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## Convention on the Settlement of Investment Disputes between States and Nationals of Other States

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# Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

On March 18, 1965, a Convention on the Settlement of Investment Disputes between States and Nationals of Other States was submitted to the member governments of the International Bank for Reconstruction and Development for signature and ratification. By September 14, 1966, 46 governments had signed the Convention and 20 had deposited their instruments of ratification. The Convention has entered into force on October 14, 1966.<sup>1</sup>

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The views expressed in this article are those of the author and do not necessarily represent the view of the International Bank for Reconstruction and Development.

The author has written on the same subject in the *Journal de Droit International* (Clunet) 1966, p. 26, under the title: "La Convention pour le Règlement des Différends Relatifs aux Investissements entre États et Ressortissants d'autres États."

<sup>1</sup> Article 68(2). The text of the Convention and of the Accompanying Report of the Bank's Executive Directors (hereinafter called the E.D. Report), which is available on request to the IBRD, Washington, D.C., has been published in IV International Legal Materials 524 (1965).

Legal literature concerning the Convention include the following: Broches, "Development of International Law by the International Bank for Reconstruction and Development," Proceedings of the American Society of International Law 33 (1965); Delaume, "La Convention pour le Règlement des Différends Relatifs aux Investissements entre États et Ressortissants d'autres États," *Journal du Droit International* 1966, 26; Hynning, "The World Bank's Plan for the Settlement of Investment Disputes," 51 *Am. Bar Ass. J.* 558 (1965); Sassoon, "The Convention on the Settlement of Investment Disputes between States and Nationals of other States," 1 *Israel Law Review* 27 (1966); Sirefman,

The result of several years of preparatory work,<sup>2</sup> the Convention provides for the establishment of an International Centre for Settlement of Investment Disputes. The Centre, though it is conceived as one of the IBRD group of institutions,<sup>3</sup> will function as an autonomous organization and will offer new facilities for the settlement of disputes between states and foreign investors by means of conciliation and arbitration.

The Convention is one of several proposals made to stimulate the flow of private international capital.<sup>4</sup> Its originality resides in its

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"The World Bank Plan for Investment Dispute Arbitration," 20 *Arb. J.* 168 (1965); Minoli, "Osservazioni sul Recente Progetto della Banca Internazionale di Ricostruzione e Sviluppo per la Risoluzione Internazionale di Controversie," *Rivista Dell'Arbitrato*, 1965, pp. 113-120.

See also, the Report prepared by the Committee on International Law of the Association of the Bar of the City of New York, 20 *The Record* No. 6 (June 1965); Senate, 89th Congress, 2d Session, Executive Report No. 2.

<sup>2</sup> Officially, the origin of the Convention goes back to the Resolution adopted on September 18, 1962 at the Seventeenth Annual Meeting of the Board of Governors of the Bank, which requested the Bank's Executive Directors to study the question.

Pursuant to this request, the Bank's staff under the direction of Mr. A. Broches, the Bank's General Counsel, prepared a series of working papers culminating in a draft Convention. Upon decision of the Executive Directors, the draft Convention was discussed with legal experts designated by member governments in a series of consultative meetings held on a regional basis from December 1963 through May 1964, in Addis Ababa, Santiago de Chile, Geneva, and Bangkok.

On the basis of the preparatory work and the views expressed at the consultative meetings, the Executive Directors reported favorably to the Board of Governors and the Board, at its Nineteenth Annual Meeting held in Tokyo, in September 1964, and requested the Executive Directors to formulate a convention. Keeping in mind "the desirability of arriving at a text which could be accepted by the largest possible number of governments" (Resolution No. 214(c) of the Board of Governors), the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task. This Committee met in Washington from November 23 through December 11, 1964. The meeting was attended by the representatives of 61 member countries.

<sup>3</sup> Only members of the IBRD are entitled as a matter of right to accede to the Convention. Other States may accede only if invited by the Administrative Council (Article 67). The seat of the Centre will be at the principle office of the IBRD (Article 2 of the Convention) and arrangements will be made for the use of the IBRD's administrative facilities and services (Article 6(d)). The IBRD has decided to underwrite, with reasonable limits, the basic overhead expenditure of the Centre for a period of years to be determined after the Centre is established (E.D. Report, para. 17. See also Convention, Article 17). See also text and notes 28 to 30 *infra*.

