THE ICSID CONVENTION
A Commentary
SECOND EDITION

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with
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The existence of a dispute presupposes a minimum of communication between the parties. The matter must have been taken up with the other party, which must have opposed the claimant’s position if only indirectly. Thus, failure to respond to a specific demand within a reasonable time would be sufficient to establish the existence of a dispute. In AAPL v. Sri Lanka, the Tribunal noted that the claim remained outstanding without a reply for more than the three months’ negotiation period provided for in the Bilateral Investment Treaty and that hence AAPL had become entitled to institute the proceedings. 46 On the other hand, it is not necessary that other means of settlement, notably negotiations, have been utilized unsuccessfully before the Centre is seized of a dispute unless the terms of the consent provide for the prior use of other means of settlement (see paras. 540–550 infra). 47

The disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of the Centre to clarify legal questions in abstracto. The dispute must relate to clearly identified issues between the parties and must not be merely academic. This is not to say that a specific action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim. 48

In some cases the respondents contended that the claims were hypothetical and hence there was no dispute. 49 In Enron v. Argentina 50 some provinces of Argentina had assessed taxes that the Claimants described as exorbitant and enough to wipe out the entire value of their investment. Argentina argued that the claim was hypothetical since the taxes had been assessed but not collected. Claimants pointed out that the taxes had not been collected only because there was a temporary injunction ordered by the Supreme Court. The Tribunal refused to accept that under these circumstances the dispute was merely hypothetical. It said:

The Tribunal is mindful of the fact that once the taxes have been assessed and the payment ordered there is a liability of the investor irrespective of the actual collection of those amounts. This means that a claim seeking protection under the Treaty is not hypothetical but relates to a very specific dispute between the parties. 51

46 AAPL v. Sri Lanka, Award, 27 June 1990, para. 3.
51 As para. 74. See also Continental Casualty v. Argentina, Decision on Jurisdiction, 22 February 2006, para. 92.
In some cases the allegedly hypothetical nature of the claims related to the quantum of damages. In Pan American v. Argentina, the Respondent complained that the damages claimed were hypothetical, conjectural and speculative. The Tribunal found that a certain degree of uncertainty about the quantum of damages was inevitable at the jurisdictional stage. This did not affect its jurisdiction provided the Claimants were able prima facie to demonstrate that some damage had occurred. In several decisions tribunals rejected the argument that negotiations pending between the parties or proceedings pending in domestic courts made their claims premature or hypothetical.

A dispute may clearly have existed, but one party may feel that it has taken steps to satisfy any claims that the other party may have had. In AGIP v. Congo, the Government had expropriated the Claimant's assets without compensation in violation of a prior agreement. Before the ICSID Tribunal, the Government declared that there was no longer any dispute since it had recognized the principle of compensation. The Tribunal found that the declarations made by the Government were so lacking in precision that the continuing existence of the dispute was not in doubt. It noted that the Claimant had not, in fact, received any compensation. In addition, the claim was directed not only at compensation for the nationalization but also at damages for losses resulting from the Government's violations of its contractual obligations.

2. The Time of the Dispute

The Convention does not indicate at what time a dispute must have arisen. The answer to this question will ultimately depend on the terms of the consent to the Centre's jurisdiction. Consent may relate to a specific dispute already existing between the parties, it may relate to future disputes only or it may relate to any dispute; that is, embracing existing as well as future disputes (see paras. 382-387 infra). The Convention itself does not impose jurisdictional requirements ratione temporis relating to the dispute.

Some BITs limit consent to arbitration to disputes arising after their entry into force. For instance, the Argentina-Spain BIT of 1991 provides:

... this agreement shall not apply to disputes or claims originating before its entry into force.

52 Pan American v. Argentina, Decision on Preliminary Objections. 27 July 2006.
53 At paras. 62-168, 177, 178.
55 AGIP v. Congo, Award. 30 November 1979, paras. 38, 39.
56 Of course. 42, 95-97.
57 See also Auerasingshe. The Jurisdiction of the International Centre. p. 171.
58 The Tribunal in South v. Jordan, Decision on Jurisdiction. 29 November 2004, para. 170, found that the phrase “any dispute which may arise” did not cover disputes that had arisen before the BIT’s entry into force. See also Impregilo v. Pakistan, Decision on Jurisdiction. 22 April 2005, paras. 297-304.
Under a provision of this kind the time at which the dispute has arisen will be of decisive importance for the applicability of the consent to arbitration. The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before a certain date should not be read as excluding jurisdiction over events occurring before that date. A dispute requires not only that the events have developed to a degree where a difference of legal positions can become apparent but also communication between the parties demonstrating that difference.

In *Maffezini v. Spain*, the Respondent challenged ICSID’s jurisdiction alleging that the dispute originated before the entry into force of the Argentina-Spain BIT. The Claimant relied on facts and events that antedated the BIT’s entry into force but argued that a “dispute” arises only when it is formally presented as such. This, according to the Claimant, had occurred only after the BIT’s entry into force. The Tribunal distinguished between the events giving rise to the dispute and the dispute itself. After noting that the events on which the parties disagreed began years before the BIT’s entry into force it said:

> But this does not mean that a legal dispute as defined by the International Court of Justice can be said to have existed at the time.

The Tribunal described the development towards a dispute in the following terms:

> ...there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant’s position directly or indirectly. This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID’s jurisdiction.

