

INTERNATIONAL LAW—ENFORCEMENT OF
INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES ARBITRAL AWARDS IN THE
UNITED STATES—Signatories to the Convention on
the Settlement of Investment Disputes Between
States and Nationals of Other States are not entitled
to sovereign immunity with respect to enforcement
of ICSID arbitral awards, *Liberian Eastern Timber
Corp. v. Government of Republic of Liberia*, 650 F.
Supp. 73 (S.D.N.Y. 1986)

Plaintiff,¹ a Liberian corporation owned and controlled by French nationals, procured an arbitral award against defendant, the Government of the Republic of Liberia (Liberia),² issued under the rules of the International Centre for the Settlement of Investment Disputes (ICSID).³ Plaintiff applied in United States federal district court to

¹ Plaintiff is the Liberian Eastern Timber Corporation (LETCO) and is designated as the "Putative Arbitration Award Creditor" in the style of the case. *Liberian E. Timber Corp. v. Government of Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986). The French owners of LETCO were required to form a Liberian company in order to carry out investment in Liberia. *Liberian E. Timber Corp. v. Government of Republic of Liberia*, 26 I.L.M. 647, 654 (1987), *award rectified*, 26 I.L.M. 677 (1987).

² Defendant is designated as the "Putative Arbitration Award Debtor" in the style of the case. *LETCO v. Liberia*, 650 F. Supp. at 73.

In 1970, Liberia granted LETCO a concession agreement (Agreement) allowing LETCO to harvest over 400,000 acres of Liberian timber in return for guarantees by LETCO, *inter alia*, to employ Liberian nationals and invest a percentage of the operation's profits in Liberia. Ten years later Liberia prematurely revoked the concession. LETCO claimed that under the terms of the Agreement Liberia had no grounds for the revocation, and even if it did, Liberia had not given proper notice to LETCO as required by the Agreement. In compliance with the arbitration clause in the Agreement, LETCO submitted its claims for arbitration by a tribunal of the International Centre for the Settlement of Investment Disputes (ICSID). The tribunal found in favor of LETCO and issued an award for \$8,750,286 despite the fact that Liberia refused to participate in the arbitration proceedings. *LETCO v. Liberia*, 26 I.L.M. at 677.

³ ICSID was established under Article 1(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (1966) [hereinafter ICSID Convention]. The purpose of ICSID is to provide neutral arbitration facilities for the settlement of investment disputes between Contracting

enforce the arbitral award.⁴ The court issued an *ex parte* judgment enforcing the award⁵ and plaintiff subsequently obtained a writ of execution on defendant's assets in the United States.⁶ Defendant then

States and nationals of other Contracting States. ICSID Convention, 17 U.S.T. at 1273, T.I.A.S. No. 6090, 575 U.N.T.S. at 162.

Both Liberia and France are Contracting States to the ICSID Convention. Article 25 of the ICSID Convention provides:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

* * *

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and *any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*

ICSID Convention, art. 25, paras. 1-2, 17 U.S.T. at 1280, T.I.A.S. No. 6090, 575 U.N.T.S. at 174 (emphasis added).

The arbitrators held, therefore, that Liberia's refusal to participate in the arbitration was immaterial, because LETCO and Liberia had consented in the written concession agreement to submit disputes to the Centre before Liberia unilaterally attempted to withdraw its consent. *LETCO v. Liberia*, 26 I.L.M. at 652. The tribunal also held that, based on the complete French control of LETCO and the parties' course of dealing, they had implicitly agreed to treat LETCO as a French national for purposes of ICSID arbitration. *Id.* at 652-54.

⁴ The United States is also a Contracting State to the ICSID Convention. Article 54(1) of the Convention 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 in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state. ICSID Convention, 17 U.S.T. at 1291, T.I.A.S. No. 6090, 575 U.N.T.S. at 194.

Article 69 of the Convention requires each contracting state to pass legislation enabling the provisions of the Convention to be effective in that contracting state. ICSID Convention, art. 69, 17 U.S.T. at 1296, T.I.A.S. No. 6090, 575 U.N.T.S. at 202. The enabling legislation in the United States is embodied in 22 U.S.C. §§ 1650, 1650a (1982).

⁵ An *ex parte* judgment is one granted on the application, and for the benefit of, one party only and without notice to the opposing party. *BLACK'S LAW DICTIONARY* 517 (5th ed. 1979).