<sup>4</sup> Such is the case of the OECD's Draft Convention on the Protection of Foreign Property and of multilateral investment assurance or guarantee schemes

particular approach to the problem. Instead of attempting to define the substantive rules applicable to foreign investments, the Convention aims at achieving its objective by offering to States and foreign investors a permanent forum for the settlement of investment disputes.<sup>5</sup> By providing international methods of settlement particularly adapted to the nature of the disputes and the identity of the parties, and by maintaining a careful balance between the interests of States and those of foreign investors, the Convention can be a major step toward the promotion of a climate of mutual confidence between States and investors and the establishment of the Rule of Law in the field of international investment.

## **I. Jurisdiction of the Centre**

### *A. Prerequisites*

Pursuant to Article 25(1) of the Convention, the jurisdiction<sup>6</sup> of the Centre:

. . . shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

The jurisdiction of the Centre is, therefore, based on three postu-

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under consideration. See e.g., van Hecke, "Le Projet de Convention de l'OCDE sur la Protection des Biens Etrangers," *Revue Générale du Droit International Public* 1964, 641; Brewer, "The Proposal for Investment Guarantees by an International Agency," 58 *Am. J. Int'l L.* 62 (1964).

<sup>5</sup> As to proposals concerning the use of the facilities of the International Chamber of Commerce and of the Permanent Court of Arbitration, see e.g., Böckstiegel, "Arbitration of Disputes between States and Private Enterprises in the International Chamber of Commerce," 59 *Am. J. Int'l L.* 579 (1965); Guyomar, "Le Règlement de la Cour Permanente d'Arbitrage Relatif aux Conflits Internationaux entre Deux Parties dont l'une seulement est un État," *Annuaire Français de Droit International* 1962, 377; Sassoon, *op. cit.* note 1 *supra*, at p. 28.

See also, Ketcham, Jr., "Arbitration between a State and a Foreign Private Party," *Symposium, Rights and Duties of Private Investors Abroad*, 403 (Int'l and Comp. Law Center 1965).

<sup>6</sup> Inasmuch as the Centre will not itself engage in conciliation or arbitration activities and these will be performed by commissions and tribunals, 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." (E.D. Report, para. 22).

lates, namely: (1) the consent of the parties; (2) their identity; and (3) the nature of the dispute.

1. *Consent of the Parties.* Consent of the parties is the "cornerstone of the jurisdiction of the Centre."<sup>7</sup> In other words, the jurisdiction of the Centre rests upon a strictly voluntary basis. Ratification of the Convention in no way compels a Contracting State to make use of the facilities of the Centre. Any Contracting State is entirely free to decide in the light of all relevant circumstances whether to consent to the submission of existing or future investment disputes to the jurisdiction of the Centre.

Investors enjoy a similar discretion. It is, therefore, not excluded that, depending upon the nature of their investment, investors may avail themselves of the provisions of the Convention or have recourse to other means of settlement. Thus, if prevailing practice is any indication of possible developments, it is conceivable that investors engaged in the exploitation of natural resources in a foreign country may make greater use of the facilities of the Centre than other investors, such as lenders, who may prefer to submit investment disputes to judicial adjudication.<sup>8</sup>

Under the Convention, consent of the parties must be in writing and its existence must be established when the Centre is seized.<sup>9</sup> The Convention, however, does not specify the type of instrument in which consent may be expressed. Consent may result from appropriate provisions in an investment agreement, such as a concession, a loan contract, bonds, or any other contractual arrangement between investors and Contracting States or in a *compromis* regarding an existing dispute. Consent does not have to be given in the same document. Thus, a Contracting State might in an investment code or similar legislation for the promotion of foreign investment accept the juris-

<sup>7</sup> E.D. Report, para. 23.

<sup>8</sup> As to concessions and similar agreements, see e.g., Fatouros, *Government Guarantees to Foreign Investors* (1962), at pp. 187-189; Kahn, "Problèmes Juridiques de l'Investissement dans les Pays de l'Ancienne Afrique Française," *Journal du Droit International* 1965, 338 at pp. 377-379.

As to the practice of lenders, see e.g., Delaume, "Jurisdiction of Courts and International Loans," 6 *Am. J. Comp. L.* 189 (1959) and "Jurisdictional Aspects of International Loans," 3 *Col. J. of Transnational L.* 3 (1964); Domke, "Dispute Settlement of International Loans," *International Financing and Investment* 525 (1964).

<sup>9</sup> Articles 25(1), 28(3) and 36(3).

diction of the Centre for certain classes of investments,<sup>10</sup> and the investor might give his consent by accepting the offer in writing.

