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## Confidentiality in ICSID Arbitration after AMCO Asia Corp. v. Indonesia: Watchword or White Elephant

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# Confidentiality in ICSID Arbitration after AMCO Asia Corp. v. Indonesia: Watchword or White Elephant

Benjamin H. Tahyar

## **Abstract**

Part I of this Note will discuss the manner in which ICSID arbitration acts as a contractual substitute for litigation before national courts. Part II will review the decision of the ICSID tribunal in *Amco Asia Corp.* In Part III, the Note will examine the confidentiality requirement imposed by the ICSID Convention and the Arbitration Rules, and will discuss the arguments for and against keeping arbitral proceedings secret. In light of this examination and discussion, the Note will argue that the ICSID tribunal correctly denied injunctive relief to Indonesia, although the denial may be inconsistent with the spirit of confidentiality traditionally associated with arbitral proceedings. This Note will conclude by recommending that article 48(5) of the ICSID Convention be changed to reflect a presumption against confidentiality, and in favor of the publication of awards.

CONFIDENTIALITY IN ICSID ARBITRATION AFTER  
*AMCO ASIA CORP. v. INDONESIA*: WATCHWORD  
OR WHITE ELEPHANT?

INTRODUCTION

One of the attractive aspects of arbitration, in comparison to judicial proceedings, is its confidentiality,<sup>1</sup> which enables business enterprises to settle their disputes privately.<sup>2</sup> Confidentiality appears to be the watchword in the arbitration rules of institutional arbitration centers.<sup>3</sup> The confidentiality of arbitral proceedings before the International Centre for Settlement of Investment Disputes<sup>4</sup> (ICSID) is protected by article

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1. Lalive, *Problèmes Relatifs à l'Arbitrage International*, 140 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 573 (1976). "It would appear that among [its] advantages, the *confidential* nature of arbitration must be one of the most important. It is unnecessary to stress the interest that parties with international commercial connections have in maintaining their business secrets and in not alerting the competition . . . or the tax authorities!" *Id.* (original emphasis) (author's translation); Yates, *Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION—SIXTH SOKOL COLLOQUIUM 231 (T. Carbonneau ed. 1984). "Confidentiality is a critical consideration; in some circumstances, it tips the balance in favor of arbitration." *Id.* To be sure, confidentiality is not the only consideration. There are other considerations in the international context that make arbitration an attractive contractual substitute to litigation. For example, enterprises engaged in international business may be more concerned with the neutrality that an arbitration tribunal affords. See Bagner, *Enforcement of International Commercial Contracts by Arbitration: Recent Developments*, 14 CASE W. RES. INT'L L.J. 573 (1982). This concern is especially true of enterprises with foreign investments where the disputes frequently involve foreign governments. See Domke, *The Settlement of International Investment Disputes*, 12 BUS. LAW. 264, 265 (1957).

2. See M. DOMKE, COMMERCIAL ARBITRATION § 29:05 (G. Wilner rev. ed. 1985). The prevalent practice in the United States among institutional and ad hoc arbitral tribunals is to refrain from publishing awards, and indeed, from explaining the reasons by which the arbitrators reached these decisions. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 581-86 (1985).

3. See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, RULES FOR THE ICC COURT OF ARBITRATION, Appendix II (1984). Appendix II states that the "work of the Court of Arbitration is of a confidential character which must be respected by everyone who participates in that work in whatever capacity." See also HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 28-29 *passim* (E. Cohn, M. Domke & F. Eisemann eds. 1977) (confidentiality must be respected).

4. The International Centre for Settlement of Investment Disputes (ICSID) was created in 1965 by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, 4 I.L.M. 532 [hereinafter ICSID

48(5)<sup>5</sup> of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States<sup>6</sup> (ICSID Convention) and by ICSID's Rules of Procedure for Arbitration Proceedings<sup>7</sup> (Arbitration Rules). It is, therefore, surprising that the ICSID arbitral tribunal in *Amco Asia Corp. v. Indone-*

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Convention]. ICSID was created as a forum for the settlement of international investment disputes "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 . . ." ICSID Convention, *supra*, art. 25(1). The nationality of a corporation party to an ICSID arbitration is determined by its place of incorporation or *siège sociale*. *Id.* art. 25(2). Thus, when a host country requires that the foreign investment be made through a locally incorporated subsidiary, the parties must provide in the arbitration agreement that the subsidiary be treated "as a national of another Contracting State for the purposes of [the ICSID] Convention." *Id.* art. 25(2)(b).

5. ICSID Convention, *supra* note 4, art. 48(5). Article 48(5) of the ICSID Convention states that the "Centre shall not publish the award without the consent of the parties." *Id.* In ICSID arbitration, however, the decisions of the tribunals must state the reasons upon which they are based. *Id.* art. 52(1)(e).

6. *Opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, 4 I.L.M. 532 (1965). ICSID was established under the auspices of the ICSID Convention. As of June 30, 1985, a total of 91 states have signed the ICSID Convention. Of this number, 87 states have also deposited instruments of ratification. ICSID 1985 ANNUAL REPORT, ANNEX I (1985). See generally Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation*, 9 VAND. J. TRANSNAT'L L. 793 (1976); Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 R.C.A.D.I. 331 (1972).

7. Rules of Procedure for Arbitration Proceedings (Arbitration Rules). The Arbitration Rules in effect on the date on which Indonesia and the Claimants consented to ICSID arbitration are published in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID REGULATIONS AND RULES (1968) [hereinafter Arbitration Rules I]. ICSID Arbitration Rule 6(2) states that all arbitrators "shall keep confidential all information coming to [their] knowledge . . ."; Rule 15 states that all "deliberations of the Tribunal shall take place in private and remain secret"; Rule 31(2) states that the "[t]ribunal shall decide, with the consent of the parties, which other persons . . . may attend the hearings;" Rule 37(2) states that the "minutes of the hearing . . . shall not be published without the consent of the parties"; and Rule 48(4) states that ICSID "shall not publish the award without the consent of the parties." See *infra* notes 94-110 and accompanying text. In 1984, the Arbitration Rules were amended. Parra, *Revised Regulations and Rules*, NEWS FROM ICSID, Winter 1985 at 4, 6. The amended Arbitration Rules are published in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID BASIC DOCUMENTS (1985) [hereinafter Arbitration Rules II]. Rule 48(4) of the Arbitration Rules was amended, while Rule 37 was revoked entirely. *Id.* The amendment and revocation of these two rules—even had they taken place earlier—would not have affected the outcome of the Tribunal's decision in *Amco Asia Corp.* because article 44 of the ICSID Convention states that "[a]ny arbitration proceeding shall be conducted . . . in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration." ICSID Convention, *supra* note 4, art. 44.

sia<sup>8</sup> refused to enjoin<sup>9</sup> the Claimants<sup>10</sup> from disseminating information to the press regarding their dispute with the Government of Indonesia (Indonesia).

Part I of this Note will discuss the manner in which ICSID arbitration acts as a contractual substitute for litigation before national courts.<sup>11</sup> Part II will review the decision of the ICSID tribunal in *Amco Asia Corp.*<sup>12</sup> In Part III, the Note will examine

8. *In re* Arbitration Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, 23 I.L.M. 351 (1984) (award on jurisdiction), 24 I.L.M. 365 (1985) (decision on the request of the Republic of Indonesia for recommendation of provisional measures); see also 24 I.L.M. 1022 (1985) (excerpts of the Tribunal's award on the merits). A relaxation of the confidentiality rules is also evident in the recent amendment to Arbitration Rule 48(4). See *supra* note 7. Under the amended rule, ICSID may now publish excerpts of the legal rules applied by the tribunals. For example, a summary of the legal rules applied by the tribunal in *Amco Asia Corp.* was published in *Legal Rules Applied by ICSID Arbitral Tribunals*, NEWS FROM ICSID, Summer 1984, at 5.

9. 24 I.L.M. at 365. The injunctive relief sought by Indonesia is governed by article 47 of the ICSID Convention, *supra* note 4, and by Rule 39(1) of the Arbitration Rules, *supra* note 7. In the context of the ICSID Convention, the injunctive relief sought is referred to as provisional measures, which may only be recommended by the ICSID tribunal to the parties. See *infra* notes 42-47 and accompanying text.

10. The Claimants are (a) Amco Asia Corp. (Amco Asia), a Delaware corporation; (b) P.T. Amco Indonesia (P.T. Amco), an Indonesian corporation; and (c) Pan American Development Limited (Pan American), a Hong Kong corporation. After an attempted coup d'état in 1965, a "New Order" was established in Indonesia under the leadership of President Suharto. Seekins, *Historical Setting*, in *INDONESIA: A COUNTRY STUDY* 1, 53-57 (F. Bunge ed. 1982). The Indonesian Government saw investment of foreign capital in Indonesia as a necessary prerequisite to the country's economic development. Glassburner, *Indonesia's New Economic Policy and Its Sociopolitical Implications*, in *POLITICAL POWER AND COMMUNICATIONS IN INDONESIA* 137, 152-53 (K. Jackson & L. Pye eds. 1978). Accordingly, in 1967 the Indonesian government enacted Law No. 1/1967 [hereinafter the 1967 Foreign Investment Law], granting generous tax and other concessions, to attract foreign investors to Indonesia. *Id.* Amco Asia, like all other foreign investors in Indonesia, was required to submit an Investment Application to the Indonesian Investment Coordinating Board (BKPM) for an investment license. Article IX of the Investment Application submitted by Amco Asia provided that any dispute or disagreement was to be brought before ICSID for settlement. 23 I.L.M. at 357. Foreign investors wishing to benefit from the 1967 Foreign Investment Law may be required, at the discretion of the Indonesian government, to make their investment through a subsidiary company incorporated under Indonesian law. Pursuant to this requirement, Amco Asia established P.T. Amco as its Indonesian subsidiary. For a general discussion of the 1967 Foreign Investment Law, see Soemitro, *Investment of Foreign Capital in Indonesia*, 22 BULL. INT'L FISCAL DOC. 496 (1968). Pan American, a company incorporated under the laws of Hong Kong, became a shareholder of P.T. Amco in 1972, when shares of P.T. Amco were transferred to Pan American, with the consent of the Indonesian Government. 23 I.L.M. at 371-73.

