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Vincent O. Nmehielle

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ENFORCING ARBITRATION AWARDS UNDER THE INTERNATIONAL CONVENTION FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID CONVENTION)

VINCENT O. ORLU NMEHIELLE*

I. INTRODUCTION

In the world of international economic relations, disputes are bound to arise which require settlement mechanisms to ensure their effective resolution. Such dispute settlement mechanisms will ordinarily entail the assumption of obligations by both parties, or by one party to protect the interest of the other. This assumption of obligations should translate into positive actions of compliance with the measures inherent in the dispute resolution mechanism. It has been observed that one should be wary of the man who urges an action in which he himself incurs no risk.¹

Arbitration is one mode of dispute resolution that has become immensely popular in international economic dispute resolution among players in the international economic arena, because it is different from domestic

* Lecturer, Faculty of Law, Rivers State University of Science & Technology (RSUST), Port Harcourt, Nigeria. Doctor of Juridical Science (S.J.D.) The George Washington University Law School, Washington, D.C., USA, 2000; LL.M. University of Notre Dame Law School, USA, 1996; LL. B. RSUST, Port Harcourt, Nigeria, 1989; B.L., Nigeria, 1990; The author wishes to thank Dr. Stanimir A. Alexandrov, Adjunct Professor, International Business Transactions Seminar, The George Washington University Law School for his useful comments and correction of the earlier draft of this paper.

1. Giovachino Setani, *Centellas de Varios Conceptos* cited in David A. Lopina, *The International Center for the Settlement of Investment Disputes: Investment Arbitration for the 1990s*, 4 OHIO ST. J. ON DISP. RESOL. 107 (1988).

judicial adjudication, and due to the sensitive jurisdictional implications arising from the supremacy of competing legal systems. One such area in which arbitration has assumed great importance is in the settlement of investment disputes, especially between private investors and host states.

The importance that the international community attaches to this sector of international economic relations has led to the promulgation of the International Convention for the Settlement of Investment Disputes ("ICSID Convention" or "the Convention")² under the aegis of the World Bank, to cover the settlement of investment disputes between investors and host states. The ICSID Convention, in turn, established the International Center for the Settlement of Investment Dispute ("the Center") which implements the provisions of the ICSID Convention.

One area of the dispute resolution mechanism under the ICSID Convention that attracts academic comment is the enforcement of ICSID arbitral awards under article 54 of the Convention. The question is often raised whether the provisions of the Convention promote effective enforcement of ICSID arbitral awards. This is due to the place accorded domestic law in resolving questions of sovereign immunity in the enforcement of arbitral awards and other issues that seem to impinge on the effective enforcement of ICSID awards.

This article addresses the broad question of enforcement of ICSID arbitral awards under the Convention, with the goal of analyzing the attendant issues. The article is divided into four parts. Part Two deals with background issues such as the purpose of ICSID as envisaged by the ICSID Convention and the composition of the ICSID. Part Three analyzes the ICSID arbitral process and discusses the ICSID's jurisdiction and the constitution of its arbitral panel. Part Four, the main section, discusses the recognition and enforcement of awards. This section will analyze the various steps of enforcement: recognition, enforcement itself, and execution of awards that have been adjudged enforceable. The article will examine the jurisprudence that has been developed in some ICSID cases before domestic courts of member states to the ICSID Convention. Part Four also discusses the practical effects of these cases and analyzes the impact of the annulment provision and process under the Convention on the ICSID mechanism.

2. March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

II. BACKGROUND

A. THE PURPOSE OF ICSID

As the international financial institution that provides loans for production and development purposes to its member countries, the World Bank upholds international investment. The World Bank's founders believed that the principal function of the institution would be to encourage international investment by private investors.³ The World Bank thus champions the ICSID Convention's goals of advancing international cooperation for economic development in developing countries through private investment and promotion of mutual confidence between governments of developing countries and foreign investors.⁴

According to Ibrahim Shihata, immediate past Vice President and General Counsel of the World Bank and Secretary-General of the ICSID, the primary objective of the ICSID is to promote a climate of mutual confidence between investors and states so as to increase the flow of resources to developing countries under reasonable conditions.⁵ It is therefore expected that like the World Bank, the ICSID must be regarded as an instrument of international policy for promoting investment and economic development.⁶

The key purpose in establishing ICSID was to assure foreign investors of protection under international law from unilateral actions of host countries which could jeopardize their investments. At the same time, host countries of foreign investments are assured a neutral dispute resolution mechanism that shields them from the economic manipulations of developed countries.⁷ The ICSID thus provides a level playing field for host countries and foreign investors alike. This balance is created by both the ICSID Convention and the ICSID Rules of

3. See Ibrahim F. Shihata, *The Settlement of Dispute Regarding Foreign Investment: The Role of the World Bank, With Particular Reference to ICSID and MIGA*, 1 AM. U.J. INT'L. & POL'Y 97 (1986).

4. See Christopher M. Koa, *The International Bank for Reconstruction and Development and Dispute Resolution: Conciliation and Arbitration with China through the International Center for the Settlement of Investment Disputes*, 24 N.Y.U. J. INT'L L. & POL. 439, 445 (1991).

5. See Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. – F.I.L.J. 1, 4 (1986).

6. *Id.*

7. Ordinarily, developing countries may not readily submit to arbitration with non-state entities in international fora commonly used by private parties because of the perceived unequal status of states and non-states and because of the potential compromises in sovereign dignity involved in acceding to arbitration.

Arbitration. While the Convention gives private investors access to an international forum, the Rules assure them that the absence of a state party to the dispute or its refusal to participate in proceedings after it has consented to ICSID arbitration cannot frustrate the arbitral process.⁸

On the other hand, the ICSID Convention provides that a contracting state may, as a condition of its consent to ICSID arbitration, require prior exhaustion of domestic remedies.⁹ This condition may be stipulated in the investment agreement, in a bilateral treaty between the host country and the investor's country, or in a declaration made by a contracting state at the time of signature or ratification of the ICSID Convention.¹⁰ Further, Article 42(1) of the ICSID Convention expressly provides that unless the parties have specifically agreed otherwise, the arbitral tribunal must decide a dispute in accordance with the law of the host state, along with such rules of international law as may be applicable.