2. *Identity of the Parties.* The Convention requires that one party be a Contracting State or a subdivision or agency designated by a Contracting State, and that the other party be a national of another Contracting State. Intergovernmental disputes and disputes wholly between private parties are, therefore, excluded from the jurisdiction of the Centre. So are also disputes between a Contracting State and one of its own nationals,<sup>11</sup> subject, however, to an important exception in the case of corporations or other juridical entities. Even though a juridical person had the nationality of the State party to the dispute (e.g. because it was locally incorporated) on the date on which the parties consented to submit an investment dispute to conciliation or arbitration, it may nevertheless be eligible to be a party to conciliation or arbitration proceedings under the auspices of the Centre if the host State has agreed that, because of foreign control, the juridical person involved should be treated as a national of another Contracting State.<sup>12</sup> This element of flexibility may well provide a broader scope to the Convention by enabling the parties to make the necessary adjustments in the light of their particular needs.

A similar, though possibly less apparent, consideration explains the rather broad reference made in Article 25(1) to "constituent subdivisions" and "agencies" of a Contracting State as possible parties to proceedings for the settlement of investment disputes. Admittedly, these expressions may have different connotations in different countries, and in particular in federal as opposed to unitary states. How-

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<sup>10</sup> See in this connection Article 25(4) according to which a Contracting State may make known to the Centre, in advance, the classes of disputes which it would or would not consider submitting to the Centre. This provision makes clear that a notification by a Contracting State that it would consider submitting a certain class of disputes to the Centre would serve for the purpose of information only and would not constitute the consent required to give the Centre jurisdiction.

<sup>11</sup> Article 25(2)(a). This ineligibility applies also to dual nationals to the extent that one of their nationalities is that of the State party to the dispute. The ineligibility is absolute and cannot be cured even with the consent of the State party to the dispute.

Since the Convention requires that the investor be a "national" of a Contracting State, it follows that the facilities of the Centre might not be available to "stateless" persons.

<sup>12</sup> Article 25(2)(b). For similar solution in the investment codes of French speaking African States, see Kahn, *op. cit.* note 8 *supra*, at pp. 350-355.

ever, after extensive comparative research,<sup>13</sup> it became apparent to the drafters of the Convention that any further attempt to use more specific language would not only be unsuccessful but would probably defeat its purpose by making the Convention unacceptable to states whose institutions would not fit exactly under the concepts defined in the Convention. Under the circumstances, the drafters of the Convention wisely decided that each Contracting State should be free to make the necessary determination by designating to the Centre the particular entities which it considered eligible to become parties to proceedings under the auspices of the Centre.<sup>14</sup>

3. *Nature of the Dispute.* The jurisdiction of the Centre is limited to a "legal dispute arising directly out of an investment." Of these two requirements, the one concerning the existence of a direct link between the dispute and an investment is, in view of the specific purpose of the Convention, self-explanatory. The second requirement concerning the "legal" nature of the dispute is intended to exclude from the jurisdiction of the Centre disputes which would have a political character or conflicts of interests between the parties, such as those concerning the opportunity to renegotiate the terms of an existing investment.

The fact, however, that the dispute must directly concern the determination of the particular legal rights of the parties or the consequences of a breach of legal obligations does not mean that disputes concerning the existence of a specific factual situation are outside the jurisdiction of the Centre. To the extent that the determination of a factual situation would have legal implications, it would fall within the jurisdiction of the Centre.<sup>15</sup>

<sup>13</sup> Both as a result of the preparatory work done by the legal staff of the IBRD and of the discussions at the regional consultative meetings and at the meeting of the Legal Committee. See note 2 *supra*.

<sup>14</sup> The question whether consent by a constituent subdivision or an agency of a Contracting State to submit a dispute to the Centre required the approval of that State raised a similar issue. In view of the many systems prevailing in the IBRD member countries, it was finally decided that such approval would be required, unless the Contracting State notified the Centre that no such approval was necessary. See Article 25(3).

<sup>15</sup> Assuming, for example, that under a concession, a foreign investor undertakes to bring production to a certain level by a certain date and that the parties disagree as to whether that level has been reached by the agreed time. This dispute, though it relates to facts, has nevertheless clear legal implications since its adjudication may affect the respective rights and obligations of the parties and justify or not a possible termination of the concession or such other sanctions against the investor as may have been agreed upon in the concession.

The term "investment" is not defined in the Convention. This omission is intentional. To give a comprehensive definition, such as that which is sometimes found in investment codes,<sup>16</sup> would have been of limited interest since any such definition would have been too broad to serve a useful purpose. In addition to the difficulty of reconciling many different concepts, insistence upon a precise formulation would have been inconvenient in that it might have arbitrarily limited the scope of the Convention by making it impossible for the parties to refer to the Centre a dispute which would be considered by the parties as a genuine "investment" dispute though such dispute would not be one of those included in the definition in the Convention.

