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A Practical Guide to the Convention on Settlement of Investment Disputes

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A PRACTICAL GUIDE TO THE CONVENTION ON SETTLEMENT OF INVESTMENT DISPUTES*

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For somewhat over a year alert international investors and their legal advisers have been aware of the birth of a new international institution within the World Bank Group, especially designed to provide a forum for the resolution of disputes arising with governments in relation to foreign investments. Though scattered reports and several theoretical analyses have appeared in specialized periodicals[1] about the formulation and entry into force of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[2] and the birth of the International Centre for Settlement of Investment Disputes (ICSID) established by that instrument to carry out its objectives, there still is considerable uncertainty about the exact functions of the new organization and about the limits and conditions of its operations. In particular, the literature up to now has dealt only with the provisions of the Convention and little account has yet been taken of the Regulations and Rules recently adopted pursuant to it.

It is the restricted purpose of this essay to give practical guidance to foreign investors[3] and to those who plan to become such,

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1. A reasonably complete list of legal Articles and Notes relating to the Convention or the Centre and published through the summer of 1967 appears in International Centre for the Settlement of Investment Disputes (hereinafter ICSID), FIRST ANNUAL REPORT 1966/1967, Annex 7 (1967). Though the literature on this subject has been somewhat enriched since that report was published, attention will be called here only to the first (and as yet only) book published about the Convention, MARIO AMADIO, LE CONTENTIEUX INTERNATIONAL DE L'INVESTISSEMENT PRIVE ET LA CONVENTION DE LA BANQUE MONDIALE DU 18 MARS 1965 (1967).

2. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August 25, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (entered in force October 14, 1966) (reprinted in 60 AM. J. INT'L. L. 892 [1966], 4 INT. L. MAT. 524 [1965]) (hereinafter cited as Convention). The Centre has published the text of the Convention in its Doc. ICSID/2. In the United States the provision of the Convention are in part implemented by the "Convention on the Settlement of Investment Disputes Act of 1966," 80 Stat. 344, 22 U.S.C. §§ 1650 and 1650a (Supp. II, 1965-1966).

3. Of course the guidance here offered is equally relevant to governments dealing with or proposing to deal with foreign investors, but in the nature of things they are less likely to be among the readers of this Article.

on whether they can and how they should submit to the jurisdiction of the Centre and what arrangements might best be made in connection with such submission. Thus the nature of the Centre as a mini-international organization under the aegis of the World Bank will not be examined. The actual conduct of conciliation and arbitration proceedings will be discussed only insofar as these can and should be affected by steps taken in connection with the submission of disputes to the jurisdiction of the Centre. Finally, no attention will be given to either the conciliation reports and arbitral awards, the challenges available against them under the Convention, or their enforcement under its terms.

THE RELEVANT INSTRUMENTS

A useful introduction to this study is a hierarchical listing of the several instruments that govern the proceedings to be conducted under the auspices of the Centre and of the explanatory documents that may be used to interpret the former.

(a) The Convention

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States[4] is an international treaty to which up to now 57 States have affixed their signatures. Of these signatories, 40 have already become Contracting States by subsequently depositing an instrument of ratification.[5]

The Convention was formulated by the Executive Directors of the World Bank on the instructions of its Board of Governors. The initial drafts were prepared by the Secretariat of the Bank, which later formulated revised versions for the Directors on the basis of consultations with legal experts from 86 countries assembled in four regional meetings and the subsequent work of a Legal Committee to which 61 members of the Bank sent representatives.

The Convention contains (in addition to institutional provisions relating to its own interpretation, amendment and entry into force and to the establishment of the Centre) a number of Chapters of direct relevance to the conduct of proceedings under the auspices of the Centre:

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4. See note 2 supra.

5. A current list of Contracting States and of the other Signatories of the Convention is available from the Centre in the form of the latest current revision of its Doc. ICSID/3.

(A) Chapter II (Articles 25-27) deals with the "jurisdiction" of the Centre;
(B) Chapter III (Articles 28-35) deals with the conduct of conciliation proceedings;
(C) Sections 1-4 of Chapter IV (Articles 36-49) deal with the conduct of arbitration proceedings, while Sections 5 (Articles 50-52) and 6 (Articles 53-55) deal respectively with certain post-award remedies and with the recognition and enforcement of awards;
(D) Chapters V (Articles 56-58), VI (Articles 59-61) and VII (Articles 62-63) deal respectively with certain common aspects of conciliation and arbitration proceedings: changes in the composition of Conciliation Commissions and Arbitral Tribunals; the cost of proceedings; and the place of proceedings.

The Convention regulates in detail only relatively few aspects of these proceedings. To the extent that it contains definitive dispositions, those naturally govern regardless of any contrary decisions of the organs of the Centre, of the parties, or of particular Commissions or Tribunals. Most of the provisions (in particular those relating to procedure rather than to jurisdiction) have more or less significant facultative features permitting the parties to agree to individual variations.

(b) The Regulations

The Administrative and Financial Regulations of the Centre were adopted by its Administrative Council in provisional form at the Inaugural Meeting on 2 February 1967, with immediate effect. The Provisional Regulations[6] were replaced by definitive ones,[7] adopted by the Council at its First Annual Meeting on 25 September 1967 with effect from 1 January 1968.

The greater part of the Regulations are of no direct interest to parties to proceedings, as they deal with the procedures of the Administrative Council, with the organization of the Secretariat, with the budgetary arrangements of the Centre and with privileges and immunities. However, certain of the Regulations are designed to have direct impact on proceedings:
(A) Regulations 13-15 in Chapter III deal with the financing of individual proceedings, as does Regulation 22 in Chapter IV;
(B) Chapter V (Regulations 23-28) deals with the functions of the

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6. Document ICSID/1, Part A; see also 6 INT'L. L. MAT. 226-240 (No. 2, March, 1968).

7. Document ICSID/4, Part A; see also VII INTERNATIONAL LEGAL MATERIALS 351-363 (No. 2, March, 1968). Individual Financial Regulations will hereinafter be cited as FR. ...

Secretariat of the Centre with respect to individual proceedings;
(C) Chapter VI (Regulations 29-30) contains important special provisions relating to all types of proceedings.

Subject to the provisions of the Convention, which the Regulations can of course not supersede, the latter are binding on the Secretariat of the Centre, on the parties to proceedings, and on Conciliation Commissions and Arbitral Tribunals. A few Regulations, however, permit the parties to agree to specified exceptions, and to that extent the standard provisions only have residual force--i.e., they in effect apply only to the extent that the parties do not agree otherwise.

(c) The Institution Rules

The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings were adopted by the Administrative Council, together with the Regulations, in provisional form at the Inaugural Meeting and in definitive form at the First Annual Meeting, to take effect respectively on 2 February 1967 and 1 January 1968.[8]

The Institution Rules regulate the procedure for the submission of requests for the institution of conciliation and arbitration proceedings by one or both parties to a dispute that meets the jurisdictional requirements of the Convention. In effect, they deal with the relations among the moving party (or parties), the Secretary-General of the Centre, and the responding party, during the period before a request is officially registered. While after registration the constitution of a Conciliation Commission or an Arbitral Tribunal proceeds semi-automatically, so that practically all further questions can eventually be submitted to such a Commission or Tribunal, during the period before registration the Secretary-General is in practice the only authority to decide any ancillary questions. For this reason the Institution Rules are more rigid than the Conciliation and Arbitration Rules referred to below, and they may not be superseded by agreement of the parties. Consequently, the status of the Institution Rules is essentially similar to that of the Regulations, i.e., subject to the Convention, the provisions of these Rules are binding on both the Secretariat of the Centre and on the parties to proceedings, except to the extent that certain options are explicitly left open.

