SOME AVAILABLE OPTIONS TO SAVE THE VIABILITY OF ICSID ARBITRATION IN THE LIGHT OF THE ANNULMENT AWARDS IN *KLOCKNER V. CAMEROON* AND *AMCO ASIA V. REPUBLIC OF INDONESIA**

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I. Introduction

On March 18, 1965, the Executive Directors of the International Bank for Reconstruction and Development (hereinafter World Bank or Bank) formally approved the submission of the text of the **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** (hereinafter Convention) to member governments of the Bank.[1]

The Convention, which was the product of more than a year of formal deliberations by representatives of the Bank's member countries, seeks on its face to establish facilities and procedures "which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration."[2] The primordial purpose of the Convention, however, is to facilitate the cause of international economic development by promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into countries which want to attract it.[3] How effective the Convention has been in satisfying the aforementioned objective is open to debate. Recent developments, however, particularly in relation to the Convention's provision on annulment of arbitral awards,[4] have placed in serious

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[1] 575 U.N.T.S. 159 (English, French and Spanish authentic texts). The text of the Convention and of the Report with which it was submitted to Governments [hereinafter Report] has been published by the International Centre for Settlement of Investment Disputes [hereinafter ICSID or Centre] in separate English, French and Spanish editions (Docs. ICSID/2). The English text of the Convention and the Report has also been published in 4 INT'L LEGAL MATERIALS 524 (1965).

[2] Report, *supra* note 1, at par. 1.

[3] Report, *supra* note 1, at par. 9.

[4] Article 52 of the Convention reads:

doubt the future viability or desirability of arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (hereinafter Centre or ICSID), the autonomous international institution charged with administering the conciliation and arbitration proceedings of the Convention.

The annulment awards in the cases of *Klockner v. Cameroon*[5] and *Amco Asia Corporation v. Indonesia*,[6] rendered by *ad hoc*

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(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a Member of the Tribunal which rendered the award, shall be the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54 and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

[5]Klockner Industrie-Anlagen GmbH, Klockner Belge, S.A. and Klockner Handelsmaatschappij B.V. v. United Republic of Cameroon and Societe Camerounaise des Engrais (ICSID Case No. ARB/81/2). The Klockner annulment decision [hereinafter Klockner Annulment Award] is published in an English translation in 1 ICSID REV-FILJ 89 (1986). All subsequent citations are taken from the latter.

[6]Amco Asia Corp., Pan American Development Ltd. and P.T. Amco Indonesia v. Republic of Indonesia (ICSID Case No. ARB/81/1). The Amco Asia annulment

Committees formed pursuant to Article 52 of the Convention, are disconcerting mainly because they adopt excessively liberal standards of review which may lead to the weakening of one of the principal salutary attributes of arbitration, namely, finality. Bereft of this attribute of finality (and expedition), arbitration, under any institutional system, loses much of its relevance.

This paper begins by focusing on the rationale behind the Convention and how the same institution should find more relevance in the present day context of international investment flows. From this, the paper adopts the premise that the standards of review applied by the *Klockner* and *Amco Asia ad hoc* Committees were not in keeping with the historical intent behind the annulment mechanism provided in the Convention. Given that no new curative annulment award is in the offing and that a multilateral consensus on the proper interpretation of the annulment procedures is not forthcoming, the author explores the possibility of, as well as the problems attendant to, *waiving* the annulment option of the Convention through bilateral investment treaties. *Incorporating more restrictive review standards* in these bilateral investment instruments is also explored.

This author is of the opinion, and he will demonstrate, that waiving the annulment option or having more restrictive review standards in bilateral treaties is valid under public international law.

The paper proceeds further by exploring two other problems associated with ICSID arbitration. The first concerns sovereign immunity from execution and how it adversely affects the desirability of ICSID arbitration vis-a-vis other systems. In this regard, the validity under public international law of bilateral agreements waiving sovereign immunity from execution shall be explored.

The second problem pertains to the lack of acceptability of the Convention in Latin American countries, a factor that may prevent ICSID arbitration clauses from finding their way into investment agreements with these countries. The probability of a change of heart in this region is also explored.

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decision [hereinafter Amco Asia Annulment Award] is published in an English translation in 25 INT'L LEGAL MATERIALS 1439 (1986). All subsequent citations are taken from the latter.

II. Development Through Investments: The Factual Milieu Surrounding the Creation and Continuing Relevance of ICSID

The Convention came into full fruition at a time of simmering tensions between capital-exporting and capital-importing nations. That the purpose for which the Convention came into being would assume tremendous relevance within two decades from its adoption bears testimony to the foresight of the Convention's framers.

The *raison d'etre* of the Convention is straightforward. As intimated earlier, it was prompted by a desire to forward the cause of economic development by creating an atmosphere of mutual confidence that would encourage a larger flow of private international capital into countries which want to attract it.[7] Parenthetically, it was not inconsistent for the World Bank to sponsor the Convention because, although the Bank's principal activity is to provide finance, it does so in carrying out its task *as a development institution.*[8]

However, the Convention was adopted as much to aid international investors evade the discriminatory policies that may be adopted by host States. These policies relate to expropriations, stability of contracts, and wavering social and economic policies. It has been submitted that in curbing policies which are not conducive to foreign investments, the Convention's machinery does not affect the sovereignty of States; in fact, it aids the development of competitive entrepreneurial activity. The Convention is seen as a neutral instrument intended to make investors confident in the currencies of host States and as an imperative generated by the dramatic devaluation of money in most countries.[9]

The most tangible factual event that led to the increased importance of the Convention was the international debt crisis and the resultant pressures brought to bear upon heavily indebted countries to invite foreign exchange generating investments. These investments, in turn, have assumed new forms that require no less protection than the traditional ones.

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[7]Report, *supra* note 1, at par. 9.

[8]Broches, *The Convention On The Settlement of Investment Disputes Between States And Nationals Of Other States*, in 136 RECUEIL DES COURS 331, 342 (1972).

[9]Menchaca, *Multinational Firms And The Process Of Regional Economic Integration*, in 150 RECUEIL DES COURS 337, 424, 464 (1976).

A. The debt crisis, new forms of investment and the demand for investment protection

The global debt crisis traces its beginnings to the Arab oil embargo that ensued after the Arab-Israeli War of 1973. Almost immediately, quadrupled oil prices brought tremendous petrodollars into the coffers of oil producing Arab nations, which resources these nations, in turn, plowed back mostly into the international banking institutions of Europe and the United States.

Quite understandably, this glut in the dollar deposits of the large money center banks led these institutions to be giddy in loaning out huge sums at attractive interest rates. The money center banks did not have to do much enticing to shift the development strategies of less-developed countries from one emphasizing internal capital-generated development to one centering on debt-financed development. Many less-developed countries were all too willing to borrow heavily in order to precipitate an early take-off of their economies.[10]

The vagaries of world market prices for the export commodities of most less-developed countries, however, took their toll as can be seen in the failure of these countries to build enough foreign exchange as a reserve upon which to draw come maturity of their long term loans. As the world ushered in a new decade, it became increasingly clear that most nations which financed their development strategies through heavy borrowing would not be able to service their maturing debts.

Indeed, the debt crisis that broke out in 1982 pushed principal borrowing nations into a depression that nearly rivalled that of the 1930s. Shortages of capital and foreign exchange, which are unlikely to be generated simply by tighter austerity programs, constrained the ability of these countries to service their existing debts. This left a large gap of about ten to thirty billion dollars a year in what is considered necessary for the largest developing-country debtors to return to a steady growth path.[11]

It is in this area of "growth stimulation" that private foreign investment has been traditionally important. Historically, the response of the international investment community after cyclical

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[10]Goldsbrough, *Investment Trends and Prospects: The Link with Bank Lending*, in INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL 173 (Moran ed. 1986).

[11]INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL 12 (Moran ed. 1986).

downturns has been quite strong.[12] There were estimates in 1986, for instance, that while foreign investments declined by more than twenty-eight percent in 1982-1983, net inflows of direct investment would climb to a total of nearly forty percent in the beginning of 1987, levelling off to an annual rate of increase of 3.25% thereafter.[13]

But even under the relatively optimistic scenario just presented, the contribution of direct foreign investment in filling the "debt gap" is really a modest fraction of what is needed.[14] What additional measures then may stimulate increased investment flows? What other forms of capital inflows may bridge the gap needed to propel debtor nations into growth?

Answering these queries conjunctively, some new forms of investment that may accelerate growth are joint ventures in which foreign equity does not exceed fifty percent, licensing agreements, management contracts, franchising contracts, turnkey and product-in-hand contracts, production-sharing and risk-service contracts, and international subcontracting. Many of these forms are not really "new" as they are "non-traditional," but use of the term "new" focuses attention on the extreme importance of these business forms as a whole, given their significant proliferation in recent years.[15]

International commercial arbitration procedures become relevant with respect to these new forms of investment because a significant number of them carry arbitral clauses. While these forms involve minimal or no equity capital, the value of the technology involved and other inputs has led investors to maximize safeguards against expropriations and other unilateral acts of host States.

As an illustration of a new form of arrangement, in mineral extraction and energy generation industries of many developing countries, it is common for turnkey contracts to be executed between State-run companies and foreign multinational companies. Turnkey contracts typically provide that the contractor shall conduct a

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[12]Goldsbrough, *supra* note 10, at 173-174.

An increase of 34% in 1973 after a drop of 16% in 1972, and an increase of more than 19% in 1977-1978 after a drop of 21% in 1976.

[13]*Id.* This projection was strengthened by support from survey data from 52 large international corporations conducted by the Group of Thirty (which, since 1978, has explored basic problems in the functioning of the international economic system): 22% of the firms expected their real investment flows to be larger in the period 1983-1987 than during 1978-1982, while seven percent expected them to be lower.

[14]Moran, *supra* note 11, at 14.

