

1977

Dispute Settlement Machinery in Relations between States and Multinational Enterprises - With Particular Reference to the International Centre for Settlement of Investment Disputes

C. F. Amerasinghe

Recommended Citation

C. F. Amerasinghe, *Dispute Settlement Machinery in Relations between States and Multinational Enterprises - With Particular Reference to the International Centre for Settlement of Investment Disputes*, 11 INT'L L. 45 (1977)

<https://scholar.smu.edu/til/vol11/iss1/4>

This Symposium is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Dispute Settlement Machinery in Relations Between States and Multinational Enterprises— With Particular Reference to the International Centre for Settlement of Investment Disputes

I. Introduction

Dispute settlement in relations between multinational enterprises and States has generally been soft-pedalled in many of the recent studies on the control of multinational enterprises and their role in development. For example, the report of the Group of Eminent Persons, which may be a convenient starting point for a study of the subject, not only referred almost exclusively to disputes arising from nationalization, whereas in fact disputes may arise from a variety of causes, but also was rather cursory in dealing with the manner in which such disputes should be approached or settled.¹ While stating that compensation should be fixed by mutual agreement or, failing that, by recourse to local legislative and judicial processes, it gave no preference to the settlement by international tribunals of international legal problems, since it merely referred to the fact that, "if the parties agree, arbitration can be a good method of settling the matter."

A. The General Assembly of the United Nations

The General Assembly of the United Nations has really accomplished even less in its approach to the international settlement of investment disputes.

*M.A., LL.B., Ph.D., LL.D. (Cambridge, England), LL.M. (Harvard), Ph.D. (Deylon). The author is a Senior Counsel in the Legal Department of The International Bank of Reconstruction and Development.

The views expressed herein are not necessarily the views of The International Bank for Reconstruction and Development.

¹See 13 INTERNATIONAL LEGAL MATERIALS (1974) p. 800 at pp. 826 ff.

While also concentrating primarily on nationalization disputes, in 1962 it was able at least to approve a resolution that:

In any case, where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.²

The position had changed radically by 1973 when Resolution 3171 (XXVIII) declared:

any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures. . . .³

There was apparently a slight modification of this extreme sovereignty-oriented view in late 1974 when the Charter of Economic Rights and Duties of States was formulated, which stated that:

In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.⁴

It is significant that the United Nations General Assembly has never wholeheartedly advocated international settlement of nationalization disputes by the International Court of Justice or any other international body such as the Centre. At best it merely noted that international dispute settlement agreements or agreements based on such agreements should be honored.

Too much emphasis seems generally to have been laid on nationalization as a source of investment disputes. While it must be conceded that nationalization does constitute a major cause of friction, it is worth bearing in mind that compensation is not the only bone of contention between States and investors, including multinational enterprises. For example, the five cases which are currently being arbitrated by the Centre⁵ do not concern the nationalization of property but the alleged violation of other obligations involving multinational enterprises. Indeed, it may well be the case that the obligations allegedly violated are owed by the investing corporation to the host State. It is really the whole complex of relations between host States and multinational investors that is relevant to the regime of dispute settlement.

²Resolution 1803 (XVII), paragraph 4. See U.N. Document A/RES/1803.

³Paragraph 3. See 68 A.J.I.L. (1974) p. 381 at p. 382.

⁴Resolution 3281 (XXIX) Article 2(2)(c). See 14 *INTERNATIONAL LEGAL MATERIALS* (1975) p. 251 at p. 255. See *Commentaries and Discussion, A Symposium on the New International Economic Order*, 16 VA. J. INT'L LAW 347, 351 (1976).

⁵See ICSID, *Eighth Annual Report 1973/74* p. 4, and Ninth Annual Report 1974/75, p. 5 ff.

B. *The Draft of the Organization for Economic Cooperation and Development*

Mention may also be made of efforts by at least one other organization than the World Bank to deal with dispute settlement. The Organization for Economic Cooperation and Development (OECD) did produce a draft convention on the protection of foreign property⁶ with a section on dispute settlement. While the object of the draft seems to have been the protection of foreign property (as opposed to that plus the protection of interests of host States), its section on dispute settlement does reflect a concern for international dispute settlement machinery.