The report of the executive directors of the World Bank¹¹ recognizes that when a host state consents to the submission of a dispute with an investor to ICSID, thereby giving the investor direct access to international jurisdiction, the investor should not be in a position to ask its state to espouse its cause.¹² This provision eliminates the use of diplomatic protection by the investor's state, or the institution of an international claim, unless the host state fails to comply with the award rendered in the dispute. This position also strengthens an implied objective of the ICSID Convention: the depoliticization of investment disputes to enhance the larger goal of promoting an atmosphere of mutual confidence between states and foreign investors, favorable to increasing the flow of resources to developing countries.

While the main purpose of the ICSID Convention is to level the playing field for private investors in international investment dispute settlements, the enforcement of awards arising under the Convention does not follow the same rules. As will be discussed in more detail in Part Four of this article, the ICSID Convention allows the politics of national sovereignty to affect enforcement. That, in the opinion of this author, stands out as politicization of the supposedly level playing field.

8. Art. 45 of the ICSID Convention. See also Rule 42 of ICSID Rules.

9. Art. 26.

10. See Shihata, *supra* note 3, at 102.

11. REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, 4 I.L.M. 524 (1965).

12. See art. 27 of the ICSID Convention.

B. COMPOSITION OF THE ICSID

The ICSID is composed of an Administrative Council, a Secretariat, a Panel of Arbitrators, and a Panel of Conciliators.¹³ Each member of the Administrative Council represents a contracting member state to the Convention and a Chairman.¹⁴ The Administrative Council is therefore the governing body of the ICSID and has a wide range of powers and functions¹⁵ bestowed upon it by the ICSID Convention. As government representatives, members of the Administrative Council receive no remuneration from ICSID.¹⁶

The Secretariat consists of the Secretary-General, one or more Deputy Secretaries-General, and other staff.¹⁷ The Secretary-General and the Deputy Secretary-General are elected by the Administrative Council on the nomination of the Chairman after due consultation with the Council. The Secretariat is the principal administrative organ of the ICSID, with the Secretary-General performing the functions of Registrar and having the power to authenticate arbitral awards rendered pursuant to the provisions of the Convention.

The offices of Secretary-General and Deputy Secretary-General are purely non-political. The panels are composed of arbitrators or conciliators nominated by either a contracting state or the Chairman of the Administrative Council.¹⁸ Members of the panels must be persons of high moral character with recognized competence in the fields of law, commerce, industry, or finance, the general requirements of persons occupying positions in international adjudicating or quasi-adjudicating bodies.

The composition of the ICSID reflects the importance of contracting states and therefore places them at the top of decision-making under the ICSID Convention. As members of the Administrative Council, states adopt rules of procedure for the institution of conciliation and arbitration proceedings, as well as for conciliation and arbitration processes. The

13. Art. 3 of the ICSID Convention.

14. The President of the World Bank is the *ex officio* chairman of the council. See art. 5 of the ICSID Convention.

15. See art. 6 of the ICSID Convention on the powers and functions of the Administrative Council.

16. See art. 8 of the ICSID Convention.

17. See generally arts. 9 to 11 of the ICSID Convention on composition and functions of the Secretariat.

18. By virtue of art. 13(1) and (2) of the ICSID Convention, a contracting state may designate to each panel four persons who need not be its nationals, while the Chairman may designate up to ten persons to each panel.

involvement of contracting states in fashioning these rules is an indication of the seriousness of the ICSID scheme as a self-contained dispute settlement mechanism which should promote effective enforcement of awards arising under the ICSID arbitration process.

III. THE ICSID'S ARBITRATION PROCESS

A. JURISDICTION

Article 25(1) of the ICSID Convention provides for the jurisdiction of the ICSID. According to that article:

The jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State, which the parties to the dispute in writing consent to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally.

Thus, for the ICSID to be vested with jurisdiction, a case must first involve a legal dispute arising out of an investment. Second, the dispute must be between a contracting state or its authorized constituent subdivision or agency, and a national of another contracting state. Third, the parties must have consented in writing to bring their dispute to the ICSID, and such consent may not be unilaterally withdrawn.

Some concepts in Article 25(1) require further clarification. For example, the term "investment" was not defined by the ICSID Convention. This was not an oversight, but a deliberate attempt by the drafters of the Convention to have a wider and more flexible interpretation covering major international business transactions rather than just trade in the traditional sense. Thus, the term tends to include joint ventures, among other traditional investment projects. It might also encompass capital contributions, loans, "associations between States and foreign investors, such as profit sharing, service and management contracts, turn-key contracts, international leasing arrangements and agreements for the transfer of know-how and technology."¹⁹

Article 25(2) defines a "national" of another contracting state as follows:

19. GEORGE DELAUME, LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS, 351, 353 (1988) cited in Koa, *supra* note 4, at 452.

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State Party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Realizing the practical situation in many developing countries, Article 25(2) provides a mechanism for investors to gain access to the ICSID. This is so even when a local company, as subsidiary of a foreign investor through whom the foreign investor must channel all investments based on domestic law and regulations, is the appropriate party to the dispute. The fact that a local company may be under foreign control, despite its incorporation under the domestic law of the contracting state, may make it a national of a contacting state for purposes of the ICSID Convention. Whether an investor should be treated as a national of a contracting state based on foreign control must be decided based on circumstances, despite the provision that treating an investor as such requires agreement of the parties to the particular contract. This agreement need not be in writing. The conduct of the parties may suffice to prove such agreement.²⁰

A further requirement is that consent to the jurisdiction of the ICSID excludes all other remedies²¹ and may not be unilaterally withdrawn.²² This requirement emphasizes and consolidates the mutuality of the binding consent which is the cornerstone of ICSID jurisdiction,

20. *See generally*, Liberia E. Timber Corp. (letco) v. Government of Liberia, ICSID ARBITRATION n.31 (1986), 26 I.L.M. 647 (1987), 13 COMMERCIAL ARBITRATION YEARBOOK 35, 37-41 (1988).

21. *See* art. 26 of the ICSID Convention.

22. *Agip v. Popular Republic of Congo*, ICSID CASE NO. ARB/77/1, 21 I.L.M 726 (1982).

especially where a contracting state does not subject its consent to the exhaustion of local administrative or judicial remedies. It does not matter if such a party seeks provisional measures; it must seek such measures through the ICSID tribunal.²³

It should be reiterated that in the various jurisdictional bases of the ICSID under the Convention, the drafters of the Convention displayed the need to balance the playing field between developing countries and foreign investors. Developing countries have ample opportunities within the jurisdiction provisions to enter into investment contracts with all legal precautions. On the other hand, investors are assured that entering into such contracts will guarantee them access to the ICSID without fear that the contracting host state may not have been serious. This could be contrary to the spirit of the ICSID Convention. The enforcement provisions, however, do not seem to implement this spirit of the Convention in a practical way.