[15]Oman, *New Forms of Investment in Developing Countries*, in INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL 131 (Moran ed. 1986).

feasibility study, provide technology and know-how, and carry out or supervise the design, engineering and construction of, as well as supply capital equipment for the project. Very often, turnkey contracts are resorted to where major infrastructure projects are involved.[16]

The risk to a foreign investor in the above example should be self-evident, especially if the payment to turnkey contractors comes in the form of a percentage of the operating profits of the project over a specified period of time. An abrupt expropriation by a host State would almost surely generate gigantic losses for the investing firm and the latter would very likely be at a disadvantage should it try to vindicate its rights within the local administrative or judicial systems. Even assuming that the adjudicatory mechanisms within the host State have reached a level of sophistication and reputation for evenhandedness, perhaps similar to the structures found in the investor's home State, one cannot discard the basic distrust attendant to a situation where one party is forced to litigate in the territory of its adversary. This basic distrust has led to an even greater role played by commercial arbitration clauses in negotiations leading to investment agreements.[17]

It should be noted that new forms of investment were involved in the *Klockner*[18] and *Amco Asia*[19] arbitral awards, which goes to show that even these new forms may generate undesired controversy.

In *Klockner*, the issues decided by the arbitral tribunal, later reviewed by an *ad hoc* committee, revolved around the construction and management of a fertilizer factory in Cameroon. The factory itself was constructed under a turnkey contract, while the operation of the plant was undertaken on the strength of a management contract. The arbitral and annulment awards in *Klockner* concentrated on the obligations arising under the management contract, particularly in relation to the broad responsibilities provided in the protocol of agreement between the disputants.[20]

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[16] *Id.* at 137-138.

[17] The basic distrust of the impartiality of local tribunals when faced with a controversy between local and foreign litigants must be added to the traditional reasons for favoring arbitration. Thus perceptions that "procedures followed in the official tribunals are very intricate, slow and costly" and that "the substantive law (applied in the host State) is obscure, complex or out of touch with contemporary needs and realities" may fortify the preference of an investor for arbitration as a mode of settlement of investment disputes. *See* A. von Mehren, A General View of Contract, Ch. 1, Vol. VII, Contracts in General, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 52 (1982).

[18] Klockner Annulment Award, *supra* note 5.

[19] Amco Asia Annulment Award, *supra* note 6.

[20] Klockner Annulment Award, *supra* note 5, at 94.

In *Amco Asia*, the dispute arose out of an agreement between foreign investors and an Indonesian organizaton linked to the Army for the construction and management of a hotel in Jakarta, Indonesia. A management contract was the main arrangement between the investors and the Indonesian government. At issue was the propriety of the unilateral rescission by the Indonesian Government of the management contract and the physical force by which the same Government took control over the hotel operations.[21]

These two cases exhibit the contentious scenarios that may erupt as capital-importing and capital-exporting countries turn increasingly towards new forms of investment in business arrangements.

B. State enterprises as new partners for development

It is not difficult to appreciate why in less-developed countries state enterprises have mushroomed in areas heretofore reserved for private initiatives. In developing countries, where financial resources may run scarce in long spells, Government, which often has a near monopoly of financial resources, has had to take the lead in generating activities that would prop up the domestic economy. Of late, the joint venture agreement is the most popular 'new form of investment' in government-transnational corporation long term projects.

State enterprises have become active partners in joint ventures in highly capital-intensive industries which use complex technology such as petrochemicals. Transnational corporations, while formerly reluctant to participate in ventures with state enterprises, have more readily become partners in such arrangements. Often state enterprises contribute local capital, raise substantial funds from local and international lending organizations, assume general managerial responsibilities, and bring the support of the Government. On the other hand, transnational corporations provide important technical know-how and engineering, technical training, continued technological inputs, and specialized management. While transnational corporations have managed production and technical operations, state enterprises have been assuming more of the managerial responsibilities of the joint ventures.[22]

To illustrate the involvement of state enterprises in new forms of investment, some examples are in order.

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[21]Amco Asia Annulment Award, *supra* note 6, at 1442-1443.

[22]UNCTC Advisory Studies. Arrangements Between Joint Venture Partners in Developing Countries, Series B No. 2, United Nations 1987 at 9.

In Mexico, Pemes, the State-owned oil company, has Dupont as its minority partner in a major petrochemical complex in the country. International Telephone and Telegraph has reduced its ownership to forty percent in a telecommunication manufacturing plant in Mexico; Grupo Semex, a state-owned banking and industrial conglomerate, owns forty percent, while Mexican investors own the other twenty percent equity. The State has been buying telephone equipment from the joint venture affiliate. Kobe Steel (Japan) recently entered into a joint venture with Sindermex, Mexico's state-owned steel conglomerate, and the government's development bank, Nacional Financiera, to establish a major capital goods manufacturing plant in Mexico.

In Malaysia, where natural rubber is plentiful, Goodyear Tire and Rubber is involved in a fifty-one percent-owned tire manufacturing joint venture with Pernas, a Malaysian Government holding company and conglomerate. Goodyear provides the manufacturing and product technology, specialized management, and some capital, while Pernas contributes local capital, general management, and government support. Pernas also has a fifty percent ownership in a consumer electronics joint venture with Electrolux, a home appliance manufacturer.[23]

Where does the Convention situate itself in this growing trend of state enterprise presence in new investment agreements?

It is precisely the factual scenario just described that leads to the increased relevance of the Convention. The Convention was designed to encourage contractual arrangements where State companies may play the role of the most important contractual actor. Inasmuch as these arrangements give the host State a more direct interest in protecting the local party to the agreement, fears of the partiality of local tribunals in resolving disputes arising from investments become even greater. As will be seen shortly, assuaging these fears is one of the reasons why the Convention has attracted more followers in recent years.

III. The ICSID Machinery: Balancing the Interests of Host States and Investors

It has been advanced that one noteworthy contribution of the Convention is its success in depoliticizing the settlement of investment disputes.[24] This has led to less prospects for the use of diplomatic protection in investment disputes, which action has often been followed

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[23] *Id.*

[24] Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID-FILJ 1 (1986).

by the use of armed force. By lessening the prospects for diplomatic protection, the Convention has made it difficult for capital-importing nations to insist on local remedies as the exclusive means for the settlement of investment disputes. In short, the Convention has made both the resort to diplomatic protection and the adherence to the so-called Calvo doctrine counterproductive to economic development.[25]

It is no surprise that the reason Latin American countries, for instance, have an aversion to arbitration as an institution is because, historically, these countries were exposed to abuses of diplomatic protection and, at times, to armed intervention and occupation by foreign forces dispatched by the governments of foreign investors. Against this experience, most Latin American nations sought to include Calvo clauses in their agreements with investors. These clauses begin with the premise that aliens are not entitled to rights not enjoyed by nationals, and conclude that aliens can seek redress of grievances only before local authorities.[26]

Evidently anticipating resistance along these lines from Latin American and other developing countries, the Convention's provisions on the exhaustion of local remedies, the application of domestic law, and diplomatic protection offer developing nations a wider application of the Calvo clause.

The Convention provides in Article 26 that a Contracting State may require, as a condition for its consent to ICSID arbitration, prior exhaustion of local remedies. This condition may be specified in many ways, such as in an investment agreement, in a bilateral treaty, or in a declaration made by a Contracting State at the time of signing or ratification of the Convention that it intends to avail itself of Article 26 and will require, as a condition for its consent to ICSID arbitration, the exhaustion of its local remedies.

Under Article 42 of the Convention, an arbitral tribunal must decide a dispute in accordance with the law agreed upon by the parties, and should there be no agreement, the same provision stipulates that the law of the host State should apply, along with the applicable rules of international law.

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[25]The Calvo doctrine may be traced to statements made by the Argentine diplomat and international law writer, Carlos Calvo, in his major work, LE DROIT INTERNATIONAL THOERIQUE ET PRATIQUE (5th ed. 1896).

[26]Lillich, *The Valuation of Nationalized Property in International Law, excerpted* in L. HENKIN, *et al.*, INTERNATIONAL LAW: CASES AND MATERIALS 699 (1980).

In addition to the foregoing, Article 27 of the Convention expressly prohibits a Contracting State from giving diplomatic protection or bringing an international claim in respect of a dispute which one of its nationals and another Contracting State have consented to submit to ICSID arbitration. It is only when the State party to the dispute fails to comply with the award rendered against it that the right of diplomatic protection is revived.

Balanced against these concessions to host countries, nationals of non-host States may find relief in the provisions of the Convention relating to the non-revocability of consent, the exclusivity of ICSID arbitration, and the binding effect of the ICSID arbitral awards.[27] While the parties are free to decide on whether to make use of the ICSID machinery or not,[28] once they have consented to submit a dispute to ICSID conciliation or arbitration, neither party can unilaterally revoke its consent.[29]

The effectiveness of the ICSID system is also enhanced by its exclusivity. Consent of the parties to ICSID arbitration is deemed to be exclusive of any other remedy, unless the parties otherwise agree.[30] One consequence of this rule, which tends to assuage the fears of investing nationals, is that ICSID proceedings are insulated in all Contracting States from any form of judicial intervention or control.

The Convention also assures the effectiveness of an ICSID award. An arbitral award is deemed binding on the parties[31] and a party may obtain recognition and enforcement of the award by furnishing a certified copy thereof to the competent court or other authority designated for that purpose by each Contracting State.[32] This

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[27]Shihata, *supra* note 24, at 7-10.

[28]CONVENTION, art. 25, par. 1.

[29]In the cases of Alcoa Minerals of Jamaica, Inc. v. Jamaica (ICSID Case No. ARB/74/2), Kaiser Bauxite Co. v. Jamaica (ICSID Case No. ARB/74/3), Reynolds Jamaica Mines Ltd., Reynolds Metal Co. v. Jamaica (ICSID Case No. ARB/74/4), the arbitral tribunals were faced with the issue of whether the Government of Jamaica, which had earlier consented to ICSID arbitration with respect to agreements forbidding the increase of taxes payable by the investors, could indirectly revoke its consent by notifying ICSID that it intended to exclude from its consent disputes arising out of an "investment relating to minerals or other natural resources" and by seeking to give such notification retroactive effect. The arbitral tribunals held that the disputes concerned "investments" and that the initial consent of Jamaica being unconditional and unqualified, no retrospective effect could be given to Jamaica's declaration limiting investments subject to resolution by the Convention's machinery.

[30]CONVENTION, art. 26.

[31]CONVENTION, art. 53, par. 1.

