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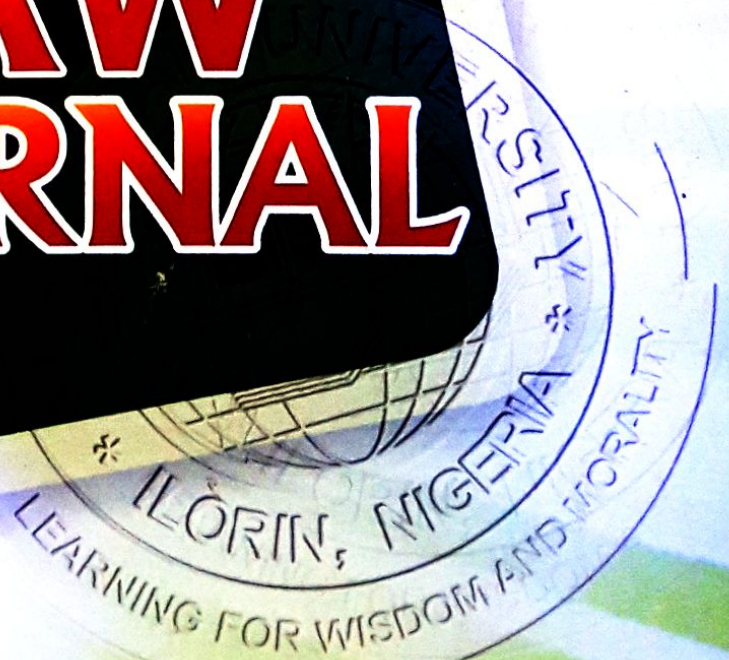
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ENFORCEMENT OF ARBITRAL AWARDS: ISSUES AND CHALLENGES

BY

KUDIRAT MAGAJI W. OWOLABI*

Abstract

The importance that the international community attaches to this sector of international economic relations has led to the promulgation of the International Convention for the Settlement of Investment Disputes (ICSID Convention) under the aegis of the World Bank, to cover the settlement of investment disputes between investors and host states. The ICSID Convention, in turn, established the International Centre for the Settlement of Investment Dispute (the Centre), which implements the provisions of the ICSID Convention. One area of dispute resolution mechanism under the ICSID Convention that attracts academic comment is the enforcement of ICSID award. The question is often raised whether the provisions of the Convention promote effective enforcement of ICSID awards. The purpose of this article is 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. Therefore this article will be analytical and evaluative; that is, the provisions of the Convention are critically analysed to show its area of challenges. It is therefore concluded that the Challenges of ICSID awards potentially may be based upon the provisions of the ICSID Convention itself and from outside the ICSID Convention.

1. INTRODUCTION

One of the Conventions which is sui generis is the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States.¹ This is due to the place accorded domestic law resolving questions of sovereign immunity in the enforcement of arbitral awards and other issues that seem to impinge on the effective enforcement of ICSID awards. ICSID sought to remove major hurdles to the free international flow of private investment posed by non-commercial risks and the absence of specialised international methods for investment dispute settlement.² The Convention regulates the conciliation and arbitration of investment (legal) disputes between contracting States and nationals of other contracting states in accordance with the provisions of the Convention.³ Thus, only such disputes which have been submitted to ICSID by the mutual consent of the parties will be settled under the ICSID.⁴ It also regulates its arbitral proceedings through the ICSID Arbitration Rules.⁵

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¹ hereinafter referred to as ICSID Convention

²Paulsson J, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 Int'l & Comp. L. Q. 375-385.

³ICSID Convention 1965, Article 1

⁴ICSID Convention 1965, Article 25 (1)

⁵ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) 1967, Rules 32, 37, 41

This article addresses the broad question of enforcement of ICSID arbitral awards under the ICSID Convention, with the goal of analysing the attendant issues. The first section deals with background issues such as the purpose of ICSID as envisaged by the ICSID Convention. Second section discusses the recognition and enforcement of awards. The third section examines the provision for annulment of award under the ICSID Convention and the impact of the annulment provision. The fourth section discusses challenges face by parties when trying to enforce the ICSID award under the Convention. The fifth section attempts to proffers possible solution to the identify problem of enforcement and concludes with the recommendation.