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8. The Provisional Institution Rules appear in document ICSID/1, Part B and in 6 INT'L. L. MAT. 241-245 (No. 2, March, 1967). The definitive Rules appear in annotated form in Doc. ICSID/4, Part B, and unannotated 7 INT'L. L. MAT. 363-365 (No. 2, March, 1968). Individual Institution Rules will hereinafter be cited as IR. ...

(d) Conciliation and Arbitration Rules

The Rules of Procedure for Conciliation Proceedings and the Rules of Procedure for Arbitration Proceedings were also first adopted in provisional and later in definitive form, with the same effective dates as the Regulations and the Institution Rules.[9]

The Conciliation and the Arbitration Rules regulate the conduct of proceedings from the time of the registration of the request for instituting the proceeding until the communication of a conciliation report or until the rendering of an arbitral award and the exhaustion of all the possible post-award remedies. Both sets of Rules deal first with the establishment of the actual decision making bodies (the Conciliation Commission or Arbitral Tribunal), continue with certain general provisions regarding the work of these bodies and then with more specific procedural points (considerably more extensive and detailed in relation to arbitration proceedings), and finally regulate the formulation and formal communication of the conciliation report and the arbitral award; the Arbitration Rules conclude with a Chapter concerning the several post-award remedies admitted by the Convention.

The Conciliation and the Arbitration Rules are naturally subject to the Convention and, to a certain extent, to the Regulations. Their status, however, is in general different from that of the Regulations and the Institution Rules, since they may, except to the extent that they merely restate provisions of the Convention or of the Regulations, be superseded by the agreement of the parties to a particular proceeding.[10] In effect, they thus only have residual force, governing those situations that are not regulated by the Convention or the Regulations and as to which the parties fail to reach an agreement.[11]

(e) Explanatory Documents

In addition to the instruments listed above, which contain definitive provisions regulating, either absolutely or conditionally, the conduct of proceedings, account should be taken of several docu-

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9. The provisional texts appear respectively in Parts C and D of Doc. ICSID/1 and in 6 INT'L. L. MAT. 365-375 and 260-283 (No. 2, March, 1968). Individual conciliation Rules will hereinafter be cited as CR. ...

10. Convention, Articles 33 and 44.

11. See Introductory Notes D and E to the Conciliation Rules and also those to the Arbitration Rules, respectively in Parts C and D of Doc. ICSID/4.

ments containing explanatory material useful in interpreting certain provisions of these instruments which on their face may appear cryptic or ambiguous.

Concurrently with their approval of the Convention, the Executive Directors of the World Bank adopted a "Report on the Convention . . .," which they submitted to the governments of the members of the Bank together with the text of the Convention itself. That Report, which still accompanies the Convention in the official publications of the Bank and the Centre,[12] was designed to provide an authoritative elucidation of many of the more important provisions of the Convention. Thus the Report not only reflects the understanding of the body responsible for the final text of the Convention, but it is also an explanation that was available to (and therefore could not simply be disregarded by) the government of each Contracting State before it decided to sign and to ratify that instrument.

The Secretariat of the Centre is assembling and preparing for publication an extensive set of travaux preparatoires of the Convention, tracing its formulation from the first draft prepared by the Bank Secretariat for its Executive Directors, through the various texts presented to the regional groups of legal experts, to the Legal Committee and finally again to the Executive Directors. This publication will also include the several commentaries that accompanied these drafts as well as the official records of and the reports on the meetings at which the Convention was considered.

The Institution, Conciliation and Arbitration Rules are supplemented by explanatory Notes formulated by the Secretariat of the Centre. These had originally been prepared for the benefit of the Administrative Council in considering the definitive texts of the Rules. Though the Notes were not adopted by the Council and have no legal force as formal parts of these instruments, the Council did consider that they might be useful to the parties to proceedings and should therefore be published together with the Rules. In the official publication of the Regulations and Rules[13] these annotations follow each of the Rules, and the total length of this explanatory material is more than double that of the provisions themselves.

Finally, once disputes are submitted to the Centre it is likely that decisions interpreting the Convention, the Regulations and the Rules will be made as necessary by Conciliation Commissions and Arbitral Tribunals. Though the Convention prohibits the publication of

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12. Doc. ICSID/2. The Report of the Executive Director will hereinafter be cited as the "ED Report."

13. Doc. ICSID/4.

arbitral awards without the consent of both parties to the proceeding[14] and the Conciliation Rules make a similar disposition with respect to conciliation reports,[15] the Regulations require the Secretary-General, once such consent has been obtained, to arrange for the publication of such reports and awards, as well as of the minutes and other records of proceedings.[16] To the extent that publication can be agreed to, these will undoubtedly constitute an important source of interpretative material of which account will have to be taken in conducting later proceedings under the auspices of the Centre.

JURISDICTION

The first question that must be asked by anyone desiring to use the Centre for the settlement of an existing or potential dispute is whether that organization will actually be competent to deal with the matter. Unlike other provisions of the Convention, most of which are relatively flexible, those relating to jurisdiction are rather narrow and rigid.

One reason for the restrictive jurisdictional requirements is that the Convention was designed precisely to fill a particular gap in the array of earlier fora available to settle investment disputes. If both parties are States, they can resort to the International Court of Justice or to the older Permanent Court of Arbitration; if both parties are private persons (of different nationality) they may resort to the courts of a third State or to one of the international arbitration organizations such as the International Chamber of Commerce (ICC) or the Inter-American Commercial Arbitration Commission; finally, if the investor is a national of the State in which he makes the investment, he must be prepared to submit any disputes with his own government to his national courts or competent administrative bodies. It is only in the special, asymmetrical situation of a dispute between an investor and a foreign government that no convenient forum was previously available--taking into account the general undesirability of involving the investor's own government in an essentially private law dispute merely to gain access to an intergovernmental tribunal, the unlikelihood that a government would submit to the jurisdiction of a foreign court and the reluctance with which it would submit even to ICC, and the understandable suspicion of a for-

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14. Convention, Article 48(5); see also AR.48(4).

15. CR.34(3).

16. ER.21(2).

eign investor when asked to leave the final definition of his rights and obligations to the courts of the very government with which he is proposing to litigate.

While the limited purpose of the Convention made it possible to define restrictively the jurisdiction it was to create, the jealous concern of States for their sovereign prerogatives made it necessary that these restrictions be actually imposed. During the formulation of the Convention it became clear the governments would be most reluctant to become members of the Centre if they felt that its jurisdiction would in any way extend beyond the absolutely essential minimum. It had been agreed from the beginning that the jurisdiction of the Centre with regard to any dispute would always have to be based on the mutual agreement of the parties concerned; nevertheless, the governments of particularly the developing States (i.e., those in which investments were likely to be made) wished to preclude a priori any possibility that they might later be pressured into settling disputes under the Centre with another government, or with one of their own nationals, or which did not relate to an investment or did not involve a legal claim, or finally as to which no advance consent had been given.