⁶ *LETCO v. Liberia*, 650 F. Supp. at 75.

moved to vacate the *ex parte* judgment in the federal district court, or, in the alternative, to vacate the execution of that judgment on its United States property.⁷ Defendant argued that United States courts had jurisdiction neither to enforce, nor issue executions on, the arbitral award⁸ because defendant had not waived its sovereign immunity and was therefore immune from suit under Section 1605 of the Foreign Sovereign Immunities Act (FSIA).⁹ *Held*, affirmed in part.¹⁰ Signatories to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "Convention") waive their sovereign immunity under the FSIA in United States federal courts with respect to the enforcement of any arbitral awards entered pursuant to the Convention. *Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986), *appeal filed*, (2d Cir. Dec. 15, 1986).

LEGAL BACKGROUND

A. *The ICSID Convention*

The Executive Directors of the International Bank for Reconstruction and Development (the "World Bank") formulated the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States primarily to stimulate increased private

⁷ *Id.* at 74.

⁸ Liberia also alleged that the executions of the judgment entered by the court had been improperly served on sovereign assets in the United States. Additionally, since the Foreign Sovereign Immunities Act grants immunity from execution to "property . . . [not] used for a commercial activity," the executions on the judgment should be vacated. The district court agreed and vacated the executions. *LETCO v. Liberia*, 650 F. Supp. at 78. The question of whether Liberia ship registry fees and tonnage taxes are immune from execution is currently on appeal in the U.S. Court of Appeals for the Second Circuit.

⁹ 28 U.S.C. §§ 1602-1611 (1982). Section 1605(a) provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

28 U.S.C. § 1605(a) (1982).

The remainder of the statute enumerates several other exceptions to sovereign immunity for foreign states, none of which were applied to the enforcement issue in the *LETCO v. Liberia* case.

¹⁰ See *supra* note 8.

international investment in developing countries.¹¹ Prior to the Convention, the official fora of the state in which the investment occurred were usually the only fora available to resolve disputes between private investors and states.¹² The lack of a more neutral forum provided a disincentive to prospective investors, and both investors and states that wished to attract investment felt it would be mutually beneficial to have an international method of dispute settlement available.¹³ The World Bank Directors, therefore, designed the Convention to ensure that parties to investment agreements could have disputes settled by knowledgeable and impartial arbitrators whose decisions would provide effective remedies.¹⁴

To accomplish these goals the Convention established the International Centre for the Settlement of Investment Disputes (ICSID). The Centre provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.¹⁵ Conciliation or arbitration of all investment disputes by ICSID is not mandatory; the Centre's jurisdiction is based on the parties' consent to submit a dispute to the Centre.¹⁶ The Convention states that arbitral awards issued pursuant to the Convention "shall be binding on the parties and shall not be subject to

¹¹ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *submitted to governments* Mar. 18, 1965, 4 I.L.M. 524, 525 [hereinafter World Bank Report]. As of January 1, 1987, eighty-eight countries were signatories to the Convention. OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, PUB. NO. 9433, TREATIES IN FORCE 267 (1987).

¹² World Bank Report, *supra* note 11, at 525.

¹³ *Id.* The State Department's support for ICSID was stated as follows:

As the country with the greatest amount of international investment, and the greatest stake in the development and wide acceptance of international law standards regarding protection of private property, the United States stands to gain substantially from the convention. Moreover, if the convention facilities do lead, as we expect, to increased investment by Americans and others in the less developed countries, this will benefit in an important way our overall objective of international economic development and will complement our foreign assistance programs and related activities.

Convention on the Settlement of Investment Disputes: Hearings on H.R. 15785 Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs, 89th Cong., 2d Sess. 7 (1966) [hereinafter *Hearings*] (testimony of Andreas F. Lowenfeld, Deputy Legal Adviser, Dept. of State).

¹⁴ World Bank Report, *supra* note 11, at 525.

¹⁵ ICSID Convention, art. 1, 17 U.S.T. at 1273, T.I.A.S. No. 6090, 575 U.N.T.S. at 162.

¹⁶ ICSID Convention, art. 25, 17 U.S.T. at 1280, T.I.A.S. No. 6090, 575 U.N.T.S. at 174.

any appeal or to any other remedy except those provided for in [the] Convention."¹⁷ The exclusive remedies provided for in the Convention are revision and annulment proceedings which either party may institute only within the Centre.¹⁸ Through these limitations the Convention provides for complete and final resolution of all legal and factual issues in an international, and therefore presumptively neutral,¹⁹ forum.

In addition to providing this neutral forum, the Convention's enforcement provisions make it highly likely that the prevailing party in a dispute resolved through ICSID will be able to collect on the award. Under Article 54 of the Convention each Contracting State must recognize and enforce an award rendered pursuant to the Convention upon presentation of a certified copy of the award to a competent domestic court.²⁰ This strong enforcement provision is weakened to some extent because Article 55 defers to the law in each Contracting State on sovereign immunity from execution.²¹ Nevertheless, the prospects for a creditor in possession of an ICSID award collecting on that award are better than prospects for collecting on a domestic court judgment. This improvement is due to Article 54, under which a prevailing party can look not only to assets held in its own state or the state of the award debtor, but can also obtain

¹⁷ ICSID Convention, art. 53, 17 U.S.T. at 1291, T.I.A.S. No. 6090, 575 U.N.T.S. at 194.