2.0 BACKGROUND AND PURPOSE OF ICSID

As the international financial institution that provides loans for production and development purposes to its member countries, the World Bank upholds international investments. The founders of the bank believed that the principal function of the institution would be to encourage international investment by private investors.⁶ The World Bank thus champions the ICSID Convention's goals of advancing international cooperation for economic development in developing countries through private investment and promotion of mutual confidence between governments of developing countries and foreign investors.⁷

Giardina opines that the Convention was:

Prompted by the World Bank (and) provides a system for settling disputes that takes into account the interest of both foreign investors and the host states and, at the same time, guarantees continuous flow of private investment into the developing countries, a factor of vital importance if balanced growth is to be achieved in the world economy.⁸

According to Shihata (the past Vice President and General Counsel of the World Bank and Secretary-General of the ICSID), the primary objective of the ICSID is to promote a climate of mutual confidence between investors and states so as to increase the flow of resources to developing countries under reasonable consideration.⁹

The key purpose in establishing ICSID was therefore to assure foreign investors of protection under international law from unilateral actions of host countries which could jeopardise their investments. At the same time, host countries of foreign investments are assured a neutral dispute resolution mechanism that shields them

⁶Shihata F. I., 'The Settlement of Dispute Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA' (1986) 1(1) AM.U.J. INT'L & POL'Y, 97-116, 97.

⁷Christopher M. K., 'The International Bank for Reconstruction and Development and Dispute Resolution: Conciliation and Arbitration with China through the International Centre for the Settlement of Investment Disputes' (1999) 24 N.Y.U.J. INT'L & POL., 439, 445

⁸Giardina A., 'The International Centre for Settlement of Investment Disputes between States and Nationals of other States (ICSID)' in Sarcevic P (ed), *Essays on International Commercial Arbitration* (ICSID, 1989) 214-234, 219.

⁹Shihata F.I., 'Towards a Greater Depoliticisation of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1(1) ICSID Review-F.I.L.J., 1-25, 4.

from the economic manipulations of developed countries.¹⁰ The ICSID thus provides a level playing field for host countries and foreign investors alike. This balance is created by both the ICSID Convention and the ICSID Rules of Arbitration. While the Convention gives private investors access to an international forum, the Rules assure them that the absence of a state party to the dispute or its refusal to participate in proceedings after it has consented to ICSID arbitration cannot frustrate the arbitral process.¹¹

On the other hand, the ICSID Convention provides that a contracting state may, as a condition of its consent to ICSID arbitration, require prior exhaustion of domestic remedies.¹² This condition may be stipulated in the investment agreement, in a bilateral treaty between the host country and the investor's country, or in a declaration made by a contracting state at the time of signature or ratification of the ICSID Convention.¹³ Further, ICSID Convention expressly provides that unless the parties have specially agreed otherwise, the arbitral tribunal must decide a dispute in accordance with the law of the host state, along with such rules of international law as may be applicable.¹⁴

3. ENFORCEMENT OF AWARD UNDER ICSID CONVENTION

Articles 53-54 of ICSID Convention, deal with recognition and enforcement of award under the convention. Article 53 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 the Convention while article 54 (1) of the ICSID Convention provides:

Each contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by the 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 award, as if it were a final judgment of a court of a constituent state.

Article 54 (2), on the other hand, prescribes that a party seeking recognition or enforcement must do in the territories of a contracting state in order to satisfy the obligations of such states under Article 54 (1)

Nigeria, in a bid to encourage foreign investment, ratified the ICSID Convention in 1967 and passed the International Centre for the Settlement of Investment Decree

¹⁰Ordinarily, developing countries may not readily submit to arbitration with non-state entities in international fora commonly used by private parties because of the perceived unequal status of states and non-states and because of the potential compromises in sovereign dignity involved in according to arbitration.

¹¹Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) 4 I.L.M 524

¹²ICSID Convention 1965, Article 26

¹³Shihata F.I, (n 6)102

¹⁴ICSID Convention 1965, Article 42(1)

No. 49 of 1967 which is now an Act¹⁵ under Constitution of the Federal Republic of Nigeria.¹⁶ The ICSID Convention was domesticated as a local legislation and thus referred to as the International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act.¹⁷ The Act consists of only two sections, the first section states and explains the right of a party to enforce an ICSID award by registering the award at the Supreme Court of Nigeria from when it can be enforced as a judgment of the court.¹⁸ While the second section gives the Chief Justice of Nigeria, the power to make appropriate rules for the enforcement of such awards.¹⁹ The Act provides that an ICSID award shall be enforced in Nigeria as if it were an award contained in a final judgment of the Supreme Court if a copy of such an award, duly certified by the Secretary General of the Centre is filed in the Supreme Court by the party seeking its recognition and enforcement.²⁰

