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Georges R. Delaume

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ICSID Arbitration in Practice

by
Georges R. Delaume†

The International Centre for Settlement of Investment Disputes (ICSID) was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the Convention), which came into force on October 14, 1966.¹ After a relatively slow start, ICSID activities have significantly increased in the last few years. Whereas only nine disputes had been submitted to ICSID before the end of 1980,² five new arbitration proceedings³ and one conciliation proceeding⁴ have been instituted since the beginning of 1981.

ICSID membership has also changed, providing a new geographical dimension to the Convention's application. Over the years, commentators noted the limited participation of Arab countries and the total lack of par-

† Senior Legal Adviser, International Bank for Reconstruction and Development. The views expressed in this Article are those of the author and do not necessarily represent those of the IBRD or of ICSID.

1. *Opened for signature* March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159. The text of the Convention, the ICSID Model Clauses, the List of Contracting States, and other ICSID publications can be obtained on request addressed to:

International Centre for Settlement of Investment Disputes
1818 H Street, N.W.

Washington D.C. 20433, U.S.A.

Telephone: (202) 477-1234

2. Six disputes have been the object of settlement or discontinuance: *Holiday Inns/Occidental Petroleum v. Government of Morocco*, ICSID ARB 72/1; *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, ICSID ARB 74/2; *Kaiser Bauxite Company v. Government of Jamaica*, ICSID ARB 74/3; *Reynolds Jamaica Mines Ltd. and Reynolds Metals Company v. Government of Jamaica*, ICSID ARB 74/4; *Guadalupe Gas Products Corporation v. Federal Military Government of Nigeria*.

Three disputes led to arbitral awards: *Adriano Gardella Spa. v. Government of Ivory Coast*, ICSID ARB 74/1 (unpublished); *AGIP Spa. v. Government of the People's Republic of the Congo*, 64 RIVISTA DI DIRITTO INTERNAZIONALE 863 (1981) (french original), 21 I.L.M. 726 (1982) (english translation); *Societe Ltd. Benvenuti & Bonfant srl. v. Government of the People's Republic of the Congo*, 21 I.L.M. 740 (1982), with a correction in 21 I.L.M. 1478 (1982).

3. *Amco Asia Corporation, Pan American Development Ltd., and P.T. Amco Indonesia v. Government of Indonesia*; *Klöckner Industrie-Anlagen GmbH, Klöckner Belge S.A., and Klöckner Handelsmaatschappij B.V. v. United Republic of Cameroun and Société Camerounaise des Engrais (SOCAME) S.A.; Société Ouest Africaine des Betons Industriels (SOABI) v. Government of Sénégal*; *Swiss Aluminum Ltd. (ALUSUISSE) and Icelandic Aluminum Company Ltd. (ISAL) v. Government of Iceland*; *The Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia*.

4. *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Government of the Democratic Republic of Madagascar*. This proceeding, the first of this type under the Convention, was instituted in October 1982. It was discontinued in June 1983.

ticipation of Latin American countries.⁵ This is no longer true. In addition to Egypt, Morocco, Sudan, and Tunisia, which were among the first countries to ratify the Convention, Kuwait, Saudi Arabia, and the United Arab Emirates have now ratified the Convention.⁶ Also significant is that three Latin American countries, Costa Rica, El Salvador, and Paraguay, have recently signed the Convention and that Paraguay ratified it in January 1983.⁷ At present the Convention has been signed by eighty-nine States and ratified by eighty-three.⁸ In comparison with other conventions dealing with arbitration, this is an impressive record.⁹

References to ICSID arbitration in national investment laws¹⁰ and in bilateral treaties for the promotion and protection of investments¹¹ are steadily increasing, as is the number of inquiries received by the ICSID Secretariat from potential investors, attorneys, and other interested parties, including government officials. The nature of these inquiries clearly varies from case to case. For the benefit of potential ICSID users, this Article focuses attention on three of the major issues that arise in the context of ICSID arbitration: (i) the drafting of ICSID clauses; (ii) the autonomous character of ICSID arbitration; and (iii) the effectiveness of ICSID awards.

I

DRAFTING AN ICSID ARBITRATION CLAUSE

There is no more magic in drafting an ICSID arbitration clause than there is in drafting any other contractual covenant. Of necessity, the form and content of the clause will vary according to the particular circumstances of each case.¹² Except for the provision that consent to ICSID arbitration must be "in writing",¹³ the Convention wisely leaves it to the parties

5. See, e.g., Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256 (1970-71).

6. See ICSID, SEVENTEENTH ANNUAL REPORT, Annex 1 at 6 (1982/1983).

7. *Id.* at 7.

8. For a list of contracting states and signatories of the Convention, see ICSID, SEVENTEENTH ANNUAL REPORT, *supra* note 6.

9. By way of illustration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, 7 I.L.M. 1946, which includes the greatest number of contracting States, has been ratified by only fifty-nine States. This is far short of the State participation in ICSID.

10. Eleven national investment laws refer to ICSID. A list of these laws appears in ICSID, SEVENTEENTH ANNUAL REPORT, Annex 4, pt. II (1982/83).

11. Eighty-seven investment treaties refer to ICSID. The texts of these and other investment treaties are reprinted in ICSID, INVESTMENT, PROMOTION, AND PROTECTION TREATIES, (1983) (A loose-leaf collection filed under the larger title INVESTMENT LAWS OF THE WORLD, INVESTMENT TREATIES).

12. In order to assist the parties in drafting ICSID clauses, ICSID offers Model Clauses. Doc. ICSID/5/Rev.1 (1981). As the title indicates, these clauses are only models and have been prepared merely for the convenience of the parties, who remain responsible for the ultimate drafting of the relevant provisions.

13. Convention, *supra* note 1, art. 25(1).

to determine the form of their consent. In order for the Convention to apply to a dispute, however, article 25(1) requires that:

(i) one of the parties be a Contracting State or a constituent subdivision or agency of that State, and the other party a "national" of another Contracting State; and

(ii) the dispute be a legal dispute arising directly out of an investment.

The content and impact of these requirements are examined below.

