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THE ENFORCEMENT OF ICSID ARBITRAL AWARDS

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I.

This paper examines the regime for the enforcement of arbitral awards rendered under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) pursuant to its constituent treaty, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).¹ As of October 22, 2007, 144 countries had signed and ratified the ICSID Convention to become

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¹ The ICSID Convention and the regulations and rules adopted pursuant to it are reprinted in booklet form in *ICSID Convention, Regulations and Rules*, Doc. ICSID/15 (April 2006) and posted on the website of ICSID, www.worldbank.org/icsid. Since 1978, ICSID has had a set of Additional Facility rules under which the ICSID Secretariat is authorized to administer certain types of proceedings between States and foreign nationals that fall outside the scope of the ICSID Convention. These notably include arbitration proceedings for the settlement of investment disputes where either the home or the host State of the foreign national concerned is not an ICSID Convention Contracting State. The Additional Facility Rules are also reprinted in booklet form, Doc. ICSID/11

Contracting States.² The Convention offers them procedures for the conciliation, as well as the arbitration, of investment disputes they may have with individuals or companies that qualify as nationals of other Contracting States.³

The arbitration procedures are often called truly delocalized or denationalized.⁴ This refers to the fact that they are governed exclusively by the international law provisions of the ICSID Convention and exempt from the application of the arbitration laws and the control of the courts of Contracting States. Article 53(1) of the ICSID Convention is frequently mentioned in this context. According to its first sentence, an award rendered pursuant to the Convention is binding on the parties and not subject to any appeal or to any other remedy except those which, like the remedy of annulment, are provided for in the Convention itself. Also frequently mentioned in this context is Article 54 of the Convention. It addresses the enforcement of the awards.

(April 2006), and posted on the ICSID website. The enforcement of Additional Facility awards is not considered in this paper except to emphasize here that such awards do not benefit from the provisions of the ICSID Convention on the subject. Enforcement of Additional Facility awards is instead governed by such more general instruments as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

² See ICSID, List of Contracting States and Other Signatories of the Convention, www.worldbank.org/icsid/constate/constate.htm. However, one of the Contracting States, Bolivia, has denounced the Convention pursuant to its Article 71. In accordance with Article 71, the denunciation will take effect on November 3, 2007. See ICSID News Release, May 10, 2007, www.worldbank.org/icsid/highlights/05-16-07.htm.

³ See ICSID Convention, *supra* note 1, at arts. 1 and 25.

⁴ See, e.g., A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* 57 (2004 4th ed. with N. Blackaby and C. Partasides).

II.

Article 54(1) of the ICSID Convention requires each Contracting State to recognize an award rendered pursuant to the Convention as binding and to enforce the pecuniary obligations imposed by the award as if it were a final judgment of the State's courts. Under Article 54(2) of the Convention, recognition and enforcement of the award may be obtained from the competent court of a Contracting State on simple presentation of a copy of the award certified by the Secretary-General of the Centre.

The regime of the Convention does not, however, extend to the execution of the award. Such execution is, in accordance with Article 54(3) of the Convention, governed by the law on the execution of judgments in force in the country where execution is sought. Article 55 of the Convention additionally makes it clear that Article 54 does not derogate from the law of the enforcement forum on sovereign immunity from execution of an award.

These provisions of the Convention have been tested in four cases. In the first case, *Benvenuti & Bonfant*, an Italian company, obtained, from the Tribunal de Grande Instance of Paris, an order for the enforcement of the Convention award against the company's adversary, the Republic of Congo.⁵ The Tribunal de Grande Instance made this order subject to the condition that without its prior authorization there could be no execution on assets

⁵ See *S.A.R.L. Benvenuti & Bonfant v. Republic of the Congo*, Decision of Jan. 13, 1981 of the Tribunal de Grande Instance, Paris, 108 *Journal du droit international* 365 (1981); 1982 *Revue de l'arbitrage* 206; English translation of French original in 65 *I.L.R.* 91 (1984); 1 *ICSID Rep.* 368 (1993).

located in France. The Court of Appeal of Paris struck down this condition.⁶ In doing so, the Court of Appeal explained that Article 54 of the ICSID Convention provided for a “simplified” enforcement procedure, that enforcement was a step preliminary to execution, and that courts in Contracting States therefore could not at the enforcement phase delve into the execution phase, the second phase being the one in which there might be a question of sovereign immunity.

