

THE INTERNATIONAL COURT OF JUSTICE IN THE SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES

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Abstract

*This article examines the contemporary role of the International Court of Justice in the settlement of international investment disputes, specifically through the currently unused mechanism of Article 64 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereafter, the “ICSID Convention”). **Part II (Court of Last Resort, but not Appeal: the Article 64 Clause Compromissoire in the ICSID Convention)** examines how Article 64 of the ICSID Convention operates as a clause compromissoire to invoke the compulsory jurisdiction of the Court: “[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of dispute settlement”. Read in conjunction with Article 27(1) of the ICSID Convention (a provision that expressly prohibits States from diplomatically espousing claims that are already subject of a pending arbitration), Article 64 has been regarded as a post-award inter-State enforcement mechanism to ensure compliance with arbitral awards issued under the Convention. On the basis of this conception, the Court has not yet received any referrals of international investment disputes since the passage of the ICSID Convention.*

*A fair reading of Article 64, however, should also take into consideration the Court’s own interpretation of similar clauses compromissoire throughout its jurisprudential history. As I show in **Part III (The Court’s Judicial Function in Support of ICSID Arbitration)**, the Court has not hesitated to exercise its judicial function to independently and objectively determine the scope of its jurisdiction *ratione materiae*. While the Report of the Executive Directors to the ICSID Convention specifically restrict the scope of the Court’s jurisdiction to matters that do not affect pending arbitrations, the Court may not necessarily find itself bound by this interpretation. I submit that Article 64’s scope of “disputes...concerning the interpretation or application” of a treaty could also support the Court’s jurisdiction *ratione materiae* over three issues central to the preservation of the parties’ exclusive choice of forum through the ICSID arbitral process: first, the narrow theoretical possibility of seeking immediate provisional measures, in extreme situations, against a State’s injurious measures during the intervening period before the constitution of the arbitral tribunal; second, the possibility of seeking injunctive or declaratory relief from the Court against recalcitrant States that purposely attempt to thwart or prevent participation in the ICSID arbitration by interposing domestic court actions; and third, the possibility of seeking post-award conservatory measures to ensure a State’s recognition or execution of a Convention award. In these instances, the Court exercises jurisdiction to ensure States’ continued support of the arbitral process pursuant to their Convention obligations. In the **Conclusion**, I observe that while the early jurisprudence of the Court provided for inter-State settlement of disputes arising from the espousal of claims by aggrieved investors, the advent of the ICSID Convention has not necessarily eliminated any meaningful role for the Court in international investment disputes. Rather, it is a combination of both the prevailing conservatism of States*

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Parties towards the perceived limited uses of the Article 64 mechanism in the ICSID Convention, and States' pragmatic attitudes concerning the strategic efficacy of the Court, that might provide a better explanation for why the Court has remained dormant and underutilized in the settlement of modern international investment disputes.

I. Introduction: The Court's Role in Settling Investment Disputes

The postwar dominance of the investment treaty arbitration system, especially under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (otherwise known as the ICSID Convention),² plausibly explains why very few investment disputes have been referred to the International Court of Justice.³ The direct accessibility of the investment treaty arbitration system to foreign investors obviates the need for diplomatic espousal by the States of their nationality,⁴ rendering the Court's direct inter-State adjudication unnecessary for the settlement of these types of disputes.

To some extent, however, it may also be said that the Court itself minimized its utility as a forum for settlement of international investment disputes. Its 2007 Decision on Preliminary Objections in the *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*⁵ is a crystal example of how the Court closed the door on States seeking to exercise diplomatic protection on behalf of foreign investors that are minority shareholders. To recall, in *Diallo* the Republic of Guinea sought to assert diplomatic protection on behalf of a Guinean national, Mr. Ahmadou Sadio Diallo, who was a minority shareholder of a company registered in Zaire (now the Democratic Republic of Congo, or DRC). Guinea asserted that Mr. Diallo incurred injury arising from his arrest, deportation, and expulsion from the DRC for supposedly "hav[ing] breached public order in Zaire, especially in the economic, financial and monetary areas".⁶ As a preliminary

² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159. [hereafter, "ICSID Convention"]

³ See ANDREW PAUL NEWCOMBE AND LUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 35-39* (Kluwer Law International, 2009).

⁴ Christoph Schreuer, *The Dynamic Evolution of the ICSID System*, in *THE CONVENTION ON THE SETTLEMENT OF DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 15-30*, 16 (R. Hofmann and C. Tams (Eds.), 2007).

⁵ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, at 582.

