# THE RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS AND ARBITRAL AWARDS: A NORTH–SOUTH PERSPECTIVE

## I. INTRODUCTION

International trade has increased dramatically in recent years as many developing nations have entered the world economic market.[1] Economic dealings and business relationships invariably produce disputes, oftentimes complicated when parties from developed and developing countries are involved.[2] Whether resolved through the national court system of a party to the dispute or through an arbitration tribunal, the dispute usually results in a settlement of some sort. This Note focuses upon the enforcement process of the settlement, particularly in the context of a conflict between developed and developing countries. At the outset, a consideration of the reasons underlying the enforcement or non-enforcement of foreign country judgments and arbitral awards is undertaken. An examination of the various multilateral treaties and national legislation concerning enforcement follows. The goal of conflicts law should be resolution of the traditional problems to enforcement and uniformization of the procedures used, procedures which will benefit both developed and developing countries.[3]

## II. SURVEY OF ENFORCEMENT MECHANISMS

When a dispute arises between parties, they usually seek a quick and effective settlement. Settlements of varying form[4] can be reached through numerous procedures.[5] Two forms will be con-

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[1] *See generally* W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 11-12, 21-25, 170-76, 341-61 (1964); Domke & Glossner, *The Present State of the Law Regarding International Commercial Arbitration*, *in* THE PRESENT STATE OF INTERNATIONAL LAW 307 (M. Bos ed. 1973).

[2] Achebe, *The United States Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958: Implications for United States Investors in Nigeria*, 9 TEX. INT'L L.J. 157, 159 n.7 (1974); *see also* Smedresman, *Conflict of Laws in International Commercial Arbitration: A Survey of Recent Developments*, 7 COL. WEST. INT'L L.J. 263 (1977).

[3] *See* Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Fact-finding*, 7 L. & POL'Y INT'L BUS. 813, 814-15 (1975); *see also* Achebe, *supra* note 2, at 158, 172.

[4] The most common are judgments and arbitral awards.

[5] Examples are judicial proceedings, arbitration, negotiation, conciliation, and fact-finding commissions.

sidered herein: an arbitral award and a judgment. An arbitral award represents the finding of an arbitration tribunal. The jurisdiction of the tribunal and its composition usually are prescribed by clauses within the original business contract.[6] The arbitration procedure represents the mutual bargained-for agreement of the contracting parties. Conversely, a judgment represents the decision of a national court. Few contracts involving parties of different countries provide for the settlement of economic disputes by the courts of one nation or another.[7] Resort to judicial proceedings therefore is seldom by mutual agreement, but rather indicates an unwillingness to negotiate further. Clearly, the stigma attached to court proceedings is more ominous than that of an arbitration tribunal. However, regardless of the method of dispute settlement utilized, there remains the matter of enforcement of the settlement.

Enforcement is the effectualization of the settlement rendered, whether arbitral award or judgment. The codes of procedure of most nations provide methods through which judgments of the nation's courts can be enforced within the forum country against those persons subject to the jurisdiction of the court.[8] Similarly, each state within the United States has rules outlining the procedure to be followed for enforcement of judgments of the state courts.[9] The enforcement of a judgment rendered in State *A* of the United States is summarily enforced in State *B* of the United States under the full faith and credit doctrine,[10] which requires that the courts of State *B* give full effect to the judgment of State *A*'s courts just as if the judgment had been rendered by a court in State *B*. Obviously, if international law contained a full faith and credit doctrine, enforcement of a judgment rendered in Nation *A* would not present a problem in Nation *B*. However, because the

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[6] Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA. J. INT'L & COMP. L. 343, 346 (1974).

[7] One author suggests that lawyers are reluctant to discuss such matters because it may disturb signing of the business contract. Achebe, *supra* note 2, at 171.

[8] The various procedures outlined for the enforcement of foreign country judgments and arbitral awards within national codes of procedure are discussed in greater detail later in this Note.

[9] The procedure used within the United States is an action upon the judgment, discussed in detail later in this Note.

[10] Article IV, section 1 of the United States Constitution mandates that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." UNITED STATES CONST. art. IV § 1.

full faith and credit doctrine is not a part of international law, a settlement rendered in Nation *A* is not mandatory in Nation *B*.

## III. AWARDS VS. JUDGMENTS

Although enforcement of an arbitral award or foreign country judgment is not mandatory, the majority of awards and judgments based on contractual obligations between parties of different countries are complied with voluntarily.[11] Arbitral awards rendered by neutral tribunals, submitted for enforcement to the domestic court of a country in which the losing party has property, are more likely to be enforced by the domestic court than is a judgment rendered by a foreign national court based on the same dispute.[12] The reasons are subtle yet important. First, an arbitral award is the culmination of a bargained-for procedure agreed upon by the contracting parties, whereas a foreign judgment represents the act of the courts of a foreign sovereign.[13] No sovereign state relishes the unchallengeable extraterritorial application of a foreign judgment as to one of its citizen's or as to the state's economic activities. To many of the newly-independent developing countries, such an action is reminiscent of colonial imperialism. Second, the doctrine of *pacta sunt servanda*[14] is of considerable importance to the enforcement of arbitral awards. Not only does the doctrine dictate that the contract and its constituent clauses, including arbitration clauses, be honored, but also that the arbitral award be honored.[15] Third, voluntary compliance with an arbitral award allows the parties to continue their business relationship without a substantial diminution in the original spirit of goodwill.[16]

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[11] *See* Sanders, *International Commercial Arbitration*, 20 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 37, 40 (1973). It is estimated that 90% of the arbitral awards rendered by the International Chamber of Commerce (I.C.C.) Court of Arbitration are complied with voluntarily. Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 GA. J. INT'L & COMP. L. 471, 482 (1975).

[12] Vuylsteke, supra note 6, at 357.

[13] *Id.*

[14] *Id.* at 358. The doctrine of *pacta sunt servanda* (agreements are made to be kept) is a recognized principle of international law. *Id. See also* W. Friedmann, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 300 (1964).

[15] *See* Vuylsteke, supra note 6, at 358.

[16] Tiewul & Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, 24 INT'L & COMP. L. Q. 393, 410 (1975).

## IV. NON-ENFORCEMENT OF FOREIGN JUDGMENTS

Underlying the refusal of State *B*'s courts to enforce the judgments rendered in State *A* is a general feeling of distrust among many countries.[17] Few countries completely trust the political and economic motives of other countries with which they deal. This distrust is intensified between developing and developed countries, due in many instances to exploitive colonial relationships and current economic disparities.

Investors from developed countries often distrust the court systems of developing countries, believing that such courts will be biased against them either:

> (1) Because such systems are vastly different in their origins and application and their substantive and procedural rules from that of the investor's native countries; or (2) because, in fact, the treatment foreigners receive, even if comparable to that afforded nationals, may be below that of their own countries; or (3) because some local court systems simply lack the sophistication needed to resolve complex commercial disputes.[18]

Distrust extends not only to the court system, but also to arbitration proceedings located in a foreign country, especially where foreign law is stipulated in the arbitration agreement as applicable.[19]

Conversely, developing countries distrust litigation in developed countries and believe that any method of dispute settlement would be biased toward the investor.[20] Developing countries, aware of past exploitation, believe that foreign litigation represents an attempt to continue foreign domination by developed countries.[21] Perhaps nowhere in the developing world is distrust more openly manifested than in Latin America as illustrated in the Calvo Doctrine,[22] which dictates that contracting parties agree

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[17] *See* Wesley, *supra* note 3, at 814.

[18] *Id. See also* Achebe, *supra* note 2, at 170.

[19] *See* Achebe, *supra* note 2, at 170.

[20] *Id.* at 167.

[21] Wesley, *supra* note 3, at 814.

[22] Wesley states:

> Conceived as a device to resist economic imperialism from Europe, the Calvo Clause . . . prevents an alien from skirting the jurisdiction of a local tribunal by procuring diplomatic espousal of his claim. As a standard provision in most concession agreements, the clause's principal function is to shut off diplomatic intervention by the concessionaire's parent country in the event of a commercial dispute. . . . A number of common provisions thread the clause: (1) submission to local jurisdiction; (2) application of local law; (3) assimilation of foreigners for pur-

to submit to local jurisdiction only and to waive all other judicial recourse, thus eliminating outside intervention by other countries.[23] In light of past colonial exploitation and imperialistic attitudes of the developed countries, the fears of the developing countries seem well founded. Not surprisingly, the national public policy of many states may dictate that enforcement of a foreign judgment is contrary to public policy. However, courts are not eager to explain a refusal to enforce a judgment or arbitral award strictly in terms of public policy. Instead, courts have erected fictions, cloaked in judicial rhetoric yet anchored substantively in public policy concerns and political doctrines, which are used as obstacles to prevent enforcement of a foreign judgment or arbitral award.

One obstacle to enforcement is reciprocity.[24] Traditionally, as a matter of course, the courts of State *A* would not enforce the judgments of the courts of State *B* unless the courts of State *B* would reciprocate and enforce the judgments of State *A*. Reciprocity is a non-controversial means for the court to rule that enforcement of the judgment would be contrary to the public policy of the forum state.

Another obstacle to enforcement is the claim of sovereign immunity.[25] The essence of the claim in its political sense is that acts

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poses of local contractual agreements; (4) waiver of diplomatic protection by the foreigner's home state; and (5) surrender of rights arising under international law. Wesley, *supra* note 3, at 818.

