THE APPLICATION OF 'SOVEREIGN IMMUNITY DOCTRINE' IN INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENTS DISPUTE (ICSID) ARBITRATION*

Abstract
The invocation of sovereign immunity by States had been a recurring event in international commercial arbitration and enforcement of awards arising therefrom. This was also an issue in ICSID arbitration. This work aimed at examining the provisions of ICSID Convention relating to sovereign immunity of a State Party both as it related to immunity from jurisdiction and immunity from execution. The objectives of this work were to identify those challenges encountered in the arbitration of investment disputes involving a State Party under the ICSID Convention as well as the execution of the resulting award and to recommend ways of overcoming the challenges. This work used doctrinal method of data gathering and in effect primary sources of law notably the ICSID Convention, the United Nations Convention on Jurisdictional Immunities of States and Their Property and relevant case laws were consulted. Secondary sources like relevant law textbooks and journal articles were also consulted. This study found that the problem of invocation of sovereign immunity by a State party in ICSID arbitration had been eliminated by the ICSID Convention since the consent of a Contracting State to submit to ICSID arbitration meant an irrevocable waiver of jurisdictional immunity. This work however found that sovereign immunity from execution was still a major challenge in ICSID arbitration as the ICSID Convention preserved the law of Contracting States relating to immunity from execution which might lead to an invocation of sovereign immunity that might defeat an ICSID award at the enforcement stage. The work also found that such invocation of sovereign immunity could trigger the institution of international claim and restoration of diplomatic protection by the Contracting State whose national was an award creditor in favour of such national against the defaulting State party. The work recommended that should any opportunity arise for amendment of the ICSID Convention, the article of the Convention dealing with immunity from execution should be amended and streamlined in line with the relative theory of customary international law on sovereign immunity from execution incorporating the right of a State party to waive its immunity from execution, and also stipulating that the property of a State in use or intended use for commercial purposes in relation to the proceedings should not be exempted from execution.

Keywords: Sovereign Immunity, State, Investment Disputes, International Commercial Agreement, ICSID Convention

Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), otherwise known as the Washington Convention which established the International Centre for Settlement of Investment Disputes (ICSID) is a product of the International Bank for Reconstruction and Development otherwise known as the World Bank. The ICSID Convention was formulated by Executive Directors of the World Bank and later submitted with an accompanying Report to the member governments of the World Bank. Upon the ratification of the Convention, the Convention entered into force on the 14th of October 1966.[1] The purpose of ICSID is to provide facilities for the settlement of investment disputes between Contracting States and the nationals of other Contracting States through the means of conciliation and arbitration.[2] The ICSID Convention also preserves the immunity of a Contracting States or that of any foreign State from execution.[3] This is based on the Report of the Executive Directors on the Convention that stated among other things that 'The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought.'[4] This is basically hinged on the rule of customary international law deriving from the principle of sovereign equality of states.[5]

The issue of sovereign immunity is a major challenge in the enforcement of international commercial arbitration process and award against a State Party in an ICSID arbitration process. What are those difficulties encountered in the execution of arbitral award against a State Party under the ICSID Convention? What improvements can be made on the relevant laws to address them? In what ways can those challenges be overcome in practical terms?

The aim of this study is to examine the provisions of the ICSID Convention on sovereign immunity *vis-a-vis* the rules of customary international law. The objectives of this study are to identify those difficulties encountered in the enforcement of ICSID award against a State Party and to make recommendations on how to overcome those challenges. The study

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[1]See the Introduction to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1966
[2] The ICSID Convention, Article 1(2)
[3]Ibid Article 55
[4]See the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals o Other States, International Bank for Reconstruction and Development, March 18, 1965, Article 43
[5]Malcolm N. Shaw, *International Law* (7th edn, Cambridge: Cambridge University Press 2014) 509; see also *Germany v Italy* ICJ Reports 2012 Pp. 99, 123*; Jones v United Kingdom*, European Court of Human Rights, Judgment of 14th January 2014, p.49.

adopts the doctrinal method of legal research by gathering data through the primary sources of law, notably the ICSID Convention, the Vienna Convention on the Law of Treaties, the United Nations Convention on Jurisdictional Immunities of State and Their Property and case law, as well as secondary sources like relevant law textbooks and journal articles. This study is significant as it has delved into the critical issues of sovereign immunity in international commercial arbitration particularly as it relates to ICSID arbitration. It also recommends ways of overcoming the challenges in practical terms.

