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RECENT DEVELOPMENTS IN INTERNATIONAL ORGANIZATIONS

THE EFFECT OF THE ANNULMENT DECISIONS IN *AMCO v. INDONESIA* AND *KLÖCKNER v. CAMEROON* ON THE FUTURE OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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INTRODUCTION

The International Centre for Settlement of Investment Disputes (ICSID)¹ provides a forum for arbitrating investment disputes between foreign investors and contracting states.² Theoretically, ICSID interna-

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1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, *reprinted in* 4 I.L.M. 532 (1965) [hereinafter ICSID Convention]. The United States signed the Convention on August 27, 1965. Note, *Some Legal Questions Concerning the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 12 Sr. Louis U.L.J. 679, 679 n.1 (1968). The Senate approved the Convention on May 16, 1966, and President Johnson ratified it on June 1, 1966. *Id.* Congress later enacted enabling legislation. 22 U.S.C. §§ 1650, 1650a (1966).

2. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263, 264 (1966) [hereinafter Broches, *Observations on Jurisdiction*]. To initiate ICSID proceedings, an applicant must establish a *prima facie* case that ICSID has jurisdiction over the dispute. Broches, *Settlement of Disputes Arising out of Investment in Developing Countries*, 11 INT'L BUS. LAW. 206, 208 (1983) [hereinafter Broches, *Settlement of Disputes*]. The ICSID Secretary-General will register the request and will establish a tribunal, unless the request for arbitration is manifestly outside the jurisdiction of ICSID. *Id.* The respondent may address objections to the jurisdiction of ICSID pursuant to article 41 of the Convention. *Id.*; see also ICSID Convention, *supra* note 1, art. 41(2) (providing that a tribunal must determine whether the objection of a contracting party to the jurisdiction of ICSID is a preliminary question or part of the merits of the dispute).

Unless the parties do not agree on the number of arbitrators, the tribunal will consist

tional arbitral awards are final and binding.³ Foreign investors rely on ICSID to enforce tribunal awards, because article 54 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) provides that a contracting state must treat an ICSID award as a final judgment of a court of that state.⁴ Similarly, a contracting state expects enforcement of ICSID tribunal awards, because ICSID prevents the foreign investor's home state from making international claims or intervening through diplomatic channels.⁵

An *ad hoc* committee, however, pursuant to ICSID rules,⁶ annulled the ICSID arbitration awards in *Amco v. Indonesia*⁷ and *Klöckner v. Cameroon*.⁸ These two annulments of arbitral awards are the only ones in the history of ICSID. Nevertheless, the annulments aroused considerable controversy about the future of ICSID as an alternative dispute settlement forum.⁹

This concern, however, is not entirely justified. Recent developments within the ICSID system will promote heightened demand for ICSID arbitration. First, the arbitral tribunals' expansive interpretations of ICSID jurisdiction in case law increases the willingness of contracting parties to incorporate ICSID arbitration clauses into their agree-

of three arbitrators. Each party will appoint one arbitrator and the third, who is the president of the tribunal, is appointed through the agreement of the parties. ICSID Convention, *supra* note 1, art. 37(2)(b). If the parties do not appoint arbitrators, then the President of the World Bank (acting as *ex officio* chairman of the Administrative Council of ICSID) appoints the arbitrators. *Id.* art. 38.

3. See Branson, *Annulments of 'Final' ICSID Awards Raise Questions About the Process*, NAT'L L.J., Aug. 4, 1986, at 25 (questioning the finality of international arbitration awards).

4. ICSID Convention, *supra* note 1, art. 54(1). A contracting state with a federal constitution may enforce an ICSID award in its federal courts as if it were a final judgment of the courts of that state. *Id.*

5. *Id.* art. 27(1).

6. *Id.* art. 52.

7. *Amco Asia Corp. v. Indonesia* (Case No. ARB/81/1), registered Feb. 27, 1981; Award on the Jurisdiction of Sept. 25, 1983, reprinted in 23 I.L.M. 351, 351 (1984) [hereinafter 1983 Amco Award on Jurisdiction]; Award on the Merits of November 21, 1984, excerpted in 24 I.L.M. 1022, 1022 (1985) [hereinafter 1984 Amco Award on the Merits]; Decision on Request for Provisional Measures of December 9, 1983, reprinted in 24 I.L.M. 365, 365 (1985) [hereinafter 1983 Amco Provisional Decision]; Annulment Decision of May 16, 1986, 1 INT'L ARB. REP. 649, 649 (1986) [hereinafter 1986 Amco Annulment Decision].

8. *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon* (Case No. ARB/81/2), registered Apr. 14, 1981; Award of Oct. 21, 1983, excerpts translated in 1 J. INT'L ARB. 145, 145 (1984) [hereinafter 1983 Klöckner Decision]; Annulment Decision of May 3, 1985, excerpts translated in 1 ICSID REV. FOREIGN INV. L.J. 89, 89 (1986) [hereinafter 1985 Klöckner Annulment Decision].

9. Branson, *supra* note 3, at 25.

ments.¹⁰ Second, broad jurisdictional interpretations allow contracting parties to apply ICSID provisions to a wide range of circumstances.¹¹

Additionally, developments outside the ICSID system will strengthen the contracting parties' use of ICSID. First, the establishment of the Multilateral Investment Guarantee Agency (MIGA) promotes ICSID arbitration, because it insures investors against non-commercial risks such as expropriation and nationalization.¹² Second, contracting parties cannot rely on other arbitral tribunals such as the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA), because they subject arbitration procedures to the control of the courts of the arbitration forum.¹³ Contracting parties designate ICSID as the forum for settling disputes, preventing a domestic court of the parties from enforcing its country's laws.¹⁴ ICSID membership will therefore continue to increase significantly as constructive developments continue.¹⁵

This article analyzes the developments within and outside the ICSID system that sustain the demand of contracting parties for ICSID arbitration, despite the *ad hoc* committees' annulments in *Amco v. Indonesia* and *Klöckner v. Cameroon*. Part I traces the external developments of the ICSID system and the internal procedures of ICSID that reduce the importance of the *Amco* and *Klöckner* annulments, allowing for continued growth of ICSID. Part II discusses ICSID jurisdictional requirements and the case law highlighting these requirements and offers

10. Rand, Hornick & Friedland, *ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction*, 19 N.Y.U. J. INT'L L. & POL. 33, 61 (1986) [hereinafter Rand, Hornick & Friedland].

11. *Id.*

12. Convention Establishing the Multilateral Investment Guarantee Agency, opened for signature Oct. 11, 1985, reprinted in 24 I.L.M. 1598, 1598 (1985) [hereinafter MIGA Convention]. See Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. FOREIGN INV. L.J. 1, 13 (1986) [hereinafter Shihata, *Roles*] (stating that the MIGA Convention will enter into force upon ratification through five capital-exporting and 15 capital-importing countries if the subscriptions of these countries amount to one-third of MIGA's authorized capital, or approximately \$36 million).

13. See Broches, *Settlement of Disputes*, *supra* note 2, at 207 (stating that developing countries prefer not to submit disputes to arbitration where courts of the arbitration forum review the arbitration procedures).

14. See ICSID Convention, *supra* note 1, art. 42(1) (providing that a tribunal decides disputes according to rules of law upon which the contracting parties agree).

15. See ICSID 1986 ANNUAL REPORT 4 (stating that ICSID membership has increased significantly since its inception). Accord Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L LAW. 521, 528 n.71 (1985) (showing a 1974 study finding that over 1000 investment contracts incorporated ICSID dispute resolution procedures and covered approximately \$2 billion in international investments).

definitions of ambiguous terms for parties negotiating ICSID contracts. Part III analyzes the effects of the annulment decisions in *Klöckner* and *Amco* and concludes that the demand for ICSID arbitration will increase regardless of the annulment decisions.

I. BACKGROUND

A. DEVELOPMENTS EXTERNAL TO THE ICSID SYSTEM

Parties to international investment contracts will continue to utilize ICSID arbitration clauses because of the lack of alternatives in international and national law.¹⁶ There are three main reasons for this paucity of alternatives. First, the decisions of national courts usually have political undertones.¹⁷ Consequently, foreign investors perceive the decisions of national courts as unfair and discriminatory.¹⁸ Second, the International Court of Justice (ICJ) fails to protect shareholders with substantial interests in an investment, because the government of the shareholders cannot pursue the shareholders' claims.¹⁹ Third, AAA and ICC awards are subject to the control of domestic law.²⁰ Consequently,

16. See Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA. J. INT'L & COMP. L. 343, 343-44 (1974) (stating that prior to the establishment of ICSID, no single forum offered a means of directly settling investment disputes between a private party and a governmental party).

17. Chong Su Yun, *The Convention on the Settlement of Investment Disputes - Commentary and Forecast*, 11 MALAYA L. REV. 287, 289 (1969). The executive and legislative branches of a state pressure the courts to decide cases favorably in the political interests of that state. *Id.* ICSID, however, establishes an autonomous jurisdictional system. Broches, *Settlement of Disputes*, *supra* note 2, at 208. No national authorities review or supervise ICSID arbitration. *Id.*

18. Chong Su Yun, *supra* note 17, at 289.

19. *Id.* For an investor to seek assistance from his or her government, the investor must first prove that international law denied the investor justice. *Id.* The government, in its discretion, can then pursue the claim through diplomatic notes or it can present a claim before the International Court of Justice (ICJ). *Id.* The jurisdiction of the ICJ, however, is limited. See *Barcelona Traction Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Judgment of Feb. 5) (holding that Belgium could not claim diplomatic protection on behalf of Belgian shareholders who held substantial shares in a Spanish corporation, because international law authorized only the state of incorporation, Canada, to make a claim).

In comparison to an investor, a contracting state must recognize and enforce an ICSID award as if it were a final judgment of its own court. ICSID Convention, *supra* note 1, art. 54(1); see also Broches, *Settlement of Disputes*, *supra* note 2, at 208 (stating that each contracting state must recognize an award rendered pursuant to the ICSID Convention and enforce the pecuniary obligations that the award imposes as if it were a final judgment from one of its own courts). The contracting state must present a certified copy of the ICSID decision to the court that the contracting parties designated in their contract. *Id.*

20. Broches, *Settlement of Disputes*, *supra* note 2, at 207. The ICC and AAA settle investment disputes for parties under national law supplemented through a treaty that recognizes and enforces the arbitral award. *Id.* Consequently, when parties submit

developing countries and their agencies usually disfavor submitting disputes to these arbitral courts.²¹ Under article 42 of the ICSID Convention, however, parties have the authority to decide the applicable law subsequent or prior to a particular investment dispute.²²

Additionally, some external developments indicate that the demand for ICSID arbitration will increase in the future. First, less developed countries (LDCs) have shifted demand from foreign borrowing (debt) to direct foreign investment (equity) as a means of acquiring foreign hard currency to stimulate their economic development²³ and have thereby ensured the utility of ICSID as a dispute settlement forum.²⁴ In addition, the ICSID Secretariat recently began promotional activities publicizing ICSID.²⁵ These efforts resulted in increased inquiries regarding information on ICSID, the drafting of ICSID clauses, and

disputes for arbitration to the AAA or ICC, they are subject to the jurisdiction of foreign courts. *Id.*

21. *Id.*; see Haight, *International Arbitration*, 14 CASE W. RES. J. INT'L L. 253, 255 (1982) (stating that foreign investors are likely to find the domestic courts of developing countries unacceptable for settling disputes).

