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THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES

By A. BROCHES *

On March 18th of this year the Executive Directors of the World Bank approved the text of a "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" and submitted it to the Bank's 102 member governments for signature and ratification.

The Convention establishes an International Centre for Settlement of Investment Disputes as an autonomous international institution "to provide facilities for conciliation and arbitration of investment disputes". The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.

Not every kind of investment dispute may be brought to the Centre. For one thing, the dispute must be a "legal dispute arising directly out of an investment". Secondly, one of the parties must be a Contracting State or a subdivision or agency of such a State, and the other party must be a national of another Contracting State. Thirdly, and most importantly, the parties must have consented to submit the dispute to the Centre, a provision which the Executive Directors in their report have described as "the corner-stone of the jurisdiction of the Centre". However, once the parties have given their consent, which may be either before or after the dispute has arisen, it cannot be withdrawn unilaterally.

Use of the Centre's facilities for conciliation and arbitration is entirely voluntary. No government and no investor will ever be under an obligation to go to conciliation or arbitration without having consented to do so. But once having consented they are bound to carry out their undertaking and, in the case of arbitration, to abide by the award.

Proceedings before the Centre, whether for conciliation or arbitration, may be instituted either by a Contracting State or by an investor. The Centre will maintain a Panel of Conciliators and a Panel of Arbitrators. Each Contracting State will be entitled to designated four members to each panel. The parties determine the number (which must be an uneven one) and the method of appointing members of a Conciliation Commission or an Arbitral Tribunal. If the parties cannot agree, provisions of the Convention specifying the number and manner of appointment of conciliators or arbitrators become operative, so that the proceedings will not be frustrated. If one of the parties refuses to appear in arbitration proceedings, the Tribunal may render a default award. The applicable rules of procedure will be those agreed by the parties, but failing their agree-

* Address by the General Counsel of the World Bank at the Section Luncheon at the Regional Meeting in San Juan, Puerto Rico, May 27, 1965.

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ment rules adopted by the Administrative Council of the Centre will apply. Arbitral Tribunals will apply the law agreed by the parties; if there is no agreement, the Tribunal will apply the law of the State party to the dispute, as well as any applicable rules of international law.

With respect to the question of the exhaustion of local remedies, the Convention provides that, if neither party to an arbitration agreement explicitly reserves the right to have recourse to other remedies or requires that other avenues of relief shall first be exhausted, it will be conclusively assumed that they meant to exclude any remedy other than arbitration.

Under the provisions of the Convention the parties are bound to abide by the terms of an arbitral award. They may not appeal it and it is not subject to any other remedy unless there are grounds, as specified in the Convention, for revision or annulment.

Looked at from the investor's point of view, the principal feature of the Convention is that, given the consent of the host government—and that consent is irrevocable—the investor will have direct access to the conciliation and arbitration facilities, without the intervention of his national government. As a concomitant of that recognition, the Convention provides that, once an investor and a host government have agreed to submit a dispute to arbitration, the investor's government will not be entitled to take up his case. This development of existing international law has, in my opinion, the great merit of helping to remove investment disputes from the intergovernmental political sphere.

The negotiation of an international agreement of this type is a many faceted and fascinating enterprise. We have carried on these negotiations not through the medium of the traditional diplomatic conference but through a series of consultative meetings held on a regional basis followed by a world wide meeting of legal representatives of member governments. All of these meetings reported to the governing bodies of the Bank. The final action on the Convention was taken, as I said at the beginning of these remarks, by the World Bank's Executive Directors who approved the text for submission to the Bank's 102 member governments. The Convention is now open for signature and will enter into force upon signature and ratification by twenty States. During this month the Convention has received its first signatures. Tunisia signed on May 5th and Great Britain signed yesterday morning, the 26th.*

I referred to the process of negotiation of the Convention as a fascinating enterprise. Let me mention some of the elements which made it so.

The purpose of the Convention is to improve the investment climate, and thereby to stimulate a larger flow of international capital into those

* By June 30, 1965 the Ivory Coast, Jamaica, Nigeria and Pakistan had also signed the Convention or officially announced that they would sign it in the immediate future.

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areas of the world which need and wish to attract it. On this point, the interests of capital-exporting and capital-importing countries coincide. However, it is clear that the first group would wish to maximize the protection of foreign investment, whereas the second would wish to minimize limitations on the freedom of action of host governments.

For another thing, the subject matter of the Convention, conciliation and arbitration, even though affected by policy and political considerations of the kind I just mentioned, is essentially technical and lies in a field in which there are great differences among the various legal systems represented in the Bank's membership. Finally, there is a great variety of techniques for regulating relations between foreign investors and host States. In some parts of the world most major investments are governed by agreements entered into between the investor and the host State, whereas in other parts of the world foreign investments are regulated by general law or, after approval by the host State, by special investment promotion legislation reserved for approved investments.

