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ICSID Arbitration Proceedings¹

Georges R. Delaume†

The International Centre for Settlement of Investment Disputes (hereinafter ICSID), created by treaty in 1966² is less than twenty years old. Nevertheless, ICSID's increasing caseload, the fact that several ICSID awards have been published by the parties, and the appearance of comments by certain municipal court decisions regarding the application of the ICSID Convention all permit the identification of certain characteristic traits of arbitration proceedings under ICSID.

With the exception of two conciliation proceedings, one of which is pending, the other having been settled, ICSID proceedings relate to arbitration.³ This Paper will focus on these arbitration proceedings.

From the outset, it should be noted that ICSID proceedings are specialized insofar as they are limited to investment disputes. The ICSID Convention intentionally refrains from defining the term "investment", in order to preserve flexibility. Nevertheless, ICSID's purpose is not to compete with other arbitral institutions, and it is clear that certain purely commercial disputes fall outside of ICSID's competence. It has become increasingly difficult to distinguish investment disputes from commercial disputes because the meaning of "investment" is no longer limited to the contribution of capital, but has come to include other operations such as the performance of services and the transfer of technology or know-how.⁴ In practice, however, the parties themselves have thus far been able to distinguish between disputes within the competence of ICSID and those which fall within the jurisdiction of arbitral tribunals functioning under the auspices of other institutions. ICSID's jurisdiction has been hotly contested for other reasons, but never have these jurisdictional objections been based on the nature of the dispute.

1. This speech was adapted from an article written by Mr. Delaume entitled *ICSID Arbitration Proceedings: Practical Aspects*, 5 PACE L. REV. 563 (1985). The speech was translated from the French by Gérard Lacroix.

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2. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (entered into force on October 14, 1966) [hereinafter cited as the Convention or the ICSID Convention].

3. See 2 NEWS FROM ICSID 2 (Winter 1985).

4. For more detailed treatment of the concept of investment, see Delaume, *Le Centre international Pour le Règlement des Différends Relatifs aux Investissements (CIRDI)*, 1982 CLUNET 775, 800; Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101, 116-20 (1984).

A second fundamental characteristic of ICSID is that the administration of the proceedings by the Secretariat and the arbitral tribunals is regulated by a body of international rules completely detached from any municipal law, including that of the situs of the arbitration. Moreover, these rules are not subject to the review of municipal courts. Pursuant to the system established by the ICSID Convention, the role of municipal courts is limited to one of assistance in the recognition and enforcement of ICSID awards.

Perhaps the simplest way of summarizing practice under ICSID is to focus first on the internal administration of ICSID proceedings, and then on the external relations between ICSID and the courts of the member states of the ICSID Convention.

I.

THE INTERNAL ADMINISTRATION OF ICSID PROCEEDINGS

A. Institution of the Proceedings and the Role of the Secretary-General of ICSID

ICSID proceedings are commenced by the filing of a request, which must be supported by documentation sufficient to establish that the basic requirements of the Convention are satisfied. These requirements are delineated in Article 25 of the Convention which provides that parties may submit claims to ICSID arbitration if three conditions are satisfied: 1) the dispute must be a "legal" controversy directly based upon an investment; 2) the parties must have agreed to submit their dispute to ICSID arbitration; and 3) the dispute must be between a state member of the Convention (hereinafter the "Contracting State"), or a subdivision or agency thereof, and a "national" of another Contracting State. Subject to these conditions, the request need not be drafted in any particular form. In practice, the requests tend to be well documented, but vary significantly in length and presentation.

Upon receipt of a request, which must be accompanied by a US \$100 filing fee, the Secretary-General sends an acknowledgment to the requesting party and transmits the request and accompanying documentation to the opposing party. The Secretary-General then decides, pursuant to a unique prerogative conferred by Article 36(3) of the Convention, whether to register or refuse to register the request. Article 36(3) provides that the Secretary-General may refuse to register the request upon finding, on the basis of the information contained in the request, that the dispute "manifestly" exceeds ICSID jurisdiction, meaning that the request fails to satisfy the conditions of Article 25 regarding consent to arbitration, the identity of the parties, and the nature of the dispute. The purpose underlying the Secretary-General's "screening power" is to avoid embarrassment to the opposing party, especially if such party is a Contracting State, which might result from the filing of frivolous requests manifestly outside the jurisdiction of the Centre.