22. ICSID Convention, *supra* note 1, art. 42(1). The ICSID Convention requires that the tribunal apply rules that the parties previously agreed upon to resolve a dispute. *Id.* In absence of such an agreement, the tribunal must apply the law of the contracting state party to the dispute, including its rules on the conflict of laws and rules of international law. *Id.* But cf. 1985 Klöckner Annulment Decision, *supra* note 8, at 112 (establishing a three tier standard of applicable laws to arbitral disputes where domestic law has first preference. According to the three tier Klöckner standard, tribunals first apply domestic law, and secondly, tribunals fill gaps in domestic law with international law. Where international law conflicts with domestic law, international law takes precedence. *Id.*; see 1986 Amco Annulment Decision, *supra* note 7, at 654 (stating that the committee's reading of article 42 is contrary to its plain meaning that will likely result in frustrating the expectations of the host state and thereby discouraging acceptance of ICSID).

23. See United Nations Commission on Transnational Corporations, *Recent Developments Related to Transnational Corporations and International Economic Relations, Report of the Secretary General*, at 16, U.N. Doc. E/10/1986/2 (stating that both bank lending to and direct foreign investment in developing countries have decreased significantly). The LDCs increased their demand for direct foreign investment because foreign borrowing created debt that the LDCs were unable to service or repay. *Id.* Equity investment, however, does not create debt. *Statement of the Honorable James A. Baker, III, Secretary of the Treasury of the United States Before the Joint Annual Meeting of the International Monetary Fund and the World Bank, Oct. 8, 1985, Seoul, Korea*, 25 I.L.M. 412, 417. Moreover, equity investment can stimulate growth and innovation, transfer technology, keep capital in the LDCs, and result in an alleviation of the long-term debt crisis. *Id.*

24. See ICSID, 1986 ANNUAL REPORT 16 (annex 1) (providing a complete list of the states that either signed or ratified the Convention). Some Latin American nations have ratified ICSID, demonstrating that they are changing their hostile attitudes toward international arbitration. *Id.*

25. ICSID 1986 ANNUAL REPORT 5. The Secretariat has issued new brochures and publications. *Id.* at 96. In addition, the Secretariat has participated in seminars and colloquia relating to arbitration, investments, and finance to reach non-legal professions. *Id.*

the use of ICSID arbitration. These external developments indicate that ICSID is an expanding institution.

Despite external developments supporting future use of ICSID arbitration, external political factors threaten the future use of ICSID.²⁶ First, states often perceive transnational contracts containing ICSID clauses as a threat to their sovereignty and the jurisdiction of their national courts.²⁷ States are inherently unable to accept the principle of equality of parties.²⁸ Second, LDCs perceive ICSID as a "Western idea."²⁹ Third, Latin American countries employ the Calvo Doctrine.³⁰ The Calvo Doctrine forbids any foreign state from interfering in the affairs of Latin American countries.³¹ Fourth, Latin American countries adopted the Andean Foreign Investment Code (Andean Code)³²

26. See Lalive, *Some Threats to International Investment Arbitration*, 1 ICSID REV. FOREIGN INV. L.J. 26, 34 (1986) (explaining that contracting parties encounter political problems when using ICSID arbitration).

27. See *id.* at 33 (explaining that states may perceive that ICSID partly diminishes their authority and discretion over transnational contracts). A host state that uses ICSID, however, could increase investments in that state. *Id.* at 34.

28. *Id.* at 37. The state as an entity is forced to play two roles in international arbitration proceedings: one as a state and the other as a contracting party. *Id.* Neither industrialized nor developing states can adjust themselves to ICSID as easily as transnational corporations. *Id.* at 36.

Consequently, the state party expects, or even requests, that a tribunal should not have the ability to grant procedural privileges because the tribunal should put the state on an equal footing with the investor. *Id.* at 37. Examples of such state requests include extensions of or disregard for time limits and derogation of ordinary rules of evidence. *Id.* This attitude poses a barrier to future expansion of international arbitration. *Id.* Foreign investors may begin to distrust ICSID if arbitral procedures do not recognize the equality of the parties. *Id.* If both the state party and investor are reluctant to arbitrate because of their concern about equality in the settlement of disputes, then the future success of the arbitral process is uncertain. *Id.* at 34. This concern, however, is overemphasized, because the bargaining powers of host states are beginning to equal those of investors. Gopal, *International Center for Settlement of Investment Disputes* 14 CASE W. RES. J. INT'L L. 591, 593 (1982).

29. Lalive, *supra* note 26, at 34. The LDCs often maintain the view that ICSID is a western idea, because the industrialized countries have made greater use of international arbitration than LDCs. *Id.* LDCs maintain that international arbitration serves only the interests of the industrialized nations. *Id.* Consequently, LDCs are not prepared to play in an arena where they perceive an inherent disadvantage for themselves. *Id.* at 35.

30. See Gopal, *supra* note 28, at 602 (explaining how Latin American countries use the Calvo Doctrine as a result of colonialist exploitation).

31. *Id.* The Calvo Doctrine was the consequence of colonialist investors making excessive profits without reciprocating sufficient benefits to the state. *Id.* at 602. Latin American countries treat foreigners as Latin American citizens in national courts. *Id.* ICSID, however, gives foreign investors a legal status different from that of investors in the host country. *Id.* Consequently, ICSID squarely opposes the Calvo Doctrine. *Id.* Nevertheless, the Calvo Doctrine will continue to impede contracting parties from using ICSID as a forum for investment disputes. *Id.* at 603.

32. Commission of the Cartagena Agreement, Decision No. 109, Andean Foreign Investment Code, Nov. 30, 1976, *reprinted in* 16 I.L.M. 138 (1977) [hereinafter

mandating that courts of the host country have jurisdiction over investors.

A more positive signal for the future use and effectiveness of ICSID is that many Latin American countries recently signed the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA).³³ MIGA insures investors against non-commercial risks, such as expropriation and nationalization.³⁴ This development indicates that investors may become more willing to submit disputes to ICSID in the future.³⁵

B. DEVELOPMENTS INTERNAL TO THE ICSID SYSTEM

In addition to external factors, several developments within ICSID contribute to its future application and effectiveness. First, the permissive provisions of the ICSID Convention allow a state party and an investor to depart from certain ICSID contractual provisions.³⁶ Consequently, a state and an investor may supplement the ICSID provisions in their contracts to further accommodate their needs.³⁷ Second, the

Andean Code].

33. See *Founders of MIGA Define Agency's Politics*, World Bank Release, Oct. 7, 1986 [hereinafter World Bank Release] (providing that 44 states, including eleven industrialized and 33 developing countries, signed the MIGA Convention as of October 7, 1986). *Id.* Of the 44 states, Barbados, Ecuador, Indonesia, and Saudi Arabia have ratified the MIGA Convention. *Id.* MIGA will become an independent international organization once the Convention Establishing the Multilateral Investment Guarantee Agency enters into force. See MIGA Convention, *supra* note 12, art. 61(a) (explaining the requirements for MIGA to become enforceable).

34. MIGA Convention, *supra* note 12, art. 11. Article 11 of the MIGA Convention covers the following categories of non-commercial risks: (1) the risk from currency conversion and transfer; (2) the risk of loss from the host government's legislative or administrative actions which deprive the foreign investor of ownership or control of the investment; (3) the repudiation of government contracts where the investor has no access to a competent forum, unreasonable delays in courts or inability to enforce a final judicial or arbitral decision; and (4) the risk from armed conflict and civil unrest. *Id.* See Shihata, *Foreign Investment, The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U.J. INT'L L. & POL'Y 97, 109 (1986) [hereinafter Shihata, *Foreign Investment*] (explaining these categories of non-commercial risks).

35. World Bank Release, *supra* note 33, at 13-25. MIGA compensates the foreign investor. MIGA Convention, *supra* note 12, art. 26; see Shihata, *Roles*, *supra* note 12, at 17 (discussing the financing provisions of MIGA). MIGA will vary its premiums according to the actual risks assumed under its guarantees. *Id.* After MIGA pays a claim, it will assume the same rights that the indemnified investor may have acquired against the host country. *Id.* MIGA would have recourse to international arbitration to enforce these rights. See Shihata, *Foreign Investment*, *supra* note 34, at 113-14.

36. See Shihata, *Foreign Investment*, *supra* note 34, at 104 n.35 (stating that certain permissive provisions apply only in the absence of agreement between the parties).

37. See Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101, 120 n.70 (1984) [hereinafter Delaume, *Practical Considerations*] (suggesting that the parties may want to keep the option of seeking interim or conservatory measures,

cost of ICSID arbitration is decreasing and its effectiveness is increasing.³⁸ Although ICSID arbitration has in the past taken a considerable amount of time, ICSID created measures in 1986 to make arbitration more efficient.³⁹

Some ICSID decisions, however, appear to make the tribunal's existence unstable. In *Klöckner v. Cameroon*,⁴⁰ the arbitral tribunal accepted the Cameroonian government's designation of a company, SOCAME, as one of its agencies, even though Cameroon designated the agency after the initiation of formal arbitration proceedings.⁴¹ This decision resulted in the investor instituting annulment proceedings.⁴² Moreover, the tribunal in *Amco v. Indonesia* asserted jurisdiction over P.T. Amco, the local subsidiary of a foreign parent corporation, even though Indonesia and the foreign parent corporation did not expressly agree to treat the subsidiary as a foreign corporation in the ICSID contract.⁴³ Consequently, Indonesia requested annulment

including attachment, in domestic courts); Shihata, *Foreign Investment*, *supra* note 34, at 104 (discussing the flexibility of the ICSID proceedings). The parties may determine the substantive rules that apply to the dispute. *Id.*; see ICSID Convention, *supra* note 1, art. 42 (providing that the parties may designate the rules of law that the tribunal shall use in case of dispute); Gopal, *supra* note 28, at 595 (discussing provisions that facilitate the renegotiation of the contracts as the bargaining power of the contracting party changes).

38. ICSID, 1986 ANNUAL REPORT 4. Prior to 1984, ICSID established maximum fees for arbitrators and *ad hoc* committee members. *Id.* at 5. ICSID itself admits that costs are high. *Id.* at 4. *But see* Soley, *supra* note 15, at 524 (appraising the low cost of ICSID fees resulting from the actual costs of the subsidized staff).

39. *See* Gopal, *supra* note 28, at 594 (concluding that the average ICSID arbitration settlement takes three years to complete and serves to stagnate the frozen capital of investors); ICSID, 1986 ANNUAL REPORT 4 (stating that the revised Regulations and Rules further economized time and costs by allowing a "pre-hearing" conference to exchange information and accelerate fact-finding); 2:1 NEWS FROM ICSID 5 (1985) (stating that ICSID saves time because it no longer requires that the secretary of each commission, tribunal and committee attend all the hearings). Also, the regulation revision that requires parties to make quarterly advance payments to cover arbitration costs serves as a disincentive to bring frivolous time-consuming claims. *Id.*

40. 1983 Klöckner Decision, *supra* note 8, at 145.

41. *Id.* at 149-50.

42. *Id.*

43. 1983 Amco Award on Jurisdiction, *supra* note 7, at 356. The arbitration settlement was the result of a dispute concerning the hotel of a multinational company that Indonesia expropriated. *Id.* When Amco Asia Corporation (Amco Asia) applied for and became a foreign business in Indonesia named P.T. Amco Indonesia (P.T. Amco), Amco Asia agreed to ICSID arbitration of all disputes between the business and the government. *Id.* at 357. P.T. Amco began construction of a hotel on land which was leased to it by P.T. Wisma Kartika (P.T. Wisma), an Indonesian corporation owned by an Indonesian army co-operative, INKIPAD (Induk Koperasi Angkatan Darat). *Id.* at 352. As a result of a dispute between P.T. Amco and P.T. Wisma, P.T. Wisma and the Indonesian army seized the hotel. *Id.* Amco Asia and P.T. Amco filed a claim for ICSID arbitration against Indonesia for expropriation of property in the amount of \$9 million in 1973. 1984 Amco Award on the Merits, *supra* note 7, at 1022. Indonesia,

proceedings.⁴⁴ The *ad hoc* committee's subsequent annulments of the tribunal's awards in *Klöckner*⁴⁵ and *Amco*⁴⁶ created uncertainty about the finality of ICSID arbitration awards.

