Comment

Now we have come to the ICSID Party: Are its Awards Final and Enforceable?

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Introduction

The International Centre for the Settlement of Investment Disputes ("ICSID") was established under the aegis of the International Bank for Reconstruction and Development.[1] The purpose of the planned arbitration centre was closely related to the major purpose of the Bank: "to encourage and accelerate economic development in the poorer countries".[2] ICSID was established at a time of great uncertainty and expropriation risk for investments in less developed countries. The new arbitral centre was designed as a completely impartial venue for the resolution of disputes unconnected to and uninfluenced by the courts of either party to the investment. The only nexus with domestic courts was, of necessity, to be in the enforcement of awards. One important feature of the Convention is that it recognises individuals and corporations as subjects under international law and thus enables direct enforcement of their rights. This contrasts with the general rule of international law which is that where "an unlawful act [is] committed against a company representing foreign capital . . . the national state of the company alone [may] make a claim".[3]

The Centre was established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Convention") which came into force in 1966 and was signed by Australia in 1975. The *ICSID Implementation Act* 1990 received the royal assent in December 1990 and after ratification of the Convention in May 1991, Australia became the 93rd party to the Convention on 1 June 1991.[4] We certainly gave ourselves time for mature reflection upon whether we wished to come to the ICSID party. Having come to the party, it appears appropriate to investigate how final and enforceable are ICSID awards. Part I of this article is a general overview of how a dispute comes before ICSID.[5] Part II considers the implementation of the Convention in Australia. Part III

1 Commonly known as the "World Bank".

2 Reisman, W M, "The Breakdown of the Control Mechanism in ICSID Arbitration" (1989) *4 Duke LJ* 739 at 750 .

3 *Barcelona Traction, Light and Power Co Ltd Case* (1970)ICJ 32 at para 88.

4 Commonwealth Attorney-General's Department, "Review of Developments in International Trade Law" October 1991 at 38, a paper presented at the Eighteenth International Trade Law Conference, 18-19 October 1991 in Canberra; and (1991) 8 *News From ICSID* 2.

5 The Convention also provides for conciliation of investment disputes but the scope of this paper is limited to arbitration.

and IV analyse the finality of and enforceability of ICSID awards, respectively, and Part V considers the future of dispute resolution at ICSID.

I. How a Dispute Comes Before ICSID?

Article 25(1) of the Convention provides that

> the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

Jurisdiction in this sense does not mean the authority of the Centre to determine disputes for the essence of the convention is consensual. Rather, jurisdiction is used to describe the steps which must be satisfied for parties to have their dispute resolved under the auspices of ICSID.[6]

The terms "legal dispute" and "investment" were intentionally not defined by the Convention so as to fall for agreement by the parties.[7] Any practitioner drafting a clause to submit disputes to resolution under the auspices of ICSID would be well advised to define the transaction as an "investment" within the meaning of the Convention.[8]

Australia is now a Contracting State. Accordingly, foreign investors (whether individuals or corporations) who are nationals of another contracting state may elect, in a contract with the Australian government or any "constituent subdivision" such as a state or territory or "agency", to have disputes arising under the contract resolved through ICSID. Likewise, an Australian entity doing business in another contracting state with that state or a constituent subdivision or agency of it, may together with the state, subdivision or agency elect to have all disputes resolved through ICSID.

The terms "constituent subdivision or agency" are not defined. "Constituent subdivision" appears to refer to states and territories in the Australian context and all states and territories except Western Australia have been designated to ICSID for this purpose.[9]

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6 In 1978 an Additional Facility was created at ICSID to administer certain proceedings which otherwise would have fallen outside the ambit of the Convention. Awards rendered by the Additional Facility may not be enforced under the Convention. For information on the enforcement in the US of such awards, see generally Leahy, R E and Orentlicher, D F, "Enforcement of Arbitral awards Issued by the Additional Facility of the International Centre of Settlement of Investment Disputes (ICSID)" (1985) 2 *J Int'l Arb* 15.

7 Moti, J R, "Australia to Ratify the ICSID Convention" 17 *Aust Construction L Newsletter* 26 at 27.

8 Broches, A, "A Guide for Users of the ICSID Convention" (1991) 8 *News from ICSID* 5 at 6; Delaume, G R, "ICSID Arbitration and the Courts",(1983) 77 *The Amer J Int'l L* 784 at 795 and see ICSID Model Clauses, Doc ICSID/5/Rev 1, s2 (1981).

9 (1991) 8 *News From ICSID* 2; and Moti, J R, above n7 at 27. At the time of the Commonwealth's attempts to ratify the Convention in 1975, the Western Australian government was particularly concerned about the effect of the Convention upon mining investment in that state. This may be some indication of why Western Australia, in 1991, declined to be designated to ICSID.

