THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES — COMMENTARY AND FORECAST

The 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States,' or simply referred to as the World Bank Convention,[1] was formulated by the Executive Directors of the World Bank, and opened for signature by the member States of the World Bank on March 18, 1965. It has entered into force on October 14, 1966, 30 days after the deposit of the twentieth instrument of ratification in accordance with Article 68(2) of the Convention. As a result, The International Centre For Settlement Of Investment Disputes (ICSID) came into being as the newest and only non-financial member of the World Bank group of organisations. As of May 20, 1968, 57 States had signed the Convention, of which 40 States have deposited instruments of ratification.[2]

Both Malaysia and Singapore have signed and ratified the Convention. Malaysia signed the Convention on October 22, 1965. On February 9, 1966, both Houses if Parliament passed, and His Majesty the Yang di-Pertuan Agong assented to the Convention on the Settlement of Investment Disputes Act, 1966 [No. 14 of 1966], which "ratified and gave legal sanction to the provisions of the Convention." Pursuant to Section 1 of the Act, the Minister of Finance designated March 15, 1966, as the date on which the Act entered into force thus completing all action necessary by the Malaysian government. As noted above the Convention, itself, came into force on October 1st, 1966. The Convention was signed by Singapore on February 2, 1968, and became part of the law of Singapore with the passage of the Abitration (International Investment Act, 1968 [No. 18 of 1968] which came into force on September 10, 1968. Both the Malaysian and the Singapore Acts provide that arbitration awards under the Convention shall be recognized as if they were judgments of the respective High Courts.[3]

1. (Hereinafter referred to as the Convention).
2. ICSID/3/Rev. 4. Since May 20, 1968, additional States, including Singapore, have signed and/or ratified the Convention, but ICSID/3/Rev. 4 is the latest document presently available to the author.
3. For the Malaysian provision, see Convention on the Settlement of Investment Disputes Act, 1966 [No. 14 of 1966], s. 3. In Singapore, see the Arbitration (International Investment Disputes) Act, 1968 [No. 18 of 1968]. Section 4(1) of the Act provides that any person seeking enforcement of an award shall be entitled to have the award registered in the High Court. Section 5 provides that an award registered under s. 4 shall "be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court . . . Section 3 provides that "Sections 4 and 5 of this Act shall bind the Government (but not so as to make an award enforceable against the Government in a manner in which a judgment would not be enforeable against the Government)".

As the Convention is perhaps the most important recent multilateral effort directed at assisting to increase the flow of private foreign investment into developing countries, its ratification by Singapore and Malaysia, and incorporation into the law of the two countries, gives reason for lawyers, businessmen, and government officials to examine just how the Convention operates. The following article is intended to explore the background of the Convention, its administrative framework, and the procedural rules which will govern the various organs set up by the Convention. In addition, some attention will be given to the controversial or problematic issues arising from the Convention.

I. THE HISTORY AND THE BACKGROUND OF THE CONVENTION

In 1961 the World Bank commenced the initiative of studying the possibility of establishing facilities which could be made available for the settlement of investment disputes between States and foreign private investors. The question of desirability and practicability of establishing institutional facilities, sponsored by the World Bank, was officially placed before the Board of Governors of the World Bank at its Seventeenth Annual Meeting, held in Washington, D,C. in September 1962. At that Meeting, the Board of Governors, by Resolution No. 174, adopted on September 18, 1962, requested the Executive Directors to study the question. Aron Broches, the General Counsel of the Bank, spearheaded the study group.

After a series of informal discussions on the basis of working papers prepared by the staff of the Bank, the Executive Directors decided that the Bank should convene consultative meetings of legal experts designated by member governments to consider the subject in greater detail. The consultative meetings were held on a regional basis in Addis Ababa (December 16-20, 1963), Santiago de Chile (February 3-7, 1964), Geneva (February 19-21, 1964) and Bangkok (April 27-May 1, 1964). The discussions were based on the preliminary Draft Convention on the Settlement of Investment Disputes between States and Nationals of Other States prepared by the staff of the Bank and conducted in the light of the discussions of the Executive Directors and the views of the member governments. The meetings were attended by legal experts from 86 countries.

,The Executive Directors reported to the Board of Governors at its Nineteenth Annual Meetings, in September 1964, that it would be desirable to establish the institutional facilities envisaged, and to do so within the framework of an Inter-governmental agreement. The Board of Governors adopted Resolution No. 214 approving the report of the Executive Directors who were thereby requested to formulate a Convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between States and nationals of other Contracting States through conciliation and arbitration.[4] With a view to arriving at a text which could be

4. Report of the Executive Directors, para. 1.

accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task.[5] As a result, representatives from 64 member States assisted in the task carried out in Washington under the Chairmanship of Aron Broches.

The traditional view widely held in international law is that a private individual should not have access to an international forum in the settlement of dispute between himself and a Sovereign State. To allow him such a right would be tantamount to derogation of the sovereignty of the State in which the dispute *vis-a-vis* the individual arises. It would accord the private foreign national a right above the enjoyed by the nationals of the State. Traditionally, then a foreign national has had only two possible alternatives in seeking whatever redress he might wish to obtain.

First, he would have to seek redress from the domestic courts of the State in which the dispute arises. In so doing he might confront two disadvantages. One disadvantage is that a dispute of an investment nature between a national of a State and another State has political undertones and the individual cannot be sure that the national courts are free from all prejudices or pressures, executive or legislative, in making an impartial decision. Another disadvantage is that the State is practically a judge of its own cause. A situation such as this is perceived by many foreign investors as being unfair and discriminatory. However, the individual can do nothing about it unless he enlists the help of his government which is willing to espouse his claim.

Second, if the individual seeks assistance from his government, it must be shown that the individual was subjected to a 'denial of justice' under international law before the investor's country could legally pursue his claim through diplomatic channels or espouse his claim before the International Court of Justice. One example of a denial of justice would be the taking of an alien's property without compensation and closing all avenues of judicial recourse. Therefore, as a pre-condition for the assistance from the country of the individual, the private party must have exhausted all local remedies offered in the foreign State involved. In addition to this rather time-consuming obstacle in getting diplomatic protection from his government, the private investor has no control over the vigour with which his government will press his claim.

As a result, the recent years have witnessed various attempts by different bodies to afford some kind of arbitration facilities for the settlement of disputes between an individual and another sovereign State. Hence, in spite of the fact than an individual is generally treated as an inactive unit in international law, the concept of direct access by

5. *Ibid*., para. 7-8.

a private foreign investor to some independent forum of settlement is not a novel one.[6]

The existing methods of protecting investors who committed their capital can be classified into three categories. They are (1) the unilateral method, (2) the bilateral method, (3) the multilateral method. They are not suggested to be exclusive of one another, but rather complementary to one another.