The permissive provisions of the ICSID Convention as well as its decreased costs heighten the desirability of ICSID arbitration. The decisional case law with regard to annulment proceedings, however, may inhibit the appeal of ICSID. Despite this restraint, the decisional case law expanding the range of jurisdictional issues will increase the demand for ICSID arbitration.

II. ESTABLISHING THE JURISDICTIONAL SCOPE OF ICSID

The scope of ICSID jurisdiction will have a major impact on the progress of ICSID. Factors such as the predictability and enforceability of the tribunal's jurisdiction will determine the willingness of the parties to accept ICSID in the future.⁴⁷ The jurisdictional question, therefore, is crucial to the success of this tribunal.

Article 25 of the ICSID Convention provides that, for the tribunal to have jurisdiction: (a) a legal dispute must exist; (b) the legal dispute must arise directly out of an investment; (c) the legal dispute must arise between a contracting state and a national of another contracting

however, disputed the tribunal's jurisdiction to decide the claim on the basis that P.T. Wisma was the primary party. 1983 Amco Award on Jurisdiction, *supra* note 7, at 356. Nevertheless, the tribunal ruled that it had jurisdiction over all the parties and granted the award to Amco Asia. 1984 Amco Award on the Merits, *supra* note 7, at 1039.

44. 3:2 NEWS FROM ICSID 2 (1986); see ICSID Convention, *supra* note 1, art. 52(1) (stating the procedures a party must follow when requesting annulment of an ICSID award); see also *id.* art. 52(3) (stating that upon receipt of the request for annulment, the Chairman of the Administrative Council shall appoint an *ad hoc* committee of three persons from the Panel of Arbitrators). The *ad hoc* committee has the authority to annul the award, or any part of it, on any of the grounds set forth in article 52(1). *Id.* art. 52(1). Indonesia requested an annulment proceeding, because the tribunal failed to apply the relevant law in *Amco*. 1986 Amco Annulment Decision, *supra* note 7, at 652; see ICSID Convention, *supra* note 1, art. 52(1)(b) (providing that a party may request annulment of the award on the ground that the tribunal has manifestly exceeded its powers). The *ad hoc* committee interpreted article 52(1)(b) to mean that a tribunal has exceeded its powers when it fails to apply the relevant law. 1986 Amco Annulment Decision, *supra* note 7, at 655. Indonesia sought the annulment of the *Amco* award for failure to state the reasons upon which the tribunal based its decision. 1986 Amco Annulment Decision, *supra* note 7, at 652; see ICSID Convention, *supra* note 1, art. 52(e) (stating that a party may request annulment of a tribunal's award on the ground that the award fails to state the basis of the decision).

45. 1985 Klöckner Annulment Decision, *supra* note 8, at 166-68.

46. 1986 Amco Annulment Decision, *supra* note 7, at 671.

47. See Shihata, *Roles*, *supra* note 12, at 3-10 (explaining the voluntary character, flexibility, and effectiveness of the ICSID system).

state; and (d) the parties to the dispute must consent in writing to submit legal disputes to ICSID.⁴⁸ The decisions of the tribunal in *Klöckner*⁴⁹ and *Amco*⁵⁰ extend the jurisdictional provisions of article 25. These broad interpretations allow parties to include a wider range of international business contracts within the realm of ICSID. This development secures the future growth of ICSID as a forum for investment disputes. The ambiguity in the language of the ICSID Convention, however, presents potential problems in establishing jurisdiction.

A. LEGAL DISPUTE

Article 25(1) of the ICSID Convention provides that ICSID has jurisdiction only over a "legal dispute"⁵¹ and not over all disputes.⁵² The limitation of ICSID to arbitrate only legal disputes will not necessarily restrict the growth of ICSID, because the usual role of courts is to rule on legal disputes. ICSID, moreover, has broadened its role to incorporate the function of a limited fact-finder.⁵³

The ICSID Convention, however, has neither defined "dispute" nor "legal dispute."⁵⁴ The Convention therefore fails to provide guidelines for parties to an ICSID contract. A clear definition of legal dispute, therefore, would aid future parties who have agreed to ICSID arbitration.

1. Suggestions For Defining Legal Disputes

Many investment treaties define the categories of disputes or legal disputes that could fill in the definitional gaps for ICSID. Most bilateral investment treaties (BITS) and multilateral investment treaties (MITS) either contain categories of disputes or provide conditions precedent for recourse to ICSID.⁵⁵ Parties to an ICSID contract may look to multilateral and bilateral treaties for examples of model consent clauses to include in their contracts.

48. ICSID Convention, *supra* note 1, art. 25(1).

49. 1983 Klöckner Decision, *supra* note 8, at 145.

50. 1983 Amco Award on Jurisdiction, *supra* note 8, at 351.

51. See ICSID Convention, *supra* note 1, art. 25 (1) (delineating the scope of the arbitral tribunal's jurisdiction under the ICSID Convention).

52. See Amerasinghe, *Submission to the Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 5 J. MAR. L. & COM. 211, 220 (1973-74) (describing the ambiguous nature of the term "dispute").

53. See 2:1 NEWS FROM ICSID 5 (1985) (stating that the pre-hearing conference formulated under the revised regulations and rules accelerates the fact-finding process).

54. ICSID Convention, *supra* note 1, art. 25(1). ICSID also excludes factual disputes arising from accounting or fact-finding. *Id.*

55. 2:1 NEWS FROM ICSID 16-17 (1985).

a. *Categories Of Disputes*

Contracting parties may look to certain BITs to help define categories of disputes. Some BITs define disputes broadly.⁵⁶ Broad definitions give the parties the most flexibility for future, unforeseen developments in the contractual relationship between the parties.

The BITs of the United States, however, are more limited in defining the categories of disputes.⁵⁷ The BITs define investment disputes in various ways: 1) the involvement of the application of an investment agreement between ICSID parties; 2) the interpretation or application of a party's foreign investment grant of an investment to a national or company; or 3) an alleged breach of any right that the treaty creates concerning an investment.⁵⁸ These treaties, however, exclude disputes arising under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or other similar agreements where the parties have stipulated other methods of dispute settlement.⁵⁹

56. Agreement for the Promotion and Protection of Investments, May 22, 1981, People's Republic of Bangladesh - Belgo - Luxembourg Economic Union, art. 6 (1), *reprinted in* Investment Laws of the World 1981 INVESTMENT TREATIES 63 (providing that parties may submit any investment dispute, except tax disputes, to ICSID arbitration).

57. See 2:1 NEWS FROM ICSID, 16 (1985) (providing examples of BITS of the United States that curtail true areas of disputes).

58. Treaty Between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement of Investment, Dec. 6, 1983, United States - Senegal, art. 7(6) *reprinted in* Investment Laws of the World, 1983 INVESTMENT PROMOTION AND PROTECTION TREATIES 99 (ICSID ed. 1986); Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 3, 1985, Turkey - United States, art. 6 *reprinted in* 25 I.L.M. 85 (1986) [hereinafter Turkey - United States Treaty]. Turkey has signed ICSID, but has not yet deposited its ratification. List of Contracting States and Signatories of the Convention, June 24, 1987 (ICSID ed.).

59. See United States - Senegal Treaty, *supra* note 58, art. 7(6) (excluding disputes arising under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States, or under other official credit, guarantee or insurance arrangements pursuant to which the parties have agreed to other means of settling disputes.) Turkey - United States Treaty, *supra* note 58, art. 6 (providing that contracting parties may submit disputes to ICSID and arbitration with one year from the date that the dispute arose, unless the parties previously agreed on other dispute settlement procedures). China also limited disputes between investors and Chinese authorities to disputes concerning the amount of compensation due if China expropriates or nationalizes companies. Agreement for the Reciprocal Promotion and Protection of Investments, June 4, 1984, Belgo Luxembourg Economic Union - People's Republic of China, art. 10(3) *reprinted in* 24 I.L.M. 538, 543 (1985); see also Agreement between the Federal Republic of Germany and the People's Republic of China for the Promotion of Investments, Oct. 7, 1983, Federal Republic of Germany - People's Republic of China, art. 4(1) *reprinted in* Investment Laws of the World, 1983 INVESTMENT PROMOTION AND PROTECTION TREATIES (ICSID ed. 1986) (stating that the People's Republic of China may expropriate investments of the investor if expropriation is in the "public interest"). The Chinese treaty with Germany has a side letter providing for

Parties to an ICSID contract should consult BITs for examples of categories of disputes and should clearly define when ICSID applies to the investments. Some BITs apply to investments the parties made prior to or after the signature or entry into force of the treaty.⁶⁰ In other cases, BITs apply to investments the parties made after the date of signature or entry into force of the treaty,⁶¹ while some BITs apply only to investments that the host state will approve in the future.⁶² This lack of precision is likely to lead to divergent interpretations and disputes.⁶³

The Canada - United States Free Trade Agreement (Agreement)⁶⁴ defines disputes, even though it does not contain an ICSID clause.⁶⁵ Under the Agreement, disputes occur whenever a party considers that an actual or proposed measure of the other party or its political subdivisions is or would be inconsistent with the obligations of the Agreement.⁶⁶ This definition of dispute allows a party to claim that even potential measures of the other party that are inconsistent with the contract can create a dispute.

b. Conditions Precedent

In addition to merely limiting disputes to particular categories, ICSID allows contracting parties to incorporate conditions precedent. Several BITs serve as models to contracting parties desiring to include

Additional Protocol if and when the People's Republic of China adheres to the ICSID Convention. *Id.* The provisions in the Chinese treaties with the Federal Republic of Germany, France, and Belgium that limit investment disputes to the narrow categories of expropriation and nationalization are not found in other treaties. *Id.*

60. 2:1 NEWS FROM ICSID 16 (1985); see Agreement between Japan and the Arab Republic of Egypt concerning the Encouragement and Reciprocal Protection of Investment, Jan. 28, 1977, Egypt - Japan, art. 9, *reprinted in* 18 I.L.M. 44, 46 (1979) [hereinafter Egypt - Japan Treaty]. See Agreement for the Promotion and Protection of Investments, June 11, 1975, Egypt - United Kingdom, art. 13, *reprinted in* 14 I.L.M. 1470, 1473 (1975) [hereinafter Egypt - United Kingdom Treaty] (providing that the Agreement applies to investments made while the Agreement is in force and shall continue to apply to the investments for 10 years after the date of the termination).

61. 2:1 NEWS FROM ICSID 16 (1985); see Egypt - United Kingdom Treaty, *supra* note 60, art. 14(2) (providing that investments the parties made while the treaty was in force should continue in effect for ten years after the termination of the treaty).

62. 2:1 NEWS FROM ICSID 16 (1985); see Agreement for the Promotion and Protection of Investments, July 22, 1975, Singapore - United Kingdom, art. 12 *reprinted in* 11 I.L.M. 591 (1972) [hereinafter Singapore - United Kingdom Treaty] (providing that the provisions of the BIT shall extend only to present or future investments that the contracting party has or will approve).

63. 2:1 NEWS FROM ICSID 17 (1985).

64. Canada-United States Free-Trade Agreement, Dec. 22, 1987, Canada - United States, *reprinted in* 27 I.L.M. 281, 281 (1988).

65. *Id.* at 383.