Any Commonwealth "agencies" which wish to avail themselves of the ICSID machinery will have to ensure that they are likewise designated to ICSID. The Convention does not refer to an agency of a constituent subdivision so a statutory corporation or instrumentality established under the laws of a state or territory of Australia may not be designated to ICSID.[10] In the Australian context this is a significant lacuna in the Convention. Much, if not most, foreign investment in Australia to which an Australian governmental entity is party involves agencies or instrumentalities of state governments. Disputes between the foreign investor and such agencies or instrumentalities cannot by definition be referred to ICSID. If amendment of the Convention is proposed in the future then Australia would be well advised at the time to seek amendment of Article 25(1) so that the jurisdiction of the Centre extends to any legal dispute between an agency of a constituent subdivision of a contracting state and a national of another contracting state.

The final requirement for "jurisdiction" is that the parties must have consented in writing to submit the dispute to the Centre. Ratification of the Convention does not require a state to submit disputes to ICSID. In practice, consent is usually included in the dispute resolution clause in the investment agreement, although it may be in other documents or given on an ad hoc basis after the dispute has arisen. A State may consent in its legislation[11] or in a bilateral treaty, as have Australia and China recently,[12] to the submission of relevant disputes to ICSID. Such a consent amounts to a standing offer to submit disputes to ICSID which is binding until revoked.

The party wishing to resolve the dispute through ICSID initiates the procedure by addressing a request to institute arbitration proceedings to the Secretary-General of ICSID who, pursuant to Article 36, is required to send a copy of the request to the other party. Unless the Secretary-General finds the request is manifestly outside the jurisdiction of ICSID, he is required to register the request and as soon as possible thereafter constitute an arbitral tribunal pursuant to Article 37 of the Convention. A tribunal consists of a sole arbitrator or any uneven number of arbitrators as agreed by the parties. Members of the tribunal are drawn from the panel of arbitrators established under the Convention. It is this tribunal which sits in resolution of the dispute rather than the Centre itself.

II. The Incorporation of the Convention into Australian Law

The legislative scheme adopted in Australia to implement the Convention was for the *ICSID Implementation Act* 1990 to amend the *International Arbitration Act* 1974 by the addition of a new Part IV. This approach

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10 Moti, J R, "Settling Disputes the 'ICSID' Way" (1990) 5 *Aus L News* 25 at 27; and Moti, J R, "Recent Developments — Commercial Arbitration" *[1990] Comm LQ at* 26.

11 See Broches, above n8 at 6.

12 On 11 July 1988 Australia and China signed an Agreement on the Reciprocal Encouragement and Protection of Investments, (1989) 28 ILM 121. Paragraph 4 of Art XII provides, in part, that "a dispute may be submitted to ICSID for resolution in accordance with the terms on which the . . . (nation) which has admitted the investment is a party to the Convention". This provision will become operative when China ratifies the Convention, which it signed on 9 February 1990 (see (1990) 7 *News from ICSID* at 2).

conforms with the policy of the Commonwealth Government to have all provisions relating to international arbitration contained within one statute.[13]

The Australian implementing legislation is simple, clear and well adapted to give effect to the speed, neutrality and enforceability which have made the ICSID arbitration regime attractive. Section 32 of the *International Arbitration Act* now provides that, subject to Part IV of that Act, the provisions of the Convention which affect private disputes have the force of law in Australia. Section 33 provides that "an award is binding on a party to the investment dispute to which the award relates" and "an award is not subject to any appeal or to any other remedy, otherwise than in accordance with the Investment Convention".

It is interesting to compare Australia's recognition and enforcement legislation with that of the United States. The US legislation provides that:

> an award of an arbitral tribunal rendered pursuant to Chapter IV of the Convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states.[14]

In the words of one US commentator, "the full faith and credit language of the statute appears to allow domestic courts to re-evaluate an ICSID tribunal's jurisdiction over the parties and the subject matter of the dispute, and to evaluate the procedural aspects of the arbitration."[15] In short, "the enabling legislations seems . . . to adopt a weaker position on enforcement than that required by the Convention".[16]

No comparable criticism can be made of the Australian implementation legislation which, particularly relative to its US counterpart, should also be applauded for its clarity.

However, just as Australia has finally decided to commit itself to dispute resolution under the aegis of ICSID,[17] one learned author has been moved to write,

> if (the current) situation continues, the long-term future of arbitration at the World Bank seems uncertain. Until now, ICSID has enjoyed a rather rapid subscription, but it is doubtful that prudent counsel will continue to recommend to their clients a system of dispute resolution that no longer economically resolves disputes.[18]

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13 See Moti, above n7 at 26.