¹⁸ ICSID Convention, arts. 51, 52, 17 U.S.T. at 1289-91, T.I.A.S. No. 6090, 575 U.N.T.S. at 190-92.

¹⁹ See World Bank Report, *supra* note 11, at 525.

²⁰ ICSID Convention, art. 54, 17 U.S.T. at 1291, T.I.A.S. No. 6090, 575 U.N.T.S. at 194. For the text of Article 54(1), see *supra* note 4. Article 54(2) provides:

A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which shall have been designated for this purpose a copy of the award certified by the Secretary-General.

ICSID Convention, art. 54, para. 2, 17 U.S.T. at 1291, T.I.A.S. No. 6090, 575 U.N.T.S. at 194.

²¹ ICSID Convention, arts. 54(3), 55, 17 U.S.T. at 1292, T.I.A.S. No. 6090, 575 U.N.T.S. at 194. Article 54(3) provides:

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

Id.

Article 55 provides:

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

Id.

enforcement, and attempt to collect on the award debtor's assets in any Contracting State.²²

B. *The United States' Enabling Legislation*

President Johnson ratified the Convention with the advice and consent of the Senate in 1966 and the United States acceded to the Convention that same year.²³ In that year, Congress also enacted enabling legislation required by the Convention, which provides:

An award of an arbitral tribunal rendered pursuant to chapter IV of the Convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states. The Federal Arbitration Act (9 U.S.C. § 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.²⁴

This statute, which implements Article 54(1) of the Convention,²⁵ gives the federal district courts jurisdiction to enforce the awards by characterizing the awards as creating a "right arising under a treaty."²⁶ By making the Federal Arbitration Act (FAA) inapplicable to enforcement of ICSID awards, the statute implicitly recognizes that United States courts may enforce any ICSID award and that revision and annulment are not to be handled by United States courts.²⁷ The

²² Article 54(1) requires each Contracting State to enforce the pecuniary obligations of *any* ICSID award. ICSID Convention, art. 54(1), 17 U.S.T. at 1291, T.I.A.S. No. 6090, 575 U.N.T.S. at 194.

²³ United States instrument of ratification for ICSID Convention, signed Sept. 30, 1966, 17 U.S.T. 1356.

²⁴ 22 U.S.C. § 1650a (1982). Congress passed this legislation pursuant to the requirements of the Convention. See ICSID Convention, art. 69, 17 U.S.T. at 1296, T.I.A.S. No. 6090, 575 U.N.T.S. at 202.

²⁵ *Hearings, supra* note 13, at 4 (testimony of Hon. Fred B. Smith, General Counsel, Dept. of Treasury).

²⁶ The judicial power of the federal courts extends "to all cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority. . . ." U.S. CONST. art. III, § 2, cl. 1; *accord Hearings, supra* note 13, at 5 (testimony of Hon. Fred B. Smith, General Counsel, Dept. of Treasury).

²⁷ The FAA provides that arbitral awards rendered pursuant to the FAA may only be enforced in the courts specified by the parties, 9 U.S.C. § 9 (1982), and allows the courts to vacate or modify awards on specified grounds, 9 U.S.C. §§ 10-11 (1982). In contrast, the ICSID Convention provides that any Contracting State is obligated to enforce ICSID arbitral awards. ICSID Convention, art. 54, 17 U.S.T. at 1289-91, T.I.A.S. No. 6090, 575 U.N.T.S. at 190-94; *accord Hearings, supra* note 13 at 4 (testimony of Hon. Fred B. Smith, General Counsel, Dept. of Treasury).

statute also clearly mandates enforcement of the pecuniary obligations of ICSID awards, and brings the awards within the full faith and credit clause of the 14th Amendment, thereby precluding any defenses to enforcement based on a lack of reciprocity or lack of comity.²⁸

The enabling legislation seems, however, to adopt a weaker position on enforcement than that required by the Convention. The full faith and credit language or the statute appears to allow domestic courts to re-evaluate an ICSID tribunal's jurisdiction over the parties and the subject matter of the dispute, and to evaluate the procedural aspects of the arbitration.²⁹ In contrast, the Convention provides that parties must use the Convention's annulment proceedings when objecting to the validity of an award on jurisdictional or procedural grounds.³⁰ Additionally, the enabling statute does not explicitly deny to Contracting States any sovereign immunity from enforcement, although the mandatory enforcement language in Article 54 of the Convention implicitly denies sovereign immunity at the enforcement stage.³¹

C. *The United States Law on Sovereign Immunity*

The doctrine of sovereign immunity exempts a state from the exercise of the public authority of another state's domestic courts.³²

²⁸ See *Hilton v. Guyot*, 159 U.S. 113 (1895) (Full faith and credit clause eliminates issues of reciprocity and comity that would otherwise arise in actions to enforce foreign judgments.)

