

# Journal of International Arbitration

**KLUWER LAW**  
INTERNATIONAL

A WoltersKluwer Company

*Published by:*

Kluwer Law International  
P.O. Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands

Kluwer Law International  
Prospero House  
Lower Ground Floor  
241 Borough High Street  
London SE1 1GA  
United Kingdom

*Sold and distributed by:*

Turpin Distribution Services Ltd  
Stratton Business Park  
Pegasus Drive  
Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
E-mail: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

Subscription enquiries and requests for sample copies should be directed to Turpin Distribution Services Ltd.

Subscription prices, including postage, for 2006 (Volume 23):

EUR 589.00 / USD 695.00 / GBP 412.00.

This journal is also available online, please contact our sales department for more information at +31 (0) 172 64 1562 or at [sales@kluwerlaw.com](mailto:sales@kluwerlaw.com).

*Journal of International Arbitration* is published bimonthly.

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ISSN: 0255 8106

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## Limits to Enforcement of ICSID Awards

Edward BALDWIN, Mark KANTOR and Michael NOLAN\*

The ICSID Convention “excludes any attack on the award in the national courts.”<sup>1</sup>

Investor-state arbitration has become an important form of dispute resolution, not least because of the growing number of bilateral investment treaties and free trade agreements. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”)<sup>2</sup> establishes the most widely used institutions for those arbitrations. Many observers assume that final awards issued by arbitral tribunals organized under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) in investor-state arbitrations are final and self-executing, and that the ICSID Convention eliminates defenses in national court to the enforcement of these awards. To date, the limited existing experience with the enforcement of ICSID awards largely bears this out. To the knowledge of the authors, there have been only three decisions challenging the enforcement and execution of ICSID awards in national courts, and one case challenging only execution of the award. All of the enforcement challenges have been unsuccessful, whereas challenges to execution of the award against particular sovereign assets have been more successful. In those challenges, however, the courts have not treated the ICSID arbitral awards with the deference that commentators have expected. Moreover, there have been only 180 ICSID arbitrations in the entire fifty-year history of ICSID. As this article goes to press, eighty-nine of those arbitrations are pending and a number of the concluded arbitrations did not reach a finding of liability.<sup>3</sup> It should be assumed that an increase in the number of ICSID awards will lead to an increase in the number of challenges by disappointed parties.

The purpose of this article is not to be a practitioner’s guide to challenging ICSID awards, but rather to consider some of the tactics that disappointed parties may employ in national courts in attempts to delay or to avoid compliance with ICSID awards. Challenges of ICSID awards potentially may be based upon the provisions of the ICSID Convention itself and from outside the ICSID Convention.

The terms of the ICSID Convention afford means for a party to oppose enforcement of an ICSID award. ICSID Article 54(1) requires Contracting States to enforce an

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<sup>1</sup> *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, Case No. ARB/84/4, Ad Hoc Committee Decision of December 22, 1989, 5 ICSID REV.—FILJ 95 (1990).

<sup>2</sup> Done at Washington, D.C., March 18, 1965, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

<sup>3</sup> See <[www.worldbank.org/icsid/cases/conclude.htm](http://www.worldbank.org/icsid/cases/conclude.htm)> (last visited June 1, 2005); see also <[www.worldbank.org/icsid/cases/pending.htm](http://www.worldbank.org/icsid/cases/pending.htm)> (last visited June 1, 2005).

ICSID award “as if it were a final judgment of a court in that State.” If U.S. practice is illustrative, defenses to enforcement of a final judgment in national courts may include exceptional and extraordinary circumstances involving errors and omissions, changed circumstances, deceptive or unfair conduct by an adverse party, jurisdictional problems or fundamental due process flaws. Similarly, codes of civil procedure in many countries allow for court review of a final judgment if that judgment violates a substantial provision of law, disregards the facts of the case, contains contradictory statements or creates a situation not anticipated by the parties.

Disappointed Contracting States may also employ measures not contemplated by the ICSID Convention to avoid the enforcement of an award. A Contracting State could use its local courts to annul an award or simply declare that an award would have to meet certain conditions for enforcement. For example, the Ministry of Economy of Argentina recently stated that the decisions of the arbitration tribunals in the more than thirty ICSID arbitrations pending against it<sup>4</sup> would still be subject to local court review in Argentina if they “disturb public order because they are unconstitutional, illegal or unreasonable or if they were handed down in violation of the terms and conditions undertaken by the parties.”<sup>5</sup> Moreover, international law regarding treaty obligations offers several potential avenues for attacking enforcement of the award.

Contracting States that resort to measures outside the Convention to defeat the enforcement of an award may find their victory pyrrhic. The World Bank could, for example, take actions against Contracting States that avoid their treaty obligations. Moreover, the International Court of Justice (ICJ) might provide a forum for a Contracting State to bring a case on behalf of an investor against another Contracting State for the latter’s refusal to pay an ICSID award. The effectiveness of these and other counteractions still remain to be tested as Contracting States have to date tended to comply with their Treaty obligations.

## I. THE “FINALITY” OF ICSID AWARDS

Under the ICSID Convention, approximately 140 Contracting States have agreed to the submission of legal disputes with foreign investors to binding arbitration before arbitral tribunals established under the auspices of ICSID. Many Contracting States have given advance consent to such investor-state arbitrations in bilateral investment treaties or legislation governing foreign investments.<sup>6</sup>

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<sup>4</sup> For the number of ICSID arbitrations pending against Argentina, see <[www.worldbank.org/icsid/cases/pending.htm](http://www.worldbank.org/icsid/cases/pending.htm)>.

<sup>5</sup> *Argentina Economy: Ministry Denies Foreign Investors Discrimination*, EIU VIEWSWIRE, October 26, 2004. Argentina was a respondent in 35 ICSID cases as of June 1, 2005. See <[www.worldbank.org/icsid/cases/pending.htm](http://www.worldbank.org/icsid/cases/pending.htm)>.

<sup>6</sup> This article addresses limits to the judicial enforcement of arbitration awards under the ICSID Convention, but does not address the enforceability of arbitration awards rendered under the ICSID “Additional Facility” for proceedings outside the jurisdictional scope of the ICSID Convention. Additional Facility awards do not benefit from the special enforcement provisions of the ICSID Convention. Because Canada and Mexico are not Contracting States under the ICSID Convention, arbitration awards under NAFTA involving those countries have been administered under the ICSID Additional Facility or in ad hoc UNCITRAL proceedings.

In the words of one prominent ICSID commentator, the international arbitration community has assumed that an “award rendered pursuant to the ICSID Convention is enforceable within the Contracting States with no resistance to the enforcement possible.”<sup>7</sup> To date, there have been no successful judicial challenges to the enforcement of ICSID awards. Articles 53 and 54 of the ICSID Convention, as well as the drafting history of the ICSID Convention, reinforce the assumption that resistance to the enforcement of ICSID awards is not possible. Article 53(1) of the ICSID Convention says 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. 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.

Thus, each party to an ICSID proceeding is bound by treaty obligation to “abide by and comply” with the terms of the final award. Article 53(1) provides that the parties to a dispute may not appeal an ICSID award or pursue “any other remedy,” except for measures contained in the ICSID Convention itself, such as interpretation of the award (Article 50), rectification of the award (Article 51) and annulment of the award (Article 52).

Of these procedures, the annulment procedure comes the closest to full supervisory review. Unlike commercial arbitration awards under other well-known arbitration rules, the ICSID Convention authorizes a disappointed party to seek the establishment of a second ICSID panel under Article 52(3) to consider the annulment of the ICSID award for the grounds set out in Article 52(1): (a) the tribunal was not properly constituted; (b) the tribunal manifestly exceeded its powers; (c) there was corruption on the part of a tribunal member; (d) there was a serious departure from a fundamental rule of procedure; or (e) the award failed to state the reasons upon which it was based. If the ICSID annulment panel finds that one of these grounds exists, then the ICSID award will be annulled and a new ICSID tribunal established to rehear the case. These grounds for annulment, however, are exhaustive; the ICSID Convention does not acknowledge any other basis for overturning an ICSID award.<sup>8</sup>

In light of this self-contained system for limited review of an ICSID award, the prohibition in Article 53(1) of the ICSID Convention against appeals to national courts under national arbitration laws was a sensible decision by the drafters of the Treaty. By contrast to ICSID, a final award in an ordinary international commercial arbitration

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<sup>7</sup> Albert Jan van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2 ICSID REV. 439 (1987).