B. INITIATING ARBITRATION

The procedure for initiating an ICSID arbitration begins with a request by either the contracting state or the foreign national party to the dispute.²⁴ The Secretary-General then registers the request, unless there is reason to believe that the dispute in question is manifestly outside the jurisdiction of the Center, in which case he will refuse to register the dispute.²⁵ If the request is registered, the Arbitration Panel or Tribunal is constituted in accordance with the agreement of the parties. Where there is no such agreement, the Tribunal is comprised of three arbitrators, one appointed by each party and the third, the President of the Tribunal, is appointed by the mutual agreement of the parties.²⁶ If the parties cannot agree on the appointment of any of the arbitrators, the Chairman of the Administrative Council may appoint the remaining arbitrators after consultation with the parties.²⁷

The arbitration proceedings are conducted in accordance with the Convention and the Arbitration Rules unless the parties to the dispute opt out of the rules. The rules cover such issues as cross-examination of witnesses, evidence, and the language in which the proceeding is to be

23. See *Guinea and Soguipeche v. Atlantic Triton Co.*, 24 I.L.M. 340 (Rennes Ct. App. 1984).

24. Art. 36 of the ICSID Convention.

25. Art. 36 (3) of the ICSID Convention.

26. Art. 37 of the ICSID Convention.

27. Art. 38 of the ICSID Convention.

conducted.²⁸ The parties can also select the substantive law the Tribunal will apply.²⁹ The Convention allows the law of the host state party to apply if the parties do not provide for any substantive law, with the requirement that the host state's law comply with applicable rules of international law.³⁰

Since Article 26 of the Convention excludes reliance on any other remedy once the parties consent to ICSID arbitration, a party to a dispute subject to the ICSID's jurisdiction must rule out the possibility of using any other forum. Unless the Tribunal declines jurisdiction, the proceedings must continue in accordance with the Convention and the Center's Rule of Arbitration where applicable until the Tribunal arrives at an award. Once rendered, an award becomes binding on the parties, and may be recognized in the courts of any contracting state as if it were a "final judgment of a court in that State."³¹

The ICSID arbitration process gives the parties complete autonomy in choosing how the dispute between them should be settled. It is only when the parties fail to exercise this autonomy that the machinery of the Center is enlisted. Awards are thus enforced without major obstacles, except where there is manifest fraud or gross illegality.

IV. RECOGNITION AND ENFORCEMENT OF AWARDS

The effectiveness of international arbitration ultimately depends on whether the arbitral award can be enforced against the losing party.³² Enforcement does not necessarily mean that there must be court action before the arbitral award is complied with. To the contrary, most arbitral awards are complied with in a large number of cases, probably due mostly to the fact that effective international measures are usually available to the winning party.³³ As under the New York Convention,³⁴ the processes leading to enforcement of arbitral awards under the ICSID Convention are referred to as recognition and enforcement.³⁵ The ICSID

28. See ICSID Rules 35(1) and Rules 33 - 34.

29. Art. 42(1) of the ICSID Convention.

30. *Id.*

31. Arts. 53(1) and 54(1) of the ICSID Convention.

32. Van den Berg, *Some Recent Problems in the Practice of Enforcement Under the New York and ICSID Conventions*, 2 ICSID REV. 439 (1987), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW*, 389-394 (1995).

33. CARTER ET AL., *supra* note 32, at 390.

34. NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 21 U.S.T. 215 (1970).

35. See arts. IV of the New York Convention and 54(1) and (2) of the ICSID Convention.

Convention, however, goes further by making execution a distinct aspect of enforcement.³⁶ The interplay of the ICSID arbitral award enforcement concepts under the ICSID Convention will be analyzed below.

A. RECOGNITION OF ENFORCEMENT

According to Article 54(1) of the ICSID Convention:

[E]ach contracting State shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgement of a court in that state. A Contracting State with a federal constitution may enforce such award, as if it were a final judgment of a court of a constituent state.

Article 54(2), on the other hand, prescribes the procedural paperwork that a party seeking recognition or enforcement must do in the territories of a contracting state in order to satisfy the obligations of such states under Article 54(1).³⁷

The problem with the enforcement of an ICSID award does not have to do with recognition of the award or with whether contracting states dispute its enforceability. Contracting states realize the obligations placed on them under Article 54 of the ICSID Convention to recognize and ensure the enforcement of awards. The concern is that recognizing an ICSID award alone does not solve the problem of outright enforcement. According to Delaume,³⁸ despite the fact that the procedure for recognition and enforcement of ICSID awards is made as simple and effective as possible, a holder of a recognized ICSID award has only an executory title, especially if the losing party is the state party to the dispute. While the award may readily be enforced against an investor or its assets, the situation may be different if enforcement is sought against the state party to the dispute.

The reason for this disparity in enforcing an ICSID arbitral award is that the ICSID Convention does not alter or supersede the rules of immunity from execution against a state which fails to comply with an ICSID

36. Art. 54(3) of the ICSID Convention.

37. The party seeking recognition and enforcement of an ICSID arbitral award will have to furnish a competent court in the territory of a contracting state designated for that purpose a copy of the award duly certified by the Secretary-General.

38. George Delaume, *ICSID Arbitration*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 23-4 (J. LEW, ed. 1987).

award.³⁹ The effectiveness of measures of execution against a state depends, therefore, upon the immunity rules prevailing in the country in which execution is sought.⁴⁰ The issue of immunity in the execution of an ICSID award will be discussed in the following subsection. Suffice it to say for now that the ICSID Convention creates a loophole in the interest of state parties to the Convention over and above the interest of investors, and endorses inequality of parties in a dispute submitted to the ICSID.

B. EXECUTION OF AWARDS

As noted above, the holder of a recognized ICSID award has an executory title, especially if the losing party is a state party to the dispute, mainly because of the doctrine of immunity from execution. Article 54(3) of the ICSID Convention adds that “execution of the award shall be governed by the laws concerning the execution of judgments in the state in whose territories such execution is sought.” This provision is emphasized by Article 55 to the effect that nothing in the Convention can be construed as departing from the law in force in any contracting state relating to immunity from execution of that state or of any foreign state. The purpose of the above provisions is that execution of an ICSID arbitral award is subject to the domestic law of the state where the award is sought to be enforced, and that no exception should be made regarding the domestic law by virtue of the Convention, other than as provided by domestic law.

