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ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?

David R. Sedlak*

I. Introduction

In an ever-increasing globalization of the world economy, there exists the realistic probability of disputes arising between parties from international investment transactions. The existence of such disputes calls for an effective method of international, or preferably a-national, dispute resolution to ensure the continued expansion of international business transactions.¹ A person from one country, in an investment disagreement with a person from another country, must have a neutral forum for having the disagreement resolved or otherwise risk having a

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* J.D. Candidate, The Pennsylvania State University—The Dickinson School of Law, 2005; B.S., West Chester University of Pennsylvania, 1998. The author would like to thank the Alternative Dispute Resolution faculty of the Dickinson School of Law, especially Professor Thomas E. Carbonneau, for their inspiration and guidance, the editorial staff of the Penn State International Law Review for their fine work with his comment and all aspects of the publication, and to his family for their unending support in making this comment, and this career, possible. AEA.

judgment issued by a State that is slanted to protect the interests of its own citizens.\(^2\) That same person must also have reasonable assurances that a decision will be enforceable against the other party, no matter the particular country executing the decision.\(^3\)

One method of dispute resolution that has become popular in international investment disputes is arbitration. Arbitration has numerous advantages over the more-traditional judicial process: the ability to predetermine what national or international law will apply to govern the dispute, if not a-national law; the ability to formulate the scope of the arbitration agreement; and the ability to agree, before a dispute arises, precisely how such disputes will be adjudicated.\(^4\) Based on the universally accepted maxim *pacta sunt servanda* (commitments must be honored), parties can agree on the method of dispute resolution and the applicability of the result without knowing the particulars of the dispute.\(^5\)

As a means of fostering global investments and providing a neutral forum for international investment dispute resolution, the World Bank established The International Convention for the Settlement of Investment Disputes ("ICSID" or "ICSID Convention") in 1966.\(^6\) The Convention allowed private investors of States that have signed the

\(^2\) See id. at 767-70.

\(^3\) Id. Individuals and corporations alike can have assets scattered throughout the globe. The laws of the State where particular assets are located govern any disposition of those assets. Thomas E. Carboneau, *International Commercial Arbitration: The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, n.9 (2003). If a party wins a judgment, and attempts to collect judgment against assets located in another State, State law may prevent the winning party from doing so for any number of reasons. Id. For example, if a tribunal that includes a woman arbitrator renders an award, that award may not be enforceable in Islamic countries, leaving the winning party with a verdict, but little else. Id.

\(^4\) There are numerous articles detailing the specific advantages of arbitration in an international context. See, e.g., Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 434-38 (2000) (stating that arbitrations offer quick settlement by experts in the field, informal and cordial dispute resolution, and a neutral forum for such a resolution); Peter D. Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191, 1194 (1977) (contending that arbitration is informal, quick, private, convenient, and inexpensive); Lawrence Perlman & Steven C. Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 218-25 (1983) (arguing that arbitration minimizes problems of forum shopping, concurrent jurisdiction, and limited access to pretrial discovery inherent in international litigation).

\(^5\) Shalakany, supra note 4, at 459 ("*[P]acta sunt servanda* as a legal principle is itself the subject of unsurpassed international consensus: No international jurisdiction whatsoever has ever had the least doubt as to the existence, in international law, of the rule *pacta sunt servanda.*").

ICSID's Resurgence

Convention to invest freely in foreign States that have also signed the Convention, particularly in developing countries, without the fear of losing the investment due to issues such as sovereign immunity from suit if a dispute were to occur. In 1978, the Administrative Council of the Center authorized the Secretariat to administer, at the request of the parties concerned, certain proceedings between States and nationals of other States that fall outside the scope of the Convention, thus allowing ICSID arbitrations to take place when only one of the parties was a signatory to the Convention. At the time of its creation, ICSID was "hailed as a great achievement of World Bank diplomacy and innovative thinking in the pursuit of increased international investment for development."

ICSID, for all its advantages, was rarely utilized in its first twenty years, having only twenty-one disputes submitted between its inception and 1984. Many commentators questioned whether ICSID was going to be as effective as initially thought. However, there has been an explosion in the number of ICSID arbitrations in the past ten years, as well as in the number of signatory states.

This comment investigates the possible causes of the expansion of cases, and evaluates whether ICSID arbitration, as it exists today, can continue to grow and expand. Part II of this comment examines the historic purpose of ICSID arbitration, from the reasons for its inception to its present-day benefits and limitations, and examines whether these limitations will stunt the growth of ICSID arbitration in the future. Part III examines possible reasons for the explosion in the number of ICSID arbitrations, including the dramatic rise in the number of bilateral investment treaties (BITs), the opening of numerous new world markets, and the increased willingness of parties to invest in developing countries. Part IV takes a close look at one of the largest concerns with ICSID

7. See generally id.
8. The Administrative Council is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature Mar. 18, 1965, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117, reprinted in 4 I.L.M. 532, art. 4 [hereinafter ICSID Convention]. It is composed of the same individuals as the World Bank's Board of Governors. The powers and responsibilities of the Administrative Council are detailed in ICSID Convention, art. 4-8.
arbitration: the finality of an ICSID award. Specifically, it addresses the possible endless internal appeals process that could lead to annulment and an enforcement problem because of sovereign immunity, and evaluates whether these problems present a fundamental and insurmountable barrier to the expansion of ICSID arbitration. Part V concludes by finding that the benefits of ICSID arbitration outweigh the limitations and concerns about the process and offers suggestions for the continued growth of this dispute resolution mechanism.