The nature of the Secretary-General's prerogative distinguishes ICSID from most other arbitral institutions in two important respects. First, the Secretary-General exercises this power solely on the basis of the documentation supplied by the requesting party. The Secretary-General does not elicit the view of the opposing party before making a decision. Second, the Secretary-General's decision is final. A refusal to register the request definitively precludes access to ICSID. In contrast, a decision to register the request does not conclusively dispose of the jurisdictional issue, because the parties retain the right to object to the arbitral tribunal's jurisdiction once the tribunal is constituted. Such objections have actually been raised in several proceedings with at least one instance of success.

Given the important consequences of the Secretary-General's decision to permit or refuse registration of the request, it is clear that the Secretary-General must exercise the "screening power" with caution, and such has been the ICSID tradition. To date, only one request has been denied registration. In several cases in which the documentation accompanying the request was unclear, the Secretary-General found it necessary to obtain additional information before registering the request.

B. Constitution of the Arbitral Tribunal

The manner in which ICSID arbitral tribunals are constituted illustrates both the flexibility and the effectiveness of the ICSID Rules.⁵ Flexibility is provided by the permissive character of most of the Convention's provisions. The parties are able to adapt the provisions to their specific needs because most of the rules apply only to the extent that the parties have not agreed otherwise.

The parties enjoy complete freedom in choosing the arbitrators who will constitute the arbitral tribunal. They need not restrict their selection to the Panel of Arbitrators listed with ICSID's Secretariat.⁶ The only requirements imposed by the Convention are that the tribunal be composed of one or an uneven number of arbitrators (Art. 37(2)) and that a majority of the tribunal not be composed of arbitrators who are either nationals of the Contracting State party to the dispute, or of the Contracting State whose national is a party to the dispute (Art. 39). This latter restriction does not apply if the parties agree on the appointment of each arbitrator composing the tribunal. In the event that one of the parties refuses to cooperate in the constitution of the tribunal, the Convention provides that the remaining arbitrators be designated by the Chairman of the Administrative Council, at the request of either party (Art. 38). In such cases, the Chairman must select the arbitrators from

5. The ICSID Rules are reprinted *infra* in the Appendix to this issue of the International Tax & Business Lawyer.

6. This list has two parts. The first part includes the arbitrators designated by the Chairman of the Administrative Council of ICSID, and the second part includes a list of arbitrators nominated by the Contracting States. See ICSID Convention, art. 13(2).

ICSID's Panel of Arbitrators. Unlike the practice of other arbitral institutions,⁷ the ICSID Chairman has always tried to consult with the parties as much as possible before using this power of appointment, and the parties have generally agreed to cooperate.

The Chairman has also used the power of appointment to address the difficult problem of multiparty arbitration. This problem arose when three investors instituted separate, but substantively identical ICSID proceedings against Jamaica.⁸ Each claim alleged that Jamaica had imposed new taxes in violation of prior investment agreements between Jamaica and the investors. In all three proceedings the investors appointed the same arbitrator. When Jamaica failed to appoint an arbitrator, the claimants asked the Chairman to appoint two arbitrators for each proceeding, and to designate one of them as President of each tribunal. The Chairman selected the same two persons to serve on each tribunal. Although the claims were amicably settled after the arbitrators ruled that the disputes fell within their competence, this exercise of the Chairman's nominating power would have permitted coordinated proceedings.

C. *The Proceedings*

1. *Procedural Rules*

As mentioned above, ICSID's Rules of Procedure for Arbitration Proceedings (hereinafter the ICSID Rules) are international in nature. This feature explains why ICSID rules are considerably more detailed than those of other arbitration institutions whose rules can be supplemented by municipal law if necessary. ICSID rules apply only to the extent that the parties have not agreed otherwise. Such an agreement may be included in an arbitration clause or in a subsequent agreement made either before or after the proceeding has begun. The ICSID rules wisely provide that as soon as practicable after the constitution of the arbitral tribunal, the President of the tribunal should consult with the parties to determine their views concerning the agenda, the schedule, the language or languages to be used in the pleadings, the possibility of dispensing with oral or written proceedings, and the seat of the arbitration.