The jurisprudence arising from ICSID awards tends to differentiate between immunity from enforcement and immunity from execution. In *Liberian Eastern Timber Co. v. Government of Liberia (Letco v. Liberia)*,⁴¹ the United States District Courts for the Southern District of New York and the District of Columbia recognized for the first time an arbitral award rendered against Liberia by ICSID. The award in issue involved an attempt to recover damages for breach of a 1970 concession agreement with Liberia. Under the agreement, the Liberian Eastern Timber Corporation (LETCO) was granted a concession to harvest more than 40,000 acres of Liberian timber. In 1980, Liberia cut back the concession area by 279,000 acres, alleging contract violations by

39. *Id.*

40. *Id.*

41. *Liberian Eastern Timber Co. v. Government of Liberia (Letco v. Liberia)*, 650 F.Supp. 73 (S.D.N.Y. 1986), reported in 2 ICSID REV.-FILJ 188 (1987). See also Anne Joyce, *Arbitration: United States Court Recognition of ICSID Arbitral Award - Liberian Eastern Timber Corp. v. Republic of Liberia*, 29 HARV. INT'L L.J. 135 (1988).

LETCO and later terminating the concession altogether. LETCO initiated arbitration proceedings under the ICSID Convention, as provided in the concession agreement. The arbitration panel heard the matter despite Liberia's refusal to participate, and ultimately awarded LETCO \$8,739,280 plus interest. On seeking enforcement, LETCO was given judgement *ex parte* by the District Court as provided under the ICSID Convention, and a writ of execution issued to the United States Marshal for the Southern District of New York. LETCO's move to execute the judgement was denied on the basis of immunity from execution.

The same distinction was made by the French courts in *Soabi v. Senegal*⁴², which involved an ICSID award in favor of Soabi company in a dispute arising from termination by Senegal of agreements relating to a project for construction of low-income housing in the capital, Dakar. Soabi sought recognition of the award in France. Recognition was granted by the President of the *Tribunal de grande instance* (the court of first instance) of Paris in an unpublished decision.⁴³ On appeal, the Court of Appeal of Paris, disregarding its earlier decision in a previous case,⁴⁴ vacated the recognition order. The Court of Appeal reasoned that since Soabi had not proved the commercial nature of the Senegalese assets that might be subject to execution following recognition, not to hold that recognition should be denied violated Senegal's immunity from execution. The Court of Cassation (Supreme Court) amended the erroneous decision of the Court of Appeal, holding that the decision of the Court of Appeal violated the provisions of the ICSID Convention. The Supreme Court reaffirmed as a matter of French law that "a foreign State which has consented to arbitration has thereby agreed that the award may be granted recognition, which does not constitute a measure of execution that might raise issues pertaining to the immunity of the state concerned."⁴⁵ In other words, the Supreme Court maintained that

42. *Soabi v. Senegal*, 30 ILM 1167 (1991).

43. See Georges R. Delaume et al., *France - Recognition of ICSID Awards - Sovereign Immunity: SOABI (Seutin) v. Senegal*, 86 AM. J. INT'L L. 138, 140 (1992).

44. *Benvenuti & Bonfant Co. v. Government of the People's Republic of Congo*, translated in 20 I.L.M. 877 (CA Paris 1981). Here the Court of Appeal acknowledged that the provisions of the ICSID Convention restrict the function of the court designated for the purposes of the Convention by each contracting state to ascertain the authenticity of the award certified by the Secretary-General. In other words, it is not the function of the court so designated to attach a different meaning to the recognition procedure under the Convention.

45. See Delaume et al., *supra* note 43, at 141.

consent to arbitration by a state constitutes an implicit waiver of immunity from suit, but has no bearing on immunity from execution.⁴⁶

Having maintained that recognition of arbitral awards as an enforcement measure differs from execution, and is thus not subject to sovereign immunity, the courts went further to examine the question of immunity from execution. In the LETCO case,⁴⁷ LETCO sought to execute its judgment against tonnage and registration fees collected in the United States from shipowners flying the Liberian flag. Liberia claimed immunity from execution under the principle of sovereign immunity as codified in the United States Foreign Sovereign Immunities Act⁴⁸ (“FSIA”), because the fees were designed to raise revenue for the Republic of Liberia. For LETCO, the shipowners’ fees arose from commercial activity, and were therefore not immune from attachment or execution under the FSIA. Liberia, on the other hand, argued that because the property under consideration was Liberian tax revenue, its collection should be viewed as sovereign and not commercial in nature.⁴⁹

The United States District Court in New York agreed with Liberia and blocked execution of the shipowners’ fees, relying on Article 55 of the ICSID Convention, which surrenders to domestic law all determinations of sovereign immunity with respect to execution of judgment. An attempt by LETCO to attach “any credits other than wages, salary, commissions or pensions”⁵⁰ in banks where accounts were held by the Liberian Embassy was quashed by the District Court for the District of Columbia. The court found, *inter alia*, that the bank accounts were immune from attachment under the Vienna Convention on Diplomatic Relations,⁵¹ which requires host states to accord each foreign state full facilities for performance of the functions of that state’s mission.⁵² The court also held that the accounts were likewise immune from attachment

46. *Id.* Also, the court, in LETCO agreed with LETCO that Liberia had implicitly waived its immunity to jurisdiction in a United States court when it signed the concession contract. The court cited in particular article 54 of the ICSID Convention, which requires contracting states to enforce ICSID awards. Liberia’s accession to both the ICSID Convention and the arbitration provisions of the concession agreement led the court to conclude that Liberia had clearly contemplated the involvement of the United States courts in enforcement of the process.

47. *Letco v. Liberia*, *supra* note 41, at 137.

48. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(2) - (4), 1391(f), 1441(d), 1602 - 1611 (1976).

49. *See Joyce*, *supra* note 41, at 138.

50. *Id.*

51. Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

52. *Id.* art. 25.

under the FSIA as they did not meet the requirements of the commercial activity exception.