II. *The Centre for Settlement of Investment Disputes*⁷

The Convention on the Settlement of Investment Disputes, which came into force in 1966, established a permanent dispute settlement center. It has a number of special advantages for host States. Thus, a host State that agrees to arbitrate a dispute with a foreign investor is assured that the investor's national State or States may not give him diplomatic protection or bring an international claim on his behalf.⁸ The opportunities for intervention by other States in the affairs of the host State are thereby minimized. Secondly, the host State may require the exhaustion of local remedies as a condition of its consent to the use of the Centre.⁹ Thirdly, the law applicable in an arbitration is the host State's unless the parties agree to accept some other law.¹⁰ Fourthly, in view of the participation of State organs in proceedings under the Centre, the procedural requirements have been kept flexible to avoid automatically imposing on States any burdens they might consider unacceptable in view of their special status as parties to a litigation with a private person. In addition to the foregoing, the Convention makes it possible for a Contracting State to offer an investor an invulnerable dispute settlement procedure, without having to submit to some foreign jurisdiction or undertake an inter-State litigation with the investor's

⁶The text is attached to a resolution of the Council of OECD dated October 12, 1967.

⁷There has been much writing on the Convention and the Centre: see bibliographies in Annexes to the Annual Reports of the Centre and Centre document entitled *Publications about the International Centre for Settlement of Investment Disputes* (November 1, 1975). Among the more recent and important contributions are: A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nations of Other States*, 136 HAGUE RECUEIL (1972) p. 322; C.F. Amerasinghe, *Jurisdiction Ratione Personae, under Convention on the Settlement of Investment Disputes between States and Nations of Other States*; 48 BRIT. Y.B. INT'L L. (1974); C.F. Amerasinghe, *Submissions to the Jurisdiction of International Centre for Settlement of Investment Disputes*, 5 JOURNAL OF MARITIME LAW AND COMMERCE (1974) p. 211; P. Szasz, *A Practical Guide to the Convention on Settlement of International Disputes*, 1 CORNELL INT. L.J. (1968) p. 1.

⁸Convention, Article 27.

⁹Convention, Article 26.

¹⁰Convention, Article 42. See also below.

State. Finally, the host State also enjoys the certainty that an arbitral award will be executed in respect of pecuniary obligations by the court of any member State as if it were a final judgment of a court in that State.

From the investor's standpoint, the Convention affords private persons and corporations the only institutionalized international forum for litigating with States. A significant advantage for the corporate investor is that the jurisdictional requirements concerning nationality are not as restrictive as those under the nationality of the claims rule.¹¹ The foreign corporation may further invoke the jurisdiction of the Centre against the State organs and constituent subdivisions.¹² They are in a position, though to a lesser extent than States, to secure execution of an arbitral award against their adversaries.¹³

Both the host State and the multinational enterprise can ground the dispute settlement clause firmly in international law so that repudiation of the principal agreement would not deprive the other party of its or his right to resort to the Centre. Under the Convention the parties may accept conciliation or arbitration—or both.¹⁴ There is also the certainty that any proceeding properly instituted under the auspices of the Centre will actually take place irrespective, for example, of the failure of the other party to participate in the constitution of the commission or tribunal or in the proceedings; and in due course that arbitration proceedings will result in an arbitral award.¹⁵ This certainty may be expected to cause the parties to reduce both the number and the intensity of any differences that may arise between them. Provision is also made in the Convention for a fallback procedure in the event that the parties cannot or do not agree on a procedure.¹⁶ Of interest to claims lawyers is the recognition that a finding of *non liquet* on the ground of silence or obscurity of the law cannot be made by an arbitral tribunal.¹⁷

The Convention also enables a State, whose nationals might wish to seek its protection, to avoid the embarrassment of foreign conflicts by persuading or otherwise inducing them to rely on the Centre, hence removing disputes from the inter-government level.¹⁸

A. *Considerations Affecting the Centre's Jurisdiction*

Because of their constitutional nature, various jurisdictional limitations cannot be waived by the parties, acting either individually or jointly. Neverthe-

¹¹See Convention, Article 25(2) and C. F. Amerasinghe, *loc. cit.*, BRIT. Y.B. INT'L L.

¹²Convention, Article 25(1) and (3).

¹³Convention, Articles 54 and 55.

¹⁴Submission clauses will have to be appropriately and carefully drafted: see C. F. Amerasinghe, *loc. cit.*, J. MARITIME L. & COM., pp. 216 ff.

