

‘Enforcement/Execution’ of ICSID Awards Against Reluctant States

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INTRODUCTION

It has been internationally recognised that ICSID arbitration awards are final and binding upon the parties, and that Contracting States should perform them as if they were final judgments of national courts. The words of several prominent ICSID commentators indicate that the international arbitration community has, historically, assumed that:

*Awards rendered pursuant to the ICSID Convention are enforceable within the Contracting States with no resistance to the enforcement possible.*³

*Domestic courts must abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration.*⁴

*The ICSID Convention offers a system of automatic enforcement that is not subject to any review of the award at the stage of enforcement.*⁵

These bold statements express the notion that ICSID awards⁶ are ‘self-enforcing’, and that resistance to execution⁷ will be impossible. However, the execution of ICSID awards is not as straightforward and effective as it may appear to be at first sight, especially where the award debtor is a Contracting State. Apart from the provisions relating to annulment of ICSID awards, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States⁸ expressly contemplates that

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³ Albert Jan van den Berg, “Some recent Problems in the Practice of Enforcement under the New York Convention and ICSID Conventions”, 2 ICSID Rev. 439 (1987).

⁴ George R. Delaume, “ICSID Arbitration and the Courts”, 77 AM. J. INT’L. 784-785 (1983).

⁵ Christoph H. Schreuer, “The ICSID Convention: A Commentary”, Cambridge University Press (2001).

⁶ ICSID awards may incorporate pecuniary and/or non-pecuniary obligations, or either. This commentary only focuses on ICSID awards which contain pecuniary obligations.

⁷ For the purposes of this commentary enforcement and execution have been used synonymously. This is one of the four main objectives of this commentary and has been further elucidated in detail under the heading; ii) ‘Enforcement’ and ‘Execution’ in page 4.

⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (entered into force Oct. 14, 1996), (the Convention), see http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

Contracting States may rely on the defence of state immunity to protect their assets from enforcement/execution. In effect, this makes compliance with ICSID awards largely voluntary, at least by Contracting States which have no 'commercial' assets abroad.

Only in the fourth quartile of the twentieth century did the urgency of massive investment into the infrastructure of less-developed nations become sufficiently perceived to a wider audience. The 'accepted wisdom' became that, unless 'something is done' Planet Earth would not be able to feed its human population within fifty (some say twenty) years. However, by this time, voters in the 'rich' Western democracies had come to prefer that the political parties, and their candidates for high office, should promise them investment in hospitals, education and infrastructure at home rather than in 'foreign aid' for far-off lands.

The resulting inability of the 'rich' democracies to make increasing commitments of their taxpayers' money towards the relief of poverty in the 'poor' countries seems to have led to a requirement (or opportunity, depending on how it may be perceived) for a substantial increase in investment by 'private investors' into the less-developed nations. The term 'private investor' does not mean individual philanthropic human beings. It means very large, non-governmental, corporate entities owned in turn by investors whose primary motivation is to make at least a 'reasonable return' on their investment, commensurate with the risk involved. This in turn means that the capital deployed must be repaid plus a 'return' that will satisfy the expectations of the underlying investors, whether they are institutions, corporations or individuals.

This system seemed to work reasonably well up to about the end of the twentieth century. There were a few arbitrations under the Convention system, as well as under Bilateral Investment Treaties and other 'one off' treaties such as the (relatively youthful) NAFTA dispute resolution system. Then the system seemed, if not to 'implode', at least to go 'off track'. It is way beyond the scope of this commentary to identify or analyse all the problems of the investor-state dispute resolution processes, or to propose solutions to them. Several commentators have attempted this herculean task.

The present contribution is purposely limited to a review of the apparent inability of the ICSID system to deliver the level of investor protection that was foreseen by the distinguished authors quoted on the first page of this commentary; and, to the extent practicable, to propose some alternative solutions.

This commentary has four main objectives. Firstly, it attempts to determine whether or not the words 'enforcement' and 'execution' should be interpreted as two different concepts and, if so, to analyse the consequences. Secondly, it looks at the extent to which state immunity from execution may frustrate the 'self-contained' character of the Convention. Thirdly, it examines the position adopted by Argentina and Venezuela, as examples, in the context. Fourthly, it attempts to propose solutions that might be adopted to resolve the difficulties that may arise at the stage of execution.