<sup>8</sup> “Having provided these ‘internal remedies,’ they decided that they would be the *only* remedies.” Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REV. — FILJ 287, 290 (1987). At the time of the negotiation of the ICSID Convention, Broches was the General Counsel of the World Bank and the Chair of the Regional Consultative Meetings and of the Legal Committee advising the Bank’s Executive Directors with respect to the Convention. In October 2004, the ICSID Secretariat issued a discussion paper entitled *Proposals for Possible Improvements of the ICSID Framework for Arbitration*, available at <[www.worldbank.org/icsid](http://www.worldbank.org/icsid)>. That paper raises for discussion the possible adoption of a true appellate procedure for ICSID arbitrations. The member states of ICSID are now considering that proposal. If ICSID moves to implement an appellate mechanism, attention should be given to foreclosing yet a further round of reviews in national courts on theories such as those outlined in this article.

proceeding would be subject to national court review, and on a range of grounds. Those challenges may be brought in national courts under local arbitration law in, for example, the seat of the arbitration or the jurisdiction in which that award is to be enforced. Illustratively, Article 36(1) of the UNCITRAL Model Law on International Commercial Arbitration permits a reviewing court to decline to enforce a final award not merely for reasons similar to those set forth in ICSID Article 52(1) but also for lack of “arbitrability” of the subject matter of the dispute or for inconsistency with “public policy.” The UNCITRAL Model Law has formed the basis for international arbitration laws adopted by many countries throughout the world. In comparison, neither lack of arbitrability nor public policy is available as a defense under the annulment provisions of Article 52(1) of the ICSID Convention.

The independent nature of the provisions of the ICSID Convention for reviewing an ICSID final award is complemented by a direct obligation on the part of Treaty signatories in ICSID Article 54(1) to recognize and enforce the final award:

Each Contracting State shall recognize an award rendered pursuant to the 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.

As a consequence of Article 54(1), each Contracting State that is a party to the ICSID Convention is obligated to recognize an ICSID final award. That Contracting State is also obligated to enforce the monetary obligations in the award on the same basis as a “final judgment” of a court in the enforcement jurisdiction. If the Contracting State has a federal system (such as Germany, Switzerland and the United States), then the award may be treated as a final judgment of a court of a constituent state of that Contracting State. By means of Articles 53 and 54, the ICSID Convention thus “created an autonomous and simplified regime for recognition and execution which excluded the otherwise applicable provisions of the [local civil procedure law] and the remedies provided therein.”<sup>9</sup>

In light of the above-quoted provisions of Articles 53 and 54 of the ICSID Convention, the assumption by observers that “no resistance” is possible to the enforcement of an ICSID award should not be surprising. That strong view is reinforced by the drafting history of the Convention. The Preliminary Draft of the Treaty contained the “final judgment” language now found in Article 54(1). That language was the object of considerable discussion during the drafting process. For example, efforts were made to retain the possibility of review by domestic courts on the same grounds as are available for a reviewing court to decline enforcement of a foreign arbitral award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York

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<sup>9</sup> CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1118 (2001), paraphrasing *SOABI v Senegal*, Cour de cassation, June 11, 1991, 2 ICSID Rep. 341 (1991).

Convention”).<sup>10</sup> Indeed, the German delegate to the ICSID Treaty negotiations tried unsuccessfully to insist on review authority based upon the *ordre public* (public policy) of the forum. Although the “final judgment” formulation survived intact, the language in Article 54(1) limiting the enforcement obligation of courts in Contracting States to “pecuniary obligations” in the award, rather than all obligations, was included as a compromise to resolve this difference of views. Professor Christoph Schreuer has remarked:

The Convention’s drafting history shows that domestic authorities charged with recognition and enforcement have no discretion to review the award once its authenticity has been established. Not even the *ordre public* (public policy) of the forum may furnish a ground for refusal. The finality of awards would also exclude any examination of their compliance with international public policy or international law in general.<sup>11</sup>

Although Articles 53(1) and 54(1) establish an autonomous and simplified system for recognition and enforcement of ICSID awards, the ICSID Convention does not establish a similar self-governing system for executing the final award against particular assets of the losing party. Instead, Article 54(3) of the ICSID Convention provides that “[e]xecution 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.” Accordingly, local law regarding execution of judgments in the enforcement forum will determine whether particular assets may be seized to satisfy an ICSID award. Article 55 of the ICSID Convention buttresses that position by declaring that “[n]othing 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.”

In sum, it appears upon first review that both the text of the ICSID Convention and the Treaty’s drafting history reinforce the common assumption that the ICSID Convention “excludes any attack on the award in the national courts.” Execution of that award against particular assets nevertheless remains subject to national law, including sovereign immunity defenses.

## II. ONLY FOUR CASES

The limited number of judicial decisions considering enforcement of ICSID awards, however, is less than fully consistent with this robustly stated view. Until recently, ICSID was not a heavily utilized forum for dispute resolution. As a result, there have been few enforcement proceedings in national courts with respect to ICSID awards. During the Treaty negotiating sessions, the chair of the consultative sessions regularly expressed the view that a Contracting State would certainly honor an ICSID award without the need for further litigation.<sup>12</sup> Thus, if the drafting history is to be believed, the principal purpose

<sup>10</sup> See Broches, *supra* note 8, at 308–14. The New York Convention provides seven bases upon which courts can refuse to enforce an award, including, inter alia, lack of arbitrability and when enforcement would violate the forum’s public policy. Those same seven grounds reappear in the UNCITRAL Model Law on International Commercial Arbitration as bases to vacate or refuse enforcement of an international award under domestic arbitration law.

<sup>11</sup> *Id.* at 315 (citation omitted). See also SCHREUER, *supra* note 9, at 1129.

<sup>12</sup> Broches, *supra* note 8, at 303, 305.

of the Treaty's recognition and enforcement provisions was to enable a Contracting State to obtain recognition of an award against a losing foreign investor. The authors are understandably skeptical that these comments in the drafting record for the ICSID Convention are a full and complete statement of the purposes behind Article 54.

We are aware of only four cases involving decisions as to judicial enforcement of ICSID awards against the losing party; two in France, one in the United States and a recent decision in England.<sup>13</sup> The French cases are *Benvenuti & Bonfant v Congo*<sup>14</sup> and *SOABI v Senegal*,<sup>15</sup> the U.S. case is *LETSCO v Liberia*,<sup>16</sup> and the English case is *AIG Capital Partners v Kazakhstan*.<sup>17</sup> Despite the text of the ICSID Convention and the drafting history described above, the French lower courts in particular have shown less deference to the ICSID Convention than commentators expected.

In *Benvenuti & Bonfant*, the Tribunal de grande instance of Paris granted exequatur in favor of a claimant seeking to enforce an ICSID award against the People's Republic of the Congo, but included a limiting condition stating:

No measure of execution, or even a conservatory measure shall be taken pursuant to the said award, on any assets located in France, without the prior authorization of this Court.

Despite a request by the claimant for review, the Tribunal de grande instance refused to remove this condition, holding that it was impossible at the initial enforcement stage in the proceedings to differentiate between assets of the Congo used for sovereign conduct and assets used for commercial conduct. In reaching its conclusions, the court noted that the ICSID award "does not contain anything that is in conflict with law and public order [*aux lois et à l'ordre public*]."<sup>18</sup> The lower court thus incorporated a public policy standard into its approach towards enforcement of the award.

<sup>13</sup> In June 2004, one of the authors confirmed by an email exchange with the then Deputy Secretary-General of ICSID that there had only been three cases. To the authors' knowledge, there has only been one case decided since that time.

<sup>14</sup> *SARL Benvenuti & Bonfant v People's Republic of the Congo*, Case No. ARB/77/2, Award, August 8, 1980, 1 ICSID Rep. 330 (1993). The December 23, 1980 decision of the Tribunal de grande instance of Paris refusing enforcement and execution is not published, but significant components of that decision are found at 1 ICSID Rep. 370 and 108 JOURNAL DU DROIT INTERNATIONAL 843. That same court confirmed its earlier decision on January 13, 1981. See 1 ICSID Rep. 369; 108 JOURNAL DU DROIT INTERNATIONAL 365–66. The claimant successfully appealed to the Cour d'appel of Paris on June 26, 1981. See 1 ICSID Rep. 371; 108 JOURNAL DU DROIT INTERNATIONAL 843, 845.

