

# ICSID Implementation: An Effective Alternative to International Conflict

## I. Introduction

On May 10, 1964, the Tunisian National Assembly shocked the world by rushing through a bill nationalizing all farmland owned by foreigners.<sup>1</sup> Much of the one million acres of land<sup>2</sup> and other assets were seized from large French corporations.<sup>3</sup> In a fiery speech, Tunisian President Habib Bourguiba proclaimed that Tunisia had suffered enough under eighty-three years of French exploitation and summarily rejected an earlier agreement with France whereby Tunisia could buy back foreign property holdings remaining from colonial rule.<sup>4</sup> He defended his drastic action by declaring

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\*Mr. Soley practices law in Washington, D.C. with the firm of Venable, Baetjer, Howard & Civiletti. The author wishes to thank former President Jimmy Carter, Judge Jack Etheridge and Georges R. Delaume for their constructive comments on this article. The views expressed herein, however, are strictly those of the author.

1. *THE ECONOMIST*, May 16, 1964, at 307; *N.Y. Times*, May 13, 1964, at 17, col. 2; *The Times* (London), May 13, 1964, at 12, col. 1. The Tunisian action coincided with the eighty-third anniversary of the Bardo Treaty that turned Tunisia into a French protectorate. *THE ECONOMIST*, May 16, 1964, at 708.

2. *N.Y. Times*, May 13, 1964, at 17, col. 2; *The Times* (London), May 13, 1964, at 12, col. 1. Of this land, approximately 675,000 acres belonged to French citizens and corporations, 110,000 acres belonged to Italians, and 37,000 acres owned by Maltese subjects of Britain. *N.Y. Times*, May 13, 1964, at 17, col. 2.

3. *N.Y. Times*, May 13, 1964, at 17, col. 2; *The Times* (London), May 13, 1964, at 12, col. 1. The French owned nearly 70% of the land seized; of the expropriated French owned land, almost half belonged to large French corporations. *THE ECONOMIST*, May 16, 1964, at 708.

4. *N.Y. Times*, May 13, 1964, at 19, col. 2; *The Times* (London), May 13, 1964, at 12, col. 1. Under an earlier agreement with France, the French government had agreed to allow Tunisia to buy foreign land holdings gradually over a span of five years in exchange for a fixed rate of compensation. However, these compensation costs placed a heavy drain on Tunisia's foreign exchange reserves. In nationalizing the land immediately, President Bourguiba maintained that the French should pay these costs to make up for the exploitation that Tunisia had suffered

that, while this measure would be inconsequential to the French, it was “a question of life or death”<sup>5</sup> for newly independent Tunisia.<sup>6</sup>

The French reaction was sharp and immediate. Ignoring Bourguiba’s call for continued cooperation, General Charles de Gaulle vigorously denounced Tunisia’s “brutal” actions.<sup>7</sup> After a quickly convened cabinet meeting, the French government responded by completely suspending vast sums of financial aid intended for Tunisia.<sup>8</sup> The French ambassador was quickly recalled to Paris “for consultations.”<sup>9</sup>

This critical turn of events caught the world financial community by surprise.<sup>10</sup> It was widely feared that the sudden tension would lead to a resumption of the Franco-Tunisian hostility that had resulted in thousands of casualties just a few years earlier.<sup>11</sup> Expropriated property holders appealed to international institutions such as the World Bank, but found these institutions ill-equipped to handle the situation.<sup>12</sup> Consequently, displaced businessmen sought aid from France and escalated the essentially financial tension into a political crisis.

This event is only one example of the dozens of international incidents between foreign investors and host states that confronted the World Bank in the 1950s and 1960s.<sup>13</sup> While the Tunisian debacle gradually faded into obscurity, it and other threatened international flare-ups underlined the serious lack of an intermediary apparatus to prevent investment disputes from becoming dangerously political.

Soon after the Tunisian crisis died down, the World Bank sought to eradicate this gap by promoting one of the most ambitious international attempts to resolve investment disputes between foreign private investors

under French rule and also pointed out that French companies were “running down” the land before they left. *THE TIMES* (London), May 13, 1964, at 12, col. 1.

5. *N.Y. TIMES*, May 13, 1964, at 17, col. 2.

6. Tunisia was granted independence from France on March 25, 1956. It had been a French protectorate since 1881. *THE STATESMAN’S YEAR-BOOK* 1185 (J. Paxton 117th ed. 1980).

7. *N.Y. TIMES*, May 14, 1964, at 4, col. 3.

8. *THE ECONOMIST*, May 16, 1964, at 708; *N.Y. TIMES*, May 14, 1964, at 4, col. 3.

9. *N.Y. TIMES*, May 14, 1964, at 4, col. 3.

10. *N.Y. TIMES*, May 13, 1964, at 17, col. 2; *The Times* (London), May 13, 1964, at 12, col. 1.

11. Sterling, 25 *REPORTER* 24 (Sept. 28, 1961); *The Times* (London), May 13, 1964, at 12, col. 1.

12. Confidential sources within the World Bank; ICSID, *History of the Convention*, Vol. II, Pt. 1, Doc. 4, p. 6, Doc. 25, p. 240 (1968); see generally, Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 *INT’L & COMP. L.Q.* 367, 367-78 (1979); Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 *RECUEIL DES COURS* 2: 333 (1972).

13. See Sutherland, *supra* note 12, at 373-78. For example, the World Bank played a major role in settling the violent dispute between Britain and Egypt following the nationalization of the Suez Canal Company in 1956. *Id.* at 373-74; E. LAUTERPACHT, *SUEZ CANAL SETTLEMENT* 3 (1966). The Bank also acted in conciliation proceedings over the City of Tokyo’s refusal to fully repay a thirty year loan to French bondholders. Sutherland, *supra*, at 374; Domke, *Dispute Settlement of International Loans*, 1964 *INT’L FINANCING & INVESTMENT* 524, 542-43.

and sovereign states<sup>14</sup>—the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.<sup>15</sup> Developed to fill an existing abyss in dispute resolution, as well as to stimulate and protect a greater flow of capital into Third World nations,<sup>16</sup> the Convention created the International Centre for the Settlement of Investment Disputes (ICSID)<sup>17</sup> and established binding guidelines under which a nation and a foreign national may choose to resolve their differences.<sup>18</sup> Under the Convention, all parties to this treaty are obligated to recognize and enforce an ICSID arbitral award.<sup>19</sup> To date, the Convention had been signed by ninety-one states and ratified by eighty-seven of these signators.<sup>20</sup>

Through its careful balance between the interests of investors and those of contracting states, the Convention has succeeded in furthering foreign investment in developing nations.<sup>21</sup> Investors with an ICSID provision in their contracts with a foreign state receive direct access to an international forum that can impartially arbitrate, even in the absence of the state, and enforce an award as a final judgment in the courts of any member country.<sup>22</sup> The states acquired a similar means of proceeding against an errant investor in a foreign jurisdiction.<sup>23</sup> Thus, the ICSID treaty totally circumvents a traditional area of global hostility by requiring that all disputes between states and multinational investors be resolved through an international arbitration apparatus enforceable by every signer of the treaty.<sup>24</sup>

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14. Feverie, *International Arbitrators and Choice of Law Under Article 42 of the Convention on the Settlement of Investment Disputes*, 4 YALE STUD. IN WORLD PUB. ORD. 89 (1977).

15. *Done at Washington*, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966), reprinted in 4 I.L.M. 532 (1965).

16. Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para. 12, reprinted in 4 I.L.M. 524 (1965); see also Sutherland, *supra* note 12; Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA. J. INT'L & COMP. L. 343 (1974); Albrecht, *Some Legal Questions Concerning the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 12 ST. LOUIS U.L.J. 679 (1968). For a very indepth and more extensive discussion of ICSID, see G. DELAUME, *TRANSNATIONAL CONTRACTS*, ch. 15 (1982).

17. ICSID CONVENTION art. 1(1). The Centre is currently located in Washington, D.C.

18. These guidelines are set forth in arts. 25–75. As provided under art. 6, ICSID has also published a more comprehensive set of regulations and rules. Art. 44 enforces this framework. As for the basic procedure of the treaty, the Convention allows contracting parties to choose between arbitration and non-binding conciliation. Under the Convention, the parties are free to appoint arbitrators or conciliators either from panels compiled by ICSID or from other sources. If called upon, ICSID will appoint disinterested people from its panels.

