

## ENFORCEMENT OF INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTE (ICSID) AWARD: THE PLEA OF SOVEREIGN IMMUNITY

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### Abstract

*The outcome of every arbitration process is an award. There are different kinds of award inclusive of ICSID Award. ICSID award has a peculiar and unique method of enforcement and execution so as to prove more effective dispute settlement process. The essence of arbitration award is for the winning party to enjoy the fruit of his or her victory. Consequently, it is pertinent to provide comfortable environment for investors by assuring effective remedies against host-states. As set forth by the ICSID convention, the enforcement of ICSID awards is obligatory for all signatory states and the execution is governed by local law. This brings to the fore whether states can invoke their sovereign immunity laws against the ICSID arbitral awards and how sovereign immunity plea affects the enforcement process. This work argues that sovereign immunity plea does not disrupt the binding nature of enforcement rules. However the enforcement rules of the convention are analyzed in the essay. Also this work examines the effects of sovereign immunity plea an execution phase and the remedies which are available to investors by discussing and studying the relevant articles of the convention in chapter in, section 6 and some cases where sovereign immunity plea were invoked by host state in execution phase. The paper therefore recommends that an investor can include the exemption of the hardship of local or national law at the point of making the arbitration agreement.*

### Introduction

For commercial arbitration parties that contract with states and state-controlled entities and then seek to arbitrate dispute or executive on judgments, an increasingly common problem is the attempt by these state parties to raise the defense of sovereign immunity to challenge the jurisdiction of the arbitral tribunal<sup>1</sup> and or to avoid enforcement of an arbitral award. The difficulties in handling disputes with these sovereign entities are a major concern, especially with the growing prospect of sovereign defaults leading to cross-border disputes. Different countries have attempted to strike a balance between the input policy goal of protecting the rights of those who enter into commercial transaction with states or their entities, and the legitimate interest of sovereign states in preserving their immunity from legal proceedings before foreign courts and arbitration tribunals. During enforcement sovereign immunity exists on two levels namely- jurisdictional and remedial. Arbitrators and courts alike have ruled that a state submission to arbitration evidences an exploit or implicit waiver of sovereign immunity at the jurisdictional level. Consequently, the United States has codified the jurisdictional waiver issue. Such a waiver applies only to immunity from suit and liability in the first instance. Submission to arbitration is not presumed to be a waiver against enforcement of an award, including against assets of the foreign sovereign. This is because most contracts do not waive immunity from enforcement. A party contracting with a foreign state should negotiate for an express waiver of immunity not

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<sup>1</sup> Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries in *mayebrown.com*. Accessed 19\* October 2015 at 5.08pm.

only from suit and liability but from enforcement and execution as well. Failure to do so may hinder enforcement of an arbitral award,

Washington Convention is the brain child of World Bank with the aim of promoting sustainable economic growth and to eradicate poverty in every part of the world. To that effect the Bank constituted a convention on the settlement of investment Dispute between states and nationals of other states. Washington Convention was found in 1965 and it came into force in 1966. Nigeria became a member on the 17<sup>th</sup> of March, 1970. The convention founded international Centre for the Settlement of Investment Disputes (ICSID) to provide a "favorable investment climate"<sup>2</sup>. The purpose of establishing ICSID system was to promote the much-needed international investment by offering or providing a neutral dispute resolution from both to investors that are (rightly or wrongly) worried of nationalistic decisions of local courts and to host-states that are (rightly or wrongly) worried of self-interested actions by foreign investors<sup>3</sup>. The ICSID convention has brought unique enforcement rules for investors-state arbitration to transfer these purposes into practice. The underlying basis of this system is that success of an arbitral process is based on whether the award can be enforced and executed<sup>4</sup>.

