline and growth of the institution of private versus state arbitration in general; to note some of the instances (unfortunately all too infrequent) where arbitration has been envisaged in a contract involving a Latin American government and a foreign corporate entity; to summarize the efforts made to determine its status, or better said lack of status, in Latin America; and to speculate as to the possibilities for the future and as to what can be done to influence developments.

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1. Summers, *Arbitration and Latin America,* 3 CALIF. W. INT'L L.J. 1 (1972).

2. The rise of private versus state arbitration was mentioned in the previous article. *Id.,* at 18-20. The term is a convenient shortcut to designate arbitrations between a government agency or corporation and a private company, almost invariably a juridical entity.

I. ARBITRATION AND ADJUDICATION IN GENERAL

In the preceding article I sketched the bright promise of arbitration and adjudication in the early history of Latin America, the gradual disintegration of that promise and the contemporary reluctance of the Latin American governments to agree to international arbitration or adjudication. I did indicate that the Latin American States might be willing to resort to the legal settlement of disputes in controversies among themselves. As a result of further research and inquiry, I am now inclined to believe that only a few inter-American disputes are, in the present climate, likely to be settled by intergovernmental arbitration or adjudication. A commentary on the first article received from a well-placed source gives a very pessimistic picture of the future of arbitration in Central America. The commentator bases his judgment on several concrete cases where efforts to arbitrate on an intergovernmental or private versus state level have failed. Only too often when one party to a dispute is willing to arbitrate, the other is not.[3]

Moreover, the *New York Times* recently reported that Venezuela was unwilling to arbitrate a boundary dispute with Columbia.[4] Note should also be taken of the fact that the Peruvian government has refused to abide by the decision of the arbitral court in the La Brea y Pariñas controversy. That decision has a very important bearing on the International Petroleum Company (I.P.C.) difficulties with Peru which have strained Peruvian-United States relations.[5]

While the prospects for intergovernmental arbitration involv-

3. Some of the observations made in this article are derived from information given in confidence to the author so their exact source cannot be pinpointed in a footnote. I have, however, turned over the correspondence to the editors of this Journal so that they can satisfy themselves that the recital is correct.

4. Howe, *2 Latin Countries in Border Dispute,* N.Y. Times, April 29, 1973, § 1, at 11 (city ed.).

5. The fullest account of the I.P.C. dispute is contained in an article by Richard N. Goodwin. *See* Goodwin, *Letter from Peru,* New Yorker, May 17, 1969, at 41. Goodwin states that the Peruvian government "attacked the award and made a futile effort to bring the matter before the World Court." *Id.,* at 48.

The company has furnished the author with a printed resume presenting their side of the story entitled THE LA BREA Y PARINAS CONTROVERSY—A RESUME (Sept. 1972). The controversy is also summarized elsewhere. *See, e.g.,* U.S. FOREIGN POLICY AND PERU 246 *et seq.* (D. Sharp ed. 1972). *See also* 7 INT'L LEGAL MATERIALS 1201 (1968).

ing a Latin American State are not particularly promising, it should be noted that the government of former President Allende of Chile did offer to settle the Anaconda Copper Case dispute by arbitration.

In the July 2, 1973 issue of Newsweek, President Allende's offer was specifically mentioned in the summary of an interview given to Newsweek's Latin American Bureau Chief Bruce Van Vourst. According to the Newsweek account Allende said:

> Chile is not fighting the United States. We are talking. In the Anaconda (copper nationalization) case, we have proposed resorting to the arbitration agreement of 1914, a fair way because it is a compromise, a legal approach. Though it is nonbinding, it at least commits both parties. If two countries decide to resort to a tribunal, this is on the basis of goodwill. What we hate is that now, before we exhaust all our legal roads, measures are taken against us, credits are denied us. There is no democratic discussion, just pressure, and that's unfair. But the world is alert. These are not the times to crush Chile.[6]

The 1914 treaty to which Allende referred is the treaty between the United States and Chile for the advancement of general peace signed on July 24, 1914.[7]

It is one of the Bryan conciliation treaties which were entered into with such enthusiasm in the early part of the century but which seldom, if ever, have been used.[8]

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6. *Newsweek*, July 2, 1973 at 29.

7. Treaty for the settlement of disputes that may occur between the United States of America and Chile, July 24, 1914, 39 Stat. 1645, T.S. 5683, 532 U.N.T.S. 347.