2. Conceptual Framework

Investment

The ICSID Convention itself does not define the word 'investment.' This now leaves it to the realm of judicial interpretation. The Vienna Convention on the Law of Treaties enjoins courts and panels to interpret treaties in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[6] What may be regarded as the *locus classicus* case on the interpretation of 'investment' is the case of *Salini et al v Morocco,*[7] where a four-pronged test was introduced to determine whether an investment has been made and they are as follows: a contribution of money or assets; a certain duration over which the project was to be implemented; an element of risk; and a contribution to the host's economy. The tests introduced in the *Salini's* case have been adopted in a number of cases.[8] There is however the tendency exhibited by some later cases to remove the fourth test dealing with contribution to the host's economy.[9] Other cases on the other hand added the *'bona fide'* test to the *Salini's* case.[10] The significance of the definition of investment is underscored by the fact that for an ICSID panel to assume jurisdiction under the ICSID Convention, it has to be first determined that the matter is an investment dispute as the ICSID Convention does not open its doors to all manner of disputes. Basically, the *Salini's* test and the further test of good faith are based on the principles enunciated in the Vienna Convention on the Law of Treaties so as to give effect to the ordinary meaning of the word 'investment.' It is also necessary to retain that interpretation as that creates a reasonable level of certainty in the law, forming the basis for precedence.

National of another Contracting State

Article 25(2) of the ICSID Convention defines 'National of another Contracting State' as follows:

(a) Any natural person who 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 as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36 but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) Any juridical person which had the nationality of a Contracting State other 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.

The above shows that the term 'National of another Contracting State' has two arms, that is, a natural and a juridical person. In the case of a natural person, the person must be the national of a Contracting State other than the State party as at the date parties consented to submit the dispute for conciliation or arbitration and on the date on which the request was registered in accordance with the ICSID Convention. A natural person also does not include any person who on either date also had the nationality of the Contracting State party to the dispute.

On the other hand, for a juridical person to qualify as a 'National of Another Contracting State', such a juridical person must have the nationality of a Contracting State other than a State party on the date on which the parties consented to submit such dispute to conciliation or arbitration. Another category of the juridical person that qualifies as National of Another Contracting State is a juridical person which had the nationality of the Contracting State party to the dispute on that same 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. What this means is that if the parties in their agreement agree that a particular juridical person who has the nationality of the Contracting State party to the dispute on the date which the parties consented to submit their dispute to conciliate and arbitration should be treated as a national of another Contracting State, such a juridical person qualifies as a national of another Contracting State.

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[6]Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S.331, Articles 31

[7] ICSID Case No ARB/00/4, Decision on Jurisdiction, 52 (July 23, 2001) 42 I.L.M 607 (2003)

[8]See *Joy Mining Machinery v the Arab Republic of Egypt*, ICSID Case No ARB/03/11, Decision on Jurisdiction, 53 (July 23, 2001) 19 ICSID Rev 486 (Aug. 6, 2004*).; Jan de Nul N.V.V Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction 91 (June 16 2006)

[9]See *Saba Fakes v The Republic of Turkey*, ICSID Case No ARB/07/20, Award 110 (July 14, 2010); *Victor Pey Casedo and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Award 232 (May 8, 2008)

[10] See *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, (April 15, 2009)

It is only when the ICSID panel is satisfied that the parties before it are such as envisaged or defined in Article 25 of the ICSID Convention that it can assume jurisdiction. From the foregoing therefore, it is obvious that ICSID arbitration or conciliation facilities are only generally open to investment disputes between State parties to the ICSID Convention, and the natural and juridical persons within the Contracting States other than State parties.