[32]CONVENTION, art. 54, par. 2.

procedure eliminates the problems of recognition and enforcement of foreign arbitral awards under domestic laws and international conventions. Under the Convention, there is no exception to the binding character of ICSID awards. The role of the courts of Contracting States is purely to assist in the recognition of ICSID awards. Of course, investing nationals who prevail in an investment dispute may still have to contend with the issue of sovereign immunity from execution. As will be later discussed, while sovereign immunity from execution may render meaningless any arbitral award, the problem cannot be attributed to any system of arbitration but relates to the internal laws of individual nations.

At any rate, for a better understanding of the ICSID machinery, an explanation of some of its basic features is in order.

A. Capacity and consent to submit disputes to the Centre

The jurisdiction *ratione personae* of the ICSID is defined very narrowly. One of the parties to a dispute submitted to the ICSID must be a "Contracting State. . . or a constituent subdivision or agency of a Contracting State designated to the Centre by that State."[33]

The Convention lays down no requirements as to what constitutes a "constituent subdivision or agency." This matter is discretionary to each Contracting State. This is a necessary expansion since many foreign investment transactions are conducted not through the State itself, but through political subdivisions, public agencies, or specially created offices, mostly with some financial autonomy.

The other party to the dispute must be a national of another Contracting State, and may either be a natural or juridical person.[34]

The nationality of investors in the context of settlement of investment disputes has been a ticklish issue in recent years and the problem has not been solved by the International Court's decision in the *Barcelona Traction* case.[35] In fact, the philosophy behind the Convention may be seen as a repudiation of the *Barcelona Traction* ruling that "where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a

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[33]CONVENTION, art. 25, par. 1.

[34]CONVENTION, art. 25, pars. 1, 2.

[35]Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA. J. INT'L & COMP. L. 343, 352 (1974).

claim."[36] The Convention not only internationalizes the arbitration agreement itself, along with the procedures contained therein, but it also recognizes individuals and transnational corporations as subjects of international law.[37] As will be hereinafter discussed, the conferment of international status to transnational corporations has not elicited support from many developing countries.

The Convention does not provide a definite criteria for nationality. The only requirement for eligibility is that the other party must be a national of a Contracting State other than the State party to the dispute. The nationality of the investor is not significant insofar as it provides the link that entitles the investor to the protection of his State since the right of diplomatic protection is given up by the national State of the private party to the arbitration proceedings. Thus, the definitions in the Convention of "nationals of another Contracting State" are not the essence of nationality itself. The matter is left to be determined by the arbitral tribunal in the light of domestic and international law.[38]

In addition to the requirement that one of the parties to the dispute must be a Contracting State or a subdivision or agency designated to the Centre by that State, the consent of the designated subdivision or agency to the jurisdiction of the Centre must be approved by the Contracting State concerned, or that State must have waived the requirement of such approval.[39] The consent of both parties to an ICSID investment dispute forms the "cornerstone of the jurisdiction of the Centre."[40] The Convention does not establish a regime of compulsory arbitration through state membership; rather, the whole machinery of the Convention is set in motion by the written consent of both party disputants.

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[36]Barcelona Traction, Light and Power Co. Ltd. Case, 1970 I.C.J. 32, par. 88.

[37]Vuylsteke, *supra* note 35, at 348.

The Convention, in effect, adopted the minority view in the Barcelona Traction case as propounded by the Government of Belgium. Mr. Lauterpacht, the counsel for the Government of Belgium, mentioned, in relation to the question of whether the nationality of the majority stockholders should be considered in the controversy, that "the significance of this definition (of national of a Contracting State as embodied in the Convention) in the context of the present problem is clear. It constitutes a recognition that in international life today, it is not possible with any sense of reality to maintain a rigid barrier between the identity of a corporation and the identity of its controlling stockholders. . . . In short, an identification by reference to the place of incorporation is not enough; it is in other words inequitable." 2 Barcelona Traction, Light and Power Case, I.C.J. PLEADINGS 506-543.

[38]Vuylsteke, *supra* note 35, at 353.

[39]CONVENTION, art. 25, par. 3.

[40]Report, *supra* note 1, at par. 23.

The consent may be expressed in instruments of diverse character and need not be addressed to the other party or made with particular reference to any dispute or arrangement. The consent, therefore, of the host State may be expressed in some legislative act, such as an investment promotion law, or in a bilateral or multilateral agreement with the investor's own State. There is, furthermore, no requirement that the consent must either precede or follow the incidence of a particular dispute. Thus, consent may be expressed in general terms to cover future disputes that may arise out of a transaction. Consent may also be given once a dispute has arisen and be expressly limited to that dispute.[41]

The importance of consent cannot be downplayed since it activates the complete jurisdictional system of the Convention. Once the Centre assumes jurisdiction, this jurisdiction may not be defeated by the unilateral act of the parties. The Convention ensures that the undertaking of the parties to have recourse to the Centre will be effectively implemented.[42]

The ability of the parties to give advance consent to future disputes through several written forms is crucial for this study, especially in the light of analogies that may be drawn between advance consent and waiver of specific procedural remedies embodied in the Convention. If consent is the cornerstone of the jurisdiction of the Centre, and if it is not inconsistent with the object of the Convention for consent to be given in advance, then, perhaps, a mutual waiver of the annulment procedure in Article 52 of the Convention may likewise not be contrary to the object of the Convention. At any rate, this matter will be discussed in a later portion of this paper.

B. Jurisdiction *Ratione Materiae* of the Convention

The jurisdiction *ratione materiae* of the Centre extends to "legal disputes" and the dispute must be one "arising out of an investment."[43] Of particular importance is the fact that the Convention does not define the term "investment." This was a deliberate move on the part of the Executive Directors in order to accommodate both the traditional types of investment in the form of capital contributions and the new forms of investment previously discussed.[44] The move has been defended as

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[41]Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation*, 9 VAND. J. TRANSNAT'L L. 793, 810 (1976). *See also* Report, *supra* note 1, at par. 24.

[42]Broches, *supra* note 8, at 350.

[43]CONVENTION, art. 25, par. 1; Report, *supra* note 1, at pars. 26, 27.

[44]Shihata, *supra* note 24, at 5.

consistent with the consensual nature of the Convention because it leaves a large measure of discretion to the parties.[45]

To date, the Centre has been the recipient of disputes concerning traditional types of investment which have included those relating to the exploitation of natural resources such as bauxite, timber, and petroleum; industrial investments such as the manufacture of bottles, fibers, liquefied natural gas, and aluminum; and the construction of hotels and urban housing. Aside from the contracts involved in the *Klockner* case previously discussed, new forms of investment involved in disputes brought before the Centre have included a management contract for a cotton mill, a contract for the equipping of vessels, and technical and licensing agreements for the manufacture of weapons.[46]

Most of the aforementioned cases related to matters of performance and interpretation of investment agreements. Only a few, like the *Amco Asia* case, involved revocation of investment licenses or nationalization.

IV. Finality of Arbitral Awards and the Turbulence Effected by *Klockner* and *Amco Asia*

As mentioned earlier, the greatest selling point of international commercial arbitration is its reputed propensity to cut the time and cost normally involved in dispute resolution processes. Often, however, this imputed virtue of international arbitration is diluted by the difficulty of ensuring the finality of arbitral awards. While there has been a marked trend in recent years to recognize the autonomy of arbitral tribunals, national courts have continued to review arbitral awards under a variety of standards.[47]

Unfortunately, the *Klockner* and *Amco Asia* awards have added to the confusion generated by the varying standards of review applied by different institutions. In both cases, *ad hoc* committees formed pursuant to Article 52 of the Convention concluded that the

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[45]Broches, *supra* note 8, at 362. Broches adds, however, that this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention. This suggests that ICSID arbitral tribunals will have to refuse jurisdiction when strained interpretations of "investment" agreements, which are in reality ordinary sales agreements, are presented before them.

[46]Shihata, *supra* note 24, at 5-6.

[47]Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID-FILJ 85 (1987). On this point, Mr. Feldman cites the "pyramids resort" case where a French court set aside an ICC award on the same day that leave to enforce the award was granted by a court in the Netherlands.

arbitrators had exceeded their powers by failing to apply the proper law and to state sufficient reasons to justify their legal conclusions.

What is worrisome about these decisions is that, under the Convention, there can be no appeal from a decision of an *ad hoc* committee annulling an award. The only option left to a disputant is to resubmit the case for resolution by ICSID arbitration in a *de novo* proceeding before a new arbitral tribunal. The circularity of the procedure is evident since the losing party in the new proceeding will almost surely request for an Article 52 annulment review by a new *ad hoc* committee. Thus, there is the risk that every dispute submitted for resolution by the ICSID will entail at least two proceedings: one before an arbitral tribunal and another before an *ad hoc* committee. If the two panels disagree, further proceedings will be required to resolve the dispute.

It may be argued that the effect of these decisions is to resolve the inherent tensions in arbitration law in a way that incorporates the worst features of arbitration and ordinary judicial proceedings. It has been recognized that

> [t]here has always been a tension in arbitration law between the need for fair procedure and just decisions on the one hand, and the pursuit of those special advantages which induce parties to choose arbitration in place of litigation, on the other hand. Those perceived advantages include, *inter alia*, informality, expedition and economy. Probably most parties also expect arbitral decisions under law to be tempered by equitable considerations somewhat more than may be the case in the judgments of national courts. These values are protected by important principles of arbitration law, such as party autonomy and the finality of arbitral awards.
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> Parties to arbitration knowingly forego the elaborate procedural safeguards of the judicial process including, in most jurisdictions, the right of appeal on questions of fact or law. For the actors in international commerce, it is the worst of both worlds when agreement to arbitration results in both arbitration and litigation.[48]

It is submitted that only by reformulating the criteria by which to apply the Article 52 mechanism of the Convention may the same instrument sustain its reputation as being "the best choice (where it has jurisdiction) for a party to a conflict."[49] Otherwise, the ICSID may lose its distinct advantage over other systems of arbitration.