According to the ICSID convention, ICSID awards are recognized automatically by all signatory states and enforced by local laws including law sovereign immunity laws. This raises the contention on how ICSID awards can be effective and executor, in spite of sovereign immunity laws. In answer to the above question or problem this paper argues that ICSID provided the most effective arbitral system with automatic recognition and remedies against sovereign immunity plea. It proceeds thus: in the beginning, this work will discuss and analyze the unique nature of ICSID award, ICSID enforcement mechanism. After that, the sovereign immunity issue is argued through the ICSID convention rules and the remedies. Then, how sovereign immunity affects compliance with ICSID awards will be brought to focus with the aid of decided cases. The last part of the work is an overall review of the ICSID cases regarding sovereign immunity and how different countries deal with sovereign immunity question during the enforcement of ICSID awards.

### **The Characteristics or Features of ICSID Awards:**

International Centre for the Settlement of Investment Dispute (ICSID) has its uniqueness and peculiarities. They are as follows:

It has a limited jurisdiction and scope both as to eligible parties and as to the subject matter. In the first place one of the parties in any proceedings made pursuant to ICSID must be a contracting state or any constituent sub-division or agency thereof designated to the center by the

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<sup>2</sup> J.M Cardoso, "Precluding the Treasure Hunt: How the World Bank Group Help investors circumnavigate Sovereign Immunity obstacle to ICSID Awards Execution", *pepperline Law Review* 41, no 1(2013) Accessed October 19<sup>th</sup> 2015 at 9.1Spm.<http://digitalcommons.pepperline.edu/pir/Voll4/ss/3>.

<sup>3</sup> LReed,j. Paulson, and N. Blackaby, "Recognition, Enforcement and Execution of ICSID Awards", in *Guide to ICSID Arbitration*, Kluwer Law International, 2004, P. 4-5.

<sup>4</sup> "M.F, Ghazvi, "Recognition and Enforcement of International Arbitration Awards: A case study of Malaysia and Saudi Arabia, "International Journal of Accounting and Financial Reporting 4, no 2 (2014). Accessed October 19<sup>th</sup> 2015. <http://www.rnacrobthink.org/journal/index.php/ijaf/article/download/6753/59>.

state and the other party must be national of another states<sup>5</sup>. The subject matter of the proceeding must be investment matter<sup>6</sup>.

For arbitration proceedings to commence or be conducted pursuant to ICSID, the parties must have agreed beforehand that the provision of ICSID center shall apply in their matter. Once the parties agreed to ICSID convention as the applicable convention for the settlement of their dispute, the convention shall be applied to the exclusion of all other laws. This autonomous character of ICSID arbitration is clearly stated in article 44 of the convention: any arbitration proceeding shall be conducted in accordance with the provision of this section and except as parties, otherwise agree, in accordance with arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this section or the arbitration Rules or any rules agreed by the parties, the tribunal shall decide the question<sup>7</sup>

By Article 26 of the convention, consent of the parties to arbitration under this convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy<sup>8</sup>. By agreeing to arbitration pursuant to ICSID convention, parties have the assurance that they will take full advantage of the procedural rules specifically adapted to their needs and equally important, that the administration of these rules will be exempted from the scrutiny or control of the domestic courts in states that are parties to the convention<sup>9</sup>. Pursuant to the provision of the convention, national or domestic courts, as the case maybe, shall refrain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration<sup>10</sup>. This implies that if a court in a contracting state becomes aware that a claim pending before it is subject of ICSID convention, it must as a matter of fact refrain from further consideration of the matter and refer all the parties before to ICSID<sup>11</sup>. It is only in the event of an adverse or contrary decision by ICSID, which may entail its Secretary General refusing to register the applicant's request or the tribunal itself holding that it has no jurisdiction in the matter again<sup>12</sup>

### **Recognition and Enforcement Rules of the ICSID Convention**

Parties who go to arbitration for the settlement of their dispute have in mind to enjoy the fruit of their victory especially the successful party. Recognition and enforcement of the award go to show that the awards are binding and final decision on the issues disputed by the parties<sup>13</sup>. Consequently the award acquires res judicata effect through recognition. It means that the

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<sup>5</sup> G.C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2<sup>nd</sup> Edition Enugu Snapp Press Limited 2014) p 241.