<sup>15</sup> *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal*, Case No. ARB/82/1, Award, February 25, 1988, 6 ICSID REV. — FILJ 125 (1991), 2 ICSID Rep. 114 (1994). The decision of the Tribunal de grande instance was not published. The Cour d'appel of Paris rendered its decision on December 5, 1989 and reports of that decision may be found at 2 ICSID Rep. 337 and 117 JOURNAL DU DROIT INTERNATIONAL 141 (the English translations should be treated with caution). The decision of the Cour de cassation was issued on June 11, 1991 and is reported at 6 ICSID REV. — FILJ 598 (1991), 2 ICSID Rep. 341 and 118 JOURNAL DU DROIT INTERNATIONAL 1005.

<sup>16</sup> *Liberian Eastern Timber Corporation (LETSCO) v Republic of Liberia*, Case No. ARB/83/2, Award, March 31, 1986, 2 ICSID Rep. 346. Three U.S. District Court decisions were published in the *LETSCO* enforcement proceedings: a decision in the U.S. District Court for the Southern District of New York on September 5, 1986, 2 ICSID REV. — FILJ 187 (1987), 2 ICSID Rep. 384 (1994); a second decision in the U.S. District Court for the Southern District of New York on December 12, 1986, 650 F.Supp. 73 (S.D.N.Y. 1986), 2 ICSID Rep. 385, 2 ICSID REV. — FILJ 188; and a decision in the U.S. District Court for the District of Columbia on April 16, 1987, 659 F.Supp. 606 (D.D.C. 1987), 2 ICSID Rep. 391, 3 ICSID REV. — FILJ 161.

<sup>17</sup> *AIG Capital Partners Inc and another v Republic of Kazakhstan*, [2005] EWHC Comm. 2239, October 20, 2005, available at <[www.bailii.org/ew/cases/EWHC/Comm/2005/2239.html](http://www.bailii.org/ew/cases/EWHC/Comm/2005/2239.html)>.

<sup>18</sup> As translated in Broches, *supra* note 8, at 318–19 n.156.



The claimant successfully appealed against this limiting condition. The Paris Cour d'appel held that the ICSID Convention established a simplified enforcement procedure, independent from French law on enforcement of international arbitration awards generally. The Cour d'appel ruled that, as a result, in determining if exequatur should be granted, the lower court was limited to determining the authenticity of the award. The Cour d'appel also held that issues of immunity were a matter of execution, not enforcement, and therefore were only properly addressed at a later stage in the proceedings. The Cour d'appel did not, however, directly address the statements about *ordre public* in the lower court decision.<sup>19</sup> The claimant subsequently sought to attach funds of Banque Commerciale Congolaise (BCC) to satisfy the award. That effort was rejected by the French courts, on the basis that BCC was a separate entity whose funds were not available to satisfy an award against the People's Republic of the Congo itself.

In sum, the *Benvenuti & Bonfant* lower court began its approach to enforcement of the ICSID award by looking to the enforcement and execution procedures applicable generally to international arbitration awards in France. At the appellate level, the Cour d'appel recognized that ICSID establishes a special process for recognizing and enforcing ICSID awards separate from French procedures for enforcement of international arbitration awards generally. That court did not, however, directly reassess the willingness of the lower court to rely on principles of *ordre public*. In addition, the courts in *Benvenuti & Bonfant* all drew a distinction between enforcement, where the French judicial system ultimately afforded deference to the ICSID system as contemplated by ICSID Article 54(1), and execution against particular assets. In the latter case, the French judicial system applied its generally applicable national rules as contemplated by ICSID Articles 54(3) and 55.

The *SOABI* case developed along ultimately similar lines. In *SOABI*, the Paris Tribunal de grande instance issued an exequatur in November 1988 against the Republic of Senegal with respect to an ICSID award. This time, however, the Paris Cour d'appel vacated the order. The appellate court concluded that submission to ICSID arbitration did not constitute a waiver of sovereign immunity with respect to execution of the final award against particular sovereign assets, and therefore overruled the order of exequatur. On the particular facts of the *SOABI* case, the Cour d'appel concluded that sovereign immunity would protect the threatened Senegalese assets unless it was proven that the assets at issue were for an activity considered economic and commercial under private law. The Cour d'appel held that the claimant had not made the requisite showing. Therefore, the assets in question remained protected from execution by sovereign immunity. Accordingly, said that court, execution of the award against the specified assets would contravene the international *ordre public* (public policy) of immunity. Like *Benvenuti & Bonfant*, therefore, principles of public policy again arose for consideration, in this case international public policy.

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<sup>19</sup> *Id.* at 320.

Here too, the claimant successfully appealed. On appeal, the Cour de cassation distinguished between enforcement and execution and held that it was premature to consider questions of immunity with respect to particular sovereign assets. As Professor Schreuer has noted, the Cour de cassation determined that Articles 53 and 54 of the ICSID Convention “created an autonomous and simplified regime for recognition and execution which excluded the otherwise applicable provisions of the [French] Code of Civil Procedure and the remedies provided therein.”<sup>20</sup>

The *SOABI* courts thus also drew a distinction between enforcement of the award and execution against particular assets. Although the Cour de cassation accepted the separate nature of the ICSID provisions with respect to enforcement, the Cour de cassation further held that the source of law governing execution against particular assets was French national law, particularly with respect to issues of sovereign immunity. And like the courts in *Benvenuti & Bonfant*, concepts of *ordre public* again made an appearance notwithstanding the drafting history of the ICSID Convention. As Professor Schreuer has noted ironically, “the French courts do not seem to have been fully aware of their lack of power to review ICSID awards.”<sup>21</sup>

As did the French courts, the U.S. courts have recognized the distinction between enforcement and execution. In *LETSCO v Liberia*, LETSCO sought to enforce an ICSID award against Liberia in the Federal District Court for the Southern District of New York. That district court granted an enforcement order, but declined on grounds of sovereign immunity to permit execution of the order against fees and taxes payable to Liberia. A later effort in the District of Columbia to execute the order against certain bank accounts also failed for reasons of diplomatic and sovereign immunity.

The recent English case involved solely a question of the execution of the award, not the enforcement. In *AIG Capital Partners v Kazakhstan*, AIG sought to execute its ICSID judgment against cash and securities located in London and owned by the National Bank of Kazakhstan (NBK).<sup>22</sup> NBK intervened in the case and claimed that the assets were immune from enforcement under the English State Immunity Act.<sup>23</sup> Citing Article 55 of the ICSID Convention,<sup>24</sup> the court applied the Immunity Act and held that NBK’s assets were immune from execution.<sup>25</sup> This case reinforces the result that the Convention does not displace the right of sovereigns to claim immunity under each state’s rules.

These instances suggest that national courts have not fully accepted a deferential role in the enforcement of ICSID awards. As contemplated by Articles 54(3) and 55, the national courts have certainly turned to national law for applicable rules such as sovereign immunity with respect to execution against specific assets. Despite the drafting history of the ICSID Convention, the French lower courts recognized national and international *ordre*

<sup>20</sup> SCHREUER, *supra* note 9, at 1118.

<sup>21</sup> *Id.* at 1129. Broches criticizes the references to French law and public policy in *Benvenuti & Bonfant* as an error. “The Tribunal de grand instance was therefore not entitled to examine the award in its conformity with French law and *ordre public*.” Broches, *supra* note 8, at 320.

<sup>22</sup> *AIG Capital Partners*, ¶ 1.

<sup>23</sup> *See id.*

<sup>24</sup> “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 any foreign State from execution.”

<sup>25</sup> *AIG Capital Partners*, ¶ 95.

*public* as part of the framework within which enforcement and execution decisions would be made. These cases leave open the possibility that judicial enforcement of ICSID awards in France, the United States or elsewhere may not be a simple, unchallengeable process.

### III. DEFENSES TO ENFORCEMENT FOUND WITHIN THE ICSID CONVENTION

The growth of ICSID's caseload will give rise to many new opportunities for disappointed parties to explore possible defenses to enforcement of an ICSID award. The traditionally light ICSID docket has undergone a dramatic change in recent years as a result of the explosion in bilateral investment treaties containing consents by the signatory states to ICSID arbitration. Disputing parties can be expected to look closely at the language of the ICSID Convention regarding enforcement of ICSID awards in national courts. Significantly, defenses to enforcement of ICSID awards may arise out of the "final judgment" language of Article 54(1) of the ICSID Convention itself.