⁶ *Id.*, at 591, para. 15.

objection to the jurisdiction of the Court, the DRC challenged the standing of the Republic of Guinea to exercise diplomatic protection over Mr. Diallo's claims "since its Application seeks essentially to secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality."⁷

To justify its claim to exercise diplomatic protection, Guinea argued that it was "taking up the cause of one of its nationals, and is acting to enforce his direct rights as an individual and as shareholder and executive officer of companies which he founded...and of which he is the sole or principal owner, to the exclusion of distinct rights which these companies may have against the DRC."⁸ It sought to exercise diplomatic protection on behalf of Mr. Diallo for the violation of "three categories of rights: his individual personal rights, his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire and the rights of those companies, by substitution."⁹ As to the second and third categories of rights, Guinea clarified that it was confining itself to "the violation of the rights enjoyed by Mr. Diallo in respect of the companies, including his rights of supervision, control and management, and that it is therefore not confusing his rights with those of the company."¹⁰

Guinea relied heavily on the Court's pronouncement in the *Barcelona Traction* case to support its theory of diplomatic protection "by substitution" of Mr. Diallo of the rights accruing to the said companies,: "an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected...the situation is different if the act complained of is aimed at the direct rights of the shareholder as such."¹¹ In *Barcelona Traction*, a case it decided nearly forty years before *Diallo*, the Court noted general rule on diplomatic protection over companies ("where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim"¹²), but also issued its famous dictum which carved out a narrow exception to

⁷ *Id.*, at 589, para. 11.

⁸ *Id.*, at 595, para. 29.

⁹ *Id.*, at 596, para. 31.

¹⁰ *Id.*, at 604, para. 55.

¹¹ *Id.*, at 603, para. 54, citing *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, at 36, paras. 46-47.

¹² *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, at 46, para. 88.

this rule on the basis of equity. The Court acknowledged in *Barcelona Traction* that States of the nationality of foreign shareholders may have equitable bases to assert diplomatic protection, so long as they could show that the corporation was reduced to such a “position of impotence”¹³, to the point that the corporation could not have feasibly approached its national State for diplomatic protection.¹⁴ For nearly forty years since the Court issued that dictum in *Barcelona Traction*, the exception was maintained until the 2007 *Diallo* decision.

In *Diallo*, the Court returned to the strict rule that only States of the nationality of the corporation could exercise diplomatic protection over the rights of the corporation. The Court lent short shrift to Guinea’s attempt to exercise diplomatic

¹³ *Id.*, at 50, para. 100.

¹⁴ The Court found that the Belgian Government, as the State of the nationality of the foreign shareholders, did not meet this *jus standi* threshold. *Id.*, at 48-50, paras. 93-101:

“93. ...in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably...”

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. In this connection, account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders...

97. The situations in which foreign shareholders in a company wish to have recourse to diplomatic protection by their own national State may vary. It may happen that the national State of the company simply refuses to grant it its diplomatic protection, or that it begins to exercise it (as in the present case) but does not pursue its action to the end. It may also happen that the national State of the company and the State which has committed a violation of international law with regard to the company arrive at a settlement of the matter, by agreeing on compensation for the company, but that the foreign shareholders find the compensation insufficient. Now, as a matter of principle, it would be difficult to draw a distinction between these three cases so far as the protection of foreign shareholders by their national State is concerned, since in each case they may have suffered real damage. Furthermore, the national State of the company is perfectly free to decide how far it is appropriate for it to protect the company, and is not bound to make public the reasons for its decision. To reconcile this discretionary power of the company’s national State with a right of protection falling to the shareholders’ national State would be particularly difficult when the former State has concluded, with the State which has contravened international law with regard to the company, an agreement granting the company compensation which the foreign shareholders find inadequate. If, after such a settlement, the national State of the foreign shareholders could in its turn put forward a claim based on the same facts, this would be likely to introduce into the negotiation of this kind of agreement a lack of security which would be contrary to the stability which it is the object of international law to establish in international relations...

100. In the present case, it is clear from what has been said above that *Barcelona Traction* was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there is nothing to prevent Canada from continuing to grant its diplomatic protection to *Barcelona Traction* if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, *jus standi* is conferred on the Belgian Government by considerations of equity.”

protection according to the third category of rights allegedly pertaining to Mr. Diallo (e.g. rights of the companies, by substitution). The Court particularly noted that the special treaty regimes governing investment protection did not create an exception in customary international law allowing for diplomatic protection of foreign shareholders by substitution:

“89. The Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of *associés* and shareholders, is of the opinion that these do not reveal – at least at the present time – an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.

90. The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary...

94. In view of the foregoing, the Court cannot accept Guinea’s claim to exercise diplomatic protection by substitution. It is therefore the normal rule of the nationality of the claims which governs the question of the diplomatic protection of Africom-Zaire and Africontainers-Zaire. The companies in question have Congolese nationality...