<sup>6</sup> A.A. Asouzu, "ICSID Report" cited in *Liogd's Mortime and Commercial Law Quarterly*, 1998,299-303.G.C Nwakoby, *ICSID Arbitration Practice-Plea of Sovereign Immunity*" M.P.J.F11, Vol. 6. No 1-2, 2002) p. 27

<sup>7</sup> ICSID Convention, Article 44

<sup>8</sup> ICSID Convention, Article 26

<sup>9</sup> Convention, Article 42

<sup>10</sup> G.C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2<sup>nd</sup> Edn. Enugu: Snapp Press Ltd 2014)p. 242

<sup>11</sup> *ibid*

<sup>12</sup> *ibid*

<sup>13</sup> L. Reed, J. Paulson, and New Blackaby, *"Recognition, Enforcement and Execution of ICSID Awards"*, In *Guide to ICSID Arbitration*, Kluwer Law International, 2004, P. 4-5.

disputed issues cannot be subject to any court or arbitration proceedings<sup>14</sup>. According to Article 53 of the, ICSID convention, the ICSID awards are binding and final and cannot be subject to any remedy except those provided by the convention<sup>15</sup>. Thus the ICSID convention brings automatic recognition and gives res judicata effect ipso facto. On the other hand, enforcement refers to declaring in an order that an arbitration award is in fact, enforceable. However, in the context of ICSID arbitration, recognition and enforcement generally refers to the same process which is leading up to execution of an award. Article 54 provides that:

*Each contracting state recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligation imposed by that award within its territories as judgment of a court in that state<sup>16</sup>.*

This article shows the greatest strength of the ICSID convention that is even more favorable to recognition and enforcement than the New York convention, because the article nullified the necessity of local court's decision for enforcement. Also, the convention does not allow any refusal grounds for recognition and enforcement by clarifying that awards would be considered as a final judgment. According to Article 54, all state parties to the ICSID convention shall recognize and enforce an ICSID award as if it were a final judgment of a court in that state<sup>17</sup>. Highly usual enforcement obligation is designed to ensure payment if the other party has failed to comply with an award<sup>18</sup>. In the case of non-compliance, the prevailing party can apply to court if a contracting state where the losing party has attachable assets because awards should be recognized and enforced by all contracting states. Also, the party seeking recognition and enforcement of an award has the possibility to select most favorable forum for this purpose<sup>19</sup> another matter about Article 54 is that there is subtle difference between pecuniary and non-pecuniary obligations. Article 54 clearly put down the fact that only monetary obligations can be subjected to automatic recognition and enforcement by all contracting states. The convention does not provide this mechanism for non-pecuniary obligation such as restitution or an obligation to desist from certain action<sup>20</sup>. Indeed, it does not create a great difference because ICSID tribunals have in all cases imposed pecuniary obligation<sup>21</sup>. Therefore, ICSID keep the enforcement mechanism effective by means of implementing monetary obligation. It is an established fact that ICSID convention excludes external invasion of local courts or other authorities. Notwithstanding, the convention establishes that execution of the award shall be governed by local laws. It conjures up whether the law of the country can prevent to abide by the award. Due to the fact that the ICSID convention intended to provide more enforceable system, it eliminates the problem with strict compliance rules. Therefore, obstacles to the enforcement of an ICSID award under the law where execution is sought in no way affect the obligation of the party of the ICSID arbitration to abide by and comply "with the award in accordance with Article

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<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> ICSID Convention, Article 53

<sup>17</sup> Ibid.

<sup>18</sup> Tsi-Yu Lin, *Systematic Reflections on Argentina's Non-compliance with ICSID Arbitral Awards: Enforcement Contemporary Asia Arbitration*. Journal 5, no 1 (2012): p5. Accessed October 19, 2015. <http://papers.ssrn.com/sol3/papers.cfm?abstractid=2115553>.

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Ibid

53(1)<sup>22</sup>. In the same vein, it is a violation to avoid from compliance with an award because of states law. Also the convention brings certain remedies against such noncompliance cases. In addition to article 54(3), article 55 should be examined closely because it is a specification of article 54(3). It states that sovereign immunity laws cannot be derogated from the law of the state where execution is sought. In other words, state immunity will apply to the execution of an ICSID award in the same way as it would apply to execution of a judgment of a domestic court<sup>23</sup>. For this reason, sovereign immunity is examined closely below to reveal its effects on enforcement and execution process.

