Some Recent Decisions in ICSID Cases

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THE TEXTS OF THE AWARD AND THE DISSENTING OPINION rendered in the ICSID arbitration case of *Asian Agricultural Products Ltd. (AAPL)* v. *Republic of Sri Lanka* are published in this issue with the consent of the parties at pages 526 and 574 respectively. Also included in this issue is the decision of the French Court of Cassation in the *Société Ouest Africaine des Bétons Industriels (SOABI)* v. *Republic of Senegal* case, which involved another ICSID award. The *SOABI* v. *Senegal* decision is reproduced at page 598 below. The following discusses briefly some of the main issues raised in these cases.

A. The AAPL v. Sri Lanka Award

The dispute between AAPL, a Hong Kong corporation, and Sri Lanka[1] arose out of the destruction in Sri Lanka of the main shrimp producing farm of Serendib Seafoods Ltd. (Serendib), a Sri Lankan company in which AAPL was a shareholder. The destruction occurred during a counter-insurgency operation undertaken by governmental security forces against Tamil rebels on January 28, 1987. Following unsuccessful efforts to reach an amicable settlement, the dispute was submitted by AAPL to ICSID. AAPL appointed Professor Berthold Goldman as arbitrator and Sri Lanka appointed Dr. Samuel K. B. Asante. Dr. Ahmed El-Kosheri was appointed as President of the arbitral tribunal by the Chairman of the ICSID Administrative Council. Dr. El-Kosheri and Professor Goldman signed in June 1990 the majority award while Dr. Asante filed the dissenting opinion.

One point of interest in the *AAPL* v. *Sri Lanka* case concerns consent to jurisdiction. Hitherto, in the overwhelming majority of ICSID cases, consent to ICSID jurisdiction has resulted from arbitration clauses contained in investment agreements

[1] ICSID Case No. ARB/87/3.

concluded between the foreign investor and the host State. ICSID jurisdiction has also been founded on investment legislation promulgated by the host State.[2]

The *AAPL* v. *Sri Lanka* case is the first ICSID case in which the jurisdiction of a tribunal has been based on consent expressed in a bilateral investment treaty, namely the February 13, 1980 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sri Lanka for the Promotion and Protection of Investments, Article 8(1) of which provides:

> Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

Many bilateral investment treaties contain similar provisions. They establish[3] the unconditional consent of each contracting State to submit investment disputes to conciliation and/or arbitration before ICSID upon a request from an investor who is a national of the other contracting State. This interpretation seems to have been accepted by the parties, the majority award and the dissenting opinion.

The majority award and the dissenting opinion however reached conflicting conclusions with regard to applicable law, although both relied on Article 42(1) of the ICSID Convention[4] as the starting point. The majority pointed out that the parties (i.e. the investor and the host State) had had no opportunity to exercise the prior choice of law referred to in the first sentence of Article 42(1) of the ICSID Convention, due to the fact that the case was instituted on the basis of a bilateral investment treaty concluded between the State of the investor and the host State. In the absence of any choice of law by the parties, the award ruled that

> [T]he choice-of-law process would normally materialize after the emergence of the dispute, by observing and construing the conduct of the Parties throughout the arbitration proceedings.[5]

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[2] *See* Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), 16 Y. B. Com. Arb. 28 (1991).

[3] Broches, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, in The Art of Arbitration: Liber Amicorum Pieter Sanders 63, 66-67 (J. Schultsz & A. J. van den Berg eds. 1982); Delaume, ICSID and Bilateral Investment Treaties, 2 News from ICSID, No. 1, at 12, 13-14 (1985).

[4] Article 42(1) of the ICSID Convention provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

[5] Award of June 27, 1990, at para. 20.