19. ICSID CONVENTION arts. 53–54. Under the Convention, parties to a dispute select their own arbitration tribunal to operate under the ICSID guidelines. If agreement cannot be reached on selection of arbitrators, ICSID picks members off the panels that it maintains. Arts. 12 and 13 also provide for a conciliation panel if the disputants opt against arbitration.

20. ICSID NINETEENTH ANNUAL REPORT (1985). Indeed, the ICSID Convention has been ratified by more states than any other arbitration treaty. Broches, *Settlement of Disputes Arising Out of Investment in Developing Countries*, 11 INT'L BUS. L. 206, 208 (1983).

21. Delaume, *ICSID Arbitration and the Courts*, 77 A.J.I.L. 784, 790–91 (1983).

22. ICSID CONVENTION art. 53. 54.

23. *Id.*

24. Such immunity poses a serious problem where, for example, French investors seek to

This article initially examines the existing ICSID framework and assesses the implementation of the Convention throughout the world. The focus then shifts to an examination of adherence to the treaty by the United States, emphasizing American enforcement of arbitral awards in light of foreign sovereign immunity.

## II. The ICSID Framework for Actions Against Foreign States

### A. GENERAL

The Convention for the Settlement of Investment Disputes creates a completely autonomous jurisdictional system which arbitrates disputes between investors and host states.<sup>25</sup> The cornerstone of ICSID jurisdiction lies in the initial mutual consent of the parties.<sup>26</sup> Once a private investor and a state agree to the Convention's authority over any future disagreements, the agreement acts as a binding and irrevocable consent that cannot be unilaterally withdrawn.<sup>27</sup> The Centre for the Settlement of Investment Disputes, acting independently of any national interference, receives requests for arbitration and exercises full control over the dispute until a final award has been recognized and enforced by a domestic court of a member nation.<sup>28</sup>

As an added advantage, the Centre is also a relatively inexpensive means of resolving international conflicts.<sup>29</sup> Unlike other international investment arbitration institutions such as the International Chamber of Commerce and the American Arbitration Association, the Centre's fee is based on the actual costs incurred by its already subsidized staff and not on a percentage of the investment at stake.<sup>30</sup> The ICSID scheme is further unique due to its effective apparatus set up to enforce awards and its requirement of irrevocable consent.<sup>31</sup>

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have a United States court enforce an ICSID award against Tunisia—and Tunisia claims immunity from the jurisdiction of American courts. If the United States or the legal system of any other nation were to, in fact, grant this requested immunity, it would severely thwart the purpose of the Convention by destroying the careful balance preserved between private investor and sovereign nations. In addition to the threat to world peace, tampering with the ICSID framework would endanger developing nations dependent on financial capital, and place billions of dollars of foreign investment into greater risk.

25. Broches, *supra* note 20, at 208.

26. *Id.*; ICSID Convention art. 25; Brief for Intervenor at 44, *MINE v. Guinea*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S.Ct. 91 (1983).

27. Broches, *supra* note 25.

28. *Id.*

29. ICSID administrative costs are limited to a \$100 initial registration fee. The fees of arbitrators are limited to approximately \$650 per day plus travel and subsistence expenses. Delaume, *The ICSID and the Banker*, INT'L FIN. L. REV. 9, 12 (October, 1983); *see, generally*, McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 211 (1979) (contrasts various arbitration centers).

30. ICSID Doc. ICSID/12, at 3. While the Federal Mediation and Conciliation Services works with about 20,000 disputes annually, its scope is limited to mostly labor difficulties within the United States.

31. *Id.*

The essence of the Convention's enforcement mechanism is contained in three articles regarding the implementation of ICSID awards. Article 53 states that an award rendered by arbitrators acting according to the rules promulgated by the Centre shall be absolutely binding on the parties to the dispute.<sup>32</sup> There is to be no right of appeal or review by any domestic court.<sup>33</sup> More importantly, signers to the Convention guarantee that they shall abide by and comply with all the terms of an award.<sup>34</sup> The only exceptions to total compliance are if the arbitration tribunal decides to stay the enforcement of its award pending the possibility of interpreting, revising, or annulling the language.<sup>35</sup>

Under Article 54, the Convention details the compliance mandated for the nation in which enforcement of the ICSID award is sought.<sup>36</sup> Once a party brings a certified ICSID award before an appropriate court of a nation privy to the ICSID treaty, the domestic court is legally bound to both recognize and enforce the award exactly as if it was a final judgment from an equivalent tribunal within that same country.<sup>37</sup> A judgment, therefore, must be rendered to enforce whatever pecuniary obligations have been established.<sup>38</sup>

#### B. ENFORCEMENT-EXECUTION DISTINCTION

However, the Convention distinguishes between the notions of *enforcement* and *execution*.<sup>39</sup> While a domestic court must recognize and enforce ICSID awards against states regardless of defenses such as sovereign immunity and public policy,<sup>40</sup> Article 55 expressly does not touch upon the *execution*—the actual seizing and selling of the debtor's property<sup>41</sup>—of the judgment.<sup>42</sup> This matter is left to the domestic procedures and sovereign immunity laws existing in the country hearing the suit.<sup>43</sup> Thus, judgments rendered in accordance with the Convention are subject to different treatment in the courts of each state which is a party to the treaty.<sup>44</sup>

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32. ICSID CONVENTION art. 25(1).

33. *Id.*

34. *Id.*

35. *Id.* arts. 50–53.

36. *Id.* art. 54(1).

37. *Id.* art. 54(1), (2).

38. *Id.* art. 54(1).

39. *Id.* arts. 54, 55; see Delaume, *supra* note 21, at 799–800.

40. ICSID CONVENTION art. 54(1); see Delaume, *supra* note 21, at 797–799.

41. BLACK'S LAW DICTIONARY 510 (5th ed. 1979)

42. ICSID CONVENTION art. 55.

43. *Id.*; Delaume, *supra* note 21, at 800; Coll, *United States Enforcement of Arbitral Awards Against Sovereign States: Implications of the ICSID Convention*, 17 HARV. J. INT'L L. 401 (1976); Delaume, 20 I.L.M. 877 (1981).

44. Delaume, 20 I.L.M. 877 (1981); Coll, *supra* note 43 at 404.

## C. HYPOTHETICAL

For example, assume that before investing in Tunisia, the French corporations and the government of Tunisia agreed to take any future disputes to the International Centre for the Settlement of Investment Disputes. As both nations have now signed and ratified the ICSID treaty,<sup>45</sup> the following model arbitration<sup>46</sup> clause is placed in all the contracts:

The parties hereto consent to submit to the International Centre for Settlement of Investment Disputes any dispute in relation to or arising out of this Agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States.<sup>47</sup>

Thus, binding and irrevocable consent within the ICSID framework is created.<sup>48</sup> At this point, assume that conflict flares up between Tunisia and the French investors. As tensions increase, Tunisia nationalizes all the French holdings. Subsequent negotiations fail to arrive at a solution.

As a settlement seems unlikely, the French conglomerates, acting under their contracts, take the matter before ICSID. This may be done by either party unilaterally submitting a written request to the Secretary-General of ICSID in Washington, D.C.<sup>49</sup> It makes no difference whether Tunisia is still willing to follow through with arbitration.<sup>50</sup> Having jurisdiction over legal disputes "arising directly out of an investment between a Contracting State . . . and a national of another Contracting State which the parties to the

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45. Tunisia signed the treaty on May 5, 1965 and ratified it on Jun. 22, 1966, effective Oct. 14, 1966. France signed on Dec. 12, 1965, and ratified on Aug. 21, 1967, effective Jun. 20, 1967. ICSID, SEVENTEENTH ANNUAL REPORT 6 (1983).

46. The Convention allows for conciliation as well as arbitration. See ICSID CONVENTION arts. 28-35. However, most parties prefer to resort to arbitration since they are reluctant to go through the entire conciliation process and end up with only a non-binding award. Out of the eighteen cases that have been handled by the Centre to date, only two have involved conciliation. Interview with Georges R. Delaume, Senior Legal Adviser to the World Bank, currently assigned to the International Centre for the Settlement of Investment Disputes, in Washington, D.C. (Mar. 19, 1984).