In ICSID proceedings, the situs of the arbitration proceedings does not have the same importance as it does in ad hoc or other institutional arbitration. In fact, the seat of the proceedings has no legal significance whatsoever in ICSID arbitration. Because ICSID rules are strictly international, the law

7. For practice before the ICC, see W. L. CRIAG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION ¶ 12.03 (1984).

8. Alcoa Minerals of Jamaica/Kaiser Bauxite Co./Reynolds Jamaica Mines and Reynolds Metals Co. v. Jamaica, Cases ARB/74/2, 3 and 4. See also 1 NEWS FROM ICSID 13 (Summer 1984).

of the seat of arbitration can have no bearing at all on the proceedings. Thus the situs of ICSID proceedings is purely a matter of convenience.⁹

2. *Duration of the Proceedings: A New Initiative—
The Prehearing Conference*

The average duration of ICSID proceedings is two and a half years. But statistics regarding the length of the proceedings are of little value in view of the many factors that differentiate one proceeding from another. In this respect, ICSID proceedings are indistinguishable from other forms of arbitration.

Nevertheless, in one important respect ICSID proceedings are fundamentally different from other forms of arbitration. ICSID's role is not limited to providing a mechanism for arbitration. ICSID's primary objective is to restore whenever possible a climate of mutual confidence between the parties so that they can amicably settle the dispute. This explains why the proceedings are often stayed in order to permit the parties to negotiate. More than half of the claims brought before ICSID have been settled in this fashion, which proves that ICSID has been highly successful in the pursuit of its primary objective.

In order to accelerate the proceedings and encourage amicable settlements, the ICSID Rules were revised in 1984 to provide a new procedure called a "prehearing conference".¹⁰ Such a conference may be convened by either the Secretary-General or the President of the Tribunal with the goal of facilitating the early identification of undisputed facts, thereby limiting the proceedings to the contested issues. The ICSID Rules also permit either of the parties to request the Tribunal to convene a prehearing conference between the parties, duly represented by their authorized representatives, to promote negotiations that could result in an amicable settlement of the dispute. It is too soon to know to what extent the prehearing conference will be used. But it can safely be predicted that this new procedure will likely alter ICSID proceedings significantly.

9. Pursuant to Article 62 of the Convention, the seat of the arbitration is normally at ICSID headquarters in Washington, D.C. Article 63, however, provides that the parties can agree to another location. The parties may decide to fix the situs in The Hague, seat of the Permanent Court of Arbitration, or in a city in which an institution with appropriate arrangements with ICSID is located. To date such arrangements have been concluded with the Asian-African Legal Consultative Committee and the Regional Centres for Commercial Arbitration in Cairo and Kuala Lumpur. The parties may also agree to another location, but only if authorized by the Tribunal after consultation with the Secretary-General. Several European cities have served as seats for ICSID arbitration in this fashion. See the ICSID brochure entitled *ICSID Cases, 1972-1984*.

10. Article 2 of the Rules of Procedure for Arbitration Proceedings provides: "At the request of the Secretary-General or at the discretion of the President of the Tribunal, a prehearing conference between the Tribunal and the parties may be held to arrange for the exchange of information and the stipulation of uncontested facts in order to expedite the proceedings." Rules of Procedure for Arbitration Proceedings, available as part of Document ICSID/15 (1985) on request addressed to the ICSID Secretariat [hereinafter cited as Arbitration Rules].

3. Jurisdiction of the ICSID Arbitral Tribunal

The registration of a request by the Secretary-General does not preclude the parties from contesting the arbitral tribunal's jurisdiction.¹¹ So far, such objections have been based on either a lack of consent to ICSID arbitration or the nationality of the investor party to the dispute.