THE RELEVANT PROVISIONS

The point of departure is the applicable provisions of the Convention. These are as follows:

‘Finality’ and ‘binding force’ of ICSID Awards

Article 53

1. *The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*

Article 53(1) provides that ICSID awards are final and binding on the parties to ICSID arbitration. Once any reviewing proceedings provided in the Convention are finalised, the losing party should comply with the award immediately. In other words, ICSID awards are not subject to review by national courts of the host state. This is the crucial point at which enforcement of awards under the New York Convention⁹ differs from enforcement of awards under the Convention. The New York Convention permits national courts to review the award and refuse enforcement on the grounds of public policy.¹⁰ Theoretically, this is not permissible under the ICSID mechanism.

THE CONCEPTS OF ‘RECOGNITION’, ‘ENFORCEMENT’ AND ‘EXECUTION’

(i) *RECOGNITION AND ENFORCEMENT*

Article 54

1. *Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*
2. *A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*

The intention behind the Convention was to establish a simple mechanism for the recognition and enforcement/execution of ICSID awards. A French court stated that:

The provisions of the ICSID Convention offer a simplified procedure for recognition and enforcement (exequatur simplifié) and restrict the function of the court designated for the purpose of the Convention

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (The New York Convention), see http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf.

¹⁰ *Id.*, Article v(2).

*by each Contracting State to ascertaining the authenticity of the award certified by the Secretary General of the International Centre for Settlement of Investment Disputes.*¹¹

Article 54(1) stipulates that Contracting States are obliged to recognise an award and enforce its monetary obligations as if it was a 'final judgment'. The protection afforded to investors would be undermined if the Convention did not contain any provision securing immediate payment in the event that Contracting States breach their international obligations.

By including the term 'final judgment', the authors of the Convention reinforced the final nature of ICSID awards. This wording was subject to further negotiations. During the drafting process the German delegate to the ICSID treaty negotiations unsuccessfully attempted to retain the possibility of reviewing ICSID awards by domestic courts based on public policy issues.¹²

Article 54(2) offers certain procedural directions for recognition and enforcement of the award. Firstly, Contracting States shall designate the competent court or authority for the purpose of recognition and enforcement. Secondly, a party seeking recognition and enforcement shall submit a copy of an award (certified by the Secretary-General) to such court or authority.

Recognition is a necessary and formal procedure whereby an award will be confirmed as authentic. There are two possible consequences of the recognition of an award. Firstly, it confirms that the award is binding or *res judicata*. Secondly, it is usually seen as a preliminary step leading to enforcement.¹³ In essence, in order to obtain the pecuniary obligations contained in the award, creditors have to obtain recognition from the competent court.

Before turning to the concepts of 'enforcement' and 'execution', it is essential to highlight that the Convention uses the words 'enforce' and 'execution' in the same provision. This creates the potential for confusion. Is 'enforcement' really a different procedure from 'execution'?

(ii) 'ENFORCEMENT' AND 'EXECUTION'

Article 54

3. Execution of the award shall be governed by the law concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

¹¹ Judgment of June 26, 1981, Cour d'appel, Paris, S.A.R.L. Benvenuti & Bonfant v. Republique Populaire du Congo, *Journal du Droit International* 1981, 843, reproduced in English translation in 20 I.L.M. 878 (1981).

¹² Edward Baldwin, M. Kantor & M. Nolan, "Limits to Enforcement of ICSID Awards", *Journal of International Arbitration* 23(1): 1–24, 2006, at 5.

¹³ *Schreuer*, *supra* note 5, at 1114–1115.

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.

Articles 54(1) and (2) only refer to “enforcement”. By contrast, Article 54(3) refers to ‘execution’. This may suggest that ‘enforcement’ and ‘execution’ are different concepts, which may presumably lead to two different proceedings. If so, which proceeding should the winning party initiate in order to obtain the pecuniary relief imposed by the award?