47. ICSID Model Clauses, Doc ICSID/5/Rev. 1, at 5 (Jul. 7, 1981). This is merely a simple example of an ICSID clause. The Centre provides model clauses which are suitable for many factual situations. For a detailed account of drafting ICSID clauses, see Delaume, *Arbitration in Practice* 2-10 (ICSID pamphlet Aug. 1, 1983), forthcoming in 1 INT'L TAX & BUS. L. no. 2.

48. ICSID CONVENTION art. 25(1).

49. Any party wishing to institute conciliation or arbitration proceedings must address a request (and five copies) in writing to: The Secretary-General, ICSID, 1818 H Street, N.W., Washington, D.C. 20433, U.S.A.

The request, which may be made individually or jointly by the parties, must: indicate whether it relates to conciliation or to arbitration; be drawn up in one of the official languages of ICSID i.e., English, French or Spanish; be dated; be signed by the requesting party or parties; contain evidence of consent to conciliation or arbitration under ICSID; and include information relating to the parties to the dispute and the issues in dispute. The request may: set forth any provisions agreed upon by the parties regarding the number of conciliators or arbitrators, and the method of their appointment; and any other provisions agreed by the parties concerning the settlement of the dispute. ICSID Doc. ICSID/12, at 8.

50. ICSID CONVENTION art. 25(1).

dispute consent in writing to submit to the Centre,"<sup>51</sup> ICSID is bound to accept the case.

Even if Tunisia refuses to cooperate with ICSID, the Secretary-General of the Centre is authorized to appoint the panel of arbitrators.<sup>52</sup> The arbitration is then completed despite Tunisia's refusal to attend<sup>53</sup> and, hypothetically, an award is rendered in favor of the French corporations for \$100 million.

Ascertaining that Tunisia has a large amount of assets in American banks and investments, the French corporations next take their award to a United States district court<sup>54</sup> and demand that the United States comply with its treaty obligations under the Convention<sup>55</sup> to enforce a judgment of an ICSID tribunal. Specifically, the corporation must invoke the Article 54 provision that every party to the ICSID treaty must recognize an award 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."<sup>56</sup> Under the terms of the Convention, the United States district court is not to review the award in any manner or<sup>57</sup> object to any of the ICSID proceedings.<sup>58</sup>

As the ICSID award is to be received by the court as a binding final judgment,<sup>59</sup> the United States court is restricted to a very limited role.<sup>60</sup> Any defenses by Tunisia such as sovereign immunity or public policy would be precluded.<sup>61</sup> Indeed, Tunisia itself is obligated to comply with the terms of the award.<sup>62</sup> According to the regime set out by the Convention on the Settlement of Investment Disputes, the Arbitral Tribunal has complete authority over all matters before it<sup>63</sup> and any effort to interpret, revise, or annul the award must be made by the Secretary-General of the Centre and

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51. *Id.*

52. *Id.* at art. 38. In about two-thirds of the cases, ICSID ends up appointing arbitrators. Delaume, *supra* note 29, at 10, n. 8. The default of a party, therefore, does not frustrate ICSID proceeding. *Id.* at 10.

53. Under Art. 45(2) the arbitration may still proceed even if a party refuses to appear.

54. In the United States, federal district courts have exclusive jurisdiction over ICSID proceedings 22 § 1650a(b) (1976).

55. The United States signed the Convention on Aug. 27, 1965 and ratified it on Jun. 10, 1966, to be effective as of Oct. 14, 1966. ICSID SEVENTEENTH ANNUAL REPORT 7 (1983).

56. ICSID CONVENTION, art. 54(1).

57. *Id.* at art. 53(1).

58. *Id.* at art. 41.

59. *Id.* art. 54(1).

60. ICSID CONVENTION art. 54(1); Interview with Delaume, *supra* note 46; Schmidt, *Arbitration under the Auspices of ICSID*, 17 HARV. INT'L L. REV. 90, 105 (1976). Under Article 26 of the Convention, consent to ICSID arbitration is exclusive of any other remedy.

61. As the treaty mandates that the award be a binding final judgment, all defenses are automatically precluded by this language. *Id.* art. 54. No defenses to enforcement are provided anywhere within the treaty. See also Delaume, *supra* note 21, at 797-799.

62. ICSID CONVENTION art. 53(1).

63. *Id.* at art. 41.

ruled upon by the Arbitral Tribunal or an *ad hoc* committee appointed to that effect.<sup>64</sup> The domestic courts of a state are then required to defer to the certified decision issued by the Centre.<sup>65</sup> Once it determines the award to be *bona fide*, the forum state must enforce it.<sup>66</sup>

The only exception to the Centre's authority is Article 55. If the United States court follows Convention procedure and enters a \$100 million judgment against Tunisia, the collection of these funds must be carried out according to United States law.<sup>67</sup> While the Convention requires the domestic court to assert *jurisdiction* over the award and to enforce it, the execution is left up to domestic law.<sup>68</sup> As a further difficulty, United States law *does* provide for a "restrictive" form of sovereign immunity to prevent the specified executions against sovereign states.<sup>69</sup>

Therefore, in a case where the defendant is the host country, it is possible for a corporation to force a sovereign state to participate in arbitration, win an arbitral award, have the award recognized and enforced in a domestic nation's legal system—but then to lose on the crucial execution issue. Officials at the International Centre for the Settlement of Investment Disputes point out that investor plaintiffs may solve this problem by forum shopping for a domestic legal system that follows a restrictive view of sovereign immunity.<sup>70</sup>

### III. Worldwide Implementation of the Convention

Despite this problem of execution, the ICSID treaty is being successfully implemented throughout the world. Over one thousand investment contracts have incorporated provisions for resolving disputes within the ICSID framework.<sup>71</sup> References to ICSID arbitration are contained in eleven national investment laws<sup>72</sup> and in eighty-seven bilateral investment treaties.<sup>73</sup>

64. *Id.* at arts. 50–52.

65. *Id.* at art. 54(1), (2).

66. *Id.* at art. 54(2).

67. *Id.* at art. 55.

68. *Id.*

69. 28 U.S.C., §§ 1609–1611 (1976).

70. Delaume, *Foreign Sovereign Immunity: Impact on Arbitration*, 38 *ARB. J.* 34, 46–48 (1983).

71. As there is no way to effectively tabulate data on this point, the figure is an educated estimate. *Id.* A 1974 study estimated that ICSID clauses protected over \$2 billion of international investment. Broches, *Arbitration in Investment Disputes*, in *INTERNATIONAL COMMERCIAL ARBITRATION: DOCUMENTS AND COLLECTED PAPERS*, pt. 2, 292, 299 (C. Schmitthoff ed. 1974). More recent information has indicated that the \$2 billion figure may be extremely modest. Interview with Georges R. Delaume, Senior Legal Adviser to the World Bank, in Washington, D.C. (May 24, 1984).

72. Delaume, *supra* note 47, at 2 n. 6 ICSID, SEVENTEENTH ANNUAL REPORT Annex 4; see ICSID Newsletters (Jan. 1983, Jul. 1983).

73. Delaume, *supra* note 47, at 2 n. 7; see ICSID Newsletters (Jan. 1983, Jul. 1983).



Indeed, a number of corporations dealing with foreign governments are reluctant to make investments in nations which have not signed the Convention.<sup>74</sup> With the exception of sovereignty conscious Latin America,<sup>75</sup> the vast majority of non-“Communist Bloc”<sup>76</sup> countries have already joined the ICSID treaty.<sup>77</sup> As a whole, international arbitration is becoming an increasingly popular method for resolving commercial disputes.<sup>78</sup>

In all, the Centre has handled twenty disputes arising out of ICSID provisions in multinational contracts.<sup>79</sup> As evidence of the Centre’s growing popularity as an alternative to political confrontation, over half of these conflicts have come to ICSID within the last three years.<sup>80</sup> Thirteen of these

74. This reluctance has been communicated to the ICSID Secretariat by potential investors. Interview with Delaume, *supra* note 46.