Based on the conduct of the parties, the majority award drew the conclusion that the provisions of the Sri Lanka/U.K. Agreement were to be considered "the primary source of the applicable legal rules."[6] Noting that the bilateral investment treaty was not a self-contained legal system, the award deduced from the submissions of both parties their agreement to consider as a supplementary source of the applicable legal rules (i) general customary international law, (ii) other specific international rules rendered applicable in implementation of the most-favored-nation clause contained in the bilateral investment treaty, and (iii) Sri Lankan domestic legal rules.[7]

The dissenting arbitrator did not concur with the majority's finding on applicable law. Noting at the outset that jurisdictional issues ought to be distinguished from issues concerning applicable law[8] and that, in addition, AAPL (the investor) was not a party to the Sri Lanka/U.K. treaty,[9] the dissenting arbitrator took issue with the decision that the bilateral investment treaty was the primary source of applicable legal rules and maintained that the parties had not agreed on the rules of law applicable to the dispute.[10] As a result, the second sentence of Article 42(1) of the ICSID Convention had to be brought into play. On the basis of that alternative, the dissenting arbitrator concluded that Sri Lankan law (into which the provisions of the bilateral investment treaty were incorporated by virtue of Article 157 of the Constitution of Sri Lanka) should be the main source of law together with "such rules of international law as may be applicable."[11]

The dissenting arbitrator's reasoning is reminiscent of the conclusion reached by the tribunal in the *Aminoil* v. *Kuwait* award.[12] There, the arbitral tribunal started by holding that the host country's domestic legal system was the applicable law.[13] Then, the tribunal envisaged a certain role for the general principles of law, a source of international law, as provided for by the host country's law itself.[14] The tribunal concluded that the different sources of law thus applicable were not in contradiction since

> [I]nternational law constitutes an integral part of the law of Kuwait ... [and] the general principles of law correspondingly recognize the rights of the State in its capacity of supreme protector of the general interest.[15]

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[6] *Id.*

[7] *Id.* at paras. 21-22 and 24.

[8] *See* Dissenting Opinion of June 15, 1990, at 576.

[9] *Id.*

[10] *Id.* at 577.

[11] *Id.* at 577-78.

[12] Government of the State of Kuwait v. American Independent Oil Company (Aminoil), Award of March 24, 1982, 21 ILM 976 (1982). For additional references to the award and to the literature related to it, see Ziadé, References on State Contracts, 3 ICSID Rev.—FILJ 212 (1988).

[13] Award of March 24, 1982, 21 ILM 1000.

[14] *Id.*

[15] *Id.* at 1001.

With respect to the approach taken by the majority award, it has been argued[16] that parties may, in view of the consensual character of ICSID proceedings, use their autonomy to make an *ex post facto* selection of applicable law (*contrat de choix*) even in the course of the proceedings. A *contrat de choix* was indeed made in one prior ICSID proceeding, the *S.A.R.L. Benvenuti & Bonfant* v. *Government of the People's Republic of the Congo* case.[17] In that case, the tribunal affirmed its power to rule *ex aequo et bono* on the basis of an agreement reached between the parties during the proceedings.[18] The *contrat de choix* theory had also been used in a non-ICSID arbitral case, the *Alsing* v. *Greek State* case.[19] There, the initial agreement concluded between the Greek State and the foreign companies did not contain an applicable law stipulation. The plaintiff companies however accepted during the proceedings that the case be judged according to Greek law, as requested by the defendant State, and the umpire upheld their choice.

Having found that the Sri Lanka/U.K. treaty provisions constituted the "primary source of the applicable legal rules," the majority award examined which provisions of the treaty were relevant to the dispute. In this respect, the majority award described the path which it followed in the following words:

> [T]he relevant provisions of the Sri Lanka/U.K. Bilateral Investment Treaty have to be identified, each provision construed separately, examined within the global context of the Treaty, in order to determine the proper interpretation of each text, as well as its scope of application in relation to the other treaty provisions and with regard to the various general rules and principles of international law not specifically referred to in the Treaty itself.[20]

Article 2(2) and Article 4 of the Sri Lanka/U.K. Treaty were closely examined both in the award and the dissenting opinion. Article 2(2) of the treaty provides:

> Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party

[16] Delaume, ICSID Tribunal Determines that Parties Could and Did Make a Valid Belated Choice of Law, 6 News & Notes from Inst. for Transnat'l Arb., No. 4, at 1 (Oct. 1991); Delaume, Transnational Contracts, ch. 2, paras. 2.04-2.05 (Dec. 1989 updating) and ch. 15, para. 15.24 (May 1990 updating).