Because of their restrictive purpose, the several jurisdictional limitations cannot be waived by the parties, acting either individually or jointly.

Organs Evaluating Jurisdiction

Before analyzing the several factors defining the jurisdiction of the Centre, it may be best to review briefly the circumstances in which jurisdictional questions will be considered and how challenges may be raised, as well as the organs authorized to evaluate these.

(a) Secretary-General

A request for a conciliation or an arbitration proceeding is submitted to the Centre by filing it with its Secretary-General.[17] Before causing the proceeding to be formally "instituted" by registering the request, the Secretary-General must first consider "on the basis of the information contained in the request" whether the dispute is not "manifestly outside the jurisdiction of the Centre."[18] If he should so find, he must refuse to register the request and inform the parties accordingly. The result of such a negative decision is that the proceeding is never instituted.

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17. Convention, Article 28(1) and 36(1); IR.1(1).

18. Convention, Article 28(3) and 36(3); IR.6(1).

There is no possibility of appealing from a negative decision of the Secretary-General; not even the Administrative Council of the Centre, or its Chairman (who has certain other functions in relation to proceedings) can reverse such a decision. On the other hand, a positive decision, leading to the registration of the request, does not bind the subsequently established Commission or Tribunal, which is the ultimate judge of its own competence and of the jurisdiction of the Centre.[19] It may be expected that the Secretary-General will be most cautious in exercising his power to reject requests--aware as he is of the finality of any negative decision and of the reviewability of any positive one.

As explained in the Report of the Executive Directors of the Bank, the Secretary-General's limited power to "screen" requests is designed "with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre" and also to avoid setting into motion the machinery of the Centre in cases otherwise obviously outside of its jurisdiction.[20] Because of the restricted purpose of this special power, the procedure by which it is exercised is correspondingly simple. The Secretary-General may only look to the request itself to determine if the jurisdictional requirements appear to be met.[21] He may not formally solicit other evidence or arguments from either of the parties. Indeed, it is doubtful whether he may take any account of any data that the respondent party might spontaneously submit to him when this party is informed about the filing of the as yet unregistered request.

It thus behooves the moving party (or parties, if they act jointly) to file the request in such a form that it does not disclose any manifest jurisdictional defect (whatever the possible latent defects might be). However, if it fails to do so--and registration of the request is for that reason rejected--all is not necessarily lost. If the defect is one subject to correction, there is no obstacle to filing another request, and yet another--though each filing requires payment of the Lodging Fee, which is not refunded even if registration is refused.[22]

(b) Commissions and Tribunals

Each conciliation Commission and Arbitral Tribunal is, according

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19. See ED Report, para. 38; CR.30, Note A; AR.41, Note A.

20. ED Report, para. 20.

21. See IR.6, Note B; CR.30. Note C; and AR.41, Note C.

22. FR.15(1).

to the Convention, the ultimate judge of its own competence, which includes any challenges to the jurisdiction of the Centre itself with regard for whose resolution the Commission or Tribunal was established.[23] In making its decision, the Commission or Tribunal is not bound by the decision of the Secretary-General to register the request, especially since that decision is necessarily based only on limited evidence and no argument, and only relates to "manifest" defects in jurisdiction.[24]

The decisions of a Commission with regard to jurisdiction are unappealable, just as no other parts of its reports are subject to challenge. Decisions of a Tribunal relating to jurisdiction must generally be incorporated into its award,[25] all parts of which are subject to certain limited post-award remedies specified in the Convention: supplementation, rectification, interpretation, revision or annulment.[26] Ordinarily only the last two of these would appear to be applicable to jurisdictional questions.

Challenges to jurisdiction may be raised by either party, or by the Commission or Tribunal, sua sponte.[27] A Tribunal has a special obligation to consider its jurisdiction if one of the parties has defaulted and the other has requested it to render an award.[28] There is, however, no provision for the Secretary-General to raise such questions, even if he should retain some residual doubts from the time he registered the request.

(c) National Courts or Other Authorities

Even though arbitral awards "shall not be subject to any appeal" except for the post-award remedies provided for in the Convention,[29] enforcement against a delinquent party must take place primarily through the appropriate organs of Contracting States, each of which

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23. Convention, Article 32 and 41; see also CR.30 and AR.41.

24. See note 19 supra.

25. AR.41(5) and Note F thereto; see also Convention, Article 48(3) and AR.47(1)(i).

26. Convention, Articles 49(2), 50, 51, and 52.

27. CR.30(1), (2) and AR.41(1), (2).

28. AR.42(4) and Note E(a) thereto.

29. Convention, Article 53(1).

is required by the Convention to designate a competent court or other authority for this purpose.[30]

If these national authorities comply strictly with the requirements of the Convention, they will entertain no challenge, either on jurisdictional or on substantive grounds, to an award that they are requested to enforce. However, it would be ideal to hope that all such authorities will exercise absolute self-restraint, particularly if the defendent party alleges the complete lack of jurisdiction of the Tribunal on a ground which the latter had not examined (this assumes that the party did not participate in the proceeding and therefore failed to raise the challenge there). On the other hand, to the extent that particular jurisdictional questions have been fully disposed of by the Tribunal in its award (which must deal with every question raised, and state the reason on which its disposition is based)[31] it is less likely that a national court would disregard the treaty injunction against reviewing such awards. It would thus appear to be the wisest course for any party aware of a doubtful jurisdictional point to raise the question before the Tribunal and to obtain an explicit decision recorded in the award--whose res judicata effect will be much stronger and clearer than that merely flowing implicitly from the fact that any substantive award necessarily implies a finding in favor of jurisdiction.

Jurisdictional Factors

(a) Nature of Dispute

Two requirements are set by the Convention with respect to the nature of the disputes that may be submitted to the jurisdiction of the Centre.

(i) Relation to an "Investment"

The Convention specifies that any dispute submitted to the Centre must be one "arising directly out of an investment."[32] As the Report of the Executive Directors explains, no attempt was made to define the term "investment"[33]--though strictly speaking the travaux preparatoires

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30. Convention, Article 54.

31. Convention, Articles 48(3), 49(2) and 52(1)(e).

32. Convention, Article 25(1).

33. ED Report, para. 27.

of the Convention show that some attempts to do so had indeed been made in the early drafts, but these had been abandoned because of the intricacy of the question and the apparent difficulty of reaching a consensus.

As the Report suggests, there is no need to give a strict definition to the term "investment" since in any case both parties must consent to the jurisdiction of the Centre with regard to the dispute. In addition, the governments of Contracting States may individually clarify their interpretation of the term, since they may inform the Centre of the class(es) of disputes which they would (or would not) consent to submit to the jurisdiction.[34] Though the very submission of a dispute to the Centre implies that it is one which the parties consider to arise directly out of an investment, it might still be advisable for them to stipulate, in any doubtful case, particularly if an advance consent may relate to disputes arising out of various aspects of a complex business arrangement, that they consider the entire transaction in question to constitute an investment.

