Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.20, 2013

The Enforcement Mechanism under the International Centre for Settlement of Investment Dispute (ICSID) Arbitration Award: Issues and Challenges

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Abstract
International Centre for Settlement of Investment Dispute (ICSID) is an autonomous international institution established under the convention on the settlement of Investment Disputes between States and Nationals of other states. The conventions primary purpose is to provide facilities for conciliation and arbitration of international investment disputes. The convention sought to remove major impediments to the free international flows of private Investment poses by non-commercial risks and absence of specialized international method for investment dispute resettlement. ICSID as an impartial international forum provides facilities for the resolution of legal dispute between eligible parties through conciliation or arbitration procedure process. Usually, recourse to the ICSID facilities is always subject to the parties consent and this accounts for the binding nature of its award. Countries who have consented to the convention usually regard the ICSID arbitral decision, as that of the highest court in the land. This of course stand as the force behind the effective mechanism of enforcement for all decisions reached at ICSID arbitration center on settlement of investment disputes. As a matter of fact ICSID play an important role in the world over in the field of international investment and economic development.
Keywords: Enforcement, Arbitration, Dispute, Settlement

1. Introduction

International Centre for Settlement of Investment Dispute (ICSID)

ICSID, the International Centre for Settlement of Investment Disputes was established by the Convention on the Settlement of Investment Dispute between states and national of other states. The convention came into force on, 14 October 1965.

The Convention established International Centre for Settlement of Investment Dispute as an autonomous international institution[139]. The purpose of the centre is to provide facilities for conciliation and arbitration of investment dispute[140].

The centre will not itself engage in conciliation or arbitration activities usually it is the task of Conciliation Commissioners and Arbitral Tribunal constituted in accordance with the provisions of the convention. The IBRD, International Bank for Reconstruction and Development which established the centre usually provide the centre with premises for its seat and, pursuant to arrangements between the two institutions, with other administrative facilities and services[141].
The organs of the centre are the Administrative Council and the Secretariat[142]. The Administrative council is composed of one representative of each contracting state, serving without remuneration from the centre. Each member of the council costs one vote, and the council are directed by a majority of the votes cast unless a different majority is required by the convention. The convention requires the Secretary General to perform a variety of administrative functions as legal representative registrar and principal officer of the centre as contained in **Article 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1) 51(1), 52(1), 54(2) 59, 60(1) 63(b) and 56 of Conventions Regulations and Rules.** The Secretary General has the power to refuse registration of a request for conciliation proceedings or arbitration proceedings and thereby to prevent the institution of such proceedings especially on the basis of the information furnished by the applicant if discovered that the dispute is manifestly outside the Jurisdiction of the centre[143]. The Secretary General has powers to screen request for conciliation or arbitration proceedings with a view to avoid the embarrassment to a party (Particularly a state) which might

[139] Article 18-24 Washington Convention (ICSID) Convention on Regulations and Rules
[140] Article 1(2) ICSID Convention Regulations and Rules
[141] Article 6(b) ICSID Convention Regulations and Rules.
[142] Article 4-8 ICSID Convention Regulations and Rules.
[143] Article 28(3) and 36(3) Conventions Regulations and Rules

result from the institution of the proceedings against it in a dispute which it has not consented to about too the centre as well as the possibility that the machinery of the centre would be set in motion in cases which for other reasons were obviously outside the Jurisdiction of the Centre because either the applicant or the other party was not eligible to be a party in proceeding under the convention.
Article **25(1) of the ICSID Convention** provides that the disputes to be referred must have arisen directly from investment, conflict of interest are not among issues to be referred. For a dispute to be within the Jurisdiction of the Centre; one of the parties must be a contracting state (or a constituent subdivision or agency of a contracting state) and the other party must be a (national of another contracting state)[144]. Under **Article 25(2)** a natural person who was a national of the state party to the dispute would not be eligible to be a party in proceedings under the auspices of the centre, even if at the same time he had the nationality of another state. This ineligibility is absolute and cannot be cured even if the state party to the dispute had given consent[145]. The rule is flexible on judicial persons.