[17] ICSID Case No. ARB/77/2. English translations of the August 8, 1980 Benvenuti & Bonfant v. Congo award are published in 21 ILM 740 (1982); 8 Y.B. Com. Arb. 144 (1983); 67 I.L.R. 345 (1984).

[18] *Id.* at paras. 4.1-4.4.

[19] Alsing Trading Company, Ltd. and Svenska Tändsticks Aktiebolaget v. The Greek State, Award of December 22, 1954, in 1955 Revue de l'Arbitrage, No. 2, at 27; 23 I.L.R. 633 (1956).

The *contrat de choix* theory has further been adopted in Article 3(2) of the June 19, 1980 Rome Convention on the Law Applicable to Contractual Obligations (19 ILM 1492 (1980)), in Article 7(2) of the December 22, 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (24 ILM 1574 (1985)) and more recently in Article 116(3) of Switzerland's Private International Law Statute of December 18, 1987.

[20] Award, *supra* note 5, at para. 41.

shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

The first problem concerned the interpretation of the words "full protection and security" in Article 2(2). The Claimant had argued that through the mere use of these words, the treaty went beyond the minimum standard of customary international law to impose on the host State an obligation of "strict or absolute liability" for damages.[21] Such interpretation of the words "full protection and security" would have led to the replacement of the "due diligence" standard of general international law by an obligation on the State to achieve a result (*obligation de résultat*) providing the foreign investor with "insurance" against any risk in any circumstances.[22] To this, the Respondent replied that the words "full protection and security" incorporate the customary international legal standard of responsibility requiring "due diligence" on the part of the State.[23] Both the majority award and the dissenting opinion supported the Respondent's view on this question. After referring to a number of judicial pronouncements leading to the same conclusion (including the International Court of Justice judgment in the *Elettronica Sicula* case),[24] the award held:

> The arbitral Tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with "full protection and security" was construed as absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a "strict liability" on behalf of the host State.
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> In the opinion of the present Arbitral Tribunal, the addition of words like "constant" or "full" to strengthen the required standards of "protection and security" could justifiably indicate the Parties' intention to require within their treaty relationship a standard of "due diligence" higher than the "minimum standard" of general international law. But, the nature of both the obligation and ensuing responsibility remain unchanged, since the added words "constant" or "full" are by themselves not sufficient to establish that the Parties intended to transform their mutual obligation into a "strict liability."[25]

The dissenting opinion, while supporting the view of the majority on the interpretation of Article 2(2),[26] went even further. It held that Article 2(2) was not applicable to the case on the ground that, as a general provision, it must yield to the special provision of Article 4[27] which contains specific rules governing investment losses sustained in civil disturbances.[28]

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[21] *Id.* at para. 26 (A).

[22] *Id.* at para. 45.

[23] *Id.* at para. 32 (A).

[24] In the Elettronica Sicula case, Article V of the 1948 U.S./Italy Friendship, Commerce and Navigation Treaty provided that nationals of each treaty should receive, for their persons and property, "the most constant protection and security" defined by reference to "the full protection and security required by international law." I.C.J. Reports 1989, p. 15; 4 ICSID Rev.—FILJ 330 (1990); 84 I.L.R. 312 (1991).

[25] Award, *supra* note 5, at paras. 48 and 50.

[26] Dissenting Opinion, *supra* note 8, at 582.

[27] I.e., *generalis specialibus non derogant.*

[28] Dissenting Opinion, *supra* note 8, at 581 and 584.

Article 4 of the Sri Lanka/U.K. treaty has two paragraphs. Article 4(1) of the treaty provides:

> Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State.