Despite the primarily subjective meaning of the term "investment" in the context of the Convention, it is clear that it should not be entirely deprived of objective significance. It is easy to conceive of disputes that so obviously do not relate to an investment that, in spite of the desire and express stipulation of the parties, a Commission or Tribunal would have to decide that the Centre lacks jurisdiction--or indeed the registration of the request which must contain "information concerning the issues in dispute"[35] may even be refused by the Secretary-General as manifestly inappropriate. While it is not useful or even possible to list all the categories of transactions which plainly would, or would not, be considered as "investments" under the Convention, it may be useful to mention briefly some as to which doubts are most likely to arise:

(A) Bond issues by a government for sale to foreign purchasers would clearly seem to qualify as investments. The only substantial jurisdictional problem would be the indentification of who are the "nationals" who may become parties to a dispute with the issuing State, particularly if the bonds are in bearer form;[36]

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34. Convention, Article 25(4).

35. I.R.2(1)(e) and Note K thereto.

36. The problem with any negotiable bond is two-fold, but is accentuated in the case of bearer bonds: (i) the bonds might be transferred to persons who could not under the Convention lit-

it would in general appear advisable to provide that the trustee for the issue, preferably a corporation foreign to the issuing State, should be authorized to litigate in the name of the bond-holders.

(B) Construction contracts would appear to present a marginal situation. If the enterpreneur is required to commit substantial resources for extended periods of time to the project, there would seem to be little doubt that it could qualify as an investment. If, on the other hand, payments are always made currently there would be considerable doubt about how the transaction should be classified.

(C) Ordinary sales, even if they involve substantial supplier credits, probably would not be considered as constituting investments, unless some special feature of the transaction could objectively support a subjective stipulation by the parties to that effect.

(ii) "Legal" Disputes

Besides relating to an investment, a dispute must be a "legal" one in order to come within the jurisdiction of the Centre. The report of the Executive Directors of the Bank explains that the "expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interest are not. The dispute must concern the existence or scope of a legal right or obligation. . . ."[37]

The intention of the Executive Directors, which reflected the concern of certain States expressed in the course of the formulation of the Convention, was that the Centre not be used to resolve disagreements about how the future relationship among the parties to a transaction should be constituted beyond the framework of the legal instruments to which they had already agreed. For example, upon the expiration of a concession contract, the facilities of the Centre can not

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igate with the issuing State (e.g., citizens of that State or of a non-Contracting State; governmental authorities of other States); (ii) how the written consent, required by Article 25(1) of the Convention to submit disputes to the Centre is to be obtained from the holder of the bond. In the latter connection it is not sufficient to provide that such consent by the bond-holder be filed only when the litigation is commenced for until both parties have consented, either (e.g., the issuing State) can withdraw its earlier unilateral consent.

37. ED Report, para. 26.

be used to assist the parties to negotiate a new agreement, unless the expiring contract contains an obligation for both parties to engage in such negotiations on the basis of some specified principles.[38]

What sort of disputes are thus likely to come to the Centre? The most drastic ones, which are often mentioned as examples in listing the potential uses of the Convention, are disputes involving expropriations. However, it is likely that most cases submitted to the Centre will involve less spectacular and divisive questions. Thus differences might arise about the interpretation of tax and customs concessions granted to an investor, or about an agreed formula for profit sharing. Other disputes in which the host government is more apt to be the moving party might involve alleged failures by an investor to complete a project by a given date, or to reach a specified level of production, or to train or employ a certain number of local staff members, etc.

It should be clearly understood that the limitation of the jurisdiction of the Centre to "legal" disputes does not exclude purely factual questions, as long as these relate to a legal right or obligation. Thus the question of how much oil was extracted from a well, if payments between a host government and a foreign investor depend on that determination, can clearly be submitted to the Centre.

(b) Parties

The strictest and most precise jurisdictional requirements laid down by the Convention relate to the nature of the parties authorized to submit disputes to the Centre. These requirements, unlike most others in the Convention, are markedly asymmetrical since on one side of each dispute there must be a governmental authority and on the other a private person.

The one qualification common to both parties is the requirement that each be associated with a Contracting State, that is with a State that had, at least 30 days earlier, confirmed its previous signature of the Convention by depositing an instrument of ratification, accession or approval.[39] If such association does not exist, with respect to two different States by the two parties, the Centre cannot assume jurisdiction, even if both parties are prepared to

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38. See the final paragraphs of the Address by Mr. A. Broches, the Secretary-General of the Centre, presented at the First Annual Meeting of the Centre's Administrative Council, ICSID 1967 Annual Meeting Press Release No. 2, Sept. 25, 1967.

39. Convention, Articles 68 and 70.

waive this requirement; not would it suffice if a government which could sign and ratify the Convention merely attempts to authorize the ad hoc submission of a particular dispute to which either it itself or one of its nationals is a party. The facilities of the Center are available only to its members and to their nationals.

If one or both parties are associated with non-Contracting States, then they can at best make only marginal use of some of the facilities of the Convention. Thus they can agree to apply its provisions and the Regulations and Rules of the Centre, mutatis mutandis, in conciliating or arbitrating their disputes instead of trying to reach agreement on a complex set of ad hoc procedural rules. They can also request the Chairman of the Administrative Council (or perhaps the Secretary-General) to be the appointing authority of last resort for any conciliation commission or arbitral tribunal established by them--but these officials are not obliged to accept such a function outside of the framework of the Convention. Such disputants cannot utilize the administrative facilities of the Centre and, more importantly, they cannot assure for the awards of their tribunal the wide enforceability of awards rendered under the Convention. However, if they expect their States will eventually become parties to the Convention, they can make a conditional submission to the Centre, to take effect automatically as soon as such membership has been perfected. If the State whose membership is still outstanding is that of the government party to the investment agreement, then that government might even undertake to accomplish the attainment of such membership rapidly.

(i) Governmental Party

One of the parties to a dispute submitted to the Centre must be "a Contracting State . . . or any constituent subdivision or agency of a Contracting State designated to the Centre by that State."[40]

If that party is the Contracting State itself, then presumably the submission must be agreed to by the government of that State. In this connection it should be noted that although the Convention requires that it itself be ratified in accordance with the constitutional procedures of the signatory State concerned,[41] no indication is given as to how a foreign investor dealing with a governmental official is to make sure that the consent he gives is that of the government in the name of the State.

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40. Convention, Article 25(1).

41. Convention, Article 68(1).

If the governmental party is a "constituent subdivision" of the State or a governmental "agency," then two special requirements must be fulfilled:

(A) The subdivision or agency must have been designated to the Centre by the State. It is not clear whether such a designation needs to be separately communicated to the Centre, or whether it can merely be incorporated into some instrument concluded between the investor and the government. In view of the wording of the Convention the former would appear to be the more cautious course. It should also be noted that the Convention lays down no requirements as to what constitutes a "constituent subdivision" (the ones that come most readily to mind are the states of a federal system, or semi-autonomous dependencies,[42] or perhaps municipalities) or an "agency" (which certain would include wholly government-owned corporations such as TVA or the U.S. Export-Import Bank, but may also extend to enterprises with far less governmental control). It thus seems that this matter is left entirely to the discretion of each Contracting State, and it is difficult to see how a designation once made by such a State could later be challenged, by either a party or by a Conciliation Commission or Arbitral Tribunal, as being inconsistent with the Convention.