²⁹ Coll, *United States Enforcement of Arbitral Awards Against Sovereign States: Implications of the ICSID Convention*, 17 HARV. INT'L L.J. 401, 411 (1976).

³⁰ The grounds for annulment of an ICSID arbitral award are 1) the Tribunal was not properly constituted, 2) the Tribunal manifestly exceeded its powers, 3) corruption on the part of an arbitrator, 4) a serious departure from a fundamental rule of procedure, or 5) that the award does not state the reasons on which it is based. ICSID Convention, art. 52, 17 U.S.T. at 1290-91, T.I.A.S. No. 6090, 575 U.N.T.S. at 192. The only ground for revision of an ICSID arbitral award is discovery of a material fact not known before the award was granted and not negligently missed by the party requesting revision. ICSID Convention, art. 51, at 1289, T.I.A.S. No. 6090, 575 U.N.T.S. at 190-92.

³¹ Article 54 mandates that the arbitral awards be enforced by all Contracting States upon presentation of a certified copy of the award, and does not mention sovereign immunity. Article 55 mentions sovereign immunity only in relation to execution. ICSID Convention, arts. 54, 55, at 1291-92, T.I.A.S. No. 6090, 575 U.N.T.S. at 194. These articles should be interpreted to be consistent with the object and purpose of the treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, para. 1, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention]. Such an interpretation leads to the conclusion that the Convention prohibits the defense of sovereign immunity from enforcement.

³² H.R. REP. No. 1487, 94th Cong., 2d Sess. 8 (1976), *reprinted in* 1976 U.S.

During the early part of the 20th century the Supreme Court of the United States relied on State Department policies in deciding whether a foreign state was entitled to sovereign immunity from suit.³³ In 1952, the State Department formally adopted the restrictive theory of sovereign immunity.³⁴ Under this theory, a foreign state is immune from legal actions arising out of its public acts, but is not immune from actions based on its commercial or private acts.³⁵ In practice, however, since a foreign state could exert diplomatic pressure on the State Department to gain the Department's recommendation of a grant of immunity, the federal courts could not consistently apply the restrictive doctrine.³⁶ This situation gave an unfair advantage to influential foreign states,³⁷ and discouraged private parties from contracting with foreign governments because they could not be certain that United States courts would deny immunity to foreign governments with which they had commercial disputes.³⁸ Congress responded to this situation by codifying the restrictive doctrine in the Foreign Sovereign Immunities Act of 1976 (the "FSIA").³⁹

The FSIA sets forth uniform standards for courts to employ when deciding whether a foreign state is entitled to immunity from suit in United States federal or state courts. The Act ensures consistent application of United States sovereign immunity policy by removing the decision-making process from the political influences in the foreign relations arena.⁴⁰ The language of the FSIA and its legislative history

CODE CONG. & ADMIN. NEWS 6604, 6606; see G.M. BADR, *STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW* 79 (1984).

³³ H.R. REP. NO. 1487, *supra* note 32, at 6606.

³⁴ *Id.* Before 1952 the restrictive theory of sovereign immunity had been developing in international practice, but the State Department resisted changing from the theory of absolute immunity. J. STEVENSON, J. BROWNE & L. DAMROSCH, *UNITED STATES LAW OF SOVEREIGN IMMUNITY RELATING TO INTERNATIONAL FINANCIAL TRANSACTIONS* 13 (1983). In 1952 the State Department issued the "Tate Letter" which announced the adjustment in its policy to conform with the restrictive theory. 26 DEP'T ST. BULL. 984 (1952).

³⁵ H.R. REP. NO. 1487, *supra* note 32, at 6607.

³⁶ *Id.*

³⁷ In fact, many countries' courts directly applied the restrictive theory, and a foreign state did not have the opportunity to petition a foreign affairs agency or exert diplomatic pressure to gain immunity from suit. The United States, therefore, did not receive the same liberal grants of immunity that it afforded to other nations. J. STEVENSON, J. BROWNE & L. DAMROSCH, *supra* note 34, at 16; H.R. REP. NO. 1487, *supra* note 32, at 6607.

³⁸ H.R. REP. NO. 1487, *supra* note 32, at 6607.

³⁹ 28 U.S.C. §§ 1602-1611 (1982).

