

The origins and specificities of the ICSID enforcement mechanism

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1. Introduction

One of the unique features of the ICSID Convention is its enforcement mechanism. It consists of three provisions – Articles 53, 54 and 55 – which address different aspects of recognition and enforcement of an award rendered under the convention. The first is the binding force and finality of the award (Article 53), a principle according to which each disputing party must abide by and comply with the terms of the award, without the possibility of an appeal. The second is directed at all ICSID contracting states, imposing on them the obligation to recognise the award and to enforce their pecuniary obligations as if the award were a final judgment of a domestic court (Article 54). The third concerns execution proceedings in domestic courts, clarifying that each contracting state's laws on immunity from execution continue to apply (Article 55).

At the time of the drafting of the ICSID Convention, in the early 1960s, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) had just entered into force.¹ The drafters of the ICSID Convention could have made ICSID awards subject to the enforcement mechanism in the New York Convention in those countries bound by it. However, the drafters of the ICSID Convention chose a more innovative path. They created a system insulated from domestic laws and court involvement: an entirely self-contained treaty with provisions covering the commencement of arbitration and conciliation proceedings, rules governing the procedure, any possible post-award remedies and provisions on recognition and enforcement. ICSID Convention arbitration is exclusive of any other remedy² and any recourse against an award can be brought only before a tribunal or committee established under the convention, outside the purview of domestic courts.³

Generally, the only involvement of domestic courts in an ICSID Convention arbitration is anticipated at the time of recognition and enforcement of the award

1 The New York Convention was adopted on June 10 1958 and entered into force on June 7 1959. The first tentative draft of the ICSID Convention, the Working Paper in the Form of a Draft Convention, was drawn up in 1962; see *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention*, Vol. II (1968) (hereinafter referred to as *History II*), at 19.

2 Article 26 of the ICSID Convention. Contracting states may, however, require the exhaustion of local remedies as a condition for their consent to arbitration: *ibid.*

3 The post-award remedies in ICSID Convention arbitration cases are: supplementary decisions and rectification (Article 49); interpretation (Article 50); revision (Article 51), and annulment (Article 52).

and in execution proceedings. If the award debtor does not comply with the award, the award creditor may, through a simplified procedure, obtain recognition and enforcement upon presentation of a certified copy of the award to a court or other authority designated under the ICSID Convention.⁴ It may subsequently – usually pursuant to a separate procedure – seek execution of the monetary obligations in the award against the assets of the award debtor in that jurisdiction.⁵ The recognition and enforcement stage offers no possibility of review of the award or its enforceability.⁶ However, the ensuing execution process is governed by the laws of the state where execution is sought, including its laws on immunity from execution. Unless the state party to a dispute has waived such immunity, it may therefore invoke it to protect certain assets.⁷ The obligation to comply with the award remains nevertheless unaffected.

This chapter discusses the origins of the recognition and enforcement regime and provides a summary of the drafting history in respect of each of the articles to explain the purpose and specificities of the provisions.

2. Background to ICSID Convention enforcement mechanism

One of the challenges to the drafting of the ICSID Convention was the creation of a dispute resolution system with parties from different judicial spheres: on the one side, a state (or a constituent subdivision or agency of a state); on the other, a private party (a person or company).⁸ The enforcement mechanism underscores this difficulty, as it addresses legal obligations of different natures. Article 53 imposes an obligation on each of the disputing parties to respect the final and binding nature of the award, and to abide by and comply with it. This obligation is based on the parties' arbitration agreement, which in itself is founded in the principle *pacta sunt servanda* (agreements must be kept).⁹ By contrast, Article 54 on the recognition and enforcement of the award imposes an international treaty obligation on all ICSID contracting states in whose territories recognition and enforcement are sought. Yet these separate obligations were complementary and necessary to establish an effective enforcement mechanism in the ICSID Convention.

The drafting history of the ICSID Convention shows that one of the primary concerns in crafting this mechanism was to create a balance between the rights and obligations of states compared with those of private parties, as well as the rights and

4 See Article 54(2) of the ICSID Convention. The designations of courts or other authorities competent for the recognition and enforcement of awards rendered pursuant to the convention are listed in Doc. ICSID/8-E, available on ICSID's website at www.worldbank.org/icsid.