Contracting State

The Vienna Convention on the Law of Treaties defines a 'Contracting State' as a 'State which has consented to be bound by the treaty, whether or not the treaty has entered into force.' The Contracting States under ICSID Convention are therefore those States that have ratified, accepted and approved the ICSID Convention whether before or after the coming into force of the ICSID Convention.[11] So it is only after the ICSID Convention has been ratified, accepted and approved by a State that it can be said to be binding on the State, whether the Convention has come into force or not. The Convention shall come into force for each State 30 days after the date of the deposit of its instrument of ratification, acceptance and approval.[12] States that are qualified to sign the ICSID Convention are: (i) State members of the World Bank; and (ii) Any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council has invited to sign the Convention by a vote of two-thirds of the members.[13]

State

For the purposes of sovereign immunity, Article 2 (1) (b) of the United Nations Convention on Jurisdictional Immunities of States and Their Property defines 'State' as follows:

(i) The State and its various organs of government
(ii) Constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
(iii) Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;
(iv) Representatives of the State acting in that capacity.

Even though the United Nations Convention on Jurisdictional Immunities of States and Their Property is yet to come into force, it represents a codification of the rules of customary international law on State immunity and as Lord Sumption aptly observed, 'so far as it seeks to codify existing customary international law, it is evidence of what the law is'[14]

3. Theories of Sovereign Immunity

There are two theories of sovereign immunity under customary international law. They are the theory of absolute immunity and the theory of restrictive immunity.

Theory of Absolute Immunity

Shaw[15] stated: 'The relatively uncomplicated role of the sovereign and government in the eighteen and nineteenth centuries logically gave rise to the concept of absolute immunity, whereby the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances'. The theory of absolute immunity therefore asserts that under no circumstances will the act of a sovereign State be subjected to the legal authorities of another State. This is anchored on the concept that all States are equal. This found expression in the Latin maxim, *'par in parem non habet imperium,'* meaning that an equal cannot have authority over his equal. However as the activities of States began to grow, marked by expansive forays of States into international commercial activities, the doctrine of absolute immunity of States became untenable as that offered undue advantage to States in their dealings with private investors. It even discouraged private investors from going into transactions with State parties for fear of immunity. Consequently, the theory of restrictive immunity of States began to take root.

Theory of Restrictive Immunity

The theory of restrictive immunity provides a limit to absolute immunity of States by making exceptions to commercial activities of a State that can be classified as *acta jure gestionis* (act of a private or commercial character). By restrictive immunity, only *acta jure imperii* (government or sovereign acts) are covered by immunity. Though yet to come into force, Article 10 of the United Nations Convention on Jurisdictional Immunities of States and Their Property provides: If a State engages in a commercial transaction with a foreign natural or juridical person and by virtue of the applicable rules of private international law differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction'. The

[11]*Op cit* Vienna Convention on the Law of Treaties, note 6 Article 2
[12]The ICSID Convention Article 68(2)
[13]*Ibid* Article 67
[14]See *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* (2017) UKSC 62
[15]*Op cit* Shaw, note 5, P.509

above represents a codification of the customary international law rule of restrictive immunity of State whereby the immunity of a State can be held inapplicable to *acta jure gestionis* of a State.