It is important to note that while no conciliation or arbitration proceedings could be brought against a contracting state without its consent and no contracting state is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the convention provisions might be interpreted as holding out an expectation that contracting state would give favourable consideration to requests by investors for the submission of a dispute to the centre. In this context, there might be classes of investment disputes which government would consider unsuitable for submission to the centre or which, under their own national law, they are not permitted to submit to the centre to avoid any risk of understanding on this score, the convention permits the contracting states to make known to the centre in advance.[146]

There is also a provision that, when a state and an investor agree to have recourse to arbitration and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.[147]

A state that consented to submission of a dispute with an investor to the centre had expressly giving the investor direct to an international jurisdiction, the investor should not latter ask his state to expunge his case, the contracting state however is prohibited from giving diplomatic protection or bringing an international claim in respect of a dispute which one of its nationals and another contracting state have consented to, or have submitted to arbitration under the convention unless the state party to the party to the dispute fails to honour the award rendered in that dispute.[148]

Although, the convention leaves the parties to a large measure of freedom as regards the constitution of commissions and Tribunals; it assures that lack of agreement between the parties on these matters or the unwillingness of a party to cooperate will not frustrate proceedings. Though, the rule is that majority of the members of an Arbitral Tribunal should not be nationals of the state party to the dispute or of the state whose national is a party to the dispute. Usually conciliation proceedings and the powers and functions of Arbitral Tribunals and awards rendered by such Tribunal[149] are self explanatory. The difference between the two sets of provisions reflect the basic distinction between the process of conciliation which seeks to bring the parties to agreement and that of arbitration which aims of a binding determination of the dispute by the Tribunal. Article 41 reiterates the well-established principles that international tribunals are to be the judges of their own competence same as that of the conciliation commission principle.[150] It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration is so narrowly defined as not to encroach on the prerogative of commissions and Tribunals to determine their own competence or to preclude them from finding that the dispute is outside the jurisdiction of the centre.

In keeping with the consensual character of proceedings under the convention, the parties to conciliation or arbitration proceedings may agree on the rules of procedure which will apply in those proceedings, but where the

[144] Article 25(1)CSID Convention Regulation and Rules.
[145] Article 25(2) ICSID convention Regulations and Rules.
[146] Article 25 (4) ICSID Convention
[147] Article 26 ICSID Convention
[148] Article 27 ICSID Convention.
[149] Article 41 – 49 ICSID Convention
[150] Articles 32 ICSID Convention

parties did not agree the rules adopted by the Administrative council will apply.[151] Under the convention an Arbitral Tribunal is required to apply the law agreed by the parties, failing such agreement, the Tribunal must apply the law of the state party to the dispute (unless the law calls for the application of some other law) as well as such rules of international law as may be applicable. International law in this context should be understood in the sense provided for in the conventions rules of the statute of the International Court of Justice, allowance being made for the fact to apply to inter- state dispute.[152]

Parties to the Washington convention provisions are bound by the award and awards shall not be subject to appeal or to any other remedy except those provided for in the convention.[153] The only remedial provisions are for revision and annulment of the award. A party may in addition request a Tribunal which omits to decide on any question submitted to it, for supplementary award[154] and may request the interpretation of the award.[155] Where these are not, stay of enforcement in connection with any of the above proceeding in accordance with the provisions of the convention, parties are obliged to abide by and comply with the award and every contracting state must recognize the award as binding and to enforce the pecuniary obligation imposed by the award as if it were a final decision of a domestic or national court.[156] However, because of the different legal techniques followed in common law and civil law jurisdictions and the different judiciary systems found in Unitary and Federal or other non- Unitary states, **Article 54** does not prescribe any particular method to be followed, in its domestic implementation but requires each contracting state to meet the requirements of the provision in accordance with its own legal system.

The doctrine of sovereign immunity may prevent the execution in a state judgments obtained against foreign state or against the state in which execution in sought. Contracting states are required to equate an award rendered pursuant to the convention with a final judgment of its own court. It does not require the state to go beyond that or to undertake forced execution of awards rendered pursuant to the convention in cases in which final judgments could not be executed.

2. Enforcement under the International Centre for Settlement of Investment Dispute (ICSID)

The ICSID convention contains a specialized and autonomous mechanism for the recognition and enforcement of awards pursuant to its provision. Proceedings under the convention are special and limited in terms of the parties and the subject matter. An award rendered under the convention is in a class of its own and is unlike any other ordinary adhoc or institutional arbitral award normally covered by the New York Convention (or other bilateral, regional or multilateral treaties) on the recognition and enforcement of arbitral award.[157]

Nigeria ratified the ICSID convention on 23rd August 1965. In accordance with the provisions of the convention, in **Article 69** of ICSID every contracting state is to take a legislative or other measures as may be necessary for making the conventions provision effective in the contracting states territories, the Federal Government pursuant to its commitment as provided by the conventions **Article 54(1)** of ICSID enacted the **International Centre of Settlement Investment Dispute (Enforcement of Awards).[158]** Section 11 provides that award of International Centre for Settlement of Investment Dispute to have effect as award in final judgment of Supreme Court of Nigeria.