For these reasons, and in view of the fact that submission of a dispute to the jurisdiction of the Centre requires the mutual consent of the parties, it appeared appropriate to recognize that the elimination of any definition from the text of the Convention was, in final analysis, the best solution.<sup>17</sup>

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The same reasoning would apply in the event that the foreign investor would be prevented from conducting business because of a state of affairs allegedly provoked or condoned by the host State.

<sup>16</sup> See Kahn, *op. cit.*, note 8 *supra*, at pp. 343 *et seq.*

<sup>17</sup> E.D. Report, para. 27. See also, U.S. Senate, 89th Congress, 2nd Session, Executive Report No. 2, p. 15:

"The convention states in article 25(1) that the center shall have jurisdiction over any legal dispute arising directly out of an investment. The term 'investment' is not defined in the convention; although an earlier draft of the convention defined the term 'investment' as a contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for a period of not less than 5 years.

"During negotiations on the convention among the members of the Bank, it was decided to delete this definition and to leave the term undefined. This decision was based on the following reasons:

"1. The proposed definition would have excluded short-term projects of less than 5 years' duration, even though there could be substantial investments of less than 5 years' duration which should not be excluded from the scope of the convention, such as large construction projects. It would have been very difficult in a definition to distinguish between those short-term investments which should fall within the scope of the convention and those short-term transactions which should not. Since the submission of a dispute to arbitration requires the mutual consent of the private investors and the host government, it would be more appropriate to let them agree among themselves on the content they wish to give the term 'investment.'

"2. The jurisdiction of the center is given broader scope by leaving the term 'investment' undefined. For example, the parties might wish to arbitrate a dispute, and the arbitrators might consider that the particular dispute before them was an investment dispute, but nevertheless the latter might feel obliged to refuse the exercise jurisdiction because the facts did not come within a



## *B. Effect of Consent: Recognition and Enforcement of Arbitral Awards*

1. *The Effect of Consent.* Pursuant to Article 26 of the Convention, consent of the parties to arbitration under the Convention is construed as a renunciation of any other remedy. This rule of interpretation is reasonable. Where a State and an investor agree to have recourse to arbitration, it may be presumed that, in the absence of any reservation in their agreement, they intended to exclude recourse to any other means of settlement. This presumption, however, is rebuttable. Under the terms of Article 26, a Contracting State may, as a condition of its consent to arbitration under the Convention, require the exhaustion of local administrative or judicial remedies. Thus, the Convention does not modify the rules of international law concerning the exhaustion of local remedies.

The major contribution made by the Convention on the development of international law is twofold. First, the Convention expressly acknowledges the binding character of agreements between private persons and foreign States to submit to conciliation or arbitration under the auspices of the Centre. Once given, such consent cannot be withdrawn unilaterally.<sup>18</sup> This fundamental principle is referred to in several articles of the Convention that are intended to make sure that the proceedings will not be frustrated by the unwillingness of a party to cooperate<sup>19</sup> and provide for an effective sanction against the

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particular definition of 'investment.' This would be far less likely to occur if 'investment' is not defined in the convention.

"It is entirely clear from this negotiating history that the term 'investment' in article 25(1) of the convention does not exclude from its scope an investment simply because it is a short-term investment. It is also clear from the negotiating history that the term 'investment' is to be broadly construed.

"For example, an 'investment' within the meaning of the convention could include, though it would not be limited to, a loan by a private foreign investor of one country to the government of another country, or a transfer to a new or existing enterprise in a host country of loan or equity capital, industrial property rights or services. Such a transfer might be, but need not have been, made pursuant to an agreement between the investor and the host government to submit any future controversy to arbitration, although there would have to be such an agreement before a dispute could be submitted to arbitration under the convention."

<sup>18</sup> Article 25(1). Denunciation of the Convention by a Contracting State cannot affect the binding character of a consent given by that State (or by one of its national, a constituent subdivision or an agency) before the date of the denunciation (Article 72).

<sup>19</sup> See Articles 29 and 30, and 37 and 38 regarding the power of the Chairman to appoint conciliators and arbitrators in the absence of agreement between the parties or failure by any one of them to make the necessary appointment.

possible breach of its obligations by one party.<sup>20</sup> Secondly, the Convention, unlike other recent proposals,<sup>21</sup> for the first time acknowledges the right of private investors to seek, as *domini litis*, the adjudication of their claims against a Contracting State, without any possible interference by the State of which they are nationals. Within the framework of the Convention the latter State can neither compel its nationals to submit nor refrain from submitting or discontinue the submission of an investment dispute against another Contracting State.