An example of the unilateral approach are the Foreign-aid Riders of the United States requiring the President to suspend foreign aid to any country that has (1) seized without compensation property owned by the United States citizens or corporations of which the United States citizens own at least fifty per cent interest, (2) taken steps to nullify or repudiate existing contracts or agreements with a United States citizen or a corporation in Which United States citizens own at least a fifty per cent interest, or, (3) imposed against the interest of United States citizens discriminatory measures which have the effect of confiscating property.

Another approach is the insurance by the investor's State under national legislation, supplemented by bilateral agreements between the investor's State and the host country concerned. This approach is a unilateral-cum-bilateral method because the investor's State, apart from passing the national legislation, would also have to agree with the host country to institute a corresponding safeguard. An example of this approach is the Investment Guarantee Program of the United States. The possible risks covered by the program are the inconvertibility of currency of the foreign country, expropriation, loss through war, and, in limited instances, all risk coverage.

An example of a bilateral approach is provided by the Friendship, Commerce, and Navigation Treaties entered into between United States and other, primarily, developed countries. These treaties seek to provide for a more detailed and prompt standard as to compensation for expropriation of property belonging to a national of the other contracting States. F.C.N. treaties also provide for non-discriminatory treatment of each contracting State's nationals when they seek to establish business activities in the other territory. Typically they also forbid either State from taking unreasonable or discriminatory measures that would impair the legally acquired rights of a national. However, few of these treaties have been negotiated with underdeveloped

6. Art. VII of the well-known Abs Shawcross Draft Convention on Investment Abroad (1959) embodies such a concept. In the commentary on the Draft, the following was said:

> "The notion that an individual may enjoy a right of access directly to an international tribunal is not new. Procedural capacity of this character was enjoyed by individuals in relation to the Central American Court of Justice and certain mixed Arbitral Tribunals and is enjoyed by them today in relation to such diverse bodies as the Court of European Community, the European Commission of Human Rights and the Administrative Tribunals of the International organisations. It is therefore, no real departure from legal tradition to suggest that similar rights be conferred on individuals in connection with investment matters."

countries which are the centre of interest as far as the need for providing a favourable climate of investment is concerned. Some of the underdeveloped countries, particularly Latin America, look upon these treaties setting up standards for the treatment of the rights of aliens as an infringement of their sovereignty.

The multilateral approach is practically a 'special forum' approach as it provides for the settlement of disputes by a neutral tribunal as agreed between the parties. In the area of private commercial disputes the arbitration facilities best known in the international trade are the American Arbitration Court (AAA), headquartered in New York, and the International Chamber of Commerce (ICC), located in Paris. Both of these are private organisations. The Permanent Court of Arbitration, established by the Hague Convention of 1907 for the Settlement of disputes between States, was also made available for the Settlement of disputes between States and private parties by a decision of the Bureau of the court.[7]

Another effort, of recent development along the multilateral line to handle disputes between States and foreign nationals is the Draft Convention on the Protection of Foreign Property, prepared under the auspices of the Economic Co-operation and Development, generally known as the "OECD Convention." This OCED Convention, apart from providing an automatically operating arbitral mechanism for investment disputes, also attempts to clarify and fix the substantive legal principles which should govern the protection of foreign property in another State. The basic principles which the OECD Convention sought to include were: (1) governments should carry out their specific engagements respecting private foreign investments — the principles of *pacta sunt servanda;* (2) there must be no discrimination in the treatment of aliens and their property; (2) prompt, adequate, and effective compensation must be paid in the event of direct or indirect dispossession of the investor's property by the State; and (4) disputes should be settled by means of neutral arbitration. This draft multilateral treaty setting up an investment code has not provoked ready acceptance as most developing countries consider such a code as an infringement of their sovereignty.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States is the most recent effort undertaken on a multilateral basis to provide facilities for the settlement of investment disputes through conciliation and arbitration. It cuts across the traditional concept of an individual's standing in international law which denies him the right of direct access to an international forum for the settlement of disputes between him and a sovereign State, by providing a centre where he can have the disputes settled, provided that

7. On March 26, 1962, the Administrative Council of the Court approved the 'rules 1962 of arbitration and conciliation for the settlement of international disputes between two parties of which one is a State,' which contain, model rules for arbitration and conciliation and model clauses for referring such disputes to settlement under the auspices of the Court. No treaties exist, however, which require contracting States to recognise the jurisdiction of the ICC, the AAA, or the Permanent Court of Arbitration over disputes between States and foreign nationals.

the sovereign State consents to it. The machinery established by the Convention is also somewhat unprecedented in the history of international law and of the traditional methods of settlement of disputes; a new institution (ICSID) is created which has the force of a multilateral treaty behind it and hence the contracting States which have submitted the disputes to the Centre for arbitration will have to recognise its jurisdiction. The Convention does not attempt to set up definite legal principles governing the settlement of disputes and hence has avoided the unhappy consequence of its being branded as an infringement on the sovereignty of the States. It does however, establish in considerable detail the procedural aspects of the Centre which would facilitate the use of the machinery established by it.

II. THE PURPOSE OF THE CONVENTION

The need to accelerate the rate of economic development in the less developed countries of the world is undeniable. Many such countries encounter the difficulty of the shortage of capital which cannot be readily made available out of the savings from domestic sources. This shortage might be remedied by a genuine favourable climate for foreign investment. One of the main factors influencing foreign investment decisions is the sense of assured security that in the case of disputes arising out of the investment the investor would be able to seek redress from an impartial neutral body. The Convention seeks to assist in developing a favourable climate for private foreign investment by providing neutral, international institutional facilities for settling investment disputes.

To reinforce the effectiveness of the purpose of the Convention, it is placed under the auspices of the World Bank which is an international organisation whose working capital is composed of the capital subscriptions of the 102 member countries. There are two obvious advantages in the close nexus between the Convention and the World Bank. First, as a financially powerful organisation, it can support the ICSID created by the Convention during its initial years. The investors and the developing countries may also have a vested interest in the success of the institution sponsored by the World Bank which can make loans to the developing countries Second, the World Bank has acquired a reputation of successful efforts at concilation or arbitration of major disputes over foreign investment in the post-war period. For example, the World Bank lent its good offices to the mediation of the Pakistan-India dispute over the Indus River during the 1950's and the Suez Canal crisis of 1956. In both instances workable settlements were reached with the aid of mediation efforts by the President of the World Bank.

Finally, according to the report[8] submitted by Senator Fulbright (Chairman of the Senate Committee on Foreign Relations) to the United States Senate, it is reasonable to expect that a substantive body of new international law will be developed as a result of the Convention. Although the arbitration tribunal of the Centre will have to apply the law specified by the parties to the dispute and is not bound by the rule of

8. International Legal Materials, Vol. 5, 1966, p. 646-679.

stare decisis, its previous decisions would still have persuasive authority which, in the absence of established principle and special circumstances of the dispute in question, it would be inclined to follow in the interpretation of an investment agreement or investment promotion legislation.

