

Arbitration Under the Auspices of the World Bank

I am afraid that I must start in clarification, or rather correction, of the title of these remarks. It should be noted that the International Bank for Reconstruction and Development, to use its formal title, has not sought to extend its role as one of the principal international financial institutions to become also a tribunal for the settlement of disputes. It is true that the Bank has occasionally lent its good offices to parties seeking to settle long-festered financial disagreements, particularly if these tended to burden the credit rating or the economies of one of the parties, to the deterioration of its standing as an actual or potential borrower from the Bank. Thus, the President of the Bank has acted as conciliator with regard to three matters: Pre-World War II bonds issued by the City of Tokyo, the expropriation of the Suez Canal and the expropriation of a number of French or French-owned companies in Tunisia. At no time has the Bank or its President acted as arbitrator.

Settling disputes is not and should not be an important part of the business of any bank. Nevertheless, many more requests for the performance of such services were addressed to the World Bank and though it was reluctant to comply it appeared that there was a need for some institution that could fill a significant gap in the array of existing tribunals: one that would be especially designed to accommodate, on a basis of parity, both governmental parties and private investors. Such an institution could, through its very existence, improve the investment climate (and thus reduce the demands on the Bank's limited resources) of those developing States using its services in order to attract investors otherwise fearful of entering a foreign jurisdiction without having

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access to an impartial, assured forum to settle any disputes that might arise with the host Government.

Considerations of this type led the Bank to formulate the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965 (the SID Convention), whereby the International Centre for Settlement of Investment Disputes was established. The Centre is an independent, international entity—though, to be sure, it is closely tied, administratively even more than legally, to the Bank. At present the Centre is located at the headquarters of the Bank in Washington, and is financed by and staffed through that organization; however, the most important fixed tie between the institutions is through the President of the Bank, who *ex officio* serves as the non-voting Chairman of the Administrative Council of the Centre. Thus, while the Convention is popularly referred to as the World Bank Convention, any disputes that are submitted to the Centre for conciliation or arbitration will be resolved by Conciliation Commissions or Arbitral Tribunals established *ad hoc* under its auspices, and not under that of the Bank.

The Convention entered into force on October 14, 1966. At present, fifty-seven States have signed that instrument and forty-one of these have ratified it—thus becoming Contracting States. Among the earliest to do so was the United States of America, which thus for the first time became a party to an international agreement concerning the arbitration of private disputes.

The following observations will concern so much the structure of the Centre (which is of interest principally to scholars of international organizations), but rather its jurisdiction, and the principal and special procedural features of the Convention.

Jurisdiction of the Centre

Within the ambit of the jurisdiction it defines, the SID Convention is a potent instrument. However, just for that reason, its jurisdiction is circumscribed both narrowly and rigidly, in terms of three orthogonal factors: the nature of the parties; the nature of the dispute; and the requirement of prior consent.

The Parties

The requirements as to the nature of the parties are one of the special features of the Convention—indeed they are reflected in its title. One of the parties to any dispute presented to the Centre must be a

Contracting State, or a constituent subdivision or governmental agency of such a State, properly designated for this purpose by the latter. The other party must be a private person, who is a national of another Contracting State; though a natural person with dual citizenship, including that of the State party to the dispute, is barred from resorting to the Centre, a juridical person who is nominally the national of that State (for example, through incorporation within it) may oppose its own Government before the Centre if it is controlled by the nationals of another Contracting State.

Thus, the Centre is not available for litigation between States—who can resort to the International Court of Justice or to the Permanent Court of Arbitration. Nor is it available for litigation between private parties, who can resort to a neutral national court or to arbitration under the auspices of the International Chamber of Commerce or the Inter-American Commercial Arbitration Commission. Nor, finally, is it available for litigation between a citizen and his own Government, which normally must be accomplished in domestic courts or administrative tribunals.

The Dispute

The second jurisdictional requirement is that disputes submitted to the Centre must be “legal” ones arising directly out of an “investment.” As neither of these terms is defined in the Convention, a good deal of latitude is left to the parties to the dispute. Nevertheless, it is clear that more conflicts of interest are barred, if not based on any legal claim, and so are disputes about transactions or situations that cannot be characterized as investments.

Consent

The final, and in a sense the most important requirement is that of consent, which must be given: by both parties, in writing (though not necessarily in the same instrument,) and must in every case precede the submission of the dispute to the Centre. Thus the latter is not authorized, if a dispute is referred to it by one party, to approach the other to obtain its consent; if consent is lacking, the Centre remains inactive and the case is not even registered. Furthermore, if the existence of consent should be in question and is referred to the Arbitral Tribunal appointed for the dispute, the party contesting the jurisdiction on this or any other grounds can appear to litigate this point without fear of thereby waiving any prior lack of consent.