¹⁵See below and Articles 48 ff. of the Convention.

¹⁶Convention, Articles 33 and 44.

¹⁷Convention, Article 42(2).

¹⁸Convention, Article 27.

less, as indicated below, certain of the limitations are drawn with sufficient vagueness to make it likely that a flexible approach may be taken and considerable weight given to the agreed interpretation of the parties. In short, in many instances, it is possible to regard the Convention as laying down only the outer limits of the Centre's jurisdiction.

With respect to the kind of dispute which may be submitted to the Centre, the only limitation of importance is that the dispute must be a legal one. This could be of consequence in the regulation of multinational enterprises. In the Report of the Executive Directors it is explained 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. . . ." ¹⁹ There are some points both of history and interpretation which are worthy of note in this connection.

The concern of certain States expressed in the course of the formulation of the Convention—and the interpretation given by the Executive Directors reflected this—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 Centre cannot in general assist the parties in negotiating a new agreement. ²⁰ Differences such as those relating to the payment of compensation upon nationalization or about the interpretation of tax and customs concessions granted to an MNE or about an agreed formula for profit-sharing would generally be legal disputes. Other disputes, in which the host government is more apt to be the moving party, might involve failures by an MNE to complete a project by a given date, or to reach a specified level of production, or to train or employ local staff members.

Nothing in the *travaux préparatoires* supports the view that the Convention was intended to exclude disputes on facts from the Centre's jurisdiction. Since the determination of questions of fact is part of the normal judicial or semi-judicial function, it is reasonable to interpret Article 25(1) as including factual questions within the Centre's jurisdiction. Thus, the Centre may easily be used as a fact finding institution. But there seems to be an obvious qualification which is inherent in the characterization of the dispute as legal. The facts about which there is a dispute must be such that a legal right or obligation or the violation of a legal right or obligation depends on their establishment if the

¹⁹Report of the Executive Directors, p. 9.

²⁰See the Address by the Secretary General at the First Annual Meeting of the Administrative Council, ICSID 1967 Annual Meeting Press Release No. 2 (September 25, 1967).

Centre is to have jurisdiction. Thus, while the legal principles determining the amount of tax payable by an MNE may not be disputed, the question of whether it received certain sums as income as a result of selling its products may be disputed. On the determination of this fact will depend the exact extent of the MNE's obligation to pay tax. Hence, it will be within the Centre's jurisdiction to determine such a fact. On the other hand, if the dispute is about the actions of an MNE which led to the host State's increasing taxes on corporations doing business in its territory when there was clearly no obligation owed to the MNE not to increase its taxes in the manner in which they were increased, this dispute would not fall within the jurisdiction of the Centre, since the ascertainment of a legal obligation of the host State would not hinge on its resolution.

An issue raised during the drafting of the Convention was whether disputes on legal rights and obligations which were of high political significance were justiciable.²¹ An issue of this kind had been raised before the International Court of Justice, namely, whether a "legal" question with political implications did fall outside the Court's jurisdiction because it then ceased to be a legal question. There are, of course, differences between the Court's and the Centre's jurisdictions. Nevertheless, it is noteworthy that the Court took the view that neither the political implications surrounding the question²² nor the political motives for submission caused it to become a non-legal question.²³ Hence, there is good authority for stating that, absent an express exclusion in the Convention itself, a dispute which is otherwise legal would not cease to be legal for the purposes of the Centre's jurisdiction on account of political significance, motivation or implications or other political associations or elements. Thus, for example, a dispute relating to compensation for expropriation would not fall outside the Centre's jurisdiction on the ground that it had important political overtones for the host State.

Another question raised during the formulation of the Convention was whether disputes about rights and obligations under municipal law would come within the definition of a legal dispute for the purposes of the Centre's jurisdiction.²⁴ It seems not to have been seriously contested that the Centre would have jurisdiction over such disputes. Insofar as there is no understanding to the contrary and the term "legal dispute" is not qualified, it is clear that disputes about rights and obligations under municipal law are included in the Centre's jurisdiction.²⁵ There is no reason why an arbitral tribunal or

²¹See 2 HISTORY, pp. 500, 548.

²²See the First Admissions Case, *ibid.* at p. 61; Second Admissions Case, 1950 I.C.J. Reports at pp. 6, 7. See also *per* Judge Azavedo in the First Admissions Case, 1947-48 I.C.J. Reports at p. 75.