Most of the objections based on a lack of consent stem from the fact that, in practice, many separate and successive agreements are executed in connection with the investment at issue. In such cases, it is possible that a clause providing for ICSID arbitration in one agreement is not expressly incorporated into other agreements, or that any reference made to ICSID arbitration is ambiguous and subject to interpretation. The issues raised in such situations were explored in the cases of *Holiday Inns v. Morocco*,¹² *Amco-Asia v. Republic of Indonesia*,¹³ and *Klöckner Industrie Anlagen GmbH v. United Republic of Cameroon*.¹⁴ Notwithstanding the complex problems inherent in these situations, every tribunal that has so far addressed the lack of consent problem stemming from successive agreements has found itself competent by reason of the overlapping nature of the various agreements signed by the parties.

Objections to ICSID jurisdiction based on the nationality of a party are based on the Convention's requirement that the investor be a national of a Contracting State. In practice the question arises only with respect to corporations. For the purposes of the Convention, the general rule is that a corporation is a national of the state in which its headquarters is situated. Nevertheless, in order to account for the fact that the host state frequently requires that the investment transaction take place under the auspices of a corporation organized pursuant to local law, the Convention provides that the parties may stipulate that in view of the control exercised by the foreign investing corporation over the local corporation, the latter may be considered to have the same nationality as the investing corporation.¹⁵

This raises the practical question of whether such a stipulation must be explicit or can be inferred from the circumstances of each case. Without rejecting the second alternative outright, the tribunal in *Holiday Inns* held that

11. Article 41(1) of the Arbitration Rules provides that any objection to the tribunal's competence must be raised "as soon as possible" and in any case before pleading on the merits.

12. *Holiday Inns v. Morocco*, an unpublished award, is discussed at length in Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco)-Some Legal Problems*, 51 BRIT. Y. B. INT'L L. 123 (1980) [hereinafter cited as Lalive].

13. *Amco-Asia v. Republic of Indonesia*, 23 I.L.M. 351 (1984). A summary of the main legal points considered by the tribunal appears in 1 NEWS FROM ICSID 5 (Summer 1984).

14. *Klöckner Industrie Anlagen GmbH v. United Republic of Cameroon*, 1984 CLUNET 409. See also Paulsson, *The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North South Economic Development Agreements*, 1 J. INT'L ARB. 145 (1984); Niggeman, *The ICSID Klöckner v. Cameroon Award: The Dissenting Opinion*, 1 J. INT'L ARB. 331 (1984). This award was annulled by a May 3, 1985 decision of an ad hoc Committee.

15. Convention, art. 25(2)(b).

such an agreement should, in principle, be explicit.¹⁶ More recently, however, the tribunal in *Amco-Asia* recognized that this sort of agreement between the parties need not be formalized but could be inferred from the circumstances of the case at issue.¹⁷

The arbitral tribunal is the sole judge of its own competence. Moreover, the tribunal is not limited to ruling on the jurisdictional objections that the parties may present, but may also raise any jurisdictional issue *ex officio*. This was the case in the three parallel proceedings brought against the state of Jamaica.

4. *The Applicable Substantive Law*

Article 42 of the Convention provides that the parties may either designate the application of a municipal law or "internationalize" their relations to the extent they find mutually agreeable. In the event the parties choose neither option, i.e., in the absence of any stipulation as to which law will govern, the tribunal may, of course, simultaneously take into account municipal and international norms in rendering its decision. Article 42(1) provides that the tribunal must apply the law of the Contracting State party to the dispute and the applicable rules of international law. Article 42(2), however, permits the parties to confer upon the tribunal the power to rule in equity.¹⁸

Almost everything that can be said has been said about the doctrinal consequences of Article 42. What remains to be explored is how this article is applied in practice by the parties through appropriate stipulations or by the ICSID tribunals. Contrary to what one would expect given the original approach of Article 42, most choice of law clauses in ICSID arbitration agreements are not innovative. With the exception of loan agreements, which are invariably governed by the law of the lender's country or that of a leading financial center, the great majority of these clauses stipulate that the municipal law of the host state will govern the relations of the parties. In certain cases the clauses will also refer to general principles of law or to international law. The typical ICSID agreement choice of law clause is similar in most respects to those that have been the object of several well known and controversial awards rendered in non-ICSID cases.¹⁹

5. *The Award*

The provisions concerning the form and content of the arbitral award are relatively straightforward. The award must be rendered and signed by a

16. See discussion in Lalive, *supra* note 12.

17. 23 I.L.M. 351 (1984).