Article 54(1), as noted above, requires enforcement of the monetary obligations of an ICSID award "as if it were a final judgment of a court" in the forum where enforcement is sought. Although the phrase "final judgment" suggests true finality, in fact many jurisdictions permit final judgments to be challenged in a number of circumstances.<sup>26</sup> The practice in the United States, France, Colombia and Chile is illustrative.

In the United States, Rule 60(b) of the Federal Rules of Civil Procedure (FRCP) sets out the bases upon which a U.S. federal court may refuse to enforce a final judgment:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ; (3) fraud (whether heretofore denominated as intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Thus, Rule 60(b) offers U.S. federal courts a number of grounds for refusing to enforce a final judgment. Out of the thousands of cases in U.S. courts asserting Rule 60(b) as a basis for overturning a final judgment, however, only a very small proportion have been successful. Still, a careful attorney may pick and choose among the successes for cases that offer parallels to common arguments for challenging awards in investment treaty arbitrations. In *Tsakonites v Transpacific Carriers Corp.*, for example, the court vacated a judgment dismissing plaintiff's claim for failure to state a cause of action because

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<sup>26</sup> The prospect that a "final judgment" could be challenged in national courts was noted several times during the consultative sessions leading to the adoption of the Convention. Broches quotes himself during the sessions as saying "treating awards in the same way as court judgments implied that *exceptional grounds only* could be invoked to prevent recognition and enforcement." Broches, *supra* note 8, at 312 (emphasis added). The Austrian delegate suggested striking the reference to final judgments "since even final judgments could be annulled in certain instances." *Id.* at 314. Broches responded as follows: "Replying, I said that in my opinion by making an award the equivalent of the final judgment one had reached the maximum obtainable." *Id.*

the U.S. Supreme Court had subsequently ruled in another proceeding that a similar claim could be brought.<sup>27</sup> And in *Pioneer Investment Services Co. v Brunswick Associates Ltd. Partnership*, the U.S. Supreme Court held that, in circumstances constituting “excusable neglect,” a creditor would not be subject to a final judgment disallowing its claim in bankruptcy proceedings even though the claim was submitted late.<sup>28</sup> Analogous fact patterns may arise in investor-state arbitration.

Rule 60(b) was employed also in *Liljeberg v Health Services Acquisition Corp.*<sup>29</sup> to vacate a final judgment for lack of impartiality by the trial court judge. That case related to a dispute with respect to ownership of certain property, where the relevant U.S. District Court Judge was a trustee of the university that owned the land in question. With the growth in challenges to the impartiality or independence of arbitrators, the potential for employing Article 54(1)’s “final judgment” language to reopen an ICSID award by means of such an objection is obvious. The Rule was also utilized in *First Fidelity Bank, N.A. v Government of Antigua and Barbuda — Permanent Mission* to require that a default judgment in favor of a bank against a foreign sovereign be set aside.<sup>30</sup> Again, default awards are not uncommon events in international arbitration.

In addition, allegations of unequal knowledge and bargaining power, often raised in investment treaty arbitration, have played a role in Rule 60(b) cases. In *United States v Williams*, for example, the court voided an order for the sale of a farm by a tax authority to recover back taxes. In reaching that conclusion, the court held that, while “persons with more experience, education, and general knowledge would have taken effective steps to preserve and protect their interest in the land,” in the particular circumstances of the case the failure of the petitioner to raise certain defenses in the earlier tax litigation was “excusable neglect” under Rule 60(b)(1) of the FRCP even though the petitioner had been represented by counsel in that litigation.<sup>31</sup>

It also appears that in some circumstances, a “mistakes” or “errors and omissions” attack under Rule 60(b) of the FRCP may in fact extend to substantive errors, not merely procedural mistakes. Mistakes, errors or omissions by the trial judge are proper bases for relief under Rule 60(b)(1) and Rule 60(b)(6). However, it is commonly held that an erroneous judgment by the court is not a reason justifying relief from a final judgment under Rule 60(b), whether under clause (1) or clause (6) of the Rule.<sup>32</sup> Nevertheless, in *Hand v United States*,<sup>33</sup> the Fifth Circuit Court of Appeals overturned a final judgment in a civil jury trial denying plaintiff’s claim for a refund of taxes based upon the jury’s apparently

<sup>27</sup> 322 F.Supp. 722 (S.D.N.Y. 1970).

<sup>28</sup> 507 U.S. 380 (1993).

<sup>29</sup> 486 U.S. 847 (1988). But see *Merit Ins. Co. v Leatherly Ins. Co.*, 714 F.2d 673 (7th Cir. 1983), cert. den. 464 U.S. 1009 (1983), where the Seventh Circuit Court of Appeals overturned a trial court decision to vacate an arbitration award under Rule 60(b) based upon an arbitrator’s failure to disclose an alleged conflict of interest.

<sup>30</sup> 877 F.2d 189 (2nd Cir. 1989). See also *Secretary of State Jackson v People’s Republic of China*, 794 F.2d 1490 (11th Cir. 1986).

<sup>31</sup> 109 F.Supp. 456 (D.C. Ark. 1952).

<sup>32</sup> Annotation, Construction and Application of Rule 60(b)(6) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for “Any Other Reason,” 15 A.L.R. Fed. 193, s. 12.

<sup>33</sup> 441 F.2d 529 (5th Cir. 1971).

inconsistent answers to interrogatories, the tax authority's possibly improper use of illegally seized evidence and the lack of other evidence to support the tax assessment.

Like valuations in expropriation cases, the method of determining damages employed in a final judgment has also come in for scrutiny under Rule 60(b). By way of example, damages calculations predicated on a "pure guess" as to relevant components justified vacating a final judgment under Rule 60(b) in *United States v Miller*.<sup>34</sup> That case involved a treble damages award in favor of the U.S. government for defendant's breach of the war-era Emergency Price Controls Act. The reviewing court vacated a default judgment against the petitioner, requiring that the government's damage claim be based on more than "guesswork."

As this short list of illustrative cases demonstrates, the grounds for seeking relief from a final judgment under FRCP Rule 60(b) are both varied and substantive. In addition to FRCP Rule 60(b), additional defenses to enforcement of a final ICSID award may arise out of the federal system of the United States. As previously mentioned, ICSID Convention Article 54(1) specifies that a state with a federal constitution may provide that its federal courts shall treat an ICSID award like a final judgment of a court in a constituent state.<sup>35</sup> Article IV, section 1 of the United States Constitution states that "[f]ull faith and credit shall be given to the public acts, records and judicial proceedings of every other state."<sup>36</sup> Under the U.S. Constitution, therefore, courts in one constituent state are obligated to give "full faith and credit" to final judgments of courts in another of the fifty states. Constitutional practice in the United States, however, recognizes limited exceptions to the principle of full faith and credit for final judgments, including exceptional issues of lack of due process, fraud, lack of jurisdiction on the part of the state court granting the judgment, inadequate notice of the judgment and an inadequate opportunity to be heard before the state court granting the judgment.<sup>37</sup>

When the United States acceded to the ICSID Convention, the U.S. Congress passed implementing federal legislation providing that the "pecuniary obligations imposed by [an ICSID award] shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states."<sup>38</sup> Accordingly, U.S. constitutional practice regarding the limits of "full faith and credit" plays a role in determining the enforceability of an ICSID award by a U.S. court.<sup>39</sup>

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<sup>34</sup> 9 F.R.D. 506 (D.C. Pa. 1949).

<sup>35</sup> The substance of this provision addressing states with federal systems was proposed by the United States and adopted without comment by others. Broches, *supra* note 8, at 321–22.

<sup>36</sup> The "full faith and credit" clause of the U.S. Constitution does not cover judgments by courts of other countries.

<sup>37</sup> See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS ss. 103–105, 113–114, 117 (ALI 1989).

<sup>38</sup> 22 U.S.C. s. 1650a(a) (emphasis added). See Broches, *supra* note 8, at 322–23.