The Regime of the Convention

Having thus outlined the jurisdiction defined by the Convention, I would like to move to its special features. All legislation about arbitration, whether domestic or international, and whether expressed in the form of a law, a treaty, or an agreed or merely recommended set of regulations or rules, deals with one or more of three subjects:

- (i) The binding nature and the effect of an agreement to arbitrate;
- (ii) The arbitral procedure;
- (iii) The enforcement of arbitral awards.

Thus, for example the U.S. Code Title on "Arbitration" deals, rather briefly, with each of these subjects. The 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, however, deals only with questions of enforcement, while the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards concerns both the effect of agreements to arbitrate and the enforcement of awards. The 1961 European Convention on International Commercial Arbitration deals with the effect of arbitral agreements and with arbitral rules, but barely touches on enforcement; in contrast, the draft Inter-American Convention on Commercial Arbitration would cover primarily arbitral rules (largely by incorporating those of the Inter-American Commercial Arbitration Commission) as well as the enforcement of awards. Finally, the Arbitration Rules of the Economic Commission for Europe and those of the Economic Commission for Asia and the Far East deal, as their titles suggest, only with the procedure of arbitration—and this also is the sole subject of the several sets of rules of the International Chamber of Commerce, the Inter-American Commercial Arbitration Commission and the American Arbitration Association.

The SID Convention is one instrument that deals with all three of the listed subjects, and it does so in part in considerable detail and in rather special ways.

The Obligation to Arbitrate

Concerning the effect of agreements for the conciliation or arbitration of disputes under the auspices of the Centre, two features of the regime established by the SID Convention should be noted. The first is that once both parties have agreed to resort to the Centre with respect to either an actual or a prospective dispute, then neither of them may withdraw their consent unilaterally. Even if one or both of the Contracting States concerned (the host State, or that of the

investor) should denounce the Convention, consents given prior to such denunciation remain valid and binding; and even if the Convention itself should be amended by the unanimous agreement of its parties, this would not affect pre-existing consents. Thus, even an investor's own State cannot deprive him of his rights under the Convention—which thus joins the lengthening list of international instruments that assign direct rights to individuals.

The second feature to note is that the enforcement of the obligation to arbitrate is, in effect, almost entirely internal to the regime created by the Convention. In this it differs from legislation such as the federal Arbitration Title, which directs the federal courts to compel parties to arbitrate if they have agreed to do so, enjoins the courts from deciding issues that should be submitted to arbitration under an existing agreement, and for these purposes empowers the courts to adjudicate the validity of arbitral agreements. Under the SID Convention there is no outside authority to resort to, either to compel a party to arbitrate or to prevent it from otherwise litigating an arbitrable issue—though a national or international court to which such an issue is submitted might decline to exercise jurisdiction on the ground that such submission violates the provision of the Convention specifying that an agreement to arbitrate under the Convention ordinarily excludes all other remedies. Only the Arbitral Tribunal established for the dispute can decide all questions involving its own competence—including the validity of the arbitral agreement pursuant to which it was established. Thus the SID Convention accomplishes the “separation” of the arbitral clause from any agreement in which it may be incorporated: even the assertion that the entire agreement is invalid cannot deprive the Tribunal of jurisdiction to decide, finally, this very issue—for its authority, in this respect, derives primarily from the Convention and only secondarily from the asserted consent of the parties. In this sense an agreement to submit a dispute to the Centre is superior to other international arbitration clauses, which, even if they refer to an existing institution (such as the International Chamber of Commerce), cannot avoid the possibility that a challenge to the validity of the clause itself must first be litigated in some forum having jurisdiction with respect to both parties—which may be difficult to find if one of them is a Government—and risk frustration if no such forum can be found. Should either party refuse to acknowledge this authority of a Tribunal established pursuant to the SID Convention, that forum of course cannot force that party to litigate before it either jurisdiction or substance, but even in the event of a default it can enter an award

against either party which is, as will be pointed out below, final, binding, and enforceable without relitigation in all Contracting States.