11. See *infra* notes 15-53 and accompanying text.

12. See *infra* notes 54-83 and accompanying text.

the confidentiality requirement imposed by the ICSID Convention and the Arbitration Rules, and will discuss the arguments for and against keeping arbitral proceedings secret.<sup>13</sup> In light of this examination and discussion, the Note will argue that the ICSID tribunal correctly denied injunctive relief to Indonesia, although the denial may be inconsistent with the spirit of confidentiality traditionally associated with arbitral proceedings. This Note will conclude by recommending that article 48(5) of the ICSID Convention be changed to reflect a presumption against confidentiality, and in favor of the publication of awards.<sup>14</sup>

### I. ICSID ARBITRATION AS A CONTRACTUAL SUBSTITUTE FOR JUDICIAL PROCEEDINGS

Today, most developing countries that allow and encourage private foreign investment have generally sought to protect their rights to control the exploration and utilization of their natural resources.<sup>15</sup> These countries' development policies have been enforced rigorously by their courts.<sup>16</sup> In a dispute, a foreign investor's concern about the possibility of inadequate relief in such courts,<sup>17</sup> and the inability of local law to govern complex multinational disputes, have often led the investor to reject the host country's courts as a viable means of dispute resolution.<sup>18</sup>

Litigating before the investor's own national courts may not be a satisfactory alternative solution, because some governments will simply invoke their right to sovereign immunity and refuse to recognize a foreign judgment.<sup>19</sup> Furthermore,

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13. See *infra* notes 84-179 and accompanying text.

14. See *infra* notes 180-84 and accompanying text. Pursuant to article 65 of the ICSID Convention,

[a]ny Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered . . . .

ICSID Convention, *supra* note 4, art. 65.

15. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *TUL. L. REV.* 42, 64 (1982).

16. *Id.*

17. *Id.*

18. Domke, *supra* note 1, at 265.

19. See, e.g., Hornick, *The Recognition and Enforcement of Foreign Judgments in Indonesia*, 18 *HARV. INT'L L.J.* 97 (1977) (foreign judgments generally may not be executed

the investor's attempt to obtain personal jurisdiction may also be barred by the doctrine of sovereign immunity.<sup>20</sup> Assuming that the investor is able to attach the host government's property abroad, and thereby gain jurisdiction in rem, his case may still be dismissed for nonjusticiability under the act of state doctrine.<sup>21</sup> Thus, "[i]f a foreign government or instrumentality is involved, a provision for arbitration of disputes may well

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in Indonesia). Under United States law the investor may seek to attach the property of the foreign government in satisfaction of the judgment. See RESTATEMENT OF UNITED STATES FOREIGN RELATIONS LAW (REVISED) § 460 comment a (Tent. Final Draft 1985). A recent survey made by a West German court, 46 Entsch. BVerfG 342 (1978), suggests that international law does not preclude execution against the property of a state on the basis of a judgment based on a claim not entitled to immunity, if the property against which execution is sought is not used for a "sovereign" as opposed to a commercial purpose. RESTATEMENT OF UNITED STATES FOREIGN RELATIONS LAW (REVISED) § 460 reporter's note 1 (Tent. Final Draft 1985). United States law, however, prohibits the attachment of foreign governmental property unless it is related to the claim which gave rise to the judgment. RESTATEMENT OF UNITED STATES FOREIGN RELATIONS LAW (REVISED) § 460 comment b (Tent. Final Draft 1985). In the case of a foreign investment, that property is located in the foreign government's territory.

20. See RESTATEMENT OF UNITED STATES FOREIGN RELATIONS LAW (REVISED) § 451 (Tent. Final Draft 1985). To subject a state to the judicial jurisdiction of another, the private plaintiff must show that there is a connection between the activity giving rise to the claim and the forum state. *Id.* comment a. In the context of a foreign investment, this would be almost impossible to demonstrate. See also Domke, *supra* note 1, at 265.

21. The act of state doctrine is a doctrine of judicial restraint initially set forth by the United States Supreme Court in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) and later reaffirmed in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). See RESTATEMENT OF UNITED STATES FOREIGN RELATIONS LAW (REVISED) § 469 comment a (Tent. Draft No. 7, 1986). It is therefore a judicial creation of United States law and its application is not required by the rules of international law. The courts of most countries have, however, exercised judicial restraint in adjudicating challenges to expropriations by foreign states. *Luther v. James Sagor & Co.*, [1921] 3 K.B. 532 (C.A.) (the United Kingdom court applied the act of state doctrine); *Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R. Co.*, 1955 I.L.R. 23 (Civil Ct. Rome, Sept. 13, 1954) (the Italian court applied a narrow construction of the responsibility of states to foreign investors); *Soc. Minera El Teniente, S.A. v. A.G. Norddeutsche Affinerie*, 12 I.L.M. 251 (Landgericht, Hamburg, Jan. 22, 1973) (the West German court applied local public policy to oust normal rules of conflict of laws). In the United Kingdom, the House of Lords has adopted the American view of the act of state doctrine. *Buttes Gas & Oil Co. v. Hammer*, [1982] A.C. 888, 936-38 (H.L. (E.)). In many cases, it is likely, therefore, that the host government's act that led to the dispute will not be reviewable in the courts of the investor's home country. See RESTATEMENT OF UNITED STATES FOREIGN RELATIONS LAW (REVISED) § 469 reporter's note 12 (Tent. Draft No. 7, 1986); Schmidt, *Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L.J. 90, 105 (1976).

be a necessity from the point of view of the private party."<sup>22</sup>

ICSID provides the only arbitral forum created specifically for the settlement of investment disputes between private foreign investors and their host countries.<sup>23</sup> The chief merits of ICSID arbitration are the independence<sup>24</sup> and neutrality<sup>25</sup> of its arbitral tribunals. ICSID arbitration also provides an exclusive means of settling investment disputes.<sup>26</sup> Pursuant to the ICSID Convention, national courts of the Contracting States<sup>27</sup> are required to refrain from acting in any manner that could possibly interfere with the autonomy and exclusivity of ICSID

22. de Vries, *supra* note 15, at 64. In commercial arbitration agreements between a private party and a foreign government, however, it remains unclear whether a waiver of immunity from execution may be implied from an agreement to arbitrate. RESTATEMENT OF UNITED STATES FOREIGN RELATIONS LAW (REVISED) § 460 reporter's note 3 (Tent. Final Draft 1985). In an ICSID arbitration the problem of immunity from execution does not arise. See *infra* notes 48-53 and accompanying text.

23. Forrestal, *Examples of and Reasons for Increased Use of International Arbitration*, in *INTERNATIONAL ARBITRATION BETWEEN PRIVATE PARTIES AND GOVERNMENTS* 15, 26 (G. Aksen & R. von Mehren eds. 1982).

24. ICSID arbitration is autonomous in character, in that the arbitration proceeding is governed by ICSID's own set of procedural rules. Article 44 of the ICSID Convention provides in relevant part that "[a]ny arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration . . ." ICSID Convention, *supra* note 4, art. 44.

25. The neutrality of the ICSID arbitral tribunal is assured by article 39 of the ICSID Convention, which provides in relevant part that "[t]he majority of the arbitrators [in the tribunal] shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute . . ." ICSID Convention, *supra* note 4, art. 39.

26. ICSID Convention, *supra* note 4, art. 26. Article 26 provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration *to the exclusion of any other remedy*. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition to its consent to arbitration under this Convention.

*Id.* (emphasis added). ICSID arbitration is therefore exempt from the scrutiny of national courts. The exception to which article 26 is subject has had little practical significance. None of the ICSID arbitration clauses known to the secretariat requires the exhaustion of local remedies. In addition, neither the investment laws of Contracting States that refer the parties to ICSID arbitration for dispute resolution nor the overwhelming majority of bilateral investment protection treaties, with the exception of those concluded by Romania, require the exhaustion of local remedies. De-laume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, n.3 (1983).

27. A Contracting State is any country that has become a signatory and has ratified the ICSID Convention. See *supra* note 4.



arbitration.<sup>28</sup> Thus, a national court must refer the parties to ICSID for a settlement of their dispute whenever that national court becomes aware that a complaint brought before it may call for ICSID arbitration.<sup>29</sup>

The arbitration clause in an investment agreement to which a foreign sovereign is a party should include a choice of law provision in addition to procedural rules.<sup>30</sup> Article 42 of the ICSID Convention allows the parties to an arbitration agreement to choose the substantive law that is to govern a dispute settlement.<sup>31</sup> For practical reasons, some of the details of routine operations of the investment entity should be governed by local law.<sup>32</sup> In many instances, however, applying the law of the host state exclusively will not be satisfactory, because the unpredictability of its political conditions may often bring about unfavorable changes in its laws.<sup>33</sup> The choice of law governing dispute settlement should, therefore, take into

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28. ICSID Convention, *supra* note 4, arts. 26 & 27; see Delaume, *ICSID Arbitration in Practice*, 2 INT'L TAX & BUS. LAW. 58, 68 (1984).