II. The Purpose of ICSID

A. History of ICSID Arbitration

Following a number of requests to act as a neutral advisor to settle disputes among member states, the World Bank established ICSID in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention"). Before this Convention, the World Bank members, specifically its President, attempted to mediate disputes. However, there existed growing concerns that the World Bank was proceeding beyond its established mandate; specifically, the World Bank and its President were being stretched too thin attempting to handle an increasing number of disputes, and the World Bank’s stated role as a guarantor of loans and financing for projects in less developed countries would be diminished. Additionally, there existed a concern that member states “may be reluctant to approach the [World] Bank for any purpose in case the Banker also became the judge.” To address these concerns, the President of the World Bank, in 1961, examined the possibility of creating an arbitration and conciliation mechanism that would be equally


15. Id.; see also About ICSID, supra note 6.

16. NATHAN, supra note 14, at 48-50.

17. Id. at 49.

18. See About ICSID, supra note 6.

19. Shihata, supra note 11, at 100.

20. NATHAN, supra note 14, at 48-50.
adequate for both investors and governments.  

On October 14, 1966, after years of preparatory work by legal experts from Africa, Asia, Europe, Latin America, and the United States and after approval by the Board of Governors of the World Bank, ICSID came into force as an autonomous international agency under the auspices of the World Bank. The role of ICSID was to arbitrate and conciliate investment disputes between signatory states and investors of those states that were signatories to the convention.

The Administrative Council expanded the role of ICSID on September 27, 1978, to include disputes that involved only one signatory of the ICSID Convention and non-investment disputes, so long as the dispute was related to a transaction that distinguished it from an ordinary commercial transaction. The ICSID Convention would not govern these disputes directly. Rather, it would govern them under the Additional Facility Rules created specifically for that purpose. Furthermore, the Additional Facility Rules govern disputes that do not directly arise out of an investment, even though the term investment is broadly defined, as well as a general fact-finding process designed as a "pre-dispute" mechanism. 


22. NATHAN, supra note 14, at 50-51.


24. ICSID Convention, supra note 8, art. 25.


26. For example, Metaclad, an enterprise of the United States, a signatory to the Convention, and Mexico, a nonsignatory, engaged in the ICSID Arbitration process in 1997, under the Additional Facility Rules. This arbitration was brought under the North American Free Trade Agreement, which proscribes ICSID Arbitration. See Metaclad Corp. v. United Mexican States, 40 I.L.M. 36 (2001), 26 Y.B. COM. ARB. 99 (2001), 13 WORLD TRADE & ARB. MATERIALS 47 (2001); 119 I.L.R. 618 (2002), 5 ICSID REP. 212 (2002).


28. See infra Part II. C.

29. "Fact-finding, as contemplated by the Additional Facility Rules is a process for preventing, rather than settling legal disputes... The reason for including fact-finding in the Additional Facility was the need perceived in both private and public circles for fact-finding proceedings in the 'pre-dispute' stage." Additional Facility Rules, supra note 25, Preamble A; available at http://www.worldbank.com/ icsid/facility-archive/vi.htm (last visited May 23, 2004).
The popularity of ICSID arbitration has grown since its inception in 1966. There are presently 140 contracting states\textsuperscript{30} to the ICSID Convention, with another fourteen states as signatories.\textsuperscript{31} Additionally, advance consents to submit investment disputes to ICSID arbitration are found in about twenty national investment laws, in over 900 BITs, and under four recent multilateral trade and investment treaties: the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur.\textsuperscript{32} In all, 145 disputes have been brought to ICSID, 115 of which have been registered since 1994.\textsuperscript{33}

B. Benefits of ICSID Arbitration

Arbitration in general has many advantages as an avenue of dispute resolution for international investors, sovereign states, and the global commercial community as a whole. Arbitration allows the disputing parties the freedom to select as arbitrators those individuals with particular expertise in a specific commercial or economic field.\textsuperscript{34} While arbitrators must be independent from the specific parties in dispute,\textsuperscript{35} they can have a familiarity with, and understanding of, the particular industry—be it investments or other commercial activity.\textsuperscript{36} These arbitrators are not necessarily experts in a particular type of law, but have an intimate familiarity with the specific issues in question in a particular

\begin{itemize}
\item \textsuperscript{30} Contracting States are those States that have signed the Convention and performed whatever ratification process the individual State requires to ratify the treaty within that State. States that have just signed the Convention, but have not ratified it within their own State are deemed Signatory States.
\item \textsuperscript{32} See About ICSID, supra note 6.
\item \textsuperscript{33} See International Centre for Settlement of Investment Disputes: List of Pending Cases, at http://www.worldbank.org/icsid/cases/pending.htm (last visited May 23, 2004); Concluded Cases, supra note 10
\item \textsuperscript{34} CARBONNEAU, supra note 1, at 2.
\item \textsuperscript{35} Even though ICSID has a Panel of Arbitrators created by appointment from the Contracting States, ICSID Convention, supra note 8, art. 13, this Panel is only a recommended group of arbitrators, and parties are free to appoint arbitrators from outside the Panel. ICSID Convention, supra note 8, art. 40. If parties cannot agree on the arbitrators, then they will be selected from this Panel. ICSID Convention, supra note 8, art. 43. All ICSID Arbitrators are required to meet the qualifications of Article 14(1), which states that the arbitrators "shall be persons of high moral character and recognize competence in the fields of law, commerce, industry, or finance, who may be relied upon to exercise independent judgment." ICSID Convention, supra note 8, art. 14(1); accord ICSID Convention, supra note 8, art. 40(2).
\item \textsuperscript{36} See generally Toby Landau, Composition and Establishment of the Tribunal, 9 AM. REV. INT'L ARB. 45, n.107 (1998).
\end{itemize}
dispute, allowing for a more efficient resolution process.37

Additionally, in international disputes, the neutrality of the ruling body is a primary concern, whether in regards specifically to the parties, or generally to the nationalities.38 Arbitration allows for the selection of arbitrators who have no connection with either party, both in nationality and within the profession.39

Arbitration also minimizes direct hostility between the parties that is inherent in a more adversarial judicial process.40 This has the advantage of being less disruptive to ongoing and future dealings among the parties, an important feature in an international marketplace.41 "Its more flexible approach to adjudication is less destructive of business relationships and allows the parties to continue to do business once the dispute has been resolved."42