Section 1(1) where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for Settlement of Investment Dispute, a copy of the award duly certified by the Secretary General of the centre aforesaid, if filed in the Supreme Court, by the party seeking its recognition for enforcement in Nigeria shall for all purposes have effect as if it were an award contained in a final Judgment of the Supreme Court and the award shall be enforced accordingly.[159] Section 1(2) The Chief Justice of Nigeria may make rules of court or may adopt any rule of court necessary to give effect to the provision.[160]

[151] Article 33 and 34 ICSID Convention Regulation and Rules.
[152] Article 38 (1) of the statute of the International Court of Justice
[153] Article 53 ICSID Convention regulation and Rules
[154] Article 51 ICSID Convention Regulation and Rules
[155] Article 50 ICSID Convention Regulation and Rules
[156] Article 54 ICISD Convention
[157] Amazu A. Asouzu "African States and the Enforcement of Arbitral Awards some key issues (1999) 15 Arb Int. P. 26
[158] Cap 120, Laws of the Federation of Nigeria 2004
[159] Section 1(1) Cap 120 Laws of the Federation of Nigeria 2004.
[160] Section 1(2) Cap 120 Laws of the Federation of Nigeria 2004

The above provisions of our Act have shown the intention we have in adhering to the execution of international arbitral obligation. It is important to point out that the Act did not contain the procedure required for the registration and enforcement of the ICSID awards. The Act however provided in subsection 1(2) that the Chief Justice of Nigeria may make or may adopt any rule of court necessary to give effect to the ICSID arbitral award.

The Chief Justice have not made any rule in that regard and that has been an object of criticism as it has credited a Lacuna especially the non-provision of a standard procedure for the enforcement of ICSID awards by the Supreme Court of Nigeria.

Too, the ICSID award which by virtue of the Conventions Provisions in Article 54(1) should be seen or be taken as a final Judgment of the highest court of the Land (the Supreme Court) in which no appeal shall lie against it enforcement by the aggrieved party has grave implications, the reason being that in the regular court process, a lot of rigorous processes are involved before a final judgment is made and some expertise and professional practice available in regular court cannot be obtain in arbitration processes or among the arbitrators. In the instance situation, it is only confirmation that is required for an awards made to be transmitted for enforcement, it is important that other considerations be entrenched as part of the dynamism in commercial dealings and transactions as certain vital issues may not have been considered during arbitration process.

It is quite clear and understandable that the idea of restraining the domestic courts from tampering with the ICSID award may be to boast up the investor's confidence to reassure them that the award made pursuant to the convention will be enforced. The comment of our erudite scholar, Dr. Amazu Asouzu stands distinct in this instance, he was of the opinion that the only way to assure investors of equal treatment is to provide for the registration and enforcement of award made by the centre in the Supreme Court of Nigeria[161]
It is essentially important to ensure that the recognition and enforcement of ICSID award in Nigeria be made within a specified time limitation which in Nigeria is six years or any extended period as appropriate and as competent authority may allow. A copy of the award duly certified by the Secretary General of the centre if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly.[162]

The effect of **Article 54(1)** which provides that upon registration of award to be a final judgment of the Supreme Court in line with the conventions provision as contain in **Article 54(1)** above which provides that:

> *"Each contracting state shall recognize an award rendered pursuant to be convention as binding and enforce the pecuniary obligation imposed by the award within its territory as if it were a final judgment of a court in that state. A contracting state with a federal constitution may enforce such an award through its Federal Court and may provide that such court shall treat the award as if it were a final judgment of the court of such constitution state.*[163]

The implication of **Article 54(1)** provision is to make awards ***res Judicata*** in every contracting state. However the convention further under scores the provisions on **Article 26** and **53(1)** provides that there is no appeal or remedy other than those contained in the Convention itself [164] will be available to the parties. ICSID award then can be described as truly international because hey emanate from an independent international institution which is attached neither to a national jurisdiction nor subject to scrutiny by a national court.[165]

In the words of **Sutherland, Article 53(1)** represents a restatement of customary international law based on the concept of **Pact Sunt Servanda and res Judicata.**[166] **Article 55** of the Convention makes a distinction between