29. ICSID Convention, *supra* note 4, art. 26; see Delaume, *supra* note 26, at 785. *But see* Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983). The Court of Appeals for the District of Columbia Circuit refused to refer the parties to ICSID for arbitration. It merely reversed the decision of the district court, reported at 505 F. Supp. 141 (D.D.C. 1981), on the ground that the Republic of Guinea was entitled to immunity from suit. Both district and circuit court decisions have been criticized. See Delaume, *supra* note 26, at 786-96. The district court should have stayed the proceedings until such time as a decision may be made by the Secretary-General of ICSID refusing to exercise jurisdiction over the dispute. Only then would the district court have been at liberty to resume hearing the case. *Id.*; see also Delaume, *supra* note 28, at 68-71; Note, Maritime International Nominees Establishment v. Republic of Guinea: *Effect on U.S. Jurisdiction of an Agreement by a Foreign Sovereign to Arbitrate before the International Centre for the Settlement of Investment Disputes*, 16 GEO. WASH. J. INT'L L. & ECON. 451 (1982) [hereinafter Note, *Maritime International Nominees Establishment*].

30. de Vries, *supra* note 15, at 74-75.

31. ICSID Convention, *supra* note 4, art. 42(1). Article 42(1) provides:

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

*Id.* (emphasis added). When the parties to the dispute agree, an ICSID tribunal may also decide a dispute *ex aequo et bono*. *Id.*, art. 42(3). See Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Applicable Law and Default Procedure*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 12-22 (P. Sanders ed. 1967).

32. See de Vries, *supra* note 15, at 75.

33. *Id.* at 74-75.

account circumstances in which the host state defaults, repudiates, or unilaterally amends the agreement in light of changed economic and political realities.<sup>34</sup>

Because ICSID arbitration is provided for by contract, the consent of the parties is essential to the exercise of jurisdiction.<sup>35</sup> A host state's status as a Contracting State does not automatically constitute its consent to ICSID arbitration. The investment agreement between the private foreign investor and the host state must independently provide for ICSID arbitration.<sup>36</sup> The agreement to arbitrate, however, need not take the form of an arbitration clause written into the contract governing the underlying transaction,<sup>37</sup> but may be expressed by an exchange of letters or may result from an offer to arbitrate by one party that is subsequently accepted by the other.<sup>38</sup> Thus, the ICSID Convention does not require a specific type of instrument evidencing the agreement. The consent must merely be in writing.<sup>39</sup>

Once the parties have given their consent to ICSID arbi-

34. *Id.* The justifications for these defaults, repudiations and unilateral amendments may include assertions:

- 1) that a predecessor government lacked the right or power to enter into the agreement or to make the commitment in question, 2) that the agreement to arbitrate was not legally authorized, 3) that repudiation by the host state is justified because of breach or default by the investor, 4) that outright repudiation and expropriation is required by a new political or economic policy, and 5) that supervening regulatory legislation justifies cancellation of specific exemptions, privileges, or concessions granted in the investment agreement.

*Id.* at 74-75.

35. *See id.* at 42.

36. Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101 (1984). Ratification of the ICSID Convention by a Contracting State "constitutes only an expression of its willingness to make use of the ICSID machinery." *Id.* at 104. Ratifying the ICSID Convention, therefore, does not oblige a Contracting State to settle all international investment disputes through ICSID. *Id.*

37. de Vries, *supra* note 15, at 64-77. An arbitration clause written into the contract is referred to as a *clause compromissoire*. *Id.* at 49. It is drafted in anticipation of a possible dispute that may arise out of the transaction contemplated by the main contract. *Id.*

38. *See* Delaume, *supra* note 26, at 792.

39. *See* ICSID Convention, *supra* note 4, art. 25(1). Article 25(1) provides in relevant part that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment . . . which the parties to the dispute consent in writing to submit to the Centre." *Id.* (emphasis added).

tration, however, neither may withdraw it unilaterally.<sup>40</sup> Article 25(1) of the ICSID Convention permits an arbitral tribunal to proceed to an award despite the failure of one party to appear.<sup>41</sup> Thus, both parties are forestalled from simply ignoring the other's request for arbitration.

Due to the complex nature of international investment disputes, their settlement usually takes a long period of time.<sup>42</sup> Accordingly, provisional measures are often required to prevent the destruction of the object of the dispute, which could render the award ineffective or illusory.<sup>43</sup> In commercial arbitration proceedings, it is a general rule that, unless the parties have otherwise agreed, provisional measures must be requested from the national courts.<sup>44</sup> In keeping with the exclusive nature of ICSID arbitration, however, article 47 of the ICSID Convention provides that provisional measures may be recommended, but not ordered, by ICSID arbitral tribunals.<sup>45</sup> The parties may seek provisional measures judicially only if the parties have expressly stipulated to this in the arbitration clause recording their consent to ICSID arbitration.<sup>46</sup> Although an ICSID arbitral tribunal cannot order provisional measures, the tribunal, in making its final award, may consider

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40. *See id.*, art. 25(1). Article 25(1) provides in relevant part that "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally." *Id.*

41. *Id.* art. 25(1); *see also id.* art. 45(2). Article 45(2) provides that [i]f a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

*Id.*

42. Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 1980 BRIT. Y.B. INT'L L. 123, 132; Masood, *Provisional Measures of Protection in Arbitration under the World Bank Convention*, 1 DELHI L. REV. 138 (1972).

43. Lalive, *supra* note 42, at 132-33.

44. *Id.* at 132.

45. *See* ICSID Convention, *supra* note 4, art. 47. Article 47 provides that "[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party." *Id.*

46. *See* Arbitration Rules II, *supra* note 7, Rule 39. Arbitration Rule 39, which governs the recommendation of provisional measures, has now been tightened. Parra, *supra* note 7, at 6. Parties to an ICSID arbitration who wish to request provisional measures from the courts are required to stipulate their wish in the agreement recording their consent. Arbitration Rules II, *supra* note 7, Rule 39.

the parties' willingness to comply with the recommendation.<sup>47</sup>

Each Contracting State to the ICSID Convention agrees to enforce an ICSID award as if it were a final judgment of its own court.<sup>48</sup> Pursuant to article 55 of the ICSID Convention, however, such agreement is subject to the rules of sovereign immunity prevailing in the country in which execution is sought.<sup>49</sup> This is not to say that article 55 relieves a Contracting State of its obligations under the ICSID Convention.<sup>50</sup> The Contracting State should not invoke its immunity for the sole purpose of thwarting the enforcement of an ICSID award.<sup>51</sup> If the Contracting State were to do so, the private party award-creditor<sup>52</sup> would be free to request assistance from its own government, which could then bring a claim on its behalf in the International Court of Justice.<sup>53</sup>

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47. See Arbitration Rules I, *supra* note 7, Rule 39, Note B; Lalive, *supra* note 42, at 134-37. That a provisional measure may only be recommended should not eclipse the fact that it is likely to be followed:

The psychological climate prevailing within the framework of the international adjudicatory regime established by the [ICSID] Convention on the bedrock of the principles of good faith and *pacta sunt servanda* is likely to make the parties comply with protective measures even though they will only be "recommended" and not "ordered" by the Tribunal.

Masood, *supra* note 42, at 146.

48. ICSID Convention, *supra* note 4, art. 54(1). Article 54(1) provides in relevant part that "[e]ach Contracting State shall recognize an award rendered pursuant to [the ICSID] 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." *Id.* The first award to be enforced by a national court is the one handed down in *Société Benvenuti & Bonfant v. Gouvernement de la République Populaire du Congo*. Judgment of June 6, 1981, Cour d'appel, Paris, 108 J. DROIT INT'L 843 (1981), *reprinted in* 20 I.L.M. 878 (1981) (English translation). The Paris Court of Appeals held that the role of national courts, in giving recognition to ICSID awards, is restricted to ascertaining the authenticity of the award as certified by ICSID's Secretary-General. Such courts should not entertain any consideration of sovereign immunity. Judgment of June 6, 1981, Cour d'appel, Paris, 108 J. DROIT INT'L 843 (1981), *reprinted in* 20 I.L.M. 878 (1981) (English translation); *see* Delaume, *supra* note 28, at 73-74.

49. ICSID Convention, *supra* note 4, art. 55. Article 55 provides that "[n]othing in Article 54 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." *Id.*; *see* Delaume, *supra* note 28, at 74-76.

50. Delaume, *supra* note 28, at 74-76.

51. *Id.*

52. An award-creditor is the party in whose favor the ICSID tribunal renders an award. *See* Delaume, *supra* note 28, at 75.

53. Pursuant to article 64 of the ICSID Convention, the Contracting State whose

## II. THE AMCO ASIA CORP. v. INDONESIA DECISION ON REQUEST FOR PROVISIONAL MEASURES

### A. The Facts Behind the Decision

In January of 1981, the Claimants<sup>54</sup>—Amco Asia, P.T. Amco, and Pan American—filed, with the Secretary-General of ICSID, a request for arbitration against Indonesia for settlement of a dispute arising out of the Claimants' hotel investment in Indonesia.<sup>55</sup> The Claimants alleged that their investment had been seized by the Indonesian Government in an armed, military action.<sup>56</sup> Indonesia contested ICSID's jurisdiction over the dispute.<sup>57</sup> However, the ICSID Tribunal that was

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national is the award-creditor would be permitted to submit the issue to the International Court of Justice. See Delaume, *supra* note 28, at 74-76.