What is unique about the Nigerian ICSID Act is that section 1 which provides that 'where a party seeks to enforce the award, all which is needed, is for the award to be registered as the judgment of the Supreme Court of Nigeria and it is automatically enforced'. There have been criticisms about the procedure such that it violates the constitutional right to fair hearing and the right to go to court when a question of legal rights needs to be examined.²¹ Some have said that the main political agenda of arbitration especially in the light of ICSID awards²² is to disempower state's legislative potentials and delegitimize public regulatory interventions in commercial arrangements in the markets. On the contrary, the author disagrees with that view and considers this as strength because the summary enforcement procedure is what is obtainable in other parts of the world especially in England.²³ The English Arbitration Act²⁴ and Civil Procedure Rule²⁵ provide a clear, expeditious and effective procedure for the enforcement of awards, with safeguards to prevent an unsuccessful challenge being abused so that enforcement will subsequently become impossible. This ensures the enforcement will not be delayed because of the unavailability of a court date or a judge to hear the application for enforcement. One other striking feature of the Convention is the exclusion of right to challenge the award. According to Paulsson:

¹⁵The International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act Cap 120 Laws of the Federation of Nigeria, 2004

¹⁶Constitution of Federal Republic of Nigeria, 1999 (as amended), Section 315 of the

¹⁷Cap 120 Laws of the Federation of Nigeria, 2004

¹⁸International Centre for Settlement of Investment Dispute (Enforcement Awards) Act 2004, section 1

¹⁹International Centre for Settlement of Investment Dispute (Enforcement Awards) Act 2004, section 2

²⁰International Centre for Settlement of Investment Dispute (Enforcement Awards) Act 2004, section 1

²¹Okekeifere A I, 'The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria' (1997) 14 (3) J. Int'l Arb. 223-245, 224.

²²Seupasa S. L., 'Obstacles to International Commercial Arbitration in Africa Countries' (1992) 141 (2), Int'l Comp. L. Q., 387-108, 388.

²³See English Arbitration Act 1996, section 66; Supreme Court of England and Wales County Courts Civil Procedure Rules 1998

²⁴English Arbitration Act 1996, Section 66(1)

²⁵Supreme Court of England and Wales County Courts Civil Procedure Rules 1998, Part II

There is no possibility of challenging an ICSID award before the courts of the place of arbitration. All states signatory to the ICSID Convention have bound themselves to recognize and enforce ICSID awards to the same extent as if they were final national court judgment.²⁶

The ICSID awards have the effectiveness of final judgments and self-executing force in the legal orders of the enforcing states, though it does not mean that all problems arising at the enforcement stage have been resolved.²⁷ Indeed, they have not been resolved because the manner in which the execution is to be carried out is governed by the law in force at the place of enforcement. This is acknowledged in Article 55 of the Convention which provides thus 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 of execution.

In addition, submission to ICSID has a special attraction for developing countries. This is so because the Centre creates and indeed confers credibility of investment protection on such countries. That is the reason that section 26(3)(a) of the Nigerian Investment Promotion Commission Act²⁸ provides for the application of ICSID Rules in the arbitration of investment disputes between the Federal Government and an investor in respect of his investment and where there is disagreement as to the method of disputes settlement to be adopted.

One other important feature of the ICSID Convention is that, it makes the award rendered under ICSID Convention directly enforceable in signatory states without any standard of review to be applied in national courts.²⁹ Failure to comply with the terms of the award could have serious implications on the investment climate of the enforcing State including Nigeria. Nigeria could also risk facing the International Court of Justice, if a party seeking to enforce an ICSID award feels that the Nigerian government is uncooperative in enforcing the award.

It is, however, important to note that the provisions of ACA do not apply in anyway under ICSID Arbitration.³⁰ Under the ICSID Rules, parties are free before the determination of the arbitral process to settle on their terms and thereafter discontinue the case.³¹ The only two cases involving Nigeria have thus far been terminated under this rule. The first is the celebrated case of *Guadalupe Gas Products Corporation v. Nigeria*,³² concerning production and marketing of

²⁶Paulsson J. (n 2); ICSID Convention 1965, Article 54 (1)

²⁷Giardina A. (n 8) 220

²⁸Decree No 16 of 1995 (as amended).

²⁹ICSID Convention 1965, Articles 53-54

³⁰International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, Cap 120 LFN 2004, Section 8

³¹ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) 1967, Rule 43,

³²(ICSID Case No. ARB/78/1)

liquefied natural gas. A dispute arose over the marketing and distribution of liquefied natural gas between the gas corporation and the Nigerian Government. A settlement was reached by the parties and recorded at their request in the form of an award.³³

The second case is *Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria*,³⁴ over dispute concerning hydrocarbon concession, on which the Tribunal also issued an order taking note of the discontinuance of the proceedings pursuant to ICSID Arbitration Rules 43 (1).³⁵

Considering the confidentiality in arbitration under the ICSID, there are not many details available regarding such cases. Perhaps if the cases had gone through to conclusion the details of the proceedings and enforcement might have been available. The recent case involving *Inter ocean Oil Development Company and Interocean Oil Exploration Company Limited v. Federal Republic of Nigeria*³⁶ was registered in December 2013. How the case is determined will go a long way in highlighting the State of recognition and enforcement of ICSID awards in Nigeria.