14 (1982) 12 USC 1650a.

15 Franzoni, D B, "ICSID Arbitral Awards in the United States" (1988) 18 *Ga J Int'l Comp L* 101 at 107.

16 Ibid.

17 A commitment doubtless motivated by the desire of the Commonwealth Government and Australia's international arbitration centres for a greater role in the resolution of Asian-Pacific investment disputes. See Moti, "Settling Disputes the 'ICSID' Way" above n10 at 29.

18 Reisman, above n2 at 787 and see generally Redfern, D A, "ICSID — Losing Its Appeal?", (1987) 3 *Arb Int'l* 98.

Such comments stem from serious doubts as to the finality of ICSID awards.[19] Are such portents of doom justified?

III. The Finality of ICSID Awards

To ensure independence from any nation's judicial system, the Convention provides that the only review of awards will be by procedures internal to ICSID. Under Article 49(2) either party may request rectification of patent errors in an award. Under Article 50 either party may request an interpretation of an award. Under Article 51 either party may request revision of an award on the ground of discovery of new facts "of such a nature as decisively to affect the award".[20] And, most importantly for our purposes, under Article 52 either party may request an annulment of an award 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.[21]

As one would expect, there are also various time limitations. The basic one is that a request for annulment must be made within 120 days after the date on which the award was rendered.

It is clear from Article 52 that the remedy of annulment is much narrower than the conventional remedy by way of appeal with which lawyers are familiar. The principal attractions of arbitration are speed and economy.[22] A system which provides extensive rights of appeal offers neither of these benefits. However, there is a need for some procedure for review of arbitral decisions otherwise the words "arbitrator" and "arbitrary" could well come to share much more than merely a common Latin root. There is a distinct tension between the two needs of finality and justice. Reading Article 52 without the benefit of the decided cases this writer thought that the framers of the Convention had, as far as they dared, resolved this tension in favour of finality. The Secretary-General of ICSID, Ibrahim Shihata, has written 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 procedding from an appeal; and (c) construe narrowly the grounds for annulment so that this procedure remains exceptional.[23]

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19 One might have expected international politicking or meddling by disaffected nations to be at the root of ICSID's current problems. One would have been wrong.

20 Article 51(1) of the Convention.

21 Article 52(1) of the Convention.

22 Padilla, S B, "Some Available Options to Save the Viability of ICSID Arbitration in the Light of the Annullment Awards in *Kloeckner v Cameroon* and *Amco Asia v Republic of Indonesia*", (1988) 63 *Phillipine LJ* 321 at 335.

23 Report of the Secretary-General to the Administrative Council, ICSID Doc No AC/86/4, 2 October 1986 at 3.

Such an approach is to be expected in designing an arbitral system to be attractive to potential disputants. The plain words of Article 52 do not allow annulment of an award unless the tribunal has *manifestly* exceeded its powers or there has been a *serious* departure from a *fundamental* rule of procedure. The clear intent of Article 52 and the whole Convention was that eminent arbitrators would be appointed to the resolution of disputes and unless they clearly exceeded their powers,[24] or they so ignored rules of procedure as to have come to a result other than that which would have occurred had fundamental procedural safeguards been followed, then their decision should stand. However, the ad hoc committee appointed to sit on the first request made to ICSID for annulment of an award took a different view.

The case was *Kloeckner v United Republic of Cameroon*.[25] In brief, the dispute concerned a joint venture in which Kloeckner was to build a fertiliser manufacturing plant and the Cameroon government was to pay for it. The output of the plant was essential to Cameroon's economic aims as agriculture was essential to its economy. The plant was built, but on the evidence accepted by the initial arbitral tribunal the factory attained barely 30 per cent of its promised capacity.[26] The ad hoc committee took its task very seriously as its extensive reasons for decision reflect.[27] The facts of the case and arguments made to the committee were extremely complex but for our purposes the essential approaches taken by the committee will be considered.

The committee took a technical and limited view of its role or, at least, so it professed.[28] Article 52 (3) provides that "the committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)". These words in English would appear to be simple and direct. Yet the committee's interpretation of this sentence was that if they found a defect their duty was to automatically nullify the award irrespective of whether the defect would have had any substantial effect upon the determination of the tribunal.[29] This surely is using a mallet to crush a mosquito: it may be efficacious but the side effects may be painful — particularly if the mosquito is on your leg. Indeed, the analogy is apt. Many of the approaches taken by the *Kloeckner* committee served to replace the original mosquito bite of a request for annulment with a potential fracture to the foundations of arbitration at ICSID.[30]

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24 This is an essential limitation as those powers are only conferred upon ICSID by the parties to the dispute.