In addition to the traditional benefits of arbitration, ICSID arbitration has benefits that are more expansive. ICSID arbitration was established primarily "to assure foreign investors of protection under international law from unilateral actions of host countries which could jeopardize their investments."43 The goal of ICSID is to provide a level playing field for investors and host countries and to be a purely international dispute resolution forum.44 It offers assurances to parties that their investments are safe from unilateral actions of the host country, while the host countries, which are mostly developing countries, are assured of a dispute resolution forum insulated from the influence of developed countries.45

ICSID allows investors to sue signatory states directly for a violation of an investment contract, without sovereign immunity issues,46 and provides assurance that the foreign State will be bound to resolve any dispute arising under the investment contract through ICSID arbitration.47 Additionally, investors do not need to fear the foreign State

37. Id.
38. See CARBONNEAU, supra note 1, at 3.
39. Id.
41. Id.
42. See CARBONNEAU, supra note 1, at 3.
44. Id.
45. Id.
46. Sovereign immunity is not a problem at this particular stage of the arbitration. Article 55 speaks only to the execution of the award. Problems with sovereign immunity and execution will be discussed infra Part IV.
47. ICSID Convention, supra note 8, at art. 53-54.
appealing the decision to a court of that State.\textsuperscript{48}

While signatories to the ICSID Convention are not bound to make use of the ICSID process,\textsuperscript{49} if they choose to resolve disputes through ICSID Arbitration, either by contract\textsuperscript{50} or by treaty,\textsuperscript{51} that decision cannot be unilaterally revoked.\textsuperscript{52} This gives assurance to the private investor that the disagreement will not be heard in a biased environment as unilaterally determined by their investment partner. While the contract specifying ICSID arbitration may permissibly require exhaustion of domestic remedies,\textsuperscript{53} once ICSID Arbitration commences, a State may not seek to invalidate the findings or the decision of the Arbitration in its own court system.\textsuperscript{54}

Moreover, all ICSID Contracting States, whether parties to the dispute or not, are required by the Convention to recognize and enforce any ICSID arbitral awards.\textsuperscript{55} The recognition of an award is the formal confirmation by the State that the award is authentic and has full legal

\textsuperscript{48} Id.
\textsuperscript{49} Id. at art. 25(1).
\textsuperscript{50} This binding, irrevocable consent is a manifestation of the maxim \textit{pacta sunt servanda} (commitments must be honored). However, traditional "freedom of contract" issues apply, such as clarity of agreement, equality of bargaining powers, etc. A court can determine whether an agreement to proceed to ICSID arbitration actually exists. See Georges R. Delaume, \textit{The Finality of Arbitrations Involving States: Recent Developments}, 5 ARB. INT'L 21, 24 et seq. (1989).
\textsuperscript{51} It is important to note, however, that a mere reference to ICSID does not necessarily bind a State to ICSID. For example, the BIT between the Netherlands and Pakistan in 1988 states that the contracting party "shall assent to any demand... for arbitration or conciliation, to the Centre [referring to ICSID]." This is not an agreement to ICSID, but an agreement to agree to ICSID and, while denying a request for ICSID arbitration could be construed as a violation of the BIT, it will likely not be construed as a violation if the ICSID Convention. See SCHREUER, \textit{supra} note 9, at 216-18; Pierre Lalive, \textit{The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems}, 51 BRIT. Y.B. OF INT'L L. 123 (1980), reprinted in 1 ICSID REP. 645 (1983).

In addition, at least one contracting party must be a signatory of the ICSID Convention. If an agreement mentions ICSID and the parties are not states, or members of states, that have signed the ICSID Convention, the reference is void. This issue appears most often in multilateral treaties. For example, NAFTA includes an express reference to ICSID arbitration, but neither Canada no Mexico are signatories of the ICSID Convention. While ICSID Additional Facility Arbitration would be available in disputes between Canadian or Mexican investors and the U.S. or between U.S. Investors and Canada or Mexico, it would not be available when Canada and Mexico are the only two parties represented.

\textsuperscript{52} See SCHREUER, \textit{supra} note 9, at 216-18.
\textsuperscript{53} ICSID Convention, \textit{supra} note 8, art. 24.
\textsuperscript{54} Id. at art. 53(1). There is, however, an internal appeal mechanism available for ICSID decisions. See discussion \textit{infra} Part IV.
\textsuperscript{55} See CARBONNEAU, \textit{supra} note 1, at 911. It is important to note, however, that only final awards are subject to this mandatory recognition. Any intermediary awards, such as findings of jurisdiction or matters of procedure, may be subject to review (provided they are not incorporated into the award itself). See SCHREUER, \textit{supra} note 9, at 1110-11.
Recognition provides two fundamental effects. First, the requirement to recognize an ICSID award serves as res judicata for the particular action. This means that the "claim on which the award has decided must not be the subject of another proceeding before a domestic court or arbitral tribunal." Second, recognition of an award, in most cases, serves as a first step leading to enforcement of the award. While enforcement itself may be subject to possible sovereign immunity questions, recognition of the award is not subject to the same concerns.

The overall effect of the ICSID Convention is more far-reaching than a simple enunciation of the rights of investors in foreign countries, or the particular methodologies of any resulting arbitrations. The ICSID Convention gives investors the confidence and reassurances necessary to invest in a foreign State. "[ICSID's] paramount objective is to promote a climate of mutual confidence between investors and States favorable to increasing the flow of resources to developing countries under reasonable circumstances."

Intrinsically, the existence of the ICSID Convention is also in the best interest of the countries benefiting from foreign investors. "[T]he Convention is aimed to protect, to the same extent and with the same vigor the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries." Thus, the ICSID Convention fosters a favorable environment, which may not otherwise exist, for the exchange and sharing of financial resources between developing and developed countries.

C. Limitations of ICSID Arbitration

There are two definite limitations to ICSID arbitration, and its

56. ICSID Convention, supra note 8, art. 54(1).
58. Id.
59. Id. at 1115.
60. See discussion infra Part IV.
ability to expand, as it exists presently. First, ICSID jurisdiction exists, by definition, only where a dispute arises out of an investment. The ICSID Convention was enacted mainly to assure private investors that it was safe to invest in a foreign State and to encourage such investments. However, the drafters of the Convention consciously did not define the term investment. In drafting the Convention, there was much debate over whether the limitation to disputes of investments should even exist, let alone how that term should be defined. The chief architect of ICSID, the General Counsel of the World Bank in 1961, actually advised against defining the term investment, seeing any definition as an unnecessary limitation on the scope of potential ICSID authority. However, many of the national delegates wanted such a limitation.