4.0 ANNULMENT OF AWARD UNDER ICSID

ICSID awards are not subject to setting aside or any other form of scrutiny by domestic courts. Rather, the ICSID Convention offers its own self-contained system for review.³⁷ Under this procedure, an ad hoc committee may annul the award upon the request of a party.³⁸ Under Article 52 of the Convention, although ICSID awards may not be challenged before national courts, aggrieved parties have a right to ask the Chairman of ICSID's Administrative Council to appoint a three-member committee to review an award. Such review can lead to annulment. The grounds for such annulment under the ICSID Convention are listed exhaustively in Article 52 (1) as follows:³⁹

- a. that the Tribunal was not properly constituted
- b. that the Tribunal has manifestly exceeded its powers;
- c. that there was corruption on the part of a member of the Tribunal
- d. that there has been a serious departure from a fundamental rule of procedure ;
- e. that the award has failed to state the reasons on which it is based

Therefore, annulment under the ICSID Convention offers a review proves that is limited to a few fundamental standards of a mostly procedural nature. Only three of

³³ Award embodying the parties' settlement agreement rendered on July 22, 1980, pursuant to Arbitration Rule 43 (2)

³⁴ (ICSID case No. ARB/07/18)

³⁵ on August 1, 2011.

³⁶ (ICSID Case No ARB/13/20)

³⁷ Schreuer C, 'ICSID Annulment Revisited' (2003)30(2) LIEI, 103-122, 103

³⁸ ICSID Convention 1965, Article 52

³⁹ See also ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) 1967, Rules 50, 52-55

the grounds for annulment listed above, (b), (d), and (e) have played a practical role because they are the most frequently invoked grounds for annulment.⁴⁰

Starting from article 52(1)(b), an excessive power occurs where the tribunal deviates from the parties' agreement to arbitrate. This would be the case if a tribunal makes a decision on the merits although it does not just have jurisdiction or if it exceeds its jurisdiction.⁴¹ Thus, for the ICSID to be vested with jurisdiction, a case must first involve a legal dispute arising out of an investment. Second, the dispute must be between a contracting state or its authorised constituent subdivision or agency, and a national of another contracting state.⁴² Third, the parties must have consented in writing to bring their dispute to the ICSID, and such consent may not be unilaterally withdrawn.⁴³ Therefore, there will be an excess of powers if there is no legal dispute arising directly out of an investment. Similarly, if the nationality requirements under the ICSID Convention are not met there is no jurisdiction and a decision on the merits would be an excess of powers. Absence of a valid consent to arbitration would also mean that there is no jurisdiction and an award on the merits would be an excess of powers. Failure to exercise a jurisdiction that does not exist also constitutes an excess of powers.

To be a ground for annulment under ICSID Convention, such excess of powers has to be a manifest one. The wording of the article 52 (1) (b) of the ICSID Convention makes no difference for issues related to the competence or substance of the award. The requirement of to be 'manifest' applies equally both jurisdictional and substantive matters.⁴⁴ In *Mitchell v. Congo*,⁴⁵ it was argued that the Tribunal had committed a manifest excess of powers by assuming jurisdiction though the dispute had not arising from investment. It was decided that the essential element of the concept of investment was a contribution to the host state's economic development. The fact that there no contribution to the host state's economic development, there is no investment within the terms of the ICSID Convention. Consequently the committee annulled the award based on the manifest exceeds of powers. In this case, the committee crossed the line between annulment and appeal as it re-examine the Tribunal findings on facts regarding the existence of an investment.⁴⁶ In author's view the committee also lacked clear grounds to find a manifest excess of powers in the Tribunal's finding that it had jurisdiction over the dispute. In this case, the definition of the investment within the applicable BIT was broad enough, every kind of investment, to cover a legal consulting firm. Therefore, the Tribunal's finding of jurisdiction was not obviously incorrect and did not

*Updated background paper on Annulment for the Administrative Council of ICSID (5 May 2016) 53

⁴⁰ Feldman M.B, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987), 2(1) FILJ, 85-110, 100

⁴¹ Ibid

⁴² ICSID Convention 1965, Article 25

⁴³ Hussein Nuaman Soufraki v United Arab Emirates, ICSID Case no ARB/02/7, 2007, paras 118-119