Arbitral Procedure

The procedural regime established by the Convention with respect to conciliation or arbitration is characterized throughout by the interaction of two complementary principles:

- (a) To the extent that the parties agree as to any procedural point, that agreement will generally govern. Thus the procedure can be shaped to meet the particular requirements of the parties—a point of considerable importance to Governments, which are traditionally reluctant to submit themselves to rigid court-like rules (even if the submission to the proceeding is basically optional, such as with respect to the Permanent Court of Arbitration or the International Chamber of Commerce).
- (b) To the extent that the parties fail to agree on any point, the Convention always provides a fall-back formula or procedure which can be applied automatically. Thus, once both parties have agreed to resort to the Centre, there is no possibility of this consent being frustrated by the inability of both parties, or the unwillingness of one of them, to agree on any or all procedural details.

The impact of these two principles can be illustrated with reference to a number of separate issues:

- (1) The parties can agree to almost any formula for the composition of their Tribunal (though it must have an odd number of members, who are subject to certain restrictions as to their nationality)—but if they cannot agree, a three-member Tribunal will be established.
- (2) The parties may appoint (individually, jointly or through some impartial outside authority) almost any one to their Tribunal—but if the appointment procedure they agree on should break down for any reason, in whole or in part, then the Chairman of the Administrative Council of the Centre is empowered to make any appointments necessary to complete the Tribunal.
- (3) The parties may agree on any formula for dividing the expenses of the proceeding—but if they do not agree, the Tribunal must accomplish this apportionment in its award.
- (4) Any procedure or rules, not in conflict with the few explicitly stated in the Convention or appearing in the Regulation of the Centre, may be adopted by the parties—but if they fail to agree, then the Rules or Procedure for Arbitration Proceedings adopted by the Administrative Council automatically apply, and to the extent that these leave any hiatus the Tribunal is empowered to fill lacuna through its own rulings.

- (5) The parties may agree to any legal system (national, international or *ad hoc*) for the resolution of their dispute, and they may also empower their Tribunal to decide *ex aequo et bono*—but if no agreement is reached, then 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 are automatically applied.
- (6) The parties may agree that the proceeding be conducted anywhere the Centre can make adequate arrangements—but if they cannot agree on any such place, then the proceeding is automatically held at the seat of the Centre.
- (7) The parties may authorize or forbid their Tribunal to decide additional related claims or counter-claims and to deal with requests for provisional measures—but if they reach no agreement as to these points, then the Tribunal is automatically empowered to settle ancillary questions and to recommend, but not to impose, provisional measures.
- (8) If the parties agree to publish the award rendered by their Tribunal, or the minutes of its proceedings, this will be done—but if either party fails to agree then there may be no publication.

Enforcement of Awards

We come now finally to the recognition and enforcement of arbitral awards rendered pursuant to the SID Convention. That instrument provides that these awards shall be:

- (a) binding;
- (b) not subject to any appeal or remedy except as provided in the Convention (which allows the supplementing, correcting, revising, interpreting or annulling of awards, through the original Tribunal, a new Tribunal, or a special *ad hoc* Committee established to review charges of corruption or other fundamental defects);
- (c) abided by and complied with by each party;
- (d) recognized by each Contracting State; and
- (e) most importantly, enforceable as to their pecuniary obligations in each Contracting State, as if they were final judgments of a court in that State.

It should be noted that such recognition or enforcement must be afforded by every Contracting State, whether or not it or one of its nationals is a party to the dispute. To facilitate the implementation of this provision, each State is obliged to designate to the Centre the domestic court or other authority responsible for such enforcement; the United States has, by law, designated the Federal District Courts for this purpose. The procedure of such enforcement is not specified in the

Convention, but is to follow the laws concerning the execution of judgments of the country in which enforcement is sought. To the extent that that law protects certain property touched with sovereign or diplomatic immunity from any execution, such immunity is not affected by the Convention.

The most important feature as to the enforcement of arbitral awards through domestic tribunals is that these may not re-examine any issue decided by the Tribunal. While, for instance, the 1958 New York Convention lists over half-a-dozen grounds on which enforcement of an arbitral award may be refused, and the 1961 European Convention contains a somewhat shorter but still substantial list—and thus both these instruments require the court in which enforcement is sought to examine at least the jurisdiction of the original arbitral tribunal and in part the substance of the award—the SID Convention permits no such exceptions and allows no such examinations. In the words of the American Act to implement the Convention: “the pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.”

Conclusion

I hope I have succeeded in demonstrating that the SID Convention is a specialized instrument, designed to perform a particular task and to perform it effectively. That task is to provide an absolutely assured forum to which Governments and foreign investors can agree to resort either in advance of any legal dispute between them or once one has arisen. There already is evidence that the establishment of this new facility has been welcomed by the investment community and that the International Centre for Settlement of Investment Disputes through its very existence is helping to ease the international flow of private capital to developing countries.