5 Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration*, Kluwer (2004) at 106.

6 Except that a court may arguably refuse the certification of enforcement of a non-monetary award: *ibid.*

7 ICSID's model clauses of 1993 provided for the possibility to waive enforcement immunity. See Clause 15 of Model Clauses (1993), available at www.worldbank.org/icsid.

8 Jurisdiction under the ICSID Convention extends 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"; see Article 25(1).

9 Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev-FILJ at 289 (1987) (hereinafter referred to as Broches, *Awards Rendered Pursuant to the ICSID Convention*); Note by World Bank General Counsel A Broches, *Settlement of Disputes between Governments and Private Parties* (August 28 1961) at 2.

obligations of a state party to the dispute compared with other ICSID contracting states.¹⁰ There was a concern that other contracting states to the ICSID Convention should be committed to enforcing awards against investors, as balanced with the obligation of each contracting state to comply with an award made against it.¹¹ The drafters also found an imbalance of the positions of the state party to the dispute and that of the investor.¹² The question was how to achieve balance in the system.

Several important developments in the late 1950s aimed to promote arbitration, including the entry into force of the New York Convention and the adoption of the United Nations International Law Commission (ILC) Model Rules on Arbitral Procedure, which apply to state-to-state arbitrations.¹³ However, there were few international instruments which envisaged arbitration proceedings between governments and private parties, and none which also contained enforcement provisions.¹⁴ At the time, the two main international treaties which included a regime for enforcement of foreign arbitral awards were the New York Convention and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards.¹⁵ The very first Working Paper in the form of a Draft [ICSID] Convention¹⁶ therefore suggested that awards rendered under the convention would be granted “the most favorable treatment” given to awards under these treaties or under the laws of each contracting state.¹⁷

Because of dissatisfaction with the Geneva Convention due to its failure to meet the needs of commercial arbitration,¹⁸ the New York Convention became the main source of reference for the drafters of the ICSID Convention although, at the time, its success was not a given.¹⁹ In addition, the technique for enforcing awards was

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- 10 Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10, at 301-302; *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States* (March 18 1965).
- 11 *History II*, *supra* note 2 at 57-53.
- 12 *Ibid* at 825.
- 13 See Antonio A Parra, *The History of ICSID*, Oxford University Press, at 17, fn 47 (2012) (hereinafter referred to as Parra, *The History of ICSID*).
- 14 Two draft conventions – the 1959 Abs-Shawcross Draft Convention and the 1962 Organisation for Economic Cooperation and Development Draft Convention on the Protection of Foreign Property – provided for arbitration procedures between states as well as between states and other parties. In addition, in 1962, the Permanent Court of Arbitration (PCA) issued Rules of Arbitration and Conciliation for Settlement of Investment Disputes between Two Parties of Which Only One is a State. See Parra, *The History of ICSID*, *supra* note 14 at 14-17. The Abs-Shawcross Draft Convention did contain enforcement provisions, but never entered into force. See El Nwogogu, *The Legal Problems of Foreign Investment in Developing Countries*, Oceana Publications Inc at 147 (1965).
- 15 For the New York Convention, see above, note 2. The Geneva Convention is published in *92 League of Nations Treaty Series 302* (1929-1930). It governed the enforcement of awards rendered under the Geneva Protocol on Arbitration Clauses of 1923, the main goal of which was to ensure the validity of arbitration agreements, “whether relating to existing or future disputes”: *27 League of Nations Treaty Series 158* (1924); see also, Robert Briner & Virginia Hamilton, “The History and General Purpose of the Convention: The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards”, in E Gaillard & D Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards*, Cameron May: International Law and Policy at 3-38 (2009).
- 16 *Working Paper in the form of a Draft Convention* prepared by the General Counsel and transmitted to the Executive Directors (June 5 1962) in *History II*, *supra* note 2 at 19-46.
- 17 *Ibid* at 46.
- 18 See Briner & Hamilton, *supra* note 15 at 3-38.
- 19 See comment by Broches in *History II*, *supra* note 2 at 345, observing that the slow progress of ratification of the New York Convention was “due to the conservatism of most lawyers and the lethargic attitude of governments on purely procedural questions”.