<sup>39</sup> The impact of the ability under the U.S. Constitution to review sister state judgments on the prospects for review in the United States of ICSID awards in exceptional circumstances was recognized by Broches in his 1987 article, but he considered that the grounds for such reviews were too narrow to threaten the enforcement of ICSID awards. "Such a review is possible in the case of a state court judgment, but to such a limited extent that it would not endanger the enforceability of a Convention award." Broches, *supra* note 8, at 323. Moreover, Broches understood that (as discussed below) U.S. constitutional practice incorporates possible defenses to full faith and credit for lack of jurisdiction and lack of due process, but argued that such defenses would not be applicable to review of an ICSID award. "But if issues of lack of jurisdiction and lack of due process may not be examined by the [U.S.] District courts at the enforcement stage, the exceptions to full faith and credit based on those grounds said to be available to a federal court asked to enforce a state court judgment, equally lack application in the case of a Convention award." *Id.*

Although not frequently, U.S. courts have on occasion refused to recognize a final judgment rendered by a court from a sister state. For example, in *Hanson v Denckla*,<sup>40</sup> the U.S. Supreme Court held that Delaware courts did not have to recognize the decision of a Florida court where the decision would be invalid due to being “offensive to the Due Process Clause of the Fourteenth Amendment.” In that case, the petitioner sought to persuade the enforcing court in Delaware to refuse recognition of the original Florida judgment on the grounds that an “indispensable party” had not been made a party to the proceedings. The U.S. Supreme Court ultimately held that, since “Delaware was entitled to conclude that Florida law made the trust company an indispensable party, it was under no obligation to give the Florida judgment any faith and credit — even against parties over whom Florida’s jurisdiction was unquestioned.”<sup>41</sup> Arguably, a losing party could rely on similar reasoning to attack an ICSID award in U.S. enforcement proceedings for contravening due process protections.

Moreover, lack of jurisdiction has also proved in the rare case to be a successful defense to enforcement despite the “full faith and credit” clause. A federal court in Illinois in *In re Goodman* refused to give full faith and credit to a California court’s determination that a debt had been discharged.<sup>42</sup> The Illinois court reasoned that, since bankruptcy courts in the United States have the sole ability to determine whether debts of a bankrupt may be discharged, a state court’s discharge of the debt was improper.<sup>43</sup> And in *Splaine v Modern Electroplating, Inc.*,<sup>44</sup> a Massachusetts court refused to give full faith and credit to a Michigan judgment rendered against a Massachusetts corporation because the Michigan court did not have personal jurisdiction over the corporation. One may easily imagine circumstances in which an ICSID award allegedly suffers from due process or jurisdictional “defects” similar to those observed in these cases.

Nonetheless, whether under Rule 60(b) of the FRCP or under constitutional practice with respect to the full faith and credit clause, it is important to note that the U.S. courts have set a high threshold for refusing to enforce a final judgment. Numerous cases have made clear that relief from a final judgment is only appropriate for “exceptional and extraordinary circumstances”<sup>45</sup> or, as the U.S. Supreme Court recently stated in *United States v Beggerly*,<sup>46</sup> a “grave miscarriage of justice.”<sup>47</sup> Still, the bases upon which a challenge may be founded are quite broad:

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<sup>40</sup> 357 U.S. 235 (1958).

<sup>41</sup> *See id.* at 254.

<sup>42</sup> 25 B.R. 932 (N.D. Ill. 1982).

<sup>43</sup> *See id.* at 936.

<sup>44</sup> 17 Mass. App. Ct. 612 (1984).

<sup>45</sup> *See, e.g., The Curry ex rel. Turner v Adventist Health System/Sunbelt, Inc.*, 298 F.2d 586 (6th Cir. 2002); *Fox v Brewer*, 620 F.2d 177 (8th Cir. 1980).

<sup>46</sup> 524 U.S. 38 (1998).

<sup>47</sup> The requirement that circumstances permitting review of foreign judgments must be extraordinary was also noted in *Broches, supra* note 8, at 312 (“exceptional grounds”) and 317–18 (“‘final’ decision means a decision against which no ordinary remedies are available.”).

- errors and omissions;<sup>48</sup>
- new or changed circumstances;<sup>49</sup>
- deceptive or unfair conduct by the adverse party;<sup>50</sup>
- “void” judgments (which has been argued to include jurisdictional problems);<sup>51</sup>
- fundamental jurisdictional or due process flaws;<sup>52</sup>
- permanent injunctions by a court of competent jurisdiction.<sup>53</sup>

This broad range of potential grounds for refusing to enforce a final judgment may encourage challenges to enforcement of an ICSID award for such common investor-state issues as allegations of lack of impartiality or independence on the part of an arbitrator, false testimony during the arbitral hearings, the absence of arbitral jurisdiction, failure by the arbitral tribunal to follow the proper arbitration procedure, corruption or misrepresentations in the underlying transaction, and changed circumstances. Indeed, clause (6) of FRCP Rule 60(b) (“any other reason justifying relief”) has been described in one well-known treatise as a “grand reservoir of equitable power to do justice in a particular case.”<sup>54</sup> In the leading case construing that clause, Black, J. stated: “In simple English, the language of the ‘other reason’ clause, for all reasons except the five particularly specified, vests power in the courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”<sup>55</sup>

The United States is by no means alone in authorizing its courts to grant relief from a final judgment in exceptional circumstances. Article 595 of the French Code of Civil Procedure provides several bases upon which a court may reconsider a final judgment:<sup>56</sup>

- where it has come to light, subsequent to judgment, that the decision was obtained by fraud on behalf of the party in whose favour it was delivered;
- where, since the judgment, decisive exhibits which had been withheld by the act of another party were discovered;
- where the judgment was adjudicated on exhibits which, since the judgment, have been acknowledged or judicially declared to be false;
- where the judgment was adjudicated on statements, testimony or oaths which, since the judgment, have been judicially declared false.

<sup>48</sup> See cases cited at Annotation, Construction and Application of Rule 60(b)(6) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for “Any Other Reason,” *supra* note 32, s. 9.

<sup>49</sup> *Id.* s. 16.

<sup>50</sup> *Id.* s. 18.

<sup>51</sup> *Klapprott v United States*, 335 U.S. 601 (1949). Regarding jurisdictional flaws, see Annotation, Lack of Jurisdiction, or Jurisdictional Error, as Rendering Federal District Court Judgment “void” for purposes of Relief under Rule 60(b)(4) of Federal Rules of Civil Procedure, 59 A.L.R. Fed. 831. As that Annotation makes clear, successful jurisdictional challenges under Rule 60(b) are extremely rare.

<sup>52</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS s. 104 (“A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states”) and cases cited therein.

<sup>53</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS s. 114 (“A judgment will not be enforced in other states if the holder of the judgment has been permanently enjoined from enforcing the judgment”) and cases cited therein.

<sup>54</sup> 7 Moore’s Federal Practice ¶ 60.27[2].

<sup>55</sup> *Klapprott v United States*, *supra* note 51, at 614–15.

<sup>56</sup> Like its U.S. counterpart, art. 595 is rarely utilized successfully.

An advocate might also argue that the Colombian Civil Procedure Code authorizes review of a final judgment. Articles 379 et seq. (revision) and Articles 365 et seq. (*recurso de casación*) of the Colombian Code provide for several bases to potentially review final judgments and/or revise a judgment or award. Articles 379 et seq. may authorize review of a final judgment where, inter alia, (1) evidence is discovered that would have changed the outcome of the proceeding, (2) documents shown to be false had a material affect on the outcome, (3) perjured testimony had a material affect on the outcome, or (4) in some circumstances, the judgment is inconsistent with an earlier judgment.<sup>57</sup> Articles 365 et seq. may authorize review of a final judgment where, inter alia, (1) the judgment violated a substantial provision of law, (2) the court disregarded the facts of the case, (3) the judgment contained contradictory statements, or (4) in limited circumstances, the judgment created a situation not anticipated by the parties.<sup>58</sup> Losing parties to an ICSID arbitration may therefore try to use these provisions in French or Colombian courts, respectively, to attack an award rendered by the ICSID tribunal.

Chilean law also provides for review of final judgments in certain, more limited, circumstances. Specifically, Article 810 of the Chilean Civil Procedure Code states that final judgments may be reviewed in cases where it can be established that the judgment was based on false documents, on perjured testimony or resulted from bribery or coercion of the body that adjudicated the matter. This relief is only available under Chilean law, however, if the actions described above were not discovered until after the judgment had been rendered and were, therefore, not considered by the adjudicatory body.

The countries discussed above, of course, are only a small sample of the countries in which an ICSID award might be enforced. In contemplating ICSID proceedings, the parties to the arbitration will need to review the extent to which a “final judgment” may be challenged in the likely enforcing jurisdictions. The similarities among French, Colombian and Chilean law in this area are not coincidental; the codes of many civil law countries contain such provisions. The answer will differ from country to country, and may materially affect the course of the enforcement proceedings.