As a counterpart to the prerogative thus conferred upon private investors, the Convention assures the Contracting State party to an investment dispute that, so long as it complies with its own obligations and honors the arbitral award rendered in the dispute, it cannot be exposed to diplomatic or other claims from the Contracting State whose national is also a party to the dispute.<sup>22</sup>

2. *Recognition and Enforcement of Arbitral Awards.* Article 53(1) declares that the parties are bound by the award and that each of them must abide by and comply with the terms of the award. This rule simply reflects the consensual character of proceedings under the auspices of the Centre and the principle that the parties must comply with their obligations in good faith.

This article, in accordance with the prevailing practice in connection with international arbitration, imposes specific obligations upon the parties and, in particular, binds the State party to the dispute to give effect to the award. However, no provision for the practical enforcement of arbitral awards in the territories of Contracting States

<sup>20</sup> A breach by a Contracting State of its obligations under the Convention would be exposed to the sanctions provided for in Article 27 (diplomatic action by the government of the investor party to the dispute) and in Article 64 (proceedings before the ICJ).

Another sanction, which may affect both investors and States is the right of any party to the dispute to obtain a default award (Article 45) which is binding and enforceable in accordance with the provisions of the Convention (Article 53 to 55).

<sup>21</sup> See in particular the OECD's Draft Convention on the Protection of Foreign Property (Article 7). According to that provision, a national of a Contracting State may not institute arbitral proceedings against another Contracting State unless, among other conditions, it is established that the State of the plaintiff has no intention to espouse the claim of its national and to bring such claim directly before an international tribunal. Again, if arbitral proceedings have been instituted by the national of a Contracting State, that State remains free, at any time of the proceedings, to institute proceedings in its own name thereby suspending the original arbitral proceedings until the proceedings instituted by such State are terminated.

<sup>22</sup> Article 27.

is made in Article 54 which requires that each Contracting State must recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.<sup>23</sup>

The procedure for the recognition and enforcement of arbitral awards rendered under the auspices of the Centre is made as simple as possible. Under Article 54(2) of the Convention, any party to an arbitral award may obtain recognition and enforcement of an award by furnishing to the competent court or other authority designated for the purpose by each Contracting State, a copy of the award certified by the Secretary-General of the Centre.

The originality and the merits of this solution are apparent.<sup>24</sup> It constitutes major progress over existing rules concerning the recognition and enforcement of foreign or international awards. Furthermore, the lack of any distinction, for the purposes of recognition and enforcement, between awards rendered against an investor or a Contracting State maintains the careful balance between the respective interests of both States and investors, which is one of the major features of the Convention. This last remark must, however, be qualified, since Article 55 provides that the principle formulated in Article 54 cannot be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution. In view of the differences in this respect among municipal legal systems, it is, therefore, possible that arbitral awards rendered under the Convention will be subject to a different treatment from one country to another.

This solution, which could not be avoided given the present status of the law, is not necessarily as regrettable as it might appear. First of all, there are a number of situations in which the doctrine

<sup>23</sup> This provision may require implementing legislation in certain Contracting States. As to the United States, see U.S. Senate, 89th Congress, 2d Session, Executive Report No. 2, p. 6 and p. 30.

<sup>24</sup> In respect to the recognition and enforcement of the judgments of the Court of Justice of the EEC, cf. Stein and Hay, "Legal Remedies of Enterprises in the European Economic Community," 9 *Am. J. Comp. L.* 375 (1960), p. 380. See also, Schachter, "The Enforcement of International Judicial and Arbitral Decisions," 54 *Am. J. Int'l L.* 1 (1960) p. 13, note 34.

of immunity should cause no problem because the award is self-executory. Such is the case, for example, of awards leading to a determination of facts or acknowledging the validity of an act already done by one of the parties to the dispute, or deciding that a dispute is not within the jurisdiction of the Centre.<sup>25</sup>

Secondly, it should be noted that the limitation contained in Article 55, though intended to account for existing differences in the laws of Contracting States, in no way relieves them of their obligations under the Convention. Thus, it is clear that if a Contracting State party to the dispute invoked its immunity to prevent the enforcement of the award in its own territories or, to the same end, availed itself of the doctrine of immunity prevailing in another Contracting State in which enforcement would be sought, it would be in violation of its obligation to comply with the award and would expose itself to the various sanctions provided for in the Convention.<sup>26</sup>

## **II. Institutional Machinery: Conciliation and Arbitration Proceedings**

### *A. Organization of the Centre*

The Centre will not itself engage in conciliation or arbitration activities. These will be performed by conciliation commissions or arbitral tribunals constituted in accordance with the pertinent provisions of the Convention. The purpose of the Centre is essentially "to provide facilities for conciliation and arbitration of investment disputes . . ." <sup>27</sup> and more generally to assure the practical implementation of the Convention. It was, therefore, possible to give to the Centre a simple organizational structure. The organs of the Centre are the Administrative Council and the Secretariat.