In essence, the Calvo Doctrine requires an absolute waiver of foreign redress for aliens and foreign corporations. *Id.* at 821. In addition, it is strictly applied by the Latin American countries. For an excellent discussion of the Calvo Doctrine in Latin America, see Wesley, *supra* note 3, 818-39. *See generally* Friedman, *The Changing Structure of International Arbitration Conventions: The Quandry of Non-Ratification*, 17 HARV. INT'L L.J. 131 (1976).

[23] Wesley, *supra* note 3, at 821.

[24] Reciprocity was expressly stated by the United States Supreme Court as a requirement for recognition and enforcement of a foreign country judgment in the United States. In Hilton v. Guyot, 159 U.S. 113 (1895), the Court refused to enforce a French judgment solely on the grounds that French courts did not recognize judgments rendered in the United States. Although never expressly overruled, the reciprocity requirement fortunately has been abandoned by a majority of the states in the United States. Reciprocity still plagues international law, however, being recognized in treaties regarding enforcement and in the national legislation of both developing and developed countries. *See generally* Homburger, *Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts*, 18 AM. J. COMP. L. 367, 381-85 (1970); Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 L. & POL'Y INT'L BUS. 37, 46-48 (1974).

[25] *See generally* Achebe, *supra* note 2, at 165-66; Mehren & Patterson, *supra* note 24, at 75-76; Tiewul & Tsegah, *supra* note 16, 408-09. The stance of the courts in the United States in regard to this defense is that they will generally abide by a recommendation from the

of a sovereign cannot be held subject to the jurisdiction of another country's courts.[26] If a government or government agency is a party to a contract, the government frequently raises the defense of sovereign immunity before its domestic courts or foreign courts when enforcement against the government is sought.[27] If the claim of sovereign immunity is upheld during enforcement proceedings, the court holds enforcement contrary to the forum state's public policy and economic interests.

Similar and closely tied to the claim of sovereign immunity is the act of state doctrine.[28] In its political context, the doctrine serves as a public policy obstacle and "precludes any review whatsoever of the acts of the government of one sovereign state done within its own territory by the courts of another sovereign state."[29] Yet, as related to the enforcement of foreign judgments, the doctrine must be viewed in a different light, not as an obstacle but as a valid independent reason for non-enforcement. If for instance, State *A* nationalizes a particular industry whose assets are owned by nationals of State *B*, then the act of state doctrine, as seen in its political context, would preclude State *B*'s courts (F2) from reviewing the nationalization *in toto*. The claim of sovereign immunity indicates that State *A* is not liable to State *B* for acts committed in the name of the sovereign. However, the analysis of the court of State *A* (F1), when faced with a plea of enforcement of the F2 judgment, focuses upon the misapplication of F1's law by F2, thereby affording F1 ground upon which to refuse enforcement of F2's judgment. In this context of the act of state doctrine, F1 views the nationalization by the forum state as a legislative or executive act, which simply replaces pre-existing

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Department of State as to whether the sovereign should be immune. According to Mehren and Patterson, "the State Department's view has been that courts should apply the 'restrictive theory' of sovereign immunity, under which foreign states are entitled to immunity from liability arising out of their governmental acts, but are not entitled to immunity from claims that concern their general commercial conduct." Mehren & Patterson, *supra* note 2, at 75. The restrictive theory of sovereign immunity originated in the Tate Letter of 1952. 26 STATE DEP'T BULL. 984 (1952).

[26] The claim has its basis in the notion that once a nation becomes a member of the international community, or in other words is recognized as sovereign, it is equal to all other sovereigns. Therefore, an equal may not have jurisdiction to sit in judgment of another equal. Tiewul & Tsegah, *supra* note 16, at 408. To allow jurisdiction would expose the conduct of foreign relations conducted by the political arm of government to potential embarrassment by judicial review. Achebe, *supra* note 24, at 167.

[27] Mehren & Patterson, *supra* note 24, at 75.

[28] *See* Achebe, *supra* note 2, at 167.

[29] *Id.*

conflicting law (*i.e.* the pre-nationalization law, which recognized the title to the assets as being vested in the nationals of State B). Refusal by F2 to recognize and apply the nationalizing law as controlling, and F2's insistence that title remains vested in the nationals of State *B*, is seen by F1 as a straightforward misapplication of F1's law and as a statement by F2 that application of the nationalizing law is contrary to the public policy of F2. F1, therefore, would refuse enforcement of F2's judgment, not under the pretext that the acts of its sovereign are not subject to review (the political context), but rather on grounds that F2 misapplied the laws of F1. Therein lies both the conflicts of law question crucial to enforcement and the true reason supporting refusal to enforce a foreign judgment.

The argument is essentially public policy versus public policy—F2's contention that its public policy mandates misapplication of F1's law versus F1's contention that its public policy mandates non-enforcement of judgments rendered on the basis of misapplication of F1 law in other forums. Although neither argument can be said to be clearly wrong, countries should not construct judicial facades for underlying political doctrines and public policy considerations. Removal of the surrounding rhetoric would facilitate the identification and solution of the current problems to enforcement.

## V. REASONS FOR ENFORCEMENT

Most arbitral awards and judgments are complied with voluntarily.[30] Voluntary compliance occurs for a number of reasons, primarily because nations generally wish to be friendly with each other. Voluntary compliance furthers peaceful coexistence and is therefore desirable when not in conflict with other public policy concerns. The desire to be friendly has gained expression through the term comity.

> Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[31]

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[30] *See* I.C.C. estimates at note 11 *supra*.

[31] Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). Many cases that enforce foreign country

Additional reasons for voluntary compliance are that nations that do not comply with an award or judgment can encounter difficulties in the world community, including a loss of credit[32] or the imposition of economic sanctions.[33] Another factor from the standpoint of a developing country whose courts have refused to enforce the terms of the settlement is the possibility that the developed countries will either suspend aid[34] or render it difficult for the developing country to receive aid from various international organizations and agencies.[35] Accordingly, developing countries often find voluntary compliance with awards and judgments to be in their national interest.

## VI. ENFORCEMENT MECHANISMS EMPLOYED

In addition to relying upon comity as a basis for complying with the enforcement of judgments, some countries have attempted to formulate conventional law through which enforcement is not only required, but the procedure is standardized. Treaty law not only has the advantages of predictability and ease of application, but also serves to provide an identifiable mechanism for enforcement upon which the parties to the dispute can rely. The most popular and significant international attempts at codification of enforcement procedures have been multilateral treaties.

### A. *Geneva Protocol and Convention*

The Geneva Protocol on Arbitration Clauses (Geneva Protocol)[36]

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judgments make reference to the famous language of the United States Supreme Court concerning comity.

[32] *See* Walde, *Negotiating for Dispute Settlement in Transnational Mineral Contracts: Current Practice, Trends, and an Evaluation from the Host Country's Perspective*, 7 DEN. J. INT'L & POL'Y 33, 56 (1977-78).

[33] For a scenario of the economic sanctions imposed by the United States against Peru following the Peruvian government's nationalization of United States-owned industries operating in Peru, see Arnold & Hamilton, *The Greene Settlement: A Study of the Resolution of Investment Disputes in Peru*, 13 TEX. INT'L L. J. 263, 280-81 (1977-78).

[34] An example of such a tactic used by the United States is the Hickenlooper Amendment. 22 U.S.C. § 2370(e)(1) (1970). The provision, named after its sponsor the late Senator Bourke B. Hickenlooper, provides that the President shall suspend assistance to the government of any country nationalizing the property of or repudiating or nullifying contracts with any United States citizen, unless such country takes appropriate steps within six months to assure compensation for the full value of the property involved. For a suggestion that the Hickenlooper amendment is defused if not dead, see Lillich, *Requiem for Hickenlooper*, 97 AM. J. INT'L L. 97 (1975).

[35] Because developed countries often fund and control the organizations, their potential leverage against developing countries is clear.

[36] Geneva Protocol on Arbitration Clauses, *done* Sept. 24, 1923, 27 L.N.T.S. 157 (effective

and the Geneva Convention on the Execution of Foreign Arbitral Awards[37] (Geneva Convention) represent the first major multilateral attempts[38] to standardize the enforcement of arbitral awards. Done under the auspices of the League of Nations, signatories agreed to enforce arbitral awards in accordance with respective national law regarding arbitration[39] or in accordance with the national law agreed upon by the parties as applicable.[40] Neither the Geneva Protocol nor the Geneva Convention gained much support in the international community,[41] especially in the developing world,[42] and are of no importance in the enforcement of arbitral awards today.[43]

### B. *The New York Convention*

The United Nations Convention on the Recognition and En-

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July 28, 1924) [hereinafter cited as Geneva Protocol]. The countries party to the Geneva Protocol are: Albania, Austria, Belgium, Brazil, Czechoslovakia, Denmark, Estonia, Finland, France, Germany, Greece, India, Iraq, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Mauritius, Morocco, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, United Kingdom, and Yugoslavia. *See generally* Mirabito, *supra* note 11, at 477-79; Evans & Ellis, *International Commercial Arbitration: A Comparison of Legal Regimes*, 8 TEX. INT'L L. J. 17, 51-53 (1973).

[37] Geneva Convention on the Execution of Foreign Arbitral Awards, *done* Sept. 26, 1927, 92 L.N.T.S. 301 (effective July 25, 1929) [hereinafter cited as Geneva Convention]. The countries party to the Geneva Convention are: Austria, Belgium, Czechoslovakia, Denmark, Estonia, Finland, France, Germany, Greece, India, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Mauritius, the Netherlands, New Zealand, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, United Kingdom, and Yugoslavia. *See generally* Mirabito, *supra* note 11, at 477-79; Evans & Ellis, *supra* note 36, at 51-53; and Sanders, *supra* note 11, at 41-44.