The second case also illustrates this distinction between the two phases. The Convention award in that case had been rendered against Liberia and in favor of the Liberian Eastern Timber Corporation, a company controlled by French nationals. The award was on the company’s application granted recognition and enforcement by an order of the U.S. District Court for the Southern District of New York. On the strength of that order, executions were issued on registry fees and taxes due to Liberia from shipowners and agents of Liberia in the United States. On Liberia’s motion, the same District Court, having found those assets to be immune from execution under the 1976 U.S. Foreign Sovereign Immunities Act (FSIA), because they were sovereign rather than commercial assets, vacated the executions on those assets.⁷

⁶ See decision of June 26, 1981 of the Court of Appeal, Paris, 108 *Journal du droit international* 843 (1981); 1982 *Revue de l’arbitrage* 207; English translation of French original in 20 *ILM* 878 (1981); 1 *ICSID Rep.* 369 (1993).

⁷ See *Liberian Eastern Timber Corporation v. Liberia*, Decision of Dec. 12, 1986 of the U.S. District Court, Southern District of New York, 650 *F. Supp.* 73 (1986); 2 *ICSID Rev.* —*FILJ* 188 (1987); 26 *ILM* 695 (1987); 2 *ICSID Rep.* 385 (1994).

The company then obtained writs of attachment seizing bank accounts of the Embassy of Liberia in Washington, D.C. The U.S. District Court for the District of Columbia, however, quashed the writs on the grounds that the Embassy's bank accounts were immune from attachment because they enjoyed diplomatic immunity under the Vienna Convention on Diplomatic Relations, which the United States ratified in 1972, and also because the accounts were entitled to sovereign immunity under the FSIA, the funds in the accounts being essentially public in nature.⁸

The award in the third case was rendered in favor of the Société Ouest Africaine des Bétons Industriels, a company controlled by Belgian nationals, in the ICSID Convention arbitration that the company had instituted against Senegal. The Tribunal de Grande Instance of Paris granted an enforcement order in respect of this award. The Paris Court of Appeal, however, reversed that order on the grounds that it had not been demonstrated that the award would "be enforced on assets assigned by Senegal to an economic and commercial activity, and that no objection could therefore be made for immunity from enforcement."⁹ In this decision, the Paris Court of Appeal confounded the two phases that the Court of Appeal had so clearly distinguished eight years earlier in the Benvenuti & Bonfant case. The French Court of Cassation corrected this, in a June 1991 decision that

⁸ See Decision of Apr. 16, 1987 of the U.S. District Court, District of Columbia, 659 F. Supp. 606 (1987); 3 ICSID Rev.—FILJ 16 (1988); 2 ICSID Rep. 391 (1994).

⁹ See *Société Ouest Africaine des Bétons Industriels v. Senegal*, Decision of Dec. 5, 1989 of the Court of Appeal, Paris, 117 *Journal du droit international* 141 (1990); 1990 *Revue de l'arbitrage* 164; English translation of French original in 5 ICSID Rev.—FILJ 135 (1990); 29 *ILM* 1341 (1990); 2 ICSID Rep. 337 (1994).

quashed the decision of the Paris Court of Appeal.¹⁰ In its decision, the Court of Cassation pointed out, in terms reminiscent of those used by the Paris Court of Appeal in the *Benvenuti & Bonfant* case, that the ICSID Convention provided a “simplified” regime for the enforcement of awards and that enforcement did not in itself represent an act of execution in respect of which immunity from execution could be considered.

The fourth and final case concerned an ICSID Convention award upholding claims brought against the Republic of Kazakhstan by AIG Capital Partners, a Delaware company, and a joint venture enterprise controlled by the Delaware company. An order of the High Court in London permitted the successful claimants to register the award as a judgment of the Court in accordance with the U.K.’s implementing legislation for the ICSID Convention.¹¹ The claimants then obtained interim third-party debt and charging orders against cash and securities held by banks in London for the National Bank of Kazakhstan, the country’s central bank. In October 2005, the High Court discharged the interim orders.¹² In doing so, it noted that the obligation of a Contracting State to enforce an ICSID Convention award was made subject by Article 55 of the Convention to the State’s law relating to sovereign immunity. The Court held in this respect that the assets in question

¹⁰ See Decision of June 11, 1991 of the Court of Cassation, France, 6 ICSID Rev.—FILJ 598 (1991); 118 *Journal du droit international* 1005 (1991); 1991 *Revue de l’arbitrage* 637; English translation of French original in 30 *ILM* 1169 (1991); 2 ICSID Rep. 341 (1994).

¹¹ The Arbitration (International Investment Disputes) Act 1966.