8. The failure to use the early arbitration and conciliation treaties is commented upon by George Kennan. G. KENNAN, REALITIES OF AMERICAN FOREIGN POLICY 18-19 (1954). He states:

> The most elaborate of these projects was the negotiation of an extensive framework of treaties of arbitration and conciliation. Now I would not like to be misunderstood. My point is not that there was no place for arbitration. There was. It was a useful and important device for the settlement of certain types of dispute, under certain specific conditions. But the tendency of many Americans was to glorify the arbitral principle beyond its capabilities, to push it to extremes, to hope for too much from it. The fault, like most of the faults of American statesmanship, was one of emphasis, not of concept or intent. And as a result of this misplaced emphasis the United States Government, during the period from the turn of the century to the 1930's, signed and ratified a total of ninety-seven international agreements dealing with arbitration or conciliation, and negotiated a number of others which, for one reason or another, never took effect. Of the ninety-seven, seven were multilateral ones; the remainder, bilateral. The time, trouble, and correspondence that went into the negotiation of this great body of contractural material was stupendous.

Subsequent to the overthrow and death of Allende, the Junta, according to a news broadcast from C.B.S. has renewed the offer to arbitrate under that treaty.

The Department of State has apparently received the offer to arbitrate with little enthusiasm. One diffculty is that the treaty, although not particularly long, establishes a potentially protracted and complicated procedure. The dispute is submitted initially to a five member international commission. The commission must make a report within one year after starting an investigation unless its time is extended. The United States and Chile then have six months in which to negotiate on the basis of the report. If there is still no agreement, the dispute is submitted to the Permanent Court of Arbitration. Even such a submission is not guaranteed as "any question that may affect the independence, the honor or the vital interests of either or both of the countries, or the provisions of their respective Constitutions, the interests of a third nation, will not be submitted to such or any other arbitration."

The possibilities of delay and frustration are endless. Moreover, there is a real possibility that no arbitration would ever materialize. Hence, the Department may well regard the invocation of the treaty as a stalling device, particularly as some Chileans have candidly indicated that the obtaining of delay is the real purpose of the move. Nevertheless, with all its imperfections, the treaty does provide an avenue to settle the dispute and test the sincerity of the Chilean position. Thus, the failure to use it may not be the better part of wisdom.

Anaconda, in the meanwhile, appears to be playing a waiting game to see what will develop.[9]

> Yet so far as I can ascertain, only two of these treaties or conventions were ever invoked in any way. Only two disputes were actually arbitrated on the basis of any of these instruments; and there is no reason to suppose that these disputes would not have been arbitrated anyway, on the basis of special agreements, had the general treaties not existed. The other ninety-five treaties, including incidentally every single one negotiated by Secretaries of State Bryan, Kellogg, and Stimson, appear to have remained wholly barren of any practical result. Nor is there any evidence that this ant-like labor had the faintest effect on the development of the terrible wars and upheavals by which the first half of this century was marked.

Id.

From the context it appears that the two treaties actually involved were arbitration treaties. Hence if the Allende proposal were to be accepted it would mark the first use in history of one of the Bryan conciliation treaties.

9. Much of the information concerning the Allende proposal has been gleaned from information derived orally from knowledgeable persons rather than from any written source.

On the other hand, Kennecott is tracing the copper emanating from a mine formerly owned by it or a subsidiary and suing in a foreign court whenever such copper reaches the jurisdiction of such a court. A French court suggested submitting the nationalization dispute to the International Centre for Investment Disputes. Here Chile is apparently the unwilling partner.[10]

II. PRIVATE VERSUS STATE ARBITRATION TODAY

As a result of a general preliminary survey of private versus state arbitration, made before writing this article, I was quite prepared to find that in Latin America, private versus state arbitration was akin to a small and delicate plant needing a great deal of attention and copious doses of fertilizer to make it grow. However, in view of the growth and the development of private versus state arbitration in the world at large I confidently expected, with diligent research and inquiry, to find that the plant did exist and bear promise although, like Wordsworth's violet it might be "half hidden by a mossy stone." My expectations did not materialize.

In contrast to the situation prevailing in Latin America private versus state arbitration is on the increase throughout the world. There is a growing literature on the subject.[11] Every time investments and their guarantees are discussed[12] arbitration and adjudication are mentioned.[13]

Sixty-five States have become parties to the Convention on the Settlement of Disputes between States and Nationals of other

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10. Chile has apparently rejected the use of the Centre for Investment Disputes in the Kennecott Copper Corporation dispute. That corporation has sued in a French Court for copper coming from the El Teniente mine expropriated by Chile. According to a pamphlet prepared by Kennecott Copper Corporation, CONFISCATION OF EL TENIENTE, SUPPLEMENT NO. 3 (Sept. 1972):

> *(The Court of Extended Jurisdiction of Paris stated that Kennecott and Chile should seek "a global settlement" of their entire dispute, and directed a referee "to gather all elements that could permit" such a settlement. Earlier, at the request of the Court, Kennecott had offered to submit the entire dispute to the International Centre for Settlement of Investment Disputes, but Chile refused).* (Emphasis added).

See also 12 INT'L LEGAL MATERIALS 182 *et seq.* (1973).

11. Summers, *Arbitration and Latin America*, 3 CALIF. W. INT'L L.J. 1, 18-19 nn.61-63 (1972).

12. One of the most comprehensive series of studies on private investments by leading experts is found in SOUTHWESTERN LEGAL FOUNDATION, INTERNATIONAL AND COMPARATIVE LAW CENTER, *Selected Readings on Protection by Law of Private Foreign Investments* (1964).