95. ...Guinea is without standing to offer Mr. Diallo diplomatic protection as regards the unlawful acts of the DRC against the rights of the companies Africom-Zaire and Africontainers-Zaire...”¹⁵

The Court’s ruling in *Diallo* has been critiqued as “unfavourable to foreign investors by having lowered the number of States that can protect the legal persons in which such investors have invested.”¹⁶ Seen another way, the *Diallo* ruling demonstrated an exclusive preference for the State of the nationality of the corporation as the *only* State entitled to exercise diplomatic protection in matters involving rights pertaining to the corporation. This departure from the exception in *Barcelona Traction* effectively discourages States of the nationality of foreign

¹⁵ *Ahmadou Sadio Diallo*, *supra* note 5 at. 615-616, paras. 89 – 95.

¹⁶ Alberto Alvarez-Jimenez, *Foreign Investors, Diplomatic Protection and the International Court of Justice’s Decision on Preliminary Objections in the Diallo Case*, 33 North Carolina Journal of International Law and Commercial Regulation 437, 454 (Spring 2008).

shareholders from resorting to the Court in the future for legal redress with respect to investor claims.

Admittedly, it is not only the *Diallo* ruling that manifests a rigid disinclination against enabling States of the nationality of the foreign investor/minority shareholder to bring investor claims to the Court. For one, the Court had already declined jurisdiction in three cases involving foreign investment claims brought to the Court from forty to sixty years ago.¹⁷ For another, even in the two rare investment cases of *Elettronica Sicula S.p.A. (ELSI) case* and *Pulp Mills on the River Uruguay*¹⁸ where the Court proceeded to adjudication on the merits in these disputes, the Court was not immune from criticism as to its handling of technical and evidentiary issues specifically inherent to foreign investment undertakings.¹⁹ According to one scholar in relation to the *ELSI case*:

“a Chamber of the ICJ ruled against the United States even though the United States established that the Italian government had violated its own law in requisitioning ELSI before its parent companies could exercise a plan of orderly liquidation....The Chamber did not indicate what further evidence it needed to establish that factual predicate; it apparently wanted the United States to provide with a high degree of certainty that the Italian government prevented a specific course of events from occurring....The Chamber showed little sensitivity to the potential for even the most financially distressed company to wind down its operations in a manner more beneficial to its creditors and owners than declaring bankruptcy.”²⁰

In the 2010 *Pulp Mills case*, it was two of the senior Judges of the Court who themselves pointed out in a famous dissent that the Court deficiently handled the voluminous scientific evidence involved in the case:

¹⁷ See *Anglo-Iranian Oil Co. case (Jurisdiction)*, Judgment of July 22, 1952: *I.C.J. Reports 1952*, at 93; *Case of Certain Norwegian Loans*, Judgment of July 6, 1957: *I.C.J. Reports 1957*, at 9; *Barcelona Traction, Light and Power Company, Limited*, Judgment, *I.C.J. Reports 1970*, at 36.

¹⁸ *Elettronica Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Reports 1989*, at 15; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, at 14.

¹⁹ *Elettronica Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Reports 1989*, at 15. See Sean D. Murphy, *The ELSI case: An Investment Dispute at the International Court of Justice*, 16 *Yale Journal of International Law* 391 (1991); Kurt J. Hamrock, *The ELSI Case: Toward an International Definition of Arbitrary Conduct*, 27 *Texas International Law Journal* 837 (1992); F.A. Mann, *Foreign Investment in the International Court of Justice: The ELSI Case*, 86 *American Journal of International Law* 92 (1992). For famous criticisms of ICJ Judge Al-Khasawneh and ICJ Judge Simma on the Court's poor handling of scientific evidence in *Pulp Mills*, see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, (*Joint Dissenting Opinion of Judges Al-Khasawneh and Simma*), available at <http://www.icj-cij.org/docket/files/135/15879.pdf> (visited September 20, 2012).

²⁰ See Sean D. Murphy, *The ELSI case: An Investment Dispute at the International Court of Justice*, 16 *Yale Journal of International Law* 391, 450-451 (1991).