The distinction between ‘enforcement’ and ‘execution’ has been a matter for discussion since the creation of the Convention. Some authors have attempted to clarify the issue by elaborating various different theories. However, there is no clear picture as to whether these terms should be treated either synonymously or separately. One of the most learned commentators on the Convention has suggested that the word ‘enforce’ in Art. 54(1) should have been replaced by language indicating that the pecuniary obligations imposed by an award ‘shall be enforceable’.¹⁴

Interestingly, the French and Spanish texts of the Convention do not distinguish between ‘enforcement’ and ‘execution’. A comparison of the three texts indicates that they have different meanings, which could not be resolved by ordinary rules of interpretation.¹⁵ It was thus necessary to interpret Article 54 by resorting to the 1969 Vienna Convention on the Law of Treaties. This led to the conclusion that the words ‘enforcement’ and ‘execution’ are essentially identical in meaning.¹⁶ In the view of the present authors, this is plausible. This is why the terms ‘execution’ and ‘enforcement’ are used interchangeably in this commentary.

As described above, recognition is a preliminary step to enforcement/execution. Once recognition has been obtained, enforcement/execution proceedings come into play. Prior to this stage, creditors possess only an *executory* title,¹⁷ meaning that the award is ready to be executed.

(iii) STATE IMMUNITY FROM EXECUTION

Article 54(3) provides Contracting States with the possibility of reviewing the award at the stage of execution. The Convention concedes total discretion to Contracting States, under their national laws, to determine whether the award can be executed against particular assets. Article 55 reiterates and emphasises the previous provision by stating that the laws regulating state immunity in any Contracting State shall not be derogated by the application of Article 54.

¹⁴ Aron Broches, A., “Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution”, 2 ICSID Review, Foreign Investment Law Journal 287 (1987), at 318.

¹⁵ Schreuer, *supra* note 5, at 1122.

¹⁶ *Id.*

¹⁷ Georges R. Delaume, “ICSID Arbitration Proceedings: Practical Aspects”, Pace Law Review 3 (1985), Copyright, Volume 5, at 588.

Therefore, the execution of ICSID awards depends on the immunity rules in force in the state where execution is sought. In other words, *the Convention does not oblige a Contracting State to execute an ICSID award if an equivalent judgment of its own court could not be executed*.¹⁸ This is the stage at which investors may experience difficulty in obtaining payment if Contracting States are reluctant to enforce/execute the award. This is because the Convention does not in fact provide a 'self-governing' system for the execution of ICSID awards. *The award 'floats' until enforcement seeks to anchor it within a given legal system*.¹⁹

Thus, it has been stated 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 in a dispute submitted to the ICSID.*²⁰

The Convention provides for a waiver of immunity from jurisdiction. Interestingly, it has been argued that consent of states to ICSID arbitration amounts to an implicit waiver of a defence of immunity from recognition and enforcement.²¹ However, execution of the award falls within the scope of immunity from execution, which is not waived under the ICSID Convention.²² In other words, a waiver of immunity from suit does not imply a waiver of state immunity from execution. These statements seem to contradict the principle that the terms 'enforcement' and 'execution' convey identical meanings. The question remains as to whether they are identical in practice. This of course depends on the interpretation of these two terms by national courts.

As indicated above, the ICSID Convention expressly retains the defence of state immunity from execution in Articles 54(3) and 55. The motivation for this was (presumably) that certain state assets which are reserved for public, military or diplomatic use should not be subject to seizure.²³ Thus, while many commentators mistakenly assume that final awards issued under ICSID are 'self-enforceable', the reality is that the Convention does not eliminate defences in national courts to the enforcement/execution of such awards. And it is doubtful that the Convention would have been ratified by so many states if Articles 54(3) and 55 had not been incorporated.

A number of Contracting States have failed or refused to comply with ICSID awards, including Argentina, Congo, Kazakhstan, Liberia, Senegal, and Venezuela.

¹⁸ Jan Paulsson, L. Reed, N. Blackaby, "Guide to ICSID Arbitration", Second Edition, Kluwer Law International (2011), at 185.

¹⁹ David D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", 84 AM. J. INT'L. L. 194, 118 (1990).

²⁰ Vincent O. Nmechielle, "Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)", 7 Ann. Surv. Int'l & Comp. L. 21 (2001), at 8.

²¹ Andrea K. Bjorklund, "State Immunity and the Enforcement of Investor-State Arbitral Awards", The University of Texas School of Law, Houston, Texas, May 13-14, 2010 at 4.

²² Nmechielle, *supra* note 19, at 7.

²³ Hazel Fox, "State Immunity and the New York Convention", in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 829, 858.

Various grounds for refusal have been pleaded. The most usual ground for non-compliance is immunity from execution.