13. *Id.* at 99 & 117. Arbitration is particularly discussed in these articles. *See also id.*, at 916.

States as of January 1, 1973.[14] The Permanent Court of Arbitration has issued a set of suggested rules solely for private versus state arbitration.[15] Organizations have for some years passed resolutions and made studies of this relatively new outgrowth of procedural international law.[16] Moreover, there is a growing number of decisions rendered by private versus state arbitral tribunals.[17] Some of those decisions relate to fundamental issues and are supported by lengthy and learned opinions. Furthermore, the unreported, but nevertheless important, practices of the International Chamber of Commerce (I.C.C.) cannot be ignored.[18] Even the Communist bloc seems to have arrived at the conclusion that

14. The States parties to the convention are listed in U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JAN. 1, 1973 at 313. The convention itself may be found in 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159. Analyzing the convention would lead too far afield from this Article. It may be interesting nevertheless to note that article 25 provides for the jurisdiction of the Centre in these terms:

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

15. *The Permanent Court of Arbitration—Rules of Arbitration and Conciliation for Settlement of International Disputes Between Parties of Which Only One is a State,* 57 AM. J. INT'L 500 (1963).

16. Some of those efforts are mentioned by Martin Domke in *Arbitration Between Governmental Bodies and Foreign Private Firms,* 17 ARB. J. (n.s.) 129 (1962).

17. Not counting the I.C.C. cases, there are from forty to fifty cases. Among the ones most frequently cited are the Ditta Luigi Galloti v. The Somali Government, 40 I.L.R. 158 (1964); Sapphire International Petroleums, Ltd. v. National Iranian Oil Co., 35 I.L.R. 136 (1963); Saudi Arabia v. Arabian American Oil Co., 27 I.L.R. 117 (E. Lauterpacht ed. 1958); Societe Europeene d'Etudes et d'Enterprises v. Peoples' Federal Republic of Jugoslavia, 24 I.L.R. 761 (1956); Alsoing Trading Company, Ltd. and Svenska Tandsticks Aktiebolaget v. The Greek State, 23 I.L.R. 633 (1954); Petroleum Development Ltd. v. Sheik of Abu Dhabi, 18 I.L.R. 114 (1951). These and a few other cases are cited in Lalive, *Contracts Between a State or a State Agency and a Foreign Company,* 13 INT'L & COMP. L.Q. 987 (1964). *See* in particular *id.,* at 989 n.6.

Lalive does lament the fact that "while learned writings are numerous, case law is scarce in this specific field, and it is somewhat depressing to see the same few examples cited again and again by different writers." *Id.,* at 989. A number of other cases, several involving the Greek government, are summarized in Watler and Schwebel, *Some Little-Known Cases on Concessions,* BRITISH Y. B. INT'L L. 183 (1964).

18. That practice is outlined in Bockstiegel, *Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce,* 59 AM. J. INT'L L. 579 (1965).

private versus state arbitration has much to offer. From a report made recently by a prominent Soviet authority, it seems that the Soviet State appears now to be fully in favor of private versus state arbitration.[19]

The use of private versus state arbitration can be expected to expand. An important factor that is likely to promote such growth is the decision of the International Court of Justice in the *Barcelona Traction Company* case.[20] In that case the Government of Belgium sponsored the claim of a number of its nationals who held the majority of the stock (about eighty-eight percent) in a Canadian corporation alleged to have suffered at the hands of Spanish authorities. After deliberations extending over many years, the International Court of Justice held that the Belgian government could not press a claim on behalf of shareholders in a non-Belgian corporation. It said:

> The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept

19. The report is by S. Bratus. It is given in English in 27 ARB. J. 230 (n.s. 1972) with this introductory comment:

> An increase in East-West trade is in prospect. And there is increasing recognition of the value of arbitration in facilitating that commerce. The Report given by the Chairman of the Foreign Trade Arbitration Commission of the USSR Chamber of Commerce and Industry before the recent IVth International Congress on Arbitration in Moscow provides useful and timely insight into how arbitration experts in the Soviet Union and other East European countries have viewed the arbitration process, and explains the practices which have resulted. We believe this is the most comprehensive and authoritative discussion of the subject ever published in the West.

20. Barcelona Traction, Light, and Power Co., [1964] I.C.J. 6. The text of the decision is also found in 64 AM. J. INT'L L. 653 (1970). The case has already given rise to extensive literature. One of the latest comments is Mann, *The Protection of Shareholders' Interests in Light of the Barcelona Traction Case*, 67 AM. J. INT'L 259 (1973).