The first draft of the Convention defined investment as “any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years.” After much debate and disagreement, this definition was removed and no other put in its place. The only definition of investment remaining as an official part of the ICSID Convention can be interpreted from the first phrase of the Preamble: “Considering the need for international cooperation for economic development, and the role of private international investment therein.”

Today, it is difficult to define fully the term investment for the purposes of the ICSID Convention. Parties can agree as to whether

64. The biggest limitations to ICSID Arbitration are the perception that arbitrations are subject to an endless stream of internal appeals, as well as subject to fail due to sovereign immunity from execution. CARBONNEAU, supra note 1, at 911-915. These issues will be addressed infra Part IV.

65. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State... and a national of another Contracting State.” Convention on the Settlement of Investment Disputes between States and Nationals of Other States, supra note 8, at Art. 53(1) (emphasis added).

66. See NATHAN, supra note 14, at 105.

67. Id. at 121-25.

68. Id. at 121-22.

69. Id.

70. Id. at 122; History, Vol. I, 116.

71. Id. at 122-24.

72. ICSID Convention, supra note 8, Preamble.

73. This comment does not purport to define the term investment. One method is to use the ordinary meaning of the word, “best described by the International Monetary Fund as foreign direct investment to share in an enterprise operating in a State other than the investor whose purpose is to participate in the management of the enterprise.” NATHAN, supra note 14, at 115. However, the ordinary meaning is by no means the undisputed meaning of the word in terms of the ICSID Convention. See, e.g., Chittharanjan Felix Amerasinghe, The Jurisdiction of the International Centre for the Settlement of Investment Disputes, 19 INDIAN J. OF INT’L L. 166, 177-81 (1979) (giving different definitions of investment from economic science and various Bilateral
individual transactions are actually investments, and are therefore subject to ICSID arbitration.\textsuperscript{74} However, the Tribunal appointed to a particular dispute will have the ultimate say over whether a transaction is or is not considered an investment.\textsuperscript{75} As technology grows, and the globalization of trade and economy increases, satisfactorily defining the word investment may become increasingly difficult.

The second limitation to the ICSID Convention is that any change to, or alteration of, the Convention must be done by amendment as defined by Articles 65 and 66 of the Convention. Specifically, under Article 66(1), "[e]ach amendment shall enter into force 30 days after ... [a]ll Contracting States have ratified, accepted or approved the amendment."\textsuperscript{76} With the number of Contracting States reaching 150, logistically this process becomes unwieldy to the point of being impractical.\textsuperscript{77}

Initially, the Convention required a “qualified majority of the Administrative Council” for the adoption of an amendment.\textsuperscript{78} After several delegates to the Convention balked at the idea that they would be forced to comply with an amendment that they did not agree to follow, the language was changed to require adoption by all signatories before an amendment became effective.\textsuperscript{79} As of this date, no proposed amendment has ever been made under Article 65.\textsuperscript{80} As the number of contracting States grows, this will become increasingly unlikely.

There is a way around this amendment process, as was demonstrated by the creation of the Additional Facility Rules in 1978.
However, the "Additional Facility proceedings operate [only] in analogy to ICSID proceedings." The Additional Facility itself, a mechanism activated only when one of the parties of the dispute is not a signatory to the Convention, cannot be seen as part of the Convention but as guidelines to a private contract between parties.

III. Possible Reasons for the Increased Number of ICSID Arbitrations

A. The Rise in the Number of Signatories

In 1991, Jan Paulsson, former Vice President of the London Court of International Arbitration, hypothesized that a rise in the number of ICSID cases would come as a result of Latin American and former Communist States accepting and using the ICSID Convention. Additionally, he believed that ICSID Arbitration would grow if pre-existing investment treaties from States would begin to use, or continue to use, the ICSID Convention as the chosen method of dispute resolution when the old treaties expire and new treaties are created. An analysis of the last twelve years shows that both of these factors exist, and as a result, the use of the ICSID Convention has exploded.

There were ninety-five signatories to the ICSID Convention in its first twenty-five years. In the last twelve years, fifty-seven new signatories were added, including Bosnia and Herzegovina (1997), Bulgaria (2000), Colombia (1993) Estonia (1992), Guatemala (1995), Latvia (1997), Nicaragua (1994), and Serbia and Montenegro (2002). The sixteen new cases registered with ICSID since July 2003—nearly equal to the number of cases ICSID handled in its first twenty years of existence—include older signatories such as El Salvador (1982), Hungary (1986), Niger (1965), Pakistan (1965), and the Philippines...
ICSID's Resurgence (1978), as well as recent signatories Argentina (1991), Bulgaria (2000), and Peru (1991). It is clear that old and new signatories alike are using the ICSID Convention in greater numbers.

B. The Rise in the Number of BITs

The first modern BIT was created by Germany from 1959-1961 to protect its investors in foreign countries. Over the next twenty-five years, an increased number of European countries created BITs with developing countries. It is only since the late 1980s, however, that BITs have come to be "universally accepted instruments for the promotion and legal protection of foreign investments."98


92. Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interaугua Servicios Integrales de Agua, S.A. v. Argentine Republic, ICSID Case Nos. ARB/03/17, ARB/03/18 and ARB/03/19 (registered July 17, 2003, currently pending) (concerning a water services concession); Telefónica S.A. v. Argentine Republic, ICSID Case No. ARB/03/20 (registered July 21, 2003, currently pending) (concerning a telecommunications enterprise); Enersis, S.A. and others v. Argentine Republic, ICSID Case No. ARB/03/21 (registered July 22, 2003, currently pending) (concerning an electricity distribution enterprise); Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic, ICSID Case No. ARB/03/22 and ARB/03/23 (registered August 12, 2003, currently pending) (concerning an electricity distribution enterprise); Unisys Corp. v. Argentine Republic, ICSID Case No. ARB/03/27 (registered Oct. 15, 2003, currently pending) (concerning an information storage and management project); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/03/30 (registered Dec. 8, 2003, currently pending) (concerning a water and sewer services concession agreement).