Two particular Latin American countries may be taken as examples of states that appear to be reluctant to comply with ICSID awards. One is Argentina. The huge public deficit built up during the 2001 financial crisis raised doubts as to whether the state would be able to satisfy awards that might be rendered against it, as a result of desperate actions taken by the government in an attempt to restore the economic stability of the nation. The other is Venezuela. In 2009, the government proclaimed its immunity from any international judgment or award rendered against the state. At the time of writing the extent to which this proclamation will affect creditors seeking payment through Venezuelan state assets remains uncertain. The positions adopted by each of these states are considered in turn.

ARGENTINA

Argentina signed the treaty in May of 1991 and deposited its instrument of ratification in October 1994.²⁴ Because of the financial crisis experienced by Argentina in 2001 numerous investment contracts were breached, which led investors to make claims against the state under the ICSID mechanism.²⁵ At the end of 2010, more than forty cases were pending against Argentina.²⁶ A significant number of them were brought by investors as a result of the devaluation of the peso affecting companies such as Siemens and BP.²⁷

In 2006 the Minister of Economy of Argentina stated that:

*The outcome of the more than thirty ICSID arbitrations pending against the country would be subject to local court review in Argentina if they disturb public order because they are unconstitutional, illegal, or unreasonable.*²⁸

An interesting position has been adopted by Argentina as to how Article 54 of the Convention should be interpreted. For example, in *Siemens A.G. v. Argentine Republic*, Argentina argued that Article 54 should be read as a provision that protects Contracting States:

*A further consequence of such article is that the State that is the award debtor is at least entitled to subject compliance with ICSID awards to the same or substantially the same procedures that are applicable to compliance with final judgments of local courts against the State.*²⁹

²⁴ List of Contracting States and other Signatories of the Convention, THE WORLD BANK GROUP, see <http://www.worldbank.org/icsid/constate/c-states-en.htm>.

²⁵ Charity L. Goodman, "Uncharted waters: Financial Crisis and Enforcement of ICSID awards in Argentina", U. PA. J. INT'L. ECON. L. VOL. 28:2 (2007), at 451.

²⁶ List of pending cases against the Argentine Republic, THE WORLD BANK GROUP, see <http://www.worldbank.org/icsid/cases/cases.htm>.

²⁷ Goodman, *supra* note 28, at 452.

²⁸ *Id.* at 469.

²⁹ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, (2007). See Argentina's Response to US Department of State Letter, 2 June 2008. A reasoning of the approach adopted by Argentina can be found in the article cited in footnote 19.

In *Continental Casualty Company v. Argentine Republic*, Argentina's position was as follows:

*In order for Continental to obtain payment of the Award, it would be necessary for Continental to follow the formalities applicable to enforcement in Argentina of final judgments of Argentine courts.*³⁰

These are not isolated cases.³¹ In the light of them and others, the economic situation in Argentina has raised doubts as to the effectiveness of the ICSID system.

It has been stated that:

*If ICSID is to survive as a meaningful body, the signatory countries must be able to find a method of dealing with countries that do not have the means to enforce judgment against them even if they do have the will to do so.*³²

VENEZUELA

Venezuela ratified the ICSID Convention in 1994. At the end of 2010, there were twelve pending cases against the state.³³ Although during the 1990s the country experienced positive changes in the promotion of foreign investment, the start of a new era under the Venezuelan government saw the nationalisation of many foreign and domestic companies.

Because of dramatic changes in 2006 to existing contracts in the oil sector, companies such as Conoco-Philips and Exxon Mobil brought claims for compensation under the ICSID mechanism, and arbitration awards were rendered against the state. The Venezuelan government created difficulties concerning the execution of international arbitral awards against Venezuelan assets. In 2008 and 2009, the Constitutional Chamber of Venezuelan Supreme Tribunal issued two controversial decisions concerning state immunity from jurisdiction and execution. This section briefly reviews these decisions and their potential consequences for ICSID arbitration.

The Venezuelan Constitution³⁴ of 1999 recognised arbitration as a fundamental right, which may be exercised as an alternative to other recognised judicial protection methods.³⁵ In effect, Article 258 CBRV stipulates that the law shall encourage

³⁰ *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/(2009), Decision on Argentina's Application for a Stay of Enforcement of the Award, para. 12.

³¹ *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3/(2008), Annulment Proceedings, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award. *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16(2009), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award.