⁴⁰ H.R. REP. NO. 1487, *supra* note 32, at 6610; see *Ex Parte Peru*, 318 U.S. 578, 588-89 (1943).

also indicate that the Act does not preempt jurisdictional rules already established in any international agreements in force at the time the FSIA became effective.⁴¹

The FSIA begins with the proposition that all foreign states are entitled to immunity and then specifies exceptions to this general rule.⁴² Section 1605(a)(1) provides the exception most often applied in the situation of enforcement of foreign arbitral awards. This section states that a foreign state is not immune from jurisdiction in any case "in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."⁴³

The legislative history of the FSIA indicates that Congress intended the courts to use the waiver exception as a means of obtaining jurisdiction over foreign states where private litigants seek to enforce foreign arbitral awards in United States courts.⁴⁴ The decisions involving the application of the waiver exception in enforcement of arbitral award cases reveal confusion, however, as to the scope of any implied waiver which arises out of a foreign state's agreement to arbitrate.⁴⁵ The language in the legislative history is unclear, but

⁴¹ Section 1604 of the Act reads:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604 (1982) (emphasis added).

The House Report on the FSIA states that the FSIA "is intended to preempt any other State or Federal Law (*excluding applicable international agreements*) for according immunity to foreign sovereigns" H.R. REP. No. 1487, *supra* note 32, at 6610 (emphasis added).

⁴² 28 U.S.C. §§ 1604-1607 (1982).

⁴³ 28 U.S.C. § 1605(a)(1) (1982).

⁴⁴ H.R. REP. No. 1487, *supra* note 32, at 6617. The House Report indicates tacit approval of this use of the waiver exception with the following language: "With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country" *Id.*

⁴⁵ See *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981) ("[It] is unclear whether, in referring to 'another country', Congress intended to include a third-party country"); *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F. Supp. 981 (N.D. Ill. 1980) ("[T]he presense of third-party nation choice of law and forum clauses does not in any sense [imply] consent to United States jurisdiction."); *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980) ("[A]n agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity, as was recognized by Congress."); *Ipittrade Int'l. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) ("The legislative

can be read to mean that whenever a foreign state agrees to arbitration in any country it implicitly waives its sovereign immunity in United States courts.⁴⁶ This expansive notion of implicit waiver has been highly criticized, most notably for purporting to extend jurisdiction of federal courts into an area of sensitive foreign relations.⁴⁷

A general consensus exists, however, that a foreign state's agreement to arbitrate in the United States constitutes an implicit waiver of its sovereign immunity from enforcement of the award in United States courts.⁴⁸ In *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*,⁴⁹ Tanzania agreed to arbitration and to allow for judgment to be entered on any arbitral award. The parties arbitrated the dispute in New York, but Tanzania opposed the writ of garnishment the plaintiff obtained after entry of judgment on the award, alleging that the FSIA entitled Tanzania to sovereign immunity. The court held that, under the FSIA, Tanzania's agreement to arbitrate in New York constituted an implicit waiver of immunity from enforcement of the arbitral award.⁵⁰

A foreign state's agreement to arbitrate in a country which is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")⁵¹ also constitutes a waiver of sovereign immunity under the FSIA for purposes

history of [section 1605] expressly states that an agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver.").

⁴⁶ H.R. REP. No. 1487, *supra* note 32, at 6617; *Chicago Bridge & Iron Co.*, 506 F. Supp. at 986, *Iptrade Int'l*, 465 F. Supp. at 824.

⁴⁷ See *Ohntrup*, 516 F. Supp. at 1281; *Chicago Bridge & Iron Co.*, 506 F. Supp. at 986; *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1285 (S.D.N.Y. 1980) ("[I]t is . . . difficult to infer . . . a waiver from the agreement of a foreign state to submit itself . . . to the jurisdiction of a state other than the United States."), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981) (Agreeing with the court that "[Such a view] would presage a vast increase in the jurisdiction of federal courts in matters of sensitive foreign relations. . . . [The parties] could scarcely have foreseen this untoward result when they signed the contract; and it is unlikely that Congress could have intended it."); *rev'd on other grounds and remanded*, 461 U.S. 480 (1983). See generally, *Frolova v. U.S.S.R.*, 761 F.2d 370, 377 (7th Cir. 1985) (Implicit waiver clause of § 1605 is narrowly construed.)

⁴⁸ See *Ohntrup*, 516 F. Supp. at 1284; *Birch Shipping Corp.*, 507 F. Supp. at 312; *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175, 1177 (D.D.C. 1980).

⁴⁹ 507 F. Supp. 311 (D.D.C. 1980).

⁵⁰ *Id.* at 312.