#### IV. DEFENSES TO ENFORCEMENT FOUND OUTSIDE THE ICSID CONVENTION

Apart from the defenses to enforcement of an ICSID award arising out of the “final judgment” language of the ICSID Convention itself, disappointed Contracting States may also use methods outside the ICSID Convention to resist the enforcement of awards. These methods might include using the national courts to invalidate ICSID awards for reasons arguably not allowed under the ICSID Convention. Disappointed Contracting States may also employ international law in their efforts to avoid their treaty obligations under the ICSID Convention.

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<sup>57</sup> Republic of Colombia Code of Civil Procedure, arts. 379–380.

<sup>58</sup> *Id.* art. 365 et seq.



## A. INVALIDATION OF THE AWARD BY THE HOME STATE

As previously stated, disappointed parties may seek invalidation of an ICSID award in the courts of their home state. Although, to the authors' knowledge, no party to ICSID proceeding has yet sought to invalidate an ICSID award in its home state, it is possible that home state courts may be sympathetic to losing parties in an ICSID proceeding regardless of the terms of the ICSID Convention. Although the annulment of an ICSID award in the home state may not render that award unenforceable in other states, such a decision could affect the practical opportunities for a prevailing party to enforce the award.

Article 53(1) of the ICSID Convention states that ICSID awards "shall not be subject to any appeal." But, in other contexts, courts have not always upheld agreements to limit appeals of arbitration awards. In the recent Argentine case of *Jose Cartellone Construcciones Civiles, S.A. v Hidroelectrica Norpatagonica S.A.*,<sup>59</sup> for example, the losing party sought to modify an arbitration award rendered under procedures that disallowed an appeal of the award. The Argentine High Court, the National Supreme Court of Justice, nevertheless accepted the respondent's argument that the arbitration award should be modified in the interests of *ordre public*.<sup>60</sup>

The claimant had successfully obtained an award against the respondent for damages plus interest. When the claimant sought to enforce the award in Argentina, the respondent challenged various aspects of the award, including the dates upon which interest was calculated.<sup>61</sup> In response, the claimant argued that the parties had agreed the award was not subject to appeal.<sup>62</sup> Although the lower court accepted the claimant's argument, the National Supreme Court of Justice reversed the lower court. The Supreme Court of Justice found that certain portions of the award relating to interest accrual contravened the terms of the arbitration agreement. The Supreme Court therefore modified the award to reduce the interest amount.<sup>63</sup>

More significant than the result, the Supreme Court held that agreements to restrict review of arbitration awards in the courts do not prevent the court from determining whether such awards contradict *ordre public*. The Supreme Court reasoned that parties cannot restrict appellate review by agreement, because the public's interests override the parties' intentions. In this case, the Supreme Court found that the award did not comport with what it regarded as the realities of the situation and therefore produced a disproportionate and irrational result in contravention of *ordre public*.

Although the Argentine Supreme Court's decision in the *Jose Cartellone* case to examine the award in light of the *ordre public* did not occur pursuant to Treaty arbitration, recent actions by the Argentine government indicate that Argentina might use this and

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<sup>59</sup> Argentine Supreme Court, June 1, 2004.

<sup>60</sup> *Jose Cartellone Construcciones Civiles*, ¶ 19.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* ¶ 8.

<sup>63</sup> *Id.* ¶ 9.

other reasoning to seek the invalidation of awards rendered pursuant to ICSID arbitration. In an ICSID hearing related to *CMS Gas Transmission Co. v Argentine Republic*, Argentina argued that national public services such as gas transportation and distribution must take into account particular needs of social importance.<sup>64</sup> In such circumstances, Argentina argued, necessity and emergency allowed the government to change public policy without violating its Treaty obligations.<sup>65</sup>

The CMS tribunal rejected Argentina's arguments regarding necessity and national emergency as a defense to Treaty violations and awarded CMS U.S.\$ 133 million.<sup>66</sup> Before and after the tribunal's award to CMS, Argentinean officials have made statements that ICSID awards should be subject to domestic court review based on the arguments stated above, as well as other possible bases. For example, Argentina's former Attorney General, Horacio Rosatti, made public arguments that ICSID did not have jurisdiction over Argentina if the Argentine Supreme Court found an award incompatible with the Argentine Constitution.<sup>67</sup> Notwithstanding this and other statements regarding the review of ICSID awards, Argentina, proceeding under the ICSID rules, has brought an annulment challenge to the CMS award rather than use its domestic courts to resist enforcement of the award.<sup>68</sup> Argentinean officials have also been meeting with foreign government officials and some ICSID complainants in an attempt to amicably resolve the outstanding ICSID cases.<sup>69</sup> Although Argentina, of course, may ultimately decide to use the domestic courts to resist enforcement of ICSID awards, there does not appear to be such a review in the immediate future.

Recent actions show that a trend for states to resist the enforcement of arbitral awards may be gaining force. After losing an UNCITRAL arbitration to Occidental Petroleum based on violations of a bilateral investment treaty, the Republic of Ecuador sought to avoid enforcement of the award. Initially, Ecuador brought a jurisdictional challenge to the award in the English courts, as London was the seat of the arbitration.<sup>70</sup> The court held that English courts could entertain the challenge to the jurisdiction of the tribunal even though the right of arbitration was derived from public international law.<sup>71</sup> Although the result may have been different had the *Occidental Petroleum* arbitration been conducted pursuant to the ICSID Convention, this case shows that disappointed states cannot always be relied upon to pay awards arising out of investment treaty arbitration

<sup>64</sup> See *CMS Gas Transmission Co. v Argentine Republic*, Case ARB/01/8, Award (dispatched to the parties May 12, 2005) [hereinafter "CMS Final Award"], ¶ 119, available at <<http://ita.law.uvic.ca/documents/cms.pdf>>; see also Carlos E. Alfaro, *Argentina: ICSID Arbitration and BITs Challenged by the Argentine Government*, December 21, 2004, available at <<http://www.mondaq.com/article.asp?articleid=30151&searchresults=1>>.

<sup>65</sup> Alfaro *et al.*, *supra* note 65. CMS Final Award, ¶¶ 93–94. The tribunal in the CMS case rejected this argument, *id.*, ¶¶ 203, 217.

<sup>66</sup> CMS Final Award, ¶ 468.

<sup>67</sup> *Will the Argentine Government Pay What it Owes Foreign Firms?*, EIU VIEWS WIRE, May 23, 2005.

<sup>68</sup> *Argentina Appeals ICSID Ruling to Pay \$133.2 Mln to U.S. CMS Energy*, LATIN AMERICAN NEWS DIGEST, September 9, 2005.

<sup>69</sup> See, e.g., Maria Laura Avignolo, *Argentina: Kirchner Asks to Meet French, German, Spanish Leaders in New York*, WORLD NEWS CONNECTION, August 23, 2005.

<sup>70</sup> *Republic of Ecuador v Occidental Exploration & Petroleum Co.* [2005] EWHC Comm. 774.

<sup>71</sup> *Id.*

without a fight. Incidentally, Ecuador has continued the fight by bringing an action against Occidental Petroleum in local Ecuadorian courts for contract violations based on actions taken by Occidental related to a production sharing contract.<sup>72</sup>

The *Karaha Bodas* arbitration presents another example. In April 1998, Karaha Bodas Corp. (KBC) instituted arbitration proceedings against Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (“Pertamina”), an Indonesian state-owned company, pursuant to an agreement containing an arbitration provision.<sup>73</sup> That agreement provided for UNCITRAL ad hoc arbitration and limited the rights of the parties to challenge any resulting award.<sup>74</sup> Despite this limitation, Pertamina sought to vacate the award in Switzerland and Indonesia.<sup>75</sup> The Swiss court rejected Pertamina’s action on procedural grounds.<sup>76</sup> The Indonesian district court, however, annulled the award, finding in part that the award was contrary to Indonesian law and that Indonesian courts had authority to determine the validity of the award.<sup>77</sup> Recently, though, the Indonesian Supreme Court overturned that lower court decision, finding that the district court had no “authority to examine and adjudicate” the award to KBC.<sup>78</sup>

Similarly, the arbitration clause at issue in the *Patuha* and *Himpurna* UNCITRAL ad hoc arbitrations involving Indonesia stated:

The Parties hereby renounce their right to appeal from the decision of the Tribunal and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court from the decision of the Tribunal and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of Law No. 1 of 1950 and any other provision of Indonesian law and regulations which would otherwise give the right to appeal the decisions of the Tribunal. In addition, the Parties agree that no Party shall have any right to commence or maintain any suit or legal proceeding concerning a dispute hereunder until the dispute has been determined in accordance with the arbitration procedure provided herein and then only for enforcement of the award rendered in such arbitration.<sup>79</sup>

Despite this explicit language, the losing respondent state enterprise commenced post-award proceedings before the Central District Court of Jakarta to annul the awards made in favor of the investors.<sup>80</sup> That court thereupon suspended the execution of the

<sup>72</sup> Juliette Kerr, *Ecuador’s Foreign Minister Calls for Resolution of Occidental Contract Dispute*, WORLD MARKETS ANALYSIS, October 5, 2004.