“While we agree with the Judgment’s finding of a breach by Uruguay of its procedural obligations, we cannot endorse operative paragraph 2 of the Judgment of the Court, and have accordingly voted against it. As we will explain in the following dissent, the Court has evaluated the scientific evidence brought before it by the Parties in ways that we consider flawed methodologically: the Court has not followed the path it ought to have pursued with regard to disputed scientific facts; it has omitted to resort to the possibilities provided by its Statute and thus simply has not done what would have been necessary in order to arrive at a basis for the application of the law to the facts as scientifically certain as is possible in a judicial proceeding. Therefore, faced with the results of a deficient method of scientific fact-finding, we are not in a position to agree “that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay”. The evidence submitted by Uruguay to establish this result has not been treated *lege artis* by the Court; the same is valid for the evidence submitted by Argentina in order for the Court to arrive at the opposite conclusion. Consequently, and logically, we have no other possibility than to dissent.”²¹

Juxtaposing the Court’s thin (and regrettably criticized) record in the adjudication of investment disputes with the emergence of the “self-contained dispute resolution system”²² of investment treaty arbitration under the ICSID Convention, the further stringency of the Court’s position on diplomatic protection in the *Diallo* ruling makes it understandable that foreign investment disputes are rarely brought now to the Court for its adjudication. This does not mean, however, that there is no space whatsoever for the Court within the international investment dispute settlement process. The ICSID Convention itself provides for resort to the Court. Article 64 of the ICSID Convention contains a broadly worded *clause compromissoire* that deliberately enables referrals of certain disputes to the Court:

“Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the

²¹ *Pulp Mills*, see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, (Joint Dissenting Opinion of Judges Al-Khasawneh and Simma), available at <http://www.icj-cij.org/docket/files/135/15879.pdf> (visited September 20, 2012), para. 2. See also CAROLINE E. FOSTER, SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS: EXPERT EVIDENCE, BURDEN OF PROOF AND FINALITY 134 (Cambridge University Press, 2011).

²² ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 296 (Martinus Nijhoff Publishers, 1995).

application of any party to such dispute, unless the States concerned agree to another method of settlement.”²³

While the foregoing language appears to encompass a broad range of disputes that could be subsumed under “disputes concerning the interpretation or application of the Convention”, in practice, the actual subject-matter perceived to be within the scope of Article 64 has been whittled away by the specific interpretation attached to this provision through the Report of the Executive Directors to the Convention [hereafter, “the Report”], which states:

“45. Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. *While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it.* Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in the dispute.”²⁴

The disparity between the text of Article 64 and the specific interpretation of the Executive Directors above poses some consequences for how the Court has been perceived within the “self-contained” dispute resolution system designed under the ICSID Convention. This article re-examines the pragmatic uses and interpretive limitations to the above Article 64 mechanism for referrals to the International Court of Justice, and shows why, despite the tension between the Report’s interpretation and the Court’s treatment of similar *clause compromissoires* in its jurisprudential history, there might be a wider elasticity to the scope of jurisdiction *ratione materiae* under Article 64.

²³ ICSID Convention, Article 64.

²⁴ CHRISTOPH H. SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, AND ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* 1260 (Cambridge University Press, 2011), *citing* the Report of the Executive Directors to the Convention, 1 ICSID Reports 32/3. Italics added.

As I show in *Part II (Court of Last Resort, but not Appeal: the Article 64 Clause Compromissoire in the ICSID Convention)*, the Report's interpretation depicted the Court as forever debarred from exercising any form of judicial review over any aspect of a pending investment arbitration. The persuasive power of this interpretation is such, that to date, no State has ever attempted to invoke the Court's jurisdiction through Article 64 of the ICSID Convention. While the Report's interpretation rightly preserves the integrity and exclusivity of the choice of forum consistently with Article 26 of the ICSID Convention,²⁵ and also reinforces the express prohibition in Article 27(1) of the ICSID Convention against States extending diplomatic protection over disputes already submitted to arbitration,²⁶ the effect of the Report's interpretation also creates a quandary regarding the perceived limited scope of the Court's jurisdiction *ratione*, despite the absence of this restrictive meaning from the face of the text of Article 64. Significantly, two scholars have recently argued that the Report has the legal status of "context"²⁷ that is part of the ICSID Convention, indicating that the Report "is a particularly reliable means of interpreting the ICSID Convention, but also that it is endowed with binding force for the purpose of interpreting the Convention." Following the Report's interpretation of Article 64 in conjunction with Article 27(1) of the ICSID Convention, therefore, resort to the Court can never be made unless a Contracting State fails to comply with an arbitral award. The Report's interpretation also rules out any role for the Court in the review of arbitral awards. In this sense, while the Court will not operate as an appellate court for ICSID arbitral awards, it may still be seen as a possible "court of last resort" with

²⁵ ICSID Convention, Article 26: "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. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

²⁶ ICSID Convention, Article 27: "(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

²⁷ Barton Legum and William Kirtley, *The Status of the Report of the Executive Directors on the ICSID Convention*, ICSID Review (2012); Vienna Convention on the Law of Treaties, Article 31(2):

"The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

respect to failed *exequatur* of ICSID arbitral awards²⁸ against recalcitrant Contracting States Parties to the ICSID Convention.²⁹