A. Consent to and Withholding from Arbitration

The Convention allows the parties to choose the form of their consent to ICSID arbitration. Consent may be established through an arbitration clause in an investment agreement or through a simple exchange of letters. Consent may also result from the investor's acceptance of a unilateral offer from the host State if a consent provision is contained in the host's investment law or in a bilateral treaty with the Contracting State of which the investor is a national.¹⁴ In addition, each Contracting State remains free to submit only certain categories of disputes to ICSID for arbitration. Pursuant to article 25(4) of the Convention:

Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would not consider submitting to the jurisdiction of the Centre.

To date, only four Contracting States have invoked this option. Three States have notified ICSID that they intended to exclude investment disputes relating to "oil and pertaining to acts of sovereignty" (Saudi Arabia), or to the "mineral and other natural resources of the Contracting State" (Guyana, Jamaica), and Papua New Guinea has specified that "it will only consider submitting those disputes to the Centre which are fundamental to the investment itself."

Except for Jamaica's, these notifications are perfectly orthodox and consistent with article 25(4). In the case of Jamaica, it must be recalled that when that country ratified the Convention in 1966, it did so without qualification. In 1968, Jamaica and several foreign investors concluded agreements for the mining and the processing of bauxite.¹⁵ Each of these agreements provided for ICSID arbitration. In June 1974, contrary to a provision regarding the "stabilization" of the relevant tax system, Jamaica significantly increased the taxes payable by the investors. One month before that decision was published, Jamaica notified ICSID of the above

14. Delaume, *Institutional Arbitration: The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)*, 2 *TRANSNATIONAL CONTRACTS*, paras. 15.06-15.08 (November 1982).

15. See Schmidt, *Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 *HARV. INT'L L.J.* 90, 103 (1976).

quoted declaration,¹⁶ the complete text of which specifies that it applies to any dispute regarding investment in natural resources "at any time arising", an expression intended to have both a prospective and retroactive effect.

Immediately after the enactment of the new tax legislation, the affected investors instituted ICSID arbitration proceedings. The arbitral tribunals, despite objections to their jurisdiction formulated by Jamaica, held that the disputes concerned "investments" and that since the initial consent of Jamaica in ratifying the Convention and entering into the agreements was unconditional and unqualified, no retroactive effect could be given to the 1974 exclusionary declaration. As stated in one of the decisions:

In the present case the written consent was contained in the arbitration clause between the Government and Alcoa This consent having been given could not be withdrawn. The notification under Article 25 only operates for the future by way of information to the Centre and potential future investors in undertakings concerning minerals and other natural resources of Jamaica.¹⁷

Any other conclusion "would largely, if not wholly, deprive the Convention of any practical value."¹⁸ Following these decisions, the disputes were amicably settled and the proceedings discontinued.¹⁹ Thus, since the Contracting State cannot rely on article 25(4) to subsequently alter the terms of a written consent already in effect, care should be taken to draft the consent clause only as broadly as the parties intend the eventual scope of ICSID authority to be.

B. Qualification of Potential Parties

As mentioned above, article 25(1) of the Convention requires that one party to the dispute be a Contracting State or a constituent subdivision or agency thereof and the other party be a national of another Contracting State. Insofar as the identity of the requisite governmental party is concerned, no particular problem arises when that party is a Contracting State. If the party is a subdivision or an agency the situation is somewhat more complex. The Convention requires that the entity in question be designated to ICSID by the Contracting State as eligible to become a party to ICSID arbitration²⁰ and that the consent given by such an entity be approved by its own State, unless that State notifies ICSID that no such approval is required.²¹ Elementary prudence suggests that the arbitration clause clearly state that these requirements have been duly complied with.²²

16. *Id.*

17. Unpublished Decision of Jurisdiction and Competence of Arbitral Tribunal, International Centre for Settlement of Investment Disputes ARB 74/2 (1975), *quoted in* Schmidt, *supra* note 15, at 103.

18. *See* Schmidt, *supra* note 15.

19. ICSID, FIFTEENTH ANNUAL REPORT 34-39 (1980/81).

20. Convention, *supra* note 1, art. 25(1).

21. *Id.*, art. 25(3).

22. *See, e.g.*, ICSID Model Clause VI:

A similar remark applies to the determination of the nationality of the "investors", which, as a practical matter, are corporations rather than individuals. It is generally agreed that for the purposes of article 25(2)(b), the nationality of a corporation is determined on the basis of its place of incorporation.²³ Consequently, a business association incorporated in Contracting State A and investing in Contracting State B is eligible to be a party to an ICSID arbitration clause and to avail itself of ICSID facilities if the need arises. This is to be distinguished from a juridical person incorporated in the host Contracting State party to the dispute. Such a corporation would not be so eligible. This issue was decided in Proceeding No. 1, *Holiday Inns/Occidental Petroleum v. Government of Morocco*.²⁴ There, a Swiss and a U.S. corporation filed claims against the Government of Morocco not only on their own behalf, but also on behalf of subsidiaries incorporated in Morocco. The Tribunal held that it had jurisdiction and that the principal claimants were entitled to be parties to the proceedings, but that the local subsidiaries of the claimants were not entitled to participate in the proceedings.²⁵

Although this is the principle, it is qualified in the sense that a juridical person incorporated in the host State can still be regarded as the national of

[Name of the subdivision or agency] is [a constituent subdivision] [an agency] of [name of the Host State], which has been designated to the International Centre for Settlement of Investment Disputes (ICSID) in accordance with Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention). In accordance with Article 25(3) of the Convention, [name of the Host State]:

—[hereby gives its approval to this consent agreement as recorded in (one of the Basic Clauses) (Article —, section —, paragraph —,) of (this Agreement) (the Agreement dated —, 19—) between (name of the subdivision or agency) and (name of the investor)].

—[has notified ICSID that (name of subdivision or agency) requires no approval to give its consent to ICSID (Conciliation) (Arbitration) pursuant to the provisions of (this Agreement), (the Agreement dated —, 19—) between (name of subdivision or agency and name of the investor)].