25 (ARB/81/2) Extensive portions of the tribunal's award in this case are quoted in English translation by Jan Paulsson in "The ICSID Kloeckner v Cameroon Award: the Duties of Partners in North-South Economic Development Agreements" (1984) 1 *J Int'l Arb* 145.

26 Reisman, above n2 at 756.

27 The ad hoc committee's decision is published in English translation in *ICSID Rev — FILJ* 1 (1986) 89.

28 Above n27, 3 at 93.

29 Above n27, 179 at 144. See also the comments of Paulsson, "ICSID's Achievements and Prospects" *ICSID Review — FILJ* Vol 6 No 2 (1991) 380 at 389.

30 When the committee (in 82, above n27 at 115) concluded the award should be annulled for a manifest excess of powers it acknowledged "it could dispense with examining the other complaints of the Applicant for annulment". However it declined to do so and proceeded to consider annulment for a serious departure from a fundamental rule of procedure (Art

The other adventurous interpretation adopted by the ad hoc committee was of the scope of the grounds for annulment under Article 52. According to Reisman, "the Committee interpreted the Convention as authorising and requiring it to examine a challenged award's compliance with *all* the standards set out in the rest of the Convention".[31]

The committee said,

> Article 52 on the annulment of awards must be interpreted in the context of the Convention and in particular of Articles 42 and 48, and vice versa. It is furthermore impossible to imagine that when they drafted Article 52 the Convention's authors would have forgotten the existence of Articles 42 or 48(3), just as it is impossible to assume that the authors of provisions like Articles 42(1) or 48(3) would have neglected to consider the sanction for non-compliance.[32]

This writer finds no such impossibility within Article 52. It should be read to mean what it says.

The committee's concern was that a literal reading of Article 52 would lead to an absence of sanctions for non-compliance with provisions such as Article 42(1). Article 42(1) provides that the tribunal shall decide a dispute in accordance with the law as agreed by the parties or, in the absence of such agreement, by the law of the contracting state party to the dispute and such rules of international law as may be applicable. However, in the next paragraph of its reasons,[33] the committee acknowledged that a failure to apply the appropriate rules of law may be an excess of powers and the very basis of the Committee's subsequent conclusion that the award should be annulled was that the Tribunal had applied an inappropriate body of law and "thus 'manifestly exceeded its powers' within the meaning of Article 52(1)(b) of the Washington Convention".[34]

The *Kloeckner* committee was also deeply troubled by the possible absence of a sanction for non-compliance with Article 48(3) which requires that "the award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based". Article 52(1) provides for annulment if "the award has failed to state the reasons on which it is based". These two formulations of words differ. If the Convention's drafters had intended the terms of Article 52(1) to mean what the terms of Article 48(3) say, would they not have reproduced the precise words of Article 48(3)? Moreover, to permit annulment when the tribunal fails to deal with every question raised before it (irrespective of how inconsequential or peripheral some questions may have been) appears highly questionable. Judgments of a court typically give the reasons on which they are based and out of courtesy a judge may explain why he/she declined to adopt a certain proposition but

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52(1)(d)) and for a failure to state reasons (Art 52(1)(e)). Normal Anglo-Australian judicial restraint would have better served the promotion of ICSID's popularity as an arbitral forum. As it was, more than one-half of the reasons for decision (98 paragraphs) were devoted to matters not requiring determination.

31 Reisman, above n2 at 763.

32 Above n27, 58 at 109.

33 Above n27, 59 at 110.

34 Above n27, 79 at 115.

judges do not laboriously deal with every point raised in the pleadings and to strain the language of Article 52 in order to impose a higher standard on an arbitral tribunal appears bizarre.[35] The approach taken by the ad hoc committee in *Kloeckner* swings the balance between finality and justice very much towards the side of justice and away from finality. The subsequent history of the *Kloeckner* case is particularly instructive upon this point. As the ad hoc committee annulled the initial tribunal's award entirely, none of that award remained *res judicata* and thus the second tribunal's determination amounted to an arbitration *de novo*. This second award was referred back to ICSID for another review under Article 52.[36] The second ad hoc committee declined to annul this award,[37] and so, after nine years, there was a final decision. As in childhood, one may elect to stay on the merry-go-round until one has had the perfect ride. However, the price for this quest for the perfect ride may be that it will be made alone.

Ominously, from the point of view of the finality of ICSID awards, the very next case referred to ICSID after *Kloeckner* was also subject to a request for annulment. The case was *Amco Asia Corp v Indonesia*.[38] The dispute arose out of a joint venture agreement to build a hotel in Jakarta between Amco Asia and P T Wisma, an Indonesian corporation with close ties to the Indonesian army. There was a management dispute with respect to the hotel and P T Wisma seized control of the hotel with the assistance of the Indonesian military. Three months later, the Indonesian governmental agency which issued Amco's investment licence revoked it. The simple moral of the story may be never get into bed with someone who has a bigger gun than you. However, that is not the legal moral, for the dispute was referred by Amco to ICSID.