²³See the United Nations Expenses Case, 1962 I.C.J. Reports at pp. 155, 156.

²⁴2 HISTORY, pp. 322, 498, 838.

²⁵2 HISTORY, pp. 322, 498, 838. *A fortiori* disputes as to facts on which the ascertainment of rights and obligations at municipal law is based would be within the Centre's jurisdiction.

conciliation commission constituted under the Convention as a judicial or semi-judicial body should not be qualified to decide such disputes. Equally, disputes about rights and obligations under transnational law²⁶ would be within the Centre's jurisdiction.

A further question is whether a dispute ceases to be legal if the solution sought is not limited to a decision according to legal rules. This may be the case where the parties agree to seek conciliation under the Convention²⁷ or for the tribunal to decide the dispute *ex aequo et bono*. It is clear that the Convention specifically envisages such situations insofar as it makes provision for conciliation and arbitral settlement *ex aequo et bono*.²⁸ Hence, it would seem a contradiction if at the same time the term, legal disputes, excluded such situations. In short, it seems that all that is needed for the existence of a legal dispute is that the dispute must consist of a disagreement on legal rights and obligations, whatever may be the remedies sought.

Much could be said about the scope of the provisions of the Convention relating to the nature of the parties.²⁹ However, what is of importance is that both in respect of the public party (State) and the private party (MNE) the Convention provides for a fairly broad jurisdictional scope.

The Convention envisages, for instance, the party on one side of the proceedings will be a Contracting State or a constituent subdivision or agency of such a State. The latter category opens a host of possibilities. It would seem that the term "constituent subdivisions" would cover municipalities and local government bodies in unitary states, as well as semi-autonomous dependencies, provinces or federated states in non-unitary states and the local government bodies in such subdivisions. That the latter are covered emerges from the fact that in the Legal Committee constituted to formulate the Convention it was proposed that the term used be qualified by the description "such as a State, Republic or Province";³⁰ but it was pointed out that this might exclude municipalities and subdivisions of constituent states or provinces,³¹ and no qualification appears in the final version.

The term "agencies," it would appear, was intended to cover as wide a range of entities as possible.³² The main limitation would seem to be that the entity must act on behalf of the government of the State concerned or one of its

²⁶For this concept see J-P. Lalive, *Contracts between a State or a State Agency and a Foreign Company*, 13 I.C.L.Q. (1964) at pp. 998 ff. and C. F. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1967) pp. 115 ff.

²⁷See Chapter III of the Convention.

²⁸See Article 42(3) of the Convention.

²⁹For detailed discussion see C. F. Amerasinghe, *loc. cit.*, BRIT. Y.B. INT'L L.

³⁰2 HISTORY, p. 856.

³¹2 *Ibid.*, p. 857.

³²2 HISTORY, p. 960.

constituent subdivisions. It would not seem to matter that the agency belonged to a political subdivision or that it had a legal personality separate from the government. Indeed, the use of the term "agencies," as opposed to "instrumentalities," may well indicate that it was intended to include under the term even certain government-owned companies or government-controlled corporations. On the other hand, mere ownership by the government of shares in a public company may be inadequate for the entity to qualify as an agency. Apart from the limitation mentioned above, it may not be possible at this point in the history of the Convention to define the term exhaustively.

In view of the fact that according to Article 25(1) constituent subdivisions and agencies must be designated to the Centre by the Contracting State in order to have *locus standi* before the Centre, the importance of establishing precise definitions for the terms "constituent subdivisions" and "agencies" is largely minimized. If a Contracting State designates a body to the Centre as being an agency or constituent subdivision of that State, a strong presumption is raised that such body is in fact a constituent subdivision or agency.

Concomitantly, it is a requirement that the private party, if a juridical person, as an MNE would be, must be "a national of another Contracting State." This formulation also leaves open a range of possibilities for the MNE. The meaning of the term "nationality" in the context of Article 25(2) may not be identical with the meaning of the term for the law of diplomatic protection. In the latter field, the purpose of nationality is to establish an adequate link between the private party and the State giving protection in order to enable the latter to espouse his claim. In the case of the Convention the role of nationality serves as a means of bringing the private party within the jurisdictional purview of the Centre. The capacity to appear is not conditioned by principles governing the State's right to exercise diplomatic protection.³³

In the case of an MNE the requirement of Article 25(2)(b) is that, as a juridical person, it must have the nationality of a Contracting State other than the host State on the date of consent to the jurisdiction of the Centre or that if it has the nationality of the host State, the parties must have agreed that because of foreign control it should be treated as a national of another Contracting State.