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[48] *Id.* at 87

[49] 2 J. WETTER, THE INTERNATIONAL ARBITRATION PROCESS: PUBLIC AND PRIVATE 236-243 (1979). Wetter discusses five prominent international arbitration institutions, namely: the American Arbitration Association (AAA), the London Court

In *Klockner*, it should be noted that, in arriving at the decision that the arbitral tribunal had failed to state the reasons upon which the award was based, the *ad hoc* committee laid down the standard that *the reasons advanced in an arbitral award should be sufficiently relevant or reasonably sustainable and capable of providing a basis for the decision.* Specifically, the committee, headed by Pierre Lalive, stated:

> The text of this Article [Article 52 (1) (e)] requires a statement of reasons on which the award is based. This does not mean just any reasons, purely formal or apparent, but rather reasons having substance, allowing the reader to follow the arbitral tribunal's reasoning, on facts and on the law.
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> The question can be posed in the following terms: in order to rule out annulment under Article 52 (1) (e), is it enough that there be "apparently relevant" reasons, or is it necessary that there be "relevant" reasons? In the first case, control by the Committee will be reduced; in the second, it will be broader.
>
> In the opinion of the committee, one could hardly be satisfied simply by "apparently relevant" reasons. This would deprive of any substance the control of legality Article 52 of the Convention is meant to provide. On the other hand, interpreting this provision as (indirectly) requiring "relevant reasons" could make the annulment proceeding more like an appeal, and lead the Committee to substitute its own appreciation of the relevance of the reasons for that of the Tribunal.
>
> A middle and reasonable path is to be satisfied with reasons that are "sufficiently relevant," that is, reasonably capable of justifying the result reached by the Tribunal. In other words, there would be a "failure to state reasons" in the absence of a statement of reasons that are "sufficiently relevant," that is, reasonably sustainable and capable of providing a basis for the decision.[50]

The *Amco Asia ad hoc* committee, while adopting in substance the *Klockner* review formulation, stated the standard somewhat differently:

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of Arbitration, the ICSID, the Court of Arbitration of the International Chamber of Commerce (ICC), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute). He concluded that the largest amount of assistance to tribunals is that given to the ICSID, which for administrative services has access to the staff and other resources of the World Bank. He suggests that the ICSID is the least expensive institution because the primary costs involved are all reimbursible. Wetter bases his conclusion that the ICSID is the best of the five institutions on the following grounds: the enforceability of the award, the status of the institution as one which is independent yet related to the World Bank, and the vast administrative and other resources of the ICSID

[50]Klockner Annulment Award, *supra* note 5, at 126.

> If it be true that a full control and review of the reasoning followed by an ICSID tribunal would transform an annulment proceeding into an ordinary appeal, it is also true that supporting reasons must be more than a matter of nomenclature and must constitute an appropriate foundation for the conclusions reached through such reasons. Stated a little differently, there must be a reasonable connection between the bases invoked by the tribunal and the conclusions reached by it. The phrase "sufficiently pertinent reasons" appears to this ad hoc Committee to be a simple and useful clarification of the term "reasons" used in the Convention.[51]

The *Klockner* and *Amco Asia ad hoc* committees evidently felt that some of the reasons advanced by the tribunals in those cases were not sufficiently relevant or were not reasonably capable of justifying the result reached therein. It is submitted, however, that inasmuch as these standards are unquestionably broad, they could have as well served as bases to affirm *in toto* the decisions of the arbitral tribunals. Before exploring this point further, the contentious matters advanced by the *Klockner ad hoc* committee should be reviewed in the order in which they were presented.

The first ground that led to the annulment of the award in *Klockner* was the alleged failure of the tribunal to apply "the law of the Contracting State" as mandated by Article 42(1) of the Convention.[52] Specifically, the committee ruled that the arbitral tribunal manifestly exceeded its powers by not applying the Cameroonian law obtaining in the eastern part of Cameroon (in this case, French civil law).

It must be noted that one of the reasons why the arbitral tribunal ruled against Klockner was the company's failure to deal with the Cameroonian government in a frank, loyal and candid manner, which obligation was stated to be a basic principle in French civil law. The *ad hoc* committee, however, ruled that this conclusion was merely assumed and never demonstrated.[53] The imputed duty of candor, the committee continued, was not sufficiently supported by legislative texts, judgments, or scholarly opinions, and while it is true that "good faith" forms the basis of French civil law, as with other legal systems, mere general reference to the principle may not suffice.[54]

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[51]Amco Asia Annulment Award, *supra* note 6, at 1450.

[52]The provision reads: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable."

[53]Klockner Annulment Award, *supra* note 5, at 111-114.

[54]*Id.*

One may wonder though what further demonstration the *ad hoc* committee wanted when it had already acknowledged the fact that full disclosure and good faith formed the basis of *all* legal systems. What is even more perplexing is that the *ad hoc* committee seemed to have cavalierly dismissed the factual considerations that led the arbitral tribunal to rule on the absence of good faith on the part of Klockner.[55] While it may be argued that lining up factual findings in support of a legal principle begs the question of whether the correct legal principle is used in the first place, an *ad hoc* committee should give the utmost deference possible to the findings of law of a tribunal, especially if the legal principle invoked by said tribunal is admittedly one of universal acceptance.

At any rate, it is clear that paragraph 1(b) of Article 52, which authorizes annulment for manifest excess of power on the part of the arbitral tribunal, was not intended to permit review of any error of law. Proposals which sought to authorize annulment of ICSID awards for "unwarranted interpretations of principles of substantive law," "serious misapplication of the law," and "manifestly incorrect applicaton of the law" were rejected by the Convention drafters as being tantamount to an appeal.[56] Moreover, the *travaux preparatoires* show that the drafters rejected a proposal to specify "failure to apply the proper law" as a ground for annulment. This the *ad hoc* committee in *Klockner* (and later in *Amco Asia*) failed to appreciate.[57]

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[55]Paulsson, *The ICSID Klockner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 J. INT'L ARB. 145. *See id.* at 155-157. These factual findings may be summarized as follows: (a) In pushing for the project in 1971, Klockner submitted voluminous technical studies on the cost of raw materials and final products based on 1971 estimates. The dramatic rise in petroleum products shortly thereafter radically altered the economic prospects of the fertilizer industry. (b) Yet, at no moment prior to the construction of the plant did Klockner modify its original representation that the project would be profitable. Klockner failed to deal frankly with Cameroon on the changed circumstances, particularly on financing and commodity prices. (c) In 1974, a second occasion was open to Klockner to make quite clear to Cameroon that the economic prospects that year were different from those in 1971 and that an increase in the cost of the factory was inevitable. (d) By September 1974, Cameroon could still have reconsidered the investment if Klockner had told SOCAME (a government agency) of the modified costs and economics of the project, yet it failed to do so. (e) Klockner had studies as late as October 1974 referring to the possible disadvantageous results of the factory for Cameroon, but it was only in September 1975 that Klockner acknowledged the need for an adjustment concerning the costs of the factory. Yet Klockner, at the end of 1975, did not hesitate to affirm that the factory would be profitable. In all these instances, at the very least, the silence of Klockner led Cameroon into error.

[56]Feldman, *supra* note 47, at 100-101, citing 2 HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 340, 423, 517-518, 851-854.

[57]*Id.*

As mentioned earlier, the *Klockner ad hoc* award attacked the earlier arbitral decision on the basis of Article 52 (1)(e) of the Convention, or more specifically, the failure of the award to state the reasons upon which it was based. In particular, the *ad hoc* committee ruled that the arbitral committee failed to state sufficiently relevant reasons in ruling against four arguments Klockner raised. The committee found that (a) the award imposed on Klockner an obligation of result when the same company only assumed a "best efforts obligation;" (b) the award failed to acknowledge the existence of contractual provisions limiting the warranties given by the company; (c) the brief time limits within which a claim may be made with respect to hidden defects under French law had long expired and no evidence that there was a hidden defect had ever been advanced by Cameroon; and (d) Cameroon had consistently confirmed its obligations to Klockner.

With respect to the first three, the *ad hoc* committee stated that it found it impossible to discern how and why the tribunal reached its decision:

> In the case of the obligation of result in the area of technical and commercial management, it is possible that the tribunal thought it necessary to refrain from citing the provisions of the Management Contract because it declared itself incompetent in this regard, and had tried to reason solely on the basis of Article 9 of the protocol of Agreement (interpreted, as was seen above, as "encompassing" the Management Contract - a concept which need not be discussed here but which seems difficult to reconcile prima facie with a refusal to take into account the contractual arrangements provided by the parties in the Management Contract). But the same does not hold for the Turnkey Contract. It is very surprising, and regrettable, that in accepting the theory of an obligation of result for Klockner, the Tribunal considered it unnecessary to explain why it did not have to take into account Article 9 of the Turnkey Contract or why it did not feel it more necessary or appropriate to apply the provisions of Franco-Cameroonian law on the warranty against hidden defects.
>
> The absence of any discussion by the Award of the contractual provisions on the warranty or limitation of liability is all the more astonishing as the basic reason given by the Tribunal for its decision is its desire "to maintain the equilibrium of reciprocal contractual undertakings as defined by the parties themselves.[58]

While it may be difficult to question the cogency of the reasons advanced by the *ad hoc* committee, it should not foreclose the possibility that the reasons adopted by the Tribunal are, using the standard of the *ad hoc* committee, reasonably sustainable and capable of providing a basis for the decision. Indeed, if one were to assume the

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[58]Klockner Annulment Award, *supra* note 5, at 133-134.

universality of the principles of candor and good faith and accept these as valid starting points from which other conclusions can be drawn, and if one were to accept that the evidence adduced pointed to an obligation of result on the part of Klockner, it is almost impossible to say that the arbitral award did not state anything that was capable of providing a basis for the decision.

Turning our attention to the *Amco Asia* case, it may be argued that the *ad hoc* annulment award therein was more indefensible than the *Klockner* award because, unlike in *Klockner* where a strong dissenting opinion was registered during the arbitration proceedings, *Amco Asia* involved the annulment of a unanimous award.

As stated earlier, for the Indonesian Government's act of forcibly taking control of the foreign investors' hotel and unilaterally revoking the investors' license to do business in Indonesia, the arbitral tribunal awarded Amco Asia and its affiliates over three million dollars in damages. It found that the Indonesian army interfered with the investors' property rights in violation of international law and that the revocation of the license constituted a breach of contract for which compensation was due under both Indonesian and international law.[59] The award, however, was annulled by an *ad hoc* committee on grounds identical to those in *Klockner*, namely, that the tribunal manifestly exceeded its powers by failing to state reasons for its award and to apply the relevant provisions of Indonesian Investment Law.[60]

In explaining how it intended to go about determining a manifest excess of powers on the part of the arbitral tribunal, the *ad hoc* committee stated:

> The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly a task of a court of appeals, which the ad hoc committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. *Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52 (1)(b) of the Convention. The ad hoc committee has approached this task with caution, distinguishing failure*

[59]Feldman, *supra* note 47, at 95. Feldman cites pars. 172, 244-249 of the award as it appears in 1 INT'L ARB. REP. 601 (1986).