⁴⁴ Nov., 2006, para

⁴⁵ Avila GA, 'ICSID Annulment Procedure: A Balancing Exercise Between Correctness and Finality' in Berg AJV (ed) Arbitration Advocacy in Changing Times, ICCA Congress Series (2010, Rio, Vol 15, Kluwer Law Int'l, 2011) 292

necessarily constitute a manifest excess of powers. While the Tribunal seems to stand for the subjective theory based on the BIT between the US and the Democratic Republic of Congo, the committee chose the objective approach to define investment within the terms of ICSID Convention. So, the committee stepped beyond its limited reviewing authority and replaced the Tribunal's decision with its own judgment on what should be the proper test for investment.⁴⁷

In *Mr. Tza Yap Shun v. Republic of Peru*,⁴⁸ the Republic of Peru alleged that although the Tribunal did not have jurisdiction, it has decided on the merits of the case. The dispute was about the interpretation of article 8 of the BIT between Republic of China and Republic of Peru which stipulates the dispute settlement clause. The Republic of Peru argued that article 8 clearly provides that only disputes about the amount of compensation owed to an investor after finding of wrongful expropriation can be submitted to the ICSID arbitration. The Committee agreed that the jurisdiction of a Tribunal rests on the parties' consent and ignoring the terms of the parties' agreement as expressed in the arbitration clause constitute an excess of powers. However, the committee stated that a misinterpretation of the arbitration clause does not amount to a manifest excess of powers.⁴⁹ The committee referred to the annulment decision in *Duke v Peru* case which stated that 'when a Tribunal engages in interpretation of a written instrument of consent in light of the surrounding circumstances or in the context of other documents, its final construction of the meaning of the document in the light of all evidence and submissions of the parties is unlikely to amount to a manifest excess of powers. Interpretation, which leaves room for discussion is not likely to give rise to a manifest excess of power. The committee found that the meaning of the phrase is not textually obvious. The Tribunal interpreted the expression dispute involving the amount of compensation for expropriation in the overall context of article 8. The Tribunal went through an interpretative process mandated by the Vienna Convention and looked at the ordinary meaning of the word 'involving' considered the context of article 8(3) and then looked at subsidiary sources. So, appeal body might well find fault as a matter of law with some aspects of the Tribunal's application of the Vienna Convention, but an ad hoc committee does not have such mandate and cannot replace the Tribunal's findings as a result of interpretation by its own and dismissed the request for annulment on the basis of manifest excess of powers.⁵⁰

Article 52(1)(d) generally is concerned with the integrity and fairness of the arbitral process. Thus, the breach of one fundamental rule of procedure may justify annulment, even if the procedure was otherwise fair. It is generally accepted that

⁴⁷Kim D, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to move away from an Annulment System' (2011) NYU Law Rev, 270

⁴⁸ICSID Case No. ARB/07/6, 2015

⁴⁹ICSID decision 2011, para 160.

⁵⁰Para 98-99

this ground for annulment refers to a set of minimal standards of procedure to be respected as a matter of international law. This means that a request for annulment does not need in every case to point to a specific rule in the ICSID Convention or in the ICSID Arbitration Rules that has been breached but, rather, to a fundamental rule or principle. Further, demonstration of a breach of such a specific rule may not be enough if the departure is not seen as serious or the rule as fundamental. Yet the idea that an ICSID tribunal holds a wholly unfettered power on certain evidentiary matters is troubling, even with the caveat that the tribunal may not breach other fundamental rules. Given the crucial role of evidence in any adversarial proceeding, a more cautious approach is preferable, such as the one adopted recently in *Teco v. Guatemala*.⁵¹ It was recognised that a tribunal is not required to refer to every piece of evidence in the record, but this does not mean that a tribunal can simply gloss over evidence upon which the parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory.⁵² A tribunal, of course can completely reject the relevance of any evidence adduced by the parties and is not required to allude to all pieces of evidence. Yet the failure to even mention and give some consideration to a piece of evidence on which a party has placed significant emphasis, and which refers to an important issue in the case, does raise due process concerns. In certain cases, it may justify annulment.

However, an ICSID tribunal's duty to state reasons upon which the award is based, established in article 52(1)(e) as a ground for annulment is one fundamental features of the ICSID Convention.

4.1. IMPACT OF THE ANNULMENT PROVISION OF THE ICSID CONVENTION

The grounds for annulment under the ICSID Convention are not new to arbitral nullity. What is new is the control entity to which the claims for nullifications are to be submitted, in this case, the Secretary General and an ad hoc committee of three persons to hear the dispute regarding the annulment claim.⁵³ According to the provisions of Article 52(6), annulment of an arbitral award could lead to submission of the dispute to a new Tribunal, presumably for a fresh hearing.