III. THE MACHINERY SET UP BY THE CONVENTION

The Convention establishes the International Centre for the Settlement of Investment Disputes (ICSID), or Centre, as an autonomous international institution.[9] The intention is to make the Centre a related agency of the World Bank. It has full international legal personality and legal capacity.[10] The seat of the Centre is located at the Headquarters of the World Bank, but the seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.[11]

The purpose of the Centre is "to provide facilities for conciliation and arbitration of investment disputes between contracting States and nationals of other contracting States in accordance with the provisions of the Convention."[12] However, the Centre will not itself engage in conciliation and arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the Convention. The Centre is, in effect, the registry for the lodgement of documents or the initiation of proceedings.

The organs of the Centre are the Administrative Council[13] and the Secretariat.[14] The Centre also maintains separate panels of conciliators and of arbitrators.[15] The Centre maintains a list of the courts or other authorities required to be designated by such contracting State to recognise and enforce any arbitral award rendered in pursuant to the Convention.

The expenses incurred by the Centre in connection with any proceeding must be borne by the parties thereto: divided evenly in the case of conciliation,[16] and as agreed by the parties or decided by the Tribunal in the case of arbitration.[17] The overhead expenditures of the Centre are to be covered in part by any miscellaneous receipts, but largely by assessments on the contracting States (generally in proportion to their capital stock in the World Bank.)[18] However, the Bank has agreed to

9. Art. 18-24.
10. Art. 18.
11. Art. 2.
12. Art. 1(2).
13. Art. 4-8.
14. Art. 9-11.
15. Art. 3, 12-14.
16. Art. 61(1).
17. Art. 61(2).
18. Art. 17.

accommodate the Centre free of charge as long as its seat is at the Headquarters of the Bank, and also to underwrite its overhead expenditures during its initial years.[19]

The jurisdiction of the Centre is based on consent, given by both parties to an investment dispute. It is dealt with in Chap. II of the Convention.[20] Since the Centre does not itself engage in conciliation or arbitration, the term "jurisdiction of the Centre" is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings.[21]

Consent to the jurisdiction of the Centre must be given in writing and once given cannot be unilaterally withdrawn.[22] Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromise* regarding a dispute which has already arises. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

There are two further limitations to the jurisdiction of the Centre. One of these is that one of the parties to the dispute must be the government of the contracting State, or a constitutional subdivision or agency designated by such a government. The other party must be a national of another contracting State, who may be a natural or juridical person. The other limitation is that only a "legal dispute arising directly out of an investment" is within the Centre's jurisdiction.[23]

A. *The Administrative Council*

The Administrative Council is the governing body of the Centre and it is dealt with in Section 2 (Art. 4-8) of the Convention. The Administrative Council is a plenary body within which each Contracting State will be represented, each having one vote.[24] Unless a State makes a specific designation, the Governor appointed by it to the World Bank is automatically its representative on the Council.[25] The President of the World Bank is the ex-officio, non-voting chairman of the Council of the Centre.[26] The President will have other functions to perform, such

19. Report of the Executive Directors, para. 16-17.
20. Art. 25-27.
21. Report of the Executive Directors, para. 22.
22. Art. 25(1).
23. *Infra,* p.
24. Art. 4(1).
25. Art. 4(2).
26. Art. 5.

as, nomination of the Secretary-General,[27] designation of ten members to each of the panels of conciliators and of arbitrators maintained by the Centre[28] and the appointment of the members of conciliation commissions and Arbitral Tribunals if the parties to a proceeding fail to do so.[29]

The principal functions of the Council are to adopt the annual budget of the Centre and its administrative and financial regulations, to adopt the rules (the Conciliation Rules and the Arbitration Rules) governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings, to elect the Secretary-General and to decide on invitations to non-members of the World Bank to become parties to the Convention.[30] Action on these matters requires a majority of two-thirds of the members of the Council. Other functions include the holding of annual meetings in conjunction with the annual meeting of the Board of Governors of the World Bank: special meetings may be convened, and urgent decisions may be taken by correspondence. A *quorum* for any meeting of the Administrative Council shall be a majority of its members.[31] Members on the Administrative Council and the Chairman shall serve without renumeration from the Centre.[32]

B. *The Secretariat*

The Secretariat is one of the organs of the Centre and it carries on the day-to-day business of the Centre. The Centre makes available the services of its Secretariat to assist in the initiation and conduct of proceedings and in bringing them to a definitive conclusion. The Secretariat is headed by a Secretary-General and by one or more deputy Secretaries-General, all of whom are to be elected by a two-thirds vote of the Administrative Council.[33]

The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar and principal officer of the Centre.[34] The Secretary-General receives requests for conciliation or arbitration under the Centre's auspices; the Convention requires him to give notice of the request to the other party.[35] In addition, the Secretary-General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and therefore to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant he finds that the

27. Art. 10(1).
28. Art. 13(2), 14(2).
29. Art. 30, 38.
30. Art. 6(1) (a) (b) (c) (f), Art. 67.
31. Art. 7(3).
32. Art. 8.
33. Art. 10.
34. Art. 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b), 65.
35. Art. 28, 36.

dispute is manifestly outside the jurisdiction of the Centre.[36] The Secretary-General is given this limited power to 'screen' requests for conciliation or arbitration proceedings 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, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre, *e.g.,* because either the applicant or the other party was not eligible to be a party in proceedings under the Convention.[37] In general, the Secretary-General will appoint a secretary for each proceeding, who becomes the channel of communications between the parties and the Commission or Tribunal and enables that body as well as the parties to make use of the facilities of the Centre.[38]

The Secretary-General performs the function of a registrar and shall have the power to authenticate arbitral awards rendered pursuant to the Convention and to certify copies thereof.

The Secretary-General and the Deputy Secretary-General are elected for a term of service not exceeding six years and shall be eligible for re-election. At the inaugural meeting of the Council, Mr. A. Broches was elected to the post of the Secretary-General. He is a Dutch lawyer who holds an American law degree. Broches, as the Bank's general counsel, took charge of the discussion and formulation of the Convention.