4. Application of Sovereign Immunity under the ICSID Convention

One major concern with regard to the arbitration of investment dispute involving a State party under the ICSID Convention and the execution of an award obtained against the State party is the doctrine of sovereign immunity. This will be discussed under two sub-headings, namely, immunity from ICSID arbitration and immunity from the enforcement of any resulting award against the State

Immunity from ICSID Arbitration

One notable feature of the ICSID Convention is the binding character of ICSID arbitration. Under the ICSID Convention, once a party consents to ICSID arbitration, it can no longer unilaterally withdraw from it. The last leg of Article 25(1) of the ICSID Convention states that 'When the parties have given their consent, no party may withdraw its consent unilaterally.'[16] Going by this provision, on the part of the State, once the State consents to ICSID arbitration, such consent constitutes an irrevocable waiver of immunity from ICSID arbitration. In exchange, the State party is assured of protection from any action of an investor in a municipal court by the rule of judicial abstention. The rule of judicial abstention is codified in Article 26 of the ICSID Convention which states that '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.' Furthermore, under Article 26 of the ICSID Convention, the Contracting State may insist on the exhaustion of all the available 'local administrative or judicial remedies' before consenting to ICSID arbitration. In this context, once a State party has clearly consented to ICSID arbitration, the possibility of the invocation of sovereign immunity does not arise because it is bound under the ICSID Convention to participate in the proceedings to the end.[17] The situation, however, is not the same at the enforcement stage and this poses some problems. This will be discussed anon.

Immunity from Execution

As indicated earlier, enforcing judgment against a State party in terms of the actual attachment of the property of a State presents a different challenge in ICSID arbitration. Two scenarios are envisaged and provided for under the ICSID Convention and these are provisional measures in terms of pre-award attachment and post-award execution. For pre-award attachment, Article 47 of the ICSID Convention provides as follows: 'Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.' Thus, under the ICSID Convention, the only interim measure of attachment which the parties are entitled to, are those recommended by the Tribunal except the parties otherwise agreed in their arbitration agreement. So for the parties to be able to exercise the right of pre-award measures of attachment, they must expressly state so in their arbitration agreement, otherwise they will be only entitled to those recommended by the Tribunal in the course of the arbitral proceedings. For post-award attachment, there are primarily two competing provisions of the ICSID Convention and they are Article 54(1) and Article 55. Article 54(1) of the ICSID Convention provides as follows: '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'. By this, Contracting States are enjoined to recognise and enforce an ICSID award. By section 54 (3), execution of an ICSID award shall be governed by the law regulating execution in the State where execution is sought. The above provisions compel a Contracting State to give effect to a seamless enforcement of an ICSID award. In contrast, Article 55 provides that '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'.

The issue of immunity from execution (post-award execution) has been regulated in some conventions and domestic legislations of some States. For example, the European Convention on State Immunities provides that 'No measure of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.'[18] Similarly, Article 19 of the United Nations Convention of Jurisdictional Immunities provides as follows: 'No post-judgment measure of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:
(i) By international agreement;
(ii) By an arbitration agreement or in a written contract; or
(iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceedings; or

[16] See *Spp v Arab Republic of Egypt* (1983) 22 ILM 752; see also *AAPL v Sri Lanka* (1991) 6 (5) Int. Arb Report 1
[17] *Ibid*
[18] European Convention on State Immunity, European Treaty Series No 74, Basle 16 v. 1972, Article 23.

(c) It has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against the property that has a connection with the entity against which the proceedings was directed.

So uncharacteristically, at the point of execution of an ICSID award, the domestic law of the State where the execution is sought will have a role to play, but only as it relates to execution. Some States like the United States of America and the United Kingdom have both enacted legislations on immunity of States and in their laws, properties of a sovereign State are generally immune from execution except generally where such immunity is waived by written consent, where the property is use or intended use for commercial purposes in relation to that particular proceedings.[19]. However, property in use for or intended for use for commercial purposes does not include State's Central Bank or other monetary authority.[20]

From the above, it is clear that a distinction has been drawn between properties of a State used for sovereign purposes and properties of a State used for commercial purposes. While properties of a State used for sovereign purposes are immune from execution, properties of State used for commercial purposes are not so immune. Besides, States can waive their immunities in writing. Waiver of immunity by a State can never be inferred. In the *Philippines Embassy* case,[21] the West Germany Federal Constitutional Court stated as follows:

> Forced execution of judgment by the States of the forum under a writ of execution against a foreign State which has been issued in respect of non-sovereign acts…of that State, or property of that State which is present or situated in the territory of the State of the forum, is inadmissible without the consent of the foreign State if ….such property serves purposes of the foreign State.