The question that one will be tempted to ask is whether the procedure will ever end. The ICSID Convention does not specify the number of times challenges to an award can be entertained. The difficulty of this situation can be gleaned from two classic annulment requests from previous ICSID awards: *Kloeckner Industrie Anlagen GmbH v United Republic of Cameroon*⁵⁴ and *AMCO Asia Corp et al v. Indonesia*⁵⁵

⁵¹ICSID Case No ARB/10/23(April 2016)para 131

⁵²Ibid, Para 131

⁵³ICSID Convention 1965, Article 52(2) &(3) on the procedures pertaining to the annulment process. The Chairman of the Administrative Council is vested with the power of appointing ad hoc Committee member

⁵⁴ICSID case No ARB/81/2

⁵⁵Int'l Arb. Rep. 649 (1986)

In Kloeckner case, an ICSID tribunal rendered award in 1983, finding the Cameroon debt to be extinguished by reason of Kloeckner's failure to perform its contractual obligations. In 1984, Kloeckner filed a request for annulment of the award in accordance with Article 52 of the ICSID Convention. In 1985, an ad hoc committee annulled the award in its entirety, citing, inter alia, a manifest excessive exercise of power by the Tribunal.

The fact that the entire award was annulled by an ad hoc committee meant a reconsideration of the entire dispute in a second arbitration requested by Kloeckner. In the second arbitration, the Tribunal returned an award which favoured Kloeckner. The award then challenged by the Government of Cameroon in another Article 52 procedures.⁵⁶

Also in AMCO case, the Tribunal made a unanimous award in favour of the Claimant AMCO, which Indonesia requested be annulled under Article 52 of the ICSID Convention. The ad hoc committee set up to consider the request annulled on grounds that the first Tribunal had manifestly exceeded its powers in failing to apply the relevant provisions of Indonesian law in determining the amount of AMCO's investment with the finding that the revocation of AMCO's investment license was not justified in substance, and that the Tribunal failed to state sufficient reasons for its decision in this respect. AMCO applied for new arbitration, and the Tribunal returned an award on the merits in favour of AMCO in 1990. Since there appeared to be no limit to the use of the annulment procedure under Article 52 of the ICSID Convention, both AMCO and Indonesia applied for the annulment of the second award.

Given that the ICSID mechanism is self controlling the point is that there is need to prevent proliferation of the annulment process because of its impact on the resources of the parties and the finality of the arbitration as an alternative process to adjudication in the regular courts. Additionally, knowing that enforcement may entail another protracted legal battle has a lasting impact on the enforcement of the award by the successful party. The unending nature of the annulment process causes potential parties to reconsider whether arbitral proceedings are a more expeditious way of resolving disputes.⁵⁷

5. CHALLENGES UNDER ICSID CONVENTION

The problem with the enforcement of an ICSID award does not have to do with recognition of the award; the concern is that, recognising an ICSID award alone does not solve the problem of outright enforcement. According to Delaume,⁵⁸ despite the fact that the procedure for recognition and enforcement of ICSID awards

⁵⁶Reisman M, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) Duke L.J., 739, 749

⁵⁷Leigh M, 'Arbitration, Annulment of Arbitral Award for Failure to apply Law Applicable under ICSID Convention and Failure to State Sufficiently Pertinent Reasons' (1987) 81 AM.JINTL 222, 225

⁵⁸Delaume G, ICSID Arbitration in Contemporary Problems in International Arbitration (J. LEW Publisher, 1987) 23-4

is made as simple and effective as possible, a holder of a recognised ICSID award has only an executory title, especially, if the losing party is the state party to the dispute. While the award may be readily enforced against an investor or its assets, the situation may be different if enforcement is sought against the state party to the dispute. Article 54 (3) of the ICSID Convention adds that 'execution of the award shall be governed by the laws concerning the execution of judgments in the state in whose territories such execution is sought.' This provision is emphasised by Article 55 to the effect that nothing in the Convention can be construed as departing from the law in force in any contracting state relating to immunity from execution of that state or of any foreign state.

The purpose of the above provisions is that, execution of an ICSID arbitral award is subject to the domestic law of the state where the award is sought to be enforced and that, no exception should be made regarding the domestic law by virtue of the Convention other than as provided by domestic law.

The reason for this disparity in enforcing an ICSID arbitral award is that the ICSID Convention does not alter or supersede the rules of immunity from execution against a state which fails to comply with an ICSID awards.⁵⁹ The effectiveness of measures of execution against a state depends, therefore, upon the immunity rules prevailing in the country in which execution is sought. Suffice to say that ICSID convention creates a loophole in the interest of the state parties to the Convention over and above the interest of investors, and endorses inequality of parties in the dispute submitted to ICSID.