(B) Each consent to the jurisdiction of the Centre given by any such subdivision or agency must either be approved ad hoc by the Contracting State concerned, or that State must have informed the Centre that it has waived the requirement of such ad hoc approval.[43] This condition is of such importance that, unless a general waiver has been received by the Centre, the approval of the Contracting State must be documented as part of the request by which a dispute is submitted to the Centre.[44]

(ii) Private Party

The other party to the dispute must be a "national" of a Contracting State other than that of the governmental party. It may be either a natural or a juridical person. In general, except as indicated below, persons of either category must in any case fulfill

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42. The only designations under Article 25(1) of the Convention received by the Centre up to now were made by the British Government, relating to 25 colonial dependencies.

43. Convention, Article 25(3).

44. IR.2(2).

the stated nationality requirement on the date of consent.[45]

(A) Natural Person

If the private party is a natural person, he must, in addition to meeting the above-stated requirement, also fulfill two others:

(1) He must still be a national of a Contracting State on the date on which the request for conciliation or arbitration is registered.[46] However, since the Secretary-General must screen requests before registering them, the Institution Rules introduce a minor subsidiary requirement: that the nationality of the private party on the date of the request be stated in that instrument.[47] This date may also be the date of consent, but it almost surely precedes the date of registration--unless special arrangements for immediate registration were made in advance with the Secretary-General. Should that person then lose such nationality in the short interval between the date of the request and its registration, then the jurisdiction of the Centre can later be challenged before the competent Commission or Tribunal.

(2) He may not be, either on the date of consent or on the date of registration, the national also of the Contracting State that is (or whose constituent subdivision or agency is) a party to the dispute. Again, the Institution Rules add the procedural requirement that the lack of such conflicting nationality be asserted in the request.[48]

It should be noted that the several assertions concerning nationality that are to be included in the request (with reference to both the date of consent and to the date of the request) need not at that stage be documented. Thus a correctly formulated set of assertions will preclude the Secretary-General from refusing to register the request on the ground of non-fulfillment of this requirement. Later, however, the competent Commis-

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45. Convention, Article 25(2)(a), (b).

46. Convention, Article 25(2)(a).

47. IR.2(1)(d)(A) and Note H.

48. IR.2(1)(d)(B) and Note I. The Convention states specifically that this jurisdictional bar cannot be waived. However, other types of dual nationality, involving a Contracting and a non-Contracting State, constitute no obstacle to jurisdiction.

sion or Tribunal may well require documentary or other proof.[49]

(B) Juridical Person

The general nationality requirement for juridical persons is actually eased, unlike with respect to natural persons where it is doubly reinforced. In the first place, the requirement need only be fulfilled on the date of consent--and even there a significant exception has been introduced. Even though the party on that date had the nationality of the Contracting State party to the dispute (for example, if it was incorporated in that State), the two parties may stipulate that "because of foreign control" the juridical person "should be treated as a national of another Contracting State for the purposes of the Convention."[50] The Convention does not specify what constitutes "control" for this purpose(i.e., must there be a majority of foreign shareholders), and thus it would be difficult to challenge later such a stipulation agreed to by the Contracting State concerned, regardless of the objective situation. Nor does the Convention require that this control be exercised by the nationals of only one particular Contracting State,[51] or that this State be named in the stipulation. However, a cautious lawyer will generally be well advised to include in the stipulation a specification of which State (or States) are meant, since in the establishment of Arbitral Tribunals a number of exclusionary rules operate with regard to co-nationals of any of the parties.[52] Similarly, the Contracting State party to the dispute may be interested in clarifying this point because the Convention prohibits the government of a national who has consented to submit a dispute to the Centre from giving diplomatic protection to that national with respect to such dispute.[53]

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49. See IR.2, Note D.

50. Convention, Article 25(2)(b).

51. For this reason the parties to the Convention d'Etablissement entre le Gouvernement de la Republique de Cote d'Ivoire et la societe UNIWAX specified in Article 38 that the foreign control over the Ivory Coast company was exercised by English, French and Dutch interests (see Journal Officiel de la Republique de Cote d'Ivoire, April 18, 1968, at 651, 656).

52. See Convention, Articles 38 and 39, and also 52(3).

53. Convention, Article 27(1).

The Convention does not indicate what form the stipulation of foreign control should take, but normally it would appear best to include it in the consent agreement. The Institution Rules do require that such a stipulation be documented in the request,[54] and the absence of such documentation might lead the Secretary-General to reject a request as manifestly unfounded.

(c) Consent

The third, and in the sense the most important jurisdictional requirement, is that of consent, by both parties, to the submission of the dispute to the Centre. In the report of the Executive Directors this requirement is described as "the cornerstone of the jurisdiction of the Centre."[55] Its paramount importance is underlined by the fact that at least to a certain extent the other two jurisdictional requirements can be conditioned (though not waived) by agreement of the parties that would normally be expressed in the instrument expressing the consent: the characterization of a particular transaction as an "investment," and the stipulation that a domestic corporation is to be considered as a national of another State because of foreign control.

Given the importance of the fact of consent, it is interesting to note that the Convention states only a single requirement as a form--that consent must be in writing.[56] This requirement is reinforced by the Institution Rules, which require that all requests for the institution of proceedings contain documentary proof of the fulfillment of this requirement.[57] In addition, if the consent is that of a "constituent subdivision" or of a governmental "agency," it must be approved by the Contracting State concerned, and this approval too must be documented when the request is filed with the Centre--unless the State has notified the Centre that it waives its right of approval.

One other important requirement with respect to consent should be noted. The consent of both parties must exist at the time a request for conciliation or arbitration is filed. If the request filed with the Secretary-General fails to show on its face (and by means of supporting documentation) that both parties have consented, then

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54. IR.2(1)(d)(iii) and 2(2).

55. ED Report, para. 23.

56. Convention, Article 25(1).

57. IR.2(2) and Note F thereto.

he must refuse to register it. Indeed his power to "screen" requests was given to him primarily for this purpose, to preclude the possibility of one party to the dispute attempting to mobilize the moral authority of the Centre for the purpose of pressuring the other to give a consent previously withheld.[58] Under no condition can the Secretary-General, in that capacity, approach a non-consenting party to urge it to submit to the jurisdiction of the Centre.[59]

Though the consent must in all cases precede the filing of the request, there is no requirement that it either precede or follow the arising of a particular dispute. Thus consent may be expressed in general terms, in a new investment agreement, to cover any future disputes that might arise out of the transaction. Such a general consent may be included in a separate instrument relating to an earlier transaction, even if the latter antedates the Convention. Finally, consent may be given after a dispute has arisen and be expressly limited to that dispute--and again it does not matter if the underlying transaction or even the dispute itself should antedate the Convention.

Neither the Convention nor the Regulations and Rules prescribe any particular form of words to be used to signify consent. However, to assist parties in the drafting of clauses which will, as far as possible, be free of ambiguities that might raise jurisdictional doubts or procedural controversies, the Secretariat of the Centre is developing some model clauses designed to avoid such difficulties and to direct the attention of potential parties to the ancillary matters that they may wish to cover in the consent agreement.

Given this freedom as to the form of consent, many variations

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58. ED Report, para. 20.