As seen in the LETCO case, American courts tend to favor the doctrine of immunity and thus would not enforce a recognized ICSID award that does not clearly fall under the commercial activity exception of the FSIA. French courts, on the other hand, have limited their examination of the immunity doctrine to the recognition stage of awards, which they have exhaustively held inapplicable when a state has consented to ICSID arbitration by virtue of ratifying or acceding to the ICSID Convention and entered into an agreement providing for ICSID arbitration. Thus, the question of immunity from execution should not be considered until after an award is recognized and funds have been attached to satisfy the award.⁵³

This position of the French courts has been read by some scholars to be a restrictive application of the immunity doctrine that should ensure the smooth enforcement of future ICSID awards.⁵⁴ This reasoning flows from decisions of French courts in other matters of a commercial arbitration, which, though not ICSID awards, have implied that where it is established that funds sought to be attached are earmarked for commercial purposes, the doctrine of immunity from execution may not apply.⁵⁵

For this author, there seems to be no difference between the French and American positions. If the French courts recognize a waiver of immunity where the activity in question is of commercial nature, that only accords with the exception under the American FSIA. The problem still remains that execution of ICSID awards is greatly hampered by domestic law principles of sovereign immunity.

These cases demonstrate the distinction between immunity from jurisdiction and immunity from execution. Thus, enforcement of an award against a state falls under immunity from jurisdiction, while immunity from execution comes into play when actual execution measures are sought.⁵⁶ While it may be said that theories of restricted immunity and waiver of immunity are now well-accepted in many

53. Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 184 (1995-96).

54. *Id.*

55. *See* *Republique Islamic d'Iran v. Societe EURODIF*, REV. ARBITRAGE 204 (1982), 110 J. DROIT INT'L 145 (CA Paris 1982).

56. *See* Van den Berg, *supra* note 32, at 392.

countries with respect to jurisdiction, actual execution of recognized ICSID still suffers from application of the absolute immunity doctrine.⁵⁷ This author believes it is preposterous that a private party, after having put all efforts into arbitration against a state and obtaining judgment or leave to enforce an award, finds himself (or itself) unable to collect money to which that party is entitled.⁵⁸

One will agree with the arguments of *Van den Berg*⁵⁹ that it is illogical that in matters of arbitration, a waiver of immunity is accepted with respect to jurisdiction leading to enforcement but not with respect to execution. If a state agrees to arbitration, it must be deemed to have accepted all its consequences, including compliance with an unfavorable award.⁶⁰ Failure to carry out the award must mean that the assets of the state party to the dispute, like those of a private party, are capable of being attached and lead to full execution of the award. It follows that if the defense of immunity from recognition and enforcement is not available to a state, that should imply a waiver of immunity from execution, as anything to the contrary would defeat the internationally acclaimed principle of law of *pacta sunt servanda*.⁶¹

There is no doubt that the reasons for the absolute immunity doctrine in execution of ICSID awards are both political and economic. Execution is commonly thought to be a severe interference with the rights of a state. On the other hand, a generous interpretation against immunity from execution could result in foreign states refraining from investing in countries in which their property and other assets could be subject to execution.⁶² The point, however, remains that a strict application of the doctrine of absolute immunity from execution leaves a sour taste in the mouth of justice. It means that a state may very well enter an agreement without intending to be bound at the outset while representing to the other party that it does intend to be bound. A person who benefits from a transaction should not be heard to say that he or she cannot be proceeded against to enforce the requirement of the benefit.

It is true that Article 54(3) of the ICSID Convention contains open-ended language surrendering measures of execution to domestic rules of immunity, thus providing courts with little explicit guidance on how to

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

approach execution of an ICSID award. It is also true that it would be difficult to amend the Convention to expressly waive immunity from execution, since the drafters were unable to agree as to the meaning and scope of immunity from execution, both in its domestic and international aspects. Nevertheless, the solution lies with domestic courts, which must develop doctrines of immunity that will meet the object and purpose of the ICSID Convention when the situation arises. A combined reading of Articles 54(3) and Article 55 could be interpreted to mean that recognition of an ICSID award gives the holder a valid title, on which basis measures of execution can be taken, provided, however, that where such measures are directed at the assets of a state, execution is possible under the law of the contracting state in which execution is sought.⁶³ This interpretation, if accepted, carries a further implication that an ICSID award will be subject to different interpretations in contracting states, as in the case of other arbitral awards.⁶⁴

The function of domestic courts in giving meaning to the ICSID Convention cannot be overemphasized. Domestic courts need to realize that international law cannot be developed in a vacuum. It takes a willingness on their part. One cannot help but recall the LETCO case. The spirit of the ICSID Convention, combined with the previous judicial interpretation of the FSIA, suggests that United States courts have taken an overly restrictive approach to the problem posed in that case.⁶⁵ Looking back to the goals that prompted the ICSID Convention, it is clear that the drafters of the Convention intended to create an international mechanism to promote the free flow of investment resources from one country to another. This purpose is reflected in several provisions of the Convention which tend to promote the autonomy of the arbitration mechanism and the easy enforceability of ICSID awards.⁶⁶ Thus, even though a narrow application of the United States' sovereign immunity doctrine is technically permissible under the ICSID Convention, it hardly seems consistent with the expansive language articulated in the exception provisions of the FSIA.⁶⁷

Previous case law, particularly that construing the commercial activity exception of the FISA, suggests that a less conservative approach might well have suited the LETCO case. The District of Columbia Court cited

63. Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 800 (1983).

64. *Id.*

65. See Joyce, *supra* note 41, at 140.

66. *Id.* at 141.

67. *Id.*

two decisions⁶⁸ which explicitly adopt a broader view, but refused to distinguish them. One of them, *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*⁶⁹ had similar facts to the LETCO case. The dispute involved an attempt to execute an arbitral, though not an ICSID award, against a bank account held by the Tanzanian Embassy in Washington, D.C. As in LETCO, the account was used for different purposes, one of which was commercial. The court concluded that the funds could be segregated and that attachment was therefore permissible. The LETCO court, without explanation, declined to follow this highly relevant precedent, concluding that “the concept of commercial activity should be defined narrowly because sovereign immunity remained the rule rather than the exception.”⁷⁰ The LETCO decision was thus a missed opportunity for scholars of the ICSID mechanism that could have set the stage for full realization of the object and purpose of the ICSID Convention. The decisions of French courts are no different.

One wonders whether the LETCO line of cases would have been decided the same way today considering the steps taken by the United States to amend the FSIA⁷¹ to enhance arbitration as a means of resolving international commercial disputes between private parties and governments and their agencies.⁷² Added section 1605(a)(6) provides that a foreign state is not immune from jurisdiction of U.S. courts in any case:

In which the action is brought, either to enforce an agreement made by the foreign State with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such agreement to arbitrate, if (A) the arbitration takes place in the United States, (B) the agreement or award is or may be

68. *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C.Cir. 1987); *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F.Supp. 311 (D.D.C. 1980).

69. *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F.Supp. 311 (D.D.C. 1980).

70. *Letco v. Liberia*, *supra* note 41, at 610.

