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# DISPUTE SETTLEMENT

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SETTLEMENT OF INVESTMENT DISPUTES

## 2.9 Binding Force and Enforcement



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## NOTE

**The Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

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## OVERVIEW

This Module deals with an ICSID award's binding force and with its enforcement. These matters are regulated in the Convention on the Settlement of Investment Disputes between States and Nationals of other States ( the ICSID Convention).

ICSID awards are final and not subject to any appeal or other remedy except as provided for by the Convention itself. Under the Convention, post-award remedies are limited to supplementation and rectification, interpretation, revision and annulment. These post-award remedies are described in Module 2.7.

ICSID awards are binding on the parties. The parties are under a legal obligation to comply with awards.

Voluntary compliance is the norm. If it is not forthcoming, the Convention provides for enforcement.

Enforcement takes place through the appropriate authorities of the States parties to the Convention. All States parties to the Convention are under an obligation to recognize and enforce ICSID awards as if they were final judgments of local courts.

Enforcement has its limit in State immunity. An award against a host State need not be enforced if this would be in violation of the rules on State immunity as applied in the enforcing State.

## OBJECTIVES

Upon completion of this Module the reader should be able to:

- Explain the finality of ICSID awards.
- Explain the binding force of ICSID awards.
- Distinguish the recognition and enforcement of awards.
- Delineate the obligation to recognize and enforce awards.
- Describe the procedure for the enforcement of awards.
- Appreciate the significance of State immunity in the enforcement of awards.
- Recount the practice of domestic courts in the enforcement of ICSID awards.
- Evaluate the overall effectiveness of ICSID arbitration.





## INTRODUCTION

<b><u>Binding force</u></b>	Under Article 53, an award is binding on the parties to the proceedings. This means that a losing party is under a legal obligation to comply with an award. A winning party has a legal right to demand compliance. Non-compliance by a party with an award would be a breach of a legal obligation.
<b><u>No review</u></b>	ICSID awards are not subject to any remedy, except as provided for in the Convention. The remedies under the Convention are: supplementation and rectification (Art. 49(2)), interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52). These remedies are described in Module 2.7. This system of remedies is exhaustive and self-contained. In particular, awards are not subject to any review by domestic courts.
<b><u>Finality</u></b>	ICSID awards are final. This means that once an ICSID award has been rendered, the parties may not seek a remedy on the same dispute in another forum. This <i>res judicata</i> effect applies in relation to other arbitration tribunals, including ICSID tribunals, as well as domestic courts. In the case of a partial annulment under Art. 52(3), this effect applies to those parts of the award that have not been annulled.
<b><u>Recognition and enforcement</u></b>	The obligation to recognize and enforce an ICSID award is incumbent upon all States parties to the ICSID Convention. The procedure for enforcement is governed by the laws of the country where enforcement is sought. The award must be treated for purposes of enforcement like a final decision of a local court.
<b><u>Competent court or authority</u></b>	The Convention leaves the choice of the appropriate court or authority charged with the enforcement of ICSID awards to each State party to the Convention. Each State party must designate a court or authority for this purpose and notify the designation to the Secretary-General of ICSID. The party seeking recognition and enforcement must submit the award to the court or authority thus designated.
<b><u>Immunity from execution</u></b>	Under Art. 55, a State's immunity from execution remains unaffected by the ICSID Convention's provisions on enforcement. In practice, this means that only State property serving commercial purposes is subject to execution for the enforcement of an ICSID award.
<b><u>Additional Facility</u></b>	The ICSID Convention does not apply to the Additional Facility. <sup>1</sup> The Additional Facility Arbitration Rules embody the principles of finality and binding force <sup>2</sup> . But they do not contain a rule excluding external review. Also, recognition and enforcement of awards made under the Additional Facility are governed by the national law of the place of arbitration and by any applicable

<sup>1</sup> For an explanation of the Additional Facility see Module 2.4 dealing with requirements *ratione personae*.

<sup>2</sup> Art. 53 of the Additional Facility Arbitration Rules, 1 ICSID Reports 267.

treaties. This means that an award rendered under the Additional Facility is subject to any review or appeal provided by the law of the place of arbitration. The Additional Facility Rules provide<sup>3</sup> that the place of arbitration must be in a State party to the 1958 [New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>4</sup> This is designed to facilitate the recognition and enforcement of resulting awards in States parties to the New York Convention. But it also means that an Additional Facility award will be subject to the reasons for non-enforcement listed in Art. V of the New York Convention.

### Summary:

- **ICSID awards are final and binding. They are not subject to any review outside the Convention's system.**
- **All States parties to the Convention are under an obligation to recognize and enforce ICSID awards.**
- **Execution of an ICSID award against a State is subject to the rules on State immunity.**
- **Awards rendered under the Additional Facility are not subject to the Convention's rules on recognition and enforcement.**

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<sup>3</sup> Art. 20 of the Additional Facility Arbitration Rules, 1 ICSID Reports 258.

<sup>4</sup> 330 UNTS 38; 7 ILM 1046 (1968).

# 1. BINDING FORCE AND FINALITY

## Article 53

Art. 53 of the Convention provides for the binding force and finality of ICSID awards in the following terms:

- (1) *The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*
- (2) *For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.*

## Nature of arbitration

The binding nature of the award is inherent in the concept of arbitration. Arbitration is based on an agreement between the parties and this agreement includes a promise to abide by the resulting award.

## Awards only

The term “award”, as used in Art. 53, only refers to final decisions of the tribunal. It does not include decisions on provisional measures under Art. 47 or procedural orders which the tribunal makes in the course of the proceedings. Also, it does not include preliminary decisions on jurisdiction. But these will ultimately be reflected in the award and will then be binding like other parts of the award. Art. 53(2) specifies that the obligation to abide by and comply with the award relates to the award as interpreted or revised. If the award is annulled, the obligation to comply disappears. If the award is annulled in part, the obligation to comply with the award applies to the unannulled portion of the award unless there is a stay of enforcement.

## Constituent Subdivision or Agency

In accordance with Art. 25(1), the party on the host State’s side may be a constituent subdivision or agency designated to the Centre by that State. Under these circumstances, the effect of the award’s binding force under Art. 53 would be upon that entity. The host State, not being a party to the proceeding, would not be subject to the obligation of Art. 53. But the host State would be responsible for the compliance with an award rendered against one of its constituent subdivisions or agencies.<sup>5</sup>

## No binding precedent

Art. 53(1) may also be read as excluding the applicability of the doctrine of binding precedent for subsequent ICSID cases.<sup>6</sup> ICSID tribunals and *ad hoc* committees have repeatedly referred to and relied on previous decisions.<sup>7</sup> But they have also pointed out that they were not bound by these decisions.<sup>8</sup>

<sup>5</sup> Broches, A., *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 *ICSID Review—Foreign Investment Law Journal* 287, 298 (1987).

<sup>6</sup> Art. 59 of the Statute of the International Court of Justice is more specific on this point by saying: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

<sup>7</sup> Schreuer, C., *The ICSID Convention: A Commentary*, 617 (2001).