It may happen that, at the time of the negotiations, the parties are not in a position to ascertain all the public entities which may be in contact with the investor during the life of the investment. In that case, the following provision may be (and has been) used:

Solely for the purpose hereof the Government pursuant to Article 25(1) of the Convention hereby agrees to take all steps necessary to designate any agency or instrumentality of the Government that becomes a party to this Agreement or to any of the Scheduled Agreements as constituent subdivisions or agencies of the Government for the purpose of the Convention and pursuant to Article 25(3) of the Convention, the Government hereby agrees to approve any consent of such agency or instrumentality.

23. International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter Report of the Executive Directors], sec. 5, no. 26 (Mar. 18, 1965), *reprinted in* ICSID, 2 HISTORY OF THE CONVENTION 1069, 1078 (1968).

24. ICSID ARB 72/1.

25. Decision of the Arbitral Tribunal of July 1, 1973, as summarized in Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123, 142 (1980).

another Contracting State if "because of foreign control, the parties have agreed [that it] should be treated as [such] for the purposes of the Convention."²⁶ This provision is intended to account for the rather common situation in which a host government insists that foreign investors channel their investment through a locally incorporated company. In the absence of this qualification of the general rule, such a company could not resort to ICSID facilities, notwithstanding its foreign elements. Disputes with the host State would have to be resolved through other means, presumably by bringing an action in the host State courts or by using other local remedies. Such a situation would be contrary to the purpose of the Convention, which is to promote investment by removing investment disputes from domestic fora and referring them to international adjudication.²⁷

The Convention does not specify the manner in which the parties' agreement regarding investor nationality must be made. All that can be inferred from the text of the Convention and from the Institution Rules adopted for its implementation²⁸ is that this agreement should be explicit.²⁹ It is not excluded that an implied agreement might be acceptable in the event that the circumstances indicated the unequivocal agreement of the parties. For example, exchanges of correspondence, minutes of negotiations, or the treatment given the investor by the host State could indicate an agreement between the parties. Precise drafting could prevent serious difficulties arising from a lack of initial acknowledgment of the investor's nationality.

In discussing the parties' right to specify nationality, *Maritime International Nominees Establishment v. The Republic of Guinea*³⁰ (hereinafter *MINE v. Guinea*) deserves mention since it raised, though did not resolve, an interesting question. In 1971, MINE and Guinea entered into a joint

26. *Id.* at 138.

27. Convention, *supra* note 1, Preamble.

28. See, e.g., *id.*, art. 25(2)(b); Institution Rules, art. 2(1)(d)(iii).

29. This was clearly stated in the case of Holiday Inns. See Lalive, *supra* note 25, at 141 (quoting the decision of the Arbitral Tribunal):

The solution which such an agreement is intended to achieve constitutes an exception to the general rule established by the Convention, and one would expect that parties should express themselves clearly and explicitly with respect to such a derogation. Such an agreement should therefore normally be explicit. An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties

30. 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, — U.S. —, 104 S. Ct. 71 (1983), *reprinted* in 21 I.L.M. 1355 (1982), *as amended*, 22 I.L.M. 86 (1983). The decision of the District Court in the same case appears at 505 F. Supp. 141 (D.D.C. 1981), *reprinted* in 20 I.L.M. 669 (1981). See also Shifman, *Maritime International Nominees Establishment v. Republic of Guinea: Effect on U.S. Jurisdiction of an Agreement by a Foreign Sovereign to Arbitrate before the International Centre for Settlement of Investment Disputes*, 16 GEO. WASH. J. INT'L L. & ECON. 451 (1982); Birn, *Sovereign Immunity: Enforcement of Arbitral Award Against Foreign State*, 24 HARV. INT'L L.J. 236 (1983); Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784 (1983).

venture agreement. Subsequently, they agreed on an ICSID arbitration clause stating that even though MINE was a Liechtenstein company, they would treat it as a Swiss national, since Liechtenstein is not a party to the Convention, but Switzerland is. During the course of proceedings in the United States, MINE argued the clause was invalid because it exceeded the scope of the Convention.³¹ According to MINE, the Convention would apply only to situations in which the company involved is incorporated in the host Contracting State. If the company were incorporated in a third State, neither the company nor the host State would have the power to agree upon the nationality of that company.

Although the case was decided on other grounds, it must be acknowledged that the question raised by MINE is a difficult one. Most of the discussions relating to the successive drafts of what became article 25(2)(b) of the Convention focused primarily on the case of entities incorporated in the host State, yet under foreign control, and on the possible definition of what should constitute "foreign control".³² Nevertheless, the history of the Convention shows that the range of the discussions covered a much broader scope, the general feeling being that, since consent is the cornerstone of the Convention, each Contracting State agreeing to ICSID arbitration should have discretion when signing to determine to its own satisfaction whether it is willing to treat a particular corporation as the "national" of another Contracting State, regardless of the place of incorporation.³³

C. Disputes Qualifying for ICSID Arbitration

In addition to the nationality requirement, an ICSID arbitration clause should also address the nature of the dispute. As already mentioned, a dispute can be submitted to ICSID arbitration only if it is a "legal dispute" arising out of an "investment". Neither the expression "legal dispute" nor the term "investment" are defined in the Convention.

It is generally agreed, however, that reference to the "legal" nature of a dispute limits the scope of ICSID arbitration to a review of the respective rights and obligations of the parties as set forth in an investment agreement in light of the laws and regulations relevant to that agreement.³⁴ Examples of "legal" disputes are those concerning non-performance, including causes of excuse based on *force majeure* or similar events, the violation of "stabilization" clauses, the interpretation of the agreement and of the relevant legislation, the termination of the agreement, including expropriation or nationalization, and related issues of compensation. In contrast, disputes regarding conflicts of interest between the parties, such as those involving the desirability of renegotiating the entire agreement or certain of its terms,

31. See Shifman, *supra* note 30, at 454-55.

32. See generally, ICSID, 2 HISTORY OF THE CONVENTION, *supra* note 23.

33. *Id.* at 260, 359, 447-50, 851-52.

34. Report of the Executive Directors, *supra* note 23, sec. 5, no. 26.

would normally fall outside the scope of the Convention.³⁵ The Convention also does not apply to factual disputes, such as those concerning accounting or fact-finding investigations.³⁶

The failure of the Convention to define "investment", clearly of fundamental importance for determining the scope of the Convention, has been lamented by a number of commentators.³⁷ This ambiguity may, however, actually prove to be a blessing in disguise for the future implementation of the Convention and the corresponding potential recourse to ICSID arbitration.