[161] Amazu A. Asouzu, Development and Using Commercial Arbitration and Conciliation in Nigeria.
[162] International Centre for Settlement of Investment Dispute (Enforcement of Awards) CAP 189 Law of the Federal of Nigeria 1990 Section 1(1) now Cap 120 LFN 2004.
[163] The ICISD Convention Article 54(1) Liberation Eastern Timber Corporation V The Government of the Republic of Liberia (1994) 21 ICSID Rep. 383.
[164] The remedies are those of interpretation (Article 51) and annulment (Article 52) of the award An appeal
[165] Bjorn Pinwitz "Annulment of Article Award under Article 52 of the Washington Convention on the Settlement of Investment Dispute between States and Nationals of other states (1988) 23 Texas Int. Law Jan. 82.
[166] B. P. F. Sutherland "The World Bank Convention on the settlement of Investment Dispute 91979) 28 ICISD P. 394

the issues of recognition and enforcement of an ICSID award from the subsequent issue of execution by providing that nothing in **Article 54** shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution. As observed by **Bjorn Pirrwitz**[167]**, Article 54 and 55** of the Convention when taken together contemplates that as soon as an ICSID award is recognized, it becomes a valid title upon which execution can be taken provided that when such measures are directed at state property as opposed to the property of an investor which an execution is possible under the law of the contracting state in which execution is sought.

Article 52 of the Convention provides recourse for the losing party in ICSID arbitration. Pursuant to this provision, the loosing party may move for annulment of the award before an Adhoc committee appointed by the Secretary General of the ICSID.[168] Under **Article 52,** a party may request annulment of an **ICSID** award on the following grounds:

(a) That the Tribunal was not properly constituted.
(b) That the Tribunal has manifestly exceeded its powers.
(c) That there was corruption on the part of a member of the Tribunal.
(d) That there has been a serious departure from a fundamental rule or procedure or
(e) That the award has failed to state reasons on which it was made.

An application for annulment shall be made within 120 days from the date of the award except when annulment is requested on the grounds of corruption. Such application shall be made within 120 days of the discovery of the corruption and, in any event within three years of the date on which the award was rendered. The Convention provides further that the committee may **sou motu** stay enforcement of an award if it is considered necessary. It may also stay enforcement of an award if the applicant requests so in his application. Such a stay of enforcement shall be provisional until the committee rules on the request.[169]

3. Failure to Abide By an Award

Article 27(1) of the Convention provides that where a contracting staff falls to abide by and comply with an award rendered, the right of diplomatic protection hereto suspended, automatically revives and a national of another contracting state injured by the refusal may resort to his own state for diplomatic protection.

Sutherland [170] notes that **Aaron Broches** has interpreted **Article 64**[171] of the Convention to mean that the **Locus standi** required to approach the International Court of Justice is capable of being satisfied by a national court of a contracting state to comply with or enforce an award constitutes a violation of the convention's rules and regulation, which threatens to defeat the purpose for which the convention was established. Each contracting state upon this interpretation has the necessary **locus standi** to approach the ICJ in the event of a contracting state ignoring the obligations as imposed by the Convention seeking declaratory judgment and award of damages.

3.1 Sovereign Immunity and ICSID Award

The success of international arbitration depends on the extent to which awards made by arbitrators are accepted and where such awards are not accepted by the loosing party, the extent at which it can be enforced against such party. However, in a majority of cases, parties usually abide by the award made by the commercial arbitrations.[172] The reason for this may be that the parties may want to avoid the cost of litigation involved in challenging awards or that they may not want their reputation and commercial credibility to be affected by being seen as refusing to abide by an award.

This position may, however, be different where the arbitral award is against a state or state entity. This is particularly so in situations where a state has effected a change in its policy which has the effect of bringing about a dispute between the state and the party affected by the change of policy. In such instance, there is always

[167] Bjum Purwtiz Op Cit P. 82.
[168] Article 52(2) ICISD Convention
[169] Article 52(5) ICSID Convention and Rules
[170] P. F. Sutherland OP Cit P. 397
[171] Article 64 ICSID
[172] Redferm and Hunter Op Cit 41

reluctance on the part of state to appear before arbitral tribunal.

They have always taken the view that such changes matters of domestic concern and should, therefore, not be settled by foreign tribunals. Arbitral tribunals, on the other hand, have not been deterred by such non-appearance of state. They still make their awards in the absence of such state party. When the awards are made the states may resist enforcement on the ground of sovereign immunity. It is important to state that whereas by **Article 54 of ICSID** convention, member nations or contracting states are to enforce the award made pursuant to the convention. There are obstacles, which the award may encounter, and that is the issue of sovereign state immunity. The issue of sovereign state immunity comes up at the state of execution of the judgment and not at the time of ordering enforcement of ICSID award.