In *Alcom v Republic of Colombia*,[22] the United Kingdom House of Lords upheld the general rule of international rule on immunity of sovereign act of a State *visa vis* the State Immunity Act and held that 'the bank account of a diplomatic mission did not fall within section 13(4) exception relating to commercial purposes unless the bank account was earmarked by the foreign State… solely for being drawn on to settle liabilities incurred in commercial transaction'.[23] One notable case on the extent of the operation of sovereign immunity is the case of *Germany v Italy (Greece intervening)*[24] which was decided by the International Court of Justice (ICJ) in 2012. In 2008, Germany filed an application against Italy before the ICJ contending that 'in recent years, Italian Judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a Sovereign State.' The background to this was that between 2004 and 2008, Italian courts gave a number of judgments awarding damages against Germany in favour of victims of war crimes and crimes against humanity committed by the German Reich during the World War II. Germany formulated a three-pronged claim against Italy as follows:

i. Italy breached international law by permitting civil claims to be brought against it in the Italian courts for war crimes committed by the German armed forces during World War II;
ii. Italy violated its sovereign immunity by taking measures of constraint against a German property situated in Italy; and
iii. Italy violated its sovereign immunity by declaring enforceable a Greek judgment rendered against Germany concerning similar acts.

The ICJ found for Germany in all these three grounds and held that Italy had violated Germany's immunity both from jurisdiction and from enforcement. The ICJ held that Germany was entitled to sovereign immunity under customary international law in respect of acts committed by its armed forces during the World War II as those were sovereign acts (*acta jure imperii*). The ICJ further held that even in cases where it could be said that the courts of one State had jurisdiction over another State due to waiver of immunity by one State that did not automatically translate to waiver of immunity against enforcement. The decision of the ICJ on this case is perfectly in line with the rules of customary international law on sovereign immunity as discussed earlier. Such rule cloths a sovereign State not only with immunity from the jurisdiction of another State for sovereign acts of the former except when it is waived, but also with immunity from enforcement. The judgment of the ICJ in *Germany v Italy* must be distinguished from claim of immunity by State officials that violated international criminal norms. Such State officials will not enjoy any kind of immunity.[25]

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[19]See United States' Foreign Sovereign Immunities Act 1976, sections 1609 and 1610 (a) (1) & (2); the United Kingdom's State Immunity Act, Section 13 (2) (3) & (4)

[20]See the United Kingdom's Act *ibid*, section 14(4); the United Sates Act *ibid, section* 1611; See also *Koo Golden East v Bank of Nova Scotia* (2008) QB717;

[21]See UN Materials, P. 297; 65 ILR, Pp.146, 150

[22](1984) 2 ALL ER, 74 ILR p.180; See also C. Ryngaert, 'Embassy Bank Accounts and State Immunity from Execution', 26 LJIL, 2013, P. 73

[23]See also *Banamar v Embassy of the Democratic and Popular Republic of Algeria* 84 AJIL, 1990; 87 ILR p.56; *Libya v Rossbeton* SRL, 87 ILR p.63; *Abbott v South Africa* 113 ILR Pp.411, 423-4. *Leasing West GMBH v Algeria* 116 ILR, p.526

[24]ICGJ (ICJ 2012), 3rd February 2012

[25] See *Jones v Saudi Arabia* (2007) 1 AC 270; *The Pinochet Case* No 3 (2003)1 AC147