¹² See Judgment of Oct. 20, 2005, High Court of Justice, Queen’s Bench Division, Commercial Court [2005] EWHC 2239 (Comm); 31 *Y.B. Comm. Arb.* 1520 (2006); 11 ICSID Rep. 118 (2007).

were property of a central bank deemed, by the 1978 State Immunity Act of the U.K., as non-commercial and hence immune from execution under the Act. As for the interim third-party debt order, the Court held that such an order could only be made in respect of a debt owed to the judgment debtor, which in this case was the Republic of Kazakhstan, not its central bank.

III.

It is important in considering the subject of the enforcement of awards rendered pursuant to the Convention also to recall the provisions of its Article 53(1). Mention was made earlier of the provision of the first sentence of Article 53(1) regarding the binding force and finality of such an award. The second sentence requires each party to “abide by and comply with the terms of the award.” For the Contracting State party to the dispute, a failure to abide by and comply with the award is therefore a violation not only of its undertaking to arbitrate, but also of an international treaty obligation.

Article 27(1) of the Convention provides that a Contracting State may not give diplomatic protection, or bring an international claim, in respect of a dispute that one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention. Article 27(1) of the Convention also provides that the first Contracting State may nevertheless give diplomatic protection or bring an international claim if the second State fails to honor its obligation under Article 53 to abide by and comply with the award. In such circumstances, the first State could

under Article 64 of the Convention institute proceedings against the second before the International Court of Justice.¹³

Indeed, for the drafters of the Convention, the main purpose of the enforcement provisions of Article 54 was to facilitate the enforcement of an award by a State as a successful claimant against an investor lacking assets in the host State.¹⁴ This was seen as redressing the imbalance in the relative positions of the State party to the dispute, which would be bound directly under the Convention to comply with an award, and the investor.¹⁵ As Aron Broches, the principal drafter of the Convention, explained:

as regards enforcement against governments, as distinguished from that against private parties, what has become Article 53 of the Convention is the primary provision and . . . while Article 54 is important, concern with the possibilities offered by that provision should not be permitted to obscure or weaken the importance of Article 53. The obligation of governments to abide by awards remains unaffected by the limitations on their forcible execution.¹⁶

¹³ Article 64 of the Convention provides for the referral to the International Court of Justice of “[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention.” To date, no such reference has been made to the Court under Article 64 of the Convention.

¹⁴ See ICSID, 2 Documents Concerning the Origin and Formulation of the Convention 892 (1970).

¹⁵ See *id.*

¹⁶ Broches, Awards Rendered Pursuant to the ICSID Convention; Binding Force, Finality, Recognition, Enforcement, Execution, 2 ICSID Rev.—FILJ 287, 302 (1987). It may be added that the obligation of governments to abide by awards in accordance with

IV.

Supporting perhaps Louis Henkin's aphorism about the observance by governments of their international law obligations,¹⁷ the record of compliance with awards rendered pursuant to the ICSID Convention has generally been good.

As of the date of writing (October 22, 2007), the ICSID website listed 115 concluded arbitration proceedings instituted against States under the Convention.¹⁸ In 47 of these, the parties had reached an amicable settlement of their dispute or decided otherwise to discontinue the proceeding before the rendition of an award. In seven of the concluded cases, there had been awards embodying settlement agreements of the parties.¹⁹ Awards in another six cases had been annulled in whole or in part pursuant to Article 52 of the Convention; and the time limit for seeking the annulment of the award made

Article 53 is also unaffected by the limitation of the scope of the enforcement obligation in Article 54 to the pecuniary obligations imposed by the award. The point may, however, be of little more than theoretical interest since, as explained by Christoph Schreuer, claims in ICSID Convention proceedings almost always have been for pecuniary compensation and the tribunals almost always have confined themselves to this remedy. *See* Schreuer, Non-Pecuniary Remedies in ICSID Arbitration, 20 *Arbitration International* 325, 329 (2004).

¹⁷ "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." L. Henkin, *How Nations Behave* 42 (1968).

¹⁸ *See* List of Concluded Cases, www.worldbank.org/icsid/cases/conclude.htm

¹⁹ As provided for in the ICSID Arbitration Rules, *supra* note 1, at rule 43(2), according to which an arbitral tribunal may, at the written request of the parties, record their settlement agreement in the form of its award.

in a further six cases had not yet expired.²⁰ The outcomes of the remaining 49 concluded arbitration proceedings against States were just about evenly divided: in 23 there were awards upholding claims and ordering the respondent governments to pay compensation to the claimant investors; and in 26 of the cases, awards had been rendered dismissing all claims on the merits or on jurisdictional grounds.