One will agree with the arguments of van den Berg⁶⁰ that it is illogical that in matters of arbitration, a waiver of immunity is accepted with respect to jurisdiction leading to enforcement but not with respect to execution. If a state agrees to arbitration, it must be deemed to have accepted all its consequences, including compliance with an unfavourable award. Failure to carry out award must mean that the assets of the state party to the dispute, like those of a private party, are capable of being attached and lead to full execution of the award. It follows that if the defence of immunity from recognition and enforcement is not available to a state, which should imply a waiver of immunity from execution, as anything to the contrary would defeat the internationally acclaimed principle of law of *pacta sunt servanda*.

There is no doubt that the reasons for the absolute immunity doctrine in execution of ICSID awards are both political and economic. Execution is commonly thought to be a severe interference with the rights of a state. On the other hand, a generous interpretation against immunity from execution could result in foreign states refraining from investing in countries in which their property and other assets could

INT'L & POL, 175, 214.

⁵⁹ Delaume G. R, 'Economic Development and Sovereign Immunity' (1999) 79 AM J. INTL, 319, 344

⁶⁰ Ibid

be subject to execution.⁶¹ The point however remains that, a strict application of the doctrine of absolute immunity from execution leaves a sour taste in the mouth of justice. It means that, a state may very well enter into an agreement without intending to be bound at the outset while representing to the other party that it does intend to be bound. A person who benefits from transaction should not be heard to say that he or she cannot be proceeded against to enforce the requirement of the benefit.

However, the solution lies with domestic courts, which must develop doctrines of immunity that will meet the object and purpose of the ICSID Convention when the situation arises. It has to be understood that investment disputes cannot be compared with other disputes because of their nature. A combined reading of Articles 54 (3) and 55 of the ICSID Convention would be interpreted to mean that, recognition of an ICSID award gives the holder a valid title, on which basis measures of execution can be taken provided, however, that where such measures are directed at the assets of a state, execution is possible under the law of the contracting state in which execution is sought. This interpretation, if accepted, carries a further implication that an ICSID award will be subject to different interpretations in contracting states, as in the case of other arbitral awards.

Nigeria acceded to the ICSID convention in order to submit to a credible platform for the settlement of investment conflicts arising from investments by foreign investors within its territory. Nigeria has so far demonstrated its commitment of the recognition and enforcement of ICSID awards. It was the first nation to sign the ICSID Convention, and also went ahead to enact a domestic legislation, putting ICSID award at the same level with the judgment of the Supreme Court. To further underscore this commitment, the settlement terms of the two cases⁶² settled under ICSID involving Nigeria were quietly complied with.

Nigeria's ability to attract foreign investors in the face of security, economic, social and political challenges is not unconnected with its positive attitude towards amicable settlement of investment disputes, among other parameters. It is therefore in Nigeria's best interest to continue to demonstrate to the foreign investor-community its continual commitment to this forum of settling investment disputes.

6.0. POSSIBLE REMEDIES FOR THE IMMUNITY PROBLEM

6.1 WAIVER OF IMMUNITY

From the time of entering into an investment contract, investors should properly address the possibility of waiving immunity from execution. Waiver of immunity is controversial, and thus, will depend on who has greater bargaining power. Where

⁶¹Nmechielle V.O, 'Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)' (2001)7(1)A.S Int'l & Comp. L, 21-48, 23

⁶²Guadalupe Gas Products Corporation v. Nigeria (ICSID Case No.ARB/78/1) and Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria (ICSID case No.ARB/07/18)

the private party is in a stronger position, it is likely that the state will succumb to the pressure of waiving immunity from execution.⁶³ Whether the private party is in a stronger position depends upon the kind of investment contemplated.⁶⁴ Experience has shown that though waivers of immunity in economic development agreements vary from case to case, waivers of immunity are commonplace in transnational loan agreements. Lenders almost never fail to see that borrowing states or other public entities waive immunities from jurisdiction and enforcement, whether before or after recovery of judgment.⁶⁵ It can be expected that as long as the relevant provision is clearly worded and does not lend itself to restrictive interpretation, or border on other considerations impacting the act of state doctrine, there is reason to have confidence in the merits of such waivers.⁶⁶

Recognising the Convention's shortcomings regarding execution of its awards, the ICSID recommends the following model clause for the purpose of waiving immunity:

the [Name of Contracting State] hereby irrevocably waives any claims to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this agreement, including immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.⁶⁷

There is no doubt that waiver of immunity will be a difficult issue in the negotiation of any investment agreement with the state parties to the contract, one which most states will oppose. The real issue boils down to the bargaining power of the investor, which depends on the attendant need of the state party with regard to the investment contemplated. While private parties engaged in giving loans to states may be in a better bargaining position to demand a waiver of immunity, other aspects of investments may require such waivers, especially if the parties proceed under the ICSID Convention.