C. *The Panels*

Article 3 of the Convention requires the Centre to maintain a panel of conciliators and a panel of arbitrators, most of whom are designated by the Contracting States (each Contracting State may place four persons on each list). The Chairman of the Administrative Council may designate ten person for each panel, each person having different nationality.[39] Persons designated to serve on the panels shall be persons of high moral character having recognised competence in the fields of law, commerce, industry or finance who may be relied upon to exercise independent judgment.[40] They shall serve for renewable periods of six years.[41] In keeping with the essentially flexible character of the proceedings, the Convention permits the parties to appoint conciliators and arbitrators from outside the panels but requires[42] that such appointees possess the qualities indicated above. The Chairman, when called upon to appoint conciliators or arbitrators pursuant to Art. 30 or 38, when the parties fail to do so, is restricted in his choice to panel members. In

36. Art. 28(3), 36(3).
37. Report of the Executive Directors, para. 20.
38. Copy of the leaflet issued by the ICSID on September 1, 1967.
39. Art. 13.
40. Art. 14(1).
41. Art. 15(1).
42. Art. 31(2), 40(2).

the case of conciliators, he has to choose from the Panel.[43] Arbitrators appointed by the Chairman shall not be the nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.[44]

IV. Conciliation and Arbitration Proceedings Under the Convention

A. *Institution of Conciliation and Arbitration*

Proceedings before the Centre, whether for conciliation or arbitration, may be instituted either by a Contracting State or by an investor, through a request made to the Secretary-General, setting forth the information necessary to establish the Centre's jurisdiction, the consent of the other party, and the nature of the dispute, etc.[45]

Except that consent must be given in writing there are no other special requirements as to form — indeed the two parties may do so in separate instruments. Once given, consent cannot be unilaterally withdrawn by either party, even if one of the contracting States concerned should withdraw from the Centre. The consent may, however, *ab initio* be qualified in various ways; for example, a contracting State may require the prior exhaustion of local administrative or judicial remedies; consent may be restricted to conciliation, to arbitration, or to conciliation followed, if necessary, by arbitration.[46]

Article 28(2), dealing with conciliation, states "The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure or the institution of conciliation and arbitration proceedings." Article 36(2) deals with the initiation of arbitration proceedings in the same manner. Rule 2 of the Institution Rules adopted by the Administrative Council of the ICSID at its First Annual Meeting on September 25, 1967, pursuant to Article 6(1)(a)-(c) of the Convention deals with the contents of the request for conciliation and arbitration in details.

As regards consent, Rule 2(1) (c) states "The request shall indicate the date of consent and the instruments in which it is recorded including, if one party is constituent subdivision or agency of a contracting State, similar data on the approval of such consent by that state unless it had notified the Centre that no such approval is required." Rule 2(3) states " 'Date of Consent' means the date on which the parties to the dispute consent in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted." The contingency foreseen in the Rule 2(3) that the consent of both parties may not have been given on the same day, relates both

43. Art. 31(1).
44. Art. 38.
45. Art. 28(1), 28(2), 36(1), 36(2).
46. Copy of the leaflet issued by the ICSID on September 1, 1967.

to the possibility of a particular instrument being signed on different days by the two parties, and that the consent is not expressed in a single instrument, *e.g.,* where the offer to submit disputes to the Centre is made by a host State in its investment promotion legislation.[47] A request, alone, is insufficient "information" concerning the necessary consent, thus "if the requesting party had not previously recorded its consent, then the request should record that the party gives its consent thereby; equally, both parties may record their consent in a joint request."[48]

As regards the identity of the parties, it is required by Rule 2(1) of the Institutional Rules that the request shall:

(d) indicate with respect to the party that is a national of a Contracting State:

(i) its nationality on the date of the consent; and

(ii) if the party is a natural person:

(a) his nationality on the date of the request; and

(b) that he did not have the nationality of the contracting State party to the dispute either on the date of consent or on the date of the request; or

(iii) if the party is a juridical person which on the date of consent had the nationality of the contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention.

Both Article 25(1) and (2) of the Convention and Rule 2(1) (d) clearly indicate the difference in nationality requirements between natural and juridical persons who are nationals of a Contracting State other than the State which is a party to the dispute. For a natural person to be eligible he must have the nationality of a Contracting State which is not a party to the dispute both on the date when the parties consented to the jurisdiction of the Centre, and on the date of the request for the Centre to be instituted.[49] However, for a juridical person the only relevant date is when the parties consented to the jurisdiction of the Centre. Further, such a person will be eligible even if he is a national of the State party to the dispute if, because of foreign control the two parties have agreed to treat it as a national of another Contracting State for purposes of the Convention.[50]

As regards disputes, the request must contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment.[51]

47. Report of the Executive Directors, para. 24.
48. Institutional Rules, Rule 2, note F.
49. See also note H to Rule 2 of the Institutional Rules.
50. *Ibid.*, note F.
51. Institutional Rules, Rule 2(1)(e), Art. 25(1).

If, on the basis of the information contained in the request, the Secretary-General finds that the dispute is manifestly outside the jurisdiction of the Centre, he has the power to deny the request for lack of jurisdiction.[52] If the request is not refused, the Secretary-General then registers the request whereupon *the proceeding is considered as constituted.* He should forthwith notify the parties of registration or refusal to register. The detailed procedure as to the registration of request or refusal to register is governed by Rule 6 of the Institution Rules.

Rule 6(1) (a) requires the Secretary-General to register the report in the conciliation or arbitration register as soon as possible and on the same day notify the parties of the registration. Though the 90-day period within which the Conciliation Commission or Arbitral Tribunal must, in principle, be constituted, runs from the date of the despatch of the registration notice,[53] Rule 6(1) (a) requires that this date be the the same as the date of registration.[54] A proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request.[55]

The requesting party (or parties, if the request was made jointly) may, by written notice to the Secretary-General, withdraw the request before the request had been registered.[56] If, however, the request has already been registered, "discontinuance" of the proceedings is governed by the Conciliation Rules, or by Rules 43-45 of the Arbitration Rules which require the concurrence of both parties.

B. *Constitution of the Conciliation Commission and the Conciliation Rules.*

The procedure for the constitution of the Conciliation Commission is governed by Articles 29-31 of the Convention and Rules 1 and 2 of the Conciliation Rules. These rules cover the period of time from the despatch of the notice of registration of a request for conciliation until a report is drawn up. The transactions previous to that are to be regulated in accordance with the Institution Rules and Article 28.[57]

The parties are free to agree on the form and method of constituting their Commission subject to the minimal restrictions of the Convention, e.g. parties are free to appoint conciliators outside the Panel of Conciliators maintained by the Centre,[58] but the conciliators so appointed

52. -Arts. 28(3), 36(3). It is interesting to note that there is no possibility for an appeal from such a denial by the Secretary-General.

53. Art. 30, 38.

54. Institutional Rules, Rule 6, note D.

55. Institutional Rules, Rule 6(2).

56. Institutional Rules, Rule 8.

57. Note C of the Introductory Notes to the Conciliation Rules adopted by the Administration Council.

58. Art. 31(1).

must possess the qualities stated in Article 14(1) of the Convention.[59] Similarly, the parties are free to agree on the number of conciliators to be chosen so long as it is an uneven number.[60] However, if the parties fail to agree either as to the method of constitution of the Commission or the number to be constituted, or both, a formula set forth in the Convention and the Conciliation Rules provides a ready solution. Thus, while preserving maximum freedom for the parties to act by agreement, neither of them can, by failing to co-operate, prevent the constitution of the body to which it had consented to submit a dispute.