The doctrine of sovereign immunity is a defense of jurisdiction that could be pleaded by a foreign state or state entity when it is pleaded before a domestic tribunal.[173] It has been described as a "hallowed principle of International law under which a State is essentially exempted from the jurisdiction of the courts of foreign States.[174] It means that a state cannot be compelled to accept the jurisdiction of another state. [175]According to **Redfern and Hunter,**

> *"The sovereign was a definable person, to whom allegiance was due. As an integrate part of this mystique, the sovereign could be made subject to the judicial processes of his country. Accordingly, it was only fitting that he could not be sued in foreign courts. The idea of the personal sovereign would undoubtedly have been undermined had courts been able to exercise jurisdiction over foreign sovereigns. This personalization was gradually replaced by the abstract concept of state sovereignty but the basic mystique remained. In addition, the independence and equality of states made it philosophically as well as practically difficult to permit municipal courts of one country to manifest their power over foreign states without their consent.[176]*

In the common law tradition, the doctrine had its origins in the acknowledgment of the need for international comity and the evolution of the concept of national sovereignty.[177] In that respect, it was thought that the assumption of Jurisdiction over a sovereign state without its consent constituted an erosion of the principle of sovereign equality of nations and an affront to its dignity.[178]

3.2 Jurisdiction Immunity

By **Article 26** of the ICSID convention, consent to arbitration by any of contracting states constitutes an irrevocable waiver of immunity from jurisdiction. It means therefore, that once a state has agreed to arbitrate, it is taken as a waiver of it immunity from the jurisdiction of the arbitral tribunal.

3.3 Immunity from Execution

The doctrine of sovereign immunity as it relates to immunity from execution of arbitral award continues to be a hurdle to the enforcement of ICSID awards. The availability of the plea of sovereign immunity against an ICSID award was canvassed in the celebrated case of **Benvenuti and Bonfant Coy.**

V

The Government of the People's Republic of Congo

In this case, an application for the enforcement of ICSID award was granted subject to the condition that applicant would obtain prior consent from the court for any measure of execution or safeguarding measure so as to ensure the immunity of sovereign and public asset. The applicant for enforcement immediately applied to the tribunal which made the order for a modification of its order but the tribunal refused, on the ground that as it was not possible to ascertain which assets or fund were immune from execution. The applicant however appealed against the order contending ***inter alia*** that the judge at the first instance could only ascertain the authenticity of the award but that the judge had confused two distinct stages. The first relating to the obtaining of an **exequatur**

[173] Somaraja M. International Convention Arbitration (Singapore Longman 1990) 200.
[174] Osode Patrick C. "State Contracts, State Interests and International Commercial Arbitration" A Third World Perspective (1997) 9 Radic 110.
[175] Refern and Hunter Op Cit P. 474.
[176] Ibid 424.
[177] Osode Patrick C. *Op Cit* P. 110
[178] Chukwumerije. o. "Arbitration and Sovereign Immunity (1990) Angio America I. J. 169.

and the second relating to the actual execution of the award. The judge should not have been involved in the second stage since what he was invited to do was to entertain an application on the enforcement of the award. The applicant then urged the court to delete that part of the order in respect of the second stage which was on immunity.[179]

The Court of Appeal in a ruling allowed the appeal and amended the order of the court of first instance. It decided among other things that:

(a) **Article 54** laid down a simplified procedure for obtaining an **exequatur** for awards rendered within the framework of the Convention and limit the function of municipal courts to ensuring that the document before them was a copy of an award properly certified by the Secretary General of ICSID.

(b) **Article 55** provides that nothing in **Article 54** was to be construed as limiting the immunity from execution enjoyed by a foreign state. An order granting **exequatur** from an arbitral award did not however constitute a measure of execution but simply preliminary measures prior to measure of execution.

(c) The judge at the first instance had therefore exceeded his competence under **Article 54** by becoming involved in examining the question of immunity from execution of a foreign state which was only relevant at the second stage during actual execution.[180]

It is important to mention that any foreign state which has given its consent to arbitration under **ICSID** convention by so doing consented, that ICSID award when made shall be recognized which as such does not constitute a measure of execution of the state concerned.

It is reasonable to state that because the Convention surrenders measure of execution to domestic rules of immunity; it would be possible that just like other arbitral awards, **ICSID** awards would be subject to different treatment in contracting states.[181]

Though, execution of ICSID award is subject to this issue of immunity, the contracting state has a right to waive its rights to its laws and rights in respect of her immunity policy when entering into any contract with another party. Once the state by its own act waives its right to this plea and defense of immunity, any award made can be executed expressly. The availability of the plea of sovereign immunity against an ICSID award was considered by an America Court

Liberian Eastern Timer Corporation

V

The Government of The Republic of Liberia[182]

In that case, an ICSID award of over nine million dollars was rendered against Liberia. The award on a **motion ex-parte** recognised and ordered to be enforced by a United States District Court. The writ of execution was issued issued following this judgment and efforts were made to vacate the judgment or, in the alternative, to vacate the execution on its property located in the United States under the **Foreign Sovereign Immunity Act (FSIA)** it was argued that the execution would violate Liberia immunity from execution which it did not waive by agreeing to arbitrate. The court also noted that under the **Foreign Sovereign Immunity Act (FSIA)** no exception applied to deprive the Bank account of their grant of authority.