[60]Amco Asia Annulment Award, *supra* note 6, at 1459-1460.

> *to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.*[61]

It is submitted, however, that the *ad hoc* committee in *Amco Asia* went beyond its own standard of review by holding, in effect, that the arbitral tribunal misconstrued or misapplied the Indonesian Investment law when it (the tribunal) determined that P.T. Amco (the main foreign investor) had invested over two million dollars in Indonesia at the time of the take-over.

Not only did the *ad hoc* committee, in effect, review the findings of fact of the arbitral tribunal, it also failed to definitively say that the tribunal failed to apply the proper Indonesian law. The *ad hoc* committee strongly suggested that the tribunal misunderstood the proper law for, had it done otherwise, the tribunal would have arrived at a lower calculation for the total investments of P.T. Amco.[62]

The *ad hoc* committee speculated that the tribunal failed to appreciate the critical importance of P.T. Amco's failure to register its claimed inward investment of foreign exchange because this matter had been obscured by the arguments and counter-arguments on accounting principles and problems on deductible taxes, undistributed profits, and depreciation, among others.[63]

The *ad hoc* committee also reviewed the tribunal's calculation of P.T. Amco's total investment in Indonesia and suggested that the proper figure was not reached because of some confusion over the rules. Thus, the committee stated, for instance, that it

> acknowledges that the Tribunal *was aware* of the rule excluding loan funds from the foreign capital investment contemplated by the Foreign Investment Law (Award, paras. 228 and 236, p. 107) and therefore concludes that the Tribunal seems to have contradicted itself. *At least, this impression is not fully disproved* by the text of the award itself (para. 326i, at p. 107). [64]

In short, the committee conducted a *de novo* review of the merits. It held that the tribunal's calculation of the amount invested by P.T. Amco and associates was erroneous since it did not accept the Bank of Indonesia's certification of the amount of investment as conclusive and, although the tribunal ruled that loans should not be treated as investment (unless forgiven), it credited a million dollar loan as equity.

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61 *Id.* at 1446 (emphasis supplied).
62 *Id.* at 1460.
63 *Id.*
64 *Id.* at 1460-1461 (emphasis supplied).

From the foregoing, it appears that the committee believed that the tribunal sought to apply the correct Indonesian law, but it failed to apply the law correctly or fully.

The *Klockner* and *Amco Asia* annulment decisions send a forceful message to future ICSID arbitrators that their awards must be reasoned fully and consistently.[65] They also send an ominous message to parties that may desire to incorporate arbitral clauses in their investment contracts. If finality is their purpose for choosing arbitration, they should seek other arbitral systems that offer a definite end to the review process.

It is submitted that the ICSID should seek a consensus from signatory countries on what the proper annulment standards should be. The "sufficiently relevant" and "sufficiently pertinent" standards of *Klockner* and *Amco Asia* should be made flexible to keep pace with the increasing attractiveness of international arbitration as a mode of settlement of disputes. The standards adopted in these awards must be read to accord the utmost deference possible to judgments of law and fact made by arbitral tribunals. If only to underscore what should be evident, it can not be gainsaid that the reasons advanced by the arbitral tribunals in *Klockner* and *Amco Asia* were not "reasonably capable of providing a basis for the decision." A contrary conclusion would merely give premium to the notion that review standards are a mere play of words that provide a facade to the predilections of particular arbitrators in deciding disputes.

As a form of curative action, the ICSID should promulgate rules for review requiring future *ad hoc* committees to give the utmost deference possible to tribunal rulings on fact and law, so long as the reasons supplied are not eggregiously off-tangent from the chosen law. Only whimsical or capricious reasons, hornbook law standards often applied in United States certiorari proceedings, should provide a defensible basis for pursuing the annulment mechanism of Article 52. A standard of this sort will allow a summary disposition of the request for annulment, consistent with the principle of finality, and will add sanctity to the parties' choice of arbitrators.

V. Reopening the Lanes Closed by *Klockner* and *Amco Asia*

In view of the results in *Klockner* and *Amco Asia*, ICSID arbitration may lose a following from would-be parties to investment agreements. The Secretary-General of the ICSID himself, Ibrahim

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[65]Feldman, *supra* note 47, at 97.

Shihata, has commented "that if parties, dissatisfied with an award, made it a practice to seek annulment, the effectiveness of the ICSID machinery might become questionable and both investors and Contracting States might be deterred from making use of ICSID arbitration."[66]

Shihata recalled that the "history of the Convention makes it clear that the draftsmen intended to: (a) assure the finality of ICSID awards; (b) distinguish carefully an annulment proceeding from an appeal; and (c) construe narrowly the grounds for annulment so that this procedure remained exceptional."[67] He advanced the need to explore ways by which the annulment provisions of the Convention can be clarified through elaboration of the arbitration rules of the ICSID.[68]

Whether a consensus may be reached on the proper interpretation of Article 52 of the Convention remains uncertain. The rules and regulations formulated by the ICSID do not provide for a consensus building machinery for the interpretation of particular provisions of the Convention. Neither does an amendment to the Convention itself appear to be a workable alternative. Article 66 of the Convention provides a two-tiered process for the approval of proposed amendments. First, *two-thirds* of all the members of the Administrative Council must approve *the circulation* of the proposed amendment to all Contracting States for ratification. Second, each amendment shall enter into force thirty days after dispatch to Contracting States by the depositary of the Convention of a notification that *all* Contracting States have ratified, accepted, or approved the amendment. Considering that a time gap usually exists between the signing of the Convention by a State and its ratification of the same, a multilateral approach to a clarification of the Convention's annulment machinery is not advisable.[69] A bilateral approach seems to be the more viable option.

The framers of the Convention appear to have foreseen that consent to ICSID arbitration through bilateral investment treaties

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[66]Report of the Secretary-General to the Administrative Council, ICSID Doc. No. AC/86/4, Oct. 2, 1986, at 2.

[67]*Id.* at 3.

[68]*Id.*

[69]Averaging the time gaps between the dates of signing and the dates of deposit of ratification by 89 states, where the Convention is now in force, it takes about one year and a half between signing and ratification. In several countries, however, the time gap is longer. It took Ireland and New Zealand, for instance, 15 and 10 years respectively to ratify the Convention after signing the same instrument. *See* ICSID Annual Report, 1987, at 14-15. It is difficult, therefore, to assume that a unanimous approval for any amendment to the Convention is probable in the near future.

would be the wave of the future. As stated earlier, consent to ICSID arbitration may be given in advance. The Convention does not require that the consent of both parties be expressed in a single instrument. Thus, the consent of a State may be expressed in an investment protection treaty, but it must be supplemented by the consent of the investor in order to be the basis for the Centre's jurisdiction. If the investor wants to institute proceedings, he will see to it that his consent is duly recorded and communicated in writing to the host state. Although the contracting parties to the treaty may have explicitly or impliedly agreed that either side to an investment dispute may bring the dispute before the Centre, the investor's consent is still required by the Convention. If the investor refuses to give it, the Centre's jurisdiction is defeated.[70]

Consent to ICSID arbitration through bilateral investment protection treaties has generated debate on the availability of revocation to a treaty signatory prior to the actual elevation of the dispute to the Centre. This issue is especially relevant where one party, usually the investor, is given the first option to use the ICSID machinery, while the other party is "obligated" to accept ICSID proceedings when its contracting partner so chooses it.

It should be recalled that Article 25(1) of the Convention provides that when both parties have consented to the jurisdiction of the Centre, "no party may withdraw its consent unilaterally." There is authority, however, to the effect that in investment agreements that provide advance consent on the part of a Contracting State, said Contracting State may withdraw its consent provided it does so before the party-investor signifies its own consent to ICSID arbitration. Thus,

> [u]ntil the investor has also signified his consent in writing, the prohibition against unilateral withdrawal of consent does not apply, that is to say, the host State's consent is revocable under the Convention. On the other hand, that consent forms part of a treaty with the investor's national State and, unless the Convention is deemed to be *pro tanto* incorporated in the treaty, revocation of consent would constitute a breach of the treaty. In that event, the investor's national State could proceed against the host State and demand that the revocation be retracted. But pending such retraction, an application by the investor to the Centre -- after his consent in writing has been expressed -- would presumably be rejected by the Secretary-General if he considers that the revocation was clearly permitted under the Convention and the Centre therefore manifestly lacks jurisdiction or, if he feels that the matter is not entirely free from doubt, he would register

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[70]Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes*, in THE ART OF ARBITRATION 63, 67-68 (J. C. Schultsz & A. J. Van Den Berg eds. 1982).

> the application whereupon an arbitral tribunal would be constituted which would immediately be faced by an objection on behalf of the host State to its competence. An investor who wants to rely on a host State consent expressed in an investment protection treaty should therefore promptly signify his own consent in order to assure irrevocability.[71]

Aside from the issue of revocation of the advance consent to ICSID arbitration given by a party, normally a host State, the *reciprocity and mutuality* of obligations may place in question the validity of the advance consent clause. While theoretically both less-developed and industrialized host States are bound by advance consent clauses, in practice, it is more likely that private investors from industrialized States would invoke these clauses against less-developed States than the latter would against the former. Reciprocity, therefore, between these nations is to a large extent an illusion rather than a reality.[72]

While there is no jurisprudence that suggests that this absence of reciprocity should lead to the non-enforceability of the advance consent clause, the same could be the basis for challenging in the future the validity of advance consent clauses should instruments like the Declaration of the New International Economic Order be accepted as a new source of international law.[73]

Given the wide acceptance of bilateral treaties that provide advance consent to ICSID arbitration, the question may be asked: if treaty clauses of this nature are valid under public international law, will it be equally valid for bilateral treaties to explicitly waive the annulment mechanism of Article 52 of the Convention? Corollary to this, may the parties to a bilateral investment agreement expressly agree on the finality of the award rendered by an arbitral tribunal? In the same vein, may the parties to a bilateral investment treaty provide their own standards of review for the Article 52 mechanism?

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[71] *Id.* at 68-69.