Article 4(2) of the treaty provides:

> Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from
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> (a) requisitioning of their property by its forces or authorities, or
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> (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,
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> shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

As to the applicability of Article 4 of the Sri Lanka/U.K. Treaty, the award made a distinction between its two provisions. Article 4(1) was to be applied as *lex generalis* to all situations not covered by the *lex specialis* of Article 4(2).[29]

The tribunal determined that the special rule provided for by Article 4(2) becomes applicable in cases characterized by the existence of the following three factors which have to be established by the foreign investor:

(1) the destruction of property was proven to be committed by the governmental forces;

(2) the destruction was not caused in combat action; and

(3) the destruction was not required by the necessity of the situation.[30]

The tribunal reached the conclusion that the three conditions provided for by Article 4(2) did not exist and therefore that Article 4(2) did not cover the events which occurred on January 28, 1987.[31] The dissenting arbitrator also agreed with the majority award on that point.[32]

Article 4(2) being inapplicable to the present case, Article 4(1) became the only part of Article 4 available for the Claimant on which to base its claim. After determining that the presence of "losses suffered" was the only condition required for the applicability of Article 4(1),[33] the tribunal held:

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[29] Award, *supra* note 5, at para. 65 *in fine*.

[30] *Id.* at paras. 57 and 58.

[31] *Id.* at paras. 59-64.

[32] Dissenting Opinion, *supra* note 8, at 584.

[33] Award, *supra* note 5, at para. 65.

> Article 4(1) does not include any substantive rules establishing direct solutions; i.e. material rules providing remedies expressed in fixed and definitive terms. Like conflict-of-law rules, Article 4(1) contains simply an indirect rule whose function is limited to effecting a reference (*renvoi*) towards other sources which indicate the solution to be followed.
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> According to the undisputed plain language of Article 4(1), the investor—already enjoying the "full security" under Article 2(2) of the Sri Lanka/U.K. Treaty—has to be accorded treatment no less favourable than:
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> (i) that which the host State accords to its own nationals and companies; or
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> (ii) that accorded to nationals and companies of any Third State.[34]

The award went on to note:

> Once failure to provide "full protection and security" has been proven (under Article 2(2) of the Sri Lanka/U.K. Treaty or under a similar provision existing in other bilateral Investment Treaties extending the same standard to nationals of a third State), the host State's responsibility is established, and compensation is due according to the general international law rules and standards previously developed with regard to the State's failure to comply with its "due diligence" obligation under the *minimum standard* of customary international law.
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> ...
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> [T]he arbitral Tribunal has to review the evidence submitted by both Parties in the present case in order to establish the proven facts, and to determine whether these facts sustain the Claimant's allegation that the Respondent Government failed to comply with its obligation under the Sri Lanka/U.K. Bilateral Investment Treaty (particularly the standard provided for in Article 2(2), as well as by virtue of the rules governing State responsibility under general international law (which becomes necessarily applicable by virtue of the *renvoi* contained in Article 4(1) of the Treaty).[35]

After reviewing the evidence submitted by the parties, the majority award found that Sri Lanka failed to take important precautionary measures to get all suspected persons out of the farm premises peacefully before launching the operation. Such measures would, in the words of the tribunal, have minimized the risks of killings and destruction. The award concluded that, through inaction and omission, Sri Lanka violated its due diligence obligation and was therefore liable for compensation.[36]

The dissenting arbitrator diverged from the majority on the issue of the interpretation of Article 4(1). In this respect, Dr. Asante held the view that a proper interpretation of Article 4(1) should not lead to the imposition on Sri Lanka of liability to pay compensation:

> [T]he foreign investor does not derive any benefit from Article 4(1) unless some right or privilege has been explicitly granted by the host State to its nationals or

[34] *Id*. at para. 66.

[35] *Id*. at paras. 67 and 78.

[36] *Id*. at para. 85(B).

> companies or to the nationals or companies of a third State in similar circumstances.
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> ...
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> In the case before us, no evidence has been adduced to establish that Sri Lanka provides or has offered compensation or other settlement to its nationals or companies or the nationals or companies of a third State in similar circumstances. It follows that the essential prerequisite for invoking national or most-favoured-nation treatment has not been satisfied.
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> ...
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> By employing the concept of renvoi in interpreting Article 4(1), the Tribunal reaches the untenable result of substituting a general standard of property protection derived from customary international law for a specific undertaking of Sri Lanka to a national or a company of a third State. Such an interpretation confuses most-favoured-nation treatment, a creature of treaty, with the tenets of general international law, and constitutes a fundamental misconception as to the very notion of most-favoured-nation treatment.[37]

B. *The SOABI v. Senegal Decision*

The June 11, 1991 French Court of Cassation decision[38] concerns the recognition and enforcement in France of an ICSID award pursuant to Article 54 of the ICSID Convention. The background to this decision is as follows.