<sup>73</sup> *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F.Supp. 2d 936, 939–40 (S.D. Tex. 2001).

<sup>74</sup> *Id.*

<sup>75</sup> *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Indonesia’s supreme court rules for U.S. firm against state company*, AGENCE FRANCE PRESSE — ENGLISH, November 24, 2004. The decision was apparently made by the Supreme Court in March 2004 but not announced until late in November. The Indonesian tax authorities immediately assessed a tax bill against KBC for unpaid income taxes on the amount of the arbitration award, despite the fact that Indonesia continues to refuse to pay the award. The Indonesian authorities then jailed one company executive and issued arrest warrants for others for non-payment of the assessed taxes. Shawn Donnan, *Jakarta Stalls in Dispute Resolution*, FINANCIAL TIMES (LONDON) April 1, 2005.

<sup>79</sup> *Patuha Power Ltd. (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award, 14 Mealey’s Int. Arb. Rep. B-1, B-4 at ¶ 38 (December 1999).

<sup>80</sup> *Id.* B-13 – B-14, ¶ 97.

final awards in the two arbitrations pending its decision on the merits of the defenses raised in that action.<sup>81</sup>

Although neither the *Patuha/Himpurna* arbitrations nor the *Karaha Bodas* arbitration were conducted pursuant to the ICSID Convention, and the Jakarta District Court's decision in *Karaha Bodas* was ultimately overturned, the cases brought by the Indonesian state parties to annul the awards demonstrate that domestic courts may reject an arbitration award despite explicit party agreement prohibiting court challenges.

#### B. THE INTERNATIONAL LAW OF TREATIES

The international law of treaties may also create grounds for refusing to enforce an ICSID award. Professor Schreuer, as noted above, has remarked that the “finality of [ICSID] awards would also exclude any examination of their compliance with international public policy or international law in general.”<sup>82</sup> Here too, commentators may have too quickly dismissed the prospect that national courts will not review an ICSID award on the basis of international public policy, as illustrated by the reference to international *ordre public* found in *SOABI v Senegal*. Moreover, international law respecting Treaty obligations applies to both the interpretation of obligations of Contracting States under the ICSID Convention and to the circumstances in which those obligations may be suspended. Therefore, the international law of treaties may also come into play. Let us turn first to the interpretation of a Contracting State's obligation under Article 54(1) to recognize and enforce an ICSID award.

The core instrument for interpreting treaties is the Vienna Convention on the Law of Treaties, to which virtually all countries are adherents. Article 31(3)(c) of the Vienna Convention tells us that treaties should be interpreted in light of “any relevant rules of international law applicable in the relations between the parties.” Sympathetic domestic courts might employ, among other arguments, the international law doctrines of “abuse of right,” “denial of justice,” “unfair and inequitable treatment” or “good faith” as bases to interpret the recognition and enforcement obligations established by ICSID Article 54(1). As the reader is aware, the scope of these doctrines, and indeed in some cases their very existence, can be controversial. For purposes of this article, we offer no opinion regarding those issues.

The doctrine of “abuse of right” arguably obligates parties to exercise a right reasonably and in good faith.<sup>83</sup> An abuse of right may arise, for example, where a party “adopts a position contrary to one it has previously taken [and] the other party has relied on the initial position to its detriment.”<sup>84</sup> This international precept is codified in the domestic law of many countries as well. Article 2 of the Swiss Civil Code states that “[e]very person

<sup>81</sup> *Id.*

<sup>82</sup> SCHREUER, *supra* note 9, at 1129.

<sup>83</sup> See A. F. M. Maniruzzaman, *State Contracts with Aliens: the Question of Unilateral Change by the State in Contemporary International Law*, 9 J. INT'L ARB 141 (No. 4, 1992).

<sup>84</sup> *Riahi v Iran*, Award in Case No. 485 (600-485-1), Iran-United States Claims Tribunal, February, 27, 2003.

shall exercise his rights and perform his obligations in accordance with the rules of good faith. A manifest abuse of right is not protected by law.” Article 281 of the Greek Civil Code states that “[t]here is an abuse of a right under this article, if the party exercising that right goes well beyond the limits of accepted principles of good faith and morality. The exercise of a right becomes ‘abusive,’ if a reasonable person would say its exercise exceeded its financial or social objective.” Although admittedly in a different context, the concept of “abuse of right” was employed by the arbitrators in recent ad hoc investor-state arbitrations involving geothermal power projects in Indonesia to limit the damages awarded against the Indonesian side.<sup>85</sup>

“Fair and equitable treatment” and “denial of justice” may provide another set of bases for a court to narrowly construe its enforcement obligations under ICSID Article 54(1). The revised 2004 Model U.S. Bilateral Investment Treaty states in Article 5.2(a) that the customary international law obligation of “fair and equitable treatment” includes the obligation of a state “not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”<sup>86</sup> According to the ICSID “Additional Facility” tribunal in *Robert Azinian and others v United Mexican States*,<sup>87</sup> a finding of denial of justice may be based upon: (i) a court decision clearly incompatible with international law; (ii) lack of procedural and substantive due process, including the relevant court’s refusal to entertain a suit, creation of undue delay, administration of justice in a seriously inadequate way, or adoption of a “clear and malicious misapplication of the law”; or (iii) in some circumstances, a judicial decision contrary to municipal law. Arguably, proceedings held before an ICSID tribunal may fall below international standards of justice if there are instances of corruption, threats, unwarranted delay, flagrant abuse of judicial procedure, or a judgment so manifestly unjust that no competent and honest court could have issued it.<sup>88</sup> While “denial of justice” has developed as a customary international law standard applicable to states, not private parties, there is no assurance that a court in an enforcing jurisdiction would reject the application of that standard to investor-state arbitration proceedings conducted pursuant to an international treaty and administered by an international organization. Similarly, based on early international decisions such as the 1926 decision in *Neer v United Mexican States*, the minimum standard of “fair and equitable treatment” under customary international law has traditionally been understood to prohibit acts by states amounting to “bad faith, willful neglect, clear instances of unreasonableness or lack of due diligence.”<sup>89</sup> For instance, the international standard of fair and equitable treatment may be invoked where “national law does not provide . . . for adequate guarantees of fair treatment in accordance with generally shared values of substantial and

<sup>85</sup> See *Himpurna California Energy Ltd. (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award, 14 MEALEY’S INT. ARB. REP. A-1 (1999) and *Patuha Power Ltd. (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award, 14 MEALEY’S INT. ARB. REP. B-1 (1999).

<sup>86</sup> The 2004 Model U.S. BIT can be found in final form at <[www.state.gov/e/eb/rls/othr/38602.htm](http://www.state.gov/e/eb/rls/othr/38602.htm)>.

<sup>87</sup> ICSID Case No. ARB(AF)/97/2, Award of November 1, 1999, 5 ICSID Rep. 272 (2002).

<sup>88</sup> See J. BRIERLY, *THE LAW OF NATIONS* (6th ed., 1963).

<sup>89</sup> See UNCTAD, *Fair and Equitable Treatment*, at 39–40 (citing *Neer v United Mexican States*, 4 RIAA 60 (1926)).

procedural fairness and justice in respect of the enjoyment of property and the normal conduct of business operations.”<sup>90</sup> An ICSID tribunal is not, of course, an organ of a particular state. Nevertheless, it is certainly possible that counsel for a disappointed respondent state may seek to extend the principle of fair and equitable treatment to public sector activities such as investor-state arbitration under the auspices of an arm of the World Bank Group, ICSID. Accordingly, a respondent state might argue in the enforcement forum that the obligation to enforce the ICSID award under Article 54(1) is subject to interpretation taking account of unfair or inequitable treatment by the tribunal.