Nigeria is yet to enact a legislation on State immunity. Incidentally some decisions of Nigerian courts on sovereign immunity tend to uphold the sovereign immunity which is no longer the global trend[26] The provisions of most of the domestic legislations on State immunity (for States like the United States, the United Kingdom, the Republic of South Africa, Singapore, Australia and Pakistan[27] that have such legislations) and the rules of customary international law on State immunity are largely the same and they are based on restrictive immunity theory. Such is also the case with the United Nations Convention on Jurisdictional Immunities of States and Their Property as well as the European Convention of State Immunity. In *Alcom Ltd v Republic of Colombia*,[28] the House of Lords accepted that the general rule in international law was not overturned in the State Immunity Act of the United Kingdom. So the general rule under customary international law is that all properties of a State that are used for sovereign purposes or function are immune from attachment or execution while those used for commercial purposes are not so immune. A State however still reserves the right to waive its immunity against execution. Beyond this, a State party that has decided not to comply with an ICSID award but rather seeks to invoke its immunity at the enforcement stage risks incurring repercussions. Under Article 27 of the ICSID Convention, the Contracting States covenanted not to give any diplomatic protection or bring any international claim for its national in the event of any dispute that is subject to ICSID arbitration unless the State party fails to abide by the ICSID award. This right of a Contracting State whose national is an award creditor to give diplomatic protection or bring international claim may be restored by such Contracting State in the event of the failure of the State party to comply with the award. By this, the Contracting State whose national is an award creditor may provide diplomatic protection for the national and in addition bring an international claim against the defaulting State (award debtor) in the International Court of Justice pursuant to Article 64 of the ICSID Convention for violation of treaty obligations by the State party. This may expose the defaulting State party to international sanctions and deprive such a State of credibility in international community

Perhaps for the above reasons, there is relatively a higher degree of State participation in ICSID proceedings. As Delaume[29] observed, 'the theoretically troublesome issue of immunity from execution, which has been the object of much scholarly discussion and regret, loses a great deal of practical significance.' The optimism expressed by Delaume may not indeed always be the case as a few instances of failure to abide by ICSID award have been recorded[30]. In *AIG Capital Partners Inc v Kazakhstan*[31], an investor sought to enforce cash and securities held in the United Kingdom which were part of the national fund of a foreign State held with a financial institution (AAMSS) based on a custody agreement between the financial institution and the National Bank of Kazakhstan. This was based on an ICSID award obtained against the Republic of Kazakstan. The State of Kazakhstan applied that the order be discharged on the ground, inter alia, that the assets held by the financial institution were the property of the central bank and that the property was not used for commercial purposes and therefore immune under the State Immunity Act of the United Kingdom. The court held that the assets held by AAMGS on behalf of the National Bank of Kazakhstan were 'property of Central Bank', i.e., property of the National Bank of Kazakhstan within the meaning of section 14(4) of the United Kingdom State Immunity Act and are therefore immune from the enforcement jurisdiction of the United Kingdom Courts. On the other hand, the court held that even if the assets were not the property of the National Bank of Kazakhstan within the meaning of section 14(4), they would constitute 'the property of a state under section 13(2)b and 13(4) of the State Immunity Act and that the assets were not at any time either in use or intended for use for 'commercial purposes.' On that note equally, the court held that they were still immune from the enforcement jurisdiction of the United Kingdom Court under section 13(2) (b) of the State Immunity Act. Accordingly the charging order was dismissed. As such, the issue of immunity from execution constitutes the only notable instance where domestic courts can be of relevance under the ICSID Convention and that is when applying the law on immunity from execution either as provided in the domestic law or from the rules of customary international law. This can become an Achilles' heels for the enforcement ICSID awards as States have different laws regulating immunity from execution with some even still applying the absolute immunity doctrine. For instance, in *Democratic Republic of the Congo v FG Hemisphere Associates LLC* (No. 1) the Hong Kong's Court of Final Appeal, following the doctrine applicable in its parent State, ie the People's Republic of China, applied the absolute immunity theory to refuse the enforcement of two International Chamber of Commerce (ICC) arbitration awards in Hong Kong.[32] Therefore, the issue of sovereign immunity from execution which the ICSID Convention preserves needs to be addressed should an occasion for the amendment of ICSID Convention ever arise and the preferred solution will be to adopt the restrictive immunity which will preserve the right of a State to waive its immunity from execution. Furthermore, it should also be provided in the ICSID Convention that the property of a State in use or intended for use for commercial transactions in relation to the proceedings should not be immune from execution, in line with the restrictive theory.