The dispute, involving SOABI, a company controlled by largely Belgian interests, and the Republic of Senegal, arose from the implementation of a project for the construction of low-income housing in Dakar, in conjunction with which a factory for the prefabrication of reinforced concrete was also to be erected by SOABI. SOABI instituted ICSID arbitration proceedings which resulted in a majority award of February 25, 1988[39] in which the Tribunal determined that Senegal was liable for the unilateral termination of the underlying contract and should indemnify SOABI for the resulting damages (*damnum emergens*) and loss of future profits (*lucrum cessans*).

On November 14, 1988, SOABI obtained from the President of the Paris Tribunal of First Instance an order for enforcement of the award (*ordonnance d'exequatur*). On the strength of that order, SOABI sought to attach some properties owned by Senegal in Paris. Following Senegal's appeal, the Paris Court of Appeal held on December 5, 1989[40] that Senegal "did not waive its right to invoke its immunity from execution" and that SOABI had not demonstrated that execution of the award in

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[37] Dissenting Opinion, *supra* note 8, at 586 and 588.

[38] The Court of Cassation decision is also commented on by Broches, 1991 Revue de l'Arbitrage 638; Delaume, 30 ILM 1167 (1991); and Gaillard, 118 Journal du Droit International 1006 (1991).

[39] ICSID Case No. ARB/82/1. The award and its annexes are reprinted in 6 ICSID Rev.—FILJ 125 (1991). The jurisdictional issues addressed by the award and its annexes are discussed by this writer in an introductory note, *id.* at 119.

[40] The decision of the Paris Court of Appeal in the SOABI v. Senegal case is published in 117 Journal du Droit International 141 (1990); 1990 Revue de l'Arbitrage 164; 80 Revue Critique de Droit International Privé 121 (1991). English translation of the Court of Appeal decision is published in 5 ICSID Rev.—FILJ 135 (1990) and 29 ILM 1341 (1990).

France would affect assets which were not subject to the principle of sovereign immunity from execution. Noting that in these circumstances, such execution would conflict with international public policy, the Paris Court of Appeal vacated the enforcement order pursuant to Article 1502(5) of the New Code of Civil Procedure.

In the aftermath of the December 5, 1989 Court of Appeal decision, commentators[41] criticized the court for confusing the enforceability of an award with subsequent measures of execution. The leave for enforcement of an award (*ordonnance d'exequatur*) is a preliminary step to the execution of the award. However, it does not in itself constitute a measure of execution since its purpose is limited to giving executory force to the award. Therefore it remains possible for the State concerned to raise the issue of immunity from execution during the subsequent execution proceedings, the more so since the ICSID Convention itself reserves in its Article 55 the application of the rules of immunity prevailing in Contracting States in regard to immunity from execution.

Another target for criticism was the fact that the French Court of Appeal had relied on French municipal law, namely Article 1502 of the New Code of Civil Procedure, in order to vacate the order for the enforcement of an ICSID award. It should instead have acknowledged that the ICSID Convention creates in its Articles 53 and 54 an autonomous international regime for the recognition and enforcement of ICSID awards[42] and that as soon as the ICSID Convention is applicable, all other rules—including those which are normally applicable to international arbitral awards—should be disregarded.

Under the ICSID Convention, each Contracting State recognizes the final and binding character of an ICSID award (Art. 54(1)). The ICSID Convention provides a simple procedure for the recognition and enforcement of ICSID awards, which is limited to furnishing to a competent court or any other authority, which each Contracting State shall have designated for that purpose, a copy of the award certified by the ICSID Secretary-General (Art. 54(2)). The ICSID Convention excludes thus all traditional means of control of an award. There is no exception (not even on the grounds of public policy) to the final and binding character of an ICSID award.

The Court of Cassation's decision of June 11, 1991 appears to be in line with the various criticisms addressed to the Court of Appeal's decision since it quashed it and held:

> Considering nevertheless that the foreign State which has submitted to arbitration has thereby agreed that the award might be granted an order for enforcement (*exequatur*) which in itself does not constitute a measure of execution of the type that might bring into play immunity from execution of the State concerned.