The Conciliation Rules contemplate two situations for the constitution of the Conciliation Commission *i.e.* where there has been a previous agreement as to the number and method of appointment of the conciliators, and where there is no such agreement. In the case of a previous agreement, Rule 1 requires the parties, upon notification of the registration of the request for conciliation, to proceed, with all possible despatch, to constitute a commission, with due regard to Articles 29-31 of the Convention. Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible by provisions agreed by them regarding the number of conciliators and the method of their appointment.[61]

Rule 2 states that if the parties, at the time of registration of the request for conciliation, have not agreed upon the number of conciliators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:

(1) (a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole conciliator or of a specified uneven number of conciliators and specify the method proposed for their appointment;

(b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:

(i) accept such proposals; or

(ii) make other proposals regarding the number of conciliators and method of their appointment;

(c) within 20 days after the receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.

(2) The Communication provided for the paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties

59. Art. 31(2).

60. Art. 29(2) (a).

61. Concilation Rules, Rule 1(2).

shall promptly notify the Secretary-General of the contents of any agreement reached.

(3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it choses the formula provided for in Article 29 (2) (b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Commission is to be constituted in accordance with that article.

Article 30 of the Convention may be invoked as a last resort by either party. If the parties cannot agree on any joint appointments, or if either of them declines to make the designations for which it is responsible, or if for any reason the constitution of the body is delayed, either party may require the Chairman of the Council to make the necessary appointments from the appropriate panel. The proceeding of the Commission is deemed to have begun on the date the Secretary-General notifies the parties to the dispute that all conciliators, however chosen, have accepted their appointments.

C. *Conciliation Proceedings*

Article 33 states "Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not by this section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question."

Each commission is the ultimate judge of its own competence.[62] Each may also decide whether the proceeding is within the jurisdiction of the Centre, and is not affected by the preliminary decision to register the request made by the Secretary-General.

Conciliation Commissions are required to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them on mutually acceptable terms. Though the parties are required to co-operate in good faith with their Commission, and to give most serious consideration to its recommendations for settlement. they are not required to accept these. The Commission must conclude its work by drawing up a report, recording either that the agreement has been reached. or that it has proved impossible to reach an agreement, or that one party has failed to appear or to participate in the proceeding.[63]

D. *Constitution of the Tribunal and the Arbitration Rules*

The procedure governing the constitution of the Arbitration Tribunal is provided by Articles 37-40 of the Convention and Rules 1 and 2

62. Art. 32.
63. Art. 34, 35.

of the Arbitration Rules. The parties are given almost the same freedom of action over the agreement as to the constitution of the Tribunal as that given to them in the constitution of a Conciliation Commission. There are, however, some additional restrictions. Article 39 requires that the majority of the arbitrators be nationals of States other than the States of the parties to the dispute except where the appointment has been made by the agreement of the parties. This means, for example, that in a Tribunal composed of five persons, at least three must be nationals of States other than that of the National party and the States party to the dispute. Rule 1(4) states "no person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as member of the Tribunal."

Where there is no previous agreement, Rule 2 provides for the same procedure as Rule 2 of the Conciliation Rules[64] except that if no agreement has been reached 60 days after the registration of the request, either party may inform the Secretary-General that it chooses the formula provided for in Article 37(2)(b) of the Convention.

If the Tribunal shall not have been constituted 90 days after notice of registration of the request, the Chairman shall, at the request of either party after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to Article 38 shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

E. *Powers and Functions of the Tribunal*

Articles 41-49 of the Convention deal with the power and function of the Tribunal. Whereas the process of conciliation is to help the parties to the dispute to reach an agreement, the arbitration process aims at a binding determination of the dispute by the Tribunal. Arbitral Tribunals are required to render an award, on the basis of the rules of law agreed by the parties or as specified in the Convention.[65] The failure of the party to appear or to present its case "shall not be deemed an admission of the other parties' assertions" and cannot prevent the Tribunal from rendering an award, though it is required to follow special procedures in such a situation.[66] An Arbitral Tribunal may also consider claims ancillary to the principal dispute, such as incidental or additional claims or counterclaims, and it may recommend provisional measures to be taken by the parties.[67] The decisions of the Tribunal are taken by the majority of its members and the award must be signed by the members voting in favour of the award.[68] It is then certified by the Secretary-General.[69]

64. *Supra.*
65. Art. 42.
66. Art. 45.
67. Art. 46, 47.
68. Art. 48.
69. Art. 49(1).

Article 41 reiterates the well-established principle that international tribunals are to be judges of their own competence. It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for arbitration[70] is so narrowly defined as not to encroach on the prerogative of the Commissions and Tribunals to determine their own competence. On the other hand, registration of a request by the Secretary-General does not, or course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.[71]

In keeping with the consensual character of proceedings under the Convention, the parties to arbitration proceedings may agree on the rules of procedures that will apply in the proceeding. However, to the extent that they have not so agreed the Arbitration Rules adopted by the Administrative Council will apply.[72]

F. *Law to be Applied*

Article 42 of the Convention deals with the law to be applied by the Tribunal. The Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-state disputes.[73] Article 38(1) of the Statute of International Court of Justice reads as follows:

> 1. The court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognised by civilised nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

70. *Supra.*

71. Art. 41(2).

72. Art. 44.

73. Report of the Executive Directors, para. 40.

V. THE ARBITRATION AWARD: ITS INTERPRETATION, REVISION, ANNULMENT, RECOGNITION AND ENFORCEMENT

Once an award has been given, the Secretary-General shall promptly despatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which certified copies were despatched. Provision is made for the rectification of omissions, clerical, arithmetical or similar errors in the award upon the request of a party made within 45 days from the date on which the award was rendered.[74] The rectification will form part of the original award.

The original tribunal, or if necessary, a newly constituted one may be requested to interpret or revise an award.[75] The request has to be in writing addressed to the Secretary-General. Any dispute as to the scope and meaning of the award may be submitted for interpretation. The application for revision, however, has to be based on special grounds, *i.e.* the discovery by the party of some fact material to the award and unknown to the tribunal or the applicant at the time when the award was rendered, and that the ignorance of the applicant must not have been due to negligence. The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

Either party may request annulment of the award by an application in writing addressed to the Secretary-General. The Chairman of the Council may constitute an *ad hoc* committee of arbitrators to consider the annulment on the following grounds:

(a) that the tribunal was not properly constituted;

(b) that the tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

The application shall be made within 120 days after the date on which the award was rendered except that when annulment was requested on the ground of corruption such application shall be made within 120 days after the discovery of the corruption and in any event within three years after the date on which the award was rendered. If the award is thus annulled in whole or in part, the dispute may be submitted to a new tribunal.[76]

Article 53 declares that the parties are bound by the award and that it shall not be subjected to appeal or to any other remedy except those provided for in the Convention.[77] Subject to any stay of enforce-

74. Art. 49.
75. Art. 60, 51.
76. Art. 52(2), 52(6).
77. *Supra.*

ment in connection with any of the above proceedings in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every contracting State to recognise the award as binding and to enforce the pecuniary obligation imposed by the award as if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil jurisdictions and the different juridical systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each contracting State to meet the requirements of that Article in accordance with its own legal system.[78]

The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which the execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point, Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.[79]

VI. THE COST AND THE PLACE OF PROCEEDINGS

The charges for the use of the facilities of the Centre and the fees and expenses of the Commission and Tribunal in connection with any proceeding must be borne by the parties. The charge shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council, *e.g.* the US$100/- lodgement fee is established in the Administrative and Financial Regulations of the Centre. Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with Secretary-General.[80] The parties may agree in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.[81]

In the case of conciliation proceedings, the charge, the fees and the expenses shall be borne equally by the parties.[82] In the case of arbitration, the charges, the fees and the expenses shall be borne by the parties as agreed between themselves or decided by the Tribunal. This decision shall form part of the award.[83]

78. Executive Directors' report, para. 42. For Singapore and Malaysia, see *supra,* footnote 3.
79. *Ibid.,* para. 43.
80. Art. 60.
81. Art. 60(2).
82. Art. 61(1).
83. Art. 61(2).