<sup>8</sup> *Amco v. Indonesia, Decision on Jurisdiction*, 25 September 1983, 1 *ICSID Reports* 395; *Amco v. Indonesia, Decision on Annulment*, 16 May 1986, 1 *ICSID Reports* 521; *LETCO v. Liberia, Award*, 31 March 1986, 2 *ICSID Reports* 352.

**Obligation to comply**

The award's binding force implies that the parties are under an obligation to comply with it. This obligation is independent of any procedural obstacles that may arise in the course of enforcement. In particular, even if State immunity is available to thwart enforcement, this does not affect the obligation to comply with the award.

The *ad hoc* Committee in *MINE v. Guinea* expressed this principle in the following terms:

25. ... It should be clearly understood, ..., that State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions. The Committee refers in this connection among other things to Article 27 and 64 of the Convention, and to the consequences which such a violation would have for such a State's reputation with private and public sources of international finance.<sup>9</sup>

**Stay of enforcement**

The duty to comply is suspended while a stay of enforcement is in force. A stay of enforcement may be granted under Arts. 50(2), 51(4) and 52(5) while proceedings for interpretation, revision or annulment are pending. A stay of enforcement is not possible in connexion with a request for supplementation or rectification in accordance with Art. 49(2).

**Means to secure compliance**

If a party fails to comply with an award, two types of legal action are available. One is recognition and enforcement in accordance with Art. 54. Recognition and enforcement action may be taken against either the host State or the investor. The other is legal action by a State party to the Convention in accordance with Arts. 27 (diplomatic protection) and 64 (action before the International Court of Justice). The latter remedy is only available against a host State that has failed to comply with the award.

**Diplomatic protection**

Diplomatic protection for the purpose of securing compliance with the award may be exercised only by the State of nationality of the aggrieved investor. Diplomatic protection may be exercised through negotiations, the institution of judicial proceedings between the two States or by any other means of dispute settlement that may be available. Referral of the dispute between the two countries to the International Court of Justice in accordance with Art. 64 of the Convention would be one of the means for dispute settlement available in such a situation. In actual practice, this has never happened.

**No review by domestic courts**

The Convention provides for its own self-contained system of review of awards. The exclusion of any external remedy, as expressed in Art. 53(1), also bars any review by domestic courts. A party to ICSID proceedings may not initiate

<sup>9</sup> *Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award*, 12 August 1988, 4 ICSID Reports 115/6.

action before a domestic court to seek the annulment or another form of review of an ICSID award. A court of a State that is a party to the ICSID Convention would be under an obligation to dismiss such an action. This independence from national procedures for review of arbitral awards means that the place of arbitration in ICSID proceedings is irrelevant for the award's validity and enforcement. In the same vein, national courts charged with the enforcement of an ICSID award, have no power to review that award for substantive correctness or procedural irregularities.

The *ad hoc* Committee in *MINE v. Guinea* expressed this effect of Art. 53 in the following terms:

*4.02 Article 53 of the Convention provides that the award shall be binding on the parties "and shall not be subject to any appeal or to any other remedy except those provided for in this Convention". The post-award procedures (remedies) provided for in the Convention, namely, addition to, and correction of, the award (Art. 49), and interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52) of the award are to be exercised within the framework of the Convention and in accordance with its provisions. It appears from these provisions that the Convention excludes any attack on the award in national courts.<sup>10</sup>*

#### No review by ICJ

Art. 53 also excludes any appeal against an ICSID award to the International Court of Justice (ICJ). Art. 64 of the ICSID Convention provides that a dispute between Contracting Parties concerning the interpretation or application of the Convention may be referred to the ICJ. But the preparatory works to the Convention make it quite clear that Art. 64 does not confer jurisdiction on the ICJ to review the decision of an arbitral tribunal<sup>11</sup>.

#### Exclusion of another remedy

The exclusion of another remedy means that a party to ICSID proceedings that is dissatisfied with the award may not turn to another forum to seek relief for the same claim. Once the ICSID tribunal has rendered its award and the review procedures under the Convention have been exhausted, the case is *res judicata*. The principle *ne bis in idem* precludes resort to any national or international judicial remedy. Therefore, an ICSID award may be used as a defence against an action in the same matter before another judicial forum. This would apply even if a court or tribunal otherwise had jurisdiction over the matter. This principle applies only if the ICSID award has yielded a decision on the merits of the dispute. The exclusion of another remedy would not apply if the ICSID tribunal has given an award in which it finds that the dispute is not within its jurisdiction.

<sup>10</sup> *MINE v. Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports 84. Cf. also at pp. 85 and 88.*

<sup>11</sup> *See Schreuer, Commentary, pp. 1084-1085.*

### Summary:

- **The Convention’s provisions on binding force and enforcement only relate to an “award”, that is, the final decision of a tribunal.**
- **If the party to the arbitration was a constituent subdivision or agency, the obligation to comply with the award is incumbent upon that entity.**
- **There is no doctrine of binding precedent with respect to earlier ICSID awards. But earlier decisions enjoy a high degree of authority.**
- **A stay of enforcement suspends the obligation to comply.**
- **If a State party to ICSID proceedings fails to comply with the resulting award, the State of the investor’s nationality may exercise diplomatic protection.**
- **ICSID awards are final and not subject to review by any decision maker including domestic courts or the International Court of Justice.**
- **A decision on the merits contained in an ICSID award is *res judicata*.**
- **Successful reliance on obstacles to enforcement, including State immunity, does not affect the obligation to comply with the award.**

## 2. RECOGNITION AND ENFORCEMENT

### Article 54

Article 54(1) provides for a general obligation to recognize and enforce ICSID awards in the following terms:

*(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*

### Obligation to recognize and enforce

Under Art. 54, all States parties to the ICSID Convention shall recognize and enforce an ICSID award as if it were a final judgment of a court in that State. This obligation under the ICSID Convention is highly unusual. Other instruments governing international adjudication do not cover enforcement but leave this issue to domestic laws and treaties. These typically provide for some review of arbitral awards at the enforcement stage.<sup>12</sup> Enforcement under the ICSID Convention is independent of the New York Convention and other international and domestic rules dealing with the enforcement of foreign arbitral awards. Art. 54 of the Convention does not distinguish between the recognition and enforcement of awards against investors on the one side, and against host States, on the other.

### Obligation of each Contracting State

Recognition and enforcement of an award may be sought in any State party to the ICSID Convention not just in the State party to the arbitration proceedings and the State of nationality of the investor who was a party to the proceedings. Therefore, the party seeking recognition and enforcement of an award has the possibility to select the forum most favourable for this purpose. This selection will be determined primarily by the availability of suitable assets. Failure of a State party to the Convention to recognize and enforce an award would be a breach of a treaty obligation and would carry the usual consequences of State responsibility, including diplomatic protection.

### Awards only

The obligation to recognize and enforce only applies to final awards. Decisions preliminary to awards such as decisions upholding jurisdiction under Art. 41, decisions recommending provisional measures under Art. 47 and procedural orders under Arts. 43 and 44 are not awards and are therefore not subject to recognition and enforcement. But if these preliminary decisions are later incorporated into an award, they become part of the award and are subject to recognition and enforcement. A decision on supplementation or rectification, in accordance with Art. 49(2), also becomes part of the award with the same consequence. A settlement by the parties that is embodied into an award in accordance with Arbitration Rule 43(2), is also subject to recognition and enforcement.