The Administrative Council consists of one representative of each Contracting State who, in the absence of a contrary designation, will be the governor of the IBRD appointed by the Contracting State.<sup>28</sup> Each representative casts one vote and matters before the Council are decided by a majority of the votes cast, unless a different majority is required by the Convention.<sup>29</sup> The President of the IBRD is *ex*

<sup>25</sup> Comp., Jenks, *The Prospects of International Adjudication* (1964), pp. 688-690.

<sup>26</sup> Articles 27 and 64.

<sup>27</sup> Article 1(2).

<sup>28</sup> Article 4. Members of the Administrative Council serve without remuneration from the Centre (Article 8).

<sup>29</sup> Article 7(2) and (4); Article 6(a), (b), (c) and (f); Article 10.

*officio* the Chairman of the Administrative Council but has no vote.<sup>80</sup> The principal functions of the Administrative Council are the election of the Secretary-General and his deputies, the adoption of the budget of the Centre, and the adoption of administrative and financial regulations rules governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings.<sup>81</sup>

The Secretariat is composed of a Secretary-General, one or more Deputy Secretaries-General and a staff. Upon nomination by the Chairman, the Secretary-General and his Deputies are elected by a majority of two-thirds of the members of the Administrative Council. Their terms of service are limited to a period not exceeding six years though they may be re-elected.<sup>82</sup>

The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar, and principal officer of the Centre.<sup>83</sup> In addition, the Convention gives to the Secretary-General the power to "screen" requests for conciliation or arbitration proceedings and to refuse registration of a request (and thereby prevent the institution of the proceedings) if, on the basis of the information contained in the request, he finds that the dispute in question is "manifestly outside" the jurisdiction of the Centre.<sup>84</sup>

Article 3 requires the Centre to maintain a Panel of Conciliators

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<sup>80</sup> Article 5. The Chairman serves without remuneration from the Centre (Article 8).

<sup>81</sup> Article 6.

<sup>82</sup> Article 10(1). The initial election may be for a short term so as not to deprive the States which ratify the Convention after its entry into force of the possibility of participating in the selection of the high officials of the Centre (E.D. Report, para. 18).

Article 10(2) provides that the offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

<sup>83</sup> Articles 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b), and 65.

<sup>84</sup> Articles 28(3) and 36(3). According to the E.D. Report (para. 20) this power was given to the Secretary General "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."

and a Panel of Arbitrators which are to consist of qualified persons designated in part by each Contracting State and in part by the Chairman of the Administrative Council.<sup>85</sup> In particular, Article 14 seeks to ensure that Panel members will possess a high degree of competence in the fields of law, commerce, industry, or finance and be capable of exercising independent judgment. Furthermore, the same provision requires the Chairman to pay due regard, in making the proper designation, to the importance of assuring representation on the Panel of the principal legal systems of the world and of the main forms of economic activity.<sup>86</sup>

### *B. Conciliation and Arbitration Proceedings*

Certain provisions of the Convention are mandatory. These include provisions intended to prevent the frustration of the proceedings,<sup>87</sup> or to assure respect for certain rules deemed essential to the success of the proceedings. Examples of such provisions are various articles concerning the number of conciliators or arbitrators<sup>88</sup> and their nationality,<sup>89</sup> and the rendition, interpretation, revision, and amendment of awards.<sup>40</sup>

To account for the many situations which may surround conciliation or arbitration proceedings and which necessitate to leaving to the parties great discretion regarding the constitution of conciliation commissions or arbitral tribunals and the conduct of the proceedings, many provisions of the Convention are permissive and apply only in the absence of contrary agreement by the parties. Thus, the Convention provides that, in the absence of agreement on the number of

<sup>85</sup> Articles 13, 15 and 16.

<sup>86</sup> Under Articles 31 and 40 the parties are free to appoint conciliators and arbitrators from outside the Panels. However, the persons so appointed by the parties must possess the qualities required by Article 14(1) from persons designated to serve on the Panels.

<sup>87</sup> See text and notes 19 and 20 *supra*.

<sup>88</sup> Thus, Articles 29(2) and 37(2) require that, unless the parties have agreed to conciliation or arbitration by a sole conciliator or arbitrator, the conciliation commission or the arbitral tribunal must consist of an uneven number of arbitrators.