> *"A diplomatic mission would undergo a severe hardship if a civil judgment creditor were permitted to freeze bank accounts used for the purpose of diplomatic mission for an indefinite period of time until exhaustive discovery had taken place to determine that precise portion of bank account used for commercial activities".*

It has been observed[183], that the position of awards made by ICSID tribunal is not different from award made by

[179] Benvenuti and Benfant SRL (BB) V The Government of the people Republic of Congo (1993) ICSID Rep. 363
[180] B.B. V GP. R. C. (1993) ICSID Rep. 363 at 371 – 372, Amazu A. Asouzu "African State and the enforce of Article Awards: Some Issues" Supra 34.
[181] Article 54(3) of ICSID Convention G.R. Delanme "Arbitration with Government Domestic V International Awards international Lawyer 1983 687 to 696
[182] Liberation Easter Timber Corporation
V
The Government of the Republic of Liberia (1994) 21 ICSID Rep. 383.
[183] Somaraja M. *Op Cit* 230

other tribunals in relation to their enforcement not based on pleas of sovereign immunity.
Soronaragh [184] further observed that,

> *"The experience with the enforcement of ICSID awards reinforces the view that sovereign immunity remains an impediment, not at the Jurisdictional stage but at the stage of execution to the enforcement of both ICSID awards".*

What then is the solution to the problems created by the immunity from execution as a defence? It has been suggested that foreign investors should
always insist on procuring an express waiver of immunity from execution in their contracts agreement with government[185] ICSID model clauses provides a sample of such a waiver clause[186]. It has been contended[187] that the immunity of contracting states from execution in relation to ICSID awards cannot be a waiver in a contract between a contracting state and a private party except to extent permisible under the relevant national law and procedure and procedure of a contracting state. The reason is twofold, the first is that Article 55 which confers immunity from execution as a provision is a multilateral treaty. An investment contract or agreement cannot, therefore, amend, or abridge a treaty, except to the extent permitted by the treaty. Seccondly, sovereign immunity is contained in a national law and an investment agreement or contract between a state and a private party cannot abridge, waive or amend the provisions of a national law except in the manner or to the extent laid down by such national law.

3.4 Enforcement of Execution of ICSID Award Against a Private Party under the Convention.

The enforcement mechanism of the ICSID system has a potential flaw; the non contemplation of the fact that a private party may refuse to comply with an award rendered against it. The Convention contains no provision as to what the position would be if such a situation arises. While the first draft of what later became the ICSID convention was being considered before the Executive Directors of the World Bank in 1962, it was observed by an Executive Director that the General Council draft provision on the enforcement of awards was somewhat one sided.[188] The observation made under the draft was: if an award made against a state which later refuse to comply with it, the national state of a private party would be in a position to protect it diplomatically or to bring an international claim on his behalf. It was therefore, proposed that there should be a balanced provision whereby an arbitral award made in favour of a state, the state of which the indivual party was a national must give its fellow state all posible assistance within the scope of its national law to carry out the award. The inability of the Convention to provide for such a situation has attracted the comments of a writer, **Amazu Asouzu[189].** He opined that the contracting state of which the private party is a national should be held vicariously liable for the refusal of the private party to comply with an award.

Nothwithstanding the problems inherent in the recognition and enforcement mechanism of **ICSID**, it still remains a very effective means of recognition and enforcement of international arbitral awards. The **ICSID** convention as earilier mentioned has as its advantages, the specialized and autonomous mechanism which no other convention, including the New York Convention process. When a company is considering a project or investment in a developing country, the availbailty of **ICSID** has an impact on their risk analysis, which can affect whether they can go ahead or not. The availability of a dispute resolution mechanism that has the potential to result in an enforceable award is often a key factor in deciding whether to enter into foreign transaction with a "foreign: sovereign or its political subdivision[190].