95. The number of new signatories to the ICSID Convention involved in ICSID proceedings may be even higher than appears at present. It is impossible to gauge the exact number of new signatories using the ICSID Convention because only the recipient country is known. The nationality of the investors in the preceding cases remains an issue to be determined by the constituted tribunal and may well involve investors from new signatory countries.

96. UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES, 8 (Graham & Trotman eds., 1988). According to this treatise, Germany was said to be particularly sensitive to investment protection as its investors had lost their foreign assets in many countries following the two world wars. Id.


Of the over 1,100 BITs currently in existence, more than 800 have been finalized since 1987, by a growing number of countries. This rapid increase in the number of BITs appears to be a growing trend. Most countries that have an established BIT program continue to pursue opportunities to enter into new treaties. In addition, a number of countries that have refrained from concluding BITs have begun in recent years to fully negotiate and sign such treaties. BITs are no longer concluded exclusively between capital-exporting and capital-importing countries; an increasing number of BITs are concluded between developing countries themselves.

Almost all modern BITs include provisions dealing with disputes between one of the parties and investors having the nationality of the other party. In this respect, most BITs can, and do, provide for arbitration under the ICSID Convention. The large number of consents given in this manner (in over 900 treaties) has been reflected in ICSID's caseload. Over half of the cases pending before ICSID at present (including two conducted under its Additional Facility Rules) have been initiated in reliance on consents given in treaty provisions.

99. Id. 100. See Jorge F. Pérez-López & Matias F. Travieso-Diaz, The Contribution of BITs to Cuba’s Foreign Investment Program, 32 LAW & POL’Y IN INT’L BUS. 529, 532 (2001). The boom in BITs in the 1990s is attributable to a number of factors. The first factor was the opening to foreign investment brought about by evolution toward a market economy in the former socialist countries of Eastern and Central Europe and in the newly independent states of the former Soviet Union. Second, the recognition among developing countries of the positive role in economic development that FDI can play and the intense competition among countries to attract FDI [Foreign Direct Investment] also lead to a large increase in BITs. Third, BITs growth is also attributable to shrinkages in foreign aid generally and difficulties on the part of many developing countries in obtaining additional foreign financing via debt. The final factor stems from a growing consensus among developed and developing countries, as well as transition economies, that it is in a country’s national interest to provide increased legal protection to FDI.

It is clear that those countries forming BITs have enough confidence in the ICSID arbitration system to continue using it, and that Jan Paulsson’s assertion concerning the growth of ICSID was correct on both accounts.\(^{108}\)

IV. Overcoming a Perceived Weakness of ICSID Arbitration—The Finality of an ICSID Award

One of the largest perceived problems of ICSID Arbitration is the ability to obtain “final and binding ICSID arbitral awards.”\(^{109}\) This problem manifests itself in two distinct areas: an internal appeals process leading to annulment of awards and states claiming sovereign immunity from the execution of the award.\(^{110}\)

A. Internal Appeals and Annulments\(^{111}\)

Article 52 allows for the annulment of an ICSID award on the following limited 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.\(^{112}\)

For the first nineteen years of the ICSID Convention, this provision lay

\(^{108}\) See Paulsson supra, note 82.

\(^{109}\) See CARBONNEAU, supra note 1, at 911.

\(^{110}\) This is distinct from sovereign immunity from recognition of the award, discussed supra Part II. B. See ICSID Convention, supra note 8, art. 55.

\(^{111}\) It is important to note that the ICSID Convention does not allow for appeals. However, many feel that the annulment process contained in the ICSID Convention is in essence an appeals process, so I have included both concepts together in this section. There are two distinct differences between the concept of an appeal and of an annulment.

As to the first, the result of a successful application for an annulment is the invalidation of the original decision. The result of a successful appeal is its modification... As to the second element, annulment is only concerned with the legitimacy of the process of the decision: it is not concerned with its substantive correctness. Appeal is concerned with both.

\(^{112}\) ICSID Convention, supra note 8, art 52(1).
dormant. That changed in 1985, when the decision in Klöckner v. Cameroon was annulled on the grounds that the Tribunal manifestly exceeded its powers.\textsuperscript{113}

Since the annulment of the ICSID decision in Klöckner, numerous commentators have feared that the annulment provisions of Article 52 would result in an unmanageable internal appeal process.\textsuperscript{114} If awards can be revisited by a new tribunal, one that is free to disagree with the original tribunal’s findings and issue a new award (or, at least, the cancellation of the old award), then can the initial ICSID award ever be considered final?

In fact, however, there have been only five additional requests for annulments of ICSID awards post-Klöckner.\textsuperscript{115} One of these requests appeared in Klöckner, when the parties were denied a request that the second award be annulled.\textsuperscript{116} Two of the five additional requests arose from one case, Amco v. Indonesia,\textsuperscript{117} where one of the requests was granted and the second was denied.\textsuperscript{118} The fourth request, SPP. v. Egypt, was settled before a decision on annulment could be reached.\textsuperscript{119} In the last request, MINE v. Guinea, the parties settled their dispute soon after the award was annulled but before a new tribunal commenced.\textsuperscript{120} In order to understand the possible effects of these annulments, the decisions of the Tribunals in Klöckner, Amco, and MINE must each be examined to discover the reasons for the annulments.\textsuperscript{121}

The tribunal in Klöckner was to reach a decision on the case based on “Cameroonian law based on French laws or French civil law.”\textsuperscript{122} The