<sup>12</sup> The most important treaty in this context is the 1958 [New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Art. V of that Convention lists a number of grounds on which recognition and enforcement may be refused.



**Interpretation, revision and annulment**

Under Art. 53(2), “award” for purposes of Art. 54 includes decisions under Arts. 50, 51 and 52 on interpretation, revision and annulment. This means that awards are to be recognized and enforced subject to any interpretation, revision or annulment. A decision annulling the award removes the obligation to recognize or enforce it. In case of a partial annulment, the obligation to recognize and enforce the award is limited to the unannulled portion of the award.

**Stay of enforcement**

Recognition and enforcement is subject to the condition that there is no stay of enforcement. The duty to recognize and enforce is suspended while a stay of enforcement is in force. A stay of enforcement may be granted under Arts. 50(2), 51(4) and 52(5) while proceedings for interpretation, revision or annulment are pending.

**No review**

ICSID awards must not be made subject to conditions for their recognition and enforcement not provided for by the Convention. Nor is it permissible to subject them to review on the occasion of their recognition and enforcement. In the process of recognition and enforcement, the domestic court’s or other authority’s task is limited to verifying the authenticity of the ICSID awards. It may not re-examine the ICSID tribunal’s jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. Not even the *ordre public* (public policy) of the State where recognition and enforcement of an ICSID award is sought, is a valid ground for a refusal to recognize and enforce. This is in contrast to non-ICSID awards, including Additional Facility awards, which may be reviewed under domestic law and applicable treaties on the occasion of their recognition and enforcement.

**a) Recognition of Awards**

Recognition is the official confirmation that the award is authentic. It has two possible effects. One is the confirmation of the award as final and binding. The other is a step preliminary to enforcement.

**Res judicata**

The recognition of an award has the effect of rendering it *res judicata* in the country concerned. This means that the claim on which the award has decided must not be the subject of another proceeding before a domestic court or arbitral tribunal. The restriction to pecuniary obligations contained in the text of Art. 54(1) only relates to the enforcement of awards but not to their recognition. Therefore, a non-pecuniary obligation of specific performance, like restitution or an obligation to desist from a certain course of action, that is spelt out in an award, once recognized, will enjoy the effect of *res judicata* even though it is not subject to enforcement.

**Recognition leading to enforcement**

As a rule, recognition is a preliminary step leading to enforcement or execution. After recognition, the award is a valid title for execution. Recognition as a preliminary step to execution may be useful even if there are no immediate prospects of an execution because there are no available assets in the State



where recognition is sought. Once recognition has been obtained, execution will be easier should assets become available at a later stage.

### Domestic law

Recognition may not be refused for reasons of domestic law. In particular, the provision on sovereign immunity from execution in Art. 55 does not apply at the stage of recognition. By contrast, Art. 54(3) subjects execution to the modalities of the local law of the country where execution is sought, including the law relating to State immunity.

### Practice of domestic courts

Domestic courts, confronted with applications to recognize ICSID awards, have at times had certain difficulties in distinguishing between recognition and enforcement.<sup>13</sup> In the end, the distinction was maintained.

In *SOABI v. Senegal*, the Award<sup>14</sup> received an *exequatur*, or recognition, by the *Tribunal de grande instance* of Paris. Senegal appealed and the *Cour d'appel* of Paris vacated the order of *exequatur*.<sup>15</sup> It held that the State of Senegal had not waived its right to invoke its immunity from execution in a Contracting State under Art. 55 of the Convention. It had not been demonstrated that execution would be carried out against commercial property. Therefore, the execution of the Award in France would be contrary to the international *ordre public* (public policy) since it would violate the principle of immunity.<sup>16</sup>

An appeal against this decision to the *Cour de cassation* was successful.<sup>17</sup> The Court held that an *exequatur* did not constitute an act of execution which could give rise to immunity from execution. The Court added that the ICSID Convention had in its Articles 53 and 54 created an autonomous and simplified regime for recognition and execution that is independent of provisions of domestic law dealing with the recognition and enforcement of other arbitral awards.

## b) Enforcement of Awards

### Enforcement and execution

Article 54 of the Convention in its English version uses the words “enforcement” and “execution” interchangeably. Any attempt to create a distinction between the two concepts cannot be sustained in light of the equally authentic French and Spanish texts of the Convention.<sup>18</sup>

### Pecuniary obligations

The obligation to enforce is limited to the pecuniary obligations imposed by

<sup>13</sup> See also *Benvenuti & Bonfant v. Congo*, *Cour d'appel, Paris*, 26 June 1981, 1 ICSID Reports 368 et seq.; 108 *Journal du Droit International* 365/6, 843, 845 (1981); *LETCO v. Liberia*, *US District Court SDNY*, 5 September 1986, 12 December 1986, 2 ICSID Reports 383-389.

<sup>14</sup> *SOABI v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 190.

<sup>15</sup> *Cour d'appel, Paris*, 5 December 1989, 2 ICSID Reports 337; 117 *Journal du Droit International* 141 (1990).

<sup>16</sup> 2 ICSID Reports 340/1.

<sup>17</sup> *Cour de cassation*, 11 June 1991, 2 ICSID Reports 341; 118 *Journal du Droit International* 1005 (1991).

<sup>18</sup> For a detailed analysis see Schreuer, *Commentary*, pp. 1121-1124.

the award. The obligation to recognize extends to any type of obligation under an award. There are many possibilities for non-pecuniary obligations that awards might impose. Examples would be the reinstatement of wrongfully discharged personnel or compliance with performance requirements like the use of local components. Non-pecuniary obligations imposed upon the host State by an award could include the restitution of seized property, the granting of a permission to transfer currency or desistance from imposing unreasonable taxes. ICSID tribunals have in all known cases only imposed pecuniary obligations. But it is possible that future awards will provide for specific performance or injunctions. Obligations imposed by an award that are not expressed in monetary terms are equally binding even though the enforcement procedure of Art. 54 does not apply to them.

**Constituent  
subdivision or agency**

A constituent subdivision or agency, designated to the Centre in accordance with Art. 25(1) of the Convention, may become a party to ICSID arbitration independently of its parent State.<sup>19</sup> In such a case, the obligation to abide by and comply with an award (Art. 53) would be incumbent upon the constituent subdivision or agency rather than upon the host State. It follows that any measures of enforcement would have to be taken against the constituent subdivision or agency and not against the host State. Conversely, an award rendered against the host State would not be enforceable against one of its subdivisions or agencies. This would also apply with respect to State-controlled entities that are not designated as constituent subdivisions or agencies under Art. 25(1). Therefore, an award against a State may not be enforced against a separate juridical person that has some connexion to the State.