### **Sovereign Immunity**

This is legal protection that prevents a sovereign state or person from being sued and without consent. Sovereign immunity is a judicial doctrine that prevents the government or its political subdivisions, departments, and agencies from being sued without is consent. The doctrine stems from the ancient English principle that the monarch can do no wrong. In line with this section 308 of the 1999 constitution of the Federal Republic of Nigeria as amended grants immunity to its leaders and provides thus Section 308 of the 1999 constitution of the Federal Republic of Nigeria as amended provides immunity from court proceeding i.e proceeding that will compel their attendance in favour of elected executive officers, namely the President and his Vice, and Governors of the states and their deputies. This immunity extends to acts done in their official capacities so that they are not responsible for acts done in their official capacities so that they are not responsible for acts done on behalf of the state. However, this immunity does not extend to acts done in abuse of the powers of their office of which they are liable upon the expiration of their tenure. It is important to note that the judiciary has absolute immunity for actions and decisions taken in their official capacity.

The National laws and International treaties on state regulate both immunity from jurisdiction and immunity from execution. Sovereign immunity from jurisdiction means a plea against the jurisdiction of the court. To be more precise, it is a protection given to a state from being sued/ in the court of other states. It arises from the notion of sovereign equality of states that a sovereign state cannot be compelled to submit jurisdiction of and be judged by another state. Along the same line, sovereign immunity from execution aims to protect states assets from execution. However, this doctrine has undergone significant changes in recent times when sovereign is taking part in commercial activities, courts soon moved to recognize that once sovereign had entered the market-place, they must be treated like the other merchant. To that end, courts began to make distinction between disputes involving purely governmental conduct for which they granted immunity and disputes arising from commercial transactions for which they did not grant immunity.

The ICSID convention is only interested in immunity from execution because Article 25 explicitly states that contracting states cannot allege sovereign immunity from jurisdiction if they submit the dispute consent in writing. Then article 55 can be implemented on only sovereign immunity from execution. Thus sovereign immunity plea cannot have effect on recognition and enforcement of an ICSID award. In other words, successful reliance on state immunity may still amount to a violation of the convention. In this way, the convention makes possible that awards can still be applicable without any damage to state's immunity law. The ICSID mechanism brings two different remedies to accomplish this purpose. The first remedy -against a non-

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<sup>22</sup> ibid

<sup>23</sup> ibid



compliance with an award because of especially sovereign Immunity is diplomatic protection pursuant to Article 27. This article was right to the Contracting state espousing its nationals' claims directly against losing state. The interference of home state arguably could exercise more pressure on the losing state than the award creditor itself could muster. As an example for that, the U.S.A suspended commercial benefits to Argentina as a result of the pile-up unenforced awards, including ICSID awards in favor of American investors .

The second remedy take place in Article 64 which provides the opportunity to submit a case to the International Court of Justice. According to Article 64, contracting states can bring a suit regarding the interpretation or application of an award before the International Court of Justice (ICJ). Article 64 does not confer jurisdiction on the (ICJ) International Court of Justice to review the discussion of an arbitral tribunal because of article 53 and 54 which have excluded any other authority. The court can only take measures to provide compliance with an ICSID award. According to article 27, investors must rely on their home state to use the remedy in article 64. However, this article has been used by other states. It shows that ICSID mechanism is successful to provide the compliance without having to use this remedy.