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[41] *See* Broches, 1990 Revue de l'Arbitrage 164; Gaillard, The Enforcement of ICSID Awards in France: The Decision of the Paris Court of Appeal in the SOABI Case, 5 ICSID Rev.—FILJ 69 (1990); and Ziadé, 80 Revue Critique de Droit International Privé 124 (1991).

[42] *See* Broches, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, 2 ICSID Rev.—FILJ 287 (1987); Delaume, Le Centre international pour le règlement des différends relatifs aux investissements (CIRDI), 109 Journal du Droit International 775, 836 (1982); Giardina, L'exécution des sentences du Centre international pour le règlement des différends relatifs aux investissements, 71 Revue Critique de Droit International Privé 273 (1982).

> And considering that the Washington Convention of March 18, 1965 has created in its Articles 53 and 54 an autonomous and simplified regime for recognition and enforcement which excludes the regime provided for in Articles 1498 et seq. of the New Code of Civil Procedure and, in particular, the means of recourse therein provided.[43]

The French Court of Cassation in the *SOABI* v. *Senegal* case not only quashed the December 5, 1989 decision of the Paris Court of Appeal in the same case; it also restated the position expressed earlier by the Paris Court of Appeal itself on the occasion of the recognition and enforcement in France of another ICSID award rendered in the *Benvenuti & Bonfant* v. *Government of the People's Republic of Congo.*[44]

At the request of Benvenuti and Bonfant, the President of the Paris Tribunal of First Instance had declared the award enforceable on December 23, 1980[45] in the following terms:

> Considering that the said decision contains nothing contrary to law and public policy,
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> We rule that the said decision shall be enforceable according to its form and terms.

to which he added the following qualification:

> We rule nevertheless that no measure of execution nor even a simple conservatory measure can be taken by virtue of the above award on any assets located in France without our prior authorization.

Benvenuti and Bonfant requested the President of the Tribunal of First Instance to retract or modify the limiting language of the *ex parte* decision. The request was denied on January 13, 1981[46] on the grounds that:

> Since it is not immediately possible to make an apportionment between funds or assets allocated to a sovereign or public service activity on the one hand and those originating from a mere economic or commercial activity subject to private law on the other hand, it has not appeared appropriate to us, in the absence of any prior investigation, to allow a situation to develop which could infringe the sovereignty of a foreign State by the imposition of a constraint in disregard of any notion of courtesy and international independence.

Benvenuti and Bonfant thereupon lodged an appeal against this qualification. On June 26, 1981, the Court of Appeal,[47] disagreeing with the President's reasoning, ruled that an *exequatur* was not an act of execution and deleted the qualification:

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43 This and other translations herein of French court decisions are translations by the author.

44 *See supra* note 17.

45 The December 23, 1980 decision in the Benvenuti & Bonfant case is published in 1982 Revue de l'Arbitrage 205.

46 The January 13, 1981 decision in the Benvenuti & Bonfant case is published in 108 Journal du Droit International 365 (1981), note Oppetit; 1982 Revue de l'Arbitrage 206.

47 The June 26, 1981 decision in the Benvenuti & Bonfant case is published in 108 Journal du Droit International 843 (1981), note Oppetit; 1982 Revue de l'Arbitrage 207; 71 Revue Critique de Droit International Privé 379 (1982). English translations of the decision are published in 20 ILM 877 (1981), note Delaume; 7 Y.B. Com. Arb. 159 (1982); 65 I.L.R. 88 (1984).

> Considering that the order for enforcement of an arbitral award does not constitute a measure of execution but only a step preceding measures of execution;
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> That the first judge, seized pursuant to Article 54 of the Washington Convention, therefore could not, without exceeding his power, interfere with the second stage, that of execution, to which the question of immunity from execution of foreign States relates.[48]

In this connection, it may be mentioned that in order to recover payment of the award rendered in its favor, Benvenuti and Bonfant obtained later an attachment order over funds held by a French bank (Crédit Lyonnais) on behalf of the Banque Commerciale Congolaise (BCC) allegedly controlled by the Congolese Government. The Paris Court of Appeal, however, held in its March 12, 1985 decision that this attachment was void. Benvenuti and Bonfant sought to have this decision reversed by the French Court of Cassation which in a July 21, 1987 decision[49] declined to do so on the grounds that the control exercised by a State was insufficient to consider entities dependent on that State as its emanations and therefore to be held liable for its debts, where those entities and their assets were distinct from the State.