In *Benvenuti & Bonfant v. Congo*, an attempt was made in France to enforce the ICSID Award rendered against The Congo<sup>20</sup> against Banque Commerciale Congolaise (BCC). BCC was not a constituent subdivision or agency designated under Art. 25(1). The attempt to enforce the Award rendered against the State by seizing property of BCC failed. The *Cour de cassation*, upholding a decision of the *Cour d'appel* of Paris, held that Benvenuti & Bonfant was the creditor of the State of The Congo but not of BCC. The bank, though dependent on the State, could not be regarded as an emanation of the State of the Congo. The control exercised by the State was not sufficient to regard it as an emanation of that State.<sup>21</sup>

**Final judgment of  
domestic court**

The reference to a final judgment of a domestic court puts ICSID awards on the same footing with domestic judgements that are not subject to review. A final court decision is one against which no ordinary remedy is available. Even a judgment of a lower court may be final if it is not subject to review or if the time limits for an appeal or another remedy have expired.

<sup>19</sup> For the role of constituent subdivisions and agencies of host States see Module 2.4 on jurisdiction *ratione materiae*.

<sup>20</sup> Award, 15 August 1980, 1 ICSID Reports 330.

<sup>21</sup> *Benvenuti and Bonfant v. Banque Commerciale Congolaise, France, Cour de cassation*, 21 July 1987, 1 ICSID Reports 373, 115 *Journal du Droit International* 108 (1988).

**Federal constitutions**

The clause in Art. 54(1), second sentence, referring to a State with a federal constitution was inserted upon the insistence of the United States. As far as it provides for enforcement of ICSID awards through federal courts it is superfluous since States are free to choose the courts or authorities designated for enforcement anyway. Treatment of an award like a judgment of a component state may be problematical if the federal courts have the power to review the judgments of component States. No practical problems have arisen in this context.

**c) Procedure**

The procedure for recognition and enforcement is covered by Art. 54(2) and (3) in the following terms:

*(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*

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

**Certified copy of award**

A party must furnish a copy of the award certified by the Secretary-General in order to obtain recognition or enforcement by the competent court or authority. Under Art. 11 of the Convention, the Secretary-General authenticates arbitral awards and certifies copies thereof. Certified copies of the award will be dispatched promptly by the Secretary-General to the parties. Only awards that are not subject to a stay of enforcement may be furnished to a competent court or other authority for purposes of recognition and enforcement. Certified copies of awards dispatched after the imposition of a stay of enforcement will reflect this fact.

**Submission by party to proceedings**

Only a party to the original ICSID arbitration proceeding may submit the award for recognition and enforcement. An interested third party is not entitled to do so. This would exclude action by a State acting on behalf of its constituent subdivision or agency that was a party to the ICSID proceedings. A State acting in the exercise of diplomatic protection of its national who was a party to an ICSID proceeding, is also barred from acting under Art. 54(2).

**Parallel proceedings**

There is no reason why proceedings for recognition and enforcement of an ICSID award should not be initiated in several States simultaneously. Recognition of an award in several States may be necessary to secure its *res judicata* effect. If execution of the award is sought in several States, the courts and competent authorities in these States will have to co-ordinate their steps to make sure that payment is not made more than once.

**Designation of competent court or other authority**

Many States parties to the Convention have made the designations required by Art. 54(2). These States cover practically all major commercial and financial centres where assets are likely to be found. The Centre publishes a list of Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention.<sup>22</sup> Designations vary widely. Most designations refer to courts but some refer to executive authorities. Some countries have designated a single court or authority, others have designated certain types of courts. Where courts have been designated, these are sometimes the courts of first instance and sometimes the supreme courts.

**Application of local procedure**

The execution of ICSID awards is subject to the law of the country where the execution takes place. Therefore, only procedures and remedies that are available under the local law will be applied to ICSID awards. Obstacles to the enforcement of an ICSID award under the law where execution is sought in no way affect the obligation of the party to the ICSID arbitration to abide by and comply with the award in accordance with Art. 53(1). A State that successfully relies on the laws concerning State immunity from execution will still be in violation of its obligation under the Convention. The consequence would be a revival of the right of diplomatic protection under Art. 27(1).

**Summary:**

- **A party to ICSID arbitration may seek recognition and enforcement in any State party to the Convention.**
- **Only a final award is subject to recognition and enforcement.**
- **Awards are to be recognized and enforced subject to any interpretation, revision and annulment.**
- **Recognition and enforcement are not an opportunity for review.**
- **Recognition is a confirmation of the award's authenticity.**
- **The award is *res judicata* in the country where it has been recognized.**
- **The obligation to enforce an award is restricted to its pecuniary obligations.**
- **Awards may be enforced only against a party to the arbitration proceedings.**
- **Only a party to the arbitration proceedings may seek the award's enforcement.**
- **A party seeking enforcement must submit a certified copy of the award to a competent court or other authority.**
- **States parties to the Convention have designated the competent court or other authority to the Centre.**

<sup>22</sup> <http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-e.htm>.

### 3. STATE IMMUNITY

#### Art. 55

Art. 55 of the Convention preserves State immunity from execution in the following terms:

*Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.*

#### State immunity under local law

Art 55 is a specification of Art. 54(3) which states that the execution of an award is governed by the law of the State in which execution is sought. This law includes the law on State immunity. In accordance with Art. 54(1), State immunity will apply to the execution of an ICSID award in the same way as it would apply to the execution of a judgment of a domestic court. Art. 55 does not grant State immunity but simply refers to the prevailing situation under the law of the State where execution is sought. Art. 55 does not freeze the law on State immunity at a particular point in time but refers to the law on immunity from execution as it evolves over time.

Assets of foreign States are most likely to be located at important commercial centres. Therefore, attempts to enforce the pecuniary obligations arising from an award will be made in these countries. It is the legal situation in these countries that is most important for purposes of Art. 55. Under the wording of Art. 55, a State against which execution of an ICSID award is sought in its own courts, may also rely on any immunity it may enjoy in its courts under the local law.

#### Legal nature of State immunity

The law relating to State immunity is at the borderline between international law and domestic law. It was developed by domestic courts which created State practice leading to the formation of customary international law. Several important developments in the law of State immunity have taken place since the adoption of the Convention in 1965. Since the 1970s, a number of countries, including the United States,<sup>23</sup> United Kingdom,<sup>24</sup> Canada<sup>25</sup> and Australia<sup>26</sup> have adopted legislation to regulate the law of State immunity domestically. There is also treaty law on the subject. The European Convention on State Immunity of 1972<sup>27</sup> has displayed relatively little practical effect. The International Law Commission adopted Draft Articles on Jurisdictional Immunities of States and Their Property in 1991.<sup>28</sup>

#### Immunity from execution

Art. 55 applies only to immunity from execution. It does not apply to immunity from jurisdiction. Jurisdiction is governed by Art. 25 of the Convention and, in accordance with Art. 41, is determined by the tribunal. Also, State immunity

<sup>23</sup> *Foreign Sovereign Immunities Act (FSIA) 1976, 28 USC §§ 1330, 1602-1611, 15 ILM 1388 (1976), as amended in 1988, 28 ILM 396 (1989) and in 1996/7, 36 ILM 759 (1997).*

<sup>24</sup> *State Immunity Act (SIA) 1978, 17 ILM 1123 (1978).*

<sup>25</sup> *State Immunity Act 1982, 21 ILM 798 (1982). Canada is not a Party to the ICSID Convention.*

<sup>26</sup> *Foreign States Immunities Act 1985, 25 ILM 715 (1986).*

<sup>27</sup> *European Treaty Series No. 74, 11 ILM 470 (1972).*

<sup>28</sup> *General Assembly Doc. A/46/405, YBILC 12 (1991-II/2), 30 ILM 1563 (1991).*



does not apply to proceedings for the recognition of an award. Art. 55 refers to execution but not to recognition. In addition, State immunity does not affect the *res judicata* effect of an award once it has been recognized. State immunity only comes into play when concrete measures of execution are taken to enforce the award's pecuniary obligations.