Since a tribunal or commission constituted under the Convention need not blindly follow the international law of diplomatic protection in deciding issues connected with its jurisdiction, it would seem that it can take a more flexible

³³It has been said the private party is required to be "a national of a Contracting State" in order to make it possible to enforce an award against him because his assets would usually be in his national State or because it is required by the principle of mutuality and reciprocity. While this may be true, such a statement was not intended to mean that nationality should be defined in terms of the location of assets or any other such criterion.

approach in deciding what is the nationality of an MNE. It could conceivably apply some other test than incorporation or registered seat, for example.³⁴ If the first question to be asked, namely whether the MNE has the nationality of the host State, is answered in the negative, then the next question arises whether the MNE has the nationality of another Contracting State. In answering this question the tribunal or commission will be distinguishing between Contracting States and non-Contracting States.

Whether the application of the "control" test or any other alternative test would result in the exclusion of one nationality in favor of another, will depend on whether a tribunal or commission must apply only one of the available tests to the exclusion of all others in determining nationality; or whether it can apply several criteria simultaneously with the result that more than one nationality may be established for an MNE. The question whether an MNE can have more than one nationality for the purposes of the Convention will be discussed below. In the event, however, that an MNE must have only one nationality, it is possible for an adjudicating body to take the position in the case *sub judice* that nationality should be attributed according to that test of several applicable tests, including the "control" test, which will operate *in favorem jurisdictionis*.

The selection of a single nationality, i.e., between a Contracting and non-Contracting State, may result in exclusion of the Centre's jurisdiction, if it is found that the proper nationality is that of the non-Contracting State, or conversely, jurisdiction would exist if the proper nationality is held to be that of the other, Contracting State. Of course the parties may certainly agree on the nationality of the MNE. So long as the choice is not unreasonable, a commission or tribunal would not interfere with such agreement. Particularly, the parties may agree that the MNE has a nationality other than that of the host State on the basis of foreign control. Here, of course, it is only if the condition of foreign control is manifestly absent that a commission or tribunal would upset the agreement.

The third, and in a sense the most important, jurisdictional requirement is that of consent, by both parties, to the submission of a dispute to the Centre. This is "the cornerstone of the jurisdiction of the Centre."³⁵ The only formal requirement of the convention is that the consent must be in writing.³⁶ This freedom as to form means, for instance, that it is unnecessary for the consent of both parties to be included in a single instrument—though in practice that may

³⁴See also A. Broches, *loc. cit.*, at pp. 360 ff.

³⁵Report of the Executive Directors, p. 8. It has already been noted that, if the party to a dispute is a constituent subdivision or an agency of the government, its consent must be approved by the Contracting State concerned, unless such State has already notified the Centre that its approval is not required.

³⁶Convention, Article 25(1).

be the most convenient and frequently used method. The consents may, indeed, be expressed in instruments of completely diverse character, and not necessarily addressed to the other party or made with particular reference to any dispute or arrangement with it.³⁷ Thus, the consent of the host State may be expressed in some legislative act, such as an investment promotion law, or in a bilateral or multilateral agreement with the investor's own State. Both these possibilities have already been used to some extent, and the Centre has issued model clauses designed for the latter purpose.³⁸ On the part of the investor, a unilateral expression of consent might appear in the general form in a charter or other instrument of incorporation, or in a by-law or resolution.

Consent may be in general terms, in a new investment agreement covering future disputes; or a general consent may be given for a single dispute which has already arisen. Nor is it significant that the dispute should antedate the Convention.

B. Choice of Law and Enforcement in Arbitration

1. APPLICABLE LAW

The applicable law aspects of arbitral proceedings under the Convention leave the parties free by their mutual agreement to determine almost all choice of law questions. On the other hand, if the parties fail to reach agreement on any point relating to the choice of law, the Convention does offer a fallback device to regulate the question, so that once consent covering a dispute has been given, a partial or even complete lack of agreement on the applicable law cannot prevent a decision.