As can be seen from above, the convention provides unique enforcement mechanism to apply awards quickly without any prevention from outside. Also, it strengthened the vulnerable points with different remedies, at the same time, the structure of ICSID provided voluntary compliance, so the necessity to apply these remedy is removed. The underlying cause is a state which does not abide by arbitral awards made against it will now prove attractive to foreign investors. Moreover ICSID has close relationship with the World Bank, because the world's Bank president is also the chairman of the ICSID Administrative Council. It implies more pressure for sates intending not to comply especially if they are not financially independent and rely on foreign aids and loans. The last reason is that non- compliance with ICSID award means the breach of an international contract, the ICSID convention. Because of these reasons, states generally comply with ICSID awards. The ICSID practice proves the previous argument because judicial enforcement proceedings have only taken places in five cases. Some of those cases are examined below to clarify how sovereign immunity plea was applied on ICSID awards by different states.

### **Recognition and Enforcement of ICSID Award in Nigeria**

In Nigeria, the Supreme Court is the court designated for the recognition, enforcement and registration of the ICSID arbitral award. The Supreme Court of Nigeria is the highest court of the land. Pursuant to Article 69 of ICSID and section 12 of the 1999 Constitution as amended which requires the domestication of the convention, the Federal Republic of Nigeria enacted the International Centre for Settlement of Investment Disputes Act Cap 120 Laws of the Federation of Nigeria 2004. The commencement date of this Act is 29<sup>th</sup> November 1967.

The International Centre for Settlement of Investment Disputes Act Cap 120 Laws of the Federation of Nigeria 2004, section 1 provides that:

*Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for Settlement of Investment Disputes, a copy of the award duly certified by the Secretary General of the centre aforesaid. If filed in the Supreme Court, by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforced accordingly*

Section 1(2) of Cap 120 provides that the Chief Justice of Nigeria (CIN) shall make or may adopt any rule of court necessary for the enforcement and registration of ICSID award at the

Supreme Court. It seems that the Chief Justice of Nigeria has as at today not made any procedure for the same. One may be tempted to ask, why ICSID award should be registered as a final judgment of the Supreme Court when in reality ICSID award is not a judgment of court. The "Spirit" and purpose of the Act which is to bolster up investors' confidence and to reassure the investors of equal treatment in respect of any award made pursuant to the convention seems to explain why the Nigerian Act is made in this form. The only way to assure investors of equal treatment is to provide for the registration and enforcement of award made by the centre in the Supreme Court of Nigeria<sup>24</sup> Upon the registration of the award at the Supreme Court, the ICSID arbitral award assumes the status of a final judgment of the Supreme Court. For the application for registration of the award, a copy of the award as certified by the Secretary General of ICSID shall be accompanied by a Sworn Statement. The limitation period applicable for the enforcement of award also applies to ICSID award.

The idea of making ICSID award a final judgment of Supreme Court upon its registration is also supported by the provisions of Article 54 of ICSID which provides that:

*Each contracting state shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligation imposed by the award within its territories as if it were a final judgment of a court in that state.*

Though Article 54 has imposed a duty on the contracting state to recognize and enforce an award rendered pursuant to ICSID convention, there is an obstacle which an arbitral award under ICSID may face but this is at the time of execution. The obstacle is the issue of plea of sovereign state immunity. Where an application is filled for the recognition and enforcement of ICSID arbitral award, the national court before which the application is made has only one function to perform and that is the duty to recognize and enforce the award accordingly. The appropriate authority can only raise the issue of plea of sovereign state immunity at the Second stage. These issues were mostly canvassed in *BB v The Government of the People's Republic of Congo*<sup>25</sup> the application for the enforcement of the award in this matter was granted subject to the applicant obtaining prior consent from the court for any measure of execution or safeguarding measure so as to ensure the immunity of sovereign and public assets. The applicant urged the court to amend its order as it went into the second stage which is on execution and by implication exceeded the extent of the application and the requirements of Article 54 of ICSID. The court refused on the premise that it is not possible to ascertain which assets or funds were immune from execution. The applicant on 26<sup>th</sup> June, 1981 appeared against the order on the grounds that the judge at the first instance could only ascertain the authenticity of the award but that the judge had confused two distinct stages, the first relating to the obtaining of an *exequatur* and the second relating to the actual execution of the award. The judge should not have been involved in the second stage. The Court of Appeal was then urged by the applicant to delete that part of order relating to Sovereign Immunity Plea. The Court of Appeal accordingly allowed the appeal and amended the order of the court of first instance<sup>26</sup> The Court of Appeal in its ruling decided thus:

