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## **Toward Mandatory ICSID Conciliation?**

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# Commentary

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## Toward Mandatory ICSID Conciliation?

### Reflections On Professor Coe's Article On Investor-State Conciliation

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Eric van Ginkel

*[Editor's Note: Eric van Ginkel is an Arbitrator and Mediator in Los Angeles, California, and Adjunct Professor at the Straus Institute for Dispute Resolution at Pepperdine University School of Law, where he teaches Alternative Dispute Resolution and International Investment Disputes. Copyright 2006 by author. Replies to this commentary are welcome.]*

Professor Jack J. Coe Jr.'s article, "Toward a Complementary Use of Conciliation in Investor-State Disputes — A Preliminary Sketch," is an excellent and thought-provoking look at conciliation as an under-utilized form of dispute resolution within the framework of investor-state dispute resolution. The article suggests a number of important ways in which conciliation can become a more useful tool in the investor-state context. It makes one re-think the entire process in ways not previously attempted. The article also, intentionally, invites discussion. I would like to focus on how Professor Coe's suggestions can be implemented within the existing framework of the ICSID Convention.

Historically, at a time (in the early 1960's) that conciliation was far from an established form of dispute resolution, it is more than remarkable that the drafters of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (known as the "ICSID" or "Washington" Convention)<sup>1</sup> even considered the possibility of conciliation as one of the two dispute resolution methods for resolving investor-state disputes.

The number of countries that have signed and ratified the Washington Treaty is testimony to the enormous

foresight that guided its drafters. As of January 25, 2006, as many as 155 States had signed the Convention, of which 143 States had deposited their instruments of ratification. In contrast, 137 States have ratified the well-known Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (known as the "New York Convention").<sup>2</sup>

The drafters of the Washington Convention contemplated that in order to encourage foreign direct investment, an impartial and effective system of dispute settlement was essential. The only way to achieve such a system, it was thought, was to design a system that would effectively avoid the use of domestic courts of both the host state and the investor's home state. Also, it was felt that the use of *ad hoc* arbitration, although a useful option, carried significant procedural disadvantages.

As a result, the ICSID Convention offers a self-contained system for dispute settlement that contains not only the necessary rules of procedure and institutional support for the conduct of those proceedings, but also includes assurances that the process cannot be frustrated by non-participation and that arbitration results in a binding award that is recognized as final and enforceable in all States that are signatories to the Convention. Domestic courts do not have the power to review ICSID awards, and such awards can be executed against all non-public assets of a respondent State.<sup>3</sup> Thus, although voluntary compliance is the norm, the Convention provides the winning party with a big stick that is likely to be at least in part responsible for the voluntariness of such compliance.

There are essentially two problems with the current system of conciliation under the ICSID Convention: first, under current interpretation of the Convention, how to use the methods of dispute resolution appears to be cast as a *choice* between instituting conciliation proceedings under Article 28 or arbitration proceedings under Article 36. For example, if the claimant (first) chooses conciliation under Article 28 of the Convention, the theory is that the other party may well be prevented from instituting arbitral proceedings, — unless it has been clearly provided (in the investment agreement, the applicable bilateral investment agreement or other document in which the State has given its consent to ICSID dispute resolution) that a conciliation proceeding not resulting in a settlement may be followed by arbitration.<sup>4</sup>

The second drawback of conciliation (as the ICSID Convention is currently interpreted) is that whenever a conciliation instituted prior to an arbitration proceeding were to result in a settlement, the settlement agreement does not have the force and effect of an arbitral award. As a result, if the settlement were to provide for monetary consideration in favor of the investor, the investor would have no better assurance that the State will recognize and fulfill its obligations under the settlement agreement than it had when the State entered into the investment agreement.

Thus, the very strength of the ICSID system as it applies to arbitration, *i.e.* almost unconditional enforceability of the arbitral award, is missing if one commences the proceedings with conciliation.

As Professor Coe already suggests, this picture will change considerably if conciliation were to be commenced *after* the institution of arbitration proceedings, because in such event Arbitration Rule 43 will apply and allow the parties to convert their settlement agreement into a binding arbitral award on agreed terms.<sup>5</sup>

In my opinion, there is nothing in the ICSID Convention that prevents arbitration and conciliation proceedings from being conducted concurrently.<sup>6</sup> The Institution Rules<sup>7</sup> may have to be adapted somewhat to make clear that Conciliation proceedings can be commenced not only separately, but also in conjunction with an arbitration proceeding. Within the structure of the Convention, it is even possible in

my opinion that the Arbitration Rules be amended to provide for *mandatory* concurrent conciliation proceedings unless the parties have expressly agreed to exclude concurrent conciliation proceedings.

Concurrent conciliation proceedings should preferably not be commenced before the Arbitral Tribunal has been constituted and has held its first session in accordance with Arbitration Rule 13, or, alternatively, at the Pre-Hearing Conference referred to in Arbitration Rule 21.<sup>8</sup> The first session is often also the preliminary procedural and scheduling hearing in which the Tribunal sets the various dates on which, *inter alia*, the various pleadings are to be submitted.<sup>9</sup> As part of its procedural order following the first session, the Tribunal could order the appointment of a Conciliation Commission (usually to consist of one conciliator) in accordance with the Conciliation Rules.