> the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company.[21]

As states are usually quite unwilling to espouse claims of corporations that are essentially foreign owned,[22] any corporation similarly situated is obviously likely to fall between two stools. Private versus state arbitration would avoid the difficulty altogether. It is therefore likely that many corporations, particularly the new breed of multinational corporations[23] will probably become the foremost proponents of private versus state arbitration.

The International Court of Justice in a rather fleeting reference to the problem in the *Barcelona Traction* case seems to think that in the absence of applicable treaty stipulations, recourse would

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21. Barcelona Traction, Light, and Power Co., [1964] I.C.J. 6, 688.

22. R. LILLICH AND G. CHRISTENSON, INTERNATIONAL CLAIMS, THEIR PREPARATION AND PRESENTATION (1962). The authors succinctly summarize the rule in the United States in these terms:

> For a corporation to be an eligible claimant, then, it must have been organized in the United States or a constituent state or other political entity. Moreover, at all times pertinent to the claim it must have been substantially (generally fifty per cent or more) owned by nationals of the United States. Even when a corporation's stock is nominally owned by United States nationals, the United States would not be "obliged to espouse a claim on behalf of a corporation organized in the United States, if the evidence showed that the real parties in interest were aliens."

Id., at 16-17.

23. For a recent essay on multinational corporations *see* Brown, *The Multinationals and the Nation-State*, 8 VISTA 15 (June 1973).

The multinational corporation phenomenon is so new that it is a little hard to draw any conclusions as to the consequences of that phenomenon. Actually, the term multinational is vague. It could mean that stock is held by nationals of various countries; that a corporation operated directly in several different countries, or holds the controlling interest in foreign corporate bodies. R. VERNON, SOVEREIGNTY AT BAY—THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971), tries to define multinationals in these terms:

> Exactly which enterprises are the object of this heightened interest? One way to define them is by induction and inference, that is, by developing a list of the "multinational" companies that governments profess to be worrying about and asking what they have in common. Each entry on a list of this sort generally turns out to be a parent company that controls a large cluster of corporations of various nationalities. The corporations that make up each cluster appear to have access to a common pool of human and financial resources and seem responsive to elements of a common strategy. Size is important as well; a cluster of this sort with less than $100 million in sales rarely merits much attention. Moreover, the nature of the group's activities outside its home country is relevant; mere exporters, even exporters with well-established sales subsidiaries abroad, are unlikely to draw much attention, and mere licensers of technology are just as rarely mentioned. Finally, the enterprises involved generally have a certain amount of geographical spread; a parent with a stake in only a country or two outside its home base is not often found on the list.

be had to private versus state arbitration. It does not refer to such arbitration specifically but the language of the court is unmistakable. It says:

> Thus, in the present state of the law, the protection of shareholders required that recourse be had to treaty stipulations *or special agreements directly concluded between the private investor and the State in which the investment is placed.*[24]

A complicating factor is the increasing tendency of a State to acquire shares in a corporation to the point where it is difficult to determine whether the corporation should be classified as public or private. It is hard to pinpoint the start of this practice. It reached one of its high points in Mussolini's Italy when the State acquired the partial or complete ownership of various corporations to assist them in their difficult financial situation during the depression.[25] Italy is however by no means the only country where corporations have a partial public interest. In the field of private versus state arbitration the question immediately arises whether the interest of the public is sufficient to make the corporation a public corporation subject, in the case of an arbitration, to any rules that may be developed concerning state versus private arbitration or whether it is essentially the case of two private entities subject to the rules concerning commercial arbitration. I am not aware of any specific case where this problem has been aired. It is bound to arise, however, sooner or later.

The worldwide development of private versus state arbitration has inevitably given rise to a number of problems; among them are the composition and selection of the tribunal, the determination of the applicable law to apply, the enforcement of the award, and the role of specific performance. There can be little question however that private versus state arbitration is proving to be a useful tool for the settlement of disputes.

III. PRIVATE VERSUS STATE ARBITRATION IN LATIN AMERICA

Whatever may be the interest in the growth of private versus state arbitration in the world at large, the concept seems to have barely touched the Western Hemisphere and the sensitive plant that I expected to find continues to remain essentially underground.

24. Barcelona Traction, Light and Power Co., [1964] I.C.J. 6, 686 (emphasis added).

25. The incredible tangle of Italian governmental ownership of corporations is described in N. KOGAN, THE GOVERNMENT OF ITALY 132 *et seq.* (1962).

Stating that there is little private versus state arbitration in Latin America has its dangers as it is almost impossible to prove a negative. It may therefore be useful to recount some of the steps taken to arrive at my conclusion so that the readers of this article can determine for themselves whether the statement is justified.