³² *Goodman*, supra note 25, at 485.

³³ List of pending cases against Venezuela, THE WORLD BANK GROUP, see <http://www.worldbank.org/icsid/cases/cases.htm>.

³⁴ Constitution of the Bolivarian Republic of Venezuela 1999 (CBRV), see http://www.analitica.com/bitbloteca/venezuela/constitucion_ingles.pdf (Official translation made by the Venezuelan Ministry of Communication and Information).

³⁵ Eugenio Hernández-Bretón, "El Arbitraje Internacional con Entes del Estado Venezolano", (*International Arbitration with State's Entities*), Bulletin of the Academy of Political and Social Science of Caracas, Boletín de la Academia de Ciencias Políticas y Sociales de Caracas, No. 147, January-December (2009), at 146.

arbitration.³⁶ This provision, theoretically, obliges the judicial organs of the Venezuelan state to promote not only domestic but also international arbitration. It must be noted that there is a contradiction between these provisions and Articles 1 and 151 CBRV.³⁷ Article 1 identifies the terms 'sovereignty' and 'immunity' separately as inalienable rights of the state.³⁸ Article 151 incorporates the 'Calvo Doctrine':

*In the public interest contracts, unless inapplicable by reason of the nature of such contracts, a clause shall be deemed included even if not expressed, whereby any doubts and controversies which may raise concerning such contracts and which cannot be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic, in accordance with its laws and shall not on any grounds or for any reason give rise to foreign claims.*³⁹

Bearing in mind that only national courts are competent to resolve dispute arising out of 'public' contracts, Venezuela appears to be immune from the jurisdiction of an ICSID Tribunal. This position was, presumably, rejected by a decision of the Supreme Tribunal in February 2009,⁴⁰ in which it was held that:

*There is a harmonic relation between Articles 1 and 151 which, by any means, denies the sovereignty or contradicts the principle of auto determination of the Bolivarian Republic of Venezuela.*⁴¹

In a 2008 decision,⁴² (decision 1541) the Supreme Tribunal held that:

*ICSID awards can be executed in the territories of Contracting States if a) execution is made following the mechanisms established by the national courts of the state, and b) the award is executed in accordance with the laws concerning the execution of judgments in force in the State in whose territories such execution is sought, as stipulated in Article 54(3) of the Convention.*⁴³

Furthermore, it was reaffirmed that:

*Foreign awards, including ICSID awards, would not be executable in Venezuela if they contravene the constitutional public order.*⁴⁴

Thus, state immunity as a barrier to execution of ICSID awards has been reinforced by Venezuelan jurisprudence. According to a recent study, decision 1541 evidences that Venezuela intends to seek all possible injunctions in order to avoid international arbitration:

*Even if a plaintiff company is able to subject Venezuela to an international arbitration tribunal's jurisdiction and subsequently wins on the merits, unless there has been a separate waiver of immunity from enforcement of any successful arbitration award, a state or state enterprise may still claim sovereign immunity from enforcement of the award.*⁴⁵

³⁶ J. Eloy Anzola, "Luces desde Venezuela, La Justicia no es Monopolio Exclusivo del Estado", (Lights from Venezuela, Justice is not a Monopoly of the Government) in Spanish Arbitration Review, Revista del Club Español del Arbitraje, No. 4, April (2009), at 2.

³⁷ Hernández-Bretón, supra note 34, at 146.

³⁸ Article 1 CBRV.

³⁹ Article 251 CBRV.

⁴⁰ Judgment number 97 of 11th February 2009, file number 08-0306, original text in Spanish available at www.tsj.gob.ve/decisiones/scon/Febrero/97-11209-2009-08-0306.html.

⁴¹ Hernández-Bretón, supra note 34, at 147.

⁴² Judgment number 1541 of 17th October 2008, file number 08-0763, original text in Spanish available at www.tsj.gob.ve/decisiones/scon/Octubre/1541-171008-08-0763.html.

⁴³ Hernández-Bretón, supra note 34, at 162.

⁴⁴ *Id.*

⁴⁵ Brandon Marsh, "Preventing the Inevitable: The Benefit of Contractual Risks Engineering in Light of Venezuela's Recent Oil Field Nationalization", 13 STAN. J. LBUS. & FIN. 453, 474 (2008).