<sup>89</sup> Article 39 requires that the majority of the members of an arbitral tribunal should not be nationals of either the State party to the dispute or the State whose national is a party to the dispute. This rule is likely to have the effect of excluding persons having these nationalities from serving on a tribunal composed of not more than three members. However, the rule will not apply if each and every member of the tribunal is appointed by agreement of the parties.

<sup>40</sup> Articles 48 to 52.

conciliators or arbitrators and the method of their appointment, the conciliation commission or the arbitral tribunal shall consist of three arbitrators, one conciliator or arbitrator appointed by each party and the third appointed by mutual agreement, or, failing such agreement, by the Chairman of the Administrative Council.<sup>41</sup> Similarly, Articles 33 and 44 stipulate that, unless the parties otherwise agree, conciliation and arbitration proceedings shall be conducted in accordance with the relevant provisions of the Convention and of the Conciliation or Arbitration Rules adopted by the Administrative Council and in effect on the date on which the parties consented to conciliation or arbitration.<sup>42</sup>

Article 42 is of particular importance. It provides that investment disputes are to be decided in accordance with such "rules of law" as may be agreed by the parties or, failing such agreement, in accordance with the law of the Contracting State party to the dispute and such rules of international law as may be applicable. While this provision is a clear recognition of the principle of party autonomy, it is also a good reminder that party autonomy can operate only within the framework of surrounding "rules of law." This writer construes the provision as an implicit rejection of proposals that contracts between States and foreign investors could be legally self-sufficient and exist independently of other, legal systems, municipal or international.<sup>43</sup> If this is the correct interpretation, the determination of the legal system or systems which can be selected by the parties as applicable to their relations becomes of paramount importance. That the parties are free to choose municipal law as the law applicable, wholly or in part, to the dispute is clear. The real question, therefore, is whether the parties, one of whom is a State, can withdraw the dispute from the sphere of municipal law and make it subject to another legal system which may be international law in its traditional sense or some international system of law, such as the general principles of law (to the

<sup>41</sup> Articles 29(2) (b) and 30; Articles 37(2) (b) and 38.

<sup>42</sup> Articles 33 and 44.

<sup>43</sup> See Verdross, "Protection of Private Property under Quasi-International Agreements," 6 *Nederlands Tijdschrift voor Internationaal Recht* 335 (1959); Bourquin, "Arbitration and Economic Development Agreement," 15 *Business Lawyer* 860 (1960); Ray, "Law Governing Contracts between States and Foreign Nationals," *Proceedings of the 1960 Institute on Private Investment Abroad* (1960), p. 5.

But see Mann, "The Proper Law of Contracts Concluded by International Persons," 35 *British Year Book of International Law* 34 (1959), p. 49; Friedmann, *The Changing Structure of International Law* (1964), p. 175.

extent that they could be distinguished from international law), transnational law or a new *lex mercatoria* in the making.<sup>44</sup> As yet, there is no clear answer to this question. All that can be said in this respect is that, inasmuch as the Convention requires the arbitral tribunal to apply municipal as well as international law, it would be strange indeed if the parties were to be denied the power, by agreement between them, to bring their relations within a system of law, namely international law, that the tribunal is under a duty to apply.

Under Article 42, the tribunal must, in the absence of contrary agreement between the parties, decide investment disputes in accordance with the law of the Contracting State party to the dispute and such rules of international law as may be applicable. It is therefore possible that an investment dispute may be governed either by the law of the Contracting State, international law or, in various degrees, by both systems of law.<sup>45</sup>

Subject to the possible application of international law, the rule that an investment dispute should be decided in accordance with the law of the Contracting State party to the dispute makes sense. In most cases, at least where the investment involved relates to the exploitation of mineral or other resources in the territories of the host country, all connecting factors point to the applicability of the law of the host State. Whether that law should be applied as *lex loci contractus* or *lex loci solutionis* is in fact irrelevant.