59. In this respect, the Convention deliberately departs from the practice of other international tribunals, such as the International Court of Justice which permits a party to a dispute to file an application in a matter with respect to which the agreement of some other State must still be obtained for the tribunal to exercise jurisdiction. The application is then put on the Register and the Registrar approaches the other party; if the latter declines to consent, the Court orders the removal of the application from the list--but a permanent public record of the application and of the refusal to consent remain, to the possible embarrassment of the noncooperating party. See, e.g., Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungarian People's Republic [1954] I.C.J. 99) and United States of America v. Union of Soviet Socialist Republics [1954] I.C.J. 103).

are possible. Thus the consent of both parties may be included in a single instrument (which will probably be the normal method), or it may be expressed in two separate and different ones (for example, in an investment promotion law adopted by the host State, which is "accepted" by the investor by means of some formal instrument filed by him).[60] Similarly, a consent clause may be simple, recording no more than an agreement to submit certain matters to conciliation and/or arbitration under the auspices of the Centre; it may be conditional, for example by requiring the prior exhaustion of local remedies;[61] it may be general, or restricted to certain classes of disputes, or specifically exclude specified controversies; it may also record the agreement of the parties (as is usual in traditional compromissory clauses) on numerous procedural details which they may wish to regulate differently from the optional provisions of the Convention or of the Regulations and Rules. In view of the special and basic feature of the regime established by the Convention, that once both parties have consented either may submit a controversy to the Centre (which is then equipped to achieve a resolution thereof without requiring any further procedural or substantive agreement between the parties--but taking strict account of any that are reached), it is vital that each party assure itself that the expressed conditions included in its consent will adequately protect its interests in all circumstances and with respect to any type of dispute; these are the questions to which the following section on "Procedure" is devoted.

Finally, attention should be called to four special legal characteristics of consents made pursuant to the Convention:

(A) Once both parties have given their consent, neither of them can unilaterally revoke it[62]--not even if one or both of the States concerned should denounce the Convention and thus cease to be Contracting States.[63]

(B) The date of the consent tends to fix the mutual rights and obligations of the parties with respect to proceedings under the Convention. Thus no subsequent amendment to that instrument, and no subsequent change in the Conciliation or Arbitration Rules, is applied to a proceeding initiated pursuant to an ear-

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60. ED Report, para. 24.

61. This possible condition is specifically mentioned in Convention, Article 26.

62. Convention, Article 25(1).

63. Convention, Article 72.

lier consent,[64] even if the proceeding is not instituted[65] until after the change in the Convention or the Rules has been perfected--unless of course both parties agree to take account of such change.

(C) Once consent to arbitration has been given, such consent is ordinarily deemed to be an agreement to exclude all other remedies.[66]

(D) Once consent to arbitration has been given, the Contracting State of which the private party is a national is precluded from giving "diplomatic protection," or from bringing "an international claim" with respect to such a dispute.[67]

(d) Filing a Request

Though not formally stated as one of the jurisdictional requirements, it is clear that the Centre cannot be seized of a dispute until and unless an appropriate request is filed with it. Such a request may be filed by either party, or by both[68]--but not by a third person. The form of the request to be filed with the Centre and the method of such filing is regulated, without undue rigidity, by the Institution Rules.

It should be noted that the request must be accompanied by a Lodging Fee--at present set at $100.[69] In effect, this fee constitutes part of the request, for until it is paid the Secretary-General may take no action whatsoever with respect to the request (even as to informing the other party of its filing) except to remind the moving party of this financial requirement.[70]

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64. Convention, Articles 33, 44 and 66(2). See also Introductory Notes D to the Conciliation Rules and to the Arbitration Rules, as well as the second paragraph on page 3 of the document in which these are reproduced (ICSID/4).

65. See IR.6(2) for the definition of that event.

66. Convention, Article 26.

67. Convention, Article 27.

68. IR.1.

69. FR.15(1).

70. IR.5(1)(b), (c).

PROCEDURE

Basic Principles

Almost all procedural[71] aspects of proceedings under the Convention are conditioned by the interaction of two basic principles:

(a) Consensual Flexibility

The parties are free, by their mutual agreement, to determine almost all procedural questions. Unlike in most court systems (and even in institutionalized arbitration schemes like those of the International Chamber of Commerce or of the American Arbitration Association) there are few rigid requirements, whether concerning the constitution of Conciliation Commissions or of Arbitral Tribunals, or the method of their operation, or the way in which the parties are to present and argue their case. This large measure of procedural flexibility is a deliberate concession to the sensibilities of governments, which are traditionally most reluctant to submit to any established "courts" (even their own), but have generally been more willing to accept formless procedures which they can shape through compromissory clauses or ad hoc agreements with their opponent.

The agreement of the parties as to the conduct of proceedings brought under the Convention can be recorded:

(i) As part of the instrument setting out the consent to the jurisdiction of the Centre with respect to future disputes--which should be the preferred place to regulate any important general questions on which it may be difficult to reach an accord after a dispute has arisen and the tactical maneuvers of the parties have commenced;

(ii) As part of a joint filing of a request for a proceeding--a device which may be used if the consent had been a general one reached before the dispute arose, at which time the parties sensibly seek the most convenient and expeditious way of living up to their obligation to submit to a settlement through the Centre;

(iii)At the beginning or at any stage of the proceeding, in any form acceptable to the Commission or Tribunal concerned.

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71. In this section the term "procedure" is generally used in a specially broad sense to refer to all aspects of proceedings with the exception of jurisdictional questions. Thus, for example, subsection (e) deals with the choice of the substantive law to be applied by Arbitral Tribunals.

The freedom of the parties to shape the procedure to their particular requirements is subject to only two special limitations (aside from those relating to the unwaivable jurisdictional standards and to the procedural devices designed to enforce them):

(A) The Convention contains certain binding requirements regarding the composition of Conciliation Commissions and especially of Arbitral Tribunals;[72]

(B) The financial obligations of the parties vis-a-vis the Centre can naturally not be attenuated by any agreement they reach inter se.[73]

(b) Non-Frustration

If the parties fail to reach agreement on any procedural point, the Convention invariably offers a fall-back device to regulate the question, so that once consent covering a dispute has been given, a partial or even complete lack of procedural agreement cannot prevent the initiation, conduct or conclusion of the proceeding. This is so whether that failure to agree follows a good faith effort by the parties, or is consequent on the deliberate attempt by either party to frustrate the proceeding, or results from the partial or complete refusal of one of the parties to participate therein (default). It is this principle which implements one of the two basic characteristics of the Convention: once mutual consent to settle a dispute has freely been given, it is unilaterally irrevocable and necessarily effective.

Examples

The subsections below illustrate the interaction of these two principles with respect to most of the significant procedural questions, with particular reference to those concerning which parties or potential parties should consider whether to make some special disposition to be recorded as part of their consent to the jurisdiction of the Centre.

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72. Convention, Articles 29(2)(a), 31(2), 37(2)(a), 39, 40(2) and 56(1), (3).