I submit, however, that the Report's interpretation would not necessarily be a reliable predictor of how the Court would react in the future to the Report's interpretive ring fencing of its jurisdiction. As I show in *Part III (The Court's Judicial Function in Support of ICSID Arbitration)*, the Court's treatment of similarly-worded *clauses compromissoires* in its history of jurisprudence reveals a significant predisposition to independently and objectively define a "dispute on the application or interpretation" of a treaty according to the facts before it, as submitted in the Application and the parties' pleadings; to ascertain the Court's jurisdiction according to its own Statute and rules on admissibility; and to determine whether (and delineate which) claims advanced by an applicant State fall within the ambit of the *clause compromissoire*, when the latter is the basis for the compulsory jurisdiction of the Court. The Court's analysis does not even limit itself to inter-State acts, as it may extend its inquiry to domestic proceedings in States when the same allegedly amount to a breach of international obligations that are within the jurisdiction *ratione materiae* stipulated in the *clause compromissoire*.³⁰ Accordingly, "when a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out therein."³¹ For this reason, while the authoritative commentary to the ICSID Convention appears to confine the scope of the Court's jurisdiction under Article 64 of the ICSID Convention to matters that do *not* involve pending arbitrations, it is entirely possible that the Court may not necessarily find itself bound to take this view.

²⁸ Recognition and enforcement of an ICSID award should be easily accomplished through mere presentation of a copy of the ICSID-certified award to a Contracting State to the ICSID Convention. See Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, in ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 131-138 (R. Doak Bishop (Ed.), (Juris Publishing Co., 2009).

²⁹ On the real possibility that recalcitrant States invoke State immunity in local proceedings for execution of an ICSID arbitral award, see Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, Chapter 17, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (Eds.), (Oxford University Press, 2009).

³⁰ See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, at 12, paras. 30-32.

³¹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, at 32, para. 65.

The fundamental purpose behind the Report’s restrictive interpretation of the Court’s jurisdiction under Article 64 is to prevent disruptions to the arbitral process. I suggest that another reading of Article 64 in relation to Articles 26 and 27(1) of the ICSID Convention could, and would, support this fundamental purpose. What Article 27(1) of the ICSID Convention prohibits in relation to Article 64 is the simultaneous bringing of international claims “in respect of a dispute” between an investor and a respondent State that has already been submitted to the arbitral procedure. As August Reinisch and Loretta Malintoppi rightly observe, “[j]urisdiction over *genuine investment disputes* between States should not be confused with the International Court of Justice’s jurisdiction over disputes concerning the interpretation or application of the ICSID Convention according to Article 64 of the Convention.”³² Matters short of the actual investment dispute, therefore, should be deemed well-within the coverage of Article 64. As such, I propose that the Court’s jurisdiction *ratione materiae* under Article 64 might be invoked for three exceptional situations that are also highly significant to preserving the parties’ exclusive choice of forum through ICSID arbitration. In these three narrow cases, the Court’s authority could be legitimately and lawfully solicited, without necessarily incurring the hazards of intrusive review *de novo* because of the Court’s exercise of jurisdiction in relation to a pending arbitral dispute.

First, I propose that Article 64 could be used to seek urgent provisional measures or immediate interim relief against the *extreme* situation where a State party to the dispute commits acts that seriously imperil the subject-matter of the investor-State dispute, during the period from the time of the registration of the request for arbitration up to the period *before* the constitution of the arbitral tribunal.³³ This is an extremely narrow and urgent situation, and admittedly has not yet arisen in international investment disputes. The theoretical possibility may be worth exploring, however, as this matter was left unaddressed by the Report of the Executive Directors to the Convention. In extreme circumstances where a recalcitrant State acts

³² August Reinisch and Loretta Malintoppi, *Methods of Dispute Resolution*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691-720, 717 (Peter Muchlinski, Federico Ortino, Christoph Schreuer (Eds.), (Oxford University Press, 2008).

³³ The period for the constitution of the arbitral tribunal from the time of the issuance by the ICSID Secretariat of the notice of the registration of the request is a maximum of 90 days, after which the ICSID Chairman appoints the arbitrators pursuant to Article 38 of the ICSID Convention. See ICSID Convention, Articles 37 and 38.

aggressively to subvert the arbitration at the earliest stages when only a request for arbitration has been filed and a tribunal has not yet been constituted, this rare situation may be appropriate for a party to invoke the limited authority of the Court simply to ensure that the arbitral process is not ultimately mooted by the acts of any State party to the dispute. During this limited period when the arbitral tribunal has not been constituted, and a State party to the dispute acts with extreme prejudice against the subject-matter of the dispute or the evidence to be presented in the arbitral proceeding, I submit that either the State of the nationality of the investor claimant, or the respondent State, should be able to invoke the *clause compromissoire* in Article 64 of the ICSID Convention in order to apply to the Court for the indication of provisional measures, pursuant to Article 41 of the Statute of the International Court of Justice.³⁴ In this matter, the Court does not review any aspect of the dispute on the merits, but rather acts *in limine*, only to determine whether interim measures are warranted to protect the subject-matter of the dispute, ensure that parties proceed to their chosen arbitration procedure, and thus safeguard against a party's circumvention of the arbitration before the arbitral tribunal has been constituted.