18. Convention, art. 42(1).

19. See G. DELAUME, *TRANSNATIONAL CONTRACTS*, Chap. XIV, ¶ 14.05 (1985 update). Only one ICSID case involved an arbitration clause that referred to the law of the host state (Congo) and international law. *AGIP S.P.A. v. People's Republic of Congo*, 64 *REVISTA DI DIRITTO INTERNAZIONALE* 863 (1981) (French original); 21 I.L.M. 726 (1982) (English translation).

majority of the arbitrators. An arbitrator not voting with the majority may write a dissenting opinion, as occurred in the above-mentioned case of *Klöckner*.²⁰ The award must state the reasons upon which it is based and address every issue submitted by the parties.²¹

Once rendered, the award can only be contested by seeking a revision on the basis of a newly discovered fact relevant to the award or by annulment proceedings. The grounds for annulment are limited to instances where: (1) the tribunal was not properly constituted; (2) the tribunal manifestly exceeded its powers; (3) there is evidence of corruption of a member of the tribunal; (4) there was a serious departure from a fundamental rule of procedure; or (5) the award failed to state the reasons for which it was rendered.²²

Although no party has used the revision procedure to date, annulment proceedings have been instituted on two occasions. The first instance involved the *Klöckner* case, in which an ad hoc committee annulled the award. The second annulment action was brought by Indonesia subsequent to the award rendered in *Amco-Asia* and also resulted in the formation of an ad hoc committee. At the time of this writing, the committee has not yet rendered its decision.

The procedure by which an award is challenged illustrates the extent to which ICSID differs from most other arbitral institutions. In ICSID arbitration, any challenge to the award is still governed by the provisions of the ICSID Convention and remains under the auspices of ICSID. In no event can the award be challenged in the courts of a Contracting State. This is but one of many illustrations of ICSID's independence from municipal courts.

II.

THE EXTERNAL ASPECTS OF ICSID PROCEEDINGS: ICSID ARBITRATION AND THE MUNICIPAL COURTS

A. *The Absence of Municipal Intervention in ICSID Proceedings*

Once the parties have consented to ICSID arbitration, their disputes are within the exclusive competence of ICSID and completely beyond the jurisdiction of municipal courts. This rule preserves the exclusive and irrevocable nature of the parties' consent to ICSID arbitration by preventing a party from subsequently avoiding the mutually agreed upon dispute resolution process.

If one of the parties attempts to bring a cause of action in a municipal court in violation of a prior agreement to submit the dispute to ICSID, then that court must stay the proceedings and refer the parties to ICSID. Two decisions, one American and one French, have addressed this problem.

20. 1984 CLUNET 409.

21. Convention, art. 48; ICSID Rules, art. 47.

22. Convention, arts. 51, 52.

In *Maritime International Nominees Establishment v. Guinea*,²³ the United States Court of Appeals for the District of Columbia found that an American court could not intervene in a dispute where the parties had agreed to ICSID arbitration. Although the court reached the correct result, it did so for the wrong reason, basing its decision on the American law of sovereign immunity instead of on the exclusive character of ICSID jurisdiction as provided by the ICSID Convention.