73. Convention, Article 59; FR.13-15.

(a) Composition and Method of Constituting Commissions and Tribunals

Subject to two restrictions set forth in the Convention, the parties are free to constitute their Conciliation Commission or Arbitral Tribunal according to any scheme they can agree on. However, the number of members of either of those bodies must in all cases be odd,[74] and except under rigidly defined circumstances the majority of the members of a Tribunal must have nationalities different from those of the parties.[75] The parties might agree, for instance, on a single member for their Commission or Tribunal; or on three members, one to be chosen by each of the parties and a neutral one to be elected by those two members; or perhaps there might be seven members, two each to be chosen by the parties and three to be appointed by a specified person or authority.

The agreement of the parties can be recorded as part of the consent agreement, or in a jointly submitted request for initiating the proceeding.[76] If no agreement, however, has been reached by the time the request is filed, then the Conciliation and the Arbitration Rules suggest a procedure by which the parties might reach agreement, by passing back and forth proposals and counterproposals for up to 60 days (unless they agree on another time limit).[77]

Should the parties totally fail to agree on a formula, then the Convention itself provides one that is automatically applicable in that contingency: a Commission or Tribunal consisting of three members, each party appointing one and a President appointed jointly.

(b) Appointment of Conciliators and Arbitrators

Depending on the agreement of the parties (or, if there is none, on the automatic formula) the several members of a Commission or Tribunal must be appointed by the parties acting individually, or by their joint action, or by the members previously appointed (and authorized to co-opt additional ones), or by some outside authority who is to act either unconditionally or conditionally (e.g., if the parties fail to make certain appointments).

Because of the variety of methods that may be adopted for

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74. Convention, Articles 29(2)(a) and 37(2)(a).

75. Convention, Article 39.

76. IR.3.

77. CR.2 and AR.2.

appointing the members of these bodies, the Convention offers no guidance on how this is to be done, and the Conciliation and the Arbitration Rules themselves only indicate an optional procedure that may be followed if the composition of the body is defined by the automatic fall-back formula.[78]

Should there be any breakdown in the appointing process, whether caused by the failure of the parties to agree on joint appointments, or by the inabilitly of the appointed members to agree on the election of further ones, or by the bad faith refusal of one of the parties to make the appointments for which it has sole responsibility, or by the inaction of an agreed outside authority (either because of an inability or unwillingness to fulfill the conditions established by the parties, or perhaps because the authority agreed to no longer exists), then the Convention once more provides an automatic fall-back solution. Either party may after 90 days appeal to the Chairman of the Administrative Council of the Centre (a position occupied ex officio by the President of the World Bank) to make any appointments necessary to complete the Commission or Tribunal. He is then obliged to do so, in accordance with certain substantive and procedural requirements stated in the Convention and in the Rules.[79]

(c) Fees of Conciliators and Arbitrators

Though the matter of the fees to be paid to the members of Commissions or Tribunals is a minor matter, it is one that must be settled if these bodies are to be established and function. Again, the parties are given free rein to settle this matter by agreement--but obviously they must also obtain the consent of the members they wish to appoint, since plainly no one can be required to serve against his will.[80]

Though it may be thought that this is a question on which the parties will surely agree, in their own interest to avoid excessive charges, account must be taken of the possible situation of one party refusing to participate in the proceeding at all--perhaps on the ground of some genuine jurisdictional objection or out of (probably misguided) tactical considerations. Again the Convention provides a fall-back device, since in the absence of agreement, the Commission or the Tribunal itself sets the fees of its members. These, however,

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78. CR.3 and AR.3.

79. Convention, Articles 30, 31(1) and 38, 40(1); CR.4, 11(2) and AR.4, 11(2).

80. Convention, Article 60(2).

must be kept within limits established by the Administrative Council, which has incorporated them in the Administrative and Financial Regulations.[81] Since these limits are rather high, and conciliators and arbitrators may not be altruistic enough to set their own reimbursements much lower, the parties would be well advised to regulate at least this matter by agreement, especially if a prolonged proceeding is anticipated.

Whatever the amount is that the members are to receive, or the basis on which payment is to be made, the Regulations provide firmly that payment must be made solely by the Centre (which uses for this purpose advances received from the parties).[82] Indeed, the conciliators and arbitrators must individually pledge not to accept any compensation except as provided in the Convention and in the Regulations and Rules.[83]

(d) Rules of Procedure

With respect to the rules of procedure (now using that term in its conventional, narrow sense) for proceedings pursuant to the Convention, it is perhaps most useful to recognize a fairly strict hierarchical order among the applicable provisions:

(A) Compulsory rules set out in the Convention--such as the requirements established for the case of a default by one of the parties.[84] As indicated in subparagraph (D), however, a much lower rank must be assigned to the facultative rules contained in the Convention, i.e., to those that can be varied by agreement of the parties--such as those relating to ancillary claims and to provisional measures.[85]

(B) The Administrative and Financial Regulations and the Institution Rules, except to the extent that some of the former permit limited variations by agreement of the parties;

(C) Procedures agreed to by the parties--to which a predominant po-

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81. FR.13(1). The limits are US $250 for each day of meetings and US $100 for the equivalent of each day of other work.

82. FR.13(2), (3).

83. CR.6(2) and AR.6(2).

84. Convention, Article 45(2).

85. Respectively, Convention, Articles 46 and 47.

sition is accorded by the Rules, pursuant to the general consensual scheme of the Convention;[86]

(D) Optional rules of the Convention and of the Administrative and Financial Regulations;

(E) The Conciliation and the Arbitration Rules--in the form which they had on the date of consent with respect to the dispute in question (unless the parties otherwise agree). Of course, to the extent some of these Rules merely restate provisions of the Convention or of the Regulations, the force of such provisions is not diminished (and their hierarchical rank is not reduced) by such restatement. Except to that extent, all the Rules, however, can be superseded by agreement of the parties--whether or not a particular Rule so states explicitly;[87]

(F) Ad hoc orders of Commissions and Tribunals.[88] Though lowest in the hierarchical order, it will in practice be these orders that permit the advancement of the proceeding when a lacuna exists in the formal structure of Conventional provisions, Regulations and Rules, and the parties are unable to reach procedural agreements.

(e) Applicable Law[89]

With respect to the vital question of the law to be applied to the arbitration of a dispute, the Convention again gives the parties

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86. Convention, Articles 33 and 44; CR.20(2) and AR.20(2). See also ED Report, para. 39, and Introductory Notes D and E to both the Conciliation and the Arbitration Rules.

87. The proviso appearing in some Rules (e.g., CR.14(2); AR.28) that "the parties otherwise agree" is substantially superfluous, but was included in order to call the attention of parties and potential parties to provisions that they might wish to vary by advance agreement.

88. Convention, Articles 33 and 44; CR.19 and AR 19. See also Introductory Notes D and E to both the Conciliation and the Arbitration Rules.

89. This question has been analyzed by the first Secretary-General of the Centre, Mr. A. Broches, in The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Applicable Law and Default Procedure, International Arbitration Liber Amicorum for Martin Domke (The Hague, 1967).

full freedom to select, by agreement, any legal system[90]--whether national, international, or perhaps one formulated entirely ad hoc. In addition, the Convention specifically provides that the parties may agree to allow the Tribunal to decide a dispute ex aequo et bono.[91]

Again, if the parties fail to agree, the Convention provides a fall-back rule. In such an event "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[92] In effect, this provision will usually result in the use of the law of the host State. Since an investor may consider this to be an unsatisfactory regime, particularly if he is concerned about the stability of such law, and since this is one point on which it is unlikely that agreement will be reached once an actual dispute has arisen, it appears that a choice-of-law clause should be a prime candidate for insertion into any carefully drafted consent agreement.