Second, I submit that Article 64 could also be invoked to seek relief against States seeking to thwart or resist participation in ICSID proceedings using parallel domestic court actions.³⁵ While a State's willful refusal to participate in the arbitral proceedings will certainly not prevent an arbitral tribunal from rendering an award based on the evidence submitted by a claimant,³⁶ it is also possible that parallel proceedings deliberately initiated by a State before its domestic courts could be interposed by a State in the future to deny recognition or enforcement of a Convention award.³⁷ An application brought to the Court through Article 64 of the ICSID Convention could thus seek injunctive relief against a State that initiates

³⁴ Statute of the International Court of Justice, Article 41:

"1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council."

³⁵ For some examples of interference by domestic courts in investment arbitration, see Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 71-94, 87-88 (Arthur W. Rovine (Ed.), (Martinus Nijhoff Publishers, 2010); Charles Claypoole, *Recent Developments in the Jurisprudence of Investment Arbitration Tribunals*, The European and Middle Eastern Arbitration Review (2012).

³⁶ See ICSID Convention, Article 45.

³⁷ See Victorino J. Tejera Perez, *Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards*, 10 Journal of International Dispute Settlement 1093 (2012).

proceedings on *identical* causes of action as the investment arbitration before its domestic courts,³⁸ as a maneuver to avoid complying with its obligation under Article 26 of the ICSID Convention to respect the exclusive choice of forum through the arbitral process. This application will not involve the Court's review of the merits of the pending dispute, but rather would be limited to the question of State responsibility for willfully thwarting and subverting the exclusive remedy of arbitration chosen under Article 26 of the ICSID Convention, due to domestic court interference tolerated or encouraged by a State.³⁹

Third, Article 64 could also be invoked to seek post-award conservatory measures from the Court to help ensure a State's recognition or enforcement of a Convention award.⁴⁰ While an arbitral tribunal has the power to issue provisional measures pursuant to Article 47 of the ICSID Convention,⁴¹ this power subsists only insofar as the arbitral tribunal remains in existence. There is no provision in the ICSID Convention for a State or an investor to apply for conservatory measures that protect the subject-matter of the dispute, after the tribunal has rendered its award and the party claimant is seeking its recognition or enforcement, either in the courts of the

³⁸ Note that the arbitral tribunal in *Lauder* declined to hold that a respondent State committed an abuse of process when it pursued remedies in its local courts simultaneously with the arbitration, since "all the other court and arbitration proceedings involve different parties and different causes of action...Therefore, no possibility exists that any other court or arbitral tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, i.e. that the Czech Republic breached or did not breach the Treaty, and is or is not liable for damages towards Mr. Lauder." See *Lauder v. Czech Republic*, Final Award, UNCITRAL ad hoc, September 3, 2001, para 171. *A fortiori*, should an action be brought on an identical cause of action before the local courts (e.g. breach by the respondent State of the same investment treaty), there would be basis to argue that an abuse of process had taken place.

³⁹ See *Lanco International Inc. v. Argentina*, Preliminary Decision on Jurisdiction, ICSID Case No. ARB/97/6, December 8, 1998, para. 40: "Finally, it should be noted that *Article 26, as a rule of judicial abstention of local courts, is underpinned by Article 64 of the ICSID Convention*, which provides that the International Court of Justice will be called on to settle any issues of interpretation among Contracting States; *thus if a local court does not apply that norm, it may expose its own State to an international claim under Article 64 of the ICSID Convention.*" (Italics added.)

⁴⁰ Although compliance with ICSID awards is the norm, one State's non-compliance with ICSID awards has emerged as a recent phenomenon. See Christopher M. Ryan, *Discerning the Compliance Calculus: Why States Comply with International Investment Law*, 38 Georgia Journal of International and Comparative Law 63 (2009-2010); Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 (2) University of Pennsylvania Journal of International Economic Law 449, 453-454 (2007) 449; Tsai-Yun Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?*, 5 Contemporary Asia Arbitration Journal 1, 1-22 (May 2012); Sylvia T. Tordova, *Compliance and Enforcement of Awards: Is there a Practical Difference between ICSID and Non-ICSID Awards?*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW, VOL. 5, Chapter 9 (2012).