In 1984 a tribunal appointed by ICSID found in favour of Amco Asia.[39] In 1986 an ad hoc committee formed at Indonesia's request annulled in part the 1984 award on the grounds that the tribunal had "manifestly exceeded its powers" and "failed to state reasons" as required by Article 52(1) of the Convention.[40]

The ad hoc committee found that the initial tribunal had applied principles of international law when it should have applied Indonesian Law. Accordingly, it had committed a technical violation of Article 52.

However, the ad hoc committee declined to nullify the award on this ground because of its conclusion that the international principles applied were functionally equivalent to the general standards of Indonesian law and thus application of the proper law would have produced the same result.[41] The

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35 Contrast the position adopted by the Court of Appeal with reference to arbitrator's awards in England in *Bremer Handelsgesellschaft v Westzucker GmbH* [1981] 2 Lloyd's Rep 130 at 132-33.

36 See "Disputes Before the Centre" (1988) *News From ICSID* Vol 5 No 2 8.

37 Decision of 4 June 1990, see "Disputes Before the Centre" (1990) *News From ICSID* Vol 7 No 2 at 2.

38 Published in full in 1 *Int'l Arb Rep* 649 (1986).

39 (1985) 24 ILM 1022.

40 (1986) 25 ILM 1441.

committee in *Amco* declined to follow the reasoning in *Kloeckner* that ad hoc committees enjoyed no discretion and were required to nullify awards upon the finding of any defect, no matter how trifling. This more enlightened approach was also taken by the ad hoc ommittee in *MINE v Guinea*,[42] and so one can hope that the annulment of awards for purely technical discrepancies has been firmly consigned to the dustbin of history.

Amco then requested that the dispute be submitted to a second tribunal pursuant to Article 52(6).[43] This second tribunal held that the determinations of the initial tribunal which were not expressly annulled or confirmed by the ad hoc committee were *res judicata*;[44] that issues as to which the initial tribunal's determinations had been annulled were open for redetermination by the second tribunal[45] and that only the decision of annulment by the ad hoc committee was binding on the second tribunal not the reasoning of the committee.[46] The second *Amco* tribunal rejected the proposition that all matters integral to a committee's decision are *res judicata*.[47] The effect of this decision is to leave a larger part of the award open to rearbitration and thus increase the incentive to seek annulment.

Accordingly, some of the damage caused to the finality and economy of ICSID proceedings by the *Kloeckner* committee's decision has been remedied by the decision in *Amco Asia*. However, there remains two principal grounds for concern. Firstly, there is the expansive reading of Article 52(1) which allows annulment for any breach of any provision of the Convention and, secondly, the narrow application of *res judicata* so as to encourage requests for annulment by broadening the range of issues open for consideration by a second tribunal.

The request for arbitration in *Kloeckner v Cameroon* was filed with ICSID in 1981 and a final determination made in June 1990. The *Amco Asia* merry-go-round continues to spin. *Amco Asia v Indonesia* was also instituted in 1981 and it may prove instructive to trace its highlights, as far as the records published in *News from ICSID* allow. This publication only began in 1984 so there is a gap in coverage of the first three years of this case's history. Actions involving tribunal or committee members and which therefore necessitated travel and other costs are listed. Procedural steps, particluarly those of the Secretary-General, are not.

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41 Id 78 & 79 at 1456, 1457.
42 Reproduced (1990) ICSID Review — FILJ 95 at 5.
43 The decision on jurisdiction by this tribunal is reproduced in (1988) 27 ILM 1281.
44 Id 48-68 at 1295 and following.
45 Id 85 at 1301.
46 Id 44 at 1294.
47 Id 87 at 1302.

AMCO Asia v Indonesia: Partial History of Proceedings

DATE	ACTION
25 September 1983	Tribunal issues award on jurisdiction.
12-23 December 1983	Tribunal meets with parties in Washington.
19-23 March 1984	Hearings in Copenhagen.
July-October 1984	Tribunal meets several times in Paris for final deliberations and drafting of the award.
20 November 1984	Tribunal renders an award.
16-17 May 1985	Preliminary session of ad hoc committee in Frankfurt.
7 September 1985	Committee meets in Rome.
7-13 January 1986	Committee meets in Vienna (from 8-10 January with parties).
April/May 1986	Committee meets in Paris and Vienna.
16 May 1986	Committee issues its decision which annuls initial award.
21 December 1987	New tribunal has been constituted and now meets in London.
31 January & 1 February 1988	Tribunal meets in London in presence of parties.
4-5 March 1988	Tribunal meets in London.
18-20 March 1988	Tribunal meets in New York.
30 April-1 May 1988	Tribunal meets in London.
10 May 1988/ 18-29 September 1989	Tribunal issues a decision on jurisdiction.
30 November-7 December 1989 & 2-5 March 1990	Hearings held in Washington.
5 June 1990/17 October 1990	Tribunal meets in London.
6 February 1991	Tribunal renders award.
	Decision rendered on rectification of award.
28 February-2 March 1991	Preliminary session of ad hoc committee (annulment having been sought). Award has been rendered, annulment has been sought and a new ad hoc committee appointed which now meets with parties in Washington.