You will realize therefore that in order to arrive at a workable and broadly acceptable agreement a whole series of compromises was necessary. The Convention had to take account of the various ways in which foreign investors participate in the economies of host countries, it had to reconcile differences in legal concepts and traditions and, finally, it had to strike an equitable balance between the interests of foreign investors and those of host States.

I have been so deeply involved in the negotiation of those compromises that you will not be surprised if I say that I am satisfied with the final result. But I am also fully aware that this or that group of countries or legal or business interests will feel disappointed or unhappy because a particular provision to which they attached particular importance was not adopted or because they were unable to obtain agreement to the deletion of a provision which they found objectionable. Time does not permit me to analyze all the issues that were raised and the ways in which we tried to solve them.

But since this is a joint meeting of North American and Latin American lawyers I would like to say something about the Latin American attitude to the Convention or, rather, what is *said to be* the Latin American attitude to the Convention.

Last September it was widely reported in the press that at the World Bank meeting in Tokyo the Latin American governors as a group had registered a loud and clear "NO" to the very idea of a Convention which contemplated international adjudication of disputes between governments and foreign investors.

These reports were entirely correct. However, there is room for serious doubt whether this "NO" (which had become known in Latin America

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as "El No de Tokyo") represented the considered opinion of the Latin American countries as a group. Many governors had little or no information about the proposals and I know that in a number of countries the original negative view is being reconsidered in the light of the final text.

I do not know what the result of that reconsideration will be, and I do not want to express a view as to what it should be. That is a matter for the sovereign determination of the countries concerned. But I do want to express the hope that whatever conclusions are reached will be arrived at after careful study and analysis of the Convention. And in that connection, Mr. Chairman, I think it would not be improper for me to discuss—and to discuss in a critical vein—some of the arguments which have been advanced in Latin America *against* the Convention.

Argument No. 1: The Convention is unacceptable because it introduces compulsory arbitration. No matter how often this statement is repeated, it remains entirely untrue. The text of the Convention makes it abundantly clear that the mere fact of signature and ratification of the Convention does not impose any obligation on a Contracting State to submit any particular dispute to arbitration, and that in fact no State and no investor can ever be compelled to go to arbitration unless they have previously agreed to do so in writing.

Argument No. 2: Submission to international arbitration of disputes between the State and a foreign investor is prohibited by Latin American constitutions. In its generality this statement is certainly wholly without foundation. I am not an expert in Latin American constitutional law, but I have been advised that only the Constitution of Venezuela contains a prohibition against the submission of state contracts to any forum other than the Venezuelan courts. And even that Constitution does not prohibit arbitration of disputes with parastatal agencies. Nor does it prohibit conciliation.

Argument No. 3: The Convention violates the constitutional principle of equality of citizens and aliens. Quite apart from the fact that that principle particularly contemplates protection of the alien against discriminatory treatment rather than a prohibition of preferred treatment of aliens, the Convention does not establish any discrimination since it confers no rights on aliens. Aliens are not entitled under the Convention to bring arbitral proceedings against the State except with the State's consent.

Argument No. 4: The establishment of international conciliation and arbitration facilities is evidence of an unacceptable lack of confidence in the integrity and independence of the national courts. I think that this is a distortion of the motives underlying the Convention. If there is a lack of confidence among investors it is not a lack of confidence in the integrity of the national courts but a fear that the executive and legislative branches will take politically motivated actions which the courts are powerless to deal with. This is a fact that has to be faced and one, moreover, that is not surprising in a world that is in political ferment.

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Argument No. 5: The history of international arbitration in Latin America has been an unfortunate one. I have never heard a bill of particulars to support that argument, and Latin American jurists who have made special studies of the subject have told me that they have been unable to find a basis for this oft-repeated statement. My own explanation of the reasons for the statement is that the history of foreign investment in Latin America has not always been a happy one. But this is no argument against the creation of facilities for conciliation and arbitration of investment disputes to which investors may only have access when the State gives its consent.

In giving you this sample of what I consider *wrong* arguments against the Convention, I want to make a plea for a careful and dispassionate examination of that document on its merits. And in that examination the legal profession can play an important role.

In their Report accompany the Convention, the Executive Directors state as their aim the strengthening of the partnership between countries for economic development. In their opinion the creation of an institution designed to facilitate the settlement of disputes between States and foreign investors could be a major step toward promoting an atmosphere of mutual confidence which, in turn, would stimulate a larger flow of private international capital into those countries which wish to attract it.

The Convention offers a service to those countries (whether capital-exporting or capital-importing) that want to have it available. Obviously, the greater the number of participating countries, the greater the potential value of the Convention will be. But it can be of value even if initially only a relatively small number of countries adhere. The Convention will enter into force after signature and ratification by 20 countries. We are confident that this will be achieved within a relatively short time and that among the initial twenty Contracting States both developed and developing countries will be represented. We are also hopeful that once the Convention is in force and the Centre established thereby will have proved its usefulness, countries that initially will be on the sidelines and those that have expressed reservations to the very idea of international adjudication, may come to accept it in time as a useful instrument of their development policy.

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