66. *Id.*

conditions precedent to the use of ICSID. Many BITs provide, for example, that contracting parties must attempt to reach a solution through negotiations,⁶⁷ through the exhaustion of local remedies, or through third party procedures⁶⁸ before submitting disputes to ICSID. If the parties cannot reach a settlement within a specific period through these procedures,⁶⁹ then parties to the BITs may submit the dispute to ICSID.⁷⁰

The United States model clause provides that either ICSID or the fact-finding facility of the Additional Facility is the usual framework for settling disputes.⁷¹ In practice, however, United States BITs vary from this proposal.⁷² Parties should avoid employing the Additional Facility exclusively, because the Facility is not based on a treaty provision.⁷³ The Facility only gives the ICSID Secretariat the option of using an *ad hoc* arbitral tribunal, thereby reducing the effectiveness of

67. 2:1 NEWS FROM ICSID 17 (1985); see Turkey - United States Treaty, *supra* note 58, arts. 6(2), 7(1) (allowing the parties to negotiate in good faith before submitting disputes to ICSID).

68. 2:1 NEWS FROM ICSID 17 (1985); see Turkey - United States Treaty, *supra* note 58, art. 6(2) (establishing that parties can settle disputes through mutually agreed upon non-binding third parties); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Sri Lanka, Feb. 13, 1980, 9(1), United Kingdom of Great Britain - Northern Ireland - Republic of Sri Lanka, *reprinted in* Investment Laws of the World, 1980 INVESTMENT PROMOTION AND PROTECTION TREATIES 1 (ICSID ed. 1983) [hereinafter United Kingdom - Sri Lanka Treaty] (allowing parties to settle disputes concerning the interpretation or application of the treaty through diplomatic channels); Egypt - United Kingdom Treaty, *supra* note 60, art. 9(1) (same).

69. See 2:1 NEWS FROM ICSID, at 17 (1985) (noting that parties usually state that they will try to settle disputes in a time frame from three months to one year); see United Kingdom - Sri Lanka Treaty, *supra* note 68, art. 8(3) (allowing parties three months from the time in which the dispute arises to settle the claim through local remedies); see also Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Saint Lucia for the Promotion and Protection of Investments, Jan. 18, 1983, United Kingdom - Saint Lucia, art. 8(1) *reprinted in* Investment Laws of the World, 1983 INVESTMENT PROMOTION AND PROTECTION TREATIES 1, (ICSID ed. 1986) (providing that parties have three months for written notification of a claim to settle the claim); Turkey - United States Treaty, *supra* note 58, art. 6(3) (allowing parties one year from the time a dispute arises to settle the dispute, provided that the parties have neither put the dispute through any other settlement procedure nor brought the dispute before courts, administrative tribunals, or agencies of the contracting party).

70. See 2:1 NEWS FROM ICSID 17 (1985) (providing that the recourse of ICSID is possible only when parties to this dispute fail to reach an agreement within three months through the pursuit of local remedies or otherwise).

71. Golsong, *Introductory Note to the Turkey - United States Treaty*, 25 I.L.M. 85, 85 (1986). The Additional Facility was set up by the ICSID Administrative Council as a framework for dispute settlement in the event that a party is not a member of the ICSID Convention and cannot invoke ICSID jurisdiction. *Id.*

72. *Id.*

73. Golsong, *supra* note 71, at 86.

ICSID.⁷⁴ Negotiators from the United States and other countries became aware of this defect and established provisions in contracts for the exclusive use of ICSID for arbitral disputes.⁷⁵

The conditions precedent provision that the United Kingdom uses in its BITs is an example of an ambiguous provision.⁷⁶ Under the British version, contracting parties have recourse to ICSID only after they failed to agree through pursuit of local remedies or "otherwise."⁷⁷ The term "otherwise" may mean that exhausting local remedies is not always an absolute prerequisite to ICSID proceedings.⁷⁸

A contracting party, for example, could contend that attempted negotiations, exchange of correspondence, or even preliminary discussions could satisfy the conditions precedent provision.⁷⁹ To avoid this problem, parties to ICSID should state clearly the conditions precedent to ICSID arbitration.

B. A LEGAL DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT

The ICSID Convention states that ICSID has jurisdiction only over those legal disputes that arise directly out of an investment.⁸⁰ Neither the Convention nor the legislative history of the Convention define "investment" or describe the circumstances where a dispute arises directly out of an investment.⁸¹ Delegates to the preliminary meetings of the ICSID Convention left the term "investment" undefined after failing to reach a consensus.⁸² Therefore, parties to an agreement must define the exact meaning of what constitutes a "dispute."

The party with the stronger bargaining power usually prevails in ne-

74. *Id.*

75. *See id.* (citing examples of treaties where the United States offers only ICSID as the model framework for dispute settlement); *see* United States - Turkey Treaty, *supra* note 58, art. 6(3)(c) (limiting dispute settlements to ICSID only); Singapore - United Kingdom Treaty, *supra* note 62, art. 8(1) (same); Egypt - Japan Treaty, *supra* note 60, art. 11 (allowing ICSID only to settle disputes); Egypt - United Kingdom Treaty, *supra* note 60, art. 8(1) (same).

76. *See, e.g.,* United Kingdom - Sri Lanka Treaty, *supra* note 68, art. 8(3) (allowing parties to settle disputes through pursuit of local remedies); Singapore - United Kingdom Treaty, *supra* note 62, art. 8(1) (allowing ICSID to settle disputes only after the parties failed to reach a settlement within three months through local remedies); Egypt - United Kingdom Treaty, *supra* note 60, art. 8(1) (allowing parties to settle disputes through local remedies or conciliation).

77. 2:1 NEWS FROM ICSID 17 (1985)

78. *Id.*

79. *Id.*

80. ICSID Convention, *supra* note 1, art. 25(1).

81. Amerasinghe, *supra* note 52, at 223.

82. Gopal, *supra* note 27, at 598-99.

gotiating the language on "disputes."⁸³ Investors from developed countries are often in stronger bargaining positions. Consequently, these investors often gain the inclusion of their definition of "dispute" to the ICSID contract.⁸⁴ This unequal bargaining situation puts contracting parties from LDCs at a disadvantage, creating a disincentive for developing countries to ratify ICSID.

The advantage of a vague term such as "investment" is that it is flexible and can apply to many different types of agreements.⁸⁵ When the original member states drafted the ICSID Convention, forms of investment were limited to concessions, establishment agreements, joint ventures, loans from private financial institutions to foreign public entities, and agreements concerning foreign property rights.⁸⁶ Presently, forms of investment include profit-sharing service and management contracts, contracts for the sale and construction of industrial plants, turnkey contracts, international leasing agreements, and especially agreements for the sale of know-how and technology.⁸⁷

The vagueness of the term "investment" enhances the chances of ICSID becoming a permanent arbitration institution. The flexible application of the term "investment" facilitates parties bringing disputes to ICSID,⁸⁸ because the parties can explicitly agree which transactions constitute "investments" under the ICSID Convention. Parties can also delineate the nature, scope, and duration of the investment to ensure

83. *Id.* at 599. Gopal argues that states party to the contract are gaining political bargaining power in relation to private investors. *Id.* at 593. As a result, once-powerful foreign investors no longer have the sole power to dictate the terms of an agreement. *Id.*

84. *Id.* at 593.

85. Golsong, *A Guide to Procedural Issues in International Arbitration*, 18 INT'L LAW. 633, 634 (1984).

86. Delaume, *Practical Considerations*, *supra* note 37, at 117. Investment disputes have included exploitation of natural resources, such as bauxite mining, oil exploitation and exploration, forestry exploitation, industrial investments regarding the production of fibers for exports, or of plastic bottles for domestic consumption, liquification of natural gas, and the production of aluminum, tourism development in the form of the construction of hotels, and urban development in the form of housing construction. *Id.* at 118.

87. *Id.* at 117. Modern types of investments include those for the construction of a chemical plant on a turn-key arrangement, with a management contract providing technical assistance for the operation of the plant, a management contract for the operation of a cotton mill, a contract for converting vessels into fishing vessels and training crews, and technical and licensing agreements for the manufacturing of weapons. *Id.* The only dispute where a state brought an action against the investor involved the construction of a maternity ward. *Id.*; see Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 795 (1983) [hereinafter Delaume, *Courts*] (explaining various types of investments).

88. Delaume, *Practical Considerations*, *supra* note 37, at 117.

that the arbitral tribunal has jurisdiction.⁸⁹ The scope of ICSID could widen as new types of "investments" fall under its jurisdiction.⁹⁰ Furthermore, the term "investment" adapts easily to a changing investment climate.⁹¹

The ICSID Secretariat reports that most parties do not clarify whether the underlying relationship constitutes an investment.⁹² These omissions in drafting can hinder the effectiveness of ICSID, because disputes over the definition of investment arise easily. To increase the efficiency of ICSID, the parties should clearly define what constitutes an investment. The Secretary General of ICSID has not yet had a problem requesting the jurisdiction of the arbitral tribunal, because the investment dispute lacked specificity. The Secretary General has, however, warned companies engaging either in public works with certain nations or in systematic transfers of technology to those nations to expressly define these activities as investments.⁹³ Parties to an ICSID contract would greatly benefit from guidelines that delineate whether specific transactions fall outside the purview of the jurisdiction of the tribunal.⁹⁴

1. Suggestions For Defining Investment

Many BITs provide the extensive guidance that contracting parties need to define clearly the term "investment." Some BITs define investment broadly.⁹⁵ One BIT, for example, defines "capital investment" as the contribution in achieving an economic objective.⁹⁶ This contribution

89. Delaume, *Courts*, *supra* note 87, at 796. Pursuant to article 25(4) of the ICSID Convention, the state party may specify what types of disputes it will include and exclude from ICSID arbitration. ICSID Convention, *supra* note 1, art. 25(4). To date, three states have excluded certain investment disputes from ICSID arbitration. Delaume, *Courts*, *supra* note 87, at 796. Saudi Arabia excluded disputes over "oil and pertaining to acts of sovereignty." *Id.* Guyana and Jamaica have excluded disagreements over "minerals and other natural resources." *Id.* Additionally, Papua-New-Guinea specified that it will only submit those disputes that are "fundamental to the investment itself." *Id.*; see Shihata, *Roles*, *supra* note 12, at 5 (describing classes of disputes that states excluded from ICSID arbitration).

90. Delaume, *Courts*, *supra* note 87, at 795.

91. *Id.*

92. See Delaume, *Practical Considerations*, *supra* note 37, at 119 (indicating that parties should accurately define "investment"); see also Delaume, *Courts*, *supra* note 87, at 795 (reminding parties to ICSID clauses of the importance of recording salient features of a transaction).

93. Delaume, *Practical Considerations*, *supra* note 37, at 119.

94. Gopal, *supra* note 28, at 599-600.

95. See 2:1 NEWS FROM ICSID 19 (1985) (stating that most BITs contain extensive interpretations of the term "investment").

96. Agreement Between the Government of the Socialist Republic of Romania and the Government of the Democratic Republic of Sudan on the Mutual Promotion and

consists of all goods, services, and financial means of the parties to the investment.⁹⁷

Most BITs, however, use an extensive list of specific categories to define investment.⁹⁸ The BITs of the United Kingdom⁹⁹ and the United States,¹⁰⁰ for example, define investments in this manner. The BITs of the United States, however, do not simply list categories of investments. To cover investments that may eventually change forms, the treaties provide that any alteration of the form of the investment where a party invests or reinvests assets should not affect the prior classification as investments.¹⁰¹

MITs also provide sources to derive a definition of investment. First, the Andean Code provides extensive categories of the term "direct foreign investment."¹⁰² Article 1 of the Andean Code defines investment broadly,¹⁰³ but the Code's annex narrows the definition to specific cate-

Guarantee of Capital Investments, Dec. 8, 1978, Socialist Republic of Romania - Democratic Republic of Sudan, art. 2(a), *reprinted in* INVESTMENT LAWS OF THE WORLD 1, 2 (ICSID ed. 1983) [hereinafter Romania-Sudan Treaty].