inspired by the model contained in Article 192 of the Treaty Establishing the European Economic Community (EEC) (the Treaty of Rome) concerning the enforcement of decisions of the then EEC Council or Commission imposing a pecuniary obligation on non-state parties.²⁰

3. Drafting history of ICSID Convention enforcement provisions

The legislative history of the ICSID Convention involved preparatory work by World Bank staff and executive directors in 1961 and 1962; a series of regional consultative meetings of experts convened by the World Bank in 1963 and 1964; and meetings of a legal committee consisting of representatives of all interested states, held at the end of 1964. Representatives of 61 countries attended the meetings of the legal committee, which subsequently submitted a draft of the ICSID Convention to the executive directors of the World Bank in early 1965. The executive directors approved the final text of the convention on March 18 1965 and submitted it for the consideration of all member governments of the World Bank. It entered into force on October 14 1966, 30 days after the 20th member government had deposited its instrument of ratification. These steps are summarised in *History of the ICSID Convention: Documents Concerning the Origins and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.²¹

The binding force of the award and its enforcement was considered from the beginning of the drafting process, in three notes outlining the possible features of a treaty for discussion by the executive directors of the World Bank.²² A proposed essential aspect of the machinery was the recognition by states of arbitration agreements made with private individuals and corporations as binding international undertakings.²³ The ways in which an arbitral award could be enforced against the investor or the government were also examined.²⁴ In this connection, it was noted that the doctrine of sovereign immunity limited enforcement against a state, but that this did not appear of concern since it was observed that governments had a good record of complying with international arbitral awards.²⁵ The main focus was to remove any doubt as to the binding character of an undertaking to arbitrate.²⁶ The drafters were confident that if there were such an international obligation for the state, the question of enforcement by the state would be 'academic', because states would honour the resulting award.²⁷ On the other hand, investors did not have the

20 Treaty Establishing the European Economic Community, March 25 1957, 298 UNTS 11, Article 192; *History II*, *supra* note 2 at 343.

21 Vol. I-IV (1970), Vol I, 2-10.

22 Note by World Bank General Counsel A Broches, *Settlement of Disputes between Governments and Private Parties* (August 28 1961), *History II*, *supra* note 2 at 1; Note by World Bank President E R Black, *Settlement of Disputes between Governments and Private Parties*, *History II*, *supra* note 2 at 4; and Note by World Bank General Counsel A Broches, *Settlement of Disputes between Governments and Private Parties* (January 19 1962), *History II*, *supra* note 2 at 6.

23 Note by World Bank General Counsel A Broches, *Settlement of Disputes between Governments and Private Parties* (August 28 1961), *History II*, *supra* note 2 at 2-3.

24 Note by World Bank General Counsel A Broches, *Settlement of Disputes between Governments and Private Parties* (January 19 1962), *History II*, *supra* note 2 at 10-11.

25 *History II*, *supra* note 2 at 11.

26 *Ibid.*

27 *Ibid.* at 304.

same obligation anchored in international law, and there was thus a perceived imbalance between a state and a private party as award creditors.²⁸ The enforcement provisions were therefore seen as more of interest to states than to private parties, as means for successful states to enforce awards against investors.²⁹ This belief is prevalent throughout the drafting history of the ICSID Convention.³⁰

Following the initial discussions, it was decided that the general counsel of the World Bank, Aron Broches, should prepare a draft convention with some concrete suggestions for further discussion.³¹ The following discussion reviews the drafting developments from the working paper³² up to the adoption of the final texts.