75. Latin American nations have historically distrusted international mediation of any kind. Most of these countries adhere to the so-called “Calvo Clause” of the Andean Foreign Investment Code which prohibits intervention of any kind of one state into the affairs of another state. Andean Investment Code, *done* Dec. 30, 1970, *reprinted* in 11 I.L.M. 126 (1971). This strong notion of state sovereignty is a reaction to years of exploitation and intervention at the hands of colonialist nations. From this, Latin America has developed the theory that all investment disputes must be settled internally as a matter of sovereignty. For a much more thorough discussion of this problem, see Comment, *A Courageous Course for Latin America: Urging the Ratification of the ICSID*, 5 HOUS. J. INT’L L. 157 (1982); Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT’L L. 256, 258 (1971); *see also* Gopal, *International Centre on the Settlement of Investment Disputes*, 14 CASE W. RES. J. INT’L L. 591, 602-03 (1982); Delaume, *supra* note 16, at 3-4; McLaughlin, *supra* note 29 at 223-24; Amerisinghe, *The ICSID and Development through the Multinational Corporation*, 9 VAND. J. TRANSNAT’L L. 793, 798 (1976); Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT’L L.J. 131 (1976); Ryans & Baker, *The International Centre for Settlement of Investment Disputes*, 10 J. WORLD TRADE L. 65, 65-66 (1976); Broches, *supra* note 12, at 348. Despite this initial Latin American recognition of ICSID, many of these countries have now recognized the long-term advantages of increased foreign investment capital and technology that may be generated through international investment cooperation. Comment, *supra*, at 157-58. Paraguay and El Salvador have now both signed and ratified the Convention. Costa Rica has signed but not yet ratified. News from ICSID, *supra* note 20, at 1.

76. However, Romania, a member of the Warsaw Pact, is a member of ICSID. ICSID, SEVENTEENTH ANNUAL REPORT 6 (1983).

77. In all, eighty-nine countries have signed the Convention and eighty-five signers have ratified. News from ICSID, *supra* note 20, at 1.

78. *See* Aksent, *International Arbitration—Its Time Has Arrived*, 14 CASE W. RES. J. INT’L LAW 247 (1982); Coulson, *A New Look at International Commercial Arbitration*, 14 CASE W. RES. J. INT’L LAW 359 (1982). For instance, the International Chamber of Commerce is nearing hearing about 250 commercial cases annually. Int’l Chamber of Commerce, Document No. 825-25/3 (1981), *see* Haight, *International Arbitration*, 14 CASE W. RES. J. INT’L LAW 253 (1982).

79. While cases are kept confidential by ICSID, the Centre acknowledges that it has handled eighteen arbitrations and two conciliations. Interview with Delaume, *supra* note 46. ICSID NINETEENTH ANNUAL REPORT (1985).

80. Nine cases were handled in ICSID’s first fifteen years of operation. Already, more than this amount has been handled in the last three years. One explanation for the paucity of cases in ICSID’s early history is that it usually takes many years before a dispute arises out of an international investment contract. *Id.*

cases were amicably settled, one dispute was resolved by an arbitral ruling, and seven cases are still pending.<sup>81</sup>

While all proceedings are kept confidential, the Convention's initial prohibition of diplomatic protection<sup>82</sup> has definitely been a strong factor in eliminating political tensions from disputes channeled through ICSID.<sup>83</sup> One published example of such an arbitration is *Alcoa Mineral v. Government of Jamaica*.<sup>84</sup> Here, an American corporation entered into a complex twenty-five-year agreement with Jamaica whereby Alcoa would construct an alumina refining plant in exchange for major tax concessions and long-term leases on bauxite mining.<sup>85</sup> The deal also contained a clause providing for ICSID arbitration for any dispute arising from the agreement.<sup>86</sup>

After political changes occurred within Jamaica, however, government officials announced that they intended to limit their adherence to the Convention to exclude disputes involving natural resources.<sup>87</sup> Shortly thereafter, Jamaica reneged on the contract with Alcoa.<sup>88</sup> When Alcoa submitted the conflict to ICSID, Jamaica cited the earlier withdrawal of consent and refused to respond to the request for arbitration.<sup>89</sup>

In a ruling that has greatly strengthened ICSID authority and bolstered the confidence of parties relying on arbitration clauses,<sup>90</sup> the ICSID panel unanimously asserted jurisdiction over the dispute by reaffirming that a party may not unilaterally withdraw consent to arbitrate.<sup>91</sup> While a party can limit consent under Article 25, the panel declared that this operated to only affect "potential *future* investors" (emphasis added)<sup>92</sup> and held that any other ruling "would very largely, if not wholly, deprive the Convention of any practical value."<sup>93</sup> Following this decision, Jamaica and Alcoa amicably settled their differences.<sup>94</sup>

Although the Centre has overseen the arbitration of many cases to date, there has only been one test of the ICSID framework in a *judicial* setting. In

81. *Id.*

82. ICSID CONVENTION art. 27(1). Diplomatic protection is forbidden from the time that parties consent to ICSID until a contracting state refuses to comply with the award rendered in the dispute.

83. Interview with Delaume, *supra* note 46; Sutherland, *supra* note 13. The existence of ICSID also has a strong deterrent effect on potential disputes by persuading parties to arrive at a settlement out of the fear that the other party will take the dispute to the Centre. Gopal, *supra* note 75, at 592.

84. See Schmidt, *supra* note 60.

85. *Id.* at 93.

86. *Id.* at 93-94.

87. *Id.* at 95.

88. *Id.* at 94-95.

89. *Id.* at 95.

90. *Id.* at 92-93.

91. *Id.* at 92-93, 103.

92. *Id.* at 103.

93. *Id.*

94. ICSID, FIFTEENTH ANNUAL REPORT 34-39 (1981).

*Benvenuti & Bonfant Co. v. The Government of the People's Republic of Congo*,<sup>95</sup> the Government of Congo<sup>96</sup> contracted with an Italian investor<sup>97</sup> to create a "semi-public" company to manufacture plastic bottles.<sup>98</sup> The contract contained the following provision:

Any dispute between the parties arising out of the performance of this Agreement, which could not be amicably settled, shall be submitted to arbitration within the framework of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of March 18, 1965, prepared by the I.B.R.D. [International Bank for Reconstruction and Development], the proceedings shall be conducted in the French language. The parties hereby agree to abide and to waive any right to any appeal or other power (sic) of such award. The costs of arbitration shall be borne equally by the parties.<sup>99</sup>

After a dispute broke out between the parties to the contract, the Italian corporation acted in accordance with the terms of the contract and requested an ICSID arbitral panel.<sup>100</sup> The panel rendered an award in favor of the corporation.<sup>101</sup> Upon receiving this award, Benvenuti & Bonfant immediately filed an action against the Congo in the *Tribunal de Grande Instance*<sup>102</sup> of Paris.<sup>103</sup> Relying on the ICSID treaty, the French court recognized the award and entered a judgment for the Italian investor subject to a reservation that no execution of this judgment could be carried out against any assets located in France without prior authorization of the court.<sup>104</sup>

Contending that this reservation made enforcement of the award impossible, the Italian corporation persuaded the Court of Appeals of Paris to delete the limitation.<sup>105</sup> According to the Senior Legal Adviser of the Centre for the Settlement of Investment Disputes, the higher court properly interpreted the Convention<sup>106</sup> by ruling that enforcement and execution were two separate and distinct procedures.<sup>107</sup> Article 54 requires that the court enforce the ICSID award by making it a valid title on the basis of which

95. 20 I.L.M. 878 (1981) (English translation).

96. Congo signed the Convention on Dec. 27, 1965 and ratified it on June 23, 1966. SEVENTEENTH ANNUAL REPORT 6 (1983).

97. Italy signed the Convention on Nov. 18, 1965 and ratified it on Mar. 29, 1971. *Id.*

98. 20 I.L.M. 878 (1981).

99. *Id.* at 879.

100. *Id.*

101. *Id.*

102. France signed the Convention on Dec. 22, 1965 and ratified it on Aug. 21, 1967. ICSID, SEVENTEENTH ANNUAL REPORT 6 (1983).

103. 20 I.L.M. 879 (1981).

104. *Id.*

105. *Id.* at 880-82.

106. Delaume, *Introductory Note to Benvenuti & Bonfant Co. v. The Government of the People's Republic of Congo*, 20 I.L.M. 878 (1981). Mr. Delaume is the Centre's Senior Legal Adviser.