97. *Id.*

98. See 2:1 NEWS FROM ICSID 19 (1985) (providing examples of BITs that list investments by categories).

99. See Egypt - United Kingdom Treaty, *supra* note 60, art. 1(a) (including the following assets as investments: immovable and movable property, stocks and debentures, companies' claims to money under a contract, intellectual property rights, and business concessions); United Kingdom - Sri Lanka Treaty, *supra* note 68, art. 1(a) (same); Singapore - United Kingdom Treaty, *supra* note 62, art. 1(a) (same). Other BITs define investments as every kind of asset including, though not limited to, the following categories: property and property rights such as mortgages, liens, or pledges; shares, stock, and debentures of companies; claims to money or to any performance under contract with a financial value; intellectual property rights and good will; and concession rights for exploring, cultivating, extracting, and exploiting natural resources. Egypt - United Kingdom Treaty, *supra* note 60, art. 1(a); Sri Lanka - United Kingdom Treaty, *supra* note 68, art. 1(a); Singapore - United Kingdom Treaty, *supra* note 62, art. 1(a).

100. Turkey - United States Treaty, *supra* note 58, art. 1(1). The Turkey - United States Treaty defines an investment as every kind of investment in the territory of a party which nationals or companies of the other party directly or indirectly control. *Id.* Under the treaty, investments include assets, equity, debt, claims, and service and investment contracts. *Id.* Further definitions of investments include the following: intellectual and industrial property rights including rights with reference to copyrights, patents, trademarks, trade names, industrial designs, trade secrets, know-how, and goodwill; and any rights, licenses, and permits; reinvestment of returns; and principal interest payments arising under loan agreements. *Id.*

101. 2:1 NEWS FROM ICSID 20 (1985); see Turkey - United States Treaty, *supra* note 58, art. 1(3) (stating that any alteration where assets are invested or reinvested shall not change their character as investment).

102. Andean Code, *supra* note 32, Annex No. 1, § II(b).

103. See *id.* art. 1 (delineating direct foreign investment). Article 1 defines direct foreign investment as contributions from abroad from foreign natural or juridical persons to the capital of an enterprise. *Id.* In addition, the Andean Code defines direct foreign investments to include investments in national currency from funds transferred

gories.¹⁰⁴ The precise annex specifications allow parties to know exactly what types of investments their contract covers.

The intentional failure of the MIGA Convention to define "investment" allows newly emerging forms of industrial cooperation to fall within the scope of MIGA.¹⁰⁵ Investments under the MIGA Convention, however, consist of equity interests,¹⁰⁶ equity-type loans,¹⁰⁷ and forms of direct investment.¹⁰⁸ The MIGA Convention may eventually extend to other medium or long-term forms of investment, if that equity interest or direct investment relates to the loans.¹⁰⁹ Only new investments are eligible for guarantees under the MIGA Convention.¹¹⁰ That is, resources must transfer from abroad into the host country after applying for MIGA Convention coverage.¹¹¹ Moreover, the investor must make the investment in the territory of a member country.¹¹²

C. CONSENT IN WRITING TO SUBMIT TO THE JURISDICTION OF ICSID

Consent to ICSID jurisdiction is voluntary.¹¹³ Ratification of the ICSID Convention does not obligate the ratifying state to submit investment disputes to ICSID arbitration.¹¹⁴ Likewise, an investor from a

and reinvested abroad.

104. *Id.* Annex No. 1, § II(b). Investment, as defined under the Andean Code, constitutes financial resources in foreign exchange or credit, including currency where the country makes the investment, capital of both national and foreign origin, credit from a parent company and other sources, and actual interest the foreign company pays on credit. *Id.* This definition also includes physical or tangible resources, such as industrial plants, new and reconditioned machinery and equipment, spare parts, loose parts and pieces, raw materials, and intermediate products. *Id.* The annex further delineates investment as resources derived from technology or intangibles, such as trademarks, industrial designs, management capacity, technical know-how, patented or not patented, and possible alternative know-how. *Id.* The working apparatus, technical documents, and instructions can constitute technical know-how. *Id.*

105. Voss, *Introductory Note to MIGA Convention*, 24 I.L.M. 1598, 1600 (1985). [hereinafter Voss, *Introductory Note*].

106. MIGA Convention, *supra* note 12, ch. 3, at 12. Equity interests include portfolio equity investments. Voss, *Introductory Note*, *supra* note 105, at 1600.

107. MIGA Convention, *supra* note 12, ch. 3, art. 12. Equity-type loans include medium or long-term loans that owners of equity in the enterprise make or guarantee. Voss, *Introductory Note*, *supra* note 105, at 1600.

108. MIGA Convention, *supra* note 12, ch. 3, art. 12.

109. Voss, *Introductory Note*, *supra* note 105, at 1600.

110. *Id.*

111. MIGA Convention, *supra* note 12, ch. 3, art. 12.

112. *Id.* ch. 3, art. 14.

113. ICSID Convention, *supra* note 1, at preamble.

114. See Vuylsteke, *supra* note 16, at 348 (stating that a contracting state is not obligated to submit any particular dispute to ICSID merely because the contracting state is a member of ICSID); see also Shihata, *Roles*, *supra* note 12, at 4 (noting that an obligation to use ICSID arises only after the contracting state has specifically

contracting state need not use the ICSID Convention for a particular dispute.¹¹⁵ The host state and the foreign investor must specifically consent to ICSID jurisdiction.¹¹⁶ The contracting parties can require, as a condition of their consent, the exhaustion of local administrative and judicial remedies and can determine the applicable rules of law specifically through agreement.¹¹⁷

The ICSID Convention does not state what effect exhausting local remedies as a precondition to arbitration will have on arbitration.¹¹⁸ It is not certain, for example, whether the arbitrators will review the fairness of the local process, or whether they will totally ignore the local process if the investor rejects the validity of the local proceedings.¹¹⁹ The ICSID Convention leaves these questions unanswered to give the parties flexibility in structuring agreements as they desire.¹²⁰

This kind of flexibility also builds an inherent instability into the ICSID Convention. Once a dispute arises where neither the ICSID Convention nor the parties have determined the rules in the event of an unfair local proceeding, the tribunal is free to decide the rules in any manner it wishes. Excessive flexibility may defeat ICSID's purpose in providing an efficient dispute settlement process.¹²¹ If parties are aware of the gaps in ICSID and provide clauses filling in gaps, then the lack of a definitive rule will not deter parties from using ICSID in the future.¹²²

Parties to an ICSID contract that condition their consent on exhausting local, administrative, and judicial remedies should include clauses that allow arbitrators to review the fairness of the local proceedings.¹²³ These clauses should detail the criteria of a fair proceeding on which the arbitrators can base their decisions.¹²⁴ Currently, BITs fail to provide models for this type of provision.

agreed to submit a dispute to ICSID arbitration).

115. Vuylsteke, *supra* note 16, at 348. The parties can consent to the jurisdiction of ICSID generally, with respect to a particular investment, or with respect to all investments. Shihata, *Roles*, *supra* note 12, at 4.

116. See Shihata, *Roles*, *supra* note 12, at 4 (noting that the decision of a contracting state to consent to ICSID arbitration is within the sole discretion of each state).

117. Vuylsteke, *supra* note 16, at 350.

118. Gopal, *supra* note 28, at 600.

119. *Id.*

120. See *id.* (stating that the main reason for giving the parties the freedom to exhaust local remedies as a precondition to arbitration is that many countries may not join the ICSID Convention without this freedom).

121. *Id.* at 601.

122. *Id.*

123. *Id.*

124. *Id.*

1. *The Form of the Consent*

The ICSID Convention specifies that the parties must consent in writing to ICSID arbitration, but does not elaborate on the form this writing must take.¹²⁵ The parties must determine the form of their consent.¹²⁶ The parties may express their consent in an ICSID arbitration clause within the investment agreement, on an *ad hoc* basis when a dispute arises, or in an exchange of letters or other documents.¹²⁷

The contracting state may offer consent either in its national legislation or in a BIT with the home state of the investor.¹²⁸ The contracting state may agree, in advance, to submit investment disputes to ICSID arbitration. The consent of the contracting state becomes binding, however, when the investor subsequently agrees to settle the dispute in this fashion.¹²⁹ ICSID may record the acceptance of the investor when the investment occurs or later when the investor requests ICSID arbitration.¹³⁰ The ICSID Convention allows the investor to bring a claim before ICSID without the consent of the home state of the investor, so long as the home state of the investor ratified the ICSID Convention.¹³¹

ICSID arbitration is more effective for the investor than the other more cumbersome remedies under international law, where only the state, not the injured national, can bring an action.¹³² In contrast, an ICSID consent clause in an investment contract creates international obligations. Once a state and contracting party consent to ICSID jurisdiction, then their agreement is irrevocable.¹³³ The contracting state, therefore, cannot refuse to or abstain from participating in the ICSID proceedings and must recognize and enforce an ICSID arbitration award.¹³⁴

125. ICSID Convention, *supra* note 1, art. 25(1).

126. See ICSID MODEL CLAUSES cl. III, at 6 (1981) (providing sample arbitration clauses permitting conditions to consent to ICSID).

127. Delaume, *Practical Considerations*, *supra* note 37, at 104; see Delaume, *Courts*, *supra* note 87, at 792 (stating that consent may also result from the unilateral offer of one party that the other party may subsequently accept).

128. Delaume, *Courts*, *supra* note 87, at 792.

129. *Id.*

130. *Id.* at 792-93.

131. Shihata, *Roles*, *supra* note 12, at 10-11.

132. See *Barcelona Traction, Light and Power Co. (Belg. v. Spain)* 1970 I.C.J. 3 (Judgment of Feb. 5) (determining that Belgium could not claim diplomatic protection on behalf of its Belgian shareholders who held substantial shares in a Spanish corporation, because international law authorized only the state of incorporation, Canada, to make a claim).

133. See Vuylsteke, *supra* note 16, at 349 (stating that parties initiating ICSID proceedings set in motion the self-contained system of ICSID that obligates the parties to perform their ICSID contract).

134. See Shihata, *Roles*, *supra* note 12, at 7 (stating that ICSID assures both the

Disputes are likely to occur when parties consent to several contracts that extend over many years, and when not all of the contracts contain ICSID arbitration clauses. For example, in *Klöckner v. Cameroon*, the parties included ICSID clauses in the initial Protocol of Agreement,¹³⁵ a turnkey contract,¹³⁶ and an establishment agreement¹³⁷ for the construction of a fertilizer factory. Four years later, the parties annexed a management contract to the establishment agreement that did not contain an ICSID consent clause, but instead referred disputes to the Rules of Arbitration of the ICC.¹³⁸ The ICSID tribunal asserted jurisdiction over the management issues, even though the initial Protocol of Agreement between the parties did not specifically include ICSID jurisdiction over the management contract.¹³⁹ The tribunal held that the management contract was part of the true overall relationship between the parties and that the parties in effect agreed to implement the Protocol of Agreement through the management contract.¹⁴⁰ An opposite interpretation would contradict the binding force of consent to ICSID jurisdiction.¹⁴¹

Similarly, the tribunal in *Amco v. Indonesia* did not require that the parties express their consent in writing.¹⁴² The government of Indonesia argued that the ICSID tribunal lacked jurisdiction over Indonesia, because the arbitration clause in the investment application failed to expressly designate the investor as a party.¹⁴³ The tribunal disagreed and ruled that formal consent was not necessary.¹⁴⁴ Because the investment agreement was in writing and contained consent to ICSID arbitration,¹⁴⁵ the tribunal concluded that the parties agreed to ICSID

investor and the contracting state that neither party can unilaterally revoke its consent).