Whilst figures are not available on the costs of ICSID arbitration, the partial review above of proceedings in the *Amco* case suggests strongly that ICSID can no longer boast unreservedly of economy or speed among its selling points.[48]

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48 Hearings or meetings were held in eight different locations, throughout Europe and the USA, at many places more than once. To be fair, the locations were presumably home cities of one member of each of the two tribunals and two committees which have considered this matter. To be realistic, the travel and accommodation expenses of the other two members each time travelling to the location must have been substantial.

IV. The Enforceability of ICSID Awards

One of the leading exponents of ICSID arbitration has written that, "the great advantage of the Convention over other international conventions regarding the enforcement of foreign arbitral awards is that not even public policy can be raised as a defence against the binding character of ICSID awards".[49] The most widely used method for the enforcement of foreign arbitral awards is the 1958 New York Convention which, in contrast, provides seven grounds upon which the recognition and enforcement of foreign arbitral awards may be refused.[50]

Article 54 of the Convention provides that:

> . . . each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as though it were a final judgment of the courts of a constituent state.

It should be noted that only "pecuniary" awards can be enforced. The ICSID enforcement regime does not extend to non-pecuniary arbitral awards, such as injunctive relief.[51]

Section 35 of the *International Arbitration Act* 1974 (Cth) designates the Supreme Court of each state or territory of Australia as courts for the purposes of Article 54 and provides that an award may be enforced in the Supreme Court of a state or territory as though the award had been made in that state or territory in accordance with its law.[52] By Article 54(2)[53] the procedure for enforcement is very simple. In the Australian context, the party seeking enforcement needs merely to provide the relevant state or territory Supreme Court with a copy of the award certified by the Secretary-General of ICSID. By Article 54(3) the execution of the award is then governed by the laws of the relevant state or territory concerning the execution of judgments which is mirrored in section 35 of the Australian legislation.[54] The only potential difficulty in this regard is the issue of sovereign immunity.[55]

The Convention provides a two-stage process for enforcement.

The first stage is the recognition and enforcement of the award by each contracting state which is mandated by Article 54(1). Under the Convention

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49 Delaume, G R, "ICSID Arbitration and the Courts", (1983) 77 *Am J Int'l L* 784 at 801.

50 See Art V of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York 10 June 1958, TIAS No 6977, 330 UNTS 38.

51 Moti, J R, "The Implementation of the ICSID Convention in Australia: Legal and Practical Implications", an unpublished paper, 1990 at 8, copy on file with this writer.

52 These provisions were added to the *International Arbitration Act* 1974 by s4 of the *ICSID Implementation Act* 1990 (Cth). It is interesting to note that while Western Australia has to date declined to be designated to ICSID as a constituent subdivision of Australia, the Supreme Court of Western Australia has been designated as a court of enforcement.

53 Which is adopted as part of the law of Australia by s32 of the *International Arbitration Act* 1974.

54 *International Arbitration Act* 1974.

55 See Moti, above n17 at 29.

the party seeking recognition or enforcement need merely "furnish to a competent court . . . a copy of the award certified by the Secretary-General".[56]

Article 54(1) compels each contracting state to recognise an award rendered pursuant to the Convention as binding and enforce it accordingly. A state party cannot decline to recognise an award on the grounds of sovereign immunity. To do so would be in breach of its treaty obligations. This would have two consequences. Firstly, the prohibition effected by Article 27 on diplomatic protection by a state of its nationals is lifted when a state fails to abide by and comply with an award. Secondly, if non-compliance arises from a dispute as to the interpretation or application of the Convention either party may refer the dispute to the International Court of Justice which has compulsory jurisdiction in such disputes.[57]

The second stage is execution. Article 54(3) provides that "execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought".