[38] *See* Mirabito, *supra* note 11, at 478. *See, e.g.*, Evans & Ellis, *Comparison of Legal Regimes*, *supra* note 36, at 51.

[39] Geneva Protocol, *supra* note 36, at art. 3.

[40] Geneva Convention, *supra* note 37, at art. 1. *See* Mirabito, *supra* note 11, at 478.

[41] The United States was a signatory to neither the Geneva Protocol nor the Geneva Convention. One writer suggests that the reason for non-participation by the United States was that domestic courts and existing law were not ready to enforce arbitral awards rendered in foreign countries. Mirabito, *supra* note 11, at 479.

[42] At the time of the Geneva Protocol and Geneva Convention, most of the developing countries were part of various colonial empires. Article 8 of the Geneva Protocol and article 10 of the Geneva Convention expressly provided that territories were not affected by the provisions of the documents unless subsequently requested by the contracting state under which the territory was held.

[43] The Geneva Protocol and the Geneva Convention are not commonly used today. However, the documents have served to provide the basis for the English Arbitration Act of 1950. Evans & Ellis, *supra* note 36, at 33; Lew, *The Arbitration Act of 1975*, 24 INT'L & COMP. L. Q. 870 (1975). They were also a starting point for later multilateral treaties regarding enforcement of foreign arbitral awards.

forcement of Foreign Arbitral Awards,[44] more commonly known as the New York Convention,[45] expressly replaced the Geneva Protocol and Geneva Convention for those countries which were party to both.[46] The New York Convention has met with widespread approval from developing and developed countries.[47] The United States became a party to the Convention in 1970.[48]

Article III of the Convention provides that each state should "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[49] Furthermore, no differentiation is to be made between awards rendered by the forum state and those rendered by foreign tribunals.[50] Under Article IV of the Convention, the enforcement procedure to be followed by the court and the party seeking enforcement is not difficult: (a) file an application for enforcement; (b) present the original award or copy; (c) present the original arbitral agreement or copy; and (d) provide a

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[44] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (effective Dec. 29, 1970) [hereinafter cited as New York Convention]. *See generally* Achebe, *supra* note 2; Domke, *The United States Implementation of the United Nations Arbitral Convention*, 19 AM. J. COMP. L. 575 (1971); Evans & Ellis, *supra* note 36; Lew, *The Arbitration Act of 1975*, 24 INT'L & COMP. L. Q. 870 (1975); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. COM. 735 (1970-71); Mirabito, *supra* note 11; Patkos, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 in light of the Greek Code of Civil Procedure of 1971*, [1972] REVUE HELLENIQUE DE DROIT INTERNATIONAL 295 (1972); Sanders, *supra* note 11.

[45] Patkos, *supra* note 44, at 297.

[46] New York Convention, *supra* note 44, art. VII (2). The countries affected by this provision are: Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Germany, Greece, India, Israel, Italy, Japan, the Netherlands, Norway, Poland, Romania, Spain, Sweden, Switzerland, Thailand, and the United Kingdom.

[47] The countries party to the New York Convention are: Australia, Austria, Belgium, Benin, Botswana, Bulgaria, Byelorussian Soviet Socialist Rep., Central African Rep., Chile, Colombia, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Dem. Rep., Germany, Fed. Rep., Ghana, Greece, The Holy See, Hungary, India, Israel, Italy, Japan, Jordan, Democratic Kampuchea, Korea, Kuwait, Madagascar, Mexico, Morocco, the Netherlands, Niger, Nigeria, Norway, the Philippines, Poland, Romania, San Marino, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syria, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Ukranian Soviet Socialist Rep., Union of Soviet Socialist Reps., United Kingdom, and the United States of America.

[48] Implementing legislation within the United States is 9 U.S.C. §§ 201-208 (1970). For a discussion of the background to United States accession, see Mirabito, *supra* note 11, at 485-87. See also *Inter-American Convention on International Commercial Arbitration*, 9 LAW. AMER. 43 (1977). For a complete discussion of 9 U.S.C. §§ 201-208, see McMahon, *supra* note 44, at 735.

[49] New York Convention, *supra* note 44, at art. III.

[50] *Id.*

translation of the above documents if in a language foreign to the forum court.[51] Article V(1) enumerates the procedural grounds upon which a court or other competent authority may refuse to enforce an arbitral award.[52] Without more, the Convention would represent an abandonment of the public policy impediments to enforcement discussed previously.[53] Unfortunately, however, such is not the case.

Article V(2) provides two additional grounds for denial of enforcement, the use of which rest entirely within the discretion of the court in which enforcement is sought.[54] First, enforcement may be denied if, in the opinion of the court, the subject matter is not capable of settlement by arbitration,[55] and second, if enforcement would be contrary to the public policy of the forum.[56] Thus,

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[51] *Id.* at art. IV. Article IV(c) indicates that awards may only be enforced if the parties originally agreed to submit the dispute to arbitration.

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

> (a) the parties . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, finding any indication thereon, under the law of the country where the award was made; or
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> (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
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> (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
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> (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
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> (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in which, or under the law of which, that award was made.

New York Convention, *supra* note 44, at art. V(1).

For a discussion of article V(1), see Mirabito, *supra* note 11, at 490-91; and Sanders, *supra* note 11, at 42-43. For a discussion of article V(1) in English law, see Lew, *The Arbitration Act of 1975*, 24 INT'L & COMP. L. Q. 870 (1975). For a discussion of African law in Sierra Leone, see Tiewul & Tsegah, *supra* note 16, at 411-16. For the law in Nigeria, see Achebe, *supra* note 2; in Greece, see Pathos, *supra* note 44; in France, Germany, and Japan, see Evans & Ellis, *supra* note 36.

[53] *See* notes 17-29 and accompanying text *supra*.

[54] New York Convention, *supra* note 44, at art. V(2).

[55] *Id.* (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country (where enforcement is sought).

[56] *Id.* (b) the recognition or enforcement of the award would be contrary to the public policy of that country (where enforcement is sought).

not only does the Convention codify enforcement procedures, it also codifies the historical impediment to enforcement—public policy. Additionally, Article I(3) allows the signatories of the Convention to attach two reservations to their acceptance of the Convention: (1) a requirement of reciprocity and (2) that the convention will apply only to commercial matters as determined by the signatory (in essence, a restatement of the act of state doctrine).[57] Therefore, the judicial facades as well as public policy concerns are adopted and codified within the Convention.

Another weakness of the Convention is the lack of any provision regarding penalties against a state party to the Convention that refuses to follow the enforcement procedure stipulated in the Convention.[58] A state that chooses not to fulfill its treaty obligation is not subject to a specified penalty under the Convention. A final inherent shortcoming of the Convention is that it does not apply to judgments but rather only to arbitral awards.[59]

The Convention also has numerous positive elements. For example, it represents a genuine internationalization[60] of enforcement procedures for arbitral awards and certainly renders the enforcement of such awards more certain.[61] Countries that formerly would not consider enforcing a foreign award summarily, including the United States, now have a treaty obligation to do so. What formerly was an uncertain procedure at best, can now be accomplished summarily under the Convention.[62] Parties seeking enforcement have the advantage of knowing, from the outset, what to expect procedurally[63] and can point to a treaty obligation by the forum state as reason for summary enforcement.[64] These features of the Convention operate not only as an advantage for investors from developed countries, but also represent an advantage for contracting parties from developing countries. Certainly, one of the greatest attributes of the Convention as far as developing countries are concerned may be the recognition of party

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[57] *Id.* art. I(3). The second reservation, as to commercial matters, is similar to the Connally Reservation, which the United States attached to its agreement to submit to the jurisdiction of the International Court of Justice. The potential for abuse of this reservation is alarming because it allows each country to decide which awards it will enforce without regard to what other countries consider to be arbitrable commercial matters.

[58] *See* New York Convention, *supra* note 44; Mirabito, *supra* note 11, at 499.

[59] New York Convention, *supra* note 44, at art. I(1); Mirabito, *supra* note 11, at 500.

[60] *See* Lew, *The Arbitration Act of 1975*, 24 INT'L & COMP. L. Q. 870 (1975).

[61] *Id.*

[62] *See* New York Convention, *supra* note 44, at art. IV; Mirabito, *supra* note 11, at 499.

[63] Mirabito, *supra* note 11, at 499.

[64] *Id.*

autonomy.[65] Under the Convention, the law stipulated by the parties will be held to govern the dispute.[66] This is a welcome development[67] in international law and allows developing countries to negotiate contracts in which it is stipulated that their law will apply, a stipulation which will then be respected in all states party to the Convention.

Case law in the United States concerning the New York Convention is relatively sparse. This is due in part to the recent accession of the United States to the Convention[68] and in part to the fact that, as noted above, most arbitral awards are complied with voluntarily.[69] In addition, the case law is entirely federal because of the original jurisdiction conferred upon the federal courts.[70] Generally, courts in the United States have confirmed arbitral awards under the Convention,[71] even when to do so placed United States businessmen and interests at a disadvantage.[72] *In the Matter of Fotochrome, Inc.*,[73] the court, on the basis of the Convention, confirmed an arbitral award rendered by a Japanese tribunal and stated: "International trade is so important to our economy and to the peace and welfare of the world that our law is justified in assuaging other nation's suspicions by the firm enforcement of treaties we find applicable."[74]

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[65] New York Convention, *supra* note 44, at art. V(1)(a)(d). For a discussion of the recognition of party autonomy within the New York Convention, see Lew, *The Arbitration Act of 1975*, 24 INT'L & COMP. L. Q. 870 (1975), which discusses the 1975 English Arbitration Act and the implementary legislation within England of the New York Convention.