⁴¹ ICSID Convention, Article 47: "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 rights of either party."

respondent State, or in other jurisdictions of States Parties to the ICSID Convention where the respondent State has assets.

These three issues briefly sketch certain areas in which the ICSID Convention appears silent, and where it would be opportune for the Court to exercise its jurisdiction *ratione materiae* on a “dispute concerning the interpretation or application” of the ICSID Convention without imperiling the “self-contained”⁴² nature of the investment arbitral process. In these three issues, the Court wields its judicial function in a manner similar to that of local judicial courts that support the arbitral process in international commercial arbitration.⁴³ The Court in these instances would not directly adjudicate the investment dispute, but rather, only assumes a ‘policing’⁴⁴ function to ensure that States comply with their international responsibilities under the ICSID Convention, such as to abide in good faith with the exclusive choice of forum in the arbitral proceeding,⁴⁵ and to adequately ensure the recognition and enforcement of Convention awards.⁴⁶ States that bring applications to the Court according to this tenor of argument thus cannot be said to violate the prohibition in Article 27(1) of the ICSID Convention against extending diplomatic protection “in respect of a dispute”.⁴⁷ The Court would not, in any case, be adjudicating the dispute itself, but rather, would exercise its authority mainly to declare whether a State is in breach of such obligations under the ICSID Convention.

Nonetheless, in proposing this reading of Article 64, I acknowledge certain justified criticisms against any protracted involvement by the Court in the settlement

⁴² Organisation for Economic Cooperation and Development (OECD), *Improving the System of Investor-State Dispute Settlement: An Overview*, in INTERNATIONAL INVESTMENT PERSPECTIVES (OECD, 2006), available at <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/40079647.pdf> (visited September 20, 2012).

⁴³ See, e.g., Article 28(2) of the ICC Rules of Arbitration: “Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures.”; Article 17(H) (Recognition and enforcement of interim measures), and Article 17(J) (Court-ordered interim measures) of the UNCITRAL Model Law on International Commercial Arbitration.

⁴⁴ On the policing function of national courts in support of international commercial arbitration, see ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 329 (Sweet and Maxwell, 2004).

⁴⁵ ICSID Convention, Article 26.

⁴⁶ ICSID Convention, Articles 53 and 54.

⁴⁷ ICSID Convention, Article 27(1).

of international investment disputes.⁴⁸ There would likewise be advantages and disadvantages to making an Article 64 referral of a dispute to the Court based on any of the three issues identified above. The Court's litigation procedures or current docket may appear too prohibitive against giving timely provisional relief, such as that which may be necessitated during the 90 day period before the constitution of an arbitral tribunal when a claimant or State cannot bring a plea for provisional or interim measures anywhere else within the arbitral process. However, as I also consider in this article, the Court's own rules also contain a remarkable flexibility that the Court has, at times, maximized in order to be responsive to emergency situations, especially in issuing provisional relief during the pendency of the question of the Court's jurisdiction.

The point, therefore, is not to dismiss the Court's relevance to international investment disputes altogether simply because of the restrictive interpretation of its jurisdiction under the Report of the Executive Directors to the ICSID Convention. Rather, this article attempts to show possibilities where the Court's judicial function, when appropriately invoked, could be most useful to have States toe the line according to the "self-contained" dispute resolution system designed under the ICSID Convention. A State choosing to refer a dispute to the Court through the Article 64 mechanism will always have to calibrate policy considerations such as procedural expediency and timeliness, the authoritativeness and practical implementation of a Court decision, the effectiveness of a Court decision in relation to the strategic objectives of the State making the referral, and the legal quality of the Court's decisions.⁴⁹ States' current reluctance to refer disputes to the Court under Article 64

⁴⁸ See Christian J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, 57 *Essays in Transnational Economic Law* 38-40 (2006), available at <http://www.telc.uni-halle.de/sites/default/files/altbestand/Heft57.pdf> (visited September 20, 2012). On some general advantages and disadvantages to ICJ litigation, see Rosalyn Higgins, *Remedies and the International Court of Justice: An Introduction*, in ROSALYN HIGGINS, *THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW* Chapter 7.10 (Oxford University Press, 2009). On the finding of bias in the decision-making of the International Court of Justice where judges allegedly "favor states that appoint them" and "favor states whose wealth level is close to that of the judge's own state", see Eric A. Posner and Miguel de Figueiredo, *Is the International Court of Justice Biased*, December 13, 2004, available at http://www.law.uchicago.edu/files/files/234.eap_.icj-bias.pdf (visited September 20, 2012).