⁵¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

of enforcement of the award.⁵² In *Ipitrade International v. Federal Republic of Nigeria*,⁵³ Nigeria agreed to arbitrate disputes arising under its agreement with Ipitrade International (Ipitrade) under Swiss law and under International Chamber of Commerce rules in Paris, France. The parties arbitrated a dispute according to the agreement, but Nigeria opposed Ipitrade's attempt to enforce the award in the United States, claiming immunity under the FSIA. The court held that because the award was subject to the New York Convention, and the United States, France, Switzerland and Nigeria were all signatories to the Convention, Nigeria waived its sovereign immunity by agreeing to the arbitration.⁵⁴

The federal courts considered the relationship between the FSIA and the ICSID Convention only one time prior to *LETCO v. Liberia*. In *Maritime International Nominees Establishment (MINE) v. Guinea*, MINE convinced a federal district court to compel arbitration before the American Arbitration Association (the "AAA").⁵⁵ MINE subsequently moved in federal district court to enforce the award it obtained at the AAA arbitration. Guinea objected, alleging that it did not waive its sovereign immunity under the FSIA when it agreed to ICSID arbitration. Guinea argued, therefore, that it was immune from suit and the judgment compelling arbitration and the resulting award were nullities. The district court disagreed, reasoning that because the parties contemplated ICSID arbitration, which the court assumed normally took place in Washington, D.C., Guinea implicitly waived its sovereign immunity in United States courts. On appeal, the District of Columbia Circuit Court of Appeals reversed, holding

⁵² See *Acme v. MCP*, No. 85 Civ. 3765 (S.D.N.Y. Mar. 5, 1986) (LEXIS, Genfed library, Dist file); *Ipitrade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978).

⁵³ 465 F. Supp. 824 (D.D.C. 1978).

⁵⁴ *Id.* at 826.

⁵⁵ *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 505 F. Supp. 141 (D.D.C. 1981), *rev'd*, 693 F.2d 1094 (D.C. Cir. 1982). MINE, a Liechtenstein corporation, entered into an agreement with the Republic of Guinea to create a mixed economy company to provide shipping services to transport Guinean bauxite to foreign markets. The agreement contained an ICSID arbitration clause, but after a dispute arose no formal request for ICSID arbitration was ever filed. MINE petitioned for AAA arbitration under sections 4 and 5 of the FAA, 9 U.S.C. §§ 4, 5 (1982). Those sections empower federal district courts to order arbitration to proceed according to the arbitration clause in the contract between the parties or to order arbitration before an arbitrator not named in the contract if a party fails to avail himself of the agreed upon method of choosing arbitrators. *MINE v. Guinea*, 693 F.2d at 1094.

that a state's agreement to submit disputes to ICSID arbitration does not constitute a waiver of sovereign immunity before the enforcement stage, because ICSID rules do not contemplate a role for United States courts until after the dispute is settled by ICSID arbitration.⁵⁶

ANALYSIS

In *Liberian Eastern Timber Corp. v. Liberia*,⁵⁷ Liberia challenged the jurisdiction of United States courts to enforce ICSID arbitral awards. Liberia moved to vacate an *ex parte* judgment of a United States district court enforcing an ICSID arbitral award, arguing that the district court did not have jurisdiction to enter the judgment or issue executions on Liberia's property. Liberia contended that the FSIA deprived the district court of jurisdiction because Liberia had not waived its sovereign immunity either by entering into the concession agreement with LETCO, by agreeing to the arbitration, or by cancelling the agreement.⁵⁸ In response, LETCO argued that Liberia's agreement to submit disputes to ICSID arbitration did constitute an implicit waiver of sovereign immunity. The waiver, LETCO contended, could be implied from the fact that Article 54 requires each Contracting State to enforce ICSID awards and, therefore, Liberia knew, before agreeing to ICSID arbitration, that the Convention obligated the United States to enforce an ICSID award rendered against Liberia.⁵⁹

Answering Liberia's objections, the district court assumed the FSIA was applicable, although it offered no explanation for this assumption.⁶⁰ The court then reasoned that when Liberia entered into the concession agreement, which provided for resolution of disputes by ICSID, Liberia invoked Article 54 of the ICSID Convention.⁶¹ Since Article 54 requires Contracting States to enforce ICSID awards, the court concluded, "Liberia clearly contemplated the involvement of the courts of any of the Contracting States, including the United States as a signatory to the Convention, in enforcing the pecuniary obligations of the award."⁶² Following the rationale of the *MINE v.*

⁵⁶ *MINE v. Guinea*, 693 F.2d at 1104.

⁵⁷ 650 F. Supp. 73 (S.D.N.Y. 1986).

⁵⁸ *Id.* at 75.

⁵⁹ *See id.* at 76.