[66] New York Convention, *supra* note 44, at art. V(1)(a).

[67] Lew, *the Arbitration Act of 1975*, 24 INT'L & COMP. L. Q. 870 (1975).

[68] The United States became party to the New York Convention in 1970. *See* note 11 *supra*.

[69] *See* note 11 *supra*.

[70] U.S.C. § 203 (1970) states: " An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." *Id.*

[71] Lamenories-Trefileries-Cableries de Lens v. Southwire Co., 484 F. Supp. 1063 (N.D. Ga. 1980); Biotromik v. Medford Med. Inst., 415 F. Supp. 133 (D.N.J. 1976); Amoco Overseas Oil Co. v. Astir Navigation Co., 490 F. Supp. 32 (S.D.N.Y. 1979); Jugomental v. Samincorp, Inc., 78 F.R.D. 504 (S.D.N.Y. 1978); Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc., 418 F. Supp. 982 (E.D. Mich. 1976); Ipitrade Int'l v. Fed. Rep. of Nigeria, 465 F. Supp. 824 (D.C.C. 1978); Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334 (5th Cir. 1976); *In re* Fotochrome, Inc. v. Copal Co., 377 F. Supp. 26 (E.D. N.Y. 1974), *aff'd* 517 F.2d 512 (5122nd Cir. 1975); Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969 (2nd Cir. 1974).

[72] *In re* Fotochrome, Inc. v. Copal Co., 377 F. Supp. 26 (E.D.N.Y. 1974), *aff'd* 517 F.2d 512 (2nd Cir. 1975).

[73] *Id.*

[74] *Id.*

The trend of United States courts, when faced with defenses to enforcement, has been to construe narrowly such defenses, thereby usually dismissing the claimed defense.[75] In *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier*,[76] the court confirmed an award in favor of an Egyptian corporation and against a United States Corporation (Overseas). In doing so, the court noted that the basic thrust of the Convention was to liberalize procedures for enforcing foreign arbitral awards,[77] a thrust which indicated a narrow construction of any defenses to enforcement.[78] The first defense addressed by the court was that enforcement would be contra to the public policy of the forum.[79] The court held that enforcement would be denied only where it would violate the forum state's "most basic notions of morality and justice."[80] The court further distinguished national policy from public policy[81] and noted:

> This provision [Art. V(2)(b)] was not meant to enshrine the vagaries of international politics under the rubric of public policy. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.[82]

A second defense claimed was that the subject matter was not capable of settlement by arbitration.[83] Again, the court adopted a

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[75] Andros Compania Maritima v. Marc Rich & Co., 575 F.2d 691 (2d Cir. 1978); Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334 (5th Cir. 1976); *In re* Fotochrome Inc. 377 F. Supp. 26, (E.D.N.Y. 1974), *aff'd* 517 F.2d 512 (2nd Cir. 1975); Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974); Stauborg v. National Metal Converters, Inc., 500 F.2d 424 (2d Cir. 1974); Lamenories-Trefileries-Cablerieo de Lens v. Southwire Co., 484 F. Supp. 1063 (N.D. Ga. 1980); MCT Shipping Corp. v. Sabet, 497 F. Supp. 1078 (S.D.N.Y. 1980); Amoco Overseas Oil Co. v. Astir Navigation Company, Ltd., 490 F. Supp. 32 (S.D.N.Y. 1979); Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc., 418 F. Supp. 982 (E.D. Mich. 1976); Brotromik v. Medford Medical Instrument Co., 415 F. Supp. 133 (D.N.J. 1976). *But see* Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980); Splosna Plovba of Piran v. Agrelak Steamship Corp., 381 F. Supp. 1368 (S.D.N.Y. 1974).

[76] Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).

[77] *Id.* at 973.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 944.

[81] *Id.*

[82] *Id.*

[83] *Id.*

narrow construction,[84] dismissing the defense in stating: "The mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable."[85] The court quickly dismissed Oversea's contention that it had not had an adequate opportunity to present a defense or that it otherwise was denied due process[86] by finding that difficulties in presenting a witness in international arbitration is an inherent risk of such arbitration,[87] a process voluntarily agreed upon by Overseas. Another defense raised by Overseas was that the arbitration was in excess of jurisdiction.[88] Finding that a narrow construction "would comport with the enforcement-facilitating thrust of the Convention,"[89] the court held that "[a]lthough the Convention recognizes that an award may not be enforced where predicted on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement."[90] Finally, the court rejected Overseas' defense that the arbitrators had acted in manifest disregard of the law,[91] because, even assuming such a defense existed under the Convention,[92] it would require extensive judicial review thereby frustrating the purpose of arbitration.[93]

Similarly, in *Laminoirs-Trefileries-Cableries de Lens v. Southwire*,[94] the court confirmed an arbitral award in favor of a French manufacturer against a Georgia corporation, the Southwire Company. Citing *Parsons*, the court adopted a narrow construction of public policy[95] and found no violation of it even though the award rendered had used interest rates usually considered usurious in Georgia.[96] The court also dismissed

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[84] *Id.*

[85] *Id.* at 975.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 976.

[89] *Id.*

[90] *Id.* at 977.

[91] *Id.*

[92] The court found that even though article V of the New York Convention did not recognize the defense, 9 U.S.C. § 10 of the Federal Arbitration Act has been read to create an implied defense to enforcement where the award is rendered in manifest disregard of the law, even where enforcement is sought under the New York Convention. *Id. In accord* MCT Shipping Corp. v. Sabet, 497 F. Supp. 1078 (S.D.N.Y. 1980); Stavborg v. National Metal Converters, Inc., 500 F.2d 424 (2nd Cir. 1974).

[93] *Id.*

[94] 484 F. Supp. 1063 (N.D. Ga. 1980).

[95] *Id.* at 1068.

[96] *Id.* at 1069. However, the court refused to enforce that part of the interest awarded which was purely penal rather than compensatory.

Southwire's claim of misconduct on the part of the arbitrators in not allowing certain proffered evidence [97] by stating that "barring a clear showing of abuse of discretion, the court will not vacate an award based on improper evidence or the lack of proper evidence."[98] In addition, the court adopted a narrow stance in rejecting Southwire's claim that the award was made in disregard of market price.[99]

In *Biotronik v. Medford*,[100] the court confirmed a Swiss award in favor of a West German company against a United States company despite claims of fraud.[101] Adopting a narrow construction of fraud, the court held that it would require a convincing showing of fraud before upsetting an award.[102] Awards in favor of developing countries have been confirmed as well.[103] In *Ethiopia v. Baruch-Foster*,[104] the court confirmed an arbitral award under the Convention in favor of the Ethiopian government, holding that the loser in arbitration cannot "freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery."[105] Other cases decided under the Convention have allowed set-offs of the awards,[106] and one court has even applied the Convention retroactively.[107]

An additional defense to enforcement of the arbitral award, raised in several cases, is the lack of explicit agreement within the arbitration clause of the contract that a judgment shall be entered

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[97] *Id.* at 1067.

[98] *Id.*

[99] *Id.* at 1068. Southwire protested use of the legal rate of interest in effect in France by the arbitrators rather than the appropriate Georgia legal rate of interest. The court held that in making an award the arbitrator may draw upon personal knowledge.

[100] 415 F. Supp. 133 (D.N.J. 1976).

[101] Medford Medical Instrument Co. raised the defense of fraud under 9 U.S.C. § 10(a), even though the defense is not recognized under article V of the New York Convention. The court refused to express an opinion as to whether the defense could be implied under the New York Convention. *Id.* at 140. The court found that Medford's real complaint was failure of the other party to present evidence favorable to Medford's case. *Id.* at 138.

[102] *Id.* at 135.

[103] An example discussed previously is the *Parsons* case, *supra* note 71, wherein the court enforced an award in favor of an Egyptian corporation. Other courts have enforced judgments based on an underlying arbitral award in favor of a developing country. *See* Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2nd Cir. 1973); New Central Jute Mills Co. v. City Trade & Industries, Ltd., 318 N.Y.S.2d 980 (1971).

[104] 535 F.2d 334 (5th Cir. 1976).

[105] *Id.* at 337.

[106] Jagomental v. Samincorp, Inc. 78 F.R.D. 504 (S.D.N.Y. 1978).

[107] *In re* Fotochrome, Inc. v. Copal Co., 377 F. Supp. 26, 30 (E.D.N.Y. 1974), *aff'd* 517 F.2d 512 (2nd Cir. 1975).

upon the award rendered.[108] Although several courts have recognized the defense, they have placed a narrow construction upon it and have found either consent by implication or by conduct of the parties to satisfy the requirement.[109] Case law involving and interpreting the Convention has not been abundant, but it clearly indicates a willingness on the part of the courts to confirm and thereby to enforce the awards and to construe narrowly any and all defenses raised against enforcement.

### C. *ICSID*

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,[110] concluded under the sponsorship of the World Bank,[111] established the International Centre for Settlement of Investment Disputes (ICSID),[112]

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[108] Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc., 418 F. Supp. 982 (E.D. Mich. 1976); Stavborg v. National Metal Converters, Inc., 500 F.2d 424 (2nd Cir. 1974). The defense is based upon 9 U.S.C. § 9, which provides that enforcement of the arbitral award is appropriate only where the parties "in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration...." 418 F. Supp. 982 (1976); 500 F.2d 424 (1974).