[72] Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT Y. B. INT'L L. 241, 241-242 (1981). Mann was using the bilateral investment protection treaty between the United Kingdom and the Philippines as basis for his observations that these particular treaties reflect reciprocity as a matter of prestige and not reality. He says that the British-Philippine investment treaty is intended primarily to protect and promote British investment in the Philippines and not vice-versa.

[73] In fact, under the New International Economic Order, non-reciprocal and preferential treatment should be accorded economically disadvantaged countries (vis-a-vis industrialized nations), and not vice-versa. *See* Feliciano, *International Law And The Establishment Of A New International Economic Order*, 5 PHIL. Y. B. INT'L L. 66, 67 (1976).

The answers to these questions may be found in the Convention in relation to laws of treaty interpretation under public international law.

The validity of a waiver or limitation of the annulment mechanism of the Convention may first be tested against the amendment provisions of the Vienna Convention on the Law of Treaties.[74] Article 41 of the Vienna Convention provides rules for *inter se* amendments to multilateral agreements:

> 1. Two or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
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> (a) the possibility of such a modification is provided for by the treaty, or
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> (b) the modification in question is not prohibited by the treaty, and
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> (i) does not affect the enjoyment by the other parties of their right under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Paragraphs 1(a) and (b) permit the conclusion of an amendatory bilateral or multilateral arrangement by parties to a multilateral treaty if the original treaty either expressly permitted or failed to prohibit such act. One of the conditions, however, for the validity of an *inter se* amendment is that such amendment must not be incompatible with the object of the original multilateral agreement.

The *travaux preparatoires* of the Vienna Convention provide the example that an *inter se* agreement modifying substantive

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[74]It has been close to 19 years since the adoption by the United Nations Conference on the Law of Treaties on May 22, 1969 of the Vienna Convention on the Law of Treaties. One hundred and ten States were represented at the second session of the Conference in 1969. Ninety-nine States participated in the final voting; 79 voted in favor, France against, and 19 States (including the Soviet-bloc) abstained. More than 35 States have now ratified the Vienna Convention and, pursuant to Article 84 of the same instrument, the convention has now entered into force. For a text of this treaty, see U.N. Doc. A/CONF. 39/27, 23 May 1969; 8 INT'L LEGAL MATERIALS 679 (1969).

provisions of a disarmament or neutralization treaty would be incompatible with the object and purpose of the latter and is not permissible under the Vienna Convention.[75]

Tested against these rules, it may be safe to conclude that a waiver or limitation of the annulment mechanism of Article 52 of the Convention may be provided in an *inter se* agreement because it does not violate any fundamental object or purpose of the Convention. Of course, it may be argued that the Convention's annulment mechanism may not be contracted away or limited because the Convention creates a complete jurisdictional system which, once activated by the completion of all jurisdictional requirements, cannot be defeated by the unilateral act of a party.[76] If one argues that the "complete jurisdictional system" includes the annulment mechanism, then both parties are locked into the system and may not deprive the other party of resorting to annulment proceedings despite an agreement to the contrary. Furthermore, if one were to accept the proposition that the jurisdictional limitations of the Convention are of a constitutional nature and, therefore, cannot be waived by the parties whether acting unilaterally or jointly,[77] one may argue that the annulment process in the Convention is just as fundamental as the jurisdictional (*ratione personae* or *materiae*) limitations and may not be validly waived as well. Balanced against these considerations, however, is the fact that "consent" has been heralded as the cornerstone of the Convention which complements the basic principle of party autonomy in international commercial arbitration. Bilateral agreements waiving the annulment mechanism of the Convention may be regarded as manifestations of party autonomy. Furthermore, as mentioned earlier, nothing in the history of the Convention points to a prohibition against a waiver or limitation of the annulment provision. In fact, a waiver provision may make possible a more expeditious settlement of investment disputes, which is a primary object of the Convention.

As a second test, a waiver or limitation of the annulment provision may be questioned on the ground that it violates *jus cogens* norms of international law.

The principle of *jus cogens* is found in the Vienna Convention, which states:

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[75]WETZEL, VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PREPARATOIRES 303 (1978).

[76]Broches, *supra* note 8, at 350.

[77]Amerasinghe, *supra* note 41, at 803.

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.[78]

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.[79]

As in the case of many other concepts in international law, *jus cogens* norms may find analogous counterparts in municipal law systems. There has evolved over the years, in practically all systems of municipal law, the principle that the will of the parties to conclude contracts is not unfettered, but is subject to certain restraints essential to the continued existence of an orderly society. These restraining rules basically proclaim that there are certain types of contract which by their very nature are injurious to society and, therefore, contrary to public policy. Although *jus cogens* is closely related to public policy, the two concepts are not exactly similar, at least if public policy is conceived of in the narrower sense as being confined to circumstances under which municipal courts will refuse to enforce a contract. *Jus cogens* is the sum of absolute, ordering, prohibiting municipal law prescriptions, in contrast to the *jus dispositivum*, or those legal prescriptions which can, and do, yield to the will of the parties.[80]

There has been considerable debate on the doctrinal evidence of the existence of *jus cogens* norms. Anglo-American writers, for instance, have expressed divergent views on the matter. McNair notes that in every civilized community, there are some legal rules and principles of morality that individuals are not permitted by law to ignore or to modify by agreement. Extending this to international law, he acknowledges the existence of rules that by treaty or custom are necessary to protect the public interest of the society of States or to maintain the standards of public morality recognized by them.[81] At the other end of the spectrum, Schwarzenberger is most skeptical. He denies the existence of *jus cogens* on the level of unorganized international society and stigmatizes the draft article of the Vienna Convention on *jus*

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[78] Art. 53.

[79] Art. 64.

[80] I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 204 (1984).

[81] *Id.* at 208.

cogens as being "perfectly adapted to the idiosyncracies of a hypocritical age."[82]

Jurisprudentially, one may see indirect references to the concept of *jus cogens* in the advisory opinion of the International Court of Justice in the *Reservations to the Genocide Convention* case. Referring to the special characteristics of the Genocide Convention, the Court noted that it was the intention of the United Nations to condemn and punish genocide as a "crime under international law" involving the right of existence of entire human groups, a denial of which shocks the conscience of mankind and results in great losses to humanity, contrary to the moral law and the spirit and aims of the United Nations.[83]

Divergent views on the existence and scope of *jus cogens* norms were also expressed in the proceedings leading to the Vienna Convention. The United States, for instance, proposed a test for the identification of *jus cogens* norms which proposal required that such norms be recognized by both national and regional systems of the world. The proposal was based on the premise that "a rule of international law" was only *jus cogens* if it was universal in character and endorsed by the international community as a whole.[84] The Eastern European delegations, on the other hand, were of the view that *jus cogens* norms do include principles such as non-aggression and non-interference in the internal affairs of States, sovereign equality, national self-determination, and the struggle against colonial domination. The latter catalogue of general principles, however, only served to confirm the anxieties of other delegations that *jus cogens* could be used as a weapon to undermine the security of treaties.[85]

In the final resolution, the *travaux preparatoires* reveal that the International Law Commission, responsible for drafting the Vienna Convention, left the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals. Some members of the Commission, however, suggested that examples of violation of *jus cogens* be included in the Vienna Convention. Some of these examples were treaties contemplating the unlawful use of force, treaties contemplating the performance of acts criminal under international law, and treaties contemplating the commission of acts such as slavery, piracy, and genocide. Other members expressed the view that if examples were given, it would appear to limit the scope of the rule to crimes under international law and treaties violating human

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[82] *Id.*

[83] I. SINCLAIR, *supra* note 80, at 210.

[84] *Id.* at 219.

[85] *Id.* at 218-219.

rights, the equality of states, and the principle of self-determination. As stated earlier, the Commission ruled against providing examples on the ground that this may lead to misunderstanding on cases not mentioned by the Article. The Commission also felt that it might find itself engaged in a prolonged study of matters which fall outside of the scope of the Article on *jus cogens*.[86]

What is the relevance of the concept of *jus cogens* in the waiver or limitation of the annulment machinery of the Convention?

It is submitted that a bilateral treaty provision waiving or limiting the annulment machinery of the Convention does not violate any *jus cogens* norm. Such a waiver does not fit into the mold of activities that States consider as violative of *jus cogens* norms. A waiver of Article 52 proceedings is far different from a provision encouraging slavery, piracy, or genocide. Neither may it be reasonably linked to any violation of human rights.

The argument that a waiver provision underscores the inequality in bargaining positions of Contracting States may not be successfully invoked against the validity of such provision on the basis of *jus cogens* because recourse to Article 52 proceedings is *not* of such a fundamental nature which corresponds to the universal ethics of the international community.[87] It is strained reasoning to suggest that issues of sovereign equality are involved in the contemplated waiver provision because said provision is double-edged, intended as it is to bind the States party to the investment accord and their investors.

Also of significance are the rules of the Vienna Convention on the avoidance of treaties due to a vitiation of consent. Article 52 of the Vienna Convention is clear when it proclaims the invalidity of a treaty procured by the "threat or use of force." The idea that a treaty could be voided on the ground that it was procured through force or the threat of the use of force has come a long way, considering the long standing argument that to place the stigma of invalidity on such a treaty would place in jeopardy all peace treaties entered into upon the conclusion of hostilities.[88]

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[86]WETZEL, *supra* note 75, at 377-378.

[87]Verdross, *Forbidden Treaties in International Law*, 31 A.J.I.L. 571, 574 (1937). Professor Verdross further limits the situations when a treaty may be considered immoral. If a treaty prevents a State from maintaining law and order within its territory, defending against external attacks, caring for the bodily and spiritual welfare of the citizens at home, and protecting its citizens abroad, it would be contrary to the universal ethics of the international community.

[88]I. SINCLAIR, *supra* note 80, at 177.