The various American decisions relating to the ICSID arbitral award rendered on March 31, 1986 in *Liberian Eastern Timber Corporation (LETCO)* v. *Liberia*[50] also made clear the distinction between recognition and enforcement of an ICSID award in accordance with Article 54 of the ICSID Convention on the one hand and subsequent measures of execution regulated by Article 55 of the ICSID Convention on the other hand. Following the rendering of the award in its favor, LETCO applied to the U.S. District Court for the Southern District of New York for the award's enforcement. The September 5, 1986 *ex parte* judgment granted such enforcement.[51] On the strength of that judgment, executions were issued on Liberian assets in the United States. The Government of the Republic of Liberia moved to vacate the judgment entered by the District Court on the award or, in the alternative, the execution of that judgment on its property located in New York. The same District Court in New York denied the motion to vacate the judgment on the award on the basis that Liberia, as a party to the ICSID Convention, had waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award pursuant to the Convention. But the Court, having found those assets—which consisted of tonnage and

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[48] It may be noted that the Court of Appeal's decision in the Benvenuti case itself followed earlier pronouncements by the Paris Tribunal of First Instance in which the immunity of jurisdiction was severed from the immunity of execution (République socialiste fédérale de Yougoslavie v. Sté européenne d'études et d'entreprises, Trib. gr. inst. Paris, July 8, 1970, Juris-Classeur Périodique 1971. II. 16810, note Ruzié; 98 Journal du Droit International 131 (1971), note Kahn; 1975 Revue de l'Arbitrage 328, note Delvolvé. République malgache v. Sté Bruynzeel, Trib. gr. inst. Paris, May 3, 1971, Juris-Classeur Périodique 1971. II. 16811).

[49] Benvenuti and Bonfant Ltd. v. Banque Commerciale Congolaise and Others, Judgment of July 21, 1987, Cour de cassation, France, 115 Journal du Droit International 108 (1988), note Kahn. English translation of French original is published in 82 I.L.R. 91 (1990).

[50] ICSID Case No. ARB/83/2. The LETCO v. Liberia award and its rectification are published in 26 ILM 647 (1987).

[51] 2 ICSID Rev.—FILJ 187 (1987).

shipping registration fees—to constitute tax revenues for the support of governmental functions, determined that the assets were sovereign rather than commercial and thus immune from execution under the 1976 U.S. Foreign Sovereign Immunities Act (FSIA). It therefore granted on December 12, 1986 Liberia's motion to vacate the execution on those assets.[52] In vacating the attachment, the Court indicated, however, that LETCO was not enjoined from issuing execution with respect to properties of Liberia which might be used for commercial purposes and may fall within one of the exceptions delineated in Section 1610(a) of the FSIA.

LETCO then obtained writs of attachment over several Liberian Embassy bank accounts in Washington, D.C. Liberia filed an emergency motion for relief. In its April 16, 1987 decision,[53] the U.S. District Court for the District of Columbia quashed the writs of attachment on the grounds that the Embassy's bank accounts were immune from attachment, both because they enjoyed diplomatic immunity under the Vienna Convention on Diplomatic Relations, which the United States ratified in 1972, and because the accounts were entitled to sovereign immunity under the FSIA, the funds in the accounts being essentially public in nature. LETCO appealed the U.S. District Court for the District of Columbia's decision, which was affirmed without opinion by the U.S. Court of Appeals for the Second District.

[52] 650 F. Supp. 73 (S.D.N.Y. 1986); 2 ICSID Rev.—FILJ 188 (1987); 26 ILM 695 (1987), note Delaume; 2 Int'l Arb. Rep. 45 (1987).

[53] 659 F. Supp. 606 (D.D.C. 1987); 3 ICSID Rev.—FILJ 161 (1988).