6.1 ESPOUSAL OF A CLAIM BY THE INVESTOR'S STATE

Thus, a plea of immunity from execution by a state which frustrates the enforcement of the award, as has been the case in the few awards rendered by the ICSID, is a violation of that state's obligation under the Convention to comply with the award.⁶⁸ Where the state fails to make good its obligation to comply with an ICSID award, the Convention restores the right of the contracting state, whose national is the

⁶³Nmehielle V.O, (n 61) 39

⁶⁴Choi S, 'Judicial Enforcement of Arbitration Awards under the ICSID and the New York Convention' (1995-96) 28 N.Y.U.J. INT'L & POL, 175, 214.

⁶⁵Delaume G. R, 'Economic Development and Sovereign Immunity' (1999) 79 AMJ. INTL, 319, 344

⁶⁶Ibid

⁶⁷Van de Berg, 'Recent Problems in the Practice of Enforcement under the New York Convention and ICSID' (1987) 2 ICSID Review, 439

⁶⁸Nmehielle V.O, (n 61) 41

award creditor, to give diplomatic protection to its national and bring an international claim on its behalf.⁶⁹

Under Article 27(1) of the ICSID Convention, diplomatic protection is suspended during the period beginning from the date of consent to ICSID arbitration and ending with compliance with the terms of the award, or ending prematurely with the dismissal of the investor's claim by the Arbitral Tribunal. In addition, since non-compliance would affect the application of the Convention, the Contracting state whose national is involved would also have the right to use the remedy provided for in Article 64 of the Convention, to the effect that non-compliance amounts to a dispute concerning the interpretation of the ICSID Convention, in which case the investor's state may refer the dispute to the International Court of Justice (ICJ).

The resumption of diplomatic action due to the failure of a state to abide by an ICSID award, as well as referring the dispute to the ICJ, qualifies as a remedy pressed by the investor's state on its behalf. The possibility that such action will bring the award debtor state into international condemnation may influence it to comply with the award.

7. CONCLUSION

The ICSID Convention is no doubt an attempt to give private parties a place in international economic relations and access to international dispute resolution. This access enables private investors to feel safe in their dealings with host countries, in hope that they will be able to seek redress on an almost equal footing with those countries in cases of violation of obligations assumed under the Convention. On the other hand, host countries are assured of the absence of international politics in their commercial relations with private investors.

On first reviewing the objectives of the ICSID Convention, one might think it a perfect mechanism for handling the inadequacies of counterpart international regimes or organisations dealing with international commercial dispute resolution. Despite its effectiveness, the ICSID Convention only goes half way in realising its objectives. The problem of enforcement still haunts the ICSID mechanism. Endorsement of sovereign immunity by the Convention amounts to giving a gift with one hand and taking it away with the other. Subjecting the interpretation of the sovereign immunity, as it applies to execution to the domestic laws of member states to the Convention, may frustrate a private party's quest to execute an award. Forum shopping for execution may be the only option available to a private party to find a restrictive application of the immunity doctrine. Unfortunately, many countries still maintain the doctrine of absolute immunity from execution. Even in countries with narrow immunity doctrines, it may be difficult for private investors to prove that attached assets are not immune from execution. Private parties should not have to

⁶⁹ICSID Convention 1965, Article 27 (1)

expend resources trying to obtain enforcement of ICSID awards in various countries around the world.

Espousing a private party's claim by its state, and the possibility of the state seeking an interpretation of obligations arising under the ICSID Convention as an alternative to execution, can aid enforcement, but they are still political measures, which may be ineffective in a world of different political considerations. A private party may retain only the hope that international embarrassment may induce the award debtor to comply with the award. The annulment process affects enforcement of awards in terms of time and resources. It provides a never ending cycle of opportunities to challenge the ICSID's arbitral awards. It is a control mechanism that itself lacks control.

The ICSID mechanism could be what it aims to be if, ICSID's Administrative Council, as a representative body of member states devise solutions to impediments which cause the mechanism to fall short of its objectives. The utility of the mechanism should not be predicated on the unpredictable conduct of the parties. Thus, it may be worthwhile to amend the ICSID Convention to eliminate the impact of sovereign immunity in the execution of awards. In the same vein, there should be a limit to the number of times losing parties may petition for annulment of arbitration awards.