[109] 500 F.2d at 425-27; 418 F. Supp. at 984-85.

[110] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *done* August 25, 1965, [1966] 1 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (entered into force for the United States October 14, 1966) [hereinafter cited as Convention on Investment Disputes]. The implementing legislation within the United States is the Convention on the Settlement of Investment Disputes Act of 1966, 80 Stat. 344 (1966), 22 U.S.C § 1650, 1650(a) (1970). For discussion of the ICSID and the Convention on Investment Disputes, see Amerasinghe, *Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 5 J. MAR. L. & COM. 211 (1973-74). See generally Mirabito, *supra* note 11, 483-84; Wesley, *supra* note 3, 841-44; Schmidt, *Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L. J. 90 (1976); Vuylsteke, *supra* note 6; Wälde, *supra* note 32, at 53-58. Those countries member to the Convention on Investment Disputes are: Afghanistan, Austria, Belgium, Benin, Botswana, Burundi, Cameroon, Central African Rep., Chad, China (Taiwan), Congo, Cyprus, Denmark, Egypt, Finland, France, Gabon, Gambia, Germany, (Fed. Rep.), Ghana, Greece, Guinea, Guyana, Iceland, Indonesia, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Korea, Lesotho, Liberia, Luxembourg, Madagascar (Malagasy Rep.), Malawi, Malaysia, Mauritania, Mauritius, Morocco, Nepal, the Netherlands, Niger, Nigeria, Norway, Pakistan, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Togo, Trinidad and Tobago, Tunisia, Uganda, United Kingdom, United States of America, Upper Volta, Yugoslavia, Zaire, and Zambia.

[111] The International Bank for Reconstruction and Development, better known as the World Bank, sponsored the Convention on Investment Disputes. *See* Domke & Glossner, *The Present State of the Law Regarding International Commercial Arbitration in* THE PRESENT STATE OF INTERNATIONAL LAW 307, 322 (M. Bos ed. 1973).

[112] The ICSID is the organ established by the Convention on Investment Disputes to ar-

through which the Convention would be applied. As its name suggests, the Convention applies only to investment disputes.[113] Article 54(1) provides:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of 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.[114]

Some writers[115] suggest that this Convention is the most effective instrument in existence for the enforcement of arbitral awards despite its limited application. Not only is the award to be treated as final and binding without being subject to review by national courts,[116] but also there cannot be a per se public policy exception to enforcement.[117] Although the obstacle of sovereign immunity is expressly provided for,[118] it is in fact largely restricted.[119]

Succinctly stated, an arbitral award cannot be denied enforcement because of the vagaries of a state's substantive law or public policy.[120] Adding further to the effectiveness of the Convention is the fact that only two reservations avail themselves to those states wishing to become party to the Convention: (1) the right to determine which classes of disputes it will submit to the jurisdic-

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range for arbitral tribunals and to assure application of the Convention on Investment Disputes to arrange for arbitral tribunals and to assure application of the Convention on Investment Disputes during arbitration proceedings. Convention on Investment Disputes, *supra* note 110, at art. 1(1)(2). See Vuylsteke, *supra* note 6.

[113] Convention on Investment Disputes, *supra* note 110, at arts. 1(2), 25. See Mirabito, *supra* note 11, 483.

[114] Convention on Investment Disputes, *supra* note 110, at art. 54(1). This provision, which mandates full faith and credit, is of particular importance to the United States because of its federal structure.

[115] *See* Schmidt, *supra* note 110, at 104; Vuylsteke, *supra* note 6, at 358, 360; W" alde, *supra* note 32, at 71.

[116] Convention on Investment Disputes, *supra* note 110, at art. 54(1). See Schmidt, *supra* note 110, at 105; Vuylsteke, *supra* note 6, at 359.

[117] A public policy exception is not found within the Convention on Investment Disputes. However, the Convention does recognize sovereign immunity in article 55, which is essentially a public policy concern as discussed herein. On the lack of a public policy exception, see Schmidt, *supra* note 110, at 105; Vuylsteke, *supra* note 6, at 358.

[118] Convention on Investment Disputes, *supra* note 110, at art. 55. *See, e.g.*, Vuylsteke, *supra* note 6, at 360.

[119] *See* Amerasinghe, *supra* note 110, at 248; Schmidt, *supra* note 110, at 106.

[120] *See* Schmidt, *supra* note 110, at 105.

tion of the ICSID;[121] and (2) a requirement that there be an exhaustion of local remedies.[122] Many developing countries in Africa[123] and Asia agree to use the ICSID in their investment dealings,[124] but the reception in Latin America[125] has been cold because of that region's unswerving distrust of other countries as exemplified by the Calvo doctrine.[126]

### D. *Inter-American Convention*

The Inter-American Convention on International Commercial Arbitration[127] is the most recent multilateral attempt to standardize enforcement procedures. The Convention is of great importance to the countries of the Western Hemisphere[128] because it marks a significant departure by the developing Latin American countries from their traditional Calvo Doctrine-oriented stance

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[121] Convention on Investment Disputes, *supra* note 110, at art. 25(4).

[122] *Id.* art. 26.

[123] For discussion and survey of the use of arbitration, including use of the ICSID, in Africa, see Tiewul & Tsegah, *supra* note 16.

[124] *See* Tiewul & Tsegah, *supra* note 16, at 407; Wälde, *supra* note 32, at 46.

[125] *See* Mirabito, *supra* note 11, at 484; Walde, *supra* note 32, at 46-47. For additional information on Latin America's position on the ICSID, see the Association of the Bar of the City of New York, Committee on Arbitration, *The Inter-American Convention on International Commercial Arbitration, reprinted in* 9 LAW. OF AMERS. 43, 51 (1977) [hereinafter cited as ABANY, *The Inter-American Convention*]; Schmidt, *supra* note 110, at 138-40; Wesley, *supra* note 3, at 842. Latin America's distaste for the Convention on Investment Disputes is unfortunate because both the ICSID and the Convention on Investment Disputes is directed to Latin America. Mirabito, *supra* note 11, at 484.

[126] For a brief discussion of the conflict between the Convention on Investment Disputes and the Calvo Doctrine, see Schmidt, *supra* note 110, at 138-40.

[127] The Inter-American Convention on International Commercial Arbitration, *done* Jan. 30, 1975, OAS/Ser. A/20 (SEPF); 14 INT'L LEGAL MAT'LS. 336 (1975) [hereinafter cited as Inter-American Convention]. The text can also be found at ABANY, *The Inter-American Convention*, *supra* note 125, at 68-72. At last count, thirteen of the twenty member states of the Organization of American States (OAS) had signed the Convention, but only two of these, Panama and Chile, had ratified the Convention. The other signatories are: Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Uruguay, and Venezuela. Those OAS countries that have not signed the Inter-American Convention are: Argentina, Dominican Republic, Jamaica, Mexico, Peru, Trinidad and Tobago, and the United States. For discussion of non-ratification of the Convention, see Abbott, *Latin America and International Arbitration Conventions: The Quandry of Non-Ratification*, 17 HARV. INT'L L. J. 131 (1976).

Apparently, the United States did not sign the Inter-American Convention because the government wanted review and comment upon the Convention by interested organizations. *See* ABANY, *The Inter-American Convention*, *supra* note 125, at 43, 58; Norberg, *Inter-American Commercial Arbitration Revisited*, 7 LAW. OF AMERS. 275 (1975). Despite only two ratifications, the Inter-American Convention is currently effective as per article 10 of the Convention. Ratification is not limited to OAS countries, according to article 9 of the Convention.

[128] See ABANY, *The Inter-American Convention*, *supra* note 125, at 43.

toward the enforcement of arbitral awards.[129] It is hoped that this departure is indicative of a future trend. The Convention provides that an arbitral award "shall have the force of a final judicial judgment,"[130] and that execution of the award is to be governed by the procedural laws of the country where it is to be executed.[131] In other respects, the Convention is similar to the New York Convention,[132] discussed above, especially as to grounds for non-enforcement[133] and reservations permitted.[134] Although substan-

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[129] *See* Norberg, *Inter-American Revisited*, *supra* note 127, at 276, 285. The traditional Calvo-oriented stance of Latin America toward arbitration is discussed herein.

[130] Inter-American Convention, *supra* note 127, at art. 4. *See* ABANY, *The Inter-American Convention*, *supra* note 125, at 44; and Norberg, *supra* note 127, at 283.

[131] Norberg, *supra* note 127, at 283.

[132] Article 5(1)(2) of the Inter-American Convention is virtually identical to article V(1)(2) of the New York Convention. The internal consistency of the two Conventions is noted in ABANY, *The Inter-American Convention*, *supra* note 125, at 44, 66.