107. 20 I.L.M. 880 (1981).

measures of execution can be taken.<sup>108</sup> While the lower court fulfilled this first step, it exceeded its authority by dealing with the second step—the execution (or attachment) of the Congo's property.<sup>109</sup> The Court of Appeals ruled that the possibility of subsequent measures of execution is a question of immunity that should not be dealt with in the initial state of the recognition and enforcement of ICSID awards.<sup>110</sup>

As to the possibility of the Congo successfully pleading sovereign immunity at a later stage in the proceedings, a French commentator has pointed out that the French doctrine of immunity for sovereign states is in a state of confusion. However, it is clear from the outcome of the *Benvenuti & Bonfant* case that the French doctrine is completely compatible with full implementation of ICSID awards in that the court freely recognized and enforced the judgment of the Arbitral Tribunal. Since the French court has acted, the Congo has complied with the award in full.<sup>111</sup>

#### IV. Adherence to the Convention by the United States

While the French legal system has readily implemented the ICSID framework, the less flexible nature of American sovereign immunity is more problematic. This poses a potential conflict with the international obligations derived from the Convention.

As a treaty to which the United States is a party, the provisions of the Convention for the Settlement of Investment Disputes become "the supreme Law of the Land."<sup>112</sup> It becomes part of American law with an importance equal to statutes.<sup>113</sup> Indeed, Congress passed the Convention on the Settlement of Investment Disputes Act of 1966<sup>114</sup> to specifically hold that ICSID awards "shall create a right arising under a treaty of the United States." The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction."<sup>115</sup> Conversely, this acceptance of the ICSID treaty further obligates the United States to restrict itself to the very limited role allowed to domestic legal systems by the Convention and to *abstain* from all ICSID proceedings short of the enforcement of certified awards.<sup>116</sup>

108. ICSID CONVENTION art. 54; 20 I.L.M. 881 (1981); see Delaume, *supra* note 106, at 878.

109. ICSID CONVENTION art. 55; 20 I.L.M. 881 (1981); see Delaume, *supra* note 106 at 878.

110. 20 I.L.M. 881 (1981).

111. News from ICSID, *supra* note 20, at 2.

112. U.S. CONST. art. VI.

113. *Missouri v. Holland*, 252 U.S. 416 (1920); *Foster v. Neilson*, 27 U.S. (2 Pct.) 253, 314 (1829) (Marshall, C.J.) (treaty is equivalent to an act of Congress); RESTATEMENT OF THE LAW OF FOREIGN RELATIONS § 131(c), comment (c), (d) (Tent. Draft No. 1, 1980) (treaties are expressly made binding obligations of the United States).

114. 22 U.S.C. §§ 1650, 1650a (1976).

115. *Id.* § 1650a (a).

116. ICSID CONVENTION arts. 25–26, 41, 48–54.

The limited powers of the court to recognize, enforce, and carry out an ICSID award, sharply conflict with the doctrine of sovereign immunity. The general principle of the doctrine, as stated by Chief Justice Marshall, is that "sovereigns are not presumed without explicit declaration to have opened their tribunals to suits against other sovereigns."<sup>117</sup> For reasons of comity and deference to the Executive Branch, a foreign sovereign is immune from any action in an American court. For instance, the sovereign state of Tunisia cannot automatically be sued in a domestic court of the United States. Therefore, in order for America to effectively implement the goals of the Convention, the scope of United States law must be accommodated with the ICSID notions of abstention and sovereign immunity.

#### A. THE RULE OF ABSTENTION

One of the most fundamental principles of the Convention is that it creates an autonomous, self-contained system for dispute resolution. The ICSID apparatus operates in total independence from domestic legal systems.<sup>118</sup> Once parties agree to be under its framework, the Convention prohibits any foreign intervention:

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.<sup>119</sup>

In this manner, the parties are assured that their dispute is free from outside scrutiny and influences. Thus, the problem is prevented from escalating into a political conflict.

The adherence of the United States to this rule of abstention was recently tested in *MINE v. Guinea*.<sup>120</sup> Here, the Republic of Guinea entered into an investment agreement with a Liechtenstein<sup>121</sup> corporation to transfer bauxite to foreign markets.<sup>122</sup> The contract expressly provided for ICSID arbitration as a mechanism for solving potential future disputes.<sup>123</sup> Nevertheless, when a dispute terminated the contract and Guinea refused to cooperate in a settlement, the corporation sued Guinea in an American court to enforce arbitration before the American Arbitration Association (AAA).<sup>124</sup>

Despite the fact that the parties had not contemplated this outcome, the court granted an order compelling arbitration and, after Guinea failed to

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117. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972), paraphrasing, *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 146 (1812).

118. See ICSID CONVENTION arts. 26-27, 41, 44.

119. *Id.* at art. 26.

120. 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983).

121. While Liechtenstein is not a member of ICSID, the court assumed that the plaintiff had sufficient contact with Switzerland to qualify as a Swiss corporation.

122. 693 F.2d 1094, 1095 (D.C. Cir. 1982).

123. *Id.*

124. *Id.* at 1096-97.

comply with this ruling, entered a judgment against the sovereign state for the AAA's award of \$25 million.<sup>125</sup> In doing so, the court asserted jurisdiction by ruling that consent to ICSID constituted a waiver of sovereign immunity since the Centre was located in Washington, D.C.<sup>126</sup>

On appeal, the Court of Appeals for the District of Columbia reversed the lower court's invasion of ICSID's autonomy.<sup>127</sup> Conforming United States law to the Convention, the court of appeals held that ICSID is a unique and distinct international body governed by the rules of the ICSID treaty—which prevents *any* type of domestic intervention until a final award is rendered.<sup>128</sup>

A prime mover for this result, the U.S. Departments of State and Justice filed an *amicus* brief arguing for the application of a rule of abstention.<sup>129</sup> The Executive Branch pointed out that the United States has been a strong supporter of the Centre since its inception and has passed legislation providing “for mandatory enforcement of awards of ICSID tribunals in United States courts, *with review restricted in accordance with the Convention* (emphasis added).”<sup>130</sup> In order to give the Centre the necessary strength to stimulate investment and settle international disputes, the Executive argued that resort to ICSID must be an exclusive remedy totally free from foreign or international litigation.<sup>131</sup> Thus, national and diplomatic remedies are unavailable once consent to ICSID arbitration is given.<sup>132</sup> Further, under the Convention, the Centre is an independent entity with “full international personality.”<sup>133</sup> Any consent to participate in a future ICSID arbitration is a consent specifically limited to ICSID proceedings.<sup>134</sup> Therefore, an agreement to arbitrate under the auspices of the Centre is not a waiver of immunity from the courts of any other international entity, including the United States.

Thus, *MINE v. Guinea* establishes a firm commitment on the part of the United States to abide by the rule of abstention. It fully recognizes the United States treaty obligation to allow the Centre to operate as a fully

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125. 505 F. Supp. 141, 144 (D.C. Cir. 1981).

126. *Id.* at 142–43.

127. 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983).

128. *Id.* at 1103.

129. Brief for Intervenor at 50–52, *MINE v. Guinea*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983).

130. *Id.* at 45.

131. *Id.* at 43–44, 46–47; see Amersinghe, *Dispute Settlement Machinery in Relations between States and Multinational Enterprises—With Particular Reference to the International Centre for the Settlement of Investment Disputes*, 11 INT'L LAW. 45, 47 (1977).

132. Brief for Intervenor, *supra* note 130, at 46–47.

133. ICSID Convention art 18.

134. *MINE v. Guinea*, 693 F.2d 1094, 1103 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983).

autonomous international organization, distinct from American legal processes and rules of immunity.

## B. CONSENT TO ICSID AS WAIVER

While establishing the United States commitment to the rule of abstention, the court of appeals in *MINE v. Guinea* never decided whether the consent of a foreign state to ICSID arbitration would waive sovereign immunity from the United States enforcement of a *final* ICSID award.<sup>135</sup> In other words, the case left open the conflict between the enforcement of awards and sovereign immunity. This is not a problem if, for example, Tunisia obtains an award against a French corporation. Tunisia merely needs to take the award to a court of any ICSID contracting state to receive an enforceable judgment. The difficulty arises, however, when French investors try to enforce an award against the sovereign state of Tunisia and Tunisia vigorously objects to the court proceeding on the basis of sovereign immunity.