On the extent of jurisdiction, **ICSID** has jurisdiction based on the following citeria:

- The subject matter must be a legal dispute arising directly out of an investment.
- The dispute must be between a contracting state and a national of another contracting state.
- The parties to the dispute must consent in writing to submit to the jurisdiction of ICSID (whether by provision in a contract or within a bilateral investment treaty)[191]

[184] Ibid 230
[185] Amazu A. Asouzu *OP Cit* 43
[186] Doc. ICSID S/Rev/2 of 1 February 1993 in March 1993 and November 1995
[187] Amazu A. Asouzu *OP Cit* 44.
[188] ICSID History of the Convention Covenning the Origin and Formulation of the Convention Vol II Part 1 at Para 31 (Doc 13) (Mr. Krishna Moorthi)
[189] Amazu A. Asouzu *OP Cit 44*
[190] Norton Rose, ICSID Convention http//www.nortoirose.com/html 15 of 32.
[191] Norton Rose *OP Cit 15 of 32*

The term "investment" is not defined in the Convention and there was concern that an arbitration agreement might be frustrated if a tribunal declared itself incompetent on the ground that it considered the underlying transaction not to be an "investment. This was one of the basic reasons for the proposal to establish the "ADDITIONAL FACILITY"called ICSID ADDITIONAL FACILITY.

3.5 ICSID Additional Facility Rules

The Administrative council of the centre adapted the additional facility rules authorizing the secretariat of ICSID to administer certain categories of proceedings between states and nationals of other state that fall outside the scope of the ICSID convention[192]. These cover investment dispute where either the state party or the home state of the foreign national is not a member of ICSID. The additional facility also covers disputes which do not arise directly out of an investment but where a least one of the parties is an ICSID contracting state or a national of a contracting state. In this case, the underlying transaction must have features which distinguish it from an "**Ordinary Commercial Transaction**". The term relating to transactions is not defined but when the provision was formulated and approved the administrative council recorded the following:

> "*Economic transactions which may or may not, depending on their terms be regarded by the parties as investments for the purposes of the convention" which involve long term relationships or the commitment of substantial resources on the part of either party" and which" are of special importance to the economy of the state, can be clearly distinguished from ordinary commercial transaction. Instances of which would be found in various forms of industrial cooperation agreement and major civil work contract*[193].

The issues in consideration are as follows:

- Conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a contracting state or a national of a contracting state.
- Conciliation and arbitration proceeding between parties at least one of which is a contracting state or a national of a contracting state for the settlement of disputes that do not arise directly out of an investment provided that the underlying transaction is not an ordinary commercial transaction[194].
- Fact finding proceedings. Fact finding is included in the additional facility rules as a method for parties to receive an impartial assessment of facts. It is a mechanism intended to prevent differences of view arising on specific factual issues in the course of a long term relationship from escalating into a legal dispute[195].

Bilateral Investment Treaties

Bilateral Investment Treaties are reciprocal agreement made between two nation states. The rights and obligations arising under a BIT may be invoked by a qualifying investor from one of the two countries in the BIT, directly against the other nation state. Many BITs provide that the rights can be enforced under ICSID that is, the government provide advance consent to submit investment disputes to ICSID[196]. Since the late 1980s, BITs have come to be universally accepted instruments for the promotion and legal protection of foreign investments; this is reflected in the rapid growth in their number.

Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes.

Article I : This covers the general definition of terms such as convention,

The secretariat of the centre is authorized to administer, subject to and in accordance with ICSID additional rules on proceedings between a state (or constituent subdivision or agency of a state) and a national of another state falling within the categories[197].

Since the proceedings as envisaged in **Article 2** are outside the jurisdiction of the centre, none of the provisions

[192] ICSID Additional Facility Rules http//www.worldbank.org/icsid/facility/intro.ltm 1 of 2
[193] Norton Rose *OP Cit 16-32.*
[194] ICSID Additional Facility Rule *OP Cit*
[195] Norton Rose- *OP Cit 16-32*
[196] Norton Rose *OP Cit 16-32*
[197] Articles 2(b)(b) and (c) of Additional Facility Rules

of the convention is applicable to the additional facility or recommendations awards, or reports which may be rendered therein[198].

The accessibility to the Additional facility in respect of conciliation and arbitration proceedings are subject to the Secretary-General approval on:

- Any agreement providing for conciliation or arbitration proceedings under the Additional facility in respect of existing of future disputes. The parties may apply for approval at any time prior to the institution of proceedings by submitting to the secretariat, a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the secretariat may reasonably request[199].
- In the case of an application based on **Article 2(a),** the Secretary-General shall give his approval only if he is satisfied that the requirements of that provision are fulfilled at the time and
- If both parties have given their consent to the jurisdiction of the centre under **Article 25** of the convention (in lieu of the Additional facility) in the event that the jurisdiction requirements **rational personae** of that article shall have been met at the time when proceedings are instituted[200].
- In the case of an application based on **Article 2(b)**, the Secretary-General shall give approval only if
- He is satisfied that the requirements of that provision are fulfilled and
- That the underlying transaction has features which distinguished it from an ordinary commercial transaction[201].
- It is the case of an application based on **Article 2(b)** the jurisdictional requirements **ratione personate** of **Article 25** of the convention shall have been met and the Secretary-General is of the opinion that it is likely that a conciliation commission or arbitral tribunal as the case may be, will hold that the dispute arises directly out of an investment, he may make his approval of the application conditional upon consent by both parties to submit any dispute in the first instance to the jurisdiction of the centre[202].
- The Secretary-General shall as soon as possible notify the parties whether he approves or disapproves the agreement of the parties. He may hold discussion with parties or invite them to meeting at the secretariat. He shall at the request of the parties or any of them keep confidential information furnished to him by such parties or party in connection with the provision of the Article[203].
- The Secretary-General usually records his approval of the agreement pursuant to this article together with the names and address of parties[204].