*Article 54 laid down a simplified procedure for obtaining an execution for award rendered within the framework of the convention and limited the function of municipal courts to ensuring that the document before them was a copy of an award properly certified by the Secretary General of ICSID, Article 55 provides that nothing in Article*

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<sup>24</sup> Amazu. A. Asouzu, "Developing and Using Commercial Arbitration and Conciliation in Nigeria, " *Lawyers' Biannual — A Journal of Nigeria and Comparative Law*, Vol.1, No. 1, June 1994, p.2 Nwakaboy Greg Chukwudi, *The Law and of Commercial Arbitration in Nigeria*, 2<sup>nd</sup> Ed, 2014, p. 246.

<sup>25</sup> (1993) ICSID Rep 368 cited in Nwakoby Greg Chukwudi, *Law and Practice of commercial Arbitration in Nigeria*, 2<sup>nd</sup> Ed, p. 248.

<sup>26</sup> *ibid*

*54 was to be construed as limiting the immunity from execution enjoyed by a foreign state. An order granting exequatur from an arbitral award did not however constitute a measure of execution but/ simply a preliminary measure prior to measure of execution; the judge at the first instance had therefore exceeded his competence under Article 54 by becoming involved in examining the question of immunity from execution of a foreign state, which was only relevant at the second stage, during actual execution<sup>27</sup>*

The decision of the Court of Appeal in *BB v. GPRC* rightly decided the effect and implication of the provision of Article 54 & 55. The decision is right in law. In *Senegal v. SOABI*<sup>28</sup> the president of the Paris Tribunal *de grande instance* recognized and in accordance with Article 54 of ICSID Convention, ordered the enforcement of SOABI's award. The Court of Appeal of Paris on appeal quashed the decision of the court of first instance on the ground that recognition and enforcement of the award in France was contrary to public policy because SOABI had not shown that the enforcement of the awards would be made in such a way as not to be in conflict with the immunity from execution of the State of Senegal. With respect, this decision is contrary to the express provisions of Article 54 and 55 of the ICSID Convention. At the first stage of recognition and enforcement the court has no right and jurisdiction to consider the issue of immunity. All that the court at first instance is required to do is to verify the authenticity of the award and order for recognition and enforcement. The plea of sovereign state immunity comes up at the second stage which is the stage of execution of the award. It is only the contracting state party that has the right to raise the plea of Sovereign State Immunity to defeat the execution of the award.

The plea of Sovereign State Immunity is an obstacle in the execution of ICSID arbitral award. The plea is only available to a state party. It is for this reason that one may insist on a waiver of Sovereign State Immunity plea at the time of entering into an ICSID arbitration agreement with a state party. Some scholars have argued that the plea of Sovereign State Immunity cannot be waived as it is often back up by statute<sup>29</sup> with respect, this line of argument seems to be porous and weak. The contracting state has a right to waive its rights to its laws particularly the right to plea of Sovereign State Immunity. The waiver is to demonstrate good faith and good commercial intention and also ensure equality with the private party with whom she is entering into the contract or agreement<sup>29</sup>. In *Liberian Eastern Timber Corporation v the Government of the Republic of Liberia*,<sup>30</sup> the United State District Court on an ex parte motion recognized and enforced an ICSID award made against Liberia. A <sup>TMt</sup> of execution **was** subsequently **issued** sul<sup>^</sup>ect to which the Government of Liberia applied -to the court to vacate the judgment or, in the alternative, to vacate the execution on its property located in the United States under the Foreign Sovereign Immunity Act. It was contended that the execution will violate its immunity from execution. The court decided among other things that it had jurisdiction to decide in the subject matter and that since Liberia was a party to the ICSID Convention, it had waived its immunity from enforcement. The judge held that:

*Liberia, as a signatory to the ICSID Convention, waived its Sovereign Immunity in the United States with respect to the enforcement of any arbitral award entered pursuant to the Convention when it entered into the concession contract with LETCO, with its specific provisions that any dispute hereunder the rules of ICSID and its enforcement of provision hereunder<sup>31</sup>*

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<sup>27</sup> *Ibid* 368 at 371-372.