\textsuperscript{115} See SCHREUER, supra note 9, at 897.
\textsuperscript{116} The \textit{ad hoc} committee’s decision remains unpublished. \textit{See} SCHREUER, \textit{supra} note 9, at 898.
\textsuperscript{118} Decision on Annulment, 17 December 1992. The \textit{ad hoc} committee’s decision remains unpublished. \textit{See} SCHREUER, \textit{supra} note 9, at 900.
\textsuperscript{121} My brief discussion of these cases is only to gain perspective on the reasons for annulment and the possible effect they could have on subsequent cases. For an excellent, and more detailed, analysis of these cases, see Aron Broches, \textit{Observations on the Finality of ICSID Awards}, 6 ICSID REV.-FOREIGN INV. L.J. 321 (1991); \textit{see also} SCHREUER, \textit{supra} note 9, at 897-902.
\textsuperscript{122} Broches, \textit{supra} note 121, at 340 (citing the Klöckner decision). The tribunal
committee, however, did not ascertain a particular principle of French law but merely presumed its existence.\textsuperscript{123} The ad-hoc committee considering the annulment request concluded that mere postulating on a legal principle without demonstrating its existence is considered not applying the law of the Contracting State as required under Article 42 of the ICSID Convention.\textsuperscript{124}

In \textit{Amco}, the tribunal identified the proper Indonesian law in question but failed to apply that law in calculating the amount of money that was invested in the project at issue.\textsuperscript{125} This miscalculation by the tribunal resulted in a gross overstatement of the investment in question thereby fundamentally changing what should have been the outcome of the arbitration.\textsuperscript{126} This, the \textit{ad hoc} tribunal determined, was a "serious departure from a fundamental rule of procedure" as articulated in Article 52(d).\textsuperscript{127}

In \textit{MINE}, the \textit{ad hoc} committee did not annul the result of the initial arbitration, but annulled the damages portion.\textsuperscript{128} The committee determined that the damages analysis of the tribunal was "inconsistent and in contradiction with its analysis of certain damages theories" and therefore failed to State the reasons on which the award was based.\textsuperscript{129} While Indonesia claimed other grounds for annulment, the committee only applied this Article 52(e) violation.\textsuperscript{130}

Many view the decisions in \textit{Klöckner} and \textit{Amco} as reviewing the merits of the particular case and disturbing the fundamental principle of arbitration: efficient and effective evaluation of a dispute.\textsuperscript{131} The fear is that Article 52 could be used as an internal appeal process that would disrupt the arbitral process and casts doubt on the finality of any ICSID judgment. However, two fundamental points seem to contradict this assertion.

First, the \textit{ad hoc} committees in \textit{Klöckner}, \textit{Amco}, and \textit{MINE} did not alter the decision, as would be the case in an appeal process. In
Klöckner, the committee did not determine that the losing party should win; they determined that the proper legal standard (indeed, that no legal standard) was used by the tribunal to reach its decision and annulled it in order to have a different arbitral tribunal decide the outcome of the case based on the merits. Amco seems most like a merits review in that the committee determined that the Tribunal did not correctly apply Indonesian law. In fact, it is clear that the Tribunal did not merely fail to apply the law correctly; it failed to apply the law at all. The committee in MINE did not nullify the factual determination of the tribunal but annulled the damages portion.

Is this internal annulment process fundamentally fatal to the development and growth of ICSID arbitration? The annulment process is designed to remove the influence on the award of any external judicial system, leading to the conclusion that the rendered award is truly a-national. Without any annulment process, fundamentally defective awards such as in MINE could not be remedied. The history of ICSID arbitrations, while not a definitive sign of future occurrences, has demonstrated that the “endless appeals process,” while possible in theory, does not in fact exist.

A number of commentators have suggested the creation of a permanent review board. An amendment creating such a review board could contain language that all complaints about an award must be

132. *Klöckner v. Cameroon: Decision of the Ad Hoc Committee—Annulment Application*, 1 ICSID Rev.-FOREIGN INV. L.J. 89, 114-115 (1986) (“[I]t must be acknowledged that in its reasoning, limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form, the Tribunal has not applied the law of the Contracting State.”).

133. 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...[but] 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.

134. Broches, *supra* note 121, at 356 (“[T]he requirement that the Award must State the reasons on which it is based is in particular not satisfied by contradictory reasons.”).

135. “Whatever constraints and limitations apply to arbitration in domestic law cannot impinge upon international arbitral agreements, proceedings, or award...the transborder arbitral process is, de facto, an autonomous and self-regulating international system of adjudication.” *Carbonneau, supra* note 1, at 32-33.

presented in one appeal, and that the decision of the review board is final. This would alleviate the worry over multiple appeals and the lack of finality of an award. However, the Convention itself must be amended through Articles 65 and 66 for such a review board to exist, an amendment that is unlikely to occur. Because of the strict amendment process of the ICSID Convention, the worry over an unfettered annulment process may never be formally alleviated. The only true assurances that investors and States have that this will not occur is the fact that it has, to date, not occurred, and all parties involved, including the ICSID arbitrators, are aware of the potential problem.

B. Sovereign Immunity from Award Enforcement

The effectiveness of international arbitration ultimately depends on whether the arbitral award can be enforced against the losing party. The question of sovereign immunity in ICSID arbitrations is technical in nature. Article 55 of the ICSID Convention states that “[n]othing in Article 54 [concerning the requirement that all signatories must recognize a rendered award] shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.” In essence, the award rendered by the ICSID Tribunal is given similar status to a court judgment. However, “even court judgments may not be enforceable: the respondent may be a State, and enjoy immunity from the jurisdiction of the local courts.”