At the stage of execution, the laws of the state where execution is sought relating to sovereign immunity do apply.[58] Thus, while immunity from jursidiction poses no difficulties under the Convention, immunity from execution is a limitation on the efficacy of the Convention's enforcement procedure. Delaume has said that "this solution is to be regretted (but) could not be avoided in view of the opinions expressed during the drafting stages . . . by governmental representatives".[59] However, the restrictive doctrine of sovereign immunity from execution has grown in influence since the Convention entered into force, particularly in those developed nations where financial centres and assets are likely to be located. Accordingly, the successful party willing to engage in "forum shopping" to locate assets in jurisdictions with narrow immunity doctrines now enjoys good prospects of successfully enforcing the award.[60]

It has been suggested that "the record of compliance by governments with international arbitral awards is very encouraging".[61] The reasons advanced for this range from the mutual trust and good faith preserved by the arbitration process to the stigma which readily attaches to a state known to be unreliable in business affairs and the loss of vital foreign investment likely to ensue from such a reputation.[62]

Be this as it may, the preferred solution to the difficulty posed by sovereign immunity from execution is, whenever possible, to include in the clause referring future disputes to ICSID an express waiver by the state of any

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56 Article 54(2) of the Convention.
57 Article 64 of the Convention and see Broches, above n8 at 8.
58 By virtue of Art 55 of the Convention which provides that "nothing in Art 54 shall be construed as derogating from the law in force . . . relating to immunity of . . . any . . . state from execution".
59 Delaume, above n49 at 800.
60 Ibid.
61 Chukwumerije, O, "ICSID Arbitration and Sovereign Immunity" (1990) 19 *Anglo-Am LR* 166 at 182.
62 Ibid.

immunity from execution in any jurisdiction in connection with the enforcement and execution of an ICSID award.[63]

V. The Future of Arbitration at ICSID

Judged by its breadth of acceptance ICSID has been a resounding success: as of October 1991, 109 States had signed the Convention and, more importantly, 97 states had ratified it and thus elected to circumscribe their own courts' jurisdiction in favour of ICSID.[64] Ease of enforceability has been a major factor which has contributed to that success to date. The recent Australian implementation legislation has fully implemented the spirit of free and immediate enforceability of ICSID awards in this country. However, immediate enforceability is of less benefit if the merry-go-round of award and annulment may spin for years.

The bleakest portent for the future of arbitration under the auspices of ICSID are the following words of a learned and experienced commentator in this field:

> Future losers in ICSID arbitrations will be hard-pressed not to exercise their option under Article 52. The very availability of the procedure, as it has developed, virtually requires the professionally ethical counsel to recommend its vigorous exploitation.[65]

An overview of ICSID's performance to date reveals that only two of the 22 disputes[66] resolved under the aegis of ICSID have required an inordinate amount of time and resources. However, balanced overviews are not in vogue. Problems are newsworthy. ICSID has a small problem with finality of its awards and a much larger image problem. The conclusion to this paper considers the two major steps open to the Centre to address this problem.[67] However, before doing so it may be helpful to put ICSID's problems into context. There are four sound reasons why dispute resolution at ICSID is likely to increase in popularity in the future even with the current annulment procedures. These reasons are as follows:

1. Absence of Alternatives

Arbitration under the auspices of the International Chamber of Commerce (ICC) or the American Arbitration Association (AAA) can result in potentially multiple levels of review by the courts of the arbitral forum.[68] The decisions of national courts are perceived to be potentially discriminatory and judicial review is slow and expensive. ICSID is the only truly de-localised,

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63 See Delaume, above n49 at 800; and Moti, above n51 at 9.

64 See Paulsson, above n29 at 381.

65 Reisman, above n 2 at 787.

66 Correspondence of 5 November 1991 between the writer and ICSID. Twenty-six disputes have been submitted to ICSID: 24 for arbitration and two for conciliation. Four of these disputes, all arbitrations, are currently pending.

67 For an extensive and detailed analysis of other possible solutions see Reisman, above n2 at 787 to 807.

68 Schatz, S, "The Effect of the Annulment Decisions in *Amco v Indonesia* and *Kloeckner v Cameroon* on the Future of the International Centre for the Settlement of Investment Disputes", (1988) 3 *Am UJ Int'l L Pol'y* 481.

neutral arbitral forum available and there is only one avenue of review of ICSID awards.[69]

2. *Investment Protection Agreements*

Investment Protection Agreements (IPAs) are bilateral treaties principally concerned with providing adequate compensation in the event of expropriation. ICSID's neutrality and the ease of enforceability of its awards by courts in nations other than the state party to the dispute make it the stand-out choice for dispute resolution under these agreements. According to ICSID, as of March 1991, there were 154 IPAs on record with it under which potential disputes were referred to ICSID.[70] In the past three years Australia has signed agreements with the People's Republic of China, Papua New Guinea, Vietnam, Poland, Czechoslovakia and Hungary and is near to agreement on the terms of an IPA with Romania.[71]