[133] The Inter-American Convention, *supra* note 127, at art. 5(1), states:

> 1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:
>
> a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or
>
> b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or
>
> c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
>
> d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or
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> e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

[134] *Id.* Art. 5(2) states:

> The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:
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> a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or
>
> b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.

tively similar to the New York Convention,[135] the Inter-American Convention represents a positive step by developing Latin American countries.[136]

### E. *FCN Treaties*

Not all of the United States attempts to facilitate the enforcement in foreign countries of awards rendered in the United States have been multilateral. For example, the United States has entered into several bilateral treaties of friendship, commerce, and navigation (FCNs)[137] with both developing and developed countries.[138] Such treaties usually provide that awards rendered in the other country are to be treated the same as domestic awards,[139] amounting to little more than declarations of nondiscrimination.[140] An example of such a clause can be found in the FCN treaty between the United States and Togo,[141] which provides:

> No award duly rendered pursuant to any such contract and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party.[142]

Although modest in scope, FCNs promote the usage of arbitration between parties in the United States and parties in those states with which FCNs have been concluded.[143]

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[135] *See* ABANY, *The Inter-American Convention*, *supra* note 125, at 53, which suggests reasons for a separate OAS Convention, despite its great similarity to the New York Convention.

[136] *See* ABANY, *The Inter-American Convention*, *supra* note 125, at 66-67; and Norberg, *supra* note 127, at 285.

[137] Such bilateral treaties are commonly and collectively known as friendship, commerce, and navigation treaties (FCN), although the actual name of each individual treaty may vary. *See generally* Evans & Ellis, *supra* note 36, at 49-51; Mirabito, *supra* note 11, at 479-81.

[138] The countries with which the United States currently has FCN treaties that include enforcement provisions are: Belgium, Denmark, France, Germany, Greece, Iran, Ireland, Israel, Italy, Japan, Korea, Luxembourg, the Netherlands, Nicaragua, Pakistan, Surinam, Taiwan, Thailand, and Togo.

[139] *See* Evans & Ellis, *supra* note 36, at 50.

[140] *Id.*

[141] Treaty of Amity and Economic Relations, *signed* Feb. 8, 1966 at Lome (*entered into force* Feb. 5, 1967), 18 U.S.T. 1, T.I.A.S. 6193, 680 U.N.T.S. 159.

[142] *Id.* at art. III(3).

[143] ABANY, *The Inter-American Convention*, *supra* note 125, at 56. It is clear that courts

## VII. UNIFORM RECOGNITION ACT

It is important to note that all of the foregoing Conventions concern only the enforcement of arbitral awards. None of the conventions mention the enforcement of foreign country judgments. Indeed, there have not been any successful multilateral attempts to address or to codify procedures to enforce foreign country judgments.[144] One reason for the non-existence of any such conventions is that a judgment represents the act of a foreign sovereign through its courts whereas an arbitral award does not.[145] Suspicions as to motive and intention are much less likely to arise with regard to a judgment than to an award.

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of the United States will recognize and apply enforcement clauses within FCN treaties. *See In re* Fotochrome, Inc., 377 F. Supp. 26 (E.D.N.Y. 1974), *aff'd* 517 F.2d 512 (2nd Cir. 1975).

[144] However, there has been a successful regional uniformization of enforcement measures, concluded by the member states of the European Economic Community (EEC), known as the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The relevant provisions are articles 26-49. Article 29 provides that under no circumstances may a foreign judgment be reviewed as to its substance, while article 26 provides that no special procedure is required for enforcement other than a simple request for enforcement. Article 27 enumerates the grounds upon which a judgment shall not be recognized:

> (1) if such recognition is contrary to public policy in the State in which the recognition is sought;
>
> (2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defense;
>
> (3) if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;
>
> (4) if the court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills, or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State; or
>
> (5) if the judgment is irreconcilable with an earlier judgment given in a non-Contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfills the conditions necessary for its recognition in the State addressed.

Unfortunately, this Convention applies only to those countries that are members of the EEC, all of which are developed countries. It is hoped that the Convention will serve as a starting point and model for future attempts to accomplish the same result on a worldwide scale.

In addition to the EEC Convention on Enforcement, many bilateral conventions, too numerous to list herein, have been concluded between developed countries concerning the enforcement of foreign judgments. For a partial listing of those which the EEC Convention on Enforcement supersedes, consult article 55 of the EEC Convention on Enforcement.

[145] The distinctions between a foreign country judgment and an arbitral award are discussed *supra* at p. 637.

Although multilateral attempts to codify the enforcement of foreign country judgments are lacking in the international community, the United States has proposed a Uniform Recognition Act[146] to be used by the individual states of the United States in the enforcement of foreign money judgments. The purpose of the Uniform Foreign Money-Judgments Recognition Act was alluded to in the Commissioner's Prefatory Note:

> Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-

[146] Uniform Foreign Money-Judgments Recognition Act of 1962 [hereinafter cited as Uniform Recognition Act]. 13 U.L.A. 417 (1980). The Uniform Recognition Act has been adopted in eleven states, most notably New York and California, as indicated in the following chart.

| Jurisdiction | Laws | Effective | Statutory Citation |
|---|---|---|---|
| Alaska | 1972,c.68 | 8-16-1972 | AS 09.30.100 to 09.30.180. |
| California | 1967,c.503 | 11-8-1967 | West's Ann.Code Clv. Proc.§§1713 to 1713.8. |
| Colorado | 1977,c.1977 | 7-1-1977 | C.R.S.'73,13-62-101 to 13-62-109. |
| Illinois | 1963,p.1506 | 7-15-1963 | S.H.A.ch.77,§§121 to 129. |
| Maryland | 1963,c.201 | 6-1-1963 | Code, Courts and Judicial Proceedings, §§10-701 to 10-709. |
| Massachusetts | 1966,c.638 | 9-3-1966 | M.G.L.A.c. 235 § 23A. |
| Michigan | 1967,No.191 | 11-2-1967 | M.C.L.A. §§691.1151 to 691.1159. |
| New York | 1970,c.981 | 9-1-1970 | McKinney's CPLR 5301 to 5309. |
| Oklahoma | 1965,c.448 | 6-30-1965 | 12 Okl.St.Ann. §§ 710 to 718. |
| Oregon | 1977,c.61 | 10-4-1977 | ORS 24.200 to 24.255. |
| Washington | 1975,c.240 1st Ex.Sess. | 6-26-1975 | RCWA 6.40.010 to 6.40.915. |

The Georgia Code (§§ 110-1301-08) provisions are similar to the Uniform Recognition Act, but are not recognized as an adoption of the Act. 13 U.L.A 417, 418 (1980).

> judgments rendered in a foreign court will make it more likely that judgments rendered in the states will be recognized abroad.[147]

Basically, the Uniform Act provides that a "foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."[148] Section 4 of the Uniform Act provides a number of grounds for non-recognition of a foreign judgment,[149] while section 5 lists several non-exclusive bases of personal jurisdiction available to the foreign court.[150]

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[147] 13 U.L.A. 417 (1980).

[148] Uniform Recognition Act, *supra* note 146, Section 3.

[149] *Id.* Section 4 provides:

(a) A foreign judgment is not conclusive if
(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
(2) the foreign court did not have personal jurisdiction over the defendant; or
(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if
(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
(2) the judgment was obtained by fraud;
(3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;
(4) the judgment conflicts with another final and conclusive judgment;
(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

[150] *Id.* Section 5 states:

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if
(1) the defendant was served personally in the foreign state;
(2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
(3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
(4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
(5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action [claim for relief] arising out of business done by the defendant through that office in the foreign state; or
(6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action [claim for relief] arising out of such operation.

(b) The courts of this state may recognize other bases of jurisdi- .1.

In order for a foreign money judgment to be enforceable under the Uniform Recognition Act, the foreign judgment must be final, conclusive, and enforceable where rendered.[151] In addition, the party seeking enforcement must establish jurisdiction over the defendant in the state where enforcement is sought.[152] Case law indicates that the courts have been liberal in construing and finding jurisdiction,[153] both in the foreign country and the state where enforcement is sought. One court found quasi-in-rem jurisdiction through the attachment of the defendant's funds held in escrow by a law firm in the state where enforcement was sought.[154] After jurisdiction has been established, the judgment "is enforceable by an action on the judgment, a motion for summary judgment in lieu of a complaint, or in a pending action by counterclaim, cross-claim, or affirmative defense."[155]

Cases interpreting and applying the Uniform Recognition Act as adopted in the various states have been fairly numerous.[156] In *Bank of Montreal v. Kough*,[157] the court affirmed the judgment of a lower court recognizing a Canadian default judgment against a resident of California. Both courts used the Uniform Recognition Act as adopted in California as the basis for recognizing the judgment.[158] The defendant challenged recognition and enforcement on grounds of lack of due process and lack of reciprocity, both of which the court rejected. Finding that due process had been satisfied,[159] the court noted that reciprocity was not a requirement to the enforcement of a foreign judgment in California,[160] and that

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[151] *Id.* Section 2 states: "This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." *Id.*

[152] Biel v. Bochm, 406 N.Y.S.2d 231, 233 (1978).

[153] *Id. See also* Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2nd Cir. 1973); Bank of Montreal v. Kough, 430 F. Supp. 1243 (N.D. Col. 1977), *aff'd* 612 F.2d 467 (9th Cir. 1980); New Central Jute Mills Co. v. City Trade & Industries Ltd., 318 N.Y.S.2d 980 (1971). *Contra* Julen v. Larson, 101 Cal. Rptr. 796 (1972).

[154] *See* Biel v. Boehm, 406 N.Y.S.2d 231 (1978).

[155] *Id.* at 233, citing C.P.L.R. § 5303 of New York.

[156] The cases relevant to this discussion are: Bank of Montreal v. Kough, 430 F. Supp. 1243 (N.D. Cal. 1977), *aff'd* 612 F.2d 467 (9th Cir. 1980); *In re* Fotochrome, Inc. v. Copal Co., 377 F. Supp. 26 (E.D.N.Y. 1974), *aff'd* 517 F.2d 512 (2nd Cir. 1975); Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2nd Cir. 1973); Julen v. Larson, 101 Cal. Rptr. 796 (1972); New Central Jute Mills Co. v. City Trade & Industries Ltd., 318 N.Y.S.2d 980 (1971).