Customary international law principles of “good faith” might affect the claimant’s rights in local enforcement proceedings as well. In a dispute between a foreign investor and a host state, the host state may assert that the foreign investor has made material misrepresentations or engaged in corrupt practices or similar misconduct. Such allegations may be renewed when the ICSID award is being enforced to support an argument that the enforcement obligations of an ICSID Contracting Party are to be interpreted in light of international law principles of good faith. If lack of good faith by the foreign investor in the underlying transaction is proven, those principles might buttress an argument that a Contracting State need not enforce an ICSID award in its national courts.

There is clearly no direct precedent to assist in evaluating such arguments. We remind readers, however, that creative advocates will have an increasing number of opportunities to make such arguments, in many different jurisdictions, as the expansion of the ICSID caseload triggers a corresponding expansion of requests for judicial enforcement of ICSID awards.

The provisions of the Vienna Convention on the Law of Treaties relating to interpretation of Treaty obligations are not the only potentially relevant Articles of that Convention. The Vienna Convention also recognizes that political and economic events outside the judicial system may affect Treaty obligations generally. Under the Vienna Convention, a Contracting State may properly suspend its Treaty obligations in certain extraordinary circumstances; by virtue of “supervening impossibility of performance” (Article 61) or a “fundamental change of circumstances ... which was not foreseen by the parties” (Article 62). Would an economic and political crisis constitute impossibility or a fundamental change of circumstances? We may wonder whether an ICSID Contracting State, at the time of ratification of the ICSID Convention, readily foresees the kind of extraordinary economic and political events that have characterized recent economic crises in Asia, Africa and Latin America.

The decision to suspend operation of a treaty, of course, is a highly sensitive determination, involving questions of economic and political relations with important trading and security partners. Moreover, a state may not selectively suspend certain of its obligations under a treaty, while retaining the benefits of the remaining provisions. Would a host state, faced with an economic crisis, choose to suspend its obligations under an

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<sup>90</sup> Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS (Hague Academy of International Law) 341–342 (1998).

investment treaty or the ICSID Convention? We hope not, just as we hope that no ICSID Contracting State faces sufficiently dire circumstances that the question becomes real, not academic. Whatever may be the resolution of such political questions, however, the assumption that international law provides no basis for resisting enforcement of an ICSID award appears to be overstated.

#### V. POSSIBLE RESPONSES TO THE ATTEMPTED AVOIDANCE OF AWARDS

It is commonly said by proponents of the ICSID investor–state arbitration system that the ICJ is available to be enlisted in its defense. Article 27 of the ICSID Convention forbids Contracting States from bringing an international claim on behalf of an investor related to an ICSID dispute unless another “Contracting State shall have failed to abide by and comply with the award rendered in such dispute.” Consistent with this provision, Article 64 of the ICSID Convention states that any dispute arising from the “interpretation or application” of the ICSID Convention shall be referred to the ICJ, therefore allowing Contracting States to bring an action against another Contracting State for failing to honor its treaty obligations under the ICSID Convention. This possible counteraction to the resistance of an ICSID award, however, presents its own difficulties. First, the investor would have to convince its home Contracting State to bring the claim on its behalf. The decision by a state to bring an ICJ action against another state will undoubtedly involve a balancing of political, economic and security issues outside the control of that investor. In the case of some states at least, this course of action may be complicated by a lack of confidence in the ICJ, as was recently addressed by Professor Eric Posner in a *NEW YORK TIMES* opinion piece.<sup>91</sup> Professor Posner noted that, in “the last 30 years, the countries with the ten largest economies have brought only two contentious cases” before the ICJ.<sup>92</sup> Moreover, a case before the ICJ would likely take a substantial length of time to prosecute. And, finally, there is no guarantee that a disappointed state would pay an ICJ award if ordered to do so.

Difficult issues also exist as to the remedies available for an investor in connection with an Article 64 ICJ proceeding brought by that investor’s state.<sup>93</sup> The ICJ’s Statute does not authorize the orders of specific performance, only “recommendations.” It is therefore unclear whether the ICJ could compel the respondent state to comply with the ICSID award. Moreover, ICSID Convention Article 64 does not necessarily give the ICJ jurisdiction over the investor’s claims as espoused by the investor’s state. Instead, Article 64 addresses only disputes between the two states about “interpretation or application” of the ICSID Convention. It is therefore also unclear how the investor’s state can bring a damage claim on behalf of the investor to the ICJ without a separate ICJ jurisdictional consent from the respondent state with respect to that claim.

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<sup>91</sup> Eric A. Posner, *All Justice, too, is Local*, *N.Y. TIMES*, December 30, 2004.

<sup>92</sup> *Id.*

<sup>93</sup> Art. 64 of the I.C.J. arguably allows any interested Contracting State, not just the investor’s home state, to bring a claim against another Contracting State before the I.C.J.

Some observers suggest that the World Bank could withhold certain benefits to Contracting States if those states take actions to avoid the enforcement of awards. The Operational Procedures of the World Bank allow Regional Vice Presidents of the Bank to withhold loans from states that do not comply with their obligations to the World Bank.<sup>94</sup> ICSID itself is undeniably a part of the World Bank Group. In contrast, an ICSID tribunal is clearly not an arm of the World Bank Group. Moreover, an award of an ICSID tribunal is not an obligation owing to the World Bank Group. Accordingly, the World Bank's Operational Procedures (and the Bank's Articles of Agreement) do not directly address the situation where a member country refuses to honor an ICSID arbitration award. Additionally, the World Bank has not, to the authors' knowledge, spoken publicly about the consequences (if any) for new loans to a Contracting State if that state refused to honor its obligations under the award and the ICSID Convention.

The IMF recently did threaten to withhold loans from Argentina in order to remedy Argentina's failure to reach agreements with its bondholders following the failure to honor the bonds.<sup>95</sup> The IMF has stated that it would require Argentina to reach agreements with its bondholders before restructuring Argentina's existing loans with the IMF.<sup>96</sup> Possibly as a result of the pressure from the IMF, Argentina reached agreements with many of its bondholders on a controversial exchange offer for sovereign Argentine debt.<sup>97</sup> Ultimately, however, the IMF agreed to restructure Argentina's loans despite Argentina's failure to reach agreements with all of its bondholders. Moreover, the terms of the exchange offer were seen by the international financial community to be favorable to Argentina. Thus, it is unclear to what extent IMF pressure influenced the conduct of Argentina.<sup>98</sup> Although the efficacy of possible pressure from the World Bank to cause the enforcement of ICSID awards is far from clear, the commitment of the World Bank itself may well be the most important factor in the ultimate success of the ICSID's investor-state arbitration regime.

## VI. PRACTICAL CONSIDERATIONS

Although no courts have yet refused to enforce an ICSID award, the number of ICSID awards to date has been very limited. Some courts may find the *ordre public* rationale of the French lower courts attractive when deciding whether to enforce an ICSID award. Others may find authority to refuse enforcement within the text of the ICSID Convention itself, their own civil procedure codes or international law. As ICSID juris-

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<sup>94</sup> See World Bank Procedure BP 7.40 (May 1996), available at <<http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/6BA5C16A82E998518525672C007D0977?OpenDocument>> (last visited on June 1, 2005).

<sup>95</sup> Stephen Temple, *Argentina Shrugs Off Pressure to Re-Open Debt Talks*, WORLD MARKETS ANALYSIS, April 18, 2005.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*



prudence develops, more courts may accept entirely different arguments from creative litigators to avoid the enforcement of awards.

Even with the possibility that a successful claimant might face obstacles when enforcing an ICSID award in a court of a Contracting State, those risks are likely to be lower than trying to enforce a foreign judgment in another state's courts. ICSID arbitration is most certainly less risky for a foreign investor than trying to prosecute its case in the courts of a hostile state.

Nonetheless, successful claimants and losing respondents alike should be aware of the potential for resistance to the enforcement of ICSID awards. The limited available case law, the ICSID Convention itself and international law regarding treaties all suggest grounds for a court to refuse to enforce an ICSID award. As the number of ICSID disputes grows swiftly, courts will likely become more involved in establishing the parameters for enforcement of ICSID awards.



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