The usual place of proceedings shall be at the seat of the Centre in Washington, but there are also provisions for proceedings to take place outside the Centre. Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into agreement for that purpose.

VII. MISCELLANEOUS PROVISIONS

A. *Disputes between Contracting States*

Article 64 provides that jurisdiction over disputes between contracting States regarding the interpretation and application of the Convention which are not settled by negotiation and which the parties do not agree to settle by any other methods rests with the International Court of Justice. Regarding this provision, the Report of the Executive Directors states that —

> "While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a state to institute proceedings before the Court in respect of a dispute which one of its nationals and another confronting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the Award rendered in that dispute."[84]

B. *The amendment of the Convention*

Chapter IX provides for amendment of the Convention which can be done by any State proposing the amendment to the Secretary-General not less than 90 days prior to the Meeting of the Administrative Council. The Administrative Council, by two-thirds majority vote may circulate the proposed amendment to the Contracting State for ratification, acceptance or approval. In order to be adopted *all* Contracting States must ratify, accept, or approve the amendment. No amendment shall have any retroactive effect on the rights and obligations of the parties arising under the Convention prior to the entry into force of the amendment.[85]

C. *Membership*

The Convention is open for signature on behalf of States members of the World Bank. It is also open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

84. Report of the Executive Directors, para. 45.

85. Arts. 65, 66.

VIII. SOME OBSERVATIONS ON THE CONVENTION

A. *The jurisdiction of the Centre*

The term "jurisdiction of the Centre" is used in the Convention as an expression of convenience.[86] Consent of the parties is the cornerstone of the jurisdiction of the Centre. It must be in writing and once given cannot be unilaterally withdrawn. A. Broches, the Secretary-General of the Centre, in his article entitled 'Some Observations on Jurisdiction'[87] raises some interesting problems connected with the time and mode of the giving of the consent.

In the case of the assistance of a previous agreement entered into between the parties. stating that they thereby agree to submit the dispute to the Centre, there is no difficulty. The consent may even be given in separate instruments and given at a different time, so long as consent of the parties exists when the jurisdiction of the Centre is seized.[88] Consent may also be given in an *ad hoc* agreement after the dispute has arisen. In both cases of a previous existing agreement and *ad hoc* agreement, there is no conceivable difficulty.

However, where the consent of the State is given in its investment promotion legislation, conceivably a complication might arise in connection with the form or timing (or both) of the acceptance.

In case A, the legislation provides that all disputes arising under it with respect to investments to which it is applicable, 'shall be settled by arbitration in accordance with the provisions of the Convention.' The question might then be raised whether the requirements of Article 25(1) are satisfied in the absence of consent in writing by the investor. If the investor brings the proceedings in the Centre, the host State might raise the objection that the Centre has no jurisdiction because there is no consent in writing by the investor as required by Article 25(1). Equally if the investor's State espouses the claim of the investor, the host State might raise the objection that the investor has, by investing in accordance with the legislation, consented to submit the dispute to arbitration by the Centre and hence Article 27 (1) precludes the investor's State from espousing the investor's case.

In case B, the promotion legislation of the host State grants the investor the right to ask for arbitration under the Convention if a dispute arises regarding the right or privileges granted by such legislation. Would the act of investing in accordance with the provisions of the investment promotion legislation (which, it may be assessed, would involve applications or certificates in writing) be regarded as fulfilling the requirement of consent by both parties embodied in Article 25(1)? If the answer is in the negative, and more explicit consent in writing by the investor is required, when must this consent be given? Could the investor postpone the consent until the time when he wishes to bring

86. *Supra,* text accompanying footnote 21.

87. 5 Columb. J. of Transnat'l L. (1966) at 263.

88. Art. 28(3), 36(3).

the proceedings? If he can,[89] would the host State be in a position to withdraw the consent prior to the investor having consented, on the ground that a unilateral withdrawal of consent is prohibited only "when the *parties* have given their consent,"

Whatever may be the answer as to the mode or time of the acceptance of consent by the investor in case A and B, one thing is quite certain; consent by both parties must be in existence when a request for conciliation[90] or arbitration[91] is made. Rule 2 of the Institution Rules also requires that the request indicates the date of the consent and *the instrument in which it is recorded.* If both parties did not act on the same day, it means *the date on which the second party acted.*[92] From the rule it may be inferred that the mere act of investment in accordance with the provisions of the promotion legislation is not sufficient to constitute acceptance of the offer contained in the legislation, as the request for conciliation or arbitration must indicate the date and the instrument in which the consent is recorded. This argument is reinforced by Note F to Rule 2 of the Institution Rules which clearly envisages the situation of the investor having invested in accordance with investment promotion legislation of Case A or B above. Note F states, *inter alia* that "If the requesting party had not previously recorded its consent then the request should record that the party gives its consent thereby;" thus indicating that the mere fact of investment in accordance with the investment promotion legislation would not satisfy the element of consent by the investor unless he expressly consented in the written agreement or unless he records his consent in the request. Equally, if there is no previous agreement, "both parties may record their consent in a joint request."[93] It is then a matter of an *ad hoc* arrangement between the parties.[94]

The further limit to the jurisdiction of the Centre is that the dispute shall be any 'legal dispute' arising directly out of an 'investment'. 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 interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature of extent of the reparation to be made for breach of a legal obligation.[95] In connection with the terms 'legal dispute' and 'investment', I can do no better than to quote J.G. Starke, Q.C.:[96]

89. See, discussion note F to Rule 2 of Institutional Rules.
90. Art. 28(2).
91. Art. 36(2),
92. Institutional Rules, Rule 2(3).
93. Institutional Rules, Rule 2, note F.
94. Although the issue of consent is not fraught with unsurmountable difficulties, it is of great importance. Contracting States and eligible investors should be careful to avoid misunderstanding. It may be helpful to refer to the "Model Clauses Recording Consent" published by the Centre in Document ISCID/5, and reproduced in 7 *International Legal Materials* 1159-1182 (1968).
95. Report of the Executive Directors, para. 26.
96. J.G. Starke, Q.C. "Tht Convention of 1965 on the Settlement of Investment Disputes Between States and Nationals of Other States", *The Protection and Encouragement of Private Foreign Investment,* 1966, p. 11.