54. For a discussion of the Claimants' relationship to each other and to the Indonesian Government, see *supra* note 10.

55. *Amco Asia Corp.*, 23 I.L.M. at 352, 361. In 1968, Amco Asia negotiated and entered into a lease and management agreement, through P.T. Amco, with P.T. Wisma Kartika (P.T. Wisma), an Indonesian corporation, for the land on which Amco Asia planned to build the hotel. Indonesian real property law, codified in the Basic Agrarian Law of 1960, does not recognize the concept of freehold land rights. See Soemitro, *supra* note 10, at 508. Instead, Indonesian law divides real property rights into distinct elements that may be separately held and regulated. See *id.* The most comprehensive of such rights, the right of ownership, or *hak milik*, may only be acquired, as a general rule, by natural persons of Indonesian citizenship. S. GAUTAMA & R. HORNICK, AN INTRODUCTION TO INDONESIAN LAW 83-84 (1983). However, Indonesian law does provide exceptions to this rule, making it possible for certain Indonesian legal entities, such as state-owned banks and cooperative associations, to acquire a *hak milik*. *Id.* Under the 1967 Foreign Investment Law, foreign-controlled companies established under Indonesian law, however, were permitted to acquire the right to build, or *hak guna bangunan*, which is identical to the *hak milik*, except that its duration is limited to 30 years. *Id.* at 85-86. P.T. Amco could have purchased from P.T. Wisma the land where the hotel was to be built, subject to a *hak guna bangunan*. The parties agreed, however, that P.T. Wisma would instead lease the land to P.T. Amco. See *Amco Asia Corp.*, 23 I.L.M. at 375. Construction of the hotel was subsequently completed, and the hotel was operated and managed by P.T. Amco until 1980, when the Indonesian army allegedly seized the hotel. *Id.* at 352.

56. *Amco Asia Corp.*, 23 I.L.M. at 352. Prior to the alleged seizure of the Claimants' investment, the relationship between them and P.T. Wisma had deteriorated: P.T. Wisma had brought suit against P.T. Amco in the Jakarta District Court for breach of the lease and management agreement. *Id.* at 378-79. During the Jakarta court proceedings P.T. Amco made no attempt to invoke ICSID arbitration. *Id.*

57. *Id.* at 353-54. Indonesia filed a counter-memorial to the Claimants' request arguing that 1) it had not consented to ICSID jurisdiction relating to any dispute between Indonesia and Amco Asia nor to any dispute between Indonesia and Pan American, 2) it had not consented to P.T. Amco being treated as a United States national for the purposes of the ICSID Convention, 3) P.T. Wisma was not an instrumentality of the Indonesian government, and 4) P.T. Amco had waived its consent to

convened to hear the dispute rejected Indonesia's arguments and handed down an award on jurisdiction in favor of the Claimants.<sup>58</sup>

Approximately three months before the ICSID Tribunal handed down its award on jurisdiction, the majority shareholder of Pan American released statements about the dispute to the *Business Standard*, an English-language newspaper published in Hong Kong.<sup>59</sup> An article about the dispute was subsequently published on the front page of the newspaper, discussing the business relationship between Amco Asia and P.T. Wisma—which held title to the land on which the hotel was built—and mentioning a lease and management agreement signed between P.T. Amco and P.T. Wisma.<sup>60</sup> The article also

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ICSID jurisdiction, with respect to the alleged seizure of the hotel and termination of the lease agreement with P.T. Wisma, because a decision on these matters had been handed down by the District Court in Jakarta. *Id.*

58. *Id.* at 356-83. Indonesia argued that although it consented to ICSID arbitration, its consent was valid—if at all—only with respect to P.T. Amco and not to Amco Asia. *Id.* at 354. The Tribunal held that article IX of the Investment Application, submitted by Amco Asia, constituted Indonesia's written consent, required by article 25(1) of the ICSID Convention, to ICSID arbitration. *Id.* at 364-71. This writing, the Tribunal reasoned, was sufficient to show that the parties had agreed to ICSID arbitration because the arbitration clause was intended to protect the foreign investor. *Id.* at 369. Thus, although article IX did not explicitly mention Amco Asia as the protected party, any other interpretation of the clause would have been illogical. *Id.*

Amco Asia's right to invoke article IX of the Investment Application is assignable with the investment. *Id.* at 371-73. This right, the Tribunal concluded, inhered in the shares of P.T. Amco and is accordingly transferable with those shares. *Id.* Thus, subject only to Indonesia's consent, a transfer of P.T. Amco's shares effectively transferred the right to invoke article IX of the Investment Application to Pan American. *Id.* The Tribunal also ruled that article 25(2)(b) of the ICSID Convention controlled the Tribunal's jurisdiction over the dispute with respect to P.T. Amco. *Id.* at 356-64. For article 25(2)(b) to be applicable, the Claimants only needed to establish that P.T. Amco was a juridical person of Indonesian citizenship, which was under foreign control. *Id.* The Tribunal concluded that the facts met both of these requirements. *Id.*

Because the Claimants had brought action against Indonesia for the Government's alleged act of expropriation or nationalization, and not for a breach of contract between P.T. Amco and P.T. Wisma, the tribunal also found legally irrelevant Indonesia's contention that P.T. Wisma was not an instrumentality of the Indonesian Government. *See id.* at 374. Finally, the Tribunal found that the Claimants had not waived their rights to ICSID arbitration purely because of P.T. Amco's participation in the proceedings before the Jakarta District Court because the parties to the two actions were different. Indonesia had not been made a party to the Jakarta proceedings. On November 21, 1984, the Tribunal handed down an award on the merits. *Amco Asia Corp.*, 24 I.L.M. 1022 (1985).

59. Cheng, *HK Firm's Clash with Indonesia goes to ICSID*, *Business Standard*, June 27, 1983, at 1, col. 2.

60. *Id.*

contained a description of P.T. Wisma's corporate structure and its relationship to the Indonesian army.<sup>61</sup> The article alleged that P.T. Wisma was run by a group of army generals acting through Inkopad, an army cooperative association.<sup>62</sup> The article went on to describe the military takeover of the hotel and the removal of P.T. Amco's business files.<sup>63</sup> The article alleged that the reason behind the takeover was the Indonesian army's dissatisfaction with the profit-sharing scheme then in force between the parties.<sup>64</sup> The takeover was, therefore, allegedly part of a strategy to coerce Amco Asia into concluding a new profit-sharing arrangement that was more lucrative for the Indonesian army.<sup>65</sup>

In September of 1983, Indonesia filed a request with the ICSID Tribunal for a recommendation of provisional measures, pursuant to article 47 of the ICSID Convention,<sup>66</sup> to enjoin the Claimants from taking any action that might possibly aggravate or extend the dispute brought before the Tribunal.<sup>67</sup> In particular, Indonesia requested the Tribunal to recommend that the Claimants "abstain from promoting, stimulating, or instigating the publication of propaganda . . . outside [the] Tribunal . . . calculated to discourage foreign investment in Indonesia."<sup>68</sup> Indonesia argued, *inter alia*, that the Claimants' action in releasing statements to the press was inconsistent with the spirit of confidentiality that normally imbues international arbitral proceedings.<sup>69</sup> The Claimants filed a reply to Indone-

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61. *Id.*

62. *Id.* Although the published decisions of the ICSID Tribunal briefly discussed the connection between P.T. Wisma and the Indonesian Army, the Tribunal never released details of that connection. *Amco Asia Corp.*, 24 I.L.M. at 1022.

63. See Cheng, *supra* note 59, at 1, col. 2.

64. See *id.* The article also discussed matters that would have been more readily accessible to the public, such as the laws governing foreign investments in Indonesia.

65. *Id.*

66. See ICSID Convention, *supra* note 4, art. 47.

67. *Amco Asia Corp.*, 24 I.L.M. 365.

68. *Id.* at 365. Specifically, Indonesia invoked article 48(5) of the ICSID Convention as well as Rules 48(4), 37(2), 6(2), 15 and 31(2) of the Arbitration Rules. See *infra* notes 94-110 and accompanying text; see also Arbitration Rules I, *supra* note 7. In addition, Indonesia argued that the Claimants had violated article 26 of the ICSID Convention by seeking remedies exclusive of the ICSID Tribunal. See *supra* note 26 and accompanying text. Indonesia also argued that the Claimants had violated the good faith requirement inhering in all international proceedings. See *Amco Asia Corp.*, 24 I.L.M. at 366.

69. *Amco Asia Corp.*, 24 I.L.M. at 366.

sia's request in October of 1983, setting forth affirmative defenses.<sup>70</sup>

### B. *The Ruling of the ICSID Tribunal*

The ICSID Tribunal rejected Indonesia's request and refused to recommend provisional measures.<sup>71</sup> The Tribunal concluded that the *Business Standard* article constituted no actual harm to Indonesia and did not aggravate or exacerbate the dispute between the parties.<sup>72</sup> The Tribunal pointed out that the article was based upon the personal opinions of a Pan American shareholder and, as such, was not presented as containing undisputed facts.<sup>73</sup>

The Tribunal agreed with the Claimants that Indonesia had failed to specify the rights that were to be protected by the provisional measures, as required by Rule 39(1) of the Arbitration Rules.<sup>74</sup> In addition, the Tribunal reasoned that the rights

70. *Id.* at 366-67. The Claimants argued that "the ICSID Convention and Arbitration Rules do not prohibit individual parties from discussing the case and the status of the arbitration, publicly or otherwise." *Id.* In addition, the Claimants pointed out that Indonesia had failed to specify the "rights to be preserved" by the requested provisional measures, as required by Rule 39(1) of the Arbitration Rules. *Id.* See *infra* notes 74-78 and accompanying text. Claimants argued that the provisional measures requested were without precedent either in previous ICSID proceedings or in past cases presented to the International Court of Justice (ICJ) and Permanent Court of International Justice (PCIJ). Moreover, the proposed provisional order, the Claimants argue, would have been impossible to police because a large number of people in the Indonesian Government, as well as among the shareholders of Amco Asia and Pan American, had become privy to the case. See *Amco Asia Corp.*, 24 I.L.M. at 367.

71. *Amco Asia Corp.*, 24 I.L.M. at 367-69.

72. *Id.*

73. *Id.* at 367-68. Rule 39(1) requires the requesting party to "specify the rights to be preserved . . . and the circumstances that require such measures." Indonesia failed to specify those rights. That "circumstances" must require such measures indicates that the test for recommending provisional measures is an objective one. Thus, at a minimum, Indonesia would have had to show how the Claimants' actions had compromised its rights.