**Execution of awards**

The law relevant to the execution of ICSID awards will normally be the law relating to State immunity from execution of judgments of domestic courts. Art. 54 states that ICSID awards shall be enforced like final judgments of domestic courts. But in some countries the law on State immunity offers separate rules on the execution of arbitral awards. In the case of ICSID awards, the law in force on immunity from execution of domestic judgments as well as of arbitral awards is applicable.

**Immunity and obligation to comply with award**

The possibility to rely on State immunity from execution does not alter the fact that non-compliance with an award is a violation of the Convention. State immunity is merely a procedural bar to measures of execution but does not affect the award debtor's obligation under Art. 53 to abide by and comply with the award. Successful reliance on State immunity may still amount to a violation of the Convention and may lead to the usual consequences of State responsibility, including diplomatic protection under Art. 27(1).

**Limit to Convention's effectiveness**

ICSID tribunals do not have the power to order execution of their own awards. Therefore, the self-contained nature of the procedure, which excludes the intervention of domestic courts, has its limit when it comes to execution. For purposes of execution of awards, the ICSID system depends on the cooperation of domestic courts or other authorities. The domestic courts or other authorities, which are otherwise under an obligation to lend their hand in the execution of an ICSID award, may refuse to do so on grounds of State immunity. This weakness of the enforcement procedure may have effects already before the stage of execution is reached. It may affect the bargaining position of the parties during the ICSID proceedings and may be reflected in a settlement between the parties.

## **a) Assets Subject to Immunity from Execution**

**Nature of property**

The most important criterion for State immunity from execution is the nature of the assets which are to be the object of enforcement. A distinction is made between commercial and non-commercial property. Execution is permitted against commercial property but not against property serving official or governmental purposes. But the exact difference between the two types of property is not always clear.

**Link between property and claim**

Some national laws require a specific link between the underlying claim and the property that is subject to execution. The United States Foreign Sovereign Immunities Act of 1976 (FSIA)<sup>29</sup> provides for an exception to State immunity

<sup>29</sup> 15 ILM 1388 (1976). Amended in 1988, 28 ILM 396 (1989).

from execution in respect of property in the United States of a foreign State used for commercial activity in the United States if that property is or was used for the commercial activity upon which the claim is based.<sup>30</sup> But it is unlikely that a host State will keep commercial assets in another country that can be said to have a direct connection to an investment in its territory. In addition, it will usually be doubtful whether the host State's underlying activity was commercial. The host State's actions *vis-à-vis* the investor that led to the dispute are more likely to be official than commercial. Therefore, this provision is unlikely to be helpful in the execution of an ICSID award.

**Expropriated property exception**

Another exception to State immunity from execution under United States law concerns commercial property which has been taken in violation of international law or which has been exchanged for such property.<sup>31</sup> This provision would be relevant for the execution of an ICSID award that has found that there has been an unlawful expropriation. Execution of such an award would be possible if pecuniary proceeds from the expropriation can be demonstrated to be present in the United States. Execution in the form of restitution in kind of unlawfully expropriated property is possible under the FSIA but is not foreseen by the ICSID Convention since Art. 54 provides for the enforcement of pecuniary obligations only. But outright expropriations of foreign investments have become rather unusual.

**Arbitral awards exception**

A 1988 amendment to the United States FSIA has added an important exception to State immunity from execution for purposes of executing arbitral awards.<sup>32</sup> That amendment provides for non-immunity of commercial property of a foreign State if a "judgment is based on an order confirming an arbitral award rendered against the foreign State, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement."<sup>33</sup> This provision is an important step towards facilitating the execution of ICSID awards. It allows execution only against property used for a commercial activity in the United States. But it does not require that there is a special nexus between the property and the claim underlying the award. Nor does it require that the underlying transaction, in our case the investment, is of a commercial nature.

In *LETCO v. Liberia*, attempts were made to execute the ICSID award<sup>34</sup> in the United States. The District Court for the Southern District of New York first recognized the Award and declared it enforceable.<sup>35</sup> The Court then examined the issue of whether the property in question was "used for a commercial activity in the United States." The assets were registration fees and other taxes due from ships flying the Liberian flag

<sup>30</sup> 28 USC 1610(a)(2). The Draft Articles on Jurisdictional Immunities of States and their Property adopted by the International Law Commission in 1991 contain a similar provision except that they do not require that the underlying activity is commercial: 30 ILM 1563 (1991), Art. 18, 1.(c).

<sup>31</sup> FSIA, 28 USC 1610(a)(3).

<sup>32</sup> 28 ILM 396, 398 (1989).

<sup>33</sup> 28 USC 1610(a)(6).

<sup>34</sup> *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 343.

<sup>35</sup> District Court, S.D.N.Y., 5 September 1986, 2 ICSID Reports 384.

and collected in the United States. The Court held that these were revenues for the support and maintenance of government functions. Therefore, Liberia's motion to vacate the executions was granted.<sup>36</sup>

The decision was rendered before the 1988 amendment to the FSIA. But that amendment would not have altered the outcome of the decision since it still requires that the assets in question must be of a commercial nature.

### Commercial property

Other domestic statutes dealing with State immunity typically provide for non-immunity of property that is used or intended for commercial activity. These statutes do not require a connexion between the property in question and the underlying transaction. Provisions of this kind are contained in the United Kingdom<sup>37</sup>, Canadian<sup>38</sup> and Australian<sup>39</sup> Acts. In case of uncertainty as to the nature of the property in question, the United Kingdom<sup>40</sup> and the Canadian<sup>41</sup> Acts provide for a certificate by the head of the affected State's diplomatic mission.

French court practice has developed along similar lines. The immunity of assets depends on whether they are used for commercial or governmental activities. In particular, immunity from execution is not granted if the property attached was intended to be used for the commercial activity upon which the claim is based.

In *SOABI v. Senegal*, the order of *exequatur* for the award<sup>42</sup> by the *Tribunal de grande instance* was set aside on appeal by the *Cour d'appel* of Paris on the ground that there was no assurance that any measures of execution would be carried out against assets designated for commercial activity. The court said:

*Considering that the immunity from enforcement [exécution] enjoyed by a foreign State in France is a matter of principle; that in exceptional circumstances it can be set aside when the assets against which enforcement is sought have been assigned by the State to an economic and commercial activity governed by private law;*<sup>43</sup>

This judgment of the *Cour d'appel* was set aside by the *Cour de*

<sup>36</sup> District Court, S.D.N.Y., 12 December 1986, 2 ICSID Reports 385, 388/9. The decision was affirmed on appeal with no published opinion by the United States Court of Appeals for the Second District on 19 May 1987.