First and foremost, I sent a questionnaire to the members of the Council of the Americas[26] to ascertain the experiences of large United States corporations with private versus state arbitration. A substantial number of replies was received, including some from the largest companies operating in Latin America. *In not one single instance was a company able to refer to an actual dispute settled by private versus state arbitration.*[27] To the contrary, several replies indicated the difficulty of even including an arbitration clause in a contract. Here are some comments:[28]

> We certainly agree that attempts should be made to establish workable and acceptable arbitration procedures, and we support any efforts made to that end. However, we doubt whether any arbitration machineries or procedures are likely to be effective in circumstances where a state does not in any event intend to pay compensation for foreign assets expropriated.
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> We recognize there are several advantages to arbitration but also appreciate the fact that it is difficult to structure meaningful arbitration terms satisfactory to both parties in Latin America where important matters are involved as well as the fact that arbitration itself in all of its many forms is by no means an elixir, for it has a host of attendant problems in any situation where it has to be used. It would seem that the juridical system of Latin America makes this all the more the case.
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> Many Latin American statutes, including recent statutes, such

26. The Council of the Americas is composed of about 200 leading United States firms doing business or having links with Latin America. The Council issues an Annual Report listing the members and outlining its activities.

27. It must be admitted that replies were not received from every company queried. Moreover not every United States company operating in Latin America is a member of the Council of the Americas. Replies were, nevertheless, received from a large number of the most important companies operating in Latin America and their experiences are persuasive.

28. Again, it would be injudicious and unfair to pinpoint the source of particular information.

> as Decision 24,[29] prohibit international arbitration, i.e. arbitration outside of the Latin American country in question or held in accordance with rules other than those governing arbitration of that country.
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> Arbitration could, in a number of instances, be a useful remedy. This is particularly the case when one considers the rather disreputable state of the courts in Latin American countries. Unfortunately it is most often impossible to get a government entity to accept an arbitration clause.
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> In a nutshell, our experience has been that the existence of a right to a neutral arbitration is very desirable as it constitutes a significant inducement to narrow the range of controversy and bring the parties to settling their own disputes within such narrower range without actual resort to arbitration. However, we have found it next to impossible to get any sort of neutral arbitration clause in a contract with a sovereign state in Latin America.
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> Although I am not aware of any case where we proposed such a clause in a government contract, conversations in the past with government authorities have led me to believe that most Latin American governments regard arbitration clauses in private contracts as an encroachment upon their sovereignty.

A letter was likewise sent to the economic or commercial officers in the Embassies of the United States in Latin America. The replies, although well reasoned, courteous, and full, were equally negative in their comments on private versus state arbitration. The Embassy in Montevideo transmitted a copy of a Uruguayan law forbidding arbitration, which is a reflection of similar tendencies elsewhere.[30]

A fruitless search was made of bibliographies and other authorities to find any significant Latin American literature on the

29. Decision 24 of the Andean Pact is discussed in Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972). In essence, Decision 24 is the decision by the Commission of the Andean Community to adopt the Andean Investment Code.

30. In fact, as pointed out in a United Nations Document excerpts from which appeared in 15 ARB. J. 80 (n.s. 1960):

> Many Latin American states . . . have constitutional provisions subjecting foreign persons and courts to their courts as well as to their laws.

Id., at 80.

subject. Even a letter to the Law Library of Congress led nowhere.[31]

An equally fruitless search was made to locate actually reported cases. The Dutch lawyer, A. M. Stuyt, in his second edition of *Survey of International Arbitrations* has a separate section on arbitration between states and other entities. The only Latin American cases involving a United States corporation he lists in that section are the Guayaquil and Quito Railroad cases. The situation in those cases was quite peculiar in that although the obligation to arbitrate stemmed from a private contract between the Ecuadoran government and the railroad company, the arbitral clause designated the President of the United States or his delegate as one of the arbiters. Hence the proceedings had all the solemnity of an intergovernmental arbitration. In a second situation, involving a British corporation, the agreement named as arbiter the President of the French Court of Cassation thereby making the arbitration effectively partake of the character of an intergovernmental arbitration.

In any case, the events in both situations took place in the first two decades of this century before the present antipathy toward arbitration had taken hold.[32]

While the preceding paragraphs certainly indicate that little progress has been made it would not be fair to leave the impression that an arbitration clause has *never* been approved for insertion in a contract. For example The Hanna Mining Company informed the author that:

> A subsidiary of The Hanna Mining Company entered into a mining concession contract with the government of the Republic of Colombia in 1970 which specifically incorporated the arbitration provisions of the then current Mining Code, Decree 805 of 1947. In addition, that subsidiary entered into a joint venture agreement at the same time with a government

31. A letter to the author of Dec. 1, 1972 from Mr. Rubens Medina, Chief, Hispanic Law Division, Law Library of Congress, speaks for itself. He says:

> Your letter of November 15, 1972, and the copy of the bibliography you prepared on private vs. state arbitration have had the attention of Mrs. Janet Juras, Editor-Bibliographer of this division. A search conducted by her through the various catalogs did not reveal any Latin American monographs or articles concerning that specific aspect of international arbitration.

32. A. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1970, 461-63 (1972). The Guayaquil and Quito Railway Co. cases wend their way through a number of volumes of UNITED STATES FOREIGN RELATIONS. Citations are given in Stuyt.

development corporation containing the attached arbitration clause.