The court in *MINE v. Guinea* addressed this problem by pointing out that, under Article 54 of the treaty and its United States implementing legislation, ICSID awards "are to be enforced as judgments of sister states."<sup>136</sup> However, when examining the issue of sovereign immunity, the court made the very limited observation that the "ICSID agreement did not contemplate the involvement of domestic courts before the enforcement stage . . ."<sup>137</sup> Hence, the court shied away from the clash between the enforcement of ICSID awards against foreign states and the bar imposed by sovereign immunity since the ICSID proceeding in *MINE v. Guinea* had not ripened into a final award demanding immediate recognition.

Commentators on the Convention for the Settlement of Investment Disputes, however, have resolved this conflict between enforcing ICSID awards against foreign states and the United States codification of sovereign immunity through resorting to the waiver theory.<sup>138</sup> This theory focuses on an important exception to the Foreign Sovereign Immunities Act of 1976:<sup>139</sup> Explicit or implicit waiver of immunity by a foreign state.<sup>140</sup>

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135. *Id.* at 1103 n. 14.

136. *Id.*

137. *Id.*

138. Delaume, *supra* note 21, at 791; see Note, *MINE v. 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. OF INT'L L. & ECON. 451, 464 (1982); Kahale, *Arbitration and Choice of Law Clauses as Waivers of Jurisdictional Immunity*, 14 N.Y.U.J. INT'L L. & P. 29, 40 (1981).

139. 28 U.S.C. §§ 1330, 1602-1611 (1976).

140. *Id.* at § 1605(a)(1).

According to these commentators, a sovereign state which consents<sup>141</sup> to ICSID arbitration is legally and irrevocably bound by this consent under Article 25 of the Convention.<sup>142</sup> Since consenting to the application of the treaty necessarily means that the contracting party agrees to the Article 53 provisions mandating compliance to the terms of the binding award<sup>143</sup> and agrees with the Article 54 clause requiring courts of other states to recognize and enforce this binding award as if it was a final judgment from an equivalent tribunal,<sup>144</sup> the state consenting to the ICSID jurisdiction is agreeing that the award may be enforced by the courts of another state. As the Convention qualifies as a treaty under the Vienna Convention on the Law of Treaties<sup>145</sup> and requires parties to comply with the terms of its awards,<sup>146</sup> the ICSID Convention is subject to *pacta sunt servanda*—parties are bound by international law to perform their treaty obligations in good faith.<sup>147</sup> Consequently, contracting states are obligated to allow awards arising from ICSID disputes to be enforced in foreign courts. This constitutes a waiver of immunity from the jurisdiction of the foreign court.<sup>148</sup>

Under international law, it is recognized that a state may waive its immunity from jurisdiction either expressly or by implication.<sup>149</sup> As previously shown, this principle has also been adopted in the United States.<sup>150</sup> Further, United States courts have specifically ruled that an agreement to arbitrate constitutes a waiver of immunity at the selected place of arbitration.<sup>151</sup> This site of arbitration need not even be within the United

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141. Under the Vienna Convention on the Law of Treaties, Article 11 establishes that consent to being bound by a treaty may be expressly subject to ratification. B. WESTON, R. FALK & A. D'AMATO, *BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER* 61–62 (1980). The ICSID Convention calls for both signature and ratification. ICSID CONVENTION arts. 67, 68. However, the member state must further give written consent to be bound in the investment agreement. *Id.* art. 25(1).

142. *Id.* art. 25; see Sutherland, *supra* note 13, at 380–82; McLaughlin, *supra* note 29, at 223; Schmidt, *supra* note 60, at 101–03; Ryans & Baker, *The International Centre for the Settlement of Investment Disputes*, 10 J. WORLD TRADE L. 65, 67 (1976); O'Hare, *The Convention on the Settlement of Investment Disputes*, 6 STAN. J. INT'L STUDIES 146, 149 (1972).

143. ICSID CONVENTION art. 53(1).

144. *Id.* art. 54(1).

145. The Vienna Convention in Article 1(1)(a) defines “treaty” as “an international agreement concluded between States in written form and governed by international law . . .” WESTON, *supra* note 141, at 60.

146. ICSID CONVENTION art. 53(1).

147. Vienna Convention on the Law of Treaties art. 26. WESTON, *supra* note 141, at 65.

148. Delaume, *supra* note 21, at 800.

149. RESTATEMENT OF THE LAW OF FOREIGN RELATIONS § 456(1)(a), at 198 (Tent. Draft No. 2, 1981).

150. 28 U.S.C. § 1605(a)(1) (1976).

151. *MINE v. Guinea*, 693 F.2d 1094, 1100 (D.C. Cir. 1982) *cert. denied*, 104 S. Ct. 71 (1983). *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *Victory Transport, Inc. v. Comisario General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 385 U.S. 931 (1966); see RESTATEMENT OF THE LAW OF FOREIGN RELATIONS 204–05 (Tent. Draft No. 2, 1981).



States if the arbitration is pursuant to an international agreement<sup>152</sup> such as the United Nations Convention for the Recognition and Enforcement of Arbitral Awards.<sup>153</sup>

Consenting to ICSID arbitration, therefore, constitutes a waiver of sovereign immunity as soon as a final award is reached and enforcement is sought. By entering into a binding contract that both parties understand may be ultimately enforced by a foreign court, the country that has agreed to be bound by these terms must have necessarily waived immunity.

Using the hypothetical example of the North African dispute once again, Tunisia signed the contract with the French corporations with full realization that, as a country bound by the Convention, consent to a contract with an ICSID provision was binding and irrevocable.<sup>154</sup> The Government of Tunisia also understood that it had an obligation to comply with the terms of any award arising from a dispute provided by the Centre.<sup>155</sup> This award, under the Convention's regime, would be recognized and enforced by any of the other nations bound by the Convention.<sup>156</sup> Indeed, the courts of the United States and each other member nation are *obligated* by treaty to at least *enforce* binding ICSID awards. Therefore, consent to an ICSID provision is logically a waiver of sovereign immunity to the enforcement of a final award.

Further, United States law clearly recognizes waivers of sovereign immunity to jurisdiction. Tunisia has in essence agreed to have a final judgment of an ICSID award enforced by all Convention states. More importantly, the United States is bound by Article 54 of the ICSID treaty and its implementing statute to enforce such an award.

Even if the American courts insisted that Tunisia's consent was not a waiver, the signing of the Convention by the Executive Branch would take precedence over the Foreign Sovereign Immunities Act. Under the Act, a finding of sovereign immunity is "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act . . ." <sup>157</sup> As the Convention was signed previously to the passage of the Act, its provisions are an exception to sovereign immunity.

Indeed, in this tangled area of international affairs, the Judiciary should always defer to the Executive since it is the latter that has the final say—both

152. *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.D.C. 1980); *Ipitrte International, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 324 (D.D.C. 1978).

153. 21 U.S.T. 2517, T.I.A.S. No. 6997, 30 U.N.T.S. 3, *codified at* 9 U.S.C., § 201 (1976).

154. ICSID CONVENTION art. 25(1).

155. *Id.* art. 53(1).

156. *Id.* art. 54(1).

157. 28 U.S.C. § 1604 (1976).

in international law and under the United States Constitution<sup>158</sup>—on the implementation of foreign policy.<sup>159</sup>

### C. THE EXECUTION OF ICSID JUDGMENTS

While Articles 53 and 54 require the courts of the contracting states to enforce awards certified by the Centre,<sup>160</sup> this is not the end of the legal process. Once sovereign immunity to the jurisdiction against the foreign state is denied and a judgment in favor of the private investor is entered, there is still the question of execution. As in the issue of enforcing ICSID awards, there is no problem under the Convention for a nation to execute a judgment against a foreign investor. The sovereign state need only present a certified ICSID award to the domestic legal system of an ICSID member,<sup>161</sup> obtain a judgment against the corporation,<sup>162</sup> and execute upon the judgment according to the process employed by the domestic court.<sup>163</sup>

The situation is much more complex, however, where a foreign state refuses to comply with an ICSID award. While the United States court is required by the Convention to enter a judgment against the errant sovereign, execution upon this judgment is quite another matter. In other words, even after jurisdiction in a court is obtained and a final judgment is rendered, there is still the possibility that the defendant state could raise sovereign immunity to prevent the execution of the judgment.