The Convention was drafted at a time when most investments took the form of concessions, establishment agreements, joint ventures, or loans made by private financial institutions to foreign public entities, and, to a certain extent, arrangements concerning industrial property rights. These types of investments are now supplemented, and sometimes superseded, by new forms of association between States and foreign investors, such as profit-sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing arrangements, and agreements for the transfer of know-how and technology. Direct investment in the traditional form of contribution of capital and acquisition of title over national resources, to the extent that it is still acceptable to developing nations, accounts only for a decreasing percentage of the arrangements concluded by States and investors for economic development purposes. An economic concept of investment has increasingly replaced the traditional notion of investment in capital; the notion of investment today is directly related to the expected contribution that an association between a foreign party and a State may make to the economy of the State concerned.

The increasing acceptance of this concept opens a new meaning to the ICSID Convention, widening its potential scope.³⁸ The ambiguous refer-

35. *Id.*

36. This last remark, however, must be qualified. To the extent that, for example, the agreement provides for the possible readjustment of the relationship on the basis of some type of "hardship" clause or a "most favored investor/host state" clause, it is clear that a dispute regarding the existence of facts allegedly triggering the clause would have legal implications, since it would ultimately affect matters of performance or non-performance.

37. The explanations given for this situation are well known. They are based on three major practical considerations. To give a comprehensive definition of "investment", such as that which is sometimes found in investment codes, would have been too broad to serve a useful purpose. Insistence upon a precise and detailed formulation would have been difficult if not impossible in view of the diversity of opinions expressed during the several drafting stages of the Convention. It might also have arbitrarily limited the scope of the Convention by making it impossible for the parties to refer what they consider a genuine "investment" dispute to ICSID if such investment activity did not fall within the scope of the definition set forth in the Convention. In view of the fact that submission of a dispute to ICSID proceedings requires the mutual consent of the parties, it appeared that the best solution was to leave the parties free to characterize the nature of their relationship, and of disputes relating thereto, as they thought fit in light of the circumstances. See Report of the Executive Directors, *supra* note 23.

38. This conclusion finds additional support in the response of interested parties to the problem of definition. A number of domestic investment laws and bilateral investment treaties

ence of the Convention to "investment" allows ICSID clauses to apply not only to investments in the classical sense but also to arrangements concerning the industrial or agricultural development of a particular State or to the development of its touristic or port facilities, as well as turn-key or technology-transfer contracts, such as in the areas of electronics and air transportation. The Convention's ability to encompass the variety of transactions corresponding to the modern notion of investment bodes well for the future of ICSID and bears testimony to the Convention's adaptability to a new investment climate.

Nevertheless, in view of the novelty of certain types of investment, the parties would be well advised to follow the suggestion made in the ICSID Model Clauses that "in order to eliminate any ambiguity [parties should] state expressly in the instrument recording their consent that the particular transaction between them constitutes an investment for the purposes of the Convention,"³⁹ and that they supplement the provision with a description of the particular features of the investment,⁴⁰ such as its nature, size, and duration. So far, the only cases in which an ICSID arbitral tribunal has been required to pass judgment upon its own jurisdiction — that is, whether a dispute is effectively related to an investment within the scope of the Convention — are those concerning the disputes between Alcoa, Kaiser, Reynolds and the Government of Jamaica.⁴¹ As discussed in connection with a party's right to withhold certain disputes from arbitration,⁴² the parties' agreement to mine and process bauxite in the host State was considered an "investment" for the purposes of ICSID arbitration.⁴³

D. Optional Clauses

In addition to making certain that the arbitration clause meets the fundamental requirements of the Convention, the drafter may also give attention to other matters left open to the discretion of the parties. To account for the variety of situations which may occur in connection with ICSID arbitration, many provisions of the Convention are permissive, applying

referring to ICSID conciliation/arbitration clearly accept the modern economic notion of investment. For illustrations, see Delaume, *supra* note 14, para. 15.15.

39. ICSID Model Clauses, sec. 2, para. 7, Doc. ICSID/5/Rev.1 (1981).

40. In this connection, the Secretariat has recently recommended that private companies involved in important public works in certain Contracting States or in systematic transfers of technology contributing to the economic development of such States pay particular attention to the problem of definition. In cases of this type, the Secretariat now suggests that the parties stipulate expressly in their agreement that the transaction's object is an investment within the meaning of article 25 of the Convention. Another alternative might be for the private party to secure a statement from the Host State that it considers the transaction involved as an investment and that in the event of a dispute the State would raise no objection to the jurisdiction of an ICSID arbitral tribunal on the ground that the nature of the dispute would not relate to an investment within the meaning of the Convention.

41. See *supra* note 2.

42. See *supra* Section I.A.

43. *Id.*

only in the absence of agreement between the parties. Thus, although in the majority of cases the parties will simply adopt by reference the procedural rules set forth in the Convention and in the Institution Rules adopted for its implementation, the parties are free to depart from those rules in various respects,⁴⁴ or to supplement them if the need arises.⁴⁵ Similar flexibility exists concerning the determination of the substantive rules applicable to the dispute.⁴⁶

II

ICSID ARBITRATION: A SELF-CONTAINED SYSTEM

Within the framework of the Convention and the Regulations and Rules adopted for its implementation,⁴⁷ the ICSID arbitration system functions in total independence from domestic legal systems. The autonomous character of ICSID arbitration is clearly stated in article 44 of the Convention:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question . . . ,

and in article 26 of the Convention, which provides that:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.⁴⁸

44. This may be the case in regard to the number of arbitrators and the method of their appointment, or the allocation of the costs of the proceedings. See Delaume, *supra* note 14, para. 15.22, para. 15.20.

45. For example, the parties may wish to retain the option of seeking interim or conservatory measures, including attachment, in domestic courts. Under article 26 of the Convention, consent to ICSID arbitration is to the exclusion of any other remedy. The parties could not, therefore, ask local courts or other authorities to order or take provisional measures in the absence of specific agreement. An example of a possible stipulation to that effect is found in Model Clause XVI, ICSID Model Clauses, sec. 4, para. 21, Doc. ICSID/5/Rev.1 (1981).