3.1 Binding force and finality – Article 53

The premise of what ultimately became Article 53 of the ICSID Convention was based on the principles of *pacta sunt servanda* and *res judicata* (a matter adjudged), which in themselves are based on the principle of good faith.³³ While these doctrines were considered part of international customary law, the binding nature of an award had not always been adhered to in state practice, thereby also questioning its *res judicata* effect.³⁴ The main aim of the drafters was therefore to ensure that no party could impair the validity of the award once post-award remedies were exhausted. The drafting history of the ICSID Convention suggests that the final and binding character of the award was never contended, although there was some debate on the timing of compliance with the award.³⁵

The main principles were included from the very beginning in the working paper, modelled on texts from the Hague Convention for the Pacific Settlement of International Disputes of 1907³⁶ and the judgment of the Permanent Court of International Justice in *Socobei*.³⁷ The working paper provided as follows:

Article II, Section 3

*An undertaking to have recourse to arbitration constitutes a legal obligation and must be carried out in good faith. Such an undertaking carries with it the obligation to comply with the arbitral award and carry the same out in good faith...*³⁸

Article VI, Section 10

The award shall be final and binding on the parties. Each party shall abide by and

28 *Ibid.*

29 *Ibid.*

30 Stanimir A Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*, TDM 6(1) at 5-8 (2009).

31 Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10 at 300.

32 *History II*, *supra* note 2, at 19-46.

33 Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10 at 289; Christoph H Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press at 1099 (2009) (hereinafter Schreuer, *The ICSID Convention*).

34 Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10 at 289. See, for example, *Case Concerning a Dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. xxi (1977).

35 Schreuer, *The ICSID Convention*, *supra* note 34 at 1106; *History II*, *supra* note 2 at 340-341 and 271-272.

36 See Article 37: "Recourse to arbitration implies an engagement to submit in good faith to the Award". (*Belgium v Greece*) (1939) PCIJ (ser. A/B) 78 at 175: "Recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of that award are definitive and obligatory." See Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10 at 289.

38 Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors (June 5 1962) in *History II*, *supra* note 2 at 23.

*comply with the award immediately, unless the Arbitral Tribunal shall have allowed a time limit for the carrying out of the award or any part thereof.*³⁹

In the ensuing discussions of the Executive Directors' Committee of the Whole on Settlement of Investment Disputes⁴⁰ held in December 1962, Article II, Section 3 was understood as an obligation between two contracting states, as opposed to an obligation of the parties to the dispute.⁴¹ Broches stated that, as regards the undertaking referred to in Section 3, it was desirable to impose not only an international legal obligation on contracting states, but also an obligation that would be binding on the private party.⁴² The question was how to clarify both obligations in the provision. In addition, there was a certain overlap between the two provisions in Article II and VI.⁴³

The provisions were remodelled in the first preliminary draft.⁴⁴ The preamble recognised the general obligation to carry out an undertaking to arbitrate in good faith and to comply with the award.⁴⁵ In addition, Article VI, Section 14 contained a provision substantially the same as Article VI, Section 10:

*The award shall be final and binding on the parties. Each party shall abide by and comply with the award immediately, unless the Tribunal shall have allowed a time limit for the carrying out of the award or any part thereof, or the enforcement of the award shall have been stayed pursuant to Sections 11, 12 or 13 of this Article.*⁴⁶

The comment to this provision stated that there could be no appeal of the award, but that "where there has been some violation of the fundamental principles of law governing the tribunal's proceedings", a party could apply for annulment of the award before a committee established under the convention.⁴⁷ The comment also noted that the parties to the dispute were required to implement the award forthwith, subject to delay in certain circumstances specified in the provision.⁴⁸

The preliminary draft, which served as the working paper for the regional consultative meetings, contained the same preamble and provision.⁴⁹ The discussions at the meetings focused on whether there should be a grace period for complying with the award in order to consider possible recourse to post-award remedies.⁵⁰ It was suggested that this would avoid difficulties if a party complied with the award and it

39 Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors (June 5 1962) in *History II*, *supra* note 2 at 42.

40 The Committee of the Whole comprised all of the executive directors and held six initial meetings from December 1962 to June 1963 to discuss the working paper. See Parra, *The History of ICSID*, *supra* note 14 at 30-44.

41 *History II*, *supra* note 2 at 54. See Comment by Mr Liefstinck (Netherlands). The Hague Convention of 1907 and *Socobel* considered arbitration agreements between state parties.

42 *History II*, *supra* note 2 at 57.

43 Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10 at 291.

44 First Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Annotated Text (August 9 1963) in *History II*, *supra* note 2 at 133-174.

45 *History II*, *supra* note 2 at 135.