On the basis of sovereign equality, Article 52 of the Vienna Convention may be used to strike down the proposed waiver provisions if the so-called progressive definition of "force" which includes "economic or political pressure" is followed.[89] When debates sponsored by the International Law Commission were held on this last point, delegates from the Afro-Asian and Latin American bloc included in their definition of "pressure" economic pressure which, in turn, embraced "the withdrawal of aid, the recall of economic experts," and other manifestations of political dependence and neo-colonialism.[90] This bloc of nineteen developing nations sought to include this concept of economic pressure in the text of the Vienna Convention. After a major controntation, the proposal was not pressed to a vote since many Western delegations hinted that its acceptance would seriously prejudice the prospect of producing a Convention that would command their support. Instead, a declaration condemning the threat or use of pressure in any form by a State to coerce any other State to conclude a treaty was adopted unanimously by the Plenum.[91]

Arguments on the basis of "economic pressure" may likely be invoked by a developing host State with regard to its waiver of the annulment option of the Convention should an ICSID arbitral tribunal render an award adverse to said State. Consistent, however, with an earlier response to arguments of this nature, which rely on progressive views of international law, it is highly unlikely that this position will be looked upon with favor by any respectable international adjudicatory body. Most of these "progressive views" have neither been codified nor elevated to the status of customary international law.

In resume, a provision in a bilateral investment treaty waiving the annulment option of Article 52 of the Convention or limiting the review standards applicable to said annulment process is not violative of *any* rule of international law. Since a treaty provision of such a nature is double-edged, there seems to be no reason for a host State or a private investor's home State to wish to include such a provision in a bilateral investment treaty. But as international arbitration becomes more and more attractive to investors because of its putative features of finality and expedition, more parties who adopt ICSID arbitration clauses will want to make sure that these putative features are made to work should actual controversies arise. Given the tumultuous effects of *Klockner* and *Amco Asia*, a provision waiving the annulment option of Article 52 of the Convention or limiting the review standards

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[89] *Id.*
[90] *Id.* at 178.
[91] *Id.* at 178-179.

applicable to said annulment process may reasonably provide that assurance.

VI. The ICSID and the Problem of Sovereign Immunity from Execution

The inability of parties to have foreign arbitral awards recognized and enforced is a problem that besets all institutional arbitral systems. This problem is brought to fore when a private investor prevails in arbitration proceeding against a State and seeks to enforce the award in the courts of the losing State or of any other State.

Article 54 of the Convention provides, in part, that "each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by a court in that State." Unlike the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[92] which enumerates grounds for the refusal of a State to enforce foreign arbitral awards, the Convention's enforcement rules do more to internationalize the award and alleviate the problems in the allocation of juridical control over the recognition and enforcement of awards between the rendering State and the enforcing State.[93]

While the New York Convention goes far in reversing the traditional attitude that private arbitral awards must be subjected to a thorough substantive review in the course of enforcement proceedings, it is inadequate in guaranteeing enforcement against a State.[94] Non-enforcement of a private arbitral award is permitted by the New York Convention when the arbitration concerned a matter which cannot be the subject of arbitral settlement under the law of the State in which the court sits[95] or when enforcement is found to be "contrary to the public policy of that country."[96] These grounds offer a leeway to a court handling a suit seeking enforcement against a State and the investor who prevailed in private arbitration may discover that the award is legally worthless.

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[92]Done at New York, 10 June 1958, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention].

[93]Vuylsteke, *supra* note 35, at 359.

[94]Schmidt, *Arbitration Under The Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L. L.J. 90 (1976).

[95]NEW YORK CONVENTION, art. V(2)(a).

[96]NEW YORK CONVENTION, art. V(2)(b).

In contrast, the role of municipal courts in award enforcement proceedings under the Convention is severely limited. The public policy exception cannot be applied because of the express mandate of Article 54 quoted above. Provisions of local law empowering municipal courts to reexamine the merits of an award or determine on review whether an award is in accordance with the national law are waived. There is no appeal from an ICSID award and an investor who has won in an ICSID arbitration cannot be denied enforcement because of the vagaries of the State's substantive law.[97]

Enforcement of foreign arbitral awards against a State, however, is just one aspect of the problem. Actual execution of an arbitral award is another. As in the case of recognition and enforcement of foreign arbitral awards, the principle of *sovereign immunity* forms a stumbling block which the prevailing private party has to overcome.

Sovereign immunity from jurisdiction of a court must be considered separately from sovereign immunity from execution. While some countries continue to accept the absolute immunity of foreign States from the jurisdiction of local courts, others recognize immunity from jurisdiction for acts *jure imperii* but deny it for acts *jure gestionis*.[98] National courts, however, have generally upheld an absolute immunity from execution even in cases where immunity from jurisdiction had been either waived or denied on the ground that the sovereign State had acted *jure gestionis*.[99]

No problem of immunity from jurisdiction arises under the Convention. But the framers of the Convention were faced with the question of whether they should include in the Convention a waiver of sovereign immunity from execution. This was resolved in the negative for fear that it would elicit opposition from developing countries. Moreover, since State practice and the practice of domestic courts had shown so many variations of State immunity, the framers thought that the time was not ripe for the creation of a new law even within the

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[97]Schmidt, *supra* note 94, at 105.

[98]The difference between acts *jure gestionis* and *jure imperii* may be gleaned from the following passage: "Originally, jurisdictional immunities were regarded as being absolute. A state could invoke them, irrespective of the nature of its sovereign activities. But as states have become increasingly involved in commercial activities, the pressures towards limiting jurisdictional immunities have grown apace. At present, the absolutist approach to jurisdictional immunities is in general decline. A restrictive doctrine has emerged, which denies immunity when a foreign state claims it in regard to an activity or property that is commercial rather than public, that belongs to the sphere of *jus gestionis* rather than *jus imperii*." *See* L. HENKIN, *supra* note 26, at 496-497.

[99]Broches, *supra* note 8, at 403.

limited context of the Convention.[100] Through Article 55 of the Convention, it was made clear that it was not the intention to include a waiver of sovereign immunity from execution.

Article 55 provides that "nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State or of any foreign State from execution." While Article 54, therefore, requires Contracting States to treat an ICSID award as a final judgment of a domestic court, it does not require them to undertake forced execution of awards in cases where final judgments could not be so executed.[101] While the express provision of Article 55 has been regretted by some, it has been suggested that this provision "does no more than acknowledge State practice as regards immunity from execution" and the scope of Article 54 will evolve along with State practice.[102] As it stands today, it is perhaps unrealistic to expect a great change in State practice in forced execution against States.

One possible method that a foreign private investor may use to go around this limitation of the Convention is to pressure a host State to waive its immunity from execution in a bilateral treaty or in the investment laws of said State. Whether this waiver, as well as its nuances, is valid under international law should be explored more thoroughly. This paper will take a brief look at this alternative in the experience of the United States.

The absolute theory of sovereign immunity was very much in vogue in the United States when, in 1930, a federal Court of Appeals ruled in *Dexter & Carpenter v. Kuuglig Jarnvagsstyrelsen*[103] that the consent of a State to be sued did not include consent to execution. Even after the restrictive theory of sovereign immunity from jurisdiction received wide acceptance from many states, including the United States, the U.S. State Department continued to emphasize that "property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit."[104] That much deference would continue to be accorded State Department pronouncements can be seen in later cases where courts not only applied the State Department's rules on sovereign

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[100] *Id.* at 403-404.

[101] *Id.*

[102] *Id.*

[103] 43 F.2d 705 (1930), *cert. denied*, 282 U.S. 896 (1931).

[104] Letter from the Department of State to the Attorney-General requesting release from attachment of property claimed by the Government of Czechoslovakia (22 June 1959), *quoted in* Stephen v. Zivnostenska Banka, National Corp., 222 N.Y.S. 2d 128, 133-134 (1961).

immunity but also followed the details laid down by said Office in stating the changing requirements of international law.[105]

In the case of *Rich v. Naviera Vacuba, S.A.*,[106] for instance, a judgment was rendered against Cuba in an *in rem* action in which Cuba had waived immunity from jurisdiction and all privileges with respect to enforcement and execution of the judgment. Upon representation of the State Department before the judgment could be executed, however, that the release of the vessel attached to satisfy the judgment would avoid disturbance of the international relations of the United States, the belated claim of immunity by the Cuban Government was allowed to defeat execution of judgment. The District Court held that the earlier *Dexter* decision was authority for the proposition that a waiver of immunity could be repudiated at any time before execution is levied and therefore allowed Cuba to repudiate its agreement not to plead immunity and its waiver of immunity from execution. It has been suggested that the *Rich* court came very close to the orthodox English view of waiver of immunity, i.e., that consent to jurisdiction or execution must be made in the presence of the court.[107]

It is of course questionable whether this approach to sovereign immunity is still valid, although it should be pointed out that even at the time these cases were decided, a number of States like Belgium, Austria, Argentina, and Switzerland were permitting execution where the sovereign was not immune from suit.[108] If, however, waiver may be repudiated even after proceedings against a State had been commenced, the efficacy of the proposed bilateral treaty or investment law provision would be seriously placed in jeopardy.

Waiver of sovereign immunity provisions, particularly in the context of investment promotion activities, will draw the ire of proponents of progressive principles of international law who consider provisions of this nature a derogation of the concept of sovereignty. Arguments may be advanced that this waiver goes against the Declaration of a New International Economic Order (Declaration) and its Programme of Action.[109] This will be possible if the waiver provisions are associated with the so-called 'neo-colonialist' tendencies of capital-exporting countries to coerce less-developed countries in their

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[105]Collins, *The Effectiveness of the Restrictive Theory of Sovereign Immunity*, 4 COLUM. J. TRANSNAT'L L. 119, 144 (1965).

[106]295 F.2d 24 (1961), *aff'g* 197 F. Supp. 710 (1961).

[107]Collins, *supra* note 105, at 145.

[108]*Id.* at 138.

[109] U.N.G.A. Res. 3201 (S-VI), May 1, 1974; U.N.G.A. Res. 3202 (S-VI), May 1, 1974.

economic activities.[110] To the extent, however, that these arguments are not general principles of international law, it is highly unlikely that any international adjudicatory body will give them much weight.

The waiver provisions discussed, therefore, are valid not only because they are not expressly prohibited by international law, but also because they are a valid exercise, not a derogation, of sovereignty. More agreements containing provisions of this nature will blossom in the years to come as, in fact, some countries desperately seeking to invite private capital have already adopted unilateral arrangements that allow such waiver.[111]

Provisions waiving sovereign immunity from execution may become a factor when capital-exporting firms, usually from developed countries, shop around for host States, usually developing countries, that will receive their investments. All things being equal, the investing national may prefer a host State that has such a waiver provision or, in the alternative, *has significant assets* in other States where an absolute theory of sovereign immunity from execution is not followed. In the context of ICSID arbitration, given that waiver provisions of the nature discussed are not yet widely accepted, the aforementioned alternative should receive tremendous encouragement if only to enhance the positive enforcement provisions of the Convention.