74. See *Amco Asia Corp.*, 24 I.L.M. at 368. At the December 8, 1964, meeting of the Legal Committee on Settlement of Investment Disputes (Legal Committee), the delegates agreed that the types of provisional measures that the ICSID tribunals could recommend were those provided by the "formulation of Article 41 of the Statute of the International Court of Justice." *Summary Proceedings of the Legal Committee Meeting, December 8, Morning*, Doc. SID/LC/SR/16, reprinted in 2 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION, pt. 2, 812 (1970) [hereinafter 2 CONVENTION DOCUMENTS].

The ICJ "requires some evidence, as distinct from mere speculation, of prejudice to the alleged rights of the applicant." Goldsworthy, *Interim Measures of Protection in the*



that were the subject of the underlying dispute could not have been threatened by the publication of articles similar to that published in the *Business Standard*.<sup>75</sup> The Tribunal conceded that a large press campaign may have been calculated to have an adverse impact upon the Indonesian economy, the Claimants being aware of Indonesia's constant need for infusion of foreign capital.<sup>76</sup> However, Rule 39(1) refers to those rights that are the subject matter of the dispute, and not to abstract general rights.<sup>77</sup> Thus, provisional measures may have been proper in this case, but only if the rights had been specified

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*International Court of Justice*, 68 AM. J. INT'L L. 258, 270 (1974) (emphasis added). In the *Interhandel Case* (Switz. v. U.S.), 1957 I.C.J. 105, 112, for example, the ICJ refused to grant provisional measures requested by Switzerland to enjoin the United States from disposing of the disputed property because the United States could not sell the property without a judicial inquiry in United States courts. Goldsworthy, *supra* at 270-71. In the *Nuclear Tests Case* (Austl. v. Fr.), 1973 I.C.J. 105, on the other hand, the ICJ granted provisional measures requested by Australia to enjoin the French Government from conducting nuclear tests on the basis of "credible scientific evidence, in particular the Reports of the United Nations Scientific Committee on the Effects of Atomic Radiation between 1958 and 1972." Goldsworthy, *supra* at 271. For a history of the Legal Committee, see *infra* note 88 and accompanying text.

75. *Amco Asia Corp.*, 24 I.L.M. at 368. The Claimants argued that they had "no intention of discouraging foreign investment [in Indonesia], and [had] no power to do so." *Id.* at 367.

76. *See id.*

77. *See* Arbitration Rules I, *supra* note 7, Rule 39(1). Opinions of the delegates to the Consultative Meeting of Legal Experts in Santiago, Chile [Feb. 3-7, 1964], concerning the purpose of provisional measures, all indicate that ICSID tribunals should only recommend provisional measures to protect rights directly related to the dispute in question. *Settlement of Investment Disputes Consultative Meeting of Legal Experts, Santiago, Chile, Feb. 3-7, 1964—Summary Record of Proceedings*, Doc. Z8, reprinted in 2 CONVENTION DOCUMENTS, pt. 1, 337. The ICSID tribunals only award provisional measures to preserve the status quo at the time that a party requested the provisional measures. *Id.* They are also intended "to ensure that a party did not take action that would frustrate a possible award" and "to safeguard the rights which the parties invoked." *Id.* Precedents set by the PCIJ also indicate that provisional measures "are designed to protect rights, but only those rights which are the subject matter of the principal action will receive protection." Goldsworthy, *supra* note 74, at 272. Thus, in the case Concerning the Polish Agrarian Reform and the German Minority (Ger. v. Pol.), 1933 P.C.I.J. (ser. A/B) No. 58 (July 29), the PCIJ denied Germany's request for interim measures of protection to prevent Poland's application of its agrarian reform. In that principal action, Germany alleged that Polish nationals of German origin were being discriminated against as a result of the reform. *Id.* at 176. Germany sought reparations on their behalf for the detriment they suffered as a result of this discrimination. *Id.* at 178. The interim protection, however, was requested to cover the possibility of future discrimination, which was not at issue in the principal case. *Id.*; see Goldsworthy, *supra* note 74, at 272. It could be argued here that Indonesia sought to protect a right not directly related to the dispute, but instead sought to protect its interest in future foreign investments. *See Amco Asia Corp.*, 24 I.L.M. at 365.

and had related to the hotel investment itself.<sup>78</sup>

The Tribunal also agreed with the Claimants when it concluded that the publication of the article was not inconsistent with the spirit of confidentiality in arbitration proceedings because neither the ICSID Convention nor its Arbitration Rules prevent the parties themselves from revealing their case.<sup>79</sup> The Tribunal failed to specify any authority upon which it based its conclusion. The Tribunal may have been influenced by the publication of a newspaper article<sup>80</sup> and a book<sup>81</sup> in Indonesia, describing the dispute in greater detail. The two publications had appeared prior to the publication of the *Business Standard* article.

The *Amco Asia Corp.* decision raises serious questions about the role of confidentiality in ICSID arbitral proceedings. ICSID provisions protecting the parties' right to confidentiality<sup>82</sup> would be rendered meaningless if individual parties were allowed to divulge information about the dispute to the press unilaterally. These provisions were largely intended to safeguard the parties' confidential business information introduced as evidence in the course of the arbitral proceedings.<sup>83</sup> The provisions would be logical if it is understood that publication of information relating to the dispute may be made only if both parties agree to it. Accordingly, the Tribunal's decision

78. *Cf.* *Holiday Inns/Occidental Petroleum v. Government of Morocco*, ICSID Case No. ARB/72/1. For a discussion of the case, see Lalive, *supra* note 42, at 132-37. The Moroccan Government filed a request with the Moroccan courts for a summary procedure known as a *référé* that entitles it to take all the measures necessary to have the construction of the hotels resumed and completed at the expense of the Holiday Inns Group. *Id.* at 133 n.5. A recommendation of provisional measures was requested by the claimant Holiday Inns Group and granted by the ICSID Tribunal. *Id.* at 136. "Both Parties are invited to abstain from any measure incompatible with the upholding of the Contract and to make sure that the action already taken should not result in any consequences in the future which would go against such upholding." *Id.* at 137.

79. *See Amco Asia Corp.*, 24 I.L.M. at 368.

80. *Sengketa BKPM Dengan PT Amco Telan Biaya Rp 838 Juta*, Surabaya Post, June 16, 1982, at 8, col. 3.

81. S. GAUTAMA, *HUKUM PERDATA INTERNASIONAL HUKUM YANG HIDUP* 38-51 (1983).

82. *See infra* notes 88-110 and accompanying text.

83. *See, e.g.*, Arbitration Rules I, *supra* note 7, Rules 6(2), 15, and 31(2). ICSID's rules on confidentiality certainly could not have been intended to keep secret the existence of a dispute between the parties because all requests for arbitration filed with ICSID are regularly published pursuant to Regulation 22(1) of ICSID's Administrative and Financial Regulations.

is subject to serious criticisms. The decision would be sound, only if it could be shown that confidentiality plays a secondary role in ICSID arbitration.

### III. THE ROLE OF CONFIDENTIALITY IN ICSID ARBITRATION: A CRITICAL EVALUATION

Because ICSID arbitration is largely a matter of contract between the parties to the dispute, it is not unreasonable for the parties to assume that the the public should be excluded from the arbitral proceedings.<sup>84</sup> Of course, parties to a dispute may agree to ignore ICSID's rules of confidentiality. For example, Rule 48(4) of ICSID's Arbitration Rules does not prohibit the parties from publishing the award, should they agree to do so.<sup>85</sup>

Nevertheless, the ICSID Arbitration Rules, and those of many other permanent arbitration institutions, do create a presumption in favor of confidentiality.<sup>86</sup> Thus, unless the Claimants and Indonesia expressly agreed to publicize certain aspects of their dispute, it is not unreasonable to assume that they submitted their dispute to ICSID with the expectation that it would be kept confidential. Indonesia's request for provisional measures in this case was therefore not without foundation. Insofar as the Tribunal's decision to deny the provisional measures disregarded the parties' expectations, that decision was inconsistent with the spirit of confidentiality that imbues arbitral proceedings.

The inconsistency of the Tribunal's decision with the spirit of confidentiality does not necessarily mean, however, that the decision was incorrect. There is no precedent among ICSID cases of a recommendation of provisional measures of the type requested.<sup>87</sup> Thus, an examination of the drafting history of article 48(5) of the ICSID Convention and the Arbitration Rules is essential to determining whether the Tribunal vi-

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84. See Jakubowsky, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation*, in *THE ART OF ARBITRATION: LIBER AMICORUM PIETER SANDERS* 182 (J. Schultz & A. van den Berg eds. 1982). Arbitral awards should therefore be kept confidential as they constitute, by inference, a contract between the parties. *Id.*

85. See *infra* notes 97-98 and accompanying text.

86. See *infra* notes 88-100 and accompanying text.

87. The ICJ and PCIJ cases also do not supply a precedent for applying a gag order in this instance.

olated the letter, if not the spirit, of ICSID's rules on confidentiality.