Article 55 only applies to a State’s immunity from execution, not jurisdiction or the recognition of an award. Specifically, Article 54(3) states that “execution of the award shall be governed by the laws concerning the execution of judgments in the State in whose territories such execution is sought.” With ICSID awards, State immunity only becomes a possibility when “concrete measures of execution are taken” to actually enforce the award, typically after recognition of the award has

137. See discussion supra Part II. C.
139. ICSID Convention, supra note 8, art. 55.
141. Id. at 270-71.
142. “Under Art. 54(3) only execution but not recognition is governed by the law of the forum State.” SCHREUER, supra note 9 at 1143. Jurisdiction in an ICSID Arbitration is governed by Article 25 and determined by the tribunal under Article 41. Recognition of an ICSID award is governed by Article 54. See ICSID Convention, supra note 8, art. 25, 41, 54.
been granted.\textsuperscript{143}”

“The principle of restrictive immunity, according to which States are immune from suits in respect of matters which are exercises of its public authority \textit{(acta jure imperii)} but not in respect of commercial transactions which it has entered \textit{(acta jure gestionis)}, is generally accepted.”\textsuperscript{144} Specific sovereign immunity issues, though, depend on the laws of the State of execution.\textsuperscript{145}

To alleviate the difficulty of sovereign immunity from suit, the drafters of the ICSID Convention could have included a waiver of immunity from execution. However, Article 55 was included in the ICSID Convention to “make clear that the Convention did not seek to change the laws of Contracting States with respect to immunity.”\textsuperscript{146} Thus, it is clear that those parties contracting under the ICSID Convention must still deal with sovereign immunity from execution issues as they exist under current State law. As seen in \textit{Liberian Eastern Timber Co. v. Government of Liberia (LETCO v. Liberia)}\textsuperscript{147} and \textit{Soabi v. Senegal},\textsuperscript{148} the law of sovereign immunity in this area could be interpreted quite differently.

In \textit{LETCO v. Liberia}, LETCO applied to the United States District Court for the Southern District of New York to have an ICSID award recognized and enforced in the United States.\textsuperscript{149} The court entered an \textit{ex parte} judgment for the plaintiff, as it was required to do under the ICSID Convention.\textsuperscript{143}

\textsuperscript{143} Schreuer, supra note 9, at 1144.
\textsuperscript{144} Collier & Lowe, supra note 140, at 271. “The most widely accepted criterion for immunity from execution is the nature of the assets which are to be the object of enforcement... distinguishing between commercial and non-commercial property [property serving governmental purposes].” Schreuer, supra note 9, at 1149. What constitutes commercial and non-commercial property is beyond the scope of this comment, but a discussion of this distinction can be found Schreuer, supra note 9, at 1151-65.

\textsuperscript{145} A number of countries have adopted legislation to regulate State immunity, including the United States (Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (1976)), Great Britain (State Immunity Act 1978, 17 I.L.M. 1123 (1978)), and Australia (Foreign States Immunities Act 1985, 25 I.L.M. 715 (1986)). There are also some international attempts to regulate State immunity, such as The European Convention on State Immunity of 1972 (European Treaty Series No. 74, 11 I.L.M. 470 (1972)) and the International Law Commission’s Draft Articles on Jurisdictional Immunities of States and their Property of 1991 (30 I.L.M. 1563 (1991)).


\textsuperscript{149} LETCO v. Liber. 2 ICSID REP. 343 (1986) (Award).
Convention, and issued a writ of execution.  

LETCO sought to “execute its judgment against certain tonnage and registration fees collected in the United States from ship owners flying the Liberian flag.” In response, Liberia invoked the United States Foreign Sovereign Immunities Act (FSIA), stating that the fees in question are in essence taxes designed to raise revenues for the Republic of Liberia and thus immune from execution since they are not “property . . . used for a commercial activity.” The District Court for the Southern District of New York agreed that the assets were sovereign, not commercial, and granted Liberia’s motion to vacate the execution against those specific assets. The court did make it clear that “LETCO [was] not enjoined from issuing executions with respect to any properties which [were] used for commercial activities and that [might have fallen] within one of the exceptions delineated in section 1610.”

LETCO then sought to execute the judgment against several Liberian Embassy bank accounts in Washington, D.C. for “any credits other than wages, salary, commissions or pensions of the defendant, The Government of the Republic of Liberia, The Republic of Liberia, or The Embassy of the Republic . . . of Liberia or any of their agencies, that are used for commercial activities.” The D.C. Circuit Court held that the Embassy accounts were immune from execution, both because they enjoyed diplomatic immunity under the 1961 Vienna Convention on Diplomatic Relations and because no exception of the FSIA applied to

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150. *LETCO*, 650 F. Supp. at 75-76.
153. *LETCO*, 650 F. Supp. at 77. 28 U.S.C. 1610(a) provides exceptions to the immunity of a foreign State from execution upon a judgment entered by a Court of the United States if the property is or was “used for a commercial activity in the United States.” *Id.*
154. *Id.* at 77-78.
155. *Id.*
deprive the bank accounts, which, in the court’s opinion, were essentially of a governmental nature, of their grant of sovereign immunity.158

In SOABI, an ICSID award had been rendered in favor of the SOABI company in a dispute that arose when Senegal terminated agreements relating to a construction project for low-income housing in its capital. SOABI sought recognition of the award in France. Recognition was granted by the President of the Tribunal de grande instance (the court of first instance) of Paris in an unpublished decision. On appeal, the Court of Appeal of Paris vacated the recognition order. The Court reasoned that, since SOABI had not proven the commercial nature of the Senegalese assets that might be subject to execution following recognition, to hold other than that recognition should be denied would violate Senegal’s immunity from execution and contravene public policy.159

The Court of Cassation annulled the Court of Appeal’s decision and ruled that the “Convention of Washington of March 18, 1965 [ICSID Convention] has instituted, in its Articles 53 and 54, an autonomous and simple system of recognition and enforcement which excludes the used or intended to be used for purposes of the diplomatic mission. If the “full facilities” to which the United States agreed to “accord” diplomatic immunity did not include bank accounts off the premises of the mission, the Liberian Embassy either would have to take grossly inconvenient measures, such as issuing only checks drawn on a Liberian bank, or would have to run the risk that judgment creditors of Liberia would cause the accounts the Embassy holds at banks located in the United States to be seized for an indefinite length of time, severely hampering the performance of the Embassy’s diplomatic functions.

LETCO, 659 F. Supp. at 607. The Court noted that Congress did not intend the FSIA to affect diplomatic immunity under the Vienna Convention, but that “28 U.S.C. § 1609 explicitly states that Congress enacted the FSIA subject to existing international agreements to which the United States is a party at the time of enactment of this Act.” Id. at 608, n.3 (internal quotations omitted).

