

CIL

CENTRE FOR INTERNATIONAL LAW
National University of Singapore

ICSID CONCILIATION

J Christopher Thomas QC | 17 January 2017



GENESIS OF ICSID

- Proposed name: “International Conciliation and Arbitration Center” (1961-65)
- Final name: “International Centre for the Settlement of Investment Disputes”

CONCILIATION VERSUS ARBITRATION

The differences between the [Convention's] two sets of provisions reflect the basic distinction between the process of conciliation which *seeks to bring the parties to agreement* and that of arbitration which *aims at a binding determination* of the dispute by the Tribunal.

REPORT OF THE EXECUTIVE DIRECTORS, PARA 37

ICSID HAS 5 TYPES OF PROCEEDINGS

- ICSID Convention Conciliation
- ICSID Convention Arbitration
- ICSID Additional Facility Conciliation
- ICSID Additional Facility Arbitration
- ICSID Additional Facility Fact-Finding

HISTORY OF THE RULES

- ▶ Convention entered into force on 14 October 1966.
- ▶ In 1967, Paul Szasz was appointed to finalize the Conciliation and Arbitration Rules to be adopted by the ICSID Administrative Council.
- ▶ The Bank's General Counsel, Aron Broches, called Szasz: "*the greatest international proceduralist known to man or God*".

HISTORY OF THE RULES

- ▶ Szasz completed the ICSID Conciliation and Arbitration Rules in six weeks.
- ▶ The drafts were sent to the Contracting States for their review, but hardly any changes were suggested.
- ▶ They were adopted on 1 January 1968.
- ▶ Unlike the Arbitration Rules, the Conciliation Rules have hardly changed since 1968.
- ▶ As a result, their explanatory notes remain a useful interpretative guide.

COMMONALITIES

Arbitration

- Immunities
- Jurisdiction based on consent
- Any legal dispute arising directly out of an investment
- Rights of a national of a Contracting State
- Request in writing
- Uneven number of arbitrators
- Panel of Arbitrators (but need only be used for institutional appointments)

Conciliation

- Immunities
- Jurisdiction based on consent
- Any legal dispute arising directly out of an investment
- Rights of a national of a Contracting State
- Request in writing
- Uneven number of conciliators
- Panel of Conciliators (but need only be used for institutional appointments)

COMMONALITIES

Arbitration

- Default appointment
- Qualities of arbitrators*
* With an added requirement of competence in law. [Article 14(1)]
- Independent judgment
- Challenges to arbitrators
- Equal treatment of the parties
- Compliance with time limits set by the tribunal

Conciliation

- Default appointment
- Qualities of conciliators
- Independent judgment
- Challenges to conciliators
- Equal treatment of the parties
- Compliance with time limits set by the commission

COMMONALITIES

Arbitration

- Objections to jurisdiction
- Party control over attendance at hearings
- Written statements, witnesses and experts
- Tribunal's power to call for production of documents, witnesses, conduct visits, etc.
- Tribunal must produce an award (unless proceeding discontinued)

Conciliation

- Objections to jurisdiction
- Party control over attendance at hearings
- Written statements, witnesses and experts
- Commission's power to call for production of documents, witnesses, conduct visits, etc.
- Commission must produce a Report

DIFFERENCES

Conciliation

- Default leads to termination of proceeding
- No limits on appointment of nationals
- Commission can hear each party separately
- No applicable law clause
- Parties' duty of cooperation in good faith with Commission

Arbitration

- Continuance if party defaults
- Limits on appointment of nationals
- Tribunal cannot meet *ex parte* with a party
- Applicable law clause
- No explicit duty to cooperate in good faith with tribunal

DIFFERENCES

Conciliation

- Costs borne equally
- Unless the parties agree, recommendations are non-binding
- No recourse against Report
- “Most serious consideration” of recommendations

Arbitration

- Costs-shifting permitted
- Award binding (subject to Convention’s remedies)
- Annulment of award
- Contracting States’ courts must recognize and enforce the Award’s pecuniary obligations

NATURE OF THE PROCESS

Commentary A to Rule 22, *Functions of the Commission*

“...Under the Convention, conciliation proceedings bear a certain resemblance to arbitration... More generally, *they are both based on a full, conscientious and impartial examination of the issues in dispute, carried out in cooperation with the parties; both are ‘contentious’ proceedings.* Therefore paragraph (1) of this Rules requires that the parties be heard...

...However, the analogy between the two types of proceedings should not be carried too far...”

COMMISSION'S GENERAL OBLIGATION AND POWERS

Article 22(1):

“In order to clarify the issues in dispute between the parties, the Commission shall hear the parties and shall endeavor to obtain any information that might serve this end. *The parties shall be associated with its work as closely as possible.*”

Commission can:

- ▶ Make recommendations, including provisional measures
- ▶ Request information from the parties or other persons
- ▶ With consent, visit any place

PARTIES' GOOD FAITH DUTY TO COOPERATE

- *The parties shall cooperate in good faith with the Commission and, in particular, at its request furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call.*
- *The parties shall also facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake.*

CLOSURE

- ▶ If agreement reached: the Commission closes the proceeding and prepares its report noting the issues in dispute and recording that the parties have reached agreement. At the parties' request, the report shall record the detailed terms and conditions of their agreement.
- ▶ If no likelihood of agreement: at any stage of the proceeding the Commission shall, after notice to the parties, close the proceeding and draw up its report (recording the failure to reach agreement).
- ▶ Non-appearance or failure to participate: Commission shall, after notice to the parties, close the proceeding and draw up its report (recording the failure of that party to appear or participate).

CONTENTS OF REPORT

- ▶ The report shall also record any agreement of the parties (subject to Article 35*) concerning the use in other proceedings of the views expressed or statements or admissions or offers of settlement made in the conciliation proceeding or any recommendation made by the Commission.
- ▶ The Centre shall not publish the report without the consent of the parties.

*Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.” [Article 35]

ICSID CONCILIATION'S FUNCTION

“...to examine the contentions raised by the parties, to clarify the issues, and to endeavour to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement.”

Lord Wilberforce

ICSID CONCILIATION



CENTRE FOR INTERNATIONAL LAW

J Christopher Thomas QC



<https://cil.nus.edu.sg>



ciljct@nus.edu.sg