Evidently, the most crucial question in many arbitral proceedings is what law is to be applied by the tribunal. The Convention gives the parties full freedom to agree on the rules of law to be applied by their tribunal in arbitrating a dispute; however, if the parties have not reached such an agreement, then the Convention specifies that the law shall be "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."³⁹

Because of the potentially decisive effect of the choice of law on the resolution of any dispute by arbitration, it is quite possible that the parties will, even in the course of negotiating their initial arrangements, find it most difficult to agree on an alternative to the fallback provision in the Convention. Nevertheless, the Convention not only fails to establish any restriction at all as to the legal system

³⁷Report of the Executive Directors, p. 8.

³⁸Model Clauses Relating to the Convention on the Settlement of Investment Disputes; designed for Bilateral Investment Treaties (document ICSID/6).

³⁹Convention, Article 42(1).

that may be chosen, constructed or expressly excluded, but even provides that, no matter what system is accepted by explicit choice, by elimination or through default, the tribunal is barred from bringing in a finding of *non liquet* on the ground of silence or obscurity of the law.⁴⁰ Given this degree of freedom and this assurance, the parties may agree to any one or a combination of a number of alternatives such as the law of the host State, general principles of law, international law, and so on.

2. ENFORCEMENT

The enforcement provisions of the Convention give it special significance. Article 53(1) states that the award is binding on the parties and that each party shall abide by and comply with the terms of the award. Further the Convention provides several remedies but at the same time makes it clear that these are the *only* remedies. A party may not abide by the award only to the extent that enforcement shall have been stayed pursuant to the relevant provisions of the Convention. The three remedies are provided by Article 50 (interpretation), Article 51 (revision), and Article 52 (annulment).

A request for interpretation of the meaning or scope of an award may be made by either party. It will, if possible, be submitted to the tribunal which rendered the award. If this is not possible a new tribunal will be constituted in accordance with the same provisions of the Convention which governed the constitution of the first tribunal.

A request for revision may be made "on the ground of discovery of some fact of such a nature as decisively to affect the award." The fact must have been unknown to the tribunal and the applicant, and the applicant's ignorance must not have been due to negligence. The application must be made within 90 days after discovery and within an absolute limit of three years after the award was rendered. As in the case of a request for interpretation, it will if possible be submitted to the tribunal which rendered the award and, if not, to a new tribunal constituted in accordance with the provisions of the Convention.

A request for *annulment* may be made on one or more of the following grounds:⁴¹ (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.

⁴⁰Convention, Article 42(2).

⁴¹Application for annulment must be made within 120 days after the award was rendered, or in the case of alleged corruption 120 days after discovery, and within an absolute time-limit of three years.

A request for annulment will of course not be submitted to the tribunal which rendered the original award. It will be heard by an *ad hoc* committee of three members appointed by the Chairman of the Administrative Council from the Panel of Arbitrators. The committee may annul the award in whole or in part.

Subject to stays as permitted under the above provisions or to annulment, the award must be carried out by the parties. Further, Article 54 provides for enforcement by municipal courts. That Article imposes a duty on each Contracting State, not merely on the State which had been a party to the dispute or whose national had been a party to the dispute, but on each Contracting State to recognize an award as binding as if it were a final judgment of a court in that State, on the simple presentation of a copy of the award certified by the Secretary-General. Just as Article 53 affirmed the absolute binding force of the award on the international law level, Article 54 affirms its external finality, i.e. vis-à-vis domestic courts. The award is *res judicata* in each and every Contracting State.

But Article 54 requires more of Contracting States than recognition of the award as *res judicata*. It also requires each Contracting State to enforce the pecuniary obligations imposed by the award within its territories as if it were a final domestic judgment and this, too, on the simple presentation of a certified copy of the award. No State is under an obligation under customary international law to recognize or enforce foreign judgments and the same is true of foreign arbitral decisions. States are therefore free either to withhold recognition and enforcement, or to subject it to such conditions as it may prescribe. The Convention, however, goes beyond customary international law in regard to the enforcement of arbitral awards. The obligation imposed by the same article on federal States is different from that relating to unitary States.