[26]See *African Reinsurance Corporation v Fantaye* (1986) LPELR- 214 (SC); *John Grisby v Jubwe*, 14 WACA 637

[27]See also South Africa's Foreign States Immunities Act 1981; Singapore's State Immunity Act 1979, Australia's Foreign States Immunities Act 1985; and Pakistan's State Immunity Ordinance 1981

[28] (1984) 2 ALLER 6; 74 ILR, p.180

[29]Georges R Delaume, 'Sovereign Immunity and Transnational Arbitration' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration*, (Springer- Science + Business Media B.V. 1887) 322

[30] Few other cases that have witnessed instances of non-compliance with ICSID awards are *SARL Benvenuti & Bonfant (B&B) v People's Republic of Congo*, ICSID Case No. ARB/77/2; *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, ICSID Case No. ARB/83/2; *Societe Quest Africaine des Betons Industriels (SOABI) v Senegal*, ICSID Case No. ARB/82/1

[31](2006) WLR 1420 (2006) 1 WLR 1420, (2005) EWHC 2239 (comm)

[32](2011) 14 HKCFAR 95

4. Conclusion and Recommendations

This article discussed the provisions of the ICSID Convention relating to consent of a State to submit to ICSID arbitration and its effect. The right of a State to regulate State immunity from execution through domestic laws under the ICSID Convention was also discussed. Theories of State immunity were also discussed, that is, the theory of absolute immunity and the theory of restrictive immunity. This work also noted the distinction between those acts of a State over which it can claim immunity which are classified as sovereign acts (*acta jure imperii*) and those acts over which the State cannot claim immunity classified as non-sovereign acts like the commercial acts of a State (*acta jure gestionis*). Also this work examined waiver of immunity by a State. It was found that ICSID Convention has preserved the right of States to regulate State immunity from execution which might lead to an invocation of sovereign immunity that might defeat an ICSID award at the enforcement stage. The work also found that such invocation of sovereign immunity could trigger the institution of international claim and restoration of diplomatic protection by the Contracting State whose national was an award creditor in favour of such national against the defaulting State party. It was also found that under the ICSID Convention, consent of a State to submit to ICSID arbitration amounts to waiver of immunity but this does not imply waiver of immunity from execution. This work notably found that the failure of the ICSID Convention to adopt a defined rule on State immunity from execution of ICSID award but rather leaving it to the domestic laws of various States could pose a serious problem during execution of ICSID award as States do not have uniform law on State immunity from execution.

It is recommended that should there be an occasion for the amendment of ICSID Convention, the most preferable solution to guide against possible defeat of an ICSID award at the point of enforcement is to adopt the restrictive immunity doctrine in the ICSID Convention to provide that not only can a State have the right to waive its immunity from execution, but also that even if when a State has not expressly waived its immunity from execution, its property in use or intended for use for commercial transactions in relation to the proceeding should not be immune from execution in an award arising from that proceeding. Private investors when entering into an ICSID arbitration agreement with a State (Contracting State party) under the ICSID Convention are also advised to insist on the insertion of certain safeguards clauses to defeat a possible invocation of immunity by the State party at the enforcement stage. These safeguard clauses should include: (i) Written waiver of immunity by the Contracting State against pre-award and post-award execution or measures of constraint and attachment, and (ii) Insistence that the State party should earmark a specific property for the satisfaction of any award that may be given against it.