135. 1983 Klöckner Decision, *supra* note 8, at 147. Under the Protocol of Agreement, Klöckner was to supply and erect a fertilizer factory with a production capacity of 157,000 tons per year. *Id.* Article 9 of the Protocol provided that Klöckner was responsible for the technical and commercial management of the Cameroonian joint venture company (SOCAME), under a management contract for at least 5 years from its inception. *Id.*

136. *Id.* The turnkey contract specifically detailed the supply of the factory, the definition of guarantee test runs and acceptance procedures, and terms of payment. *Id.*

137. *Id.* at 147-48. The establishment agreement gave SOCAME guarantees pursuant to the Cameroonian Investment Code, providing for favorable tax and customs treatment. *Id.*

138. *Id.* at 148.

139. *Id.* at 150.

140. 1:2 NEWS FROM ICSID 8 (1984).

141. *Id.* at 151.

142. 1984 Amco Award on Jurisdiction, *supra* note 7, at 370.

143. 1981 Amco Decision, *supra* note 7, at 358.

144. *Id.* at 359.

145. *Id.* at 360-61.

arbitration.¹⁴⁶

2. *Scope of Irrevocability and Abstention*

Once the parties consent to ICSID arbitration, neither side may unilaterally revoke the consent,¹⁴⁷ even if one of the contracting states withdraws from the ICSID Convention.¹⁴⁸ In *Alcoa v. Jamaica*¹⁴⁹ the ICSID arbitral tribunal upheld the principle that the jurisdiction of ICSID is irrevocable and reaffirmed the principle that a party may not unilaterally withdraw its consent to arbitration.¹⁵⁰ A party can only limit its consent with respect to potential future investors.¹⁵¹ Some commentators have noted that any other ruling would deprive ICSID of any practical value.¹⁵²

Consent of the contracting parties insulates them from local judicial scrutiny.¹⁵³ As a result, the consent provision prevents the investment dispute from becoming a political conflict.¹⁵⁴ Contracting states, how-

146. *Id.* at 377.

147. See ICSID Convention, *supra* note 1, art. 25(1) (providing that contracting parties may not withdraw consent unilaterally when they have given their consent); Shihata, *Roles*, *supra* note 12, at 7 (highlighting the importance of the rule that parties may not unilaterally revoke consent once given in the context of disputes between foreign investors and Jamaica); see also Soley, *supra* note 15, at 524 (stating that ICSID exercises full control over the dispute until a domestic court of a member nation recognizes and enforces a final award).

148. Vuyesteke, *supra* note 16, at 348; see ICSID Convention, *supra* note 1, art. 72 (stating that every member state must fulfill obligations prior to its withdrawal from the Convention).

149. See Schmidt, *Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes: Implications of the Decisions on Jurisdiction in Alcoa Minerals of Jamaica*, 17 HARV. INT'L L. J. 90, 90 (1976) [hereinafter 1977 Alcoa Minerals Decision] (analyzing the decision in the Alcoa Minerals of Jamaica case).

150. 1975 Alcoa Minerals Decision, *supra* note 149, at 102-03. In this case, Alcoa, an American mining company entered into a twenty-five year agreement with Jamaica to construct an aluminum refining plant in exchange for major tax concessions and long-term leases on bauxite mining. *Id.* at 93-95. Six years later Jamaica significantly increased Alcoa's taxes and Alcoa, claiming that this action violated their agreement, requested ICSID arbitration. *Id.* Although Jamaica argued that ICSID did not have jurisdiction as a result of the investment's relation to mineral resources, the tribunal nevertheless asserted jurisdiction. *Id.* Jamaica and Alcoa subsequently settled their differences. ICSID, 1981 FIFTEENTH ANNUAL REPORT 34-39.

151. Soley, *supra* note 15, at 530.

152. See Rand, Hornick & Friedland, *supra* note 10, at 60 (stating that for the tribunal to hold otherwise would be against good faith and the reasonable intent of the parties).

153. ICSID Convention, *supra* note 1, art. 26; see 1:1 NEWS FROM ICSID 7 (1984) (stating that the rationale behind article 26 is to conclude arbitrations even if one party abstains); see also Soley, *supra* note 15, at 532-33 (claiming that adherence of the United States to the ICSID Convention is analogous to adherence to a treaty).

154. See Soley, *supra* note 15, at 533 (explaining that the rule of abstention as-

ever, may exclude certain types of disputes they consider non-arbitrable under ICSID.¹⁵⁵

The Rules for Arbitration Proceedings¹⁵⁶ apply automatically to ICSID arbitrations if the parties do not agree on other procedures.¹⁵⁷ If one of the parties institutes proceedings in a local court contrary to the rules of ICSID, then the other party can institute ICSID proceedings.¹⁵⁸ If this situation occurs, the Chairman of the Administrative Council of ICSID is responsible for organizing the arbitral tribunal.¹⁵⁹ Under the Judicial Abstention doctrine, the local court should then stay the proceedings and refer the parties to ICSID to seek a jurisdictional ruling from ICSID.¹⁶⁰

The ICSID rules differ from those of other arbitration institutions whose rules incorporate domestic law.¹⁶¹ According to the rules of the ICC and AAA, requests for interim measures of protection from a judicial authority remain compatible with the arbitration agreement. In contrast, the exclusive character of consent to ICSID arbitration implies that the parties waive their right to seek provisional measures in other fora.¹⁶² If the parties to an ICSID agreement wish to retain the option of seeking judicial assistance, they must expressly agree to do this in their contract.¹⁶³ The effectiveness of ICSID,¹⁶⁴ however, depends on the willingness of the contracting parties to relinquish recourse to the courts and avail themselves of the ICSID Model Provisions.¹⁶⁵

sure the parties that their dispute is free from outside scrutiny and influences).

155. See *Amerasinghe*, *supra* note 52, at 221-22 (discussing disputes some contracting states consider non-arbitrable).

156. *ICSID Rules of Procedure for Arbitration Proceedings*, ICSID/15, Part D, Rule 6(1) (1985).

157. ICSID Convention, *supra* note 1, art. 44.

158. See *Soley*, *supra* note 15, at 534-35 (discussing the decision in *MINE v. Guinea* holding that ICSID is an autonomous international organization).

159. See *Vuylsteke*, *supra* note 16, at 351 (noting that when one party to a contract refuses to cooperate, the Administrative Council of ICSID can, at the request of either party, form a tribunal); see also ICSID Convention, *supra* note 1, art. 38 (giving the chairman of the Administrative Council the authority to appoint the arbitrators).

160. 1:1 NEWS FROM ICSID 4 (1984).

161. 2:2 NEWS FROM ICSID 6 (1985).

162. 1:1 NEWS FROM ICSID 4 (1984).

163. ICSID Convention, *supra* note 1, art. 26. If ICSID determines that it cannot entertain the suit under the Convention a domestic court may have an independent basis of jurisdiction over the parties or subject matter of the dispute. 1:1 NEWS FROM ICSID 7 (1984).

164. See 3:2 NEWS FROM ICSID 4 (1986) (summarizing the cases that have affirmed the judicial abstention principle).

165. See ICSID MODEL CLAUSES, *supra* note 126, cl. XIV, XVI, at 13-14 (providing model clauses for a host state to make its consent prior to exhausting its local remedies and for local legal or judicial authorities to order provisional measures, such

Courts have applied the abstention rule in several cases. The first case where a court withheld a judgment was *Atlantic Triton Company Limited v. Peoples' Revolutionary Republic of Guinea*.¹⁶⁶ Atlantic Triton instituted attachment proceedings relating to property of Guinea in France.¹⁶⁷ The Court of Appeal of Renne, France applied the judicial abstention rule and vacated the orders of attachment.¹⁶⁸

The United States Court of Appeals for the District of Columbia, the Court of First Instance of Antwerp, and the Tribunal of First Instance of Geneva all reaffirmed the abstention rule in *MINE v. Guinea*.¹⁶⁹ MINE, a Liechtenstein corporation, and the Republic of Guinea entered into a contract expressly providing for ICSID arbitration.¹⁷⁰ A dispute terminated the contract, and Guinea refused to cooperate in a settlement.¹⁷¹ The corporation sued Guinea in a United States court to enforce arbitration before the AAA.

Although the United States district court in *MINE* granted an order compelling arbitration, holding that consent to ICSID arbitration constituted a waiver of sovereign immunity,¹⁷² the United States Court of Appeals for the District of Columbia reversed the decision.¹⁷³ The court of appeals held that the district court lacked subject matter jurisdiction over the dispute and could not compel ICSID arbitration.¹⁷⁴ The Courts in Antwerp and Geneva reasoned in the same manner and

as attachment, before agreeing to submit disputes to ICSID arbitration); *see also* 2:2 NEWS FROM ICSID 4 (1985) (commenting that parties would avoid much trouble and expense if they paid greater attention to drafting matters and incorporated ICSID model clauses).

166. *Atlantic Triton Company Ltd. v. Peoples' Revolutionary Republic of Guinea* (Case No. ARB/84/1), *registered* Jan. 19, 1984; Decision on Provisional Measures of Dec. 18, 1984 (unpublished) *reprinted in* 24 I.L.M. 340 (1985) [hereinafter 1984 Provisional Decision].

167. 1984 Provisional Decision, *supra* note 166, at 340.

168. *Id.* at 341.

169. *Maritime International Nominees Establishment (MINE) v. Government of the Republic of Guinea* (Case No. ARB./84/4), *registered* Sept. 18, 1984; Decision on Provisional Measures of Dec. 4, 1985 (unpublished) *excerpts translated into English in* 3:2 NEWS FROM ICSID 4-7 (1986) [hereinafter *MINE v. Guinea*, in NEWS FROM ICSID]; *In re Maritime Int'l Nominees Establishment v. Guinea*, 505 F. Supp. 141 (D.D.C. 1981), *rev'd*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983), *reprinted in* 21 I.L.M. 1355 (1982), *as amended*, 22 I.L.M. 86 (1983).

170. *MINE v. Guinea* in NEWS FROM ICSID, *supra* note 169, at 4.

171. *Id.*

172. *In re Maritime Int'l Nominees Establishment v. Guinea*, 505 F. Supp. 141, 142-43 (D.D.C. 1981), *rev'd*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

173. *In re Maritime Int'l Nominees Establishment v. Guinea*, 693 F.2d 1094, 1099 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

174. *Id.*

refused to attach Guinean property in Europe.¹⁷⁵ This case demonstrates a commitment on the part of courts in the United States, Belgium and Switzerland to recognize the autonomy of ICSID.¹⁷⁶ These rulings affirming the exclusive jurisdiction of ICSID and assuring the contracting parties that their dispute is free from political conflicts add to the stability of ICSID as a dispute resolution mechanism.¹⁷⁷ The parties to an ICSID contract will best maintain certainty through designating, in clear and express language, all consenting parties and contracts that require ICSID arbitration.

D. NATIONALITY OF THE PARTIES

Courts in most countries apply the abstention rule and defer to ICSID arbitration. Contracting parties, however, must first establish their nationalities before an ICSID tribunal will hear a dispute. ICSID has jurisdiction over the parties when a legal dispute arises between a contracting state and a national of another contracting state.¹⁷⁸ Determining jurisdiction, however, creates the problem of defining both a governmental party and a foreign investor. This definitional problem and the resultant issues merit discussion because of the arbitral tribunals' broad interpretations of the nationality of ICSID contracting parties.