71. Section 4(b) & 4(c) of Public Law 100-669, effective November 18, 1988 amended the Federal Sovereign Immunities Act (1976) with regard to sovereign immunities relating to jurisdiction and execution of arbitral awards in the United States, in particular, sections 1605(a)(6) & 1610(a)(6) have been added.

72. *See* AMERICAN ARBITRATION ASSOCIATION, *ARBITRATION AND THE LAW: AAA GENERAL COUNSEL'S ANNUAL REPORT* in W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* 1296 (1997).

governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim save for the agreement to arbitrate, could have been brought in a United States court under section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

That portion of the amendment deals only with the issue of immunity from jurisdiction. This article has shown that the issue of immunity from jurisdiction as a separate step in the immunity argument has been held not to avail a sovereign state party to an arbitration agreement. The amendment eliminates the defense usually brought by sovereign states by codifying the unavailability of that defense. Item B of the amendment is an indication that the defense of immunity from jurisdiction will not be available to a state that has agreed to ICSID arbitration since the ICSID Convention is a "treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards."

The amendment includes section 1610(a)(6), which provides a new exception to the immunity from execution defense of states. According to that paragraph, property of a foreign state used for commercial activity in the United States shall not be immune from execution if "the judgment is based on an order confirming an arbitral award rendered against a foreign State, provided that attachment in aid of execution, or execution would not be inconsistent with any provision in the arbitral agreement." This amendment gives a new flavor to the already existing commercial activity exception of the FSIA. Previously, judgment could only be executed against the same commercial activity on which the claim was based. Under the new amendment, this requirement is no longer applicable.⁷³ An award creditor can attach whatever property belongs to the award debtor state, whether or not the property in question relates to the claim.

How this amendment will play out in ICSID arbitration cases remains to be seen. In this author's opinion, an award creditor must still be able to establish an overriding commercial activity exception under the FSIA in order to benefit from the amendment. Thus, domestic courts must still interpret commercial activity, and the question of whether courts will interpret it to bring a given asset of the award debtor state within the purview of the amendment still requires an answer. It would be fortunate

73. *Id.* at 1297.

if decisions on ICSID awards could draw from the more liberal interpretations of immunity from execution made in many commercial arbitrations to which states are parties.

C. POSSIBLE REMEDIES FOR THE IMMUNITY PROBLEM

There remains the need to avoid the unpredictable situation of an investment agreement gone sour that may mature into ICSID arbitration and require enforcement and execution, or that may have been arbitrated, resulting in a recognized but unexecuted award. There appears to be no uniform interpretation of the sovereign immunity doctrine in the domain of the domestic law of member states to the ICSID Convention. There are two possible ways to remedy this situation.

1. Waiver of Immunity

From the time of entering into an investment contract, an investor should properly address the possibility of waiving immunity from execution. At present, unfortunately, the attorney of a private investor has no choice but to insist on including a clause explicitly waiving immunity from execution in a contract with a state. Waiver of immunity is controversial, and thus will depend on who has greater bargaining power. Where the private party is in a stronger position, it is likely that the state party will succumb to the pressure of waiving immunity from execution. Whether the private party is in a stronger position depends upon the kind of investment contemplated.⁷⁴ Experience has shown that though waivers of immunity in economic development agreements vary from case to case, waivers of immunity are commonplace in transnational loan agreements. Lenders almost never fail to see that borrowing states or other public entities waive immunities from jurisdiction and enforcement, whether before or after recovery of judgment.⁷⁵ It can be expected that as long as the relevant provision is clearly worded and does not lend itself to restrictive interpretation, or border on other considerations impacting the act of state doctrine, there is reason to have confidence in the merits of such waivers.⁷⁶ Recognizing the Convention's shortcomings regarding execution of its awards, the ICSID recommends the following model clause for the purpose of waiving immunity:

74. See Choi, *supra* note 53, at 214.

75. Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319, 344.

76. *Id.*

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 immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.⁷⁷

There is no doubt that waiver of immunity will be a difficult issue in the negotiation of any investment agreement with state parties to the contract, one which most states will vehemently oppose. The real issue boils down to the bargaining power of the investor, which depends on the attendant need of the state party with regard to the investment contemplated. It has been suggested that waivers of immunity outside the financial field are relatively rare.⁷⁸ While private parties engaged in giving loans to states may be in a better bargaining position to demand a waiver of immunity, other aspects of investments may require such waivers, especially if the parties proceed under the ICSID Convention. It is not uncommon to see certain economic development agreements contain a waiver of immunity clause.⁷⁹

Apart from being in a strong bargaining position, the interest of the investor may also influence the decision whether to negotiate for a waiver of immunity clause. The investor may very well take a business risk, hoping for the best. This kind of action will depend upon the existing business relationship between the investor and the state party to the agreement.

2. Espousal of a Claim by the Investor's State

The fact that state parties to the ICSID Convention do not surrender their right to immunity under the Convention does not absolve them from their treaty obligations and commitments. Thus, a plea of immunity from execution by a state which frustrates the enforcement of the award, as has been the case in the few awards rendered by the ICSID, is a violation of that state's obligation under the Convention to comply with the award. The ICSID Convention, foreseeing the likelihood of this frustration, provides for other steps which could be read as sanctions. Where a state fails to make good its obligation to comply with an ICSID award, the Convention restores the right of the contracting state, whose national is the award creditor, to give diplomatic protection to its national and bring

77. See Van den Berg, *supra* note 32, at 439.

78. Delaume, *supra* note 75, at 344.

79. *Id.*

an international claim on its behalf.⁸⁰ Under Article 27(1) of the ICSID Convention, diplomatic protection is suspended during the period beginning from the date of consent to ICSID arbitration and ending with compliance with the terms of the award, or ending prematurely with the dismissal of the investor's claim by the Arbitral Tribunal.⁸¹ In addition, since non-compliance would affect the application of the Convention, the contracting state whose national is involved would also have the right to use the remedy provided for in Article 64 of the Convention, to the effect that non-compliance amounts to a dispute concerning the interpretation of the ICSID Convention, in which case the investor's state may refer the dispute to the International Court of Justice ("ICJ").