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[110]The Declaration, for instance, lists as a second principle full permanent sovereignty of every State over its natural resources and all economic activities with no State being subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.

[111]In the Philippines, for instance, a law was passed in 1981 allowing the Philippine President, under certain circumstances, to waive sovereign immunity from execution. The pertinent provision of the law, Presidential Decree No. 1807 (1981), reads:

> Section 1. *Procedure for, and Conditions of, Waiver of Sovereign Immunity* - In instances where the law expressly authorizes the Republic of the Philippines to contract or incur a foreign obligation, it may consent to be sued in connection therewith. The President of the Philippines or his duly designated representative may, in behalf of the Republic of the Philippines, contractually agree *to waive any claim to sovereign immunity from suit or legal proceedings and from set-off, attachment, or execution with respect to its property, and to be sued in any appropriate jurisdiction in regard to such foreign obligation.*
>
> For purposes of this decree, a foreign obligation means any direct, indirect, or contingent obligation or liability capable of pecuniary estimation and payable in a currency other than Philippine currency (emphasis supplied).

VII. The ICSID and Latin America

Another important matter that the Convention must address in order to maintain and improve its prominence among institutional systems of arbitration is its ability to draw new adherents, particularly from Latin America. With the primary exception of nations in this region, the Convention has been signed and ratified by countries in every part of the non-communist world. The fact that most countries in Latin America have not ratified the Convention is a problem that plagues the ICSID and hampers the flow of investment capital and technology from developed to less-developed nations.[112]

As indicated earlier, the core of the Latin American distrust of the ICSID, and any system of arbitration for that matter, is found in the Calvo doctrine which arose out of Latin American opposition to European colonialism. It was in 1868 when Carlos Calvo, an Argentine diplomat, announced that European States should refrain from intervening, diplomatically or otherwise, in South America insofar as the protection of private property, including debts, was concerned.[113] The doctrine is based on the premise that aliens are not entitled to rights not enjoyed by nationals and can seek redress for grievances only before local authorities.[114]

Understandably, Western international law writers regard the doctrine with disfavor. It has been suggested, for instance, that the Calvo doctrine amounts to "misguided sovereignty," which approach, taken by smaller countries against the allegedly discriminatory norms of substantive international law, is no longer valid because of the change in substantive international rules and because abuses of diplomatic protection, which admittedly were frequent in the past, have been eliminated by the general international atmosphere of the post-war period.[115] Parenthetically, it is the feared abuse of diplomatic protection (often associated with gunboat diplomacy) that the Convention attempts to eliminate.

Latin American States, however, have not been swayed. These States, in fact, objected to the Convention during the Meeting of Legal

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[112]As of 1987, the only Latin American countries that have signed the Convention *and* deposited instruments of ratification of the Convention are Ecuador, El Salvador, and Paraguay. While Costa Rica and Honduras have signed the Convention, these two countries have not yet deposited instruments ratifying the Convention. Hence, the Convention is not yet in force in these countries.

[113]Lipstein, *The Place of the Calvo Clause in International Law*, 22 BRIT. Y.B. INT'L L. 130 (1962).

[114]Lillich, *supra* note 26, at 699.

[115]*Id.* at 700.

Experts held preparatory to its formulation on the ground, *inter alia*, that the submission to an international tribunal of disputes involving foreign investment would be a derogation of the host State's sovereignty and would furthermore put foreign corporations in a privileged position as compared to nationals.[116]

Another obstacle keeping Latin America from embracing the Convention is the incorporation of the Calvo doctrine in intraregional economic pacts such as the Cartagena Agreement of 1969. The Agreement created the Andean Common Market (ANCOM) in order to promote regional economic development through the elimination of tariffs among member States and to establish a system of standardized treatment of foreign investors. The pact includes a provision that "in no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors."[117]

Still another obstacle to Latin American approval of the Convention is the fact that while a host State, consistent with Article 42 of the Convention, may require in an investment agreement that its laws be applied in the settlement of a dispute with a foreign investor,

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[116]Settlement of Disputes Consultative Meeting of Legal Experts (Santiago, Chile), February 3-7, 1965, Statements of Delegates from Brazil, Bolivia, and Ecuador, at 306-310.

A government official from Chile stated, for instance, that

> [t]he legal and constitutional systems of all the Latin American countries that are members of the Bank offer the foreign investor at the present time the same rights and protection as their own nationals; they prohibit confiscation and discrimination and require that any expropriation on justifiable grounds of public interest shall be accompanied by fair compensation fixed, in the final resort, by the law courts.
>
> The new system that has been suggested would give the foreign investor, by virtue of the fact that he is a foreigner, the right to sue a sovereign state outside its national territory, dispensing with the courts of law. *This provision is contrary to the accepted legal principles of our country and, de facto, would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority* (emphasis supplied) (Press Release No. 57, September 9, 1964, Tokyo; excerpts from the statement of Mr. Fred Ruiz, Governor of Chile).

[117]Sprague, *A Courageous Course for Latin America: Urging the Ratification of the ICSID*, 5 HOUS. J. INT'L L. 157, 162 (1982), *citing* Andean Common Market, art. 51, *reprinted in* 11 INT'L LEGAL MATERIALS 126, 141 (1972).

those rules of law have to be consistent with the applicable rules of international law. There has emerged a view that international law serves first and foremost the interests of power and that existing rules of international law were largely developed by nations that today are in the position of "haves" and therefore tend to favor positions that economically underprivileged States of today seek to modify.[118] As one writer points out, "as long as the present disagreement between the developing countries and the leading industrial States on the contents of international law relating to the treatment of foreign investment persists, article 42(1), the applicable law clause, prevents in effect most developing countries from resorting to the facilities of ICSID."[119]

Sooner or later, however, arbitration, particularly ICSID arbitration, will be accepted by most Latin American counties as foreign investments become a more desirable commodity worldwide. This prospect is enhanced by the present international debt crisis. Despite the Convention's perceived shortcomings, Latin American and other developing countries may soon find it necessary to compromise in certain areas. While they must neither sacrifice their national integrity nor necessarily abandon their goals of maintaining local control of their national economies and integrating their economic infrastructures, Latin American countries should be prepared to bargain with private investors in a flexible manner. They must keep their overriding values in mind, but at the same time demonstrate good faith.[120]

Submission to the Convention is a step toward the projection of good faith, which is one of the basic principles that should apply to all foreign investments. The Convention encourages this principle of good faith as much as it encourages the principle of compromise and the predictability of the conflict resolution process.[121] Ratification of the Convention does not signify blind faith in capital-exporting countries, as confidence is placed instead in the impartiality of the ICSID. It augurs well, therefore, for Latin American States to ratify the Convention and work within the system provided therein, otherwise, these countries may lose by default in the competition for foreign private capital so needed to uplift their economic conditions.

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[118]M. BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 53 (1979).

[119]Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUM. J. TRANSNAT'L L. 35, 72 (1981), *citing* J. KUUSI, THE HOST STATE AND THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF LEGAL RELATIONSHIPS 125 (1979).

[120]Sprague, *supra* note 117, at 164.

[121]*Id.*

VIII. Conclusion

Twenty-three years from its inception, dispute resolution under the auspices of the ICSID may be characterized as moderately successful. This success is not manifested in the number of arbitral awards rendered by tribunals formed pursuant to the Convention, but in the substantial number of disputes settled by the Centre before arbitral proceedings were actually terminated. The fact that more than half of the twenty-three disputes submitted so far to the Centre had been settled amicably or discontinued bears witness to the effectiveness of the Convention.

Ironically, the smudge in an otherwise pristine record of the Convention may be traced to permissive proceedings after an ICSID arbitral award has been rendered. The annulment mechanism of the Convention (found in Article 52) has spawned lively debate on its effect on the principle of finality which is undoubtedly the single most important drawing factor of arbitration as an institution. Moreover, the standards developed by *ad hoc* Committees in applying the annulment provision are confusing, not to say highly contentious.

This paper has demonstrated that the manner in which Article 52 of the Convention has been interpreted and applied in *Klockner* and *Amco Asia* not only backtracks from the historical intent behind the said provision, but also raises serious concern about the future drawing power of ICSID arbitration.

Fortunately, resolution of the debates concerning the long term effects of the *Klockner* and *Amco Asia ad hoc* rulings may be avoided altogether if the States of qualified parties, desirous of making ICSID arbitration a viable option for their subjects, enter into bilateral treaty arrangements that would explicitly waive the Article 52 mechanism or limit the standards applied by *ad hoc* Committees in order to give the utmost deference possible to decisions of arbitral tribunals. Arrangements of this nature are not violative of any generally accepted principle of international law, nor are they prohibited by the Vienna Convention on the Law of Treaties.

An express waiver of Article 52 is, however, not enough. The 'icing on the cake' must come from a complementary waiver, in the same bilateral treaty, of sovereign immunity from execution - a defense which has always been considered the stumbling block to the efficacy of arbitral awards under any system of arbitration. Waiver of this defense is likewise not proscribed under international law.

Not to be forgotten, though, is the fact that for any multilateral treaty to be effective, the same instrument must be respected by a majority of the nations of the world. This basket of nations must include both developed and developing countries, as well as representative nations from clearly defined regions. To the extent that most Latin American nations have not embraced the Convention, ICSID proceedings can not claim superiority over other institutional systems of arbitration. As nations in the developing sphere, however, begin to realize the dire need for "new forms of investment" to solve their economic difficulties, developing countries will find it to their benefit to ratify the Convention. Said act will not only assuage the fears of foreign investors of possible unlawful host State actions but will also display to the community of nations the ability of these countries to deal with foreign private investors in good faith.

Indeed, the salutary provisions and the depoliticized framework of the Convention should not lay in shambles because of the *Klockner* and *Amco Asia* annulment awards. The dispute resolution system provided by the Convention may still be considered the best in the world, but one would be too optimistic to believe that this reputation will continue given the uncertainties generated by these two decisions. The members of the ICSID should realize this. They should now fashion remedial rules in order to preserve the efficacy of the Convention and so that member States will not be forced to adopt remedial bilateral arrangements that may prove to be both cumbersome and expensive.