[157] Bank of Montreal v. Kough, 430 F. Supp. 1243 (N.D. Cal. 1977), *aff'd* 612 F.2d 467 (9th Cir. 1980).

[158] *Id.* at 1246.

[159] 612 F.2d at 470-71.

[160] *Id.* at 472.

the Uniform Recognition Act had intentionally failed to mention reciprocity, "apparently on the ground that the due process concepts embodied in the Act were an adequate safeguard for the rights of citizens sued on judgments obtained abroad."[161] The lower court had rejected the defendant's claim that the forum was inconvenient.[162] However, in *Julen v. Larson*,[163] the court refused to enforce a Swiss judgment because due process requirements had not been satisfied. The court found that the foreign court had not given the defendant proper notice.[164]

Some of the judgments enforced under the Uniform Recognition Act have involved the enforcement of a judgment upholding an arbitral award.[165] In *Island Territory of Curacao v. Solitron Devices, Inc.*,[166] the court, by virtue of New York's Uniform Recognition Act, enforced a Curacaoan judgment rendered pursuant to an arbitral award.[167] The court held that the New York Convention as applied to arbitral awards "in no way purports to prevent states from enforcing foreign money judgments, whether those judgments are rendered in the enforcement of an arbitration award or otherwise."[168] Similarly, the New York Supreme Court granted summary judgment in lieu of a complaint to enforce a judgment rendered in India pursuant to an arbitral award.[169] The court held that where the defendant had proper notice of the confirmation proceedings in India, the resulting judgment could not be challenged successfully in New York on defenses that should have been raised in India.[170]

However, in *Fotochrome v. Copal Company*,[171] the court found

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[161] *Id.* at 471-72.

[162] 430 F. Supp. 1243, 1250-51.

[163] Julen v. Larson, 101 Cal. Rptr, 796 (1972).

[164] The court based its decision upon the fact that the "[d]efendant did not understand the language in which the legal documents were written, and the accompanying correspondence did not identify the documents as materials of legal significance." *Id.* at 798.

[165] Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2nd Cir. 1973); *In re* Fotochrome, Inc. v. Copal Co., 377 F. Supp. 26 (E.D.N.Y. 1974), *aff'd* 517 F.2d 512 (2nd Cir. 1975) (the court enforced the award not the judgment); New Central Jute Mills Co. v. City Trade & Industries Ltd., 318 N.Y.S.2d 980 (1971).

[166] 489 F.2d 1313 (2nd Cir. 1973).

[167] Solitron did not participate in the arbitration proceedings or the proceedings before the Court of First Instance, where the writ of execution was granted in compliance with the law of the Netherlands Antilles. 489 F.2d at 1316-17.

[168] *Id.* at 1318.

[169] New Central Jute Mills Co. v. City Trade & Industries Ltd., 318 N.Y.S.2d 980 (1971).

[170] *Id.* at 985.

[171] *In re* Fotochrome Inc. v. Copal Co., 377 F.Supp. 26 (E.D.N.Y. 1974), *aff'd* 517 F.2d 512 (2nd Cir. 1975).

that even though under the Japanese Code of Procedure an arbitral award has the same effect as a judgment rendered in Japan,[172] the arbitral award would not be recognized or treated as a judgment in the United States until a judgment on the award was actually rendered in Japan.[173] Therefore, the court refused to enforce the award under New York's Uniform Recognition Act.

Recognition and enforcement of foreign country judgments has not been limited to those states that have adopted the Uniform Recognition Act, but rather has occurred in other states as well, where the courts relied on common law principles and comity.[174] In *Somportex Limited v. Philadelphia Chewing Gum Corp.*,[175] the court enforced an English default judgment on the basis of comity as espoused in *Hilton v. Guyot*.[176] The court noted that "[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect."[177] Likewise, the court in *Royal Bank of Canada v. Trentham Corp.*[178] enforced a Canadian default judgment on the basis of comity, holding that

> [g]enerally, Texas courts will recognize such a decree where the foreign court is a competent one having jurisdiction over the parties and the subject matter, where there was an opportunity for a full and fair hearing before an unbiased tribunal, and where there was no fraud in the procurement of the judgment or any other special reason for dishonoring it.[179]

Regardless of where enforcement is sought or upon what basis, the defense of public policy has arisen.[180] Just as courts faced with

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[172] "Article 800 of the Japanese Code of Civil Procedure provides: 'An [arbitral] award shall have the same effect as a judgment which is final and conclusive between the parties.'" *Id.* at 518.

[173] *Id.* at 519.

[174] Somportex Limited v. Phil. Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), *cert. denied* 405 U.S. 1017 (1972); Hunt v. BP Exploration Co., 492 F. Supp. 855 (N.D. Texas 1980) (judgment not recognized because still pending in foreign country where rendered); Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Texas 1980) Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009 (E.D. Ark. 1973).

[175] Somportex Limited v. Phil. Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), *cert. denied* 405 U.S. 1017 (1972).

[176] Hilton v. Guyot, 159 U.S. 113 (1895).

[177] Somportex Limited v. Phil. Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971), *cert. denied* 405 U.S. 1017 (1972).

[178] Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Texas 1980).

[179] *Id.* at 406.

[180] Somportex Limited v. Phil. Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), *cert. denied* 405 U.S. 1017 (1972); Hunt v. BP Exploration Co. 492 F. Supp. 885 (N.D. Texas 1980); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009 (E.D. Ark. 1973).

the public policy defense in arbitral award confirmation proceedings, the courts have construed narrowly the public policy defense in enforcement of judgment proceedings.[181]

> Enforcement of a judgment of a foreign court based on the law of the foreign jurisdiction does not offend the public policy of the forum simply because the body of foreign law upon which the judgment is based is different from the law of the forum or because the foreign law is more favorable to the judgment creditor than the law of the forum would have been had the original suit been brought at the forum. The very idea of a law of conflicts of laws presupposes differences in the laws of various jurisdictions and that different initial results may be obtained depending on whether one body of law is applied or another.[182]

A narrow construction of the defenses to enforcement of judgments under the Uniform Recognition Act is necessary if the Act is to operate effectively. It is hoped that the Act and the narrow construction of defenses to it will be noticed within the international community and that it will serve as a catalyst for increased cooperation.

## VIII. NATIONAL LEGISLATION

In light of the discussion thus far, it should be clear that, even under the various international conventions, the national law of each individual nation plays an important role in the enforcement of a judgment or arbitral award.[183] Therefore, a comparison of na-

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[181] The court rejected a public policy violation claim even though the foreign judgment allowed recovery of costs not recoverable in the state of Pennsylvania. Somportex Limited v. Phil. Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), *cert. denied* 405 U.S. 1017 (1972). The *Somportex* Court quoted another Pennsylvania case, Goodyear v. Brown, 155 Pa. 514, 518, 26 A. 665, 666 (1893), in declaring that enforcement is contra to public policy in Pennsylvania when enforcement

> tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel is against public policy.

453 F.2d at 443 (1971). In Hunt v. BP Exploration Co., 492 F. Supp. 885 (N.D. Texas 1980), the court adopted the above definition and dismissed the defendant's public policy violation claim.

[182] Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1016 (E.D. Ark. 1973). Adopted by the court in Hunt v. BP Exploration Co. 492 F. Supp. 885, 901 (N.D. Texas 1980).

[183] Geneva Protocol, *supra* note 36, art. 3; Geneva Convention *supra* note 37, art. 1; New York Convention, *supra* note 44, art. III; ICSID, *supra* note 110, art. 54(1); Inter-American Convention, *supra* note 127, art. 4.

tional legislation is relevant. Basically, there are two systems for the enforcement of judgments and arbitral awards incorporated into the national laws of most nations: common law and civil law.[184] "In most civil law countries, enforcement, if allowed at all, requires the court approval by a special validation proceeding, generally known as the exequatur. In common law countries, the traditional method of enforcement is an ordinary civil suit based on the foreign judgment."[185] Both systems are important within the developing world because of the former colonial relationships of many of the developing countries with Great Britain, a common law country, and with France, a civil law country.

The common law system, which requires an action on the judgment, is used throughout the British Commonwealth as well as in many of that country's former colonies, including the United States. In regard to case law concerning enforcement in the United States, it should be kept in mind that the common law "treats the foreign judgment as an obligation which, although conclusive, is not enforceable in another state, but must first be converted into a new domestic judgment by an action in debt to recover the amount owing under the foreign judgment."[186]

The civil law system, characterized by the exequatur process, is in essence a proceeding through which the foreign judgment or arbitral award is validated or given legal significance in the requested forum.[187] After the exequatur has been granted, the foreign judgment or arbitral award is treated as if it were a domestic judgment.[188]

All of the Latin American countries use the civil law exequatur.[189] In general, Latin American countries grant foreign

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[184] Homburger, *Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts*, 18 AM. J. COMP. L. 367, 376 (1970). A third method, judgment registration, is also discussed by the author.

> Judgment registration should not be confused with the 'execution' of the civil law or the common law action on a foreign judgment. Unlike these two enforcement methods, judgment registration in its pure form operates as an automatic validation device without any judicial supervision. The filing in the county clerk's or other registrar's office of an authenticated copy of the foreign judgment, together with other proof required by local law, converts the foreign judgment at once into a domestic judgment on which execution may issue without further ado.