Whatever law is to be applied, whether chosen by agreement of the parties or as specified in the Convention, the Tribunal is precluded from bringing in "a finding of non liquet on the ground of silence or obscurity of the law."[93]

(f) Place of Proceeding

With respect to the place of proceedings, the parties are again given considerable latitude, conditioned in practice by the requirement that the Secretary-General be consulted since it is he who is responsible for the administrative arrangements.[94] Thus, if the parties agree, then their proceeding can be held at the seat of any institution with which the Centre has made advance arrangements for that purpose, or indeed in any other place that their Commission or Tribunal approves after consultation with the Secretary-General.[95]

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90. Convention, Article 42(1). See ED Report, para. 40.

91. Convention, Article 42(3).

92. See note 90 supra.

93. Convention, Article 42(e).

94. FR.26.

95. Convention, Article 87; C.R.13(3) and A.R.13(3). The Centre has already concluded a set of "General Arrangements" with the Permanent Court of Arbitration in The Hague (the text of which

Should the parties fail to agree, however, the proceeding will automatically be held at the seat of the Centre, which for the present is at the headquarters of the World Bank in Washington.[96] Incidentally, there appears to be no reason why, if for failure of a prior agreement the proceeding starts in Washington, the parties cannot later choose (subject to the conditions indicated above) a mutually more convenient place.

Wherever the proceedings themselves take place, the Commission or Tribunal can decide (unless the parties otherwise agree), to visit any place connected with the dispute, in order to conduct particular investigations there.[97] And, if the parties agree, witnesses and experts may be examined otherwise than before the Commission or Tribunal, in any place convenient to the parties and to the person to be interrogated[98] (though subject, perhaps, to any local prohibitions against non-domestic proceedings).

(g) Procedural Languages[99]

In the choice of procedural languages the parties have a restricted degree of freedom. They may agree on either one or two of the official languages of the Centre (at present only English and French, though it is foreseen that Spanish will be added later).[100] They may also agree on other languages, but for this they should obtain the approval of their Commission or Tribunal, which must first consult the Secretary-General (who is responsible for the administrative arrangements, including the provision of translators and interpretors, and who must himself--directly or through the Secretary appointed by him--be able to follow the proceeding).[101] If the parties fail to agree on the procedural languages to be used, each of

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is annexed to Centre document AC/67/16 and will probably also be reproduced in the Second Annual Report 1967/1968 of the Centre).

96. Convention, Articles 62 and 2; CR.13(3) and AR.13(3).

97. Convention, Article 43(b) (applicable to arbitrations); CR.22(3)(c) and 23(1), AR.36.

98. CR.28(3) and AR.35(b).

99. CR.21 and AR.21.

100. FR.34(1).

101. FR.25(c) and 27; see, however, CR.21(5) and AR.21(5) and Notes D thereto.

them may select, without the requirement of further approval, any one of the official languages of the Centre.

Regardless of what procedural languages are chosen, the Commission or Tribunal may on the one hand cause any of these to be used only in a limited sense, or in the other may authorize other languages to be used for special purposes.

CONCLUSION

By now the reader will have noted that the presentation above has been based entirely on the text of the Convention and of the Regulations and Rules, as expounded in the appropriate interpretive instruments, without any reference to a jurisprudence built on actual conciliation reports issued or arbitral awards rendered. The reason for this omission is plain: up to now no dispute has yet been submitted to the Centre and thus there are as yet no reports and no awards.

Does this mean that the Convention is a failure? At this stage such a conclusion would not only be premature but wrong.

It should first of all be recalled that the formulation of the Convention was completed a scant three years ago, and that it entered into force, with just 20 Contracting States, only 18 months ago. By now that number has doubled, but it has thus been only a very short while since a significant number of governments and investors have been in a position to utilize the Centre at all. That institution itself only became tentatively operational in February, 1967 with the election of the first Secretary-General and the adoption of Provisional Regulations and Rules; only in the current year has it become fully armed with definitive Regulations and Rules and with lists of Panel members representing a substantial number of Contracting States.

In engaging in any numbers game about the success of the Convention, the natural starting point is of course a count of signatures (now 57) and ratifications (now 40) of that instrument. However gratifying as these figures are (which were attained more rapidly for this than for most general international agreements), they at best measure expectation rather than accomplishment.

Since it is the evident purpose of the Convention to stimulate private foreign investment, which may be encouraged by the existence of this unique facility for settling potential disputes, it would seem that the best measure of the use of the Convention would be a count of the number of new investment agreements containing "consent clauses" relating to the Centre. Unfortunately, however,

no such count is available now, or ever likely to be--since the Convention does not oblige the parties consenting to the jurisdiction of the Centre to inform the latter until they are ready to submit a particular dispute for settlement. Thus, although the Secretariat has informally (and sometimes confidentially) received information about a number of such agreements, involving at least half-a-dozen developing States, it seems certain that the actual number is considerably higher.

Lastly we come to the significance of the number of disputes filed. Here one must first of all recognize the certainty of a time lag: if consents are given principally in connection with new investments, it is fortunately unlikely that these will give rise to any disputes in the near future. And while nothing precludes the use of the Convention in relation to existing disputes, common sense suggests and experience teaches that once a dispute arises between parties who are not obliged to submit it to an impartial authority, one side or the other will consider it to its advantage to avoid such submission and will do so unless appropriate pressures can be brought to bear; thus, while it is not hopeless to expect the submission of some existing disputes to the Centre (in particular if the parties should already be close to agreement but for internal reasons may require an external imprimatur), it would be unreasonable to evaluate the success of the Convention by counting such special events. Finally, and perhaps even more significantly, it may be expected that widespread use of the Convention (measured by the number of consent agreements concluded) will actually reduce the number of international investment disputes--since if both parties realize that ultimately their factual and legal assertions, which were formerly not subject to effective challenge, can ultimately be tested by an impartial Commission or Tribunal established under the Convention, they may hesitate to advance indefensible claims and are thus more likely to reach agreement informally. Similarly, knowing that in the background there is the inescapable potential of an elaborate proceeding and award under the Convention, the parties may instead agree on a simplified procedure for resolving any minor disagreements.[102]

In effect, the success of the Convention will consist of any intangible but real improvement it (in interaction with many other positive and negative factors) can produce in the investment climate of the developing countries. Such improvement will of course in part result directly from the availability of a forum where none existed before--and can be measured by the direct use to which the

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102. Following the precept set out in Matthew 5:25-26 and in Luke 12:57-58.

Centre is put. But more importantly, the device of the Convention promises to create law in a field that until now has been, for want of impartial, accepted decisions, largely a lawless area. Ideally, to the extent that potential investors understand that their status in the future not depend entirely on caprice and the ability to maintain good relation with a shifting cast of politicians, but will be anchored in an objective legal framework whose elements are expounded by Tribunals established under the Convention, to that extent they will lose their reluctance to engage in foreign transactions and be able to concentrate more and more on basic economic rather than on largely political considerations.