⁶⁰ *Id.* The court simply stated, "[T]he Foreign Sovereign Immunities Act is . . . applicable here." *Id.* at 76.

⁶¹ *Id.* For the text of Article 54(1) see note 4 *supra*.

⁶² *LETCO v. Liberia*, 650 F. Supp. at 76.

Guinea decision, the court held that Liberia had waived its sovereign immunity before United States courts with respect to the enforcement of any ICSID arbitral award which arose out of disputes over the concession agreement.⁶³ The waiver exception to sovereign immunity in the FSIA, therefore, gave United States courts jurisdiction to enforce the award against Liberia.⁶⁴

While the result of the *LETCO* decision fulfills United States obligations under the ICSID Convention, the reasoning employed by the court conflicts with the language of the Convention and may undermine the Convention's effectiveness. The ICSID Convention provides its own particular jurisdictional rules for enforcement and execution of ICSID arbitral awards. Specifically, the Convention requires each Contracting State to recognize and enforce any ICSID award as if it were a final judgment of the national or state courts of the Contracting State, and only defers to domestic law of sovereign immunity on the subject of execution of the awards.⁶⁵

The enabling legislation passed by the United States Congress creates confusion because it mandates enforcement of ICSID awards, but fails to expressly exclude the defense of sovereign immunity from enforcement.⁶⁶ Given the federal courts' practice of closely following the language of a treaty's enabling legislation when interpreting the rights and duties of parties to a treaty,⁶⁷ the inconclusive treatment of the sovereign immunity issue provides little guidance for the courts, as the *LETCO* decision illustrates. The court, although clearly aware of the enforcement rules of the Convention and the mandatory en-

⁶³ *Id.*

⁶⁴ *Id.* The court quoted the waiver language in the FSIA and then stated that "Liberia, as a signatory to the Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered pursuant to the Convention." *Id.*

⁶⁵ See *supra* notes 17-18 and accompanying text.

⁶⁶ 22 U.S.C. §§ 1650, 1650a (1982). In fact, in his testimony before the House Subcommittee on International Organizations and Movements, Andreas Lowenfeld stated, after quoting article 55 of the Convention, that "[a]s to whether [a court] has jurisdiction over a party, there is nothing in the convention that will change the defense of sovereign immunity." *Hearings, supra* note 11, at 18. This statement is correct in the context of Article 55, which speaks only of execution, but is not accurate in the context of Article 54. See *supra* note 27.

⁶⁷ *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980). "[I]t is the implementing legislation, not the agreement, that is given effect as law in the United States." RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 131 comment h (1986).

forcement language in the enabling legislation,⁶⁸ automatically included the FSIA in its analysis. In relying on the FSIA to determine whether the federal courts have jurisdiction to enforce ICSID arbitral awards against Contracting States to the Convention, the *LETCO* court opened the door for Contracting States to shirk their obligation to enforce ICSID awards in the future.

Precedent does, however, support the court's reliance on the FSIA. Language in the FSIA's legislative history and in the Supreme Court case of *Verlinden B.V. v. Central Bank of Nigeria* indicates that the FSIA provides the exclusive method of obtaining jurisdiction over foreign states in United States courts.⁶⁹ In addition, federal courts previously relied on the FSIA in enforcing arbitral awards issued against signatories to the New York Convention⁷⁰ and in denying jurisdiction to compel AAA arbitration when the parties had agreed to ICSID arbitration.⁷¹ Nevertheless, a closer look at the legislative history and the language of the FSIA itself reveals that Congress did not intend for the FSIA to preempt jurisdictional law contained in any international agreements in force at the time Congress enacted the FSIA.⁷² ICSID was in force before the FSIA; therefore, the jurisdictional rules in the Convention and the United States enabling legislation are controlling on the issue of sovereign immunity from enforcement of ICSID awards.⁷³

The law of an international treaty and its enabling legislation are proper sources for jurisdictional rules. Provisions of treaties to which

⁶⁸ The court quoted the language of Article 54(1) of the Convention and made reference to 22 U.S.C. 1650a in its discussion of the case. *LETCO v. Liberia*, 650 F. Supp. at 76.

⁶⁹ "This bill . . . sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." H.R. REP. NO. 1487, *supra* note 10, at 6610.

"The [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

⁷⁰ See *supra* notes 51-54 and accompanying text.

⁷¹ See *supra* notes 55-56 and accompanying text.

⁷² See *supra* note 41.