A. *The ICSID Convention and Arbitration Rules on Confidentiality*

1. Drafting History of Article 48(5)

The question of whether ICSID would have the authority to publish awards was not hotly debated by the Legal Committee on Settlement of Investment Disputes (Legal Committee).<sup>88</sup> Indeed, the question was not considered until fairly late in the drafting process.<sup>89</sup> However, the Legal Committee voted in favor of a presumption of party autonomy on the subject.<sup>90</sup>

The intention of the Legal Committee was to determine what ICSID, and not the parties to an ICSID arbitration, would be permitted to do with respect to the publication of arbitral awards.<sup>91</sup> The drafting history of article 48(5) supports the Tribunal's conclusion in *Amco Asia Corp.*<sup>92</sup> that the ICSID Convention does not prohibit the parties themselves from revealing their case. Given the Legal Committee's respect for

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88. See *Summary Proceedings of the Legal Committee Meeting, December 8, Morning*, Doc. SID/LC/SR/16, reprinted in 2 CONVENTION DOCUMENTS, pt. 2, 812, 817. For the history of the Legal Committee on Settlement of Investment Disputes (Legal Committee), see *Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, in 1 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION 2, 8 (1970). The Legal Committee was convened in Washington, D.C. and met on 22 occasions between November 23 and December 11, 1964. Representatives from 61 countries sat on the Legal Committee. *Id.* at 8. The official function of the Legal Committee was to act as an advisory organ to the Executive Directors of the International Bank for Reconstruction and Development (World Bank), under whose sponsorship the ICSID Convention was formulated. *Id.* In practice, the Legal Committee carefully considered the First Draft of the Convention on an article-by-article basis. *Id.* Although it could not formally vote upon any specific provision of the Draft Convention, the Legal Committee attempted to reach a consensus among its members with respect to each provision. *Id.* Once the Legal Committee reached a consensus, the Drafting Sub-Committee, appointed by the Chairman of the Legal Committee, would consider the provision. *Id.* The Legal Committee published the Revised Draft of the Convention on December 11, 1964. *Id.*

89. See *Summary Proceedings of the Legal Committee Meeting, December 8, Morning*, *supra* note 74, at 817-18. The First Draft of the Convention had been silent on the subject of confidentiality. *Id.*

90. *Id.*

91. *Id.*

92. 24 I.L.M. at 368.

the principle of party autonomy,<sup>93</sup> the Tribunal's conclusion is not inconsistent with the Legal Committee's concern for the preservation of the confidentiality of awards.

## 2. The Arbitration Rules

In *Amco Asia Corp.*, the breach of confidentiality was committed by the parties, and not by ICSID or the Tribunal. The Arbitration Rules, however, apply only to the conduct of the tribunals. For example, Rule 6(2) requires the arbitrators to keep confidential all information to which they have been made privy as a result of their participation in the arbitral proceedings.<sup>94</sup> Similarly, Rule 15(1) states that the Tribunal should not divulge its deliberations to the public.<sup>95</sup> Nor do Rule 37(2)<sup>96</sup> and Rule 48(4)<sup>97</sup> regulate the conduct of the parties. Both simply state that ICSID may not publish the award without the consent of the parties.<sup>98</sup> Rule 31(2) delegates the authority to the tribunal, subject to the parties' consent, to decide who may attend the hearings.<sup>99</sup> The rule shifts to the tribunals the responsibility of protecting the parties' rights to

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93. See *Summary Proceedings of the Legal Committee Meeting, December 8, Morning, supra* note 74, at 817-18.

94. Arbitration Rules I, *supra* note 7, Rule 6(2). The Rule provides in pertinent part that all arbitrators "shall keep confidential all information coming to [their] knowledge . . ." *Id.*

95. *Id.*, Rule 15(1) provides that "[t]he deliberations of the Tribunal shall take place in private and remain secret." Note A to Rule 15 states, however, that the reason behind the rule was primarily a concern with assuring the independence of the arbitrators and with strengthening the collective character of the Tribunal. *Id.*

96. *Id.*, Rule 37(2) provided in relevant parts that "[t]he minutes of the hearing . . . shall not be published without the consent of the parties." Rule 37(2) has been abolished and replaced by Rule 20, which allows the parties to agree beforehand upon the manner in which the records are to be kept. Parra, *supra* note 7, at 5.

97. Arbitration Rules I, *supra* note 7, Rule 48(4). The Rule provides that the "Centre shall not publish the award without the consent of the parties." Rule 48(4) has been amended and now also provides that the "Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal." Arbitration Rules II, *supra* note 7, Rule 48(4).

98. Arbitration Rules I, *supra* note 7, Rule 37(2) & Rule 48(4). See Administrative and Financial Regulations, Reg. 22(1). ICSID may therefore arrange for their publication with the agreement of the parties. The publication of awards, minutes and other records (in "an appropriate form") is governed by Regulation 22(1).

99. Arbitration Rules I, *supra* note 7, Rule 31(2). The Rule provides that "[t]he Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings." *Id.*

confidentiality.<sup>100</sup> Although these Rules reflect a concern for confidentiality, it is apparent that they were designed primarily to regulate the conduct of the tribunals, not of the parties.

The only direct reference in the Arbitration Rules to the conduct of the parties with respect to confidentiality is note F to Rule 30,<sup>101</sup> which permits the parties to publish their pleadings.<sup>102</sup> Because the *Business Standard* article related only the personal opinions of a Pan American shareholder,<sup>103</sup> it may be comparable, in some respects, to the Claimants' pleadings. Note F, however, also imposes a good faith requirement<sup>104</sup> upon the parties by urging them to refrain from publishing their pleadings if they anticipate that publication may exacerbate the dispute.<sup>105</sup> In short, the parties should construe the right to publish their pleadings in light of Rules 37(2)<sup>106</sup> and 48(4).<sup>107</sup>

In *Amco Asia Corp.*, the Tribunal concluded that the publication of the *Business Standard* article did not aggravate or exacerbate the legal dispute brought before it.<sup>108</sup> At best, this conclusion is dubious. Insofar as the publication of the article deepened the misunderstanding between the parties, it did exacerbate the dispute. The good faith rule of international proceedings<sup>109</sup> should have compelled the Tribunal at least to advocate restraint to the Claimants. However, it is likely that, be-

100. *Id.*, Rule 31(2). Note C to Rule 31(2) provides, moreover, that "as a matter of principle, arbitration proceedings should not be public." *Id.*

101. *Id.*, Rule 30. The Rule lists the pleadings that the parties are required to submit to the tribunal, e.g. the memorial and counter-memorial.

102. *Id.*, Rule 30. Note F to Rule 30 provides that "[t]he parties are not prohibited from publishing their pleadings. They may, however, come to an understanding to refrain from doing so, particularly if they feel that publication may exacerbate the dispute (in this connection, see [a]rticle 48(5) and Rules 37(2) and 48(4))." *Id.*

103. See *Amco Asia Corp.*, 24 I.L.M. at 367.

104. For the good faith requirement, see Cremades, *The Impact of International Arbitration on the Development of Business Law*, 31 AM. J. COMP. L. 526, 527 (1983):

Arbitral decision making has developed good faith as an overriding rule of international contracting . . . . It is the *modus vivendi* that requires a debtor and creditor to work as partners rather than as adversaries. Good faith is a regulatory norm through which arbitrators apply equitable principles as the supreme rule of contractual interpretation.

*Id.*

105. See *supra* note 102.

106. See *supra* note 96.

107. See *supra* note 97.

108. See *Amco Asia Corp.*, 24 I.L.M. at 368-69.

109. *Id.*; see Cremades, *supra* note 104, at 527.

cause Indonesia had failed to prevent its own nationals from publicly discussing the dispute, the Tribunal concluded that Indonesia itself had violated the good faith rule.<sup>110</sup>

There are equally strong arguments for and against the Tribunal's decision. One may reasonably argue that the Tribunal's decision was incorrect because it is inconsistent with the spirit of confidentiality normally associated with international arbitration. At the same time, if one considers the drafting history of article 48(5) and the Arbitration Rules, there is an equally strong case for the technical correctness of the Tribunal's decision. Whether the decision is proper, therefore, depends largely upon whether the considerations for confidentiality are stronger or weaker than the arguments against it.

### B. *The Considerations in Favor of Confidentiality*

At least three considerations favor the retention of ICSID's rules on confidentiality. First, ICSID arbitration is a procedure *inter partes*; that is, the arbitration agreement constitutes a private contract between the parties. Accordingly, it is important that the private nature of their arrangement be respected.<sup>111</sup> Second, the rules protect the confidentiality of business information and technological secrets.<sup>112</sup> Third, confidentiality is desirable because it often prevents third parties from learning of the very existence of the dispute.<sup>113</sup> In the

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110. See *Amco Asia Corp.*, 24 I.L.M. at 368.

111. See Jakubowsky, *supra* note 84, at 182.

112. Forrestal, *supra* note 23, at 15. However, one commentator has argued that absolute secrecy can never be guaranteed. Lew, *The Case for the Publication of Arbitration Awards*, in *THE ART OF ARBITRATION: LIBER AMICORUM PIETER SANDERS* 223, 224 (J. Schultsz & A. van den Berg eds. 1982). For example, it is highly probable that the winning party may have to have the award enforced in a national court. "[W]hen enforcement of an award is sought, either at the place of arbitration or in another country, the imprimatur of judicial confirmation may be unavoidable." de Vries, *supra* note 15, at 62. On the other hand, the losing party may refuse to accept the arbitrators' award and seek to have it set aside through judicial proceedings. In either case, "the relevant facts of the contract between the parties and the dispute will become a matter of public record." Lew, *supra* at 224.

113. Forrestal, *supra* note 23, at 55. One commentator has argued, however, that "in a small commercial community the currency of an arbitration is in any event likely to become known, whereas in a large one litigation may well pass unnoticed." Kerr, *International Arbitration v. Litigation*, 1980 J. Bus. L. 164, 165. In the context of ICSID arbitration, this concern is irrelevant because all requests for arbitration are published as a matter of course. Administration and Financial Regulations, Reg. 22(1). Moreover, the private and confidential nature of arbitration often deters gov-

context of many modern transnational investment agreements, the second of these three considerations is especially important.<sup>114</sup>

The type of transnational investments covered by ICSID arbitration agreements has changed enormously.<sup>115</sup> At the time that the ICSID Convention was drafted, most transnational investments took the form of joint ventures, concession and establishment agreements, or simply loans made to foreign public entities by private financial institutions.<sup>116</sup>

More recent investments covered by ICSID arbitration agreements, however, have included such arrangements as contracts for service and management,<sup>117</sup> construction contracts,<sup>118</sup> and turn-key contracts.<sup>119</sup> Many of these new types of association between investors and foreign governments involve transfers of technical data and know-how.<sup>120</sup> Indeed, some countries insist that some form of technology transfer be

ernments from approving it as a method of resolving certain types of disputes, such as antitrust claims, because to do so would conflict with public policy. *See, e.g.*, Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072 (1969); Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. REV. 1085 (1969). *But see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985); Note, *Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 8 *FORDHAM INT'L L.J.* 194 (1984).