Article 55(1) of the Convention provides that: "Nothing in Article 54 [the enforcement of judgments] shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution."<sup>164</sup> Since the drafters of the ICSID treaty could not decide which competing view of execution to adopt, they passed a compromise measure allowing each member state to execute the judgment according to domestic rules of collection law and sovereign immunity.<sup>165</sup> Thus, it is theoretically possible for a foreign state to resist execution in a domestic legal system which strongly adheres to sovereign immunity. In the Convention's twenty-three year history, however, no state has ever raised the defense of sovereign immunity against the execution of an ICSID award.<sup>166</sup> The People's Republic of Congo, which had to be taken before a French court due to her initial lack of compliance with an award, has since

158. U.S. CONST. art. II § 2.

159. *Convention on the Settlement of Investment Disputes: Hearings on H.R. 15785 Before the Subcommittee on Foreign Affairs*, 89th Cong. 2d Sess. 96 (1966) (Statement of Andreas F. Lowenfeld, Deputy Legal Adviser, United States Department of State).

160. ICSID CONVENTION arts. 53, 54.

161. *Id.* at arts. 53(1), 54(1).

162. *Id.* at art. 54(1).

163. *Id.* at art. 54(3).

164. *Id.* at art. 55(1).

165. Interview with Delaume, *supra* note 46.

166. Telephone interview with Georges R. Delaume, Legal Advisor to the Centre for the Settlement of Investment Disputes (Nov. 29, 1983).

paid in full after the court entered an adverse judgment.<sup>167</sup> These defendant states justly fear the elaborate legal, political, financial, and moral deterrents to avoidance of an ICSID award.

### 1. *Hypothetical*

In order to demonstrate the interplay of these deterrents as well as the appropriate role of United States courts, assume that a federal district court has entered a judgment against Tunisia and in favor of the French corporations. If Tunisia attempts to raise the defense of sovereign immunity to block execution, the investors may be able to successfully assert the provision of the Foreign Sovereign Immunities Act allowing for execution upon "commercial" property<sup>168</sup> of a foreign state which has implicitly waived its immunity.<sup>169</sup>

Under this theory, a foreign state which consents to the ICSID framework implicitly waives its right to immunity from execution due to the Article 53 mandate that nations are bound to comply to the terms of an award.<sup>170</sup> Although Article 55 provides that nothing in the enforcement section of the Convention should be construed to repeal a member nation's domestic laws concerning sovereign immunity from execution,<sup>171</sup> it does not lessen a party's treaty commitments. According to Georges R. Delaume, the Senior Legal Adviser for the International Centre for the Settlement of Investment Disputes:

[T]he fact that under the Convention contracting states do not surrender their right to immunity from execution in no way relieves these states from their treaty commitments. Thus, it is clear that if a contracting state party to a dispute pleaded immunity, either in its own courts or in those of another contracting state, in order to frustrate the enforcement of an ICSID award, that state would violate its obligation to comply with the award. Moreover, the state involved would be exposed to various sanctions, which are expressly provided for in the Convention.<sup>172</sup>

The drafters of the Convention included Article 55 merely because they could not reconcile the varying interpretations of sovereign immunity from execution and thought it would be best to let each state decide for itself.<sup>173</sup>

167. News from ICSID, *supra* note 20, at 2.

168. There is, of course, some difficulty in distinguishing "commercial" property from mere investment assets. See *In the Matter of Sedco, Inc.*, 543 F. Supp. 561 (S.D. Texas 1982); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396, 405 (D.N.J. 1979).

169. 28 U.S.C. § 1610(a)(1) (1976). There are also applicable exceptions to sovereign immunity where the property to be executed upon was for the commercial activity upon which the claim is based and where the property was taken by the foreign state in violation of international law. *Id.* §§ 1610(a)(2), (3).

170. ICSID CONVENTION art. 53(1).

171. *Id.* art. 55.

172. Delaume, *supra* note 21, at 801.

173. Farley, *Commentary: The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 5 DUQUESNE L. REV. 19, 28 (1966); Conversation with Delaume, *supra* note 166.

Presumably, the drafters wished that some forms of sovereign immunity from execution should exist, such as a bar to the attachment of embassy property, but could not agree on the precise limiting guidelines. Hence, they left the matter totally up to the jurisdiction where the plaintiff party sought to enforce the ICSID award. It is important to note that nothing in Article 55 creates a right in—or even encourages—the defendant party to raise or retain sovereign immunity. The Convention is *silent* on this issue.

Therefore, reading the treaty as a whole, member states have an obligation to comply with the terms of an award and the enforcing state *must* issue a judgment based on the award. The award is then executed according to the domestic procedures of the enforcing state. Any void created by the silence of Article 55 is filled by the obligation in Article 53 to comply with the ICSID decision.

However, if a defending party such as Tunisia decided to actively fight execution of the judgment by affirmatively exercising sovereign immunity, this must be considered an active attempt to shirk its commitment to be bound by the terms of the award. The refusal to be bound by the judgment places compliance with the award in obvious jeopardy. Thus, Tunisia violates the complied waiver stemming from her obligation to comply with the Convention.

In response to this argument, the sovereign state may argue that its consent to comply with an ICSID award must be read in light of the Convention's provision that a state's right to sovereign immunity from execution remains unaffected. Under this paradoxical line of reasoning, a foreign state's agreement to adhere to the ICSID framework is limited to not include execution. For example, Tunisia may claim an obligation to abide by any award until the point when a plaintiff attempts to collect on this commitment.

Assuming that a court may find some credibility in this hypothetical line of argument, the French corporations might still be able to maneuver around Tunisia's assertion of immunity due to the general erosion of the doctrine of sovereign immunity throughout Western nations.<sup>174</sup> In the case of the United States, statutory law recognizes a broad exception for commercial activities.<sup>175</sup> Therefore, even if Tunisia's consent to ICSID arbitration is not seen as a waiver of immunity from execution because of the silence of Article 55, its commercial assets in America may still be attached if these

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174. Sornarajah, *Problems in Applying the Restrictive Theory of Sovereign Immunity*, 31 INT'L & COMP. L. Q. 661, 661–63 (1982); Delaume, *supra* note 16, ch. 11, at 1; Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 149 HAGUE RECUEIL 114 (1980), *see also*, Broches, *supra* note 20, at 209; G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 103 (5th ed. 1967).

175. 28 U.S.C. § 1610(b)(2) (1976).

properties qualify as "commercial activities" under the statute<sup>176</sup> and the requisite jurisdictional contacts with the United States are fulfilled.<sup>177</sup>

Indeed, as one commentator has pointed out, the execution of an ICSID award does not fall into one of the areas for which the doctrine of sovereign immunity was instituted to protect.<sup>178</sup> The rationale for the doctrine was to ensure that the court did not encroach onto the political and international roles of the Executive.<sup>179</sup> As the purpose of the Convention is to take dispute resolution *out* of politics by establishing a neutral international forum<sup>180</sup> where both the state and the investor can be on an equal footing, there is little danger of an execution of Tunisia's commercial holdings

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176. A "commercial activity" is defined by the Foreign Sovereign Immunities Act as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d)(1976). See *Gemini Shipping, Inc. v. Foreign Trade Org'n*, 647 F.2d 317 (2d Cir. 1981) (activity of Syrian company buying grain from United States constitutes a "commercial activity"); *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982) (joint venture between Irish companies and Americans to manufacture cosmetic containers is a "commercial activity"); *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281 (E.D.Pa. 1981) (Turkish gun manufacturer which imported weapons in United States did engage in a "commercial activity"); *China Nat'l Chemical Import & Export Corp. v. M/V Lago Hualaihue*, 504 F.Supp. 684 (D. Md. 1981) (Chilean ship delivering cargo engaged in a "commercial activity"); *but see East Europe Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383 (S.D.N.Y. 1979) (Romanian trading company's interference with plaintiff's contract to purchase Romanian cement did *not* constitute a "commercial activity"); see also note 168, *supra*. It is possible that the hypothetical Tunisian expropriation of French investment assets may not constitute a "commercial activity" under the Foreign Sovereign Immunities Act. Under this scenario, the hypothetical plaintiffs would have to provide evidence that the Tunisian investments constituted "commercial activities" or take their United States judgment to be executed in another jurisdiction.