The resumption of diplomatic action due to the failure of a state to abide by an ICSID award, as well as referring the dispute to the ICJ, qualifies as a remedy pressed by the investor's state on its behalf. The possibility that such action will bring the award debtor state into international condemnation may influence it to comply with the award. One should, however, be wary of political remedies, as they have been known to be selectively applied.⁸² It should be recalled that one of the primary goals of the ICSID Convention is the depoliticization of the dispute settlement mechanism available to investors and host states. Diplomatic actions could have many political implications, and could drag on for a very long time. Espousing a national's claim and submitting a dispute to the ICJ are supposed to be available to investors as remedies of last resort, and would rarely be employed by their states if the drafters of the ICSID Convention had been willing to adequately address the question of immunity from execution.

V. THE IMPACT OF THE ANNULMENT PROVISION OF THE ICSID CONVENTION

As one commentator has stated, "one of the major objectives of international commercial arbitration has been to keep dispute resolution out of the courts of one of the parties and protect litigants from the costs

80. See Art. 27(1) of the ICSID Convention.

81. According to Art. 27(1) of the Convention:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in the dispute.

82. Sovereign states are known to guard their relationships with other nations, and would be very reluctant most of the time to allow private disputes involving their nationals which do not squarely involve matters of security to affect such relations.

of plodding through the long corridors of national judicial bureaucracies, having to stop to rehear all, or part of the case in each successive cubicle.”⁸³ This objective emphasizes the finality of arbitration proceedings as one of its advantages over formal judicial adjudication; that is, finality in the sense that an arbitration award is binding and not appealable. While the decisions of arbitrators may not be appealed, they are, however, subject to review to ensure that awards are not made in flagrant abuse of the law on which they are based. The New York Convention recognizes the need for review, on the basis of which an award may not be enforced.⁸⁴ Review under the Convention is, however, vested in the domestic courts of the place where the awards are sought to be enforced. One would agree with Reisman⁸⁵ that the optimum control institution for international arbitration might be self-contained at the international level so as to avoid national courts completely. Accordingly, such a control institution would perform all necessary control requirements.

The ICSID mechanism is praised as a self-contained mechanism which prevents domestic courts from reviewing any of its decisions. The ICSID Convention provides for an internal control mechanism. To the extent that the Convention does so, it seems to be fulfilling the objective of international commercial arbitration mentioned earlier in this section. The main issue is whether the control mechanism is workable. Article 52 of the Convention provides, *inter alia*, for grounds for annulling an ICSID award to the effect that:

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

- (a) the Tribunal was not properly constituted;
- (b) the Tribunal has manifestly exceeded its powers;
- (c) there was corruption on the part of a member of the Tribunal;
- (d) there has been a serious departure from a fundamental rule of procedure; or

83. See W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, DUKE L.J. 739, 749 (1989).

84. Arts. 5(1)&(2) of the New York Convention provides for grounds for the nullification or non-enforcement of arbitral awards subject to the Convention.

85. *Id.*

(e) the award has failed to state the reasons on which it is based.⁸⁶

The Article further provides that “if the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.”⁸⁷

The grounds for annulment under the ICSID Convention are not new to arbitral nullity. What is new is the control entity to which the claims for nullification are to be submitted, in this case, the Secretary-General and an *ad hoc* committee of three persons to hear the dispute regarding the annulment claim.⁸⁸ According to the provisions of Article 52(6), annulment of an arbitral award could lead to submission of the dispute to a new Tribunal, presumably for a fresh hearing.

The question that every critical observer will be tempted to ask is whether the procedure will ever end. The ICSID Convention does not specify the number of times a challenge to an award can be entertained. The difficulty of this situation can be gleaned from two classic annulment requests from previous ICSID awards: *Kloeckner Industrie Anlagen GmbH v. United Republic of Cameroon*⁸⁹ and *AMCO Asia Corp. et al. v. Indonesia*.⁹⁰ These cases set the stage for the use of the ICSID annulment process.

The Kloeckner award involved a joint venture agreement between a German multinational company, Kloeckner Group through Kloeckner Industrie- Anlagen GmbH, and the United Republic of Cameroon, for the construction and operation of a fertilizer factory in Cameroon. The initial contract was subsequently supplemented with three additional related contracts. The four agreements provided for Kloeckner to construct and supply the factory and to assume responsibility for its technical and commercial management for at least five years. Kloeckner was also to be a 51% shareholder in the joint venture to be incorporated in Cameroon. The Government of Cameroon undertook to furnish an appropriate site for the factory and to guarantee payment of a loan

86. Art. 52(1) of the ICSID Convention.

87. Art. 52(6) of the ICSID Convention. Note further that the chapter in question is chapter IV dealing with Arbitration. Section 2 of the chapter deals with constitution of the Tribunal.

88. See generally arts. 52(2)&(3) on the procedures pertaining to the annulment process. The Chairman of the Administrative Council is vested with the power of appointing the *ad hoc* Committee members.

89. *Kloeckner Industrie Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2 (hereinafter, *Kloeckner Awards*).

90. *AMCO Asia Corp. et al. v. Indonesia*, 1 INT’L ARB. REP. 649 (1986).

covering the cost of the factory. Three of the agreements contained ICSID arbitration clauses, while the agreement on the management contract contained an ICC⁹¹ arbitration clause. The factory was built and commenced operations, but became unprofitable and was closed by the Government in 1981. Alleging that the plant had been improperly designed and constructed, the Government, which had not yet fully paid for the factory, refused to pay the balance.

Accordingly, in the same year, Kloeckner filed a request for ICSID arbitration, claiming 207 million French francs as the outstanding balance of the price of the factory. In a split decision, an ICSID Tribunal rendered an award in 1983, finding the Cameroon debt to be extinguished by reason of Kloeckner's failure to perform its contractual obligations, particularly the presumed duty of full disclosure among partners. In 1984, Kloeckner filed a request for annulment of the award in accordance with Article 52 of the ICSID Convention. On May 3 1985, an *ad hoc* committee annulled the award in its entirety, citing, *inter alia*, a manifest excessive exercise of power by the Tribunal.