46. Convention, *supra* note 1, art. 42; Delaume, *supra* note 14, para. 15.24. There is an abundance of literature on this subject. See the bibliography prepared by the ICSID Secretariat, Doc. ICSID/13 (1982), updated in ICSID Newsletter No. 83.2 of July 1983, which may be obtained on request by writing to ICSID.

47. ICSID, RULES AND REGULATIONS, ICSID/4/Rev. 1 (1975).

48. Pursuant to the second sentence of article 26 of the Convention, the rule formulated in that provision is subject to exception if a Contracting State, as a condition of its consent to ICSID arbitration, requires the exhaustion of local administrative or judicial remedies.

To date, only Israel has made this declaration. Although Romania has made no similar declaration, the bilateral investment treaties concluded by that country provide that consent to ICSID arbitration is limited to issues of compensation following preliminary adjudication by the Romanian courts. Delaume, *supra* note 14, para. 15.18.

Subject to these isolated cases, the exception of article 26 has had no practical significance. None of the ICSID clauses known to the Secretariat requires exhaustion of local remedies. The same is true with regard to investment disputes and bilateral investment treaties concluded by countries other than Romania.

By submitting to ICSID arbitration, the parties have, therefore, the assurance that they may take full advantage of ICSID procedural rules and, equally important, that the administration of these rules will be exempt from the scrutiny or control of domestic courts in Contracting States.

Within the scope of the Convention, domestic courts must abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration. If a court in a Contracting State becomes aware of the fact that a claim before it may call for adjudication under ICSID, the court should refer the parties to ICSID to seek a ruling on the subject. Until such a ruling is made, if the possibility exists that the claim may fall within the jurisdiction of ICSID, the court must stay the proceedings pending proper determination of the issue by ICSID. Only in the event of an adverse decision by ICSID, which, for example, may result from the Secretary-General's refusal to register a request for arbitration or from a decision of an ICSID arbitral tribunal that the issue involved does not fall within its competence,⁴⁹ may the court in question resume hearing the case, assuming, of course, that it has an independent basis for entertaining jurisdiction over the parties and the subject matter of the dispute.

This "rule of abstention", essential to the proper implementation of the Convention, finds its sanction in article 64, according to which:

Any dispute between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by application of any party to such dispute, unless the States concerned agree to another method of settlement.

Since the rule of abstention is directly relevant to the "interpretation" or the "application" of the Convention, failure of a domestic court to comply with the rule might expose its own State to the type of international dispute resolution referred to in article 64.

Just this issue was raised in the U.S. federal courts in *MINE v. Guinea*.⁵⁰ Although certain facts relevant to this issue are not altogether

49. Convention, *supra* note 1, art. 41(1).

50. The rule of abstention was clearly advocated in the Brief for the United States as Intervenor and Suggestion of Interest in *MINE v. Guinea*, *supra* note 30, No. 81-1073, at 48-49 (October 1981):

To prevent United States courts from improperly asserting jurisdiction over ICSID cases, and to accord the necessary deference to ICSID's jurisdictional autonomy, the United States submits that a rule of abstention should be followed in U.S. courts.

A similar argument is found in the Brief for the United States filed on petition for a writ of certiorari, No. 82-1754, at 12:

Accordingly, in our view, an agreement to an ICSID arbitration—without more—cannot be taken as indicative of an intent to waive sovereign immunity and submit to United States judicial processes for compelling an alternative, domestic arbitration because the ICSID process is a distinct international method of dispute resolution, with domestic courts playing only a limited role in the enforcement of ICSID awards.

clear, the trial court held it had the authority to refer the parties to arbitration pursuant to an ICSID clause in their agreement, in view of the alleged unwillingness of Guinea to submit to arbitration. The arbitration ordered, however, was not under ICSID as bargained for, but under the rules of the American Arbitration Association (AAA). This curious decision led to the no less surprising result that an AAA award was rendered by default against Guinea and affirmed by the same trial court.⁵¹ The District Court held it had jurisdiction on the ground that consent to ICSID arbitration constituted a waiver of Guinea's immunity from suit under section 1605(a)(1) of the Foreign Sovereign Immunities Act (FSIA).⁵² The Court of Appeals for the District of Columbia reversed the District Court's decision, but only on the rationale that Guinea was entitled to immunity from suit because the transaction bore insufficient nexus to the United States and that consent to ICSID arbitration was not a waiver of immunity within the meaning of the FSIA.⁵³ The court stated:

MINE has insisted, and is estopped from denying, that United States courts were powerless to compel an ICSID arbitration under this particular arbitration agreement Given that this point is now established for purposes of this litigation, we have no trouble holding that this particular ICSID agreement was not an agreement "to arbitration in another country" that waives sovereign immunity under the FSIA. A key reason why pre-FSIA cases found that an agreement to arbitrate in the United States waived immunity from suit was that such agreement could only be effective if deemed to contemplate a role for United States courts in compelling arbitration that stalled along the way. As this particular ICSID agreement concededly did not foresee such a role for United States courts, we hold that it did not waive Guinea's sovereign immunity even though the agreed-to arbitration would probably take place on United States soil.⁵⁴

While the court achieved the appropriate result, the rationale is questionable. It is quite clear that no domestic court in any Contracting State can "compel" an ICSID arbitration, as such power would directly interfere with the prerogatives of the Secretary-General of ICSID and of ICSID arbitral tribunals.⁵⁵ At the same time, a domestic court cannot remain indif-

This argument is consistent with that made by the United States in regard to claims which might fall within the jurisdiction of the Iran-United States Claims Tribunal. See *Statement of Interest of the United States, Crocker Bank v. The Government of Iran*, No. 79 Civ. 6493 (S.D.N.Y. filed February 26, 1981), reprinted in 20 I.L.M. 363, 374 (1981).

51. 505 F. Supp. at 144.

52. *Id.* See also Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-1611 (1976).

53. 693 F.2d 1094, 1102-05 (D.C. Cir. 1982).

54. *Id.* at 1103-04 (citations omitted).