177. The Foreign Sovereign Immunities Act provides, in part, that:

The property in the United States of a foreign state . . . used for commercial activity in the United States, shall not be immune from attachment in aid of execution, upon a judgment entered by a court of the United States . . . if . . . the property is or was used for the commercial activity upon which the claim is based . . .

28 U.S.C. § 1610(a)(2)(1976). The concept "commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such state and having *substantial contact* with the United States." *Id.* § 1603(a)(e) (emphasis added). See *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982) ("substantial contacts" with United States exist where substantial contract negotiations occurred in United States or substantial aspects of contract to be performed in America); *but see Verlinden B.V. v. Central Bank of Virginia*, 488 F. Supp. 1284 (S.D.N.Y.), *affirmed* 647 F.2d 320 (2d Cir. 1981), *reversed on other grounds* 103 S. Ct. 1962 (1983) (letter of credit in and of itself does not constitute "substantial contacts" with United States); *Gilson v. Republic of Ireland*, 517 F. Supp. 477 (D.D.C. 1981), *affirmed in part, reversed in part on other grounds*, 682 F.2d 1022 (D.C. Cir. 1982) (communication of Irish agents to American plaintiffs through mail, telephone, and telegraph does not constitute "substantial contacts" with United States). Unless the hypothetical French plaintiffs demonstrate "substantial contacts" existing between their dispute and the United States, the American judgment may have to be executed elsewhere.

178. Coll, *supra* note 43, at 408.

179. *Id.*

180. *Id.*

infringing upon our international relations with that country. Therefore, a waiver of immunity from execution or an attachment of commercial assets would be in the long run interests of all the countries of the world.

## 2. Model Clause

To prevent having to go through all this legal rigamarole in order to execute upon a judgment against a foreign state, many banking institutions lending money to governments are requiring that the borrower accompany an ICSID provision with an express waiver of immunity from execution.<sup>181</sup> A model clause suggested by the Centre reads:

The [name of Contracting State] hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.<sup>182</sup>

Bankers generally use a more simplified version: "The Borrower waives any immunity from which it could claim as a sovereign in the courts in which execution of the [ICSID] award would be sought."<sup>183</sup>

There can be no doubt that such an express waiver of immunity written into the investment contract would satisfy the waiver requirements of the Foreign Sovereign Immunities Act. Investors planning to enforce any ICSID award in the United States courts should take pains to follow the example of bankers in this area. The added clause circumvents the previous confusion and guarantees American adhesion to the Convention.

In the case of the hypothetical French investors who neglected to include an express waiver of immunity in their contract with Tunisia and do not wish to become ensconced in the American doctrine of sovereign immunity, there is still an opportunity to forum shop for other nations with more relaxed sovereign immunity laws. Generally, nations with leading international financial centers are likely to adhere to the restrictive view of sovereign immunity.<sup>184</sup> Aside from the United States, this includes the United Kingdom, Belgium, the Federal Republic of Germany, the Netherlands, and Switzerland.<sup>185</sup> The French investors may examine the different immunity rules of each of these countries and then file their ICSID award in the domestic legal system most favorable to their fact situation.

## 3. Sanctions

Even if Tunisia succeeded in a United States court and the French corporation failed to find a better forum, the Convention contains two

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181. Delaume, *supra* note 29, at 12.

182. ICSID Model Clauses, *supra* note 47, at 15.

183. Delaume, *supra* note 29, at 12.

184. *Id.*

185. *Id.*

express legal sanctions for nations that break their treaty commitments. Article 27 provides for diplomatic protection on behalf of the private investor when the "Contracting State shall have failed to abide by and comply with the award . . ." <sup>186</sup> Thus, the de-politicization of investment disputes and procedural equality between parties that is so key to the purpose of the Convention <sup>187</sup> is lost. Permission for diplomatic intervention on behalf of one's national is revived. <sup>188</sup> A host of diplomatic sanctions may now ensue.

In addition, any dispute over the application of the Convention would also invoke Article 64. Under this provision, the problems created by the defendant nation's exercise of the sovereign immunity defense would be resolved by the International Court of Justice or another mutually satisfactory method of dispute settlement.

Once the ICSID restraints are out of the way, the full range of financial pressures will fall upon the errant nation. In a sense, the adverse publicity may be the strongest remedy operating on behalf of the plaintiff corporations. <sup>189</sup> Other nations and leading financial institutions will shy away from a country which refuses to keep its business commitments. Corporate investors will see the state as being too great a risk. Conceptually, optimum pressure might be placed on the nation by international lending organizations such as the World Bank and the International Financial Corporation.

As a last resort, there is also the danger of political repercussions. The investment dispute-inspired military and covert interventions that have plagued the twentieth century are well known to the leaders of countries desiring foreign capital. These unfortunate incidents of the past should present a final incentive for sovereign states to comply with the execution of an ICSID award.

## V. Conclusion

The Convention is a powerful tool in de-politicizing investment disputes. From the standpoint of the United States, the ICSID framework not only lessens international tension, but provides American corporations with a safer, more stable investment climate with less risk of expropriation or unanticipated burdens. <sup>190</sup> As undeveloped nations will also welcome the increased flow of desperately needed capital stimulated through adherence to the Convention, <sup>191</sup> all parties are left with good relations and growing

186. ICSID CONVENTION art. 27(1).

187. Broches, *supra* note 20 at 208-09.

188. ICSID CONVENTION art. 27.

189. Interview with Delaume, *supra* note 46. Former President Carter has suggested that the presence of ICSID could have vastly aided his Administration in settling claims of American investors against Iran. Remarks of President Jimmy Carter, in Atlanta, Georgia (Apr. 26, 1984).

190. *See supra* note 159.

191. *Id.*

prosperity. In a modern age where the traditional international organizations such as the United Nations and the International Court of Justice have failed to inspire a consistent international regime of dispute resolution, the United States should readily recognize that the Convention affords great promise. And, as Andreas F. Lowenfeld, the Deputy Legal Adviser of the Department of State at the time of the United States ratification of the Convention, once pointed out to a congressional hearing that: "As the country with the greatest amount of international investments, and the greatest stake in the development and wide acceptance of international law standards regarding private property, the United States stands to gain substantially from the Convention."<sup>192</sup>

As a member of the Convention, the United States is bound to enforce the compliance with ICSID awards and hold itself out to the world as a nation that has accepted this commitment under international law.<sup>193</sup> Any signatory to the Convention that voluntarily consents to arbitration in accordance with the ICSID framework fully realizes that it will be held to the resulting obligations by the United States and all of the other ratifiers. Each nation which becomes a full party to the Convention has thus limited its sovereignty, explicitly or implicitly, by binding itself to comply with an award which may eventually be enforced by a foreign court. Where the investor unfortunately failed to gain the foreign state's express waiver of immunity from execution, the United States should consider the initial consent to ICSID as an implied waiver of immunity and allow execution against the state's commercial assets.<sup>194</sup> Strong diplomatic efforts should aid in obtaining the full compliance of the foreign government. In this manner, the United States can both promote controlled dispute resolution as a remedy for world investment tensions and stand firmly behind its commitments under international law.

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192. *Id.* at 7.

193. The Vienna Convention on the Law of Treaties is the principle authoritative source on the law of treaties. HENKIN, et al., *CASES AND MATERIALS ON INTERNATIONAL LAW* 580 (1980). It is printed at 63 A. J. I. L. 875 (1969). Article 26 of the treaty concerns *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed in good faith." *Id.* at 884. While the United States has never formally ratified this treaty, it has been recognized and accepted by the U.S. Department of State. S. EXEC. DOC. L. 92d Cong. 1st Sess. 1 (1971).

194. This, of course, assumes that the plaintiff has established that defendant's actions constitute "commercial activities" under the Foreign Sovereign Immunities Act and that there is a sufficient nexus between these commercial activities and the United States. See notes 168, 169, 176, 177, *supra*.