Once appointed, the Conciliator, not unlike the Arbitral Tribunal, or for that matter a commercial mediator, should arrange a pre-mediation conference (in person or by telephone), in which he or she could set out a conciliation schedule that would work within the schedule set by the Arbitral Tribunal. Conciliation Rule 20 already provides for such a preliminary hearing. At least within the ICSID procedural system, I do not believe it is necessary for the Conciliator to work closely with the Arbitral Tribunal.

One of the most important aspects of the conduct of *any* conciliation proceeding is the determination of whether and when the dispute is “ripe” for conciliation. This will differ from case to case, and ought to be a focus of special attention for the conciliator in investor-state disputes. If there are jurisdictional challenges, and if the Tribunal decides to rule on those challenges separately, it may often be useful for the conciliator to consider postponing the actual conciliation proceedings until after the Tribunal has rendered its decision on jurisdiction.

It would seem that the implementation of concurrent arbitration and conciliation proceedings as proposed by Professor Coe within the ICSID dispute resolution system would require only one major change<sup>10</sup> in the applicable ICSID Rules: the Arbitration Rules would need to include a provision that the Arbitral Tribunal shall order as part of its initial procedural order(s) that a Conciliation Commission be appointed in ac-

cordance with the Conciliation Rules. It appears that, once appointed, the Conciliator's authority under the existing Conciliation Rules is broad enough to schedule hearings with the parties as he or she sees fit under the circumstances of the particular case.

I agree with Professor Coe that the proposed concurrent proceedings may well result in the increased use of conciliation in, and the settlement of, investor-state disputes under the ICSID Convention, which will enable settlement agreements to be converted into arbitral awards upon agreed terms<sup>11</sup> that have the same force and effect as any other award rendered by the Tribunal, but with very substantial savings in time and money.

The steady increase in the number of bilateral investment agreements and the likely corresponding increase in the number of investor-state disputes requires the establishment of an effective conciliation system that is conducive to increasing the number of such cases that end in a settlement. Professor Coe makes clear the many advantages that increased use of conciliation will bring to the ICSID system. The Washington Convention, with minor amendments to the Rules adopted pursuant to it, makes the concurrent use of arbitration and conciliation possible right now.

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## Endnotes

1. The Washington Convention was the brainchild of Aron Broches, the then General Counsel of the World Bank. On March 18, 1965, the World Bank's Executive Directors submitted the Convention to member governments of the World Bank for their consideration. The Convention entered into force on October 14, 1966, when it had been ratified by 20 countries. See generally, *UNCTAD Course on Dispute Settlement, Module 2.1, Overview* 9-10 (2003), available at [http://www.unctad.org/en/docs/edmmisc232overview\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232overview_en.pdf) (last visited March 20, 2006). The text of the Convention, together with the implementing Regulations and Rules can be found at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> (last visited March 20, 2006).
2. See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited March 20, 2006).
3. Article 53 of the Convention provides that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention.
4. See *UNCTAD Course on Dispute Settlement, Module 2.2, Selecting the Appropriate Forum* 13-14 (2003), available at [http://www.unctad.org/en/docs/edmmisc232add1\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add1_en.pdf) (last visited March 21, 2006), which cites *SPP v. Egypt, Decision on Jurisdiction II, 14 April 1988*, 3 ICSID REPORTS 156, in which the Tribunal held that "Once consent has been given 'to the jurisdiction of the Centre,' the Convention and its implementing regulations afford the means for *making the choice between the two methods of dispute settlement*. The Convention leaves that choice to the party instituting the proceedings. [*emphasis added*]
5. The enforcement of a mediated settlement agreement has been the subject of great concern also within the context of international commercial mediation. For example, the California International Conciliation Act provides in Code of Civil Procedure Section 1297.401, that the written agreement "shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of [California], and shall have the same force and effect as a final award in arbitration." The problem may be, however, that a foreign court would treat such an "award" as not constituting an arbitral award within the meaning of the New York Convention and, consequently, refuse to enforce it. This issue proved to be a stumbling block among the Working Group in its deliberations leading up to the UNCITRAL Model Law on International Commercial Conciliation, which, as a result, left "Article 14, Enforceability of settlement agreement" essentially "blank", to be completed by each State adopting the Model Law. See generally, Eric van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation, A Critical Appraisal*, 21 J. INT'L ARB. 1, 52-54, 56-57 (2004).
6. In fact, Article 35 of the Convention expressly refers to other proceedings, including "before arbitrators,"

when it provides that neither party is entitled to invoke or rely on views expressed, statements, admissions or offers of settlement made in the conciliation proceedings. Such other proceedings before arbitrators could include arbitration proceedings instituted in accordance with Article 36 *et seq.* of the Convention.

7. Particularly, Institution Rule 1 that deals with the Request.
8. Currently, Arbitration Rule 21(2) provides for the possibility of a pre-hearing conference between the Tribunal and the parties to consider the issues

in dispute with a view to reaching an amicable settlement. This may also be an appropriate time and place for the Tribunal to order conciliation proceedings to commence, either in lieu of a settlement conference with the Arbitral Tribunal, or if this settlement conference takes place but does not lead to a settlement.

9. In accordance with Arbitration Rule 20.
10. In addition to the minor amendments noted herein.
11. In accordance with Arbitration Rule 43. ■



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