1. *Nationality of a Governmental Party*

The nationality of a government is easy to determine. The problem arises, however, when a host government wants its subdivision or agency to become a party to a contractual agreement. The ICSID Convention requires that the host state designate the subdivision or agency to ICSID.¹⁷⁹ The host state must then consent to ICSID's jurisdiction over the subdivision or agency.¹⁸⁰

*Klöckner v. Cameroon*¹⁸¹ raised the issue of whether ICSID had jurisdiction over a government agency. In *Klöckner*, the tribunal accepted the Cameroonian government's designation of a company as an

175. See 3:2 NEWS FROM ICSID 4 (1986) (stating that the Court of First Instance of Antwerp and the Tribunal of First Instance of Geneva reaffirmed the rule of "judicial abstention" for attachment matters in *MINE v. Guinea*).

176. Soley, *supra* note 15, at 534.

177. *Id.* at 533.

178. ICSID Convention, *supra* note 1, art. 25(1).

179. *Id.*

180. *Id.* art. 25(3); see Amerasinghe, *supra* note 52, at 224 (articulating the procedures a state must follow in designating an agency and consenting to ICSID's jurisdiction).

181. 1983 Klöckner Decision, *supra* note 8, at 145-49.

agent of Cameroon, even though Cameroon designated the agency relationship after the ICSID proceedings began.¹⁸² In analyzing the actual intent of the parties, the arbitral tribunal utilized a flexible rather than a strict interpretation of article 25(1) of the ICSID Convention.¹⁸³ Such an interpretation may help parties gain confidence in the consistency and practicality of ICSID's decision-making.

Parties to an ICSID contract, desiring to define governmental party according to the real intent of the parties, should incorporate a flexible definition of this term into their contract. A few BITs, for example, refer to agencies of a contracting state as potential parties to disputes between nationals of the other contracting state.¹⁸⁴ Some BITs of the United States provide that they apply to the political subdivisions of the contracting parties.¹⁸⁵

2. *Nationality of an Investor*

ICSID establishes jurisdiction over an investor only if the investor is a national of an ICSID contracting state.¹⁸⁶ Jurisdiction extends to any legal dispute arising directly out of an investment between a contracting state and a natural or juridical person who has the nationality of a contracting state other than the state involved in the dispute.¹⁸⁷ The natural person, nonetheless, may have the dual nationality of the contracting state as well as the nationality of the natural person's state.¹⁸⁸

Conversely, a juridical person must have the nationality of a state that is a party to the ICSID Convention.¹⁸⁹ The juridical person can either incorporate or establish its seat in the state whose nationality it wants to acquire.¹⁹⁰ If the parties agree to treat a juridical person under foreign control as a national of another contracting state, then the juridical person is a foreign national for purposes of the ICSID Convention.¹⁹¹ The ICSID tribunal established this rule because host

182. *Id.* at 151-52.

183. *Id.* at 151.

184. Agreement for the Protection and Development of the Capital Investments Between the Ivory Coast and the Republic of Italy, July 23, 1969, art. 7, *reprinted in* Investment Laws of the World, 1969 INVESTMENT PROMOTION AND PROTECTION OF TREATIES 32, 34 (ICSID ed. 1983).

185. 2:1 NEWS FROM ICSID 17 (1985).

186. ICSID Convention, *supra* note 1, art. 25(1).

187. *Id.*

188. *Id.*

189. *Id.* art. 25(2)(b).

190. *Id.*

191. *Id.*

states frequently insist that the subsidiaries of the foreign investors channel their investments through companies incorporated in the host state.¹⁹²

Determining the nationality of a juridical person was the issue raised in *MINE v. Guinea*.¹⁹³ MINE is incorporated in a state that is not a contracting state.¹⁹⁴ MINE argued in the Court of First Instance of Antwerp and the Tribunal of First Instance of Geneva that the characterization of the company as "Swiss" was invalid, because it exceeded the scope of article 25(2)(b) of the ICSID Convention.¹⁹⁵ MINE argued further that the scope of article 25(2)(b) should not extend to companies that are incorporated in a third state, of which neither the company nor the host state is a national.¹⁹⁶ Guinea argued that parties to a contractual agreement containing an ICSID clause are free to determine the nationality of the investor under the liberal consent feature of the ICSID Convention.¹⁹⁷

To date, neither party has submitted this issue to ICSID and, consequently, this issue is still unresolved. Nevertheless, this issue highlights the implications for the future use of ICSID. A narrow interpretation of the *MINE* dispute suggests that parties incorporating in third states may be unable to use ICSID. The legislative history of ICSID, however, shows that each contracting state should determine the nationality of a company at the time it agrees to ICSID arbitration, regardless of the company's place of incorporation.¹⁹⁸ Parties have not yet brought other nationality cases before ICSID. Another unresolved issue is whether a contracting party may incorporate in a third state and still fall within the scope of article 25(2)(b) of the ICSID Convention.

The general rule of the ICSID Convention is to prohibit countries and investors of the same nationality from using international arbitration.¹⁹⁹ Therefore, the agreement to treat a foreign controlled national as a national of the host state is an exception to the general rule.²⁰⁰

192. Delaume, *Practical Considerations*, *supra* note 37, at 112.

193. *MINE v. Guinea* in NEWS FROM ICSID, *supra* note 169, at 4.

194. 1:1 NEWS FROM ICSID 8 (1984).

195. *Id.*

196. *Id.*

197. *Id.*

198. Delaume, *Practical Considerations*, *supra* note 37, at 114 n.43.

199. ICSID Convention, *supra* note 1, art. 25(2)(b).

200. *Holiday Inns/Occidental Petroleum v. Government of Morocco* (Case No. ARB/72/1), registered Jan. 13, 1972; Decision on Jurisdiction of Jul. 1, 1973; Procedural Order of Oct. 17, 1978 (unpublished); see P. Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) - Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123, 123 (1980) [hereinafter *Holiday Inns Decision in Legal Problems*]; see also Amerasinghe, *supra* note 52, at 220 (admitting the existence of an implicit agreement

Recognizing such an exception further shows the flexibility that ICSID allows parties to have in investment agreements. This flexibility will encourage more parties to use ICSID in the future.

The decision in *Holiday Inns v. Morocco*²⁰¹ illustrates the exception to the general rule that prohibits countries and investors with the same nationality from using ICSID arbitration. The tribunal determined that the date of submission to arbitration is the date that determines the nationality of a corporation.²⁰² The parties in *Holiday Inns* had not expressly agreed to treat the subsidiaries as foreign nationals when they submitted to ICSID's jurisdiction. Nevertheless, the tribunal held that an implied agreement to treat subsidiaries as foreign nationals is acceptable if the circumstances exclude any other interpretation of the intentions of the party.²⁰³

The tribunal in *Amco v. Indonesia* also adopted this solution.²⁰⁴ Despite the absence of an express agreement to treat the subsidiary as a foreign corporation, the tribunal asserted jurisdiction over both the foreign parent corporation, Amco Asia, and the local subsidiary, P.T. Amco.²⁰⁵ Moreover, the tribunal rejected the claim of Indonesia that the parties must have an express agreement to name the subsidiary of the corporation that is a party to an ICSID contract.²⁰⁶ Instead, the tribunal focused on the "common will of the parties."²⁰⁷

With this principle in mind, the tribunal in *Amco* examined the Application for Establishment that the foreign parent corporation, Amco Asia, submitted to Indonesia.²⁰⁸ The tribunal determined that the subsidiary, P.T. Amco, was a foreign business in the Application for Establishment.²⁰⁹ The tribunal concluded that the contracting state, Indonesia, was fully aware that P.T. Amco was a foreign national despite its Indonesian nationality.²¹⁰ Based on these circumstances, the tribunal concluded that the government agreed to treat P.T. Amco as a foreign national.²¹¹ Moreover, the tribunal concluded that this agreement was

between the parties if foreign control is sufficiently apparent).

201. *Holiday Inns Decision in Legal Problems*, *supra* note 200, at 141.

202. *Id.*

203. *Id.*; see 1:2 NEWS FROM ICSID 18 (1984) (discussing the elements of identifying the parties to an ICSID arbitration).

204. See 1983 Amco Award on Jurisdiction, *supra* note 7, at 356-64 (establishing jurisdiction over P.T. Amco).

205. *Id.* at 363-64.

206. *Id.* at 361.

207. *Id.* at 359.

208. *Id.* at 360.

209. *Id.*

210. *Id.*

211. *Id.* at 361.

express and not implied.²¹²

The tribunal in *Amco v. Indonesia* again took an economic view in asserting jurisdiction over Amco Asia, the foreign parent.²¹³ Indonesia contended that the Application for Establishment did not grant Amco Asia the right to invoke ICSID arbitration against Indonesia.²¹⁴ The Application for Establishment, therefore, did not constitute an express consent in writing of the jurisdiction of ICSID over any claim of Amco Asia against Indonesia.²¹⁵ The tribunal held that Amco Asia channeled its investment through its subsidiary.²¹⁶ The tribunal looked beyond the arbitration clause in the Application for Establishment that on its face only applied to the subsidiary and concluded that Amco Asia was the real investor that the arbitration clause protected.²¹⁷ The tribunal preferred to examine the real intent of the parties, instead of applying the exception to article 25(2)(b) of the ICSID Convention.²¹⁸

The tribunal in *Amco* expanded its jurisdiction even further to Pan American, a local Indonesian corporation to which the subsidiary P.T. Amco ceded a portion of Amco Asia's stock.²¹⁹ Indonesia contended that the contracting parties did not include Pan American in the Application for Establishment.²²⁰ Further, Indonesia contended that in the absence of the parties' express consent in writing to the jurisdiction of ICSID over any claim of Pan American against Indonesia, ICSID failed to establish jurisdiction over Pan American and, therefore,²²¹ Pan American had no right to invoke the ICSID arbitration clause in the Application for Establishment.²²² The tribunal, however, held that the ICSID arbitration clause protected Pan American, because the Indonesian government knew of and had not objected to Pan American's acquisition of stock from Amco Asia.²²³ Consequently, the rule in *Amco* is that the right to invoke an arbitration clause, that a foreign parent corporation acquires, attaches to the foreign parent corporation's investment.²²⁴ If the government of the host country approves of

212. *Id.*

213. *Id.* at 369.

214. *Id.* at 364.

215. *Id.*

216. *Id.* at 369.

217. *Id.* at 369-70.

218. *Id.*

219. *Id.* at 372.

220. *Id.* at 371.

221. *Id.*

222. *Id.*

223. *Id.* at 373.

224. *Id.* The tribunal reasoned that the right to invoke arbitration attached to the stock of the investment, so that a cession of the shares also transferred the rights at-

this transfer, the foreign parent corporation may then transfer the right to invoke the arbitration clause through transferring its investment from its foreign subsidiary to a local subsidiary of the host country.²²⁶

The tribunal in *Amco* affirmed its competence in asserting jurisdiction over parties who acted as contracting parties to an investment dispute.²²⁸ After first determining that the parties actually intended ICSID arbitration, the tribunal could then assess the limits of its competence.²²⁷ Once the tribunal was certain not to bind a party who was not properly bound in the ICSID contract, the tribunal defined its competence broadly.²²⁸ This expansive jurisdictional interpretation facilitates recognition of the power of ICSID to settle disputes²²⁹ and ensures that ICSID will continue to apply to many kinds of new investment disputes in the future.

a. Suggestions for Defining Investor

Parties negotiating an ICSID contract should clearly define the nationality of an "investor" for ICSID purposes and can look to BITs for models. Most BITs determine the nationality of a corporation on the basis of its place of incorporation.²³⁰ BITs also determine the nationality of a corporation on the basis of control.²³¹ For example, when a corporation incorporates in the host state, but another foreign contracting state controls the corporation, BITs treat the corporation as a national of the foreign contracting state.²³²

While BITs usually define "juridical person" on the basis of control or place of incorporation, their definitions of "foreign control" differ.²³³ Parties to an ICSID contract should specify what "foreign control" means when they incorporate the term into an ICSID contract. The parties can look to several models in BITs for a definition. Some BITs provide that foreign-controlled corporations are those under the control of nationals or corporations of the other contracting state to ICSID

tached to the shares. *Id.* Consequently, the Indonesian government's approval of the cession constituted consent to arbitration. *Id.*

225. *Id.* at 372-73.