And, finally, 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." In other words, Article 54 requires Contracting States to equate an award with a final judgment of a domestic court. It does not require them to go beyond that, and to undertake forced execution of awards in cases in which final judgments could not be so executed. Article 55 does no more than acknowledge State practice as regards immunity from execution. Accordingly, the scope of Article 54 will evolve along with State practice. If a Contracting State now permits forced execution of judgments against governments in respect of actions *jure gestionis* or will permit this at some future time, that Contracting State will have a corresponding obligation of enforcement with respect to awards made under the Convention at the relevant time. As is generally known, there already exist a number of national systems which apply the theory of restricted immunity both from jurisdiction and execution as regards agencies or instrumentalities of States.

C. Conciliation

The Convention makes provision for conciliation as a mode of dispute settlement. Although conciliation reports are not binding on the parties by their very nature, this method of dispute settlement may sometimes be preferred to the less flexible arbitration. On the other hand, where there is a procedure for conciliation, it is important that such procedure be as effective as possible. To this end almost all procedural aspects of conciliation proceedings under the Convention are based on two principles. The first principle is that the parties are free by their mutual agreement to determine almost all procedural questions. The 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 the opposing party. The freedom of the parties to shape the procedure to their own particular requirements is subject to only two special limitations (aside from those relating to the procedural devices designed to implement the obligatory jurisdictional standards): certain unwaivable requirements regarding the composition of commissions,⁴² and the financial obligations of the parties *vis-à-vis* the Centre, which obviously cannot be attenuated by any agreement *inter se*.⁴³

The second principle is that if the parties fail to reach agreement on any point relating to procedure, the Convention invariably offers a fallback device to regulate the question, so that once consent covering a dispute has been given, a partial or even complete lack of agreement cannot prevent the initiation, conduct or conclusion of the proceedings. It makes no difference that the parties have failed to agree after efforts made in good faith or that one party attempts to frustrate the proceeding, or partially or completely refuses to participate.

The most important aspects in regard to which these two principles are applicable are dealt with below:⁴⁴

1. COMPOSITION AND METHOD OF CONSTITUTING COMMISSIONS

The parties may constitute their conciliation commission according to any scheme they can agree on, provided the number of members of this body is in all cases odd.⁴⁵ This proviso cannot be changed or waived even by agreement. The parties might agree, for instance, on a single member for their commission; or on three members, one to be chosen by each of the parties and a neutral one to

⁴²Convention, Articles 29(2)(a), 31(2), 56(1) and 3.

⁴³Convention, Article 59.

⁴⁴See further P. Szasz, *loc. cit.*, at p. 27 ff.

⁴⁵Convention, Article 29(2)(a).

be elected by those two members; or perhaps there might be five members, two each to be chosen by the parties and one to be appointed by a specified person or authority. Should the parties totally fail to agree on a formula, then the Convention itself provides one that is automatically applicable: a commission consisting of three members, each party appointing one and a president appointed jointly.⁴⁶

2. APPOINTMENT OF CONCILIATORS

The agreement of the parties (or, if there is none, the automatic formula) would determine whether the several members of a commission would be appointed by the parties acting individually, or by their joint action, or by the members previously appointed, or by some outside authority who is to act either unconditionally or conditionally (e.g., if the parties fail to make certain appointments). 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 inability of the appointed members to agree on the election of further ones, or by the 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 fallback 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. He must do so, while observing certain requirements stated in the Convention.⁴⁷

3. RULES OF PROCEDURE

Procedural agreements reached by the parties are, of course, accorded a high rank and will, on almost all issues, prevail over those that are used in default of such agreement. However, the parties should normally have much less reason to utilize this freedom, since the detailed Conciliation Rules of the Centre have been carefully designed to be as fair as possible to both parties in most procedural situations likely to arise. Moreover, uncertainty about what rules are to apply has been eliminated by providing that, regardless of any changes made after the date on which the consent agreement entered into force, the Rules to be used will be those prevailing on such date.⁴⁸ However, the parties may wish to modify

⁴⁶Convention, Article 29(2)(b).

⁴⁷Convention, Articles 30 and 31(1).

⁴⁸Convention, Article 33.

the standard pattern of the Rules in certain instances. For example, they may change the time limits for certain acts or agree on special rules of evidence.

In sum, the Convention offers the most sophisticated and flexible framework available to resolve disputes between States and MNEs. Its provisions also constitute a useful model for other international arrangements that might be devised to improve the resolution of disputes between States and MNEs.