The fact that the entire award was annulled by the *ad hoc* committee meant a reconsideration of the entire dispute in a second arbitration requested by Kloeckner. Thus, the first award did not provide *res judicata*. In the second arbitration, the Tribunal returned an award which favored Kloeckner, although the award gave it only a fraction of the amount claimed. That award was then challenged by the Government of Cameroon in another Article 52 procedure.⁹²

The annulment of the first Kloeckner award has been criticized on many grounds, the most important for purposes of this article being that the first *ad hoc* committee rejected the notion that its role and competence were limited to testing the award only in terms of the grounds listed in Article 52(1). In effect, the committee interpreted the Convention as authorizing and requiring it to examine a challenged award's compliance with all standards set out in the rest of the Convention, rather than sticking to the annulment grounds of Article 52(1).⁹³ A strict reading would have limited the ambit of the control function to the enumeration

91. International Court of Arbitration of the International Chamber of Commerce in Paris, France.

92. See Reisman, *supra* note 83, at 770.

93. See W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration*, in W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 985, at 995-996 (1997).

in Article 52(1).⁹⁴ This reading by the committee, aside from enhancing its own work, expanded the future possibilities for challenging awards, and implicitly affected the latent compromising function of arbitration.⁹⁵

The AMCO award arose from a dispute between a United States company and the Government of Indonesia based on a foreign direct investment contract for the building and management of a hotel. The hotel was forcibly taken over by an Indonesian Cooperative with the help of the Indonesian military after cancellation of the company's investment license. In an ICSID arbitration, the Tribunal made a unanimous award in favor of the claimant AMCO, which Indonesia requested be annulled under Article 52 of the ICSID Convention. The *ad hoc* committee set up to consider the request annulled the award on grounds that the first Tribunal had "manifestly exceeded its powers in failing to apply the relevant provisions of Indonesian Law in determining the amount of AMCO's investment with the finding that the revocation of AMCO's investment license was not justified in substance," and that the Tribunal "failed to state sufficient reasons for its decision" in these respects.⁹⁶ As expected, AMCO applied for a new arbitration, and the Tribunal returned an award on the merits in favor of AMCO on May 31, 1990. Since there appeared to be no limit to the use of the annulment procedure under Article 52 of the ICSID Convention, both AMCO and Indonesia applied for the annulment of the second award.⁹⁷

Given the fact that the ICSID mechanism is self-controlling, the point is not that a party should not have the right to contest an award under the ICSID Convention. The point is that there is a need to prevent proliferation of the annulment process because of its impact on the resources of the parties and the finality of arbitration as an alternative process to adjudication in the regular courts. Additionally, knowing that enforcement may entail another protracted legal battle has a lasting impact on the enforcement of the award by the successful party. In other words, the unending nature of the annulment process causes potential parties to reconsider whether arbitral proceedings are a more expeditious way of resolving disputes.⁹⁸

94. *Id.* at 966.

95. *Id.*

96. See Monroe Leigh, *Arbitration - Annulment of Arbitral Award for Failure to Apply Law Applicable Under ICSID Convention and Failure to State Sufficiently Pertinent Reasons*, 81 AM. J. INT'L 222, 225 (1987).

97. See REISMAN ET AL., *supra* note 93, at 1018.

98. Leigh, *supra* note 96, at 225.

While the availability of procedures to review arbitral awards may strengthen confidence in arbitration under the auspices of the ICSID, the Kloeckner and AMCO annulment decisions reveal inherent flaws in the concepts underlying the review provisions of the ICSID Convention.⁹⁹ The fact that an *ad hoc* committee under the Convention can only annul an award, not render one on the merits, compounds the problems of the review process. Rather than submitting the proceedings to a new tribunal, it seems desirable to permit the *ad hoc* committee to reconsider the merits of the case, taking into consideration the reasons for the annulment.¹⁰⁰

In international commercial arbitration, as in judicial proceedings, control is indispensable. Yet even an institutionalized system of control, if wrongly designed or applied, can undermine the institution it is supposed to protect.¹⁰¹ The losing party to a second arbitration may request the installation of an *ad hoc* committee in hopes that even a minor technical defect will entail nullification of the entire award and provide a potentially indefinite series of opportunities to win, or at least to stave off losing and paying.¹⁰² This author is in agreement with the views of Professor Reisman that, if the trend in the Kloeckner and AMCO cases is allowed to continue, future losers in ICSID arbitrations will be hard-pressed not to exercise their option under Article 52.¹⁰³ Similarly, the availability of the annulment procedure as it has developed would virtually require ethical counsel to recommend its vigorous exploitation, leading to an uncertain future for arbitration at the World Bank.¹⁰⁴

VI. CONCLUSION

The ICSID Convention is no doubt an attempt to give private parties a place in international economic relations and access to international dispute resolution. This access enables private investors to feel safe in their dealings with host countries, in hopes that they will be able to seek redress on an almost equal footing with those countries in cases of violation of obligations assumed under the Convention. On the other

99. *Id.*

100. *Id.* at 225.

101. Reisman, *supra* note 83, at 786.

102. *Id.*

103. *Id.* at 787.

104. *Id.*

hand, host countries are assured of the absence of international politics in their commercial relations with private investors.

On first reviewing the objectives of the ICSID Convention, one might think it a perfect mechanism for handling the inadequacies of counterpart international regimes or organizations dealing with international commercial dispute resolution. Despite its effectiveness, the ICSID Convention only goes halfway in realizing its objectives. The problem of enforcement still haunts the ICSID mechanism. Endorsement of sovereign immunity by the Convention amounts to giving a gift with one hand and taking it away with the other. Subjecting the interpretation of sovereign immunity, as it applies to execution to the domestic laws of member states to the Convention, may frustrate a private party's quest to execute an award. Forum shopping for execution may be the only option available to a private party to find a restrictive application of the immunity doctrine. Unfortunately, many countries still maintain the doctrine of absolute immunity from execution. Even in countries with narrow immunity doctrines, it may be difficult for private investors to prove that attached assets are not immune from execution. Private parties should not have to expend resources trying to obtain enforcement of ICSID awards in various countries around the world.

Espousing a private party's claim by its state, and the possibility of the state seeking an interpretation of obligations arising under the ICSID Convention as an alternative to execution, can aid enforcement, but they are still political measures, which may be ineffective in a world of different political considerations. A private party may retain only the hope that international embarrassment may induce the award debtor to comply with the award. The annulment process affects enforcement of awards in terms of time and resources. It provides a never-ending cycle of opportunities to challenge the ICSID's arbitral awards. It is a control mechanism that itself lacks control.

The ICSID mechanism could be what it aims to be. The Convention continues to enjoy adherence by many countries, a sign of its importance in international dispute resolution. The ICSID's Administrative Council, as a representative body of member states, should devise solutions to impediments which cause the mechanism to fall short of its objectives. It is encouraging that many ICSID cases have been settled during the course of arbitration or enforcement proceedings. The utility of the mechanism, however, should not be predicated on the unpredictable conduct of parties. Thus, it may be worthwhile to amend the ICSID Convention to eliminate the impact of sovereign immunity in the

execution of awards. In the same vein, there should be a limit to the number of times losing parties may petition for annulment of arbitration awards.