On that basis, the Tribunal reached the conclusion that the dispute in its technical and legal sense had begun to take shape after the BIT’s entry into force:

> At that point, the conflict of legal views and interests came to be clearly established, leading not long thereafter to the presentation of various claims that eventually came to this Tribunal.

It followed that ICSID had jurisdiction and that the Tribunal was competent to consider the dispute.

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60 *Maffezini v. Spain*, Decision on Jurisdiction, 15 January 2003, paras. 92, 93.

61 At para. 95.

62 At para. 96. Footnote omitted.
In Lucchetti v. Peru, the BIT between Chile and Peru similarly provided that it would not apply to disputes that arose prior to its entry into force. A series of administrative measures by local authorities had denied or withdrawn construction and operating licences from the investors. The investors had successfully challenged the earlier administrative acts through court proceedings that took place entirely before the BIT’s entry into force. A few days after the BIT’s entry into force, the municipality issued further adverse decrees. The Tribunal found that the dispute had already arisen before the BIT’s entry into force and declined jurisdiction.\(^{64}\)

In Jan de Nul v. Egypt, the BIT between the BLEU\(^{65}\) and Egypt also provided that it would not apply to disputes that had arisen prior to its entry into force. A dispute already existed when in 2002 the BIT replaced an earlier BIT of 1977. At that time the dispute was pending before the Administrative Court of Ismailia which eventually rendered an adverse decision in 2003, approximately one year after the new BIT’s entry into force. The Tribunal accepted the Claimants’ contention that the dispute before it was different from the one that had been brought to the Egyptian court:

\[\ldots\] while the dispute which gave rise to the proceedings before the Egyptian courts and authorities related to questions of contract interpretation and of Egyptian law, the dispute before this ICSID Tribunal deals with alleged violations of the two BITs.\(^{66}\)

This conclusion was confirmed by the fact that the court decision was a major element of the complaint. The Tribunal said:

The intervention of a new actor, the Ismailia Court, appears here as a decisive factor to determine whether the dispute is a new dispute. As the Claimants’ case is directly based on the alleged wrongdoing of the Ismailia Court, the Tribunal considers that the original dispute has (re)cristallized into a new dispute when the Ismailia Court rendered its decision.\(^{67}\)

It followed that the Tribunal had jurisdiction over the claim.

Helman v. Egypt concerned a clause in the BIT between Denmark and Egypt which excluded its applicability to divergences or disputes that had arisen prior to its entry into force. The Tribunal distinguished between divergences and disputes in the following terms:

Although, the terms “divergence” and “dispute” both require the existence of a disagreement between the parties on specific points and their respective knowledge of such disagreement, there is an important distinction to make between them as they do not imply the same degree of animosity. Indeed, in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner. On the other hand, in case of a dispute, the

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\(^{64}\) Lucchetti v. Peru, Award, 7 February 2005, paras. 48–59. An application for the annulment of the Award was not successful: Lucchetti v. Peru, Decision on Annullment, 5 September 2007.

\(^{65}\) Belgo-Luxembourg Economic Union.

\(^{66}\) Jan de Nul v. Egypt, Decision on Jurisdiction, 16 June 2006, para. 117.

\(^{67}\) At para. 128.
difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. Consequently, different views of parties in respect of certain facts and situations become a “divergence” when they are mutually aware of their disagreement. It crystallises as a “dispute” as soon as one of the parties decides to have it solved, whether or not by a third party.\textsuperscript{68}

On that basis, the Tribunal found that, even though a divergence had existed before the BIT’s entry into force, that divergence was of a nature different from the dispute that had arisen subsequently. It followed that the Tribunal had jurisdiction over the dispute.\textsuperscript{69}

3. The Legal Nature of the Dispute

a) Legal and Non-Legal Disputes

The requirement that a dispute must be “legal” in order to qualify for settlement by the Centre gave rise to much debate during the Convention’s preparation. The Working Paper contained no reference to the dispute’s legal nature, but it was pointed out that a clarification should be added to exclude political or commercial disputes (History, Vol. II, pp. 54, 83, 96). The Preliminary Draft referred to a “dispute of a legal character” (Vol. I, p. 112). These words were explained as excluding moral, political or commercial claims (Vol. II, pp. 203, 259, 267, 322, 397) or as expressing the requirement that a legal right or obligation had to be involved (at pp. 267, 285, 322, 565). A number of delegates from capital-exporting countries found the reference to legal disputes too limiting or too confusing and suggested its deletion (at pp. 88, 322, 396, 411, 412, 565) or found a definition unnecessary (at pp. 395, 401). Others asked for more clarification (at pp. 376, 395, 493, 495). The subsequent First Draft not only retained the reference to legal disputes but added the following definition:

“legal dispute” means any dispute concerning a legal right or obligation or concerning a fact relevant to the determination of a legal right or obligation;\textsuperscript{70}

In reaction to this draft, some delegates stated that they did not find this definition useful and that it should be deleted (at pp. 701, 707). Others offered alternative definitions (at pp. 707, 833, 835). Yet another group suggested the deletion of the limitation to legal disputes altogether (at pp. 702, 831). Eventually, it was decided by a large majority to retain the qualification “of a legal character” but without any further definition (at p. 826). The change from “dispute of a legal character” to “legal dispute” in the Convention’s final version appears to be one of pure drafting convenience.

The Report of the Executive Directors adds the following clarification:

26. . . . 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

\textsuperscript{68} Hefen v. Egypt, Decision on Jurisdiction, 17 October 2006, para. 52.
\textsuperscript{69} At paras. 53–57.