The Venezuelan legal system has limited the rights of successful claimants by leaving the compliance of the award to the total discretion of the state. This may lead to BITS between Venezuela and other Contracting States becoming not worth the paper on which they are written.

The problem of state immunity from execution in Venezuela may have severe repercussions. As stated above, there are twelve cases pending against the state, and the question remains as to what extent the new 'declaration of immunity' adopted by the Supreme Tribunal will interfere with the enforcement of ICSID awards.

STATE IMMUNITY FROM EXECUTION: THE LAST FORTRESS?

Immunity from execution may present difficulties for investors because they may find the award recognised but not enforced/executed. The number of known cases which have led to execution proceedings is rather limited. This section focuses on four judicial decisions concerning the execution of ICSID awards.

In *LETCO v. Liberia*, an award was rendered against the Republic of Liberia and LETCO sought to recognise and enforce it in the USA.⁴⁶ Upon LETCO's application, the United States Courts of the Southern District of New York issued an *ex parte* order requiring the Government of Liberia to comply with the pecuniary relief imposed in the award. Liberia made an attempt to vacate the *ex parte* order. The same District Court, after acknowledging the obligation arising from Article 54 of the Convention, held that execution of the award should be denied on the grounds of state immunity. A later attempt made by LETCO to execute the award in the District Court of Columbia was also declined on the same grounds.⁴⁷

In *SOABI v. Senegal*, the *Tribunal de grande instance* of Paris recognised an award and granted an order of *exequatur* (executory title) against the Republic of Senegal.⁴⁸ On appeal by Senegal, the *Cour d'appel* of Paris vacated the previous decision on the basis that SOABI had not proved the commercial value of the Senegalese assets. As a result, those assets remained protected from execution. SOABI appealed and the *Cour de cassation* held that the *Cour d'appel* adopted an erroneous decision because it was contrary to the provisions of the Convention.

In *SOABI*, the *Cour de cassation* drew a distinction between 'recognition' and 'enforcement/execution' by stating that:

*Articles 53 and 54 of the ICSID Convention created an autonomous and simplified regime for recognition and execution which excluded the otherwise applicable provisions of the [French] Code of Civil Procedure and the remedies provided therein.*⁴⁹

⁴⁶ *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, (February 25, 1986) 2 ICSID Rep. 346.

⁴⁷ Schreuer, *supra* note 5, at 1120-1121.

⁴⁸ *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB/82/1 (1993), 2 ICSID Rpts. 165. The decision of the Tribunal de grande instance was not published.

⁴⁹ Schreuer, *supra* note 5, at 1118.

In *Benvenuti & Bonfant v. Congo*, the *Tribunal de grande instance* of Paris granted an order of *exequatur* (executory title) requested by *Benvenuti*.⁵⁰ Nonetheless, the Tribunal added that the award could not be executed against Congo's assets located in France because they might be immune from execution. *Benvenuti* appealed to the *Cour d'appel* of Paris. The Court found that:

*Article 54 of the Convention lays down a simplified procedure for obtaining an exequatur and that the function of the court concerned was restricted to ascertaining the authenticity of the award.*⁵¹

The *Cour d'appel* held that the *Tribunal* had exceeded its authority by deciding on the execution of the award when it had been asked only to enforce it.⁵²

Finally, in *AIG Capital Partners v. Kazakhstan*, AIG sought to execute an ICSID award against assets located in London, which were owned by the National Bank of Kazakhstan (NGK).⁵³ In applying Article 55 of the Convention, the court held that NGK's assets were immune from execution under the English State Immunity Act.⁵⁴ Although some commentators have argued that enforcement falls within the scope of immunity from jurisdiction, the reality is that enforcement falls within the scope of immunity from execution. This is because (as described above) the terms 'enforcement' and 'execution' are identical in both theory and practice. The question remains as to how national courts will continue to interpret them... *State immunity from execution may be deemed as the last fortress, the last bastion of state immunity.*⁵⁵

The position adopted by some states regarding the enforcement/execution of ICSID awards is a problem which is becoming more apparent. As a distinguished professor stated: *recent examples of those States include Russia and Argentina, though there have been other isolated instances over the years.*⁵⁶

POSSIBLE SOLUTIONS AND CONCLUSIONS

In the early days, before private investors came on the scene in significant numbers, it was assumed that in the ICSID context (as opposed to the position under BITS) awards would be 'self-enforcing' because – sooner or later – the host state would come back to the World Bank (or the IMF) to ask for a further loan for another infrastructure project. The assumption was that the answer would be 'Sure, provided that the outstanding arbitration award against you is paid'; and there would follow a negotiation under which the amount of the award would be added to the new loan; the award debtor would then

⁵⁰ *Benvenuti & Bonfant v. Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/2 (1983).