ARTICLE TEN

ARBITRATION

10.1 Any difference that may arise between the Parties respecting the interpretation or application of the terms, conditions, requirements and obligations set forth in the present contract, or concerning the fulfillment thereof, that cannot be resolved by direct agreement between the Parties, shall be resolved by arbitration in the following manner:

a) The Party requesting arbitration shall present to the Party constituting the opposing party in the controversy a written petition relative thereto specifying the matter to be submitted to arbitration and indicating the person that it designates as its arbitrator.

Within the thirty (30) days following the receipt of such a petition and appointment, the other Party must in writing designate the person who will act as its arbitrator and the two arbitrators thus selected shall name a third within the thirty (30) days following the date on which the second arbitrator has been designated.

Should it not be possible to complete the [Arbitration] Tribunal because the Party receiving the petition and appointment does not name its arbitrator within the said term of thirty (30) days, the procedure prescribed in Article 5 of Law 2 of 1938 shall be followed.

Should the two arbitrators not be able to agree within the thirty (30) days allotted to them on the appointment of the third, then the third arbitrator shall be appointed by the Chamber of Commerce of Bogota at the request of either of the Parties, so long as the organization, administration and independence of the Chamber of Commerce of Bogota do not undergo substantial changes.

Should the organization, administration and independence of the Chamber of Commerce of Bogota undergo substantial changes, then the Parties shall agree on a new body to make the appointment of the third arbitrator at the request of either of the Parties.

b) Once the Tribunal has been constituted, the procedure set forth in Articles 1218 and 1227 of the Code of Civil Procedure shall be followed.

The members of the Arbitration Tribunal shall be Colom-

> bian lawyers licnsed and registered as lawyers in Colombia.
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> The costs of arbitration shall be a charge to the losing Party.
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> The winning party shall itself defray the fees and expenses of its attorneys, spokesmen and legal advisors insofar as it is not covered by the order to pay costs.
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> The Arbitration Tribunal shall sit in Bogota, D. E. Republic of Colombia, shall conduct its business in the Spanish languege and shall be governed by the laws of Colombia.

The above provision, although long, was worth quoting in its entirety as its details are interesting. Particularly interesting are the provisions that the arbitral court sit in Colombia, be composed of Colombian lawyers, be subject to Colombian law and conduct proceedings in Spanish. These provisions to say the least give the court a strong Colombian character.

International Telephone and Telegraph Company also referred to a couple of arbitration clauses between its subsidiaries and a government controlled corporation. The one between its United Kingdom subsidiary, Standard Telephones and Cables Limited and Companhia Telefonica Brasileira is particularly interesting. It reads:

> The doubts and controversies which may grow out of the fulfillment of the present contract will be resolved by arbitration, in accordance with Brazilian law which will govern, each party nominating its respective arbitrator and, in the event that an agreement is not reached, a tiebreaker will be appointed.

The clause quoted above does not however appear to represent a consistent pattern, even in Brazil. Another company replied:

> When negotiating a large contract with an agency of the Brazilian Government, we enclosed an arbitration clause in our draft. Our Brazilian attorney told us that he did not think it would be acceptable and, in fact, we were forced to remove it during negotiations. Based on this experience, I have not been hopeful of inserting a similar clause in any of our contracts in Latin America.

Also of interest is the experience of Manufacturers Hanover Trust Company which has included arbitration clauses utilizing the procedures of both the Permanent Court of Arbitration and the

International Chamber of Commerce referred to earlier in this article. One such clause reads:

> 8.9 This Agreement shall be governed by and construed and interpreted in accordance with English law. The Republic irrevocably agrees that all disputes arising out of or in connection with this Agreement shall be submitted to arbitration under the Rules of Arbitration and Conciliation for Settlement of International Disputes between two parties of which only one is a State, 1962, of the Permanent Court of Arbitration. Any such arbitration shall take place in The Hague, Netherlands, before one arbitrator who, to facilitate interpretation under English law, shall be a Judge of the Supreme Court of Judicature, England (then in office or retired), or a Queen's Counsel of not less than 10 years' standing, and who shall be appointed by the President of the International Court of Justice. The language of any such arbitration shall be English. The Republic and each of the Banks agrees that it will be bound by the decision of such Arbitrator and will take all steps necessary to give effect to any award made by him.

While the quotations used in the preceding paragraphs are derived from manuscript sources, there is a reference from time to time in readily available printed sources to private versus state arbitration clauses. This is at least some indication of continuing interest in the subject.[33]

When all is said and done however, the practice of private versus state arbitration in Latin America is embryonic. Nevertheless there are a few roots which may in the course of time develop. Hence it would be a mistake to consider the situation hopeless and to abandon all attempts to cultivate the sensitive plant.