<sup>44</sup> See e.g., Mann, *op. cit.* preceding note; McNair, "The General Principles of Law Recognized by Civilized Nations," 33 *British Year Book of International Law* 1 (1957); Jessup, *Transnational Law* (1956), 102 *et seq.*; Fatouros, *op. cit.* note 8 *supra*, pp. 288 *et seq.*; Delaume, "The Proper Law of Loans Concluded by International Persons: a Restatement and a Forecast," 56 *Am. J. Int'l L.* 63 (1962), pp. 78 *et seq.*; Lalive, "Un Récent Arbitrage Suisse entre un Organisme d'État et une Société Privée Etrangère," *Annuaire Suisse de Droit International* 1962, 273, "Contracts between a State or a State Agency and a Foreign Company—Theory and Practice: Choice of Law in a New Arbitration Case," 13 *Int'l and Comp. Law Q.* 987 (1964); van Hecke, *Problèmes Juridiques des Emprunts Internationaux* (2d ed. 1964) pp. 76 *et seq.*; Goldman, *Les Conflits de Lois dans l'Arbitrage International de Droit Privé*, 109 *Recueil des Cours*, Hague Academy, 351 (1963); Kahn, *op. cit.* note 8 *supra*, pp. 384 *et seq.*; Suratgar, "Considerations Affecting Choice of Law Clauses in Contracts between Governments and Foreign Nationals," 2 *Indian J. Int'l L.* 273 (1962).

<sup>45</sup> The E.D. Report specifies that:

"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" (para. 40).



The rule, however, is qualified in one respect. If, under the conflict of laws rules of the Contracting State party to the dispute, the law of some other country is applicable, it is that law which must be applied by the tribunal. This last solution is far from theoretical. In the case of such investments as loans or similar financial arrangements between private investors and foreign public entities, the prevailing practice is to subject, either expressly or implicitly, the loan relationship to the law of the lenders' country.<sup>46</sup> In cases such as these, it is thus possible that the tribunal, after ascertaining the conflict rules of the debtor State, will be referred to the law of the lenders' country or of the market of issue.

Another delicate issue, which is not settled in the Convention, is one which relates directly to the time element in the determination of the content of the legal rules applicable to the dispute. Assuming that the applicable law has changed between the time consent to the jurisdiction of the Centre was given and the time when a dispute must be decided, should the tribunal's decision be based on the applicable law as it stood at the time of consent or as it exists at the time of adjudication?

According to the prevailing view, the latter date ought to be determinative.<sup>47</sup> However, this view does not go unchallenged when the applicable law is that of the State party to the dispute.<sup>48</sup> At least in the absence of an express stipulation, such as a "stabilization" clause sometimes found in concessions freezing the legal status of the relations between foreign private investors and the host State, it is not clearly established whether a State should be held responsible for the damaging consequences to the investors of a change in its legislation.<sup>49</sup> This is an issue which arbitral tribunals will no doubt

<sup>46</sup> See Delaume, *op. cit.* note 44 *supra*; Broches, "Choice of Law Provisions in Contracts with Governments," *International Contracts: Choice of Law and Language* (1962), p. 64.

<sup>47</sup> See Batiffol, *Les Conflits de Lois en Matière de Contrats* (1938), p. 68; Gavalda, *Les Conflits dans le Temps en Droit International Privé* (1955), pp. 360-362, 385-389; Mann, "Time Element in the Conflict of Laws," 31 *British Yearbook of International Law* 217 (1954); Spiro, "The Incidence of Time in the Conflict of Laws," 9 *Int'l and Comp. Law Q.* 357 (1960). See, however, the Alsing Case, 23 *Int'l Law Reports* (1956), 633.

<sup>48</sup> See e.g., Mann, "State Contracts and State Responsibility," 54 *Am. J. Int'l L.* 572 (1960); Jennings, "State Contracts in International Law," 37 *British Yearbook of International Law* 156 (1961); Fatouros, *op. cit.* note 8 *supra*, pp. 261-301.

<sup>49</sup> Though the issue was brought up before the PCIJ (Losinger Case, Series C, No. 78, 1936) and the ICJ (Anglo-Iranian Oil Company Case, Reports

have to decide in the light of the relevant rules of international law to which their decision may make a significant contribution.

### **Conclusion**

Though the arbitral aspects of the Convention have, in the foregoing pages, been considered at greater length than the provisions concerning conciliation, this is due only to the fact that the legal issues of arbitration are more complex than those likely to arise in the process of conciliation. This is not intended, however, to suggest that conciliation, given its flexibility, may not prove in practice more significant than arbitration as an effective method of settling investment disputes.

It is clearly premature to attempt any forecast of the use that investors and States will make of the machinery set up by the Convention. It is safe to say, however, that the attempt made in the Convention to reconcile the respective interests of both investors and States should be particularly helpful in promoting the climate of mutual confidence which is an essential prerequisite to the flow of private capital of a developmental character.

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1952, 93; Case of Certain Norwegian Loans, Reports 1957, 9 and Pleadings, vol. I, pp. 34, 404, 485 and vol. II, pp. 61 and 134), the Hague Court has not passed judgment on the merits.