On the administrative and financial regulations the responsibilities of the secretariat in opening the additional facility and the financial provisions regarding its operation shall be as those established by the Administrative and financial regulations of the centre for conciliation and arbitration proceedings under the convention. Accordingly, **Regulation 14-16, 20-30 and 34(1) of the Administrative and Financial Regulation** of the centre shall apply **Mutatis Mutandis** in respect of fact finding, conciliation and arbitration proceedings under the Additional facility[205].

On schedules, the fact-finding, conciliation and arbitration proceedings under the Additional facility shall be conducted in accordance with the respective fact finding (Additional facility) Rules set in schedules A, B, and G[206].

Enforcement of ICSID Additional Facility Awards

[198] Article 3 *OP Cit 1 of 2*
[199] Article 4(1) ICSID Additional Facility Rule
[200] Article 4(2) ICSID Additional Facility Rule
[201] Article 4(3) ICSID Additional Facility Rule.
[202] Article 4(4) ICSID Additional Facility Rule
[203] Article 4(5) ICSID Additional Facility Rule
[204] Article 4(6) ICSID Additional Facility Rule
[205] Article 5ICSID Additional Facility Rule
[206] Article 6 ICSID Additional Facility Rule

The Additional facility proceedings are outside the scope of the ICSID convention. Consequently, the award from such proceedings cannot be enforced as ICSID award. They are therefore not insulated from the national laws of the various countries.

In Nigeria, they can be enforced by action on the award and under **section 51 of Cap A18 Arbitration and Conciliation Act L.F.N. 2004**. ICSID Additional Facility can be enforced under the Foreign Judgments (**Reciprocal Enforcement) Act CapF35 L.F.N 2004** and the **New York Convention.**

It is important to note that unlike the provisions in **New York Convention, ICSID** convention and the Foreign Judgments **(Reciprocal Enforcements) Act Cap 152 LFN 2004** of Nigeria requires reciprocity of treatment between Nigerian courts and the superior courts of the country where the award was made. **Section 51 of the Act** did not make provision for reciprocity of treatment between Nigerian courts and the superior courts of the country where the award is made.

4. Conclusion

The enforcement of ICSID Convention award in Nigeria as provided in **CAP 120 LFN 2004** has some disabilities which goes a long way to affect the enforcement mechanism.

Firstly, the Act did not make provision for procedural registration and regulation about the award to be enforced.

Secondly, the shallow provision of **Section 54(1)** of the Convention Regulations Rules which places **ICSID** arbitral award as equivalent to final Judgment of the superior court of the land.

Thirdly, the likely-hood of the contracting states authority refusing to the recognition and enforcement of the award on account that the subject matter of award is not what is capable of settlement by arbitration under the law of that country or that the recognition or enforcement of the award would be contrary to the public policy.

The above issues among others had raised the much criticism in the interpretation of the meaning and implication of taking an arbitral tribunal decision as equivalent to final Judgment of a court. The reason being that since the arbitral tribunal process is not the same or does not apply the same stick rules of court proceeding which is regarded as being very detailed should not be taken as same.

The provision of section **54(1)** of the Convention Regulation Rules which equates ICSID arbitral award as court decision and Judgment and no appeal lies, is seen as imposition and should be amended to accommodate appeal process

In another development, a critical review should be made on the nations provisions of the Act **CAP 120 LFN 2004**. The International Centre for settlement of Investment Dispute to accommodate more provisions especially on registration procedure of **ICSID** arbitral award. The **ICSID** Convention Regulation Rules should, as a matter of utmost important entrench a clause in its provisions or develop a synergy with contracting states on their laws especially as it affect commercial transaction, **immunity** and **sovereign** status and to ensure that their activities complies with the cardinal principles of **natural Justice, equity and good conscience.**

These among other views will guarantee an easy breakthrough for recognition and enforcement of ICSID arbitral awards within and among states that has consented to it.

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