226. See Rand, Hornick & Friedland, *supra* note 10, at 60 (analyzing that the brevity of the tribunal's discussion of its jurisdiction in *Amco* obscures the reasoning behind the tribunal's extension of jurisdiction).

227. *Id.* at 61.

228. *Id.*

229. *Id.*

230. 2:1 NEWS FROM ICSID 18 (1985).

231. *Id.*

232. *Id.*

233. *Id.*

arbitration or conciliation.²³⁴ Occasionally, BITs leave the definition to the discretion of the two contracting states.²³⁵ Parties negotiating an ICSID contract, however, should avoid leaving the term undefined, because the parties are likely to disagree about the definition once a dispute arises.

Bilateral investment treaties of the United States provide broad interpretations of the term "foreign control."²³⁶ The United Kingdom, by contrast, usually incorporates narrow definitions of the term "foreign control" in its BITs.²³⁷ British BITs define a foreign-controlled company as a company incorporated under the laws of the country of one of the parties to an ICSID contract and where, before a dispute arises, nationals or companies of the other contracting party own a majority of the shares.²³⁸ To register a claim after a dispute arises, the parties submit the evidence necessary to prove foreign control to the Secretary General of ICSID.²³⁹ The advantage of the definition in the British BITs is that it limits the issue of foreign control to the question of proof of ownership.²⁴⁰

Another problem may arise when a party from a market economy wants to negotiate an ICSID contract with a party from a non-market economy (NME). Determining the nationality of public entities in a NME is easy because the nationality is the same as that of the NME.²⁴¹ The investor, however, must know which entities may submit, in the capacity of investors, to ICSID conciliation or arbitration.²⁴² The

234. See Egypt - Japan Treaty, *supra* note 60, art. 11 (stating that any company of a contracting party that the nationals and companies of the other contracting party controlled prior to the dispute shall submit to arbitration).

235. Agreement Between the Republic of Finland and the Arab Republic of Egypt on Mutual Protection of Investments, May 5, 1980, Republic of Finland - Arab Republic of Egypt, art. 1(3), *reprinted in* INVESTMENT LAWS OF THE WORLD 1980 INVESTMENT PROMOTION AND PROTECTION TREATIES 49, 50 (ICSID ed. 1983) (allowing the contracting parties the discretion to define "foreign control").

236. See Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States - Egypt, art. 1(b), *reprinted in* 21 I.L.M. 927, 927-49 (1982) (allowing each party to reserve the right to deny, to any of its own companies or to companies of the other party, advantages of the treaty if nationals of any third country own or control the company).

237. 2:1 NEWS FROM ICSID, 18 (1985).

238. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments, June 26, 1980, United Kingdom - Northern Ireland - Bangladesh, art. 8, *reprinted in* INVESTMENT LAWS OF THE WORLD 1980 INVESTMENT PROMOTION AND PROTECTION TREATIES 71, 74 (ICSID ed. 1983).

239. 2:1 NEWS FROM ICSID 18 (1985).

240. *Id.*

241. *Id.* at 19.

242. *Id.*

specific entities that can submit to ICSID conciliation or arbitration differ from one country to another.²⁴³

Bilateral investment treaties have yet to resolve another significant question affecting parties entering into ICSID contracts. BITs have not specified whether a contracting party may incorporate a third state into an ICSID contract and still fall within the scope of article 25(2)(b) of the ICSID Convention. Until an ICSID decision settles this question, contracting parties may regularly challenge ICSID jurisdiction.

Multilateral investment treaties also define the term "investor". The Andean Code, for example, requires parties to specifically identify the investor in the application for foreign investment.²⁴⁴ The Andean Code requires parties to include the following information about the investor: the name or firm name, nationality, and membership of the Board of Directors.²⁴⁵ The agreement must also include the composition of personnel and management, economic activity, and a copy of the articles of incorporation of the investor.²⁴⁶ While the Andean Code delineates specific requirements, it is not complete. The Code fails to identify foreign controlled investors.

The MIGA Convention affords a broader definition of the term "investor."²⁴⁷ Under the MIGA Convention, an investor is a national of a member country. Moreover, a corporate investor is a corporation that either incorporates or has its principal place of business in a member country or has nationals of member countries that own the majority of the corporation's capital.²⁴⁸ MIGA also defines an investor as a national of the host country who transfers the assets invested from abroad.²⁴⁹ Parties to an ICSID contract can use these varying definitions of an "investor" to ascertain their jurisdictional status.

III. EFFECT OF THE ANNULMENT DECISIONS

The parties to the dispute provide input at the first level of arbitral review but have less influence over the proceedings at the annulment

243. See Agreement Between the Government of Sweden and the Government of the Socialist Federal Republic of Yugoslavia on the Mutual Protection of Investments, Nov. 10, 1978, - Sweden - Socialist Federal Republic of Yugoslavia, art. 1 (3)(b), reprinted in INVESTMENT LAWS OF THE WORLD, 1978 INVESTMENT PROMOTION AND PROTECTION TREATIES 47, 48 (ICSID ed. 1983) (authorizing jurisdiction based on the treaties' definition of 'company').

244. Andean Code, *supra* note 32, Annex No. 1.

245. *Id.*

246. *Id.*

247. MIGA Convention, *supra* note 12, art. 13(a).

248. *Id.*

249. *Id.* art. 13(c).

level.²⁵⁰ While the parties choose the members of the original tribunal,²⁵¹ the chairman of ICSID appoints a three member *ad hoc* committee to decide annulments.²⁵² Consequently, annulments of a tribunal's award appears inappropriate because of the lack of input from the parties to the dispute.

If the frequency of annulment proceedings increases, parties may discontinue using ICSID arbitration. Generally, parties believe that the *ad hoc* committee members are not as sympathetic to their claims as the arbitrators the parties originally chose. Moreover, none of the *ad hoc* committee members can be nationals of a state party to the dispute or of the state whose national is a party to the dispute.²⁵³ This provision gives the chairman of ICSID too much discretion and power to determine the outcome of a case. Consequently, parties may seek to settle their disputes through procedures other than ICSID arbitration.

Conversely, annulment procedures may actually make ICSID a more desirable alternative to investment disputes. For instance, LDCs prefer a forum where they know they can appeal from a detrimental determination. The annulment procedure gives an LDC, such as Indonesia, the opportunity to challenge an unfavorable decision.²⁵⁴ Additionally, in *Klöckner v. Cameroon*, ICSID granted an annulment to a private investor, the losing party in the original decision.²⁵⁵ Consequently, annulments benefit both private parties and LDCs in that they both can challenge arbitrations in which they lost. These benefits may actually make ICSID a more desirable forum for investment disputes.

Some commentators argue that annulment decisions of "final and binding" arbitral awards create instability in international business.²⁵⁶ Arguably, if LDCs and investors continue to annul future ICSID awards, the decisions of the tribunal will become meaningless. Most judicial systems, however, provide processes for challenging awards.²⁵⁷ The awards of the ICC and other arbitral bodies are not "final" awards, even though the arbitration clauses in the contract refer to submission to arbitration as "final and binding." Furthermore, the awards

250. See Branson, *supra* note 3, at 25 (stating that the parties appoint the arbitrators to the original panel but do not appoint the arbitrators to the reviewing panel).

251. See ICSID Convention, *supra* note 1, art. 37(2)(b) (providing that if the parties do not agree on the number of arbitrators, each party shall appoint one arbitrator and jointly agree on a third).

252. *Id.*, art. 52(3).

253. ICSID Convention, *supra* note 1, art. 52(3).

254. Branson, *supra* note 3, at 28.

255. *Id.*

256. *Id.*

257. *Id.*

are not final even though the ICC expressly states that parties "have waived their right to any form of appeal" subsequent to the ICC making an award.²⁵⁸

Although arbitral awards are not subject to appellate review, they are subject to challenge. The losing party must file a "plea in nullity."²⁵⁹ For example, where the venue is Switzerland, a Swiss court, as a matter of right, can review an ICC or *ad hoc* arbitral award as well as the successive appeal of that award. Similarly, a losing party under the AAA has a right to assert many grounds to stop enforcement of an arbitral award, including the right to appeal the award.²⁶⁰ The AAA allows appellate review even though the AAA guarantees enforcement of arbitral awards in the countries that assented to the AAA treaty.²⁶¹

Courts that review arbitral awards under pleas in nullity or under the AAA treaty should not subject arbitral awards to appellate review.²⁶² The courts should not review arbitral awards to determine if the original arbitral panel erred in interpreting the relevant law.²⁶³ Failure to apply the relevant law, however, suggests that the arbitral panel exceeded its power and is a ground for nullity.²⁶⁴

The distinction between appellate review and arbitral challenge, however, is often meaningless. Although the test for annulment is different on its face from the test for appellate review, the content in both tests is almost exactly the same.²⁶⁵ As a result, when an *ad hoc* committee annuls an arbitral award, it is actually reviewing the original panel's interpretation of the law because the tests for annulment and appellate review are essentially the same. Therefore, the committee is exceeding its arbitral power because the committee is reviewing the original arbitral panel's interpretation of the relevant law.

The ICSID annulment procedure is thus similar to a court's appellate review of arbitral awards. The ICSID's annulment procedure, however, is even more efficient because it has only one level of review, that of the *ad hoc* committee.²⁶⁶ Other arbitral bodies, such as the AAA and ICC, allow the losing party to appeal to multiple levels of a na-

258. *Id.* at 28.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. See ICSID Convention, *supra* note 1, art. 51(3) (stating that a party should submit a request for annulment to the tribunal that rendered the award, and if this is not possible, ICSID will appoint a new tribunal).

tion's courts. Moreover, under the ICC, the losing party can appeal a denial of a plea in nullity in the country that held the arbitration. Under the AAA, the losing party can challenge the award in the country seeking enforcement.²⁶⁷ Consequently, the limited review available through ICSID makes ICSID awards more "final" than arbitration awards of other arbitral bodies.

CONCLUSION

The ICSID annulments of the awards in *Amco* and *Klöckner* will actually strengthen ICSID arbitration, even though they appear at first glance to disrupt the stability of ICSID. Parties, primarily ICSID contracting parties, will continue to use ICSID arbitration in the future. External developments such as the establishment of MIGA, the lack of other adequate arbitral tribunals and increasing LDC demand for direct foreign investment indicate that demand for ICSID arbitration will increase in the future. Moreover, internal developments such as the arbitral tribunals expansive interpretations of ICSID allow contracting parties to apply ICSID provisions to a wider scope of circumstances.

ICSID benefits both investors as well as LDCs. ICSID allows investors a means of enforcing awards. Investors, moreover, can insert provisions to tailor agreements to their own needs. They can thus protect against the political risks of investing in an LDC. In addition, the provisions of ICSID allow most LDCs to draft agreements that consider political and economic ramifications. As a result of these developments, both LDCs and foreign investors will continue to rely on ICSID as a stable forum for settling investment disputes and ICSID arbitration will continue to gain importance in the future.

267. Branson, *supra* note 3, at 28.