In contrast, a French judgment of the Court of Appeal of Rennes in *République Populaire Révolutionnaire de Guinée v. Société Atlantic Triton*²⁴ is free of any such ambiguity. To place this case in its proper context, it should be noted that pursuant to the ICSID Convention only the ICSID tribunal has power to order provisional remedies in the absence of any agreement in this regard between the parties.²⁵ Parties who wish to preserve their right to obtain provisional remedies from municipal courts must do so by express stipulation. In *Atlantic Triton*, the parties' ICSID arbitration clause made no mention of provisional remedies.²⁶ Nevertheless, Atlantic Triton attached several Guinean vessels undergoing repair in a French port. The trial court of Quimper validated the attachments and Guinea appealed. The Court of Appeal quashed the attachments on the ground that French courts lacked jurisdiction to grant any provisional remedies. The court observed that once constituted the ICSID arbitration tribunal had exclusive jurisdiction not only on the merits, but also with respect to provisional remedies.²⁷

This exclusive jurisdiction to grant provisional remedies distinguishes the ICSID system from the practice of other arbitral institutions such as the International Chamber of Commerce, the American Arbitration Association, or UNCITRAL, which pose no incompatibility between consent to arbitration and recourse to municipal provisional remedies.

The independence of ICSID proceedings is further illustrated in the ICSID decision of *Holiday Inns v. Morocco*, which addressed the problem of *lis pendens*.²⁸ In *Holiday Inns*, the first controversy brought before ICSID, Morocco argued that its courts were exclusively competent to rule on a dispute regarding a transaction that Morocco thought to be outside the ICSID dispute. The ICSID tribunal, finding that the transaction at issue was part and parcel of the main investment agreement, held that it had jurisdiction over this controversy as well. In clear terms, the tribunal stated that municipal

23. *Maritime International Nominees Establishment v. Guinea*, 693 F.2d 1094 (D.C. Cir. 1982). See also *Maritime International Nominees Establishment v. Guinea*, 505 F. Supp. 141 (D.D.C. 1981). See generally Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. (1983).

24. *République Populaire Révolutionnaire de Guinée v. Société Atlantic Triton*, (Cour d'Appel de Rennes, October 26, 1985) reprinted in 24 I.L.M. 340 (1985) (English translation), 2 NEWS FROM ICSID 6 (Summer 1985).

25. Convention, art. 47; Arbitration Rules, art. 39.

26. 24 I.L.M. at 343-44 (1985).

27. *Id.* at 341.

28. See discussion in Lalive, *supra* note 12.

courts confronted with the same issues as the ICSID tribunal must stay their proceedings until these issues have been decided by the tribunal, and that once the tribunal has passed on an issue, the municipal court must follow the ICSID decision.²⁹

B. *Judicial Assistance*

The scheme of the ICSID Convention limits the role of municipal courts to one of assistance in the recognition and enforcement of ICSID awards. The general issues raised by such judicial assistance have been given adequate treatment elsewhere.³⁰ The main mechanisms of municipal judicial assistance can be summarized briefly under the rubrics of recognition and enforcement of ICSID awards.

1. *Recognition of ICSID Awards*

The courts of each Contracting State must recognize an ICSID award as soon as it is presented to the court. Pursuant to Article 54 of the Convention, a party need only furnish a copy of the ICSID award certified by the Secretary-General to obtain recognition of the award. No exequatur proceedings are necessary.

Once an ICSID award is recognized, the court must reject any defense that would tend to undermine the scheme set up by the Convention. This includes any defense based on sovereign immunity that a losing state might be tempted to raise. This requirement follows from the irrevocable nature of consent to ICSID arbitration and the duty of each party under Article 53 to "give effect to the award in conformity with its terms." To allow a state to challenge an award on sovereign immunity grounds would violate this duty. The Court of Appeals of Paris so held in *S.A.R.L. Benvenuti & Bonfant v. République Populaire du Congo*.³¹ In that case, the trial court recognized an ICSID award rendered against the Congo, but denied the plaintiff the right to attach or levy on the assets of the defendant. This decision was reversed on appeal as manifestly contrary to Article 54 of the Convention. The Court stated:

[These] provisions [of Article 54 of the ICSID Convention] offer a simplified procedure for recognition and enforcement of judgments and limit the function of the court of each Contracting State designated for this purpose by the Convention to ascertaining the authenticity of the award certified by the Secretary-General of the International Centre for Settlement of Investment Disputes.³²

S.A.R.L. Benvenuti is important not only because the Court of Appeal of Paris rendered its judgment in conformity with the ICSID Convention, but

29. *Id.* at 160.