3. *The Debt Crisis*

Since the debt crisis the international banking community has drastically reduced the access of less developed countries to foreign funds. The strong, continuing need of these countries for capital can only be met by private foreign equity investments which are far more likely than loans to result in disputes suitable for arbitration. ICSID is very well placed to assist in the resolution of such disputes.[72]

4. *The Responsiveness of the ICSID Regime*

The decisions of the ad hoc committees in *Kloeckner* and *Amco Asia* have provoked a storm of criticism from academic and practising lawyers. No future committee will be able to review an award without being acutely conscious that the international legal community has put a high price on finality of arbitral awards at ICSID. Furthermore, the Secretary-General will be aware of this in selecting the members of future ad hoc committees. In the opinion of Broches, "the *Kloeckner I ad hoc* committee seriously misconceived its role . . . *Kloeckner I* is by now thoroughly discredited",[73] and as Paulsson has said of the annulment procedure, "there are signs today that ICSID has regained control of this indispensable but delicate mechanism".[74]

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69 See Paulsson, above n29 at 387.

70 From correspondence of November 5, 1991 between the writer and ICSID. ICSID noted that this is not an exhaustive list: it is currently in the process of updating its records.

71 Rich, R, "Investment Protection Agreements: Australian Practice", a paper presented at the *Eighteenth International Trade Law Conference*, Canberra, 18-19 October 1991 at 1. For an analysis of the treaties, see Moti, "Australia Signs Investment Protection Treaties with Vietnam and Poland" (1991) *Pacific Basin Legal Developments Bulletin ("PBLDB")* 10; Moti, "Australia-Hungary Bilateral Investment Treaty" (1991) *PBLDB* 11 and Moti, "Australia-Czechoslavakia Bilateral Investment Treaty" (1992) *PBLDB* 8.

72 See Padilla, above n22 at 325-28.

73 Broches, A, "Observations on the Finality of ICSID Awards" (1991) *ICSID Review — FILJ* Vol 6 No 2 321 at 377.

74 Paulsson, above n29 at 395.

Conclusion

Amendment of the Convention with respect to the finality of awards is desirable. The simplest amendment would be to restrict Article 52(1) to its plain meaning by the addition of the word "only" after "Secretary-General".[75] A further useful amendment would be to amend the final sentence of Article 52(3) to limit the ad hoc committee's authority to annul the award to material violations and bury forever the "technical discrepancy" standard for annulment.[76] Articles 65 and 66 of the Convention provide a machinery for amendment of the Convention which should be pursued.[77]

In any event, amendment of the Convention is not the only, nor perhaps the most effective, means of change. Tribunal or committee decisions do not form a binding system of precedent. It is open to future ad hoc committees to re-weigh the balance between finality and justice in favour of finality. This balance between finality and justice is also a balance between practicality and idealism. The Secretary-General may wish to appoint members of future ad hoc committees with a keen eye to their practicality. Short of amendment to the Convention, it may be open to parties, on a case by case basis or in investment protection agreements, to waive the annulment mechanism or provide their own standards of review under Article 52.[78]

Learned authors are pressing the case in the literature for greater weight to be given to the need for finality in determinations by ad hoc committees.[79] Their voices must be heard. If the merry-go-round of award and annulment spins too long, the risk is that all will bore of it and there will be no one left to ride. That would be a tragedy. An important[80] and unique supra-national system for the resolution of investment disputes must not be allowed to sink into disuse due to the sincere efforts of talented, overly technical jurists. The good news is that the most likely approach[81] of future ad hoc committees at ICSID should assure the arbitral regime of an increasingly successful and important role in resolving disputes between states and nationals of other states.

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75 Reisman, above n2 at 806.

76 Ibid.

77 If such amendment is pursued, the amendment discussed in Pt I to include agencies of constituent subdivisions of Contracting States within ICSID's jurisdiction should also be sought by Australia.

78 Padilla, above n22 at 346-353. This rather drastic approach raises difficult questions of international law and awaits an adventurous jurist willing to test its efficacy.

79 See generally Reisman, above n2; Redfern, above n18; Padilla, above n22; and Feldman, M, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards" (1987) 2 *ICSID — Rev FILJ* 85. For opposing views on the effect of the annulment decisions see generally Schatz, above n61; Broches, above n73 and Branson, D J "Annulments of 'Final' ICSID Awards Raise Questions about the Process" 4 Aug 1986 *Nat'l LJ* at 25.

80 Wetter considered the five principal international arbitration regimes and concluded that when ICSID has jurisdiction it was to be preferred on the grounds of ready enforceability, independence and resources. See Wetter, J G, *The International Arbitration Process: Public and Private* (1979) Vol 2 at 234-43.

81 For the reasons advanced above.