114. *See infra* notes 115-124 and accompanying text.

115. Delaume, *supra* note 36, at 117.

116. *Id.*

117. *See, e.g.*, *Amco Asia Corp.*, 23 I.L.M. 351 (an agreement for the management of an hotel); *Klöckner Industrie-Anlagen GmbH v. Cameroon*, ICSID Case No. ARB/81/2 (a management contract to provide technical assistance for the operation of a fertilizer plant) (excerpts of the Tribunal's decision were published in Paulsson, *The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 *J. INT'L ARB.* 145 (1984)); *Seditex Engineering Beratungsgesellschaft mbH v. Madagascar*, ICSID Case No. CONC/82/1 (a management contract for the operation of a cotton mill) (proceedings terminated at Claimant's request).

118. *See, e.g.*, *Amco Asia Corp.*, 23 I.L.M. 351 (hotel construction); *Klöckner*, *supra* note 117 (construction of a fertilizer plant).

119. *See* *Gantt v. Van der Hoek*, 251 S.C. 307, 314, 162 S.E.2d 267, 270-71 (1968). The court defined a turn-key contract as an agreement in which a builder agrees to complete construction and installation to the point of readiness for occupancy. *Id.* One of the five agreements entered into by the foreign investors and the host country in *Klöckner*, *supra* note 117, was a turn-key contract.

120. Delaume, *supra* note 36, at 119.



effected in conjunction with any foreign investment.<sup>121</sup>

Moreover, parties to investment agreements that exclusively involve technology transfers in such areas as the development of agriculture, tourism, and the electronics and air transportation industries have begun to incorporate ICSID arbitration clauses into their contracts.<sup>122</sup> Ambiguities inherent in the complex nature of these arrangements create many difficulties that have to be resolved by arbitration.<sup>123</sup> The absence of a confidentiality requirement on ICSID's part would cause a public disclosure of secret technical data and expertise.<sup>124</sup> Publicizing the existence of a dispute may also jeopardize the long-term cooperation envisioned by the parties.<sup>125</sup>

### C. *The Considerations Against Confidentiality*

#### 1. Confidentiality Conceals the Real Merits of ICSID Arbitration

Until recently, the literature on ICSID has been of a scholarly and general nature.<sup>126</sup> ICSID's slow start<sup>127</sup> has been attributed partly to this paucity of more practical and specific literature about the forum.<sup>128</sup> A 1976 survey of 490 United States multinational corporations chosen among the 1973 *Fortune* 1,000 companies<sup>129</sup> showed that, of the 156 executives

121. *E.g.*, Indonesia. Presidential Decree 29/1984, Annex II, § III(4) provides that

(a) If a project has to be performed by a foreign contractor/ consultant because no Indonesian contractor/consultant is able to handle the project or fulfill its technical specifications or execute it for any other reasons, then the tender document for such a project must stipulate that the foreign contractor/ consultant work together with Indonesian contractors/consultants.

(b) The tender document/contract must indicate clearly and unequivocally the obligation of the foreign contractor/consultant to work together with the Indonesian contractor/consultant, as well as specify the method to be used to effect a *transfer of technology, know-how and skills*.

*Id.* (emphasis added) (author's translation).

122. Delaume, *supra* note 36, at 119.

123. *See id.* at 118-20.

124. *See* R. DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 12 (1985).

125. *Id.*

126. Delaume, *supra* note 36, at 101.

127. *Id.* Between January 1972 and April 1981 only eleven cases had been submitted to ICSID for arbitration. *See* Gopal, *International Centre for Settlement of Investment Disputes*, 14 *CASE W. RES. J. INT'L L.* 591, 596 (1982).

128. *Id.* at 596-96.

129. The *Fortune* 1000 companies are those companies listed in *The Fortune Direc-*

who responded, only 26 were familiar with ICSID.<sup>130</sup> Since 1981, however, public awareness of ICSID has increased. Between February 1981 and September 1984, eleven cases were submitted to ICSID—more than the total number of cases that were submitted to ICSID in the first fifteen years of its existence.<sup>131</sup> This increase in caseload has been credited to the increased publicity effort mounted by ICSID.<sup>132</sup> It is just as likely, however, that the public's increased recognition of ICSID is attributable to the publication, beginning in 1981, of awards<sup>133</sup> and commentaries<sup>134</sup> dealing with specific cases.

Individual experiences influence opinions about which arbitral forums and institutions are best suited to certain types of disputes.<sup>135</sup> Hence, parties are understandably reluctant to submit their disputes for arbitration before tribunals with which they have little or no familiarity. Yet parties are often willing to rely on the experiences of others, by reviewing arbitration awards handed down in other cases dealing with similar types of agreements.<sup>136</sup>

A requirement that an award not be published without the consent of the parties will naturally limit the public's access to the award and contribute to the mystification of ICSID.<sup>137</sup> Parties unfamiliar with ICSID may therefore believe that ICSID's

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*tory of the 500 Largest Industrial Corporations*, 87 *Fortune* 221-41 (May 1973) and *The Fortune Directory of the Second 500 Largest Industrial Corporations*, 87 *Fortune* 156-75 (June 1973).

130. Baker & Ryans, *The International Centre for Settlement of Investment Disputes (ICSID)*, 10 *J. WORLD TRADE L.* 65, 71 (1976).

131. Delaume, *supra* note 36, at 101-02.

132. *Id.*

133. See, e.g., *Amco Asia Corp. v. Indonesia*, Case No. ARB/81/1, 23 *I.L.M.* 351 (1984) (award on jurisdiction), 24 *I.L.M.* 365 (1985) (provisional measures), 24 *I.L.M.* 1022 (1985) (award on the merits); *AGIP SpA v. People's Republic of Congo*, Case No. ARB/77/1, 21 *I.L.M.* 726 (1982) (English translation); *Benvenuti & Bonfant srl v. People's Republic of Congo*, Case No. ARB/77/2, 21 *I.L.M.* 740 (1982) with correction in 21 *I.L.M.* 1478 (1982) (English translation).

134. See, e.g., Delaume, *supra* note 28; Delaume, *supra* note 26; Lalive, *supra* note 42; Niggeman, *The ICSID Klöckner v. Cameroon Award: The Dissenting Opinion*, 1 *J. INT'L ARB.* 331 (1984); Note, *Maritime International Nominees Establishment*; Note, *The International Centre for the Settlement of Investment Disputes: Selected Case Studies*, 7 *INT'L TRADE L.J.* 306 (1982-83); Paulsson, *supra* note 117; Schmidt, *supra* note 21.

135. Lew, *supra* note 112, at 227-28.

136. *Id.*

137. Gopal, *supra*, note 127, at 597. Confidentiality also hinders the identification of areas of the arbitration process that may be in need of revision. Lew, *supra* note 112, at 228.

reluctance to publish awards is attributable, for example, to the unreliability of the tribunals' decisions.<sup>138</sup>

## 2. Confidentiality Inhibits the Development of an ICSID Procedural Jurisprudence

The legal issues that confront ICSID tribunals are seldom simple; indeed, by the very nature of the agreements that give rise to these disputes, the problems to be resolved are almost always complex.<sup>139</sup> An indication of the manner in which similar problems were solved in the past ought, therefore, to be a welcome guide to ICSID arbitrators and parties contemplating ICSID dispute resolution.<sup>140</sup> To become the premier forum for the settlement of international investment disputes, ICSID must insure that consistency is maintained among the decisions rendered by its tribunals.<sup>141</sup> In short, ICSID must develop its own procedural jurisprudence.

The benefits that come from procedural consistency in ICSID arbitration will be especially useful to parties encountering jurisdictional problems. Because ICSID arbitration is consensual in nature, jurisdictional issues involve not only questions of personal and subject matter jurisdiction but also of consent.<sup>142</sup> For example, international investment agreements have often taken a considerable amount of time to implement and have usually involved several contractual arrangements

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138. See Lew, *supra* note 112, at 227.

139. See *infra* notes 141-179 and accompanying text. Most investment agreements consist of several contracts that may have been drafted at different stages of the implementation of the investment agreement. These different contracts are not always incorporated by reference in each of the other contracts. Consequently, problems of consent to jurisdiction, the identity of the state party, and the nature of the investments themselves often recur.

140. See Lew, *supra* note 112, at 229. Nor is the accessibility of past decisions important only to the arbitrators and parties contemplating ICSID arbitration. Knowledge of how tribunals have ruled in the past will also be a useful guide to practicing lawyers involved in the negotiations of complex international investment agreements. This is especially true of agreements involving the more modern types of investment. It is true that one could always stipulate that the transaction concerned is an investment within the meaning of Article 25(1) of the ICSID Convention. However, in the absence of more specific guidance, the difficulty of distinguishing between the old and the new types of investment, or even knowing that there is any distinction at all, may make the suggestion more difficult to implement in practice for the newcomer to the field.

141. *Id.*

142. See Delaume, *supra* note 36, at 104-08.

that, only when construed together, constitute the agreement between the parties.<sup>143</sup> It is possible that an ICSID arbitration clause drafted in one contractual arrangement may not be repeated or incorporated by reference in the others.<sup>144</sup> The question then becomes whether a challenge could be mounted against ICSID jurisdiction with respect to the other agreements.<sup>145</sup> This issue was not specifically addressed by the ICSID Convention or by the Arbitration Rules.