⁵¹ *Schreuer*, supra note 5, at 1116.

⁵² Supra note 50, at 368.

⁵³ *AIG Capital Partners Inc v. Kazakhstan* [2005] APP.L.R. 10/20.

⁵⁴ *AIG Capital Partners*, 95.

⁵⁵ *Bjorklund*, supra note 20, at 2, quoting S. Sucharitkul, Commentary to ILC Draft Articles, Article 18, para 1, C/AN.4/L/452/Add 3.

⁵⁶ *Id.*

be able to pay off the award debt at no immediate cost to the host state; and the World Bank loan would eventually be repaid in full.

Perhaps sadly, this kind of 'self-enforcement' did not survive into the 21st century (in fact it had disappeared from the radar screen somewhat earlier), and the pragmatic omissions from the ICSID Convention have led to a new reality.

It is not easy to see any realistic solutions. Perhaps there are three. First, and ideally, the ICSID stakeholders could attempt to amend the ICSID Convention to incorporate a waiver of state immunity from execution. Secondly, investors could seek an express collateral agreement by the host state in infrastructure project contracts to waive state immunity from execution, at least in respect of 'commercial' assets. Thirdly, it might become the norm that the investor's home state would bring a claim against the host state in the International Court of Justice (ICJ) where it has failed to comply with an ICSID award.

The first, amending the ICSID Convention, would be a huge, and controversial, step because it would risk the integrity of 'state assets', such as embassy property, in foreign countries. It would also be impracticable because the prospects of persuading all 157 signatories States to agree to such amendment would be minimal. Parallel discussions concerning the possibility of amending the 1958 New York Convention have been inconclusive for this reason.

Concerning the second, it is (theoretically) possible for the investor to negotiate the incorporation of a clause waiving immunity from execution in its agreement with the host state (assuming that there is one). As indicated above, the consent of the state to ICSID arbitration implies a waiver of immunity from jurisdiction, but not from execution. Therefore, including such an additional clause in the contract would preclude the state party from relying on state immunity as a ground to resist execution. ICSID recommends the following model:

*The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.*⁵⁷

However, it seems rather improbable that Contracting States would be willing to renounce their immunity from execution by incorporating such a clause in investment agreements.

It is not difficult to understand why the drafters of the Convention did not incorporate into it a waiver of immunity from execution. Any such provision would have been highly controversial, especially at the relevant time, when the level of investment by non-governmental entities into the less-developed world was relatively small. It is doubtful that the Convention would have been ratified by many states from

⁵⁷ ICSID website, clause 15, see <http://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/main-eng.htm>.

the less-developed world if such a provision had been incorporated into the Convention.

Finally, the Convention itself provides a remedy if a State Party breaches its international obligations. Article 64 allows an investor's home state to bring an international claim before the (ICJ) if the host state has failed to comply with the award.⁵⁸

Although this solution appears to be practical, it may present difficulties. First, this procedure requires the active co-operation of the investor's home government, which may have international policy considerations at stake, which may override its duty to its citizens by taking hostile action against a friendly government. Secondly, *it remains unclear whether Article 64 of the ICSID Convention gives the ICJ jurisdiction over the investor's claim as espoused by the investor's state.*⁵⁹ Finally, *there is no guarantee that a disappointed state would pay an ICJ award if ordered to do so.*⁶⁰ As of January 2011, no Contracting State had invoked the right granted by Article 64.

It therefore seems that, in practice, investors have limited opportunities for recourse against Contracting States which refuse to permit enforcement/execution of ICSID awards against them. There remains the possibility of obtaining execution of an ICSID award against assets located outside the host state, in an 'international arbitration friendly country', such as France. Nonetheless, it is essential that successful claimants and losing respondents alike are aware of the defences provided by the Convention to the enforcement/execution of ICSID awards.

⁵⁸ See Article 64 of the Convention.

⁵⁹ Baldwin, *supra* note 12, at 21.

⁶⁰ *Id.*