> "Disputes arising out of any unreasonable or discriminatory impairment of the property of the investors, which class of disputes was provided for in the International Law Association draft instrument of 1960 are outside the scope of the Convention uness such disputes involve conflicts of legal rights, or such impairment raises a matter of law. *e.g.* if its nature or extent depends upon the interpretation of some instrument, treaty, or agreement."
>
> The word 'legal' is broad enough to include notionally international law and the construction of the provisions of treaties *e.g.* treaties of Friendship, Commerce and Navigation, or treaties of establishment which deal with the subject of investment, but also the domestic law of the investment-receiving State and the proper law of any relevant contract, which proper law may consist, *e.g.* of the general principles of law recognised by civilised nations or the domestic law of some country other than the investment-receiving country. A 'legal dispute' may also be sufficiently inferred from correspondence or exchanges between the parties without the necessity that it should have reached a stage of precise legal definition.

Regarding the term 'Investment', Starke writes:[97]

> The Convention does not attempt to define this term, having regard to the essentially consensual basis of recourse to the machinery provided by it, and to the further right of contracting States under Article 25(4) to notify the Centre at the time of ratification, acceptance, or approval or the Convention or at any time thereafter, of the class or classes of disputes which it would not consider submitted to the jurisdiction of the Centre.
>
> However, the broad purposes of the Convention correspondingly require that an expansive meaning be given to the term 'investment'. It is submitted that it includes any furnishing of economic resources to others for use outside the territory of the State of nationality of the private foreign investor, and this regardless of the purpose or technical method employed for the transfer of the economic resources in question, whether by way of grant, loan, contract, guarantee, or purchase of an equity or of a controlling interest. It is immaterial that the investment be for public or private purposes in the investment-receiving country. Direct investment in joint ventures would be covered, and so also the furnishing of credits or advances to private or public borrowers. One test would be whether there was involved a net inflow of capital into the investment-receiving country from the State of nationality of the private investor. But this is, semble, not a rigid requirement, as portfolio investments *(e.g.* the local purchase of shares in companies centred in the investment-receiving country), now being a recognised medium of private foreign investment, would appear to be included in the term used in the Convention. Even small tax-saving investments *e.g.* the lodgement of capital in the investment-receiving country, the income of which is up to a certain amount free from tax in that country, would seem to be covered. If a contracting State desires to make it clear that such investments are outside the scope of the Convention, it may do so by notification under Article 25(4) of the Convention."

Lastly, the expression 'Constituent subdivision' in paragraph (1) of Article 25 is intended to cover a province, or state, or member of a federation. A dispute between (say) a Malaysian State and an overseas investor would be covered by the Convention. But, as provided in paragraph (3) of the same Article, the consent of such Malaysian State to the exercise of jurisdiction by the Centre would require the approval of the Federation of Malaysia, unless the Malaysian Government notified the Centre that no such approval was required.

97. *Ibid.,* p. 12.

B. *Issue of re-negotiation of investment agreement*

Nigel S. Rodley, in his article 'Some aspects of the World Bank Convention on the Settlement of the Investment Disputes' published in the *Canadian Yearbook of International Law* (1966), raised the issue of the possibility of re-negotiation of agreements, as a middle step between conciliation and arbitration. Both the record of the Secretary-General of the United Nations on the Promotion of International Flow of Private Capital and the OECW Draft Convention envisage the possibility of re-negotiation of investment agreements as a means of amicable settlement of investment disputes. No such reference to re-negotiation is mentioned in the World Bank Convention. The question is: Can the issue of re-negotiation be brought before the Centre?

The question raises a number of interesting points. First, what is the nature of re-negotiation issue? Second, would the requirements for the invocation of the jurisdiction of the Centre be satisfied with respect to any matter connected with investment as long as the parties consented to submit the issue to the Centre? Third, what is the extent of the power of Conciliation Commissions and Arbitral Tribunal?

Is a re-negotiation issue a 'legal dispute' arising direcly out of an 'investment'? According to the report of the Executive Directors (paragraph 26), the dispute must concern the existence or the scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation. It is clear that legal dispute must relate to dispute as to the right or obligation in existence. It is submitted that, as far as re-negotiation is concerned the parties are still in the process of bargaining as regards the new terms they are currently negotiating. Unless and until the parties have reached an agreement binding between themselves, neither can legally claim the existence of a right or obligation. Hence, a least a first glance it seems improbable that re-negotiation can qualify as a legal dispute.

However, if the existence investment agreement includes a term for re-negotiation between the parties in accordance with certain criteria, and a dispute arises as to the interpretation of the criteria for re-negotiation, it is submitted that the requirements of the Centre would have been met if both parties agree to submit the dispute to the Centre, as there is in existence a binding agreement to re-negotiate. The dispute in this respect would have been a legal dispute in the sense that it is connected with a legally binding agreement as to investment. In the absence of a term for re-negotiation, it is unlikely that the consent of the parties to submit re-negotiation issues to the Centre would overcome the requirement that the dispute must be a legal dispute, *i.e.* a dispute concerning the existence of a legal right or obligation.

With regard to Conciliation Commissions, however, it may be remembered that they are judges of their own competence.[98] Does being a judge of its own competence give a Conciliation Commission a power

98. Art. 32.

to help the parties to re-negotiate their investment agreement in the absence of a proviso for re-negotiation when the parties are to all intents and purposes in the same position as the parties who are for the first time negotiating for an agreement? Thus the Commission would be assisting the parties in reaching agreement. In doing so the Commission would act in accordance with the provisions set out in Articles 33 and 34 of the Convention; its report incorporating the agreement reached by the parties, or indicating the failure to agree if such is the case. Where the parties wish the Conciliation Commission to assist in re-negotiation, the Commission may well be able to lend valuable assistance.

It is highly unlikely, however, that an Arbitration Tribunal would consider itself competent to deal with the re-negotiation of an investment agreement. It would appear that Tribunals are required to render an award, which is binding on both parties.[99] Thus the Tribunal which entertained the re-negotiation of an agreement as being within its competence, would be making and imposing an agreement upon the parties, rather than determining the legal rights and responsibilities of the parties under an existing agreement. Clearly the Convention does not envisage such a situation.

C. *Recognition and Enforcement of an Award*

In connection with the recognition and enforcement of an award, it is proposed to consider some problems that might conceivably arise. First, where the Contracting Party State to the dispute refuses to honour the award. Secondly, where the Contracting Party State pleads the doctrine of immunity from the execution of the award. Thirdly, where the Contracting State Party does not designate to the Centre a court or other authority to recognise and enforce the award.