55. Under article 36(3) of the Convention, the Secretary-General is given the right to refuse to register a request for arbitration if he finds, on the basis of the information supplied by the requesting party, that the dispute is "manifestly outside the jurisdiction" of ICSID. This "screening power" must be exercised with great care. As there is no appeal from the Secretary-General's decision, a refusal to register a request would be a definite bar to the use of ICSID facilities. So far there is no example of such a refusal.

Registration of a request by the Secretary-General is only one step in a two-stage process. It has no bearing upon the ultimate power of an ICSID arbitral tribunal to rule on its own

ferent to the alleged existence of an ICSID arbitration clause. On the contrary, the court in question must respect the rule of abstention. The Court of Appeals apparently failed to consider this point.

The appellate decision regarding the implication of consent to ICSID arbitration in the context of the FSIA is also unsatisfactory. It is based solely on considerations pertinent to the *lex fori*. It should have been based on grounds consistent with the purposes of the Convention and the international—and autonomous—character of ICSID arbitration.⁵⁶ One of the purposes of the Convention is to maintain a careful balance between the interests of investors and the interests of Contracting States. The Convention gives investors direct access to an international forum and assures them that the refusal or abstention of the State party to a dispute to participate in the proceedings cannot prevent the institution, conduct, and conclusion of the proceedings, as well as the recognition and enforcement of an ICSID award. For the purposes of the Convention, therefore, consent to ICSID arbitration constitutes an irrevocable waiver of immunity from suit on the part of the State involved. Bound by its consent, a State is barred from raising any plea of immunity that would frustrate the proceedings or the recognition of the resulting award.⁵⁷ Thus, immunity from suit is eradicated at the outset.

In exchange, the Convention protects Contracting States from other forms of foreign or international litigation. Because consent to ICSID arbitration is equally binding upon the investor and the State party to the dispute, that State is assured that the investor cannot bring action in a non-ICSID forum, whether in the investor's own State or another location. Furthermore, the Convention expressly provides that when an investor and a Contracting State have agreed to submit investment disputes to ICSID arbitration, the State whose national is party to the agreement may not espouse the case of its national, give that national diplomatic protection, or bring an international claim in respect of the dispute.⁵⁸ Both parties, then, benefit from and must respect the exclusive character of ICSID remedies. Under the circumstances, it is clear that the Convention, and not the FSIA, supplied the correct answer to the problem that confronted the Court of Appeals. *MINE v. Guinea* must, therefore, be regarded as a missed opportunity to underscore the autonomous character of ICSID arbitration.

"competence". Convention, *supra* note 1, art. 41(1). See the decisions rendered in *Holiday Inns*, *supra* note 25 and accompanying text, *Alcoa*, *supra* notes 17-18 and accompanying text, and *Societe Ltd. Benvenuti & Bonfant srl. v. Government of the People's Republic of the Congo*, Decision of January 17-19, 1978, summarized in ICSID, FIFTEENTH ANNUAL REPORT 41 (1980/81).

56. The Court of Appeals also overlooked the fact that as an "existing international agreement" of the United States under section 1604 of the FSIA, the Convention should have had precedence over the FSIA.

57. Convention, *supra* note 1, art. 27.

58. *Id.*

Under the Convention, the role assigned to domestic courts relates chiefly to the recognition and enforcement of ICSID arbitral awards, to which we now turn.

III

THE EFFECTIVENESS OF ICSID AWARDS

An ICSID award is final and binding upon the parties.⁵⁹ Execution of an award may be stayed, however, in the event the award requires interpretation⁶⁰ or needs revision due to the discovery of new facts,⁶¹ or if one party requests annulment of the award on specific grounds.⁶² These remedies have so far not been, and are unlikely to be, used, but it is important to acknowledge their existence and to recognize that, if chosen, they must be exercised under the auspices of ICSID and within the framework of the Convention.

As established above, an ICSID award is not open to attack on any ground in the courts of a Contracting State. Further, the Convention provides no exception to the binding character of ICSID awards or to their recognition and enforcement in Contracting States, even on the basis of public policy. This rule is a vivid illustration of the autonomously effective character of an ICSID arbitral award, which compares favorably to the options available under other arbitral schemes, including those covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁶³ the European Convention on International Commercial

59. *Id.*, art. 53.

60. *Id.*, art. 50.

61. *Id.*, art. 51.

62. *Id.*, art. 52(1).

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

- (a) that the Tribunal was not properly constituted;
 - (b) that the Tribunal has manifestly exceeded its powers;
 - (c) that there was corruption on the part of a member of the Tribunal;
 - (d) that there has been a serious departure from a fundamental rule of procedure; or
 - (e) that the award has failed to state the reasons on which it is based.
63. 330 U.N.T.S. 3, 40-41, art. V:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submit-

Arbitration,⁶⁴ or the Inter-American Convention on International Commercial Arbitration.⁶⁵

ted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

64. 484 U.N.T.S. 364, 372-74, art. VI:

2. In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions:

(a) under the law to which the parties have subjected their arbitration agreement;

(b) failing any indication thereon, under the law of the country in which the award is to be made;

(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.

The courts may also refuse recognition of the arbitration agreement if by the law of their country the dispute is not capable of settlement by arbitration

4. A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court.

65. 43 O.A.S.T.S. 1, 4, art. 5:

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or

b. That the party against which the arbitral decision has been made was not duly notified of the appointment or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution

A. Recognition and Enforcement Procedures

If a party fails to comply with an ICSID arbitral award, the Convention provides the other party with a simple and effective mechanism for obtaining recognition and enforcement in Contracting States. Article 54(1) of the Convention provides that each Contracting State shall recognize an ICSID award and enforce the resulting pecuniary obligations imposed as if it were a final judgment of a court in the recognizing State. Under article 54(2) any party to an ICSID award may obtain recognition and enforcement by furnishing a certified copy of the award to the competent court or other authority designated for that purpose by each Contracting State. The ICSID Secretariat keeps an updated list of the judicial or other authorities designated by Contracting States for this function.⁶⁶ These States include those in which leading commercial and financial centers are located. In practice, therefore, parties should experience no real difficulty in identifying countries obligated to recognize and enforce ICSID judgments. Satisfaction of the award should be feasible because of the presence of assets of the award debtor within the forum State.