⁴⁹ See CONNIE PECK AND ROY S. LEE (EDS.), *INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE* (Martinus Nijhoff Publishers, 1997); W. Michael Reisman had pointed out instances where, "in the past, the International Court of Justice has misstated its own prior holdings by selective quotation. In each instance, the partial quotation was invoked as the authority for the opposite of what the Court has said." W. Michael Reisman, *Respecting One's Own Jurisprudence: A Plea to the International Court of Justice (Editorial Comment)*, 83 *Am. J. Int'l L.* 312 (1989); Michael Gilligan,

of the ICSID Convention could very likely be attributed both to the self-imposed conservative view in regard to the actual remit of the Court's jurisdiction *ratione materiae* under the terms of this particular *clause compromissoire*, as well as to States' lingering skepticism of the efficacy and practical contributions of the Court in the matter of settling international investment disputes.

Finally, one cannot overemphasize the importance of reassessing the prevailing negative perceptions and low expectations of the Court's possible contribution to the international investment dispute settlement process. Recent acts of State recalcitrance against complying with the ICSID Convention⁵⁰ further conveys that the supposedly "self-contained" dispute resolution mechanism in the ICSID Convention is not hermetically sealed from questions of inter-State responsibility. In my view, it is this precise eventuality that Article 64 was meant to govern.

Leslie Johns, Peter Rosendorff, *Strengthening International Courts and the Early Settlement of Disputes*, unpublished paper dated September 26, 2007, available at http://politics.as.nyu.edu/docs/IO/2601/GJR_070926.pdf (visited September 20, 2012), finding that "[i]f the court does not have jurisdiction or its rulings do not appreciably change the bargaining outcomes between the disputants, then the plaintiff's private information about his legal claim is irrelevant. Asymmetric information about the validity of legal claims is important only when the court has an impact on the final outcome" (at 34).

⁵⁰ See Robert J. Shapiro, *Obama should not reward Argentina's bad behavior*, Washington Examiner, April 17, 2012 ("So egregious is Argentina's disregard for international law and covenants that it accounts for 78 percent of all cases brought against G-20 countries in the World Bank's International Centre for Settlement of Investment Disputes. ICSID has issued awards totaling nearly \$1 billion in cases so far against Argentina, which it refuses to respect. Beyond ICSID, other countries find themselves in disputes over Argentina's economic actions. This week, Spain is the most obvious example, with Kirchner's peremptory nationalization of YPF/Repsol."), available at <http://washingtonexaminer.com/obama-should-not-reward-argentinan-bad-behavior/article/509126#.UGvGrY59SKg> (visited September 20, 2012); Giuliana Cané, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 Am. Rev. Int'l Arb. 439, 460 (2004) ("A plea of immunity from execution by a State frustrates enforcement of the award, thereby excusing it from its obligation under the Convention to comply with the award...Even though the majority of international arbitrations, and those of ICSID in particular, conclude successfully, 'the utility of the mechanism should not be predicated on the unpredictable conduct of parties. Thus it may be worthwhile to amend the ICSID Convention to eliminate the impact of sovereign immunity in the execution of the award."); Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 Annual Survey of International and Comparative Law 21, 31-39 (2001) (summarizing the variant practices of domestic courts from various jurisdictions as to how they accept the defense of sovereign immunity as a bar against execution or enforcement of ICSID awards).

II. Court of Last Resort, but not Appeal: the Article 64 Clause Compromissoire in the ICSID Convention

As the “principal judicial organ of the United Nations”,⁵¹ the International Court of Justice occupies a central role in the development of international law and the settlement of inter-State disputes.⁵² Its predecessor, the Permanent Court of International Justice, was founded during a climate of idealistic optimism that embraced cooperation and the cause of internationalism among the Great Powers.⁵³ Recognizing the increased complexity and diversity in the global community and the proliferation of many other international courts and tribunals, Judge Christopher Greenwood stresses several features of the International Court of Justice that continues to set it apart from all others:

“[The Court] has a universality which other courts and tribunals do not possess. Any of the 192 member States of the United Nations can be parties to cases before it and all can participate in the vote in the General Assembly to elect the judges of the Court...The Court is also universal in another sense. Unlike specialized courts and tribunals whose jurisdiction is confined to particular areas of international law...the jurisdiction of the International Court of Justice covers the whole field of international law...

..What, then, is the significance of the Court in international life? It would be easy to conclude that a court which no genuinely compulsory jurisdiction and which cannot turn to any of the normal apparatus of the State (on which national courts can rely) to enforce the judgments which it gives cannot play a significant role. Such a conclusion would be facile and misleading...[Firstly], the Court has played an important role in settling a range of disputes which the parties have chosen, by mutual agreement, to refer to it...Secondly, even in those cases (which are a clear majority) in which the Court is seised by only one party to a dispute, the Court’s verdict has almost always been accepted, even if reluctantly...Thirdly, notwithstanding the relative lack of machinery for the enforcement of judgments of the Court