<sup>37</sup> State Immunity Act, Sec. 13(4).

<sup>38</sup> State Immunity Act, Sec. 11(1)(b).

<sup>39</sup> Foreign States Immunities Act, Sec. 32(1).

<sup>40</sup> Sec. 13(5).

<sup>41</sup> Sec. 41.

<sup>42</sup> *SOABI v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 190.

<sup>43</sup> *Cour d'appel, Paris*, 5 December 1989, 2 ICSID Reports 338, 340; 117 *Journal du Droit International* 141 (1990).



*cassation*<sup>44</sup> since the granting of an *exequatur* did not constitute an act of execution which might give rise to immunity from execution. But the *Cour de cassation* did not contradict the *Cour d'appel*'s distinction between commercial assets which would be subject to execution and other assets which would enjoy immunity.

The courts of other countries, such as Germany and Switzerland, have also adopted the distinction between property serving commercial purposes and property serving sovereign purposes. Assets that are designated for public functions of the foreign State are considered immune from execution.

**Distinguishing commercial from official property**

The distinction between commercial property and property serving sovereign purposes is not always easy to make. In the context of State immunity from jurisdiction, a test that looks at the nature of the activity and not at its purpose is widely accepted.<sup>45</sup> But the test for immunity from execution is usually the purpose of the property in question, although the origin of the property is also sometimes taken into account.<sup>46</sup> If the property in question is not clearly designated, it is often difficult to determine its intended use or purpose.

**Bank accounts**

In the case of bank accounts, it is particularly difficult to distinguish commercial from sovereign property. The intended use of bank accounts is not easy to determine since the future use of money is usually uncertain.<sup>47</sup> In practice, the decisive criterion has been whether money is specifically earmarked for a particular public function. Funds that are allocated to serve specific official activities and are held by the agency carrying out that function are immune. This is particularly so with bank accounts held by diplomatic missions. Accounts kept for mixed official and commercial purposes raise particular problems. The tendency is to grant immunity to these accounts.<sup>48</sup>

**Diplomatic property**

Diplomatic property is protected by the Vienna Convention on Diplomatic Relations of 1961.<sup>49</sup> Under the Vienna Convention, the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from attachment or execution.<sup>50</sup> The national statutes dealing with State immunity typically grant special protection to diplomatic property. This is true for the United States FSIA<sup>51</sup>, the United Kingdom State Immunity Act<sup>52</sup>, and the Australian Act.<sup>53</sup>

**Embassy accounts**

The Vienna Convention on Diplomatic Relations is silent on bank accounts

<sup>44</sup> *Cour de cassation*, 11 June 1991, 2 ICSID Reports 341; 118 *Journal du Droit International* 1005 (1991).

<sup>45</sup> See Schreuer, *State Immunity*, pp. 15 et seq.

<sup>46</sup> *Op. cit.* at p. 145.

<sup>47</sup> *Op. cit.* at pp. 149 et seq.

<sup>48</sup> *Op. cit.* at pp. 151 et seq.

<sup>49</sup> 500 UNTS 95.

<sup>50</sup> Art. 22(3).

<sup>51</sup> 28 USC 1610(a)(4)(B).

<sup>52</sup> Sec. 16(1).

<sup>53</sup> Sec. 32(3)(a).

kept by a diplomatic mission. Courts have treated embassy accounts with much caution.<sup>54</sup> The German Constitutional Court<sup>55</sup> and the House of Lords in the United Kingdom<sup>56</sup> came to the conclusion that money in a diplomatic mission's bank account used for meeting the expenses of running the mission did not serve commercial purposes. In the United Kingdom case, the ambassador's certificate was accepted as conclusive evidence. The Austrian Supreme Court<sup>57</sup> and the Italian Court of Cassation<sup>58</sup> reached the same result.

In *LETCO v. Liberia*, LETCO attempted to attach bank accounts of the Embassy of the Republic of Liberia in Washington, D.C. for the purpose of executing an ICSID award.<sup>59</sup> The US District Court for the District of Columbia<sup>60</sup> rejected the attempt to seize Liberia's bank accounts. It based its decision that Liberia's bank accounts were immune from attachment on two grounds: Art. 25 of the Vienna Convention on Diplomatic Relations provides in general terms that "[t]he receiving State shall accord full facilities for the performance of the functions of the mission." In the court's view, the "full facilities" included the bank accounts which required full protection so that the Embassy could function efficiently.<sup>61</sup> The second ground for immunity was based on the FSIA. The Court held that the accounts did not qualify as property in use for commercial activity<sup>62</sup> since the bank accounts were utilized to perform Liberia's diplomatic and consular functions and were, therefore, of a public or governmental nature. The Court also rejected the idea of separating commercial from public funds for purposes of execution:

*The court presumes that some portion of the funds in the bank accounts may be used for commercial activities in connection with running the Embassy, such as transactions to purchase goods or services from private entities. The legislative history of the FSIA indicates that these funds would be used for a commercial activity and not be immune from attachment. The Court, however, declines to order that if any portion of a bank account is used for a commercial activity then the entire account loses its immunity. ... On the contrary, following the narrow definition of "commercial activity," funds used for commercial activities which are "incidental" or "auxiliary," not denoting the essential character of the use of the funds in question, would not cause the entire bank account to lose its mantle of sovereign immunity.<sup>63</sup>*

### **Military property**

Military property of foreign States also enjoys immunity and is given special

<sup>54</sup> See also Schreuer, *State Immunity*, pp. 153 et seq.

<sup>55</sup> Philippine Embassy Bank Account, *Bundesverfassungsgericht*, 13 December 1977, 65 ILR 146 (1984).

<sup>56</sup> *Alcom v. Colombia*, *House of Lords*, 12 April 1984, 23 ILM 719 (1984).

<sup>57</sup> Execution of Embassy Account, *Oberster Gerichtshof*, 30 April 1986, 77 ILR 489 (1988).

<sup>58</sup> *Benamar v. Embassy of the Democratic and Popular Republic of Algeria*, *Corte di cassazione*, 4 and 25 May 1989, 84 AJIL 573 (1990).

<sup>59</sup> *LETCO v. Liberia*, *Award*, 31 March 1986, 2 ICSID Reports, 343.

<sup>60</sup> 16 April 1987, 2 ICSID Reports 390.

<sup>61</sup> 2 ICSID Reports 392/3.

<sup>62</sup> 28 USC 1610(a).

<sup>63</sup> 2 ICSID Reports 395.

protection from execution under most of the national laws dealing with State immunity.<sup>64</sup> This applies for the United States FSIA<sup>65</sup>, the Canadian State Immunity Act<sup>66</sup> and the Australian Foreign States Immunities Act.<sup>67</sup>

### **Central bank property**

Most of the national statutes dealing with State immunity provide special protection for central banks and other monetary authorities and their property. The United States FSIA grants immunity from attachment and execution to property belonging to a foreign central bank or monetary authority held for its own account.<sup>68</sup> The phrase “held for its own account” relates to the distinction between funds held in connection with genuine central bank activities and those used to finance commercial transactions.<sup>69</sup> The Canadian Act<sup>70</sup>, the United Kingdom Act<sup>71</sup> and the Australian Act<sup>72</sup> contain provisions to the same effect.