The effectiveness of the ICSID procedure has been acknowledged by the Cour d'appel of Paris, France, in what is to date the sole judicial decision rendered in connection with the recognition of ICSID awards. In *Société Benvenuti & Bonfait v. Gouvernement de la République Populaire du Congo*,⁶⁷ the lower court granted recognition of an ICSID award against the People's Republic of Congo, but qualified its decision by requiring the award creditors first to seek the court's authorization if they wanted to enforce the award against Congolese assets.⁶⁸ On appeal, this qualification

of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or

b. That the recognition or execution of the decision would be contrary to the public policy ('ordre public') of that State.

66. Doc. ICSID/8/Rev. 9.

67. Judgment of January 13, 1981, Tribunal de Grande Instance de Paris, 108 JOURNAL DU DROIT INTERNATIONAL [J. DROIT INT'L] 365 (1981).

68. In this connection, it should be noted that although the French courts have accepted the restrictive doctrine of immunity in regard to immunity from suit, they are still hesitant to apply the same doctrine to immunity from execution. All that can be said is that if the claimant were to succeed in establishing the commercial use of a foreign state's property, a plea of immunity from execution might fail. See *Englander v. Statni Banka Ceskoslovenska*, Judgment of February 11, 1969, Cass. civ. 1re., 96 J. DROIT INT'L 932 (1969); *Clerget v. Représentation Commerciale de la République Démocratique du Viet-Nam*, Judgment of November 2, 1971, Cass. civ. 1re., 99 J. DROIT INT'L 267 (1972); *Caisse Algérienne d'Assurance Vieillesse des Non-Salariés v. Caisse Nationale des Barreaux Français*, Judgment of December 7, 1977,

was removed.⁶⁹ The Cour d'appel held that, in regard to ICSID awards, the function of the recognizing court is strictly limited to ascertaining the authenticity of the award as certified by the Secretary-General of ICSID, to the exclusion of any consideration of sovereign immunity.⁷⁰ This decision clearly illustrates the advantages of ICSID awards over other judgments. As soon as an ICSID award is recognized in accordance with the simplified procedure set forth in the Convention, the award becomes a valid title on which measures of execution can be taken. ICSID awards must be recognized with speed and without judicial interference, making such awards preferable to the procedures available under domestic laws or other international conventions for the recognition and enforcement of foreign judgments or awards.

B. Dependence Upon Domestic Rules of Execution

To be sure, the ultimate effectiveness of such measures of execution depends upon the immunity rules prevailing in the country in which execution is sought. Article 55 of the Convention acknowledges that the original procedure of recognition set forth in article 54 shall in no way "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." Thus, in contrast with its daring approach to issues of immunity from suit, the Convention does not alter or supersede the rules of immunity from execution applicable in Contracting States.

Because article 55 of the Convention surrenders measures of execution to domestic rules of immunity, it is possible that, as in the case of other arbitral awards, those rendered within the framework of the Convention

Cass. civ. I^{re.}, 67 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE* 532 (1978). So far, however, the burden of proof imposed upon the claimant has proved overwhelming and incapable of making a serious dent in the immunity rule. See *République Islamique d'Iran et. al. v. Sociétés EURODIF et SOFDIF et Commissariat à l'Energie Atomique*, Judgment of April 21, 1982, Cour d'appel, Paris, 1982, 110 *J. DROIT INT'L* 145 (1983). See also Bourel, *Arbitrage International et Immunités des Etats Etrangers*, 1982 *REVUE DE L'ARBITRAGE* 119; Delaume, *supra* note 14, ch. 10, para. 12.03.

In connection with the enforcement in France of the award to LIAMCO arising from *Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic*, 20 *I.L.M.* 1 (1981), the Tribunal de Grande Instance de Paris innovated an unusual procedure. *Procureur de la République v. Société LIAMCO*, Judgment of March 5, 1979, 106 *J. DROIT INT'L* 857 (1979). After recognition of the award in France, LIAMCO attached Libyan assets in that country. The court vacated the attachments on the ground that the evidence before it did not make it possible to ascertain whether these assets were intended to be used for sovereign or commercial activities. Nevertheless, the court took the unprecedented step of appointing a committee of three independent persons to determine the precise use of the assets in question. What would have been the outcome of this unusual procedure will forever remain unknown since settlement ended the litigation.

69. Judgment of June 26, 1981, Cour d'appel, Paris, 1981, *Société Benvenuti & Bonfant v. Gouvernement de la République Populaire du Congo*, 108 *J. DROIT INT'L* 843 (1981), *reprinted in* 20 *I.L.M.* 878 (1981) (english translation).

70. *Id.*

will be subject to different treatment among the Contracting States. While this solution is regrettable, it is unavoidable. Opinions expressed by governmental representatives during the drafting stages of the Convention indicated a lack of consensus on the meaning and scope of immunity from execution, considered in both its domestic and international aspects.⁷¹ Insofar as domestic rules of immunity are concerned, the situation is substantially the same today as it was at the time of drafting of the Convention. In many cases, execution against the public assets of a State is not permissible. The situation may be different in regard to assets owned by other public entities, particularly those engaged in commercial activities, although domestic rules continue to vary in this area as well.

In contrast, significant changes in the rules applicable to immunity from execution considered in an international environment have occurred since the Convention's entry into force in 1966. Today, the restrictive doctrine of sovereign immunity has made significant progress in a number of countries,⁷² especially in those countries in which most of the world's leading financial centers are located and in which assets of foreign States are likely to be found.⁷³ Although the restrictive doctrine of immunity is not uniformly applied, it can only contribute a new practical significance to ICSID awards. Through forum shopping, an investor is now in a position to take advantage of new immunity rules in existence or in the making.

Furthermore, issues of immunity from execution must be viewed in the context of the Convention as a whole. The fact that, in adhering to the Convention, a Contracting State does not surrender its right to immunity from execution, in no way relieves such a State, as a party to a dispute submitted to ICSID arbitration, of its obligations under the Convention.