46 *Ibid.* at 161. The following text was added at the end of the provision: "or the enforcement of the award shall have been stayed pursuant to Sections 11, 12 or 13 of this Article."

47 *History II*, *supra* note 2 at 161.

48 *Ibid.*

49 *Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Working Paper for Consultative Meetings of Legal Experts Designated by Governments* (October 15 1963), *History II*, *supra* note 2, pp. 184-235 at 218.

50 Schreuer, *The ICSID Convention*, *supra* note 34 at 1109-1110; *History II*, *supra* note 2 at 271.

was subsequently annulled, and would also “give time to the parties for reflection”.⁵¹ Other delegates were in favour of implementing a grace period with regard to post-award remedies, much like a period allowed for appeal in civil procedure law.⁵²

Broches suggested simplifying Section 14 by requiring compliance with the award “in accordance with the terms thereof”, instead of the reference to immediate compliance “unless the Tribunal shall have allowed a time limit.”⁵³

This change was incorporated in the first draft, which was prepared for consideration by the Committee of Legal Experts established to assist the executive Directors of the World Bank in the drafting process. However, the new Article 56 inadvertently omitted the saving clause which had previously delayed compliance in certain circumstances.⁵⁴ It read as follows:

*The award shall be final and without appeal. Each party shall abide by and comply with the award in accordance with its terms.*⁵⁵

The omission of the saving clause was not discovered until the end of the meetings of the Committee of Legal Experts, but it was noted in the context of post-award remedies that a stay of enforcement of the award also meant a suspension of the obligation to comply with the award.⁵⁶ Broches suggested that the exceptions to recognition and enforcement of an award could be included in Article 56 rather than draft Article 57.⁵⁷ In his view, this would “establish a complete parallelism between the obligation to comply with the award and the possibility of enforcement of that obligation through domestic courts”.⁵⁸ It would also ensure that contracting states and investors would be on an equal footing and clarify when the obligation to comply arose.⁵⁹

Consequently, the draft was amended for the final Committee of Legal Experts meeting in January 1965 to specify that an award could only be subject to the post-award remedies set forth in the convention and that any decision interpreting, revising or annulling the award would be part of the award. The text of Article 56, which also reinserted the previously omitted saving clause with some small changes in wording, provided as follows:

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the award in accordance with its terms, except during any stay of enforcement under the provisions of this Convention.

(2) For the purposes of this Section the term “award” shall include any decisions

51 History II, *supra* note 2 at 271-272. See comment by Mr Bouiti (Congo, Brazzaville).

52 *Ibid* at 340-343.

53 *Ibid* at 519.

54 See Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10 at 292, who explained that this was evident from the comment indicating that the provision corresponded to the previous draft, when in fact it did not.

55 History II, *supra* note 2 at 636.

56 *Ibid* at 847.

57 Draft Article 57(3) and (4) provided that recognition and enforcement could be refused if the award had been annulled, during the stay of enforcement of the award, during the pendency of interpretation, revision or annulment proceedings, and if a court of a contracting state found that it is contrary to public policy. History II, *supra* note 2 at 885.

58 Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10 at 294.

59 History II, *supra* note 2 at 890 and 900.

*interpreting, revising or annulling such award pursuant to Articles 53, 54 or 55 respectively.*⁶⁰

Interestingly, draft Article 57 still contained an exception to enforcement if the award was contrary to public policy, such review being left to domestic courts (discussed below). If this provision remained, it would not have created the perfect parallelism between the obligation to comply and obligation to enforce which the drafters wanted to achieve. However, the public policy exception had been much debated and was voted down during the last meeting of the legal committee.

The text of Article 56 was met with general approval and was adopted in the revised draft⁶¹ and in the final text of the convention as Article 53, with minor changes in wording:

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

This is an extract from the chapter 'The origins and specificities of the ICSID enforcement mechanism' by Ruqiyah B H Musa and Martina Polasek in Enforcement of Investment Treaty Arbitration Awards, published by Globe Law and Business.

⁶⁰ *Ibid* at 899-890.

⁶¹ Broches, *Awards Rendered Pursuant to the ICSID Convention*, *supra* note 10 at 293; *History II*, *supra* note 2 at 927 and 1062.