## **b) Waiver of Immunity**

### **Possibility to waive immunity**

In view of the far-reaching protection of State-owned property from execution, an investor has a strong interest in securing a waiver of immunity for the execution of an ICSID award from the host State. A waiver of immunity from execution is possible, in principle, but may be subject to specific conditions or limitations under the law of the country where execution is sought. The possibility to waive immunity is not necessarily unlimited. Certain waivers may have to be explicit while others may be given implicitly. Certain forms of waiver of immunity may be invalid even if agreed upon by the parties.

### **Discretionary nature of waiver**

It is left to the judgment of the parties whether a waiver of immunity should be agreed upon and how far it should go. Some States may refuse to grant waivers in principle or may refuse to waive immunity for certain types of property. A refusal to agree to any waiver of immunity from execution may adversely affect the confidence of the investor in the host State’s willingness to abide by its obligations.

### **Conditions and limitations on Waiver**

Under the United States FSIA, all exceptions to immunity from execution, including a waiver, only apply in respect of property used for a commercial activity in the United States.<sup>73</sup> Therefore, it is doubtful whether a waiver of immunity from execution in respect of non-commercial property of a State is even possible. Since arbitration is an independent and equivalent basis for non-immunity of commercial property under the FSIA,<sup>74</sup> it is doubtful whether an explicit waiver would add anything for purposes of enforcing an ICSID

<sup>64</sup> See also Schreuer, *State Immunity*, p. 146.

<sup>65</sup> 28 USC 1611(b)(2).

<sup>66</sup> Sec. 11(3). *The British State Immunity Act is rather vague on this point: Sec. 16(2).*

<sup>67</sup> Sec. 32(3)(a). See also the *International Law Commission’s Draft Articles, Art. 19, 1.(b)* 30 ILM 1573 (1991).

<sup>68</sup> 28 USC 1611(b)(1).

<sup>69</sup> *House Report, 15 ILM 1414 (1976).*

<sup>70</sup> Sec. 11(4)(5).

<sup>71</sup> Sec. 14(4).

<sup>72</sup> Sec. 35(1). See also the *International Law Commission’s Draft Articles, Art. 19, 1.(c).*

<sup>73</sup> 28 USC 1610(a)(1).

<sup>74</sup> 28 USC 1610(a)(6), 28 ILM 398 (1989).

award. By contrast, under the United Kingdom State Immunity Act a waiver of immunity from execution is independent of the commercial nature of the property concerned.<sup>75</sup> Under the United Kingdom Act, the commercial nature of property is a separate and equivalent exception to immunity from execution.<sup>76</sup> Therefore, a waiver would only make sense with respect to non-commercial property since commercial property does not enjoy immunity anyway. The situation is similar under the Canadian<sup>77</sup> and Australian Acts<sup>78</sup>.

**Diplomatic and military property**

Under most national statutes dealing with immunity from execution, a waiver of immunity in respect of diplomatic or military property does not even appear possible. This is the case under the United States FSIA,<sup>79</sup> the United Kingdom State Immunity Act<sup>80</sup> and the Canadian Act.<sup>81</sup> Under the Australian Act<sup>82</sup> diplomatic or military property would have to be expressly covered by a waiver.

**Central bank property**

Immunity of central bank property may be waived explicitly under most national statutes but should be mentioned specifically in the waiver clause to achieve that effect. This would be the case under the United States FSIA,<sup>83</sup> the United Kingdom State Immunity Act,<sup>84</sup> the Canadian Act<sup>85</sup> and the Australian Act.<sup>86</sup>

**Conservatory Measures**

Conservatory measures are taken before a decision on the merits has been rendered. The assets against which these conservatory measures are directed may eventually serve as objects for the execution of the decision. In the context of ICSID arbitration, conservatory measures by domestic courts are unlikely. Art. 26 of the Convention bars resort to remedies outside the Convention's system unless the parties agree otherwise. Under Arbitration Rule 39(5), the parties may agree, in addition to giving consent to jurisdiction, that provisional measures may be taken by a judicial or other authority. But such an agreement would be unusual. Under normal circumstances, the parties would be restricted to provisional measures recommended by the ICSID tribunal itself under Art. 47. Even if the parties were to agree to provisional measures by domestic courts, a domestic court would most probably allow such measures only if they are directed at commercial property of the State concerned.

<sup>75</sup> Sec. 13(3).

<sup>76</sup> Sec. 13(4).

<sup>77</sup> Sec. 11(1)(a)(b).

<sup>78</sup> Sec. 31.

<sup>79</sup> 28 USC 1611(b)(2).

<sup>80</sup> Sec. 16(1)(2).

<sup>81</sup> Sec. 11(3).

<sup>82</sup> Sec. 31(4).

<sup>83</sup> 28 USC 1611(b)(1).

<sup>84</sup> Sec. 14(4).

<sup>85</sup> Sec. 11(4)(5).

<sup>86</sup> Sec. 35(1).

**Summary:**

- **The Convention does not grant State immunity from execution but leaves any existing immunity unaffected.**
- **State immunity is regulated under customary international law. A number of countries have passed legislation in this area.**
- **State immunity does not affect the obligation to comply with the award.**
- **As a general rule, property serving commercial purposes is subject to measures of execution whereas property serving official State functions is not.**
- **Money or bank accounts are immune if they are specifically earmarked for an official function.**
- **Property serving diplomatic missions, including embassy accounts, as well as military property are immune from measures of execution.**
- **Funds of a Central Bank or other monetary authority also enjoy special immunity from execution.**
- **A waiver of immunity from execution is possible, in principle, but may be subject to certain limitations under the law of some States.**
- **Conservatory measures would be permissible only if the parties have agreed to them.**



## TEST MY UNDERSTANDING

After having studied this Module the reader should be able to answer the following questions. Most answers should go beyond a simple yes/no alternative and would require a brief explanation:

1. What is the legal nature of an ICSID award?
2. What is the significance of the statement that ICSID awards are *res judicata*?
3. Do the Convention's rules on recognition and enforcement apply to the Additional Facility?
4. What is the effect of a stay of enforcement?
5. May an investor's State of nationality exercise diplomatic protection to secure compliance with an award?
6. Are ICSID awards subject to review in connexion with their recognition and enforcement?
7. What is the difference between recognition and enforcement?
8. Is there an obligation to recognize and enforce an ICSID award beyond the parties to the arbitration proceedings?
9. Does the obligation to recognize and enforce extend to decisions preliminary to awards, like decisions concerning the tribunal's jurisdiction?
10. The Convention provides for the enforcement of "pecuniary obligations". What does this mean?
11. Who may request enforcement of an award?
12. What are the competent organs for the enforcement of awards?
13. Does the Convention create State immunity from execution?
14. Does State immunity absolve the debtor State from complying with the award?
15. What State property is subject to execution for the purpose of enforcing an ICSID award?
16. Is a bank account held by a State or by a State controlled entity subject to execution?
17. Can a State waive its immunity from execution?
18. Is it possible to impose conservatory measures while ICSID proceedings are pending in order to facilitate later execution?