158. The Liberian Embassy bank accounts are utilized for the maintenance of the full facilities of Liberia to perform its diplomatic and consular functions as the official representative of Liberia in the United States of America, including payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with diplomatic and consular activities necessary to the proper functioning of the Embassy. The essential character of the activity for which the funds in the accounts are used, therefore, undoubtly is of a public or governmental nature because only a governmental entity may use funds to perform the functions unique to an embassy.

Id. at 610 (internal citations omitted).

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system provided for in Articles 1498 et seq. of the New Code of Civil Procedure and, in particular, the remedies therein provided.\textsuperscript{160} Thus, the court determined that the use of the ICSID Convention excluded any recourse to the French rules on immunity or on recognition of foreign awards, including public policy grounds, and allowed the execution of the award.\textsuperscript{161}

With the seemingly opposing views of two different States on the issue of execution of awards, is it possible for an investor to adequately protect his or her interests in an international investment governed by the ICSID Convention, and thus continue to use the Convention as a dispute resolution mechanism? Perhaps the best way to solve this problem is the inclusion of a waiver of immunity from execution clause in the investment contract itself. Such an inclusion has been called "a matter of elementary prudence."\textsuperscript{162} Consider the analysis and advice of Georges R. Delaume, former Senior Legal Adviser for ICSID:

> In the final analysis, the decisions of the Court of Cassation in the SOABI case and its U.S. counterpart in the LETCO case are encouraging acknowledgments of the effectiveness of the Convention's recognition provisions. The decisions serve as a reminder that if the parties wish to avoid the pitfalls of immunity rules that may interfere with the execution of ICSID awards, they would be well-advised to address the matter directly by means of appropriate waivers of immunity.\textsuperscript{163}

> Simply including a waiver of immunity in a contract, however, does not guarantee that immunity has been waived: waivers of immunity are still subject to local law.\textsuperscript{164} Additionally, when consent to ICSID jurisdiction occurs through a BIT, rather than a private contract, States may be unwilling, or unable, to alter any of the conditions of the treaty.\textsuperscript{165}

> The investor should do everything possible to secure any potential investment before actually proceeding with it. This means that the investor should insist on a waiver clause in any investment contract with a foreign State, even if the reference to ICSID has previously been

\textsuperscript{160} France: Court of Cassation Decision in SOABI (Seutin) v. Senegal, 30 I.L.M. 1167 (1991).
\textsuperscript{161} Id.
\textsuperscript{164} SCHREUER, supra note 9, at 1165-66 ("[C]ertain waivers have to be explicit while others may be given implicitly [while] . . . [c]ertain forms of immunity may be invalid even if agreed upon by the parties.").
\textsuperscript{165} Id. at 1166-67.
established by a BIT. The investor should also know what States are available for enforcement and execution of any potential judgment and ensure that enough assets exist in States allowing the drafted waivers of immunity. The more protection the investor has, both in writing and in law, the more willing a State might be to settle a dispute in a manner more favorable to the investor, or to even continue to faithfully perform under the contract when the State otherwise would have abandoned the contract and gambled on its immunity.

V. Conclusion

"[T]he primary value of arbitration lies in its pragmatic qualities . . . [providing] basic procedural fairness and access to adjudicatory systems." The ICSID Convention arose out of global need for an independent adjudicatory process and has risen to be a standard avenue for international investment dispute resolutions. Considering the vast number of BITs and multinational investment treaties that currently refer to ICSID arbitration as their dispute resolution mechanism, and the continued increase of the flow of foreign investments to developing countries, it is clear that the utilization of the ICSID arbitration process will continue to increase.

There are a few basic precautions those involved in the ICSID arbitration process should observe so that it can continue being the dispute mechanism of choice among international investors. Presently, investors should not be overly concerned about the existence and state of the appeals process, as very few ICSID arbitrations are actually granted appeals. ICSID arbitrators should take special care when issuing judgments and awards to ensure that remains true: making sure that decisions are well reasoned, based on the selected law, and not readily appealable. Additionally, as a limited review is a hallmark of the arbitration process, any ad-hoc committee appointed by the Secretary-General to consider an appeal should strictly follow the guidelines of Article 52, realizing the repercussions of granting any such appeal. In this instance, an ounce of prevention is definitely worth a pound, or more, of cure.

The Convention amendment process continues to be a concern. "[A] legal system must have the stability and predictability essential to security, order, and evenhanded justice . . . it must also have flexibility to

166. CARBONNEAU, supra note 1, at 1203.
167. See discussion supra Part III.
168. See discussion supra Part IV. A.
170. Discussion supra Part IV. A.
change and ability to grow with the institutions and society it serves—the capacity, in short to renew itself. If the Convention needs to be amended, either to facilitate the growing number of arbitrations or to expand its mandate beyond, or limit its mandate to a stricter definition of investment contracts, that process will not be so easily accomplished. While the creation of the Additional Facility Rules outside the formal amendment process of the Convention proves that it is possible for the Convention to adapt to necessary changes, too many changes outside the formal methods of amending the Convention could cause States to abandon its use.

The strict amendment process, however, gives rise to notions of predictability, a key to the growth of international investments. As the Convention’s primary purpose is the promotion of economic development through the facilitation of international investments, a Convention favoring stability and predictability over the ability to change and adapt may in fact be preferable. The increased use of the Convention in BITs and private contracts shows that investors and States alike have confidence in the ICSID arbitration process. In the end, the ICSID Convention appears to be the correct balance of flexibility and predictability needed to encourage confidence in international investments and, with a bit of care on the part of the Administrative Council and the arbitrators themselves, can continue to be the dispute resolution method of choice for international investors for years to come.


172. As “investment” remains undefined, there may be cause in the near future to amend the Convention to better define its scope, especially if the number of cases submitted to arbitration becomes unmanageable.

173. SCHREUER, supra note 9, at 1267-68 (“The adoption of the Additional Facility Rules in 1978 ... shows that there is some flexibility without a formal amendment of the Convention.”).


175. SCHREUER, supra note 9, at 4.