Information regarding payment of the awards is somewhat sketchy, settlements often being confidential. On the other hand, successful claimants, if not paid promptly, seldom hesitate to make that fact known. From the information that can be garnered, it appears that, in almost all of the above-mentioned 23 cases of awards upholding claims, the respondents ultimately discharged their payment obligations, either in accordance with the terms of the awards or in accordance with post-award settlement agreements of the parties.²¹ It is worth noting that the cases of eventual

²⁰ The basic time limit, set out in the ICSID Convention, *supra* note 1, at art. 52(2), is 120 days after the rendition of the award.

²¹ In some of the proceedings for the annulment of an award under Article 52 of the ICSID Convention, the ad hoc committee charged with deciding the annulment application conditioned a stay of enforcement of the award for the duration of the proceeding on the provision by the respondent of a bank guarantee for the amount of the award, to be drawn upon by the claimant in the event of a rejection of the annulment application. One of the 23 awards mentioned in the text upholding claims was performed under such an arrangement. *See Wena Hotels Ltd. v. Arab Republic of Egypt, Decision on Annulment Application, February 5, 2002, 6 ICSID Rep. 129, 131 (2004)*. In addition, in one of the cases of a partial annulment of an award, the claimant was able under a similar arrangement to draw on the guarantee to the extent of the unannulled part of the award. *See Amco Asia Corp. and Others v. Republic of Indonesia, Decision on Annulment Application, December 3, 1992, 9 ICSID Rep. 9, 61 (2006)*.

In several recent annulment proceedings, the ad hoc committee by contrast refused to condition a continued stay of enforcement on the posting of such a bank guarantee. *See Patrick Mitchell v. Democratic Republic of Congo, Decision on Stay of Enforcement, November 30, 2004, www.worldbank.org/icsid/cases/mitchell-en.pdf; MTD Equity Sdn*

voluntary compliance with the award include at least three of the four cases described earlier in which there were enforcement proceedings in national courts.²²

Often brought up in connection with the enforcement (in the broadest sense) of ICSID arbitral awards is the possible role therein of the World Bank. Its Executive Directors formulated the Convention and ICSID is a member of the World Bank Group of international organizations.²³ It is sometimes suggested that the leverage of the Bank with a borrowing member country might be applied to secure payment of an award. An operational policy of the Bank indicates that it may refrain from making new loans to a member country in certain extreme cases involving expropriation or external debt disputes. These are cases involving expropriation disputes that are substantially harming the country's international credit standing and that the country is not making reasonable efforts to settle or external debt disputes that have a significant effect on the country's creditworthiness or on

Bhd v. Republic of Chile, Decision on Request for Continued Stay of Execution, June 1, 2005, www.worldbank.org/icsid/cases/mtd.pdf; CMS Gas Transmission Co. v. Argentine Republic, Decision on Request for Continued Stay of Enforcement, September 1, 2006, www.worldbank.org/icsid/cases/arb0108_decision_en.pdf.

²² See, e.g., 1 News from ICSID, No. 1, at 2 (1984) (reporting the announcement of Benvenuti & Bonfant that the Republic of Congo "had fully complied with the ICSID award rendered in a dispute between them").

Of the 26 awards referred to in the text dismissing all of the claims involved, five ordered the unsuccessful claimants to reimburse arbitration costs of the respondent governments. The author has no information on the compliance record for this group of awards.

²³ In the order of their establishment, the members of the World Bank Group are the International Bank of Reconstruction and Development (the World Bank), the International Finance Corporation, the International Development Association, ICSID and the Multilateral Investment Guarantee Agency.

its ability to implement Bank-financed projects or service Bank loans.²⁴ As indicated above, however, such situations have not arisen in connection with performance of an ICSID arbitral award. A role that has been played by the ICSID Secretariat, and occasionally also by the World Bank, when informed of a delay in paying an award, has been to remind the award debtor of the importance of prompt payment, if only to avoid the accumulation of further interest on the amount outstanding. In addition, there has been an instance of the ICSID Secretariat agreeing, at the request of the parties concerned, to host post-award settlement discussions.

²⁴ See World Bank OP 7.40 (and related BP 7.40), Disputes Over Defaults on External Debt, Expropriation and Breach of Contract, www.worldbank.org (>>Projects & Operations>>Policies & Procedures>>Operational Manual).