## HYPOTHETICAL CASES

### Federalia v. Ergon

Subsidia is a province of the State of Federalia. Federalia has designated Subsidia as a constituent subdivision in accordance with Art. 25(1) of the ICSID Convention and has approved Subsidia's consent to ICSID's jurisdiction in accordance with Art. 25(3).

Ergon Corp., a national of Eurostan, is an investor in Subsidia. In an ICSID arbitration between Subsidia and Ergon, the tribunal has awarded Subsidia a large amount of money as compensation against Ergon. Two years after the award has been rendered, there is still no prospect of payment.

Ergon has considerable assets in bank accounts in the Republic of Monetaria. Federalia, through its ambassador in Monetaria, has submitted an application for the recognition and enforcement of the award to the district court in the capital of Monetaria. The application requests the seizure of Ergon's bank accounts for the purpose of satisfying the award.

Federalia and Eurostan are Contracting Parties to the ICSID Convention. Monetaria has signed but not ratified the Convention.

You are the judge deciding on Federalia's application. Please provide a reasoned decision.

### Beflat v. Tuba

Beflat Inc., a national of the Kingdom of Major, is an investor in the Democratic Republic of Tuba. Beflat has won an ICSID award against Tuba. The award grants compensation in the amount of • (Euro) 3 million to Beflat. In addition, the award orders Tuba to desist from infringing Beflat's copyright in musical recordings in the future.

Beflat entertains serious doubts as to whether Tuba will honour its obligations under the award. Beflat wants to take all possible legal steps to make the award effective. You are Beflat's legal representative working at the law firm Besharp & Presto and are asked to develop a strategy. You are given the following information:

1. Tuba continues to infringe Beflat's copyright in the countries Viola and Harp. In Harp, Tuba has even started court proceedings to obtain a declaration that the copyright in question belongs to Tuba rather than to Beflat.
2. Tuba has assets in the Republic of Timpani. Beflat has information that in Timpani there are bank accounts in the name of the Tuban

Embassy with a balance of over • 5 million. This amount is far in excess of what is needed for the day-to-day running of the Embassy. In addition, Fortissimo, a State-owned but legally independent company of Tuba, operates in Timpani with as yet undisclosed assets.

3. Tuba also has a bank account in its name in the Commonwealth of Bassoon. This bank account has no particular designation and appears to be used for various types of government procurement including occasional arms purchases. The balance in this bank account is currently less than • 1 million. In addition, Tuba owns the Allegro Hotels chain in Bassoon. But the hotel business is currently depressed in Bassoon and it would be difficult to liquidate these hotels.

All countries in question are Contracting States to the ICSID Convention.

Beflat wants to know where and how it should pursue its rights. In particular, it wants to know if it would be permissible to orchestrate a concerted effort at enforcement of the award in several countries simultaneously.

In addition, Beflat has learned that the Foreign Minister of Major, O.B.O. Reed, has indicated her readiness, in principle, to exercise diplomatic protection on behalf of Beflat. You are asked to express an opinion whether this would be permissible.

## FURTHER READING

### Books

- **Schreuer, C.**, *State Immunity: Some Recent Developments* (1988).
- **Schreuer, C.**, *The ICSID Convention: A Commentary* (2001).

### Articles

- **Bernini, G./van den Berg, A.**, The Enforcement of Arbitral Awards Against a State: The Problem of Immunity from Execution, *in*: *Contemporary Problems in International Arbitration*, (Lew, J. ed.) 359 (1987).
- **Broches, A.**, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, 2 *ICSID Review—Foreign Investment Law Journal* 287 (1987).
- **Choi, S.**, Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions, 28 *New York University Journal of International Law and Politics* 175 (1995).
- **Crawford, J. R.**, Execution of Judgments and Foreign Sovereign Immunity, 75 *American Journal of International Law* 820 (1981).
- **Delaume, G. R.**, Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration, 2 *ICSID Review—Foreign Investment Law Journal* 403 (1987).
- **Delaume, G. R.**, Contractual Waivers of Sovereign Immunity: Some Practical Considerations, 5 *ICSID Review—Foreign Investment Law Journal* 232 (1990).
- **Delaume, G. R.**, Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies, 8 *ICSID Review—Foreign Investment Law Journal* 29 (1993).
- **Giardina, A.**, L'exécution des sentences du Centre international pour le règlement des différends relatifs aux investissements, 71 *Revue Critique de Droit International Privé* 273 (1982).
- **Langkeit, J.**, Staatenimmunität und Schiedsgerichtsbarkeit: Verzichtet ein Staat durch Unterzeichnung einer Schiedsgerichtsvereinbarung auf seine Immunität? (1989).
- **Leahy, E. R./Orentlicher, D. F.**, Enforcement of Arbitral Awards Issued by the Additional Facility of the International Centre of Settlement of Investment Disputes (ICSID), 2 *Journal of International Arbitration*, No. 3, at 15 (1985).
- **Van den Berg, A. J.**, Recent Enforcement Problems under the New York and ICSID Conventions, 5 *Arbitration International* 2 (1989).

## Documents

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States:  
*<http://www.worldbank.org/icsid/basicdoc/9.htm>*
- List of Contracting States and other Signatories of the Convention:  
*<http://www.worldbank.org/icsid/constate/c-states-en.htm>*
- ICSID Cases:  
*<http://www.worldbank.org/icsid/cases/cases.htm>*
- Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention (Art. 54(2) of the Convention):  
*<http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-e.htm>*
- ICSID Arbitration Rules (1984), relevant excerpts:

## Cases

- *Benvenuti et Bonfant SARL v. Banque Commercial Congolaise and Others*, France, Cour de cassation, 21 July 1987, 1 ICSID Reports 373; 82 ILR 91 (1990); 115 Journal du droit international 108 (1988).
- *LETCO v. The Government of the Republic of Liberia*, U. S. District Court, Southern District, New York, 5 September 1986, 12 December 1986; U. S. District Court, District of Columbia, 16 April 1987, 2 ICSID Reports 383, 390; 26 ILM 695 (1987); 89 ILR 355, 360 (1992); 2 ICSID Review—Foreign Investment Law Journal 187 (1987); 3 ICSID Review—Foreign Investment Law Journal 161 (1988).
- *SOABI v. Senegal*, France, Tribunal de grande instance, Paris, 14 November 1988; Cour d’appel, Paris, 5 December 1989; Cour de cassation, 11 June 1991, 2 ICSID Reports 337, 341; 29 ILM 1341 (1990); 30 ILM 1167 (1991); 5 ICSID Review—Foreign Investment Law Journal 135 (1990); 6 ICSID Review—Foreign Investment Law Journal 598 (1991); 117 Journal du droit international 141 (1990); 118 Journal du droit international 1005 (1991).