*Id.* at 396. Judgment registration in its pure form is not presently applied to foreign country judgments and is therefore of limited significance to this discussion.

[185] *Id.* at 377.

[186] *Id.* at 378.

[187] *Id.* at 377.

[188] *Id.*

[189] *See* INTERNATIONAL COOPERATION IN CIVIL AND COMMERCIAL PROCEDURE-AMERICAN CON-

judgments the force given them through treaties.[190] If no treaty exists, foreign judgments are given the same force as a judgment of the particular country where enforcement is sought.[191] Each country has several requisites, including the exequatur, which must be satisfied before the judgment can be enforced.[192] Subject to several variations, the procedure outlined within the Code of Civil Procedure of Argentina serves as an effective example for the entire region. Armed with a foreign judgment, the party seeking enforcement in Argentina must file a request for execution of the judgment before a judge of first instance having proper jurisdiction.[193] Five days before the scheduled hearing the petitioner must file a petition for exequatur with the judge and with the respondent.[194] Within the five days, the respondent may request that the exequatur be rejected,[195] at which time the petitioner is notified of the respondent's protest.[196] The judge then makes his decision, which may be appealed within five days.[197] If on appeal the exequatur is rejected, the petitioner has no further recourse and the exequatur is denied.[198] If the exequatur is granted, court proceedings are conducted for execution just as if it were an Argentine judgment.[199] Article 559 of the Code of Civil Procedure of Argentina states the requisities for the issuance of the exequatur:

1) That the judgment to be enforced be the result of the prosecution of a personal legal action;[200]
2) That it not be a judgment by default against the condemned

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TINENT (L. Kos-Rabcewicz-Zubkowski ed. 1975). The book discusses, among other things, the enforcement procedure of each Latin American country; Argentina (8-13); Bolivia (28), Brazil (51-62), Chile (141-156), Colombia (167), Costa Rica (197-202), Ecuador (214-215), Mexico (308-311), Nicaragua (333-336), Panama (342-344), Paraguay (357), Peru (369-370), Uruguay (425-430), Venezuela (449-454).

[190] *Id.* As to each country, consult the pages listed at note 90 *supra.*

[191] *Id.* As to each country, consult the pages listed at note 90 *supra.*

[192] *Id.* As to each country, consult the pages listed at note 90 *supra.*

[193] *Id.* at 13. Code of Civil Procedure Art. 560.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.* Code of Civil Procedure Art. 561, 228.

[198] *Id.*

[199] *Id.*

[200] The distinction here is between personal actions and those *in rem*. Since execution of *in rem* judgments would "affect things permanently located in Argentina," enforcement would be in conflict with Argentine law (Art. 10, 11 of Civil Code).

party, provided such party has been domiciled in the Republic;[201]

3) That the obligation on which the judgment is based be valid under [Argentine] laws;[202] and
4) That the judgment to be enforced meet the conditions which under the law of the country where it has been rendered, are necessary for the judgment to be considered as such, and also those required under Argentine law.[203]

Most of the procedures of other Latin American countries parallel those of Argentina, with some variations. For example, some countries will recognize default judgments if the defendant was given proper notice[204] or if reciprocity exists between the two countries.[205] It is significant that the enforcement procedure for arbitral awards is the same as that of a judgment in most of the countries. No distinction is made between a judgment and an arbitral award for purposes of obtaining an exequatur and subsequent enforcement, with the exception that the arbitral award must have been rendered pursuant to a matter capable of settlement by arbitration.[206] Brazil requires that the arbitral award first be reduced to a judgment in the country where the award was rendered,[207] while Costa Rica does not recognize or enforce awards because of the lack of any such provisions within its code of civil procedure.[208]

As stated, in common law countries, a party seeking enforcement of a judgment must bring an action upon the judgment, while in civil law countries, the same party must obtain an exequatur.

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[201] Execution of default judgments against one who, at the start of the foreign proceedings, was a domiciliary of Argentina, is against the due process of laws of Argentina.

[202] This requisite is largely directed at foreign judgments relating to divorces and family matters and is not of great concern in the economic area. INTERNATIONAL COOPERATION IN CIVIL AND COMMERCIAL PROCEDURE—AMERICAN CONTINENT, *supra* note 189, at 11-12.

[203] This requirement mandates that the foreign judgment be valid, final and enforceable where rendered. *Id.* at 12.

[204] Countries which will recognize a default judgment if proper notice is given are: Bolivia (*id.* at 28), Brazil (*id.* at 53), Costa Rica (*id.* at 207), Mexico (*id.* at 309), Nicaragua (*id.* at 335), Panama (*id.* at 343), Uruguay (*id.* at 427), and Venezuela (*id.* at 450).

[205] The countries which require reciprocity are: Chile (*id.* at 143), Colombia (*id.* at 168), Guatemala (*id.* at 262-263), Mexico (*id.* at 309), Nicaragua (*id.* at 334), Panama (*id.* at 342), Uruguay (*id.* at 427), Venezuela (*id.* at 449).

[206] *Id.* at 10. In Argentina, the non-arbitrable matter relevant to this discussion is any dispute referring to public or municipal property. *Id.* at 10, 28 (Bolivia), 153 (Chile), 167 (Colombia), 239 (El Salvador), 262 (Guatemala), 284 (Honduras), 357 (Paraguay), 370 (Peru), 429 (Uruguay), 454 (Venezuela).

[207] *Id.* at 62, 156 (Chile), 336 (Nicaragua).

[208] *Id.* at 202.

> The two devices are obviously functionally and operationally quite similar. Both are predicated upon the principles of a bilateral hearing and judicial supervision of the enforcement of the foreign judgment. Both afford the judgment debtor a limited opportunity to voice objections, directed mainly to the regularity of the foreign proceedings and the foreign court's jurisdiction. Both proceed like an ordinary contested civil suit if the judgment debtor protests enforcement. Many American jurisdictions, including New York, provide for summary disposition of actions on a judgment without a full trial when it appears that there is no genuine issue as to any material fact. Such a procedure compares favorably with the exequatur of the civil law.[209]

Therefore, a party armed with a judgment or an arbitral award need not be concerned primarily with the type of jurisdiction, whether common or civil, in which enforcement will be sought. However, the party must be concerned with the construction and interpretation the courts of the particular country have traditionally placed upon the various defenses to the exequatur or upon the action on the judgment.

## IX. IMPROVEMENT OF ENFORCEMENT PROCEDURES

The existence of the common law and civil law systems, along with the national variations of the two, illustrates the need for a worldwide uniformization of enforcement procedures for judgments as well as for arbitral awards. Such a uniformization would not only represent true internationalization, but also would facilitate the growth of international trade by removing many of the current problems and barriers to enforcement and by providing certainty to the resolution of economic disputes.[210] Worldwide procedures for the enforcement of judgments and arbitral awards would, to a substantial degree, alleviate the traditional problems associated with enforcement. Reciprocity, sovereign immunity, and the act of state doctrine would be lesser obstacles to enforcement if nations could agree upon uniform enforcement measures. Distrust, although not amenable to complete eradication, would be diminished significantly by the standardization of enforcement procedures.

One method that would diminish enforcement problems is implementation of an international court system, similar to the

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[209] Homburger, *supra* at 184, at 378.

[210] *See* Wesley, *supra* note 3, 814-15, 859-61; Achebe, *supra* note 2, at 172.

federal court system of the United States, in which full faith and credit prevail. Such a court system would treat each nation as a component in the system just as each state is treated in the United States system. Enforcement of a sister state judgment, under full faith and credit, does not pose a serious problem in the United States, nor would enforcement of foreign country judgments in an international system. The International Court of Justice, although international in scope, is not representative of such a system. However, an international court system under which full faith and credit applies is probably many years away. Indeed, it is little more than a dream of international academicians.

The adoption of full faith and credit within the international community, however, is more likely to become a reality through multilateral treaties. This is the course that should be taken. A comprehensive treaty that applies to judgments and arbitral awards alike, and under which full faith and credit is given to the final judgments of a foreign court or tribunal, subject only to due process considerations, would make international summary enforcement a reality.[211] Until the implementation of such a treaty, nations should continue to adhere to current treaties and encourage further accession to the treaties.

## X. CONCLUSION

Most foreign country judgments and arbitral awards are complied with voluntarily for reasons of comity, the desire to co-exist peacefully, and to avoid adverse economic repercussions. However, many foreign judgments and arbitral awards are not enforced voluntarily because of public policy concerns and a distrust among nations in general, particularly among developing and developed countries. Rather than openly admit public policy concerns and distrust, the courts of many nations, both developed and developing, have created such obstacles to enforcement as reciprocity and political doctrines.

National legislation regarding the enforcement of foreign judgments and arbitral awards varies, yet it usually comports to one of two systems, the common law system or the civil law system. The common law system requires an action on the judgment while the civil law system requires the obtainment of an exe-

[211] The EEC Convention on Jurisdiction, *supra* note 144, would serve as a good model and would provide a convenient starting point in this area.

quatur before enforcement can be ordered. Several multilateral attempts have been made to standardize enforcement measures as to arbitral awards. These attempts have become progressively better; yet even the best—the New York Convention—leaves much room for improvement. No successful worldwide multilateral attempt has been made to standardize foreign country enforcement procedures.

International summary enforcement of foreign judgments and arbitral awards will not realize its full potential until full faith and credit becomes a part of international law. In the interest of international economic trade, it behooves all countries, developed and developing, to pursue such an objective.

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