The decision in *Holiday Inns/Occidental Petroleum v. Morocco*<sup>146</sup> provided a useful precedent in this area.<sup>147</sup> In that case, the parties had entered into a basic agreement, pursuant to which the host state was to provide the financing, through separate loan contracts, for the construction of hotels.<sup>148</sup> The separate loan contracts did not incorporate ICSID arbitration clauses but instead contained provisions designating Moroccan courts as the proper forum for dispute resolution.<sup>149</sup> Morocco objected to ICSID jurisdiction on the grounds that although the basic agreement referred the parties to ICSID for arbitration, the dispute related to subsidiary contracts that specified Moroccan courts as the proper forum.<sup>150</sup> The ICSID tribunal rejected Morocco's objections and held that the dispute had been properly brought before it.<sup>151</sup> The issue was again raised in *Klöckner Industrie-Anlagen GmbH v. Cameroon*.<sup>152</sup> In that case, the parties entered into four agreements.<sup>153</sup> Three of the four agreements provided for ICSID arbitration, while the fourth referred the parties to the International Chamber of Commerce Court of Arbitration.<sup>154</sup> Interestingly, the details of the *Holiday Inns*<sup>155</sup> decision were made public only in 1982, the year following the institution of arbitration proceedings in

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143. *Id.*

144. *Id.*

145. *Id.*

146. ICSID Case No. ARB/72/1, discussed in Lalive, *supra* note 42.

147. *See id.* at 155-58.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. Paulsson, *supra* note 117, at 147-52.

153. *Id.*

154. *Id.*

155. ICSID Case No. ARB/72/1, discussed in Lalive, *supra* note 42.

*Klöckner*.<sup>156</sup> Thus, although the ICSID tribunal in *Klöckner* referred to the *Holiday Inns* decision,<sup>157</sup> it is possible that the parties themselves went to arbitration without the benefit of an ICSID precedent.

Another jurisdictional issue that may arise is related to the identification of the governmental party to an ICSID arbitration.<sup>158</sup> Ordinarily, the identity of a Contracting State is not problematic.<sup>159</sup> It could become so, however, if the foreign investor were dealing with a constituent subdivision or agency of the Contracting State.<sup>160</sup> The Contracting State, in these instances, would have validly consented to ICSID jurisdiction only if it had designated the subdivision or agency concerned as eligible to assume the role of a party to an ICSID arbitration.<sup>161</sup> The problem does not stop there, however. Because the implementation of an international investment agreement usually lasts several years, the Contracting State may undergo political and administrative changes.<sup>162</sup> These changes could eliminate or substitute the subdivision or agency that was originally a party to the ICSID arbitration agreement.<sup>163</sup> To date, an ICSID tribunal has not had occasion to resolve this issue.<sup>164</sup>

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156. The 1980 volume of *The British Year Book of International Law* was not published until 1982.

157. Paulsson, *supra* note 117, at 152.

158. Delaume, *supra* note 36, at 108-11.

159. A list of Contracting States may be easily obtained from ICSID's Secretariat.

160. Delaume, *supra* note 36, at 108-11.

161. *Id.*

162. See *supra* notes 32-34 and accompanying text. In the *Holiday Inns* case, important changes took place in the Moroccan Government. Cabinet members who were the main promoters of the hotel construction project were replaced by ministers who were very critical of their predecessors' negotiation of the investment agreement. Lalive, *supra* note 42, at 129.

163. Delaume, *supra* note 36, at 109-10.

164. *Id.* The Tribunal in *Klöckner* did not reach the issue. Pursuant to the basic agreement in *Klöckner*, the foreign investors were to supply and erect a fertilizer plant, which was to be operated by a locally incorporated joint venture company (SOCAME). See Paulsson, *supra* note 117, at 147. The foreign investors had a 51 percent equity share in SOCAME. *Id.* Pursuant to a turn-key contract signed by the foreign investors and the Cameroon Government, the latter assigned all its rights under the contract to SOCAME, which became the foreign investors' co-contractor in the place of the Cameroon Government. *Id.* The Cameroon Government could therefore have mounted a challenge to ICSID jurisdiction with respect to SOCAME. The Cameroon Government agreed, however, to nominate SOCAME as its constituent agency for purposes of ICSID arbitration. *Id.* at 148.

However, because international investment agreements frequently involve the participation of governmental agencies,<sup>165</sup> this issue is likely to become a recurring problem. A published precedent in this area would undoubtedly be useful.

The nationality of the investor poses another recurring jurisdictional problem.<sup>166</sup> This problem has arisen when the parties have failed to state explicitly that the locally-incorporated subsidiary of the foreign investor is to be treated as a national of a Contracting State, other than the host state, for the purposes of article 25(2)(b) of the ICSID Convention.<sup>167</sup> This was an issue that was raised in *Amco Asia Corp.*<sup>168</sup> Another issue that may recur is whether consent by a host state to ICSID arbitration is transferred to a third party along with a foreign investor's assignment of its rights in an investment agreement.<sup>169</sup> This problem was also resolved by the Tribunal in *Amco Asia Corp.*<sup>170</sup>

In international investment disputes, the choice of substantive law governing the dispute may also present troublesome issues.<sup>171</sup> According to article 42 of the ICSID Convention, if the arbitration agreement does not explicitly provide otherwise, an ICSID tribunal is to apply the law of the host state.<sup>172</sup> Normally, choice of law should not be problematic. However, because a great number of the Contracting States that are party to ICSID arbitration agreements are countries that have only recently gained their independence from European colonial powers, problems may surface.<sup>173</sup> Often, the

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165. See Delaume, *supra* note 36, at 108-09.

166. *Id.* at 111-16.

167. See, e.g., *MINE v. Guinea*, Case No. ARB/84/4, discussed in Delaume, *supra* note 26; *Amco Asia Corp.*, Case No. ARB/81/1, 23 I.L.M. 351; *Holiday Inns*, Case No. ARB/72/1, discussed in Lalive, *supra* note 42.

168. See *supra* note 58.

169. Assuming that consent to ICSID jurisdiction is freely transferable, the issue becomes whether consent would be vitiated if the transferee is a national of the host country. This issue was not raised in *Amco Asia Corp.* because Pan American was a national of Hong Kong. 23 I.L.M. 351.

170. Delaume, *supra* note 36, at 115-16.

171. Paulsson, *supra* note 117, at 153.

172. *Id.*

173. To date, of the 20 cases that have been submitted to ICSID, only two did not involve a Contracting State party that would not be considered as a less developed country (LDC): (a) Iceland in *ALUSUISSE v. Iceland* (Case No. ARB/83/1) and (b) Republic of Korea in *Colt Industries Operating Corp. v. Korea* (Case No. ARB/84/2).

legacy of the colonial era to an emerging nation-state is a pluralistic system of law.<sup>174</sup> Secured loan transactions in Indonesia, for example, may be governed by European law,<sup>175</sup> or by the indigenous customary or *adat* law,<sup>176</sup> or by interpersonal law.<sup>177</sup> At least one ICSID case has dealt directly with this issue.<sup>178</sup>

These examples of procedural problems serve to illustrate that not only do procedural uncertainties abound in ICSID arbitration, but that they also often recur. This is not unexpected, given the recent establishment of ICSID as an institution. It is perhaps a tribute to the flexibility and resilience of the ICSID Convention that it is able to accommodate an increasing variety of international investment disputes.<sup>179</sup> ICSID's reputation as a reliable and independent arbitral institution can be best served by subordinating the requirement of confidentiality to the publication of arbitral awards.

### CONCLUSION

ICSID's primary purpose is to provide an effective and neutral forum for the settlement of international investment disputes.<sup>180</sup> In view of the problems usually encountered in dispute resolution in international investments,<sup>181</sup> ICSID fulfills a unique function. It is the only forum specifically created to enable private parties and foreign sovereigns to seek legal redress against each other.

Yet, the importance of ICSID's function may be jeopardized by its own rules of confidentiality.<sup>182</sup> The Tribunal's refusal to grant provisional measures enjoining publication of in-

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174. *E.g.*, Indonesia. S. GAUTAMA & R. HORNICK, *supra* note 55, at 1-21.

175. S. GAUTAMA, D. ALLAN, M. HISCOCK & D. ROEBUCK, CREDIT AND SECURITY IN INDONESIA 83-103 (1973).

176. *Id.* at 104-05.

177. *Id.* at 110-22. Interpersonal law is a branch of Indonesian law that determines the applicable law when persons of different population groups, e.g., European and native Indonesian, enter into civil transactions or relations. *Id.* at 12.

178. In *Klößner*, the issue, resolved only after some difficulty, arose because of Cameroon's dual judicial heritage, which applies both English common law and French civil law. Paulsson, *supra* note 117, at 153.

179. See Delaume, *supra* note 36, at 117.

180. See *supra* notes 23-25 and accompanying text.

181. See *supra* notes 15-22 and accompanying text.

182. See *supra* notes 126-79 and accompanying text.

formation regarding the dispute in *Amco Asia Corp.* has helped to put into clearer perspective the limited utility of confidentiality rules in ICSID arbitration.<sup>183</sup> They are, and should be, held secondary to ICSID's primary purpose. Therefore, this Note recommends that article 48(5) of the ICSID Convention be changed to read: "The Centre shall publish the award, taking proper care, and in consultation with the parties, to delete sensitive and confidential business information that may be damaging to the parties." The amendment to Arbitration Rule 48(4) to allow the publication of excerpts of legal rules applied by the tribunals indicates that a trend towards this practice has already emerged.<sup>184</sup>

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183. See *supra* notes 54-83 and accompanying text.

184. See *supra* note 8.

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