<sup>28</sup> (1994)2ICSIDRep. 164

<sup>29</sup> Amazu A. Asouzu, "African States and the Enforcement of Arbitral Awards: Some Key Issues" *Arbitration international LCIA* Vol. 15, 1999, p. 35.

<sup>30</sup> Nwakoby Greg Chukwudi, *The Law and Practice of Commercial Arbitration in Nigeria*, 2<sup>nd</sup> Ed, p. 251-252. George Deiaume, "ICSID Arbitration Proceedings" *Berkley Journal of International Law*, Vol. 4, 1986, p. 218 at 228. See also *international Tax & Business Lawyer*, Vol. 4:218

<sup>31</sup> (11994)2 ICSID Rep. 387-388.



Hon. Justice Weinfeld in the case of LETCO refused to vacate the order for recognition and enforcement but granted the application to vacate execution with respect to some of the property of Liberian Government and its assets in United States on a successful plea of sovereign immunity from execution. What could be seen from its decision is the fact that every Contracting State waived her plea of sovereign immunity to 'recognition and enforcement of ICSID arbitral award immediately it assented to the Convention. On the other hand, Sovereign State Immunity plea to execution of ICSID arbitral award is also waiveable if the Contracting State party waived it at the time of entering into ICSID arbitration agreement in the LETCO case, the decision would have definitely been different.

Following the problem of the plea of foreign sovereign immunity by the award debtor on the basis of Article 55 of the Convention, it is advised that a practitioner acting for a foreign private party should endeavor to insist on the inclusion of an explicit clause waiving the applicability of the plea of foreign sovereign immunity in a contract entered with a Contracting State Party. Part of our main focus in this paper is the limit of the national courts in Nigeria in the recognition, enforcement and execution of ICSID arbitral awards. It is also certain that subject to the limitation placed by the provision of Article 55 of ICSID, the national courts have the right and jurisdiction to issue writ of execution for the purposes of bring the award into effect. This is the limit of the jurisdiction of the national courts in Nigeria for no national court has jurisdiction to vary or impeach ICSID award. ICSID Conventional arbitral award can only be annulled, impeached, set aside, or varied at the Centre pursuant to the provisions of Rules 50 to 53 and Article 52 of ICSID. National courts have no role to play in the interpretation, revision, annulment and impeachment of ICSID arbitral award.

### Conclusion

ICSID Convention provides the most effective dispute settlement for issues regarding investment even in the case of sovereign immunity. This system of remedies is exhaustive and self-contained<sup>32</sup>. ICSID awards are binding on the parties and they have a legal obligation to comply. Therefore the award is recognized automatically and they have a *res judicata* effect. Consequently, ICSID awards cannot be subjected to domestic court's decision. It represents a significant improvement over the enforceability of awards under the New York convention<sup>33</sup>.

On the other hand, the execution process is faced with the problem of local laws and this can lead to face with sovereign immunity law. The convention provides obligatory enforcement and other remedies in Article 27 and 64 to overcome sovereign laws. As a result, the ICSID system carries built-in incentives for compliance as well as easily identifiable risks accompanying non-compliance. In effect the system supplies perfect compliance with the awards and accomplished the purpose of providing comfortable investment environment by assuring effective remedies for both investors and states. However, where a party to international arbitration is afraid of enforcement and execution as a result of the hardship of the local or national law, he can raise it at the onset during the arbitration agreement that the sovereign immunity notwithstanding, the enforcement and execution of the award can still be effective.

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<sup>32</sup> B.B. G.P.R.C (1993) ICSID Rep. 368 at 371-372. Amazu A. Asouzu, *Africa States and the Enforcement of Arbitral Awards: Some Key Issues*".

<sup>33</sup> Course on Dispute Settlement International Centre for Investment Dispute". UNCTAD. Accessed 19<sup>th</sup> October 2015.