IV. PROPOSALS FOR THE FUTURE OF PRIVATE VERSUS STATE ARBITRATION IN LATIN AMERICA

In contemplating the future, four basic assumptions must be made.

33. *See, e.g.*, the twentieth article of the contract between the Brazilian government and an American corporation and its wholly owned subsidiary, 4 INT'L LEGAL MATERIALS 88 (1965). *See also* the revised arbitration clause in a settlement agreement involving the Argentine government: 6 INT'L LEGAL MATERIALS 718 (1967). Other instances could be multiplied. In essence an arbitration agreement is not so rare, although from the comments received from corporations it may be becoming less frequent. What is rare, or better said nonexistent, is a dispute settled definitively by arbitration.

(1) Private versus state arbitration in Latin America is presently virtually nonexistent.

(2) Many United States companies would like to see the concept of private versus state arbitration extended.

(3) Many Latin American governments for a variety of reasons look askance on the subject.

(4) The situation should be remedied in the interests of promoting the peaceful settlement of disputes and providing a favorable climate for the investments that are needed so badly by Latin America.

Hopefully, some or all of the methods suggested below may be helpful. There should not be any illusion, however, that the path is easy or that success is certain. Nevertheless, the effort is worth making. The following approaches are tentatively suggested.

1. The promotion of purely commercial arbitration in Latin America should be encouraged.—Unlike private versus state arbitration in Latin America where a sovereign entity is one of the parties, commercial arbitration has been accepted in Latin America, albeit sometimes reluctantly. It is not possible in this paper to outline the status of commercial arbitration in Latin America. Moreover, the subject has been covered quite completely elsewhere.[34] It seems quite obvious, however, that since private versus state arbitration is a close cousin to commercial arbitration, the greater acceptance of the latter may also pave the way for the eventual acceptance of private versus state arbitration.

34. The subject of commercial arbitration in Latin America is receiving the continuing attention of the Inter-American Commercial Arbitration Commission and has been discussed in various conferences held in Latin America. Some of them are described by C.R. Norberg, General Counsel of the Commission, in an article entitled *Inter-American Commercial Arbitration,* 1 LAWYER OF THE AMERICAS 1 (1969). *See also* Norberg, *Revitalization of Commercial Arbitration in the Western Hemisphere,* 3 INT'L LAWYER 109 (1968). Less than a decade before, however, F.P. Mihm bewailed the fact that the countries of Asia and the Far East, for example, were evincing a much greater interest in the subject of arbitration than Latin America. Mihm, *International Commercial Arbitration in Latin America,* 15 ARB. J. (n.s. 1966). *See* in particular page 19. For more recent developments see the mimeographed pamphlet on Inter-American Arbitration prepared by the Inter-American Commercial Arbitration Commission for the Fourth Quarter of 1972 and the First Quarter of 1973.

The Inter-American Commercial Arbitration Commission sits in Washington and helps promote commercial arbitration in the Americas. On commercial arbitration generally, there is of course a vast literature. Of particular note is INTERNATIONAL ARBITRATION, LIBER AMICORUM FOR MARTIN DOMKE (P. Senders ed. 1967).

2. A policy in support of the efforts of the World Bank, so far not very successful, to promote the acceptance by the Latin American States of the Convention on Investment Disputes should be adopted.—This Convention on Investment Disputes, as will be recalled, provides in essence for private versus state arbitration. So far not a single Latin American nation has become a party. It is true nevertheless that some of the new states of the Western Hemisphere namely Guyana, Jamaica, Trinidad, and Tobago have become parties. The hope has been expressed that their example may have a leavening influence.[35]

3. There should be an increased dissemination of information in Latin American law reviews and journals showing the acceptance of private versus state arbitration through the world at large.—It is questionable to what extent Latin American jurists and politicians are fully aware of the growing role played by state versus private arbitration in the world today. If some articles could be inserted in Latin American journals at least part of the distrust might be dissipated. It might be particularly useful to refer to the practice of the Communist countries so as to demonstrate that arbitration is not part of an imperialist plot originating in the capitalist states.

4. American corporations should be urged to press for private versus state arbitration wherever possible.—The survey of the answers received from American corporations indicates little success so far. There are glimmerings however of possible openings. To the maximum extent possible they should be exploited.[36]

5. The reluctance of the United States to permit government agencies to arbitrate should be overcome.—Obviously the United States is not in a good position to urge Latin America to adopt the principle of arbitration if it does not permit United States government agencies to arbitrate. Part of the problem lies in the opinion of the Comptroller General in the *Bofors* case.[37] In that

35. *See* Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256 (1971).

36. Many of the companies queried seemed to feel that differences could be settled by negotiation. On the other hand, a number of companies expressed interest in arbitration.