If a Contracting State party to the dispute invoked its immunity from execution in order to thwart the enforcement of an ICSID award, that State would violate its obligation to comply with the award under article 53(1) of the Convention. In this case, the State involved would be exposed to various sanctions. First, failure to comply would restore the right of the Contracting State whose national is the award-creditor to give diplomatic protection to its national and to bring an international claim on its behalf. Under article 27(1) of the Convention, diplomatic protection is generally suspended during the period beginning with the date of consent to ICSID arbitration and ending with compliance with the terms of an ICSID award. Article 27(1), however, also expressly provides that diplomatic protection may be exercised again if the Contracting State party to the dispute fails "to abide by and comply with the award rendered in such dispute." Second,

71. See ICSID, 2 DOCUMENTS CONCERNING THE ORIGIN AND FOUNDATION OF THE CONVENTION 343-44, 346, 428-31, 575 (1968).

72. See generally Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 121, 146-217 (1980).

73. Delaume, *supra* note 14, ch. XII.

should the issue of non-compliance raise a question of interpretation or application of the ICSID Convention, the Contracting State whose national is involved would have the right under article 64 of the Convention to submit the question to the International Court of Justice for adjudication unless both Contracting States agreed on another method of settlement, such as arbitration.⁷⁴ Third, if the investor's bargaining position is sufficiently strong, it may succeed in obtaining an express provision in the arbitration clause that the Contracting State involved waives its immunity from execution in connection with the enforcement of an ICSID award.⁷⁵

Finally, as a practical matter it is interesting to note that the issue of immunity from execution has played no role at all in the history of ICSID proceedings. Of the ten disputes already decided, seven have been the object of settlement or discontinuance.⁷⁶ Only three proceedings have ended in an award.⁷⁷ Of these three awards, only *Société Benvenuti & Bonfant v. Gouvernement de la République Populaire du Congo*⁷⁸ has been the object of recognition proceedings. In no case have measures of execution been sought. The inference, therefore, is that awards have been complied with consistent with the provisions of article 53(1) of the Convention, or else the parties have ultimately reached an amicable settlement. In light of these considerations, the theoretically troublesome issue of sovereign immunity from execution loses a great deal of current practical significance.

IV CONCLUSION

The above summary of the salient features of ICSID arbitration reveals that the machinery set up by the Convention offers the parties an exceptional degree of protection. If the parties have clearly expressed their consent to ICSID arbitration and have made certain that the conditions required by the Convention are satisfied, they are assured that: (i) consent once given cannot unilaterally be withdrawn;⁷⁹ (ii) the proceedings will be carried out under rules of international arbitration beyond the reach of domestic law, including the law in effect at the situs of arbitration, free from

74. Convention, *supra* note 1, art. 64.

75. Model Clause XIX provides that:

The [name of Contracting State] hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.

For other examples of waivers of immunity, see Delaume, *supra* note 14, para. 15.28.

76. See *supra* notes 2 and 4.

77. See *supra* note 2.

78. See *supra* note 2.

79. Convention, *supra* note 1, art. 25(1) (last sentence): "When the parties have given their consent, no party may withdraw its consent unilaterally."

interference by domestic courts,⁸⁰ and (iii) ICSID awards will be recognized in Contracting States, since the binding character of such awards cannot be challenged in Contracting States and the procedure for recognition is both simple and effective.⁸¹

In addition to these legal considerations, ICSID arbitration also offers a number of practical advantages not offered by other forms of arbitration. First, ICSID attempts to reduce the costs of arbitration proceedings to a minimum. Costs are limited to a registration fee of US \$100 and the fees of arbitrators are at present restricted to SDR 600 (approximately US \$600) per day of work, plus travel and subsistence expenses.⁸² Furthermore, unlike other institutions which require an advance of funds to cover full administrative charges, ICSID's practice is to request advance payments from time to time to cover anticipated expenditures for periods of three to six months.⁸³

Second, although the stage of the proceedings concerning the merits is confidential, ICSID provides full publicity for the institution of the proceedings and procedural developments, which are recorded in its *Newsletters* and in its *Annual Reports*. In this respect, ICSID proceedings differ from arbitration proceedings that remain secret. In effect, the publicity attached to ICSID proceedings is equivalent to that of a lawsuit and may be even greater in view of the large distribution of ICSID publications. This feature is unlikely to be overlooked by the parties and is possibly conducive to the type of settlements characteristic of the majority of ICSID proceedings.

Third, the duration of ICSID proceedings have averaged about two and a half years. By international arbitration standards this is not a bad record, especially when one considers the complexity of the issues involved and the fact that the proceedings are often suspended by the parties in an attempt to reach an amicable settlement.

Fourth, it is not unlikely that, in view of the framework of ICSID and its reputation as an international and neutral arbitration institution, a State may be more willing to comply with an ICSID award than with another type of adverse judgment rendered in the investor's, or some other, country. ICSID's experience bears testimony to this observation.⁸⁴ For example, even when the conditions required for using ICSID are not met, as when the State involved is not a Contracting State, parties nevertheless have elected, albeit indirectly, to seek recourse in ICSID.⁸⁵

80. See *supra* Section II.

81. See *supra* Section III.

82. Administrative and Financial Regulations, Rule 13(1), as amended on April 1, 1983.

83. *Id.*

84. See *supra* notes 74-75 and accompanying text.

85. A typical illustration of this is found in a number of loans made by American and European banks to Brazilian entities whose obligations are guaranteed by the Brazilian government. As Brazil is not yet a member of ICSID, potential disputes between the lenders and

Brazil are beyond the scope of the Convention. However, the parties have found a way to place such disputes under the aegis of ICSID. They have provided for the appointment of arbitrators in accordance with a clause stipulating that if an arbitrator is not appointed within certain time limits, the appointment shall be made by the Secretary-General of ICSID at the request of any party. The same clause provides that the arbitration proceedings shall be governed by the basic rules set forth in the ICSID Convention. Neither the proceedings nor the award which might be rendered in this case can be considered as ICSID proceedings or awards *per se*. Nevertheless, the Brazilian example sufficiently shows the confidence of the parties in the impartiality of the Secretary-General of ICSID, as an appointing authority, and in the merits of the major provisions of the Convention applicable to arbitral proceedings.