30. See the bibliography prepared by the ICSID Secretariat, Document ICSID/13.

31. *S.A.R.L. Benvenuti & Bonfant v. République Populaire du Congo*, 1981 CLUNET 843 (Cour d'Appel de Paris, June 26, 1981); reprinted in 20 I.L.M. 878 (1981) (English translation).

32. *Id.*

also for practical reasons. The judgment stands for the proposition that every duly recognized ICSID award takes on the character of a *titre exécutoire*, permitting the creditor to immediately initiate enforcement proceedings.

2. *Enforcement of ICSID Awards*

No particular problems arise with respect to the enforcement of ICSID awards against investors. The awards are simply enforced in accordance with municipal law. The situation is different when the losing party is a Contracting State that refuses to comply with the award. The Convention does not derogate from the municipal laws of each Contracting State, which might grant sovereign immunity against execution.³³ Given the substantial diversity of the various municipal rules with respect to immunity from execution, it is possible that an ICSID award, like any other award, will be enforceable in some Contracting States but not in others. This lack of uniformity is the unavoidable consequence of the divergent opinions expressed by the delegates of the Contracting States with regard to the domestic and foreign components of the sovereign immunity doctrine during the negotiation and drafting of the Convention.

The situation has changed little since the adoption of the Convention with respect to the internal component of the doctrine (the immunity of a state's assets from execution in its own courts). In many countries, public assets remain immune from execution in their own courts.

In contrast, the theory of absolute foreign sovereign immunity from execution, pursuant to which the courts of one state refuse to execute on assets belonging to another state, has been increasingly replaced by the restrictive theory, which authorizes execution against state-owned assets in certain circumstances. The adoption of the restrictive theory has been accomplished either through appropriate legislation, as in the United States, Great Britain and Canada, or by the courts, as in Belgium, France, The Netherlands, Switzerland, and the Federal Republic of Germany.³⁴ This change has greatly increased the practical enforceability of ICSID awards because the major capital markets where sovereign states usually maintain substantial deposits are located in these countries. Thus, the beneficiary of an ICSID award, often advised by experts in such matters, is usually able to shop for a forum where the chances of finding assets belonging to the foreign state are good. All this can be avoided, of course, if the parties can agree that the foreign state waives the defense of immunity from execution.

The preceding discussion of the effect of sovereign immunity on ICSID awards is also applicable to awards rendered by ad hoc arbitrators or other arbitral institutions. Nevertheless, an important difference exists between ICSID and other forms of arbitration. A state's noncompliance with an ICSID

33. Convention, art. 55.

34. See G. DELAUME, *supra* note 19, at Chapter XII, ¶¶ 12.01-.04.

award exposes that state to various sanctions set forth in the Convention. For instance, a state's assertion of immunity from execution before either its own courts or those of another country constitutes a breach of that state's duty under the Convention to acknowledge the compulsory nature of an ICSID award and to give effect to the award "in conformity with its terms."³⁵ Such conduct exposes the state to two sanctions delineated in the Convention, namely, the exercise of diplomatic protection by the Contracting State whose national is the investor,³⁶ and the right of that state to bring the case before the International Court of Justice.³⁷ In practice, however, as no ICSID award to date has been the object of enforcement proceedings, the problems attendant to the doctrine of sovereign immunity and the sanctions for non-compliance contained in the Convention are only theoretical. It appears that they will remain that way.

An encouraging sign in this respect is that ICSID proceedings are characterized by the active participation of states. Although the majority of proceedings have been instituted by investors, the sovereign defendants have generally adopted a strategy of presenting their own grievances by means of counterclaims. To the extent these counterclaims have been successful, no execution problem has arisen. In instances where an award has been rendered against the state, the latter's participation in the proceedings has certainly contributed to the state's increased willingness either to comply with the award or to reach a settlement with the investor.

35. Convention, art. 53(1).

36. *Id.* at art. 27.

37. *Id.* at art. 64.