37. The Bofors Case is reported in 32 DECISIONS OF THE COMPTROLLER GENERAL 333 (1953). *See also* Aktiebolaget Bofors v. The United States 153 F. Supp. 397 (1957). The Court of Claims said:

> Whether the agreement to arbitrate was invalid, as the General Counsel of the Navy Department wrote, or not, we do not decide. See George J. Grant Construction Co. v. United States, 109 F. Supp. 245, 124 Ct.

case a Swedish contractor had a controversy with the United States Navy. The Navy was quite willing to arbitrate the question in accordance with the contract but the Comptroller General withheld the necessary permission.

It may take legislation to overcome the decision. However, the drafting and passage of such legislation should not be an insuperable obstacle.

All in all there are possibilities for opening the door. It will not be easy nor is the problem one that can be surmounted in a short time. It is a case of education, patience and concerted action.

Cl. 202. Even if valid, we think its breach does not give rise to a cause of action against the United States. In the absence of special circumstances such as that one has been mislead, to his damage, by the repudiation of an agreement to arbitrate, the only effective judicial remedy for such a refusal is a decree for specific performance. That remedy is not available against the United States, since it has not consented to such suits. A suit for damages for the violation of an agreement to arbitrate can, in the absence of the special circumstances above referred to, result in no more than the award of nominal damages, since a court cannot know what arbitrators would have decided, if there had been arbitration.

Id., at 399.

The somewhat confused American law on the subject is analyzed by John P. Cogan, Jr. in an article entitled *Are Government Bodies Bound by Arbitration Agreements*, 22 ARB. J. 151 (n.s. 1968). *See also* Katzman, *Arbitration in Government Contracts: The Ghost at the Banquet*, 24 ARB. J. 133 (n.s. 1969).

APPENDIX:

LETTER AND ENCLOSED QUESTIONAIRE SENT TO MEMBERS OF THE COUNCIL OF THE AMERICAS

February 21, 1973

Gentlemen:

As you are, of course, well aware, one of the main problems affecting international investments in Latin America is the lack of any machinery for the impartial resolution of a dispute that may arise concerning the investment.

In an article I have already written under the auspices of an Avery Foundation grant for the California Western International Law Journal of the United States International University at San Diego, California, I have tried to analyze some of the reasons for the obvious reluctance of the Latin American States to arbitrate or adjudicate international disputes. I will be glad to send you a copy of that article on request.

In a second article for the same Journal, I want to explore the possibility of breaking the present deadlock concerning the settlement of disputes through the use of private vs. state arbitration. Hopefully, such arbitration will be more palatable than inter-governmental arbitration. That method has been rather extensively used by the ICC and a burgeoning literature is arising concerning the subject.

Unfortunately, there seems to have been very little written on the subject on Latin America. I am therefore turning to you and to other companies engaged in business in Latin America for direct information as to your experiences, if any, with private vs. state arbitration, and your interest in such procedures.

I cannot, of course, claim that a modification of Latin American attitudes will come about as the result of my articles. Nevertheless, I hope that it may be possible to establish the desirability of private vs. state arbitration as a feasible method for the settlement of disputes, and thereby lead to its more general acceptance.

I realize how burdened you and your staff are. Nevertheless, in view of what I consider to be the importance of this study which, by the way, has been encouraged by the Inter-American Commercial Arbitration Commission, I am enclosing a questionnaire with regard to your experiences and attitudes towards arbitration in Latin America, and particularly private vs. state arbitration, which I hope you can return to me in the enclosed self-addressed envelope. It would, in conjunction with other replies, constitute the primary basis for my article.

Since it only fair that I identify myself to you in making this request, I enclose my biography from the latest WHO'S WHO IN AMERICA. After that biography appeared, my book on THE INTERNATIONAL LAW OF PEACE, was published by Oceana Publications, Inc., of Dobbs Ferry, New York.

I will be very grateful to you for your help and cooperation, not only in filling out the questionnaire but in making any observations you think pertinent.

Sincerely,

Lionel M. Summers

LMS:llw
Enclosures

Questionnaire With Regard to Private vs. State Arbitration in Latin America

(Space has been provided under each question for an answer. If the space is insufficient, the question could be answered on an attached sheet of paper.)

1. Name of your company.
2. Does your company have any contract or contracts with a government or a governmental agency of a Latin American state in which it is operating providing for the arbitration of disputes relating to the contract or contracts?
3. Has your company ever attempted to obtain an arbitration clause in a contract with a Latin American government and failed in that attempt?
4. If the answer to Question No. 2 is "yes", could you attach to your report excerpts from such contract or contracts containing the clause or clauses that are pertinent?
5. Has the company had practical experience with an actual arbitration?
6. What has that experience been?
7. Is there any extant decision of an arbitral body resolving a dispute involving the company and, if so, could a copy of that decision be attached to your reply?
8. What views does the company have on the subject, i.e., is arbitration efficacious, does it provide sufficient protection, etc.?
9. Is the wider spread of private-state arbitration likely to engender confidence in the arbitral process in Latin America, including intergovernmental arbitration, as a whole?
10. Are there any other factors which should be considered?
11. Do you have any further observations?