A refusal by a Contracting Party State to honour the award would amount to a breach of the provisions of the Convention to which it is a signatory.[100] Should such a situation arise, the private investor entitled to the award can enlist the help of the Government to legally pursue the claim through diplomatic channels or to espouse his claim before the International Court of Justice as there has been a breach of the provisions of a treaty. The investor thus has the advantage of the decision of the Tribunal being backed by the force of a treaty to which his Government and the Contracting Party State are signatories.

Article 55 of the Convention emphasises that the provisions of Article 54 regarding the treatment of the award rendered by an Arbitral Tribunal at the Centre shall not alter the laws of any Contracting State relating to the immunity of either that State or any other State from the execution of judgments. Even if the private party were to obtain an award from the Arbitral Tribunal at the Centre, any Contracting State in which he might seek to enforce the judgment might be able to plead the rules of sovereign immunity from execution of judgment on

99. Arts. 42, 48.

100. Arts. 53, 54.

the award. This seems to be a derogation from the protection which the Convention takes great pains in providing by the procedural process. The whole purpose of the Convention is to ensure that the investor would have the advantage of an independent forum which would decide the dispute impartially, thus avoiding the prejudice of the domestic courts of the Contracting Party State in which the investor would otherwise have to seek the remedy. Having gone a considerable length, in giving the investor the procedural capacity equal to that of the Contracting Party State, he is again relegated to the enforcement of his rights through the domestic court of the Contracting State Party or any other Contracting State courts in which the immunity from the execution of judgment may be pleaded with impunity. The investor would have to rely a great deal on the *bona fides* of the other party that the doctrine of immunity from execution would not be pleaded to the possible frustration of the award, or on the degree of independence of the domestic court from executive or legislative pressure, and the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Secondly, even though most countries have moved towards a restrictive theory of sovereign immunity from jurisdiction, *i.e.* treating commercial transactions by the State as 'commercial acts' rather than 'governmental acts', and have rejected a defence of foreign immunity, a majority of countries still embrace the principle of absolute immunity as regards execution on a State's property to satisfy a judgment.[101] The Convention, therefore, does not eliminate the obstacle of sovereign immunity from the execution of arbitral awards against State's property. The most that the Convention has done is to require that each Contracting State execute a money award as a domestic judgment of its own courts, thus affording a potentially wider choice of forums in which to enforce his award rendered at the Centre.

Article 54 of the Convention requires each contracting State to recognise the award as binding, subject to the doctrine of immunity from execution, and to designate a competent court or other authority for the purpose of enforcing the award rendered at the Centre. However, the Convention does not specify the time for the designation of a competent court by the Contracting State to the Centre. What would happen if a Contracting State to the Convention has not designated any court of the Centre and the investor is seeking to enforce the award against it in its own domestic court? If the Contracting State refuses to designate any court to the Centre, it would contravene Article 54 and the investor's Government would legally espouse his claim through diplomatic channels or in the International Court of Justice. If the State party does not refuse to designate, but its designation requires the passing of legislation, the execution of the award might be unduly delayed.

101. See Sompong Sacharitkul, *State Immunities and Trading Activities in International Law* (1959) p. 3-50, 162-256, 265-267. See also Vernon G. Setser, "The Immunities of the State and Government Economic Activities," 24 *Law and Contemporary Prob.* 291, 308 (1959).

IX. ADVICE TO PRIVATE FOREIGN INVESTORS

From the discussions dealt with in the foregoing paragraphs about the consensual nature of the jurisdiction of the Centre and the uncertainties of some aspects of the Convention, it is suggested that the following advice might be useful to private foreign investors who wish to benefit from the Convention.

It is always advisable to include an arbitration clause in the agreement rather than to depend on the willingness of the State party to consent to submit arbitration to the Centre should any dispute arise subsequently. The safest way to assure the advantage provided by the Centre is to make provision for conciliation or arbitration by the Centre. Also, in view of the uncertainty connected with the mode and time of acceptance of consent offered by the host State in its promotion legislation, it would clearly be desirable from the point of view of the host State as well as that of the investor to specify the consent in the agreement. This will probably save both parties the embarrassment of subsequent argument over the issue of consent.

Many investment disputes develop because the parties to an agreement fail to specify the applicable law for the arbitrator. It is therefore advisable that the parties specify the law to be applied. If haggling over the applicable law would jeopardise the entire agreement, it is suggested that the agreement should provide at the very least that the arbitral tribunal can apply only the State's law in effect at the time the agreement is signed (the Convention requires the tribunal to presume that the law of the State party to the dispute is the applicable law where the agreement is silent on the choice of law), as subsequent legislative and executive action might alter the local law of the State to the possible detriment of the private investor in a later arbitration.

The Convention does not grant an alien any substantive rights above that of the national of the host State. It only provides a new forum for arbitral proceedings against the State when the State as consents.

The mere fact that the host State is prepared to accept arbitration by the Centre evinces the existence of good faith and mutual confidence between the host State and the investor, and hence would stimulate the flow of more capital into the host State for its economic development.

According to the research of the United Nations Secretariat, the host State is more inclined to deal directly with the investor than with his Government which it would probably have to do if the investor is not provided an international forum. On the other hand, the investor's Government may not be willing to espouse the claim of the nationals to avoid embarrassment to both Sovereigns in their diplomatic dealings.

X. CONCLUSION

The modern trend of the change of attitude of developing countries towards the role of the private foreign investors in the development of the economy of a country has been for the better. They are no longer

inevitably suspect as the cynical agents of colonial power bent on quick and wasteful exploitation of the natural resources of a subject people. Today the foreign investor is welcome in many countries as a source of much-needed capital, a purveyor of technical knowledge and skills and even as the essential catalyst needed to assure the growth of a developing economy. However, there are certain barriers standing in the way of the private investor withholding him from committing his capital in the foreign State. One of these barriers is the lack of an effective forum in which to enforce his legally-acquired rights in the event of any dispute arising between him and the host State. The Convention is a development along this modern trend, seeking to give the investor the assurance he needs for having an independent International tribunal in the event of dispute arising. It is a welcome development, both in the view of the host State and the private investor.

The Convention, is not, however, formulated without objections from some of the Governors of the World Bank. The Governors from Latin America, from Philippines and from Iraq, opposed the idea of an international body to hear the disputes between States and foreign investors, either on the ground that it is a derogation of the States' sovereignty or that there are already enough safeguards for the private investors provided by the domestic measures. The objections reflect the traditional attitude still existing in the minds of some of the less developed countries. These objects are not irremovable, provided that the necessary atmosphere exists and the future experience of the Centre shows the efficiency that is expected of it.

The ready acceptance of the Convention in Africa, the Middle East and South-East Asian countries augurs well for the future of the Centre. It is those underdeveloped countries that would be instrumental in bringing the success to the Convention.

The fact that the Convention is placed under the auspices of the World Bank greatly enhances the success of the Convention. The fact that the Convention is limited primarily to procedural machiery and avoids debate over substantive rules pertaining to the rights and duties of the foreign investors, has given it an advantage of prompt acceptance.

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