⁷³ Unless two conflicting statutes can be reconciled, the most recently enacted statute is controlling. *Whitney v. Robertson*, 124 U.S. 190 (1888); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 135 (1986). The FSIA and section 1650a can be reconciled, however, because the FSIA states that it does not change any international agreements in force at of the time the FSIA's enactment. See *supra* note 41.

the United States is a party become "the supreme law of the land."⁷⁴ Moreover, the Supreme Court has determined that in exercising its authority over foreign commerce and foreign relations⁷⁵ Congress has the power to decide, "whether and under what circumstances foreign nations should be amenable to suit in the United States."⁷⁶ In adopting the ICSID Convention and the accompanying enabling legislation Congress appropriately exercised this power.

Because the FSIA conflicts with the Convention by granting sovereign immunity and then carving out specific exceptions, the FSIA should not be applied when a Contracting State pleads immunity from enforcement of ICSID arbitral awards. The enabling legislation gives effect to article 54(1) of the Convention, which implicitly denies sovereign immunity from enforcement. Federal courts need only look to the Convention and the enabling legislation to determine that immunity from enforcement of ICSID arbitral awards is not available to Contracting States. The courts should consult the FSIA only to resolve the issue of which assets of a Contracting State are available for execution of the award. This bifurcated process is consistent with the distinction the ICSID Convention draws between enforcement and execution. Moreover, the FSIA lends itself to this two-step analysis, as it also separates the issues of enforcement and execution.⁷⁷

The *LETCO* decision represents another unfortunate failure by the courts to give the issue of jurisdiction to enforce ICSID awards its proper legal setting.⁷⁸ Including the FSIA in determinations of sovereign immunity from enforcement of ICSID awards is superfluous and counterproductive. Article 54 of the Convention eliminates any defense to enforcement, thereby giving greater force to ICSID awards than that possessed by other international arbitral awards.⁷⁹ The resulting strength of ICSID awards creates a more secure and at-

⁷⁴ See U.S. CONST. art. VI; *Missouri v. Holland*, 252 U.S. 416, 421 (1920); *Foster v. Nelson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.).

⁷⁵ Article I, section 8 of the Constitution grants Congress the power "[t]o regulate commerce with foreign nations." U.S. CONST. art. I, § 8.

⁷⁶ *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

⁷⁷ Section 1605 of the FSIA prescribes rules for preliminary questions of jurisdiction, while sections 1609-1611 regulate the issue of execution. 28 U.S.C. §§ 1605, 1609-1611 (1982).

⁷⁸ See Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784 (1983), in which the former Senior Legal Advisor to ICSID criticizes the court's reliance on the FSIA in the *Mine v. Guinea* decision.

⁷⁹ See Delaume, *supra* note 78, at 784; Coll, *supra* note 29, at 403.

tractive environment for private investment in third-world development.

The *LETCO* case represents only the second time an ICSID award creditor has resorted to judicial enforcement proceedings.⁸⁰ While the manner in which one Contracting State carries out its obligations under the treaty does not bind the other Contracting States, it can be influential.⁸¹ Because ICSID's denial of sovereign immunity from enforcement is not explicitly stated, subsequent practice of Contracting States in interpreting the treaty potentially becomes very influential. The *LETCO* rationale ignores the Convention and applies domestic sovereign immunity law to the issue of enforcement. This practice, if followed by other Contracting States with stricter sovereign immunity laws, will undermine the strength of the Convention's enforcement machinery by allowing Contracting States to hide behind sovereign immunity and thus avoid their treaty obligations.

CONCLUSION

The security of investment agreements with ICSID arbitration clauses is threatened each time Contracting States' courts rely on provisions of domestic law when another Contracting State raises the issue of sovereign immunity. The ICSID Convention makes it clear that Contracting States are not entitled to sovereign immunity at the enforcement stage. Federal courts must recognize and follow the federal law contained in international agreements such as the Convention so as not to operate contrary to the congressional foreign policy objectives which motivated their ratification. The courts' failure to carefully interpret treaty provisions may result not only in the United States inadvertently breaching its international obligations, but may also

⁸⁰ In *Benvenuti & Bonfant S.A.R.L. v. Gouvernement de la republique du Congo* (Cour d'Appel Paris, June 6, 1981), 20 I.L.M. 878 (1981) (in English translation), 108 J. Droit Int'l 843 (1981) (in original French), the French court of appeal gave effect to the distinction which the ICSID Convention draws between enforcement and execution. The court held that recognition and enforcement of ICSID awards is possible when the creditor furnishes a copy of the certified award to the court, and the courts therefore may not condition recognition on the creditor's ability to locate assets in France which are available for execution under the French law of sovereign immunity from execution. *Id.*

⁸¹ Article 31 of the Vienna Convention provides as a general rule that subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation should be taken into consideration when interpreting a treaty. Vienna Convention, art. 31., para. 3(b), 1155 U.N.T.S. at 340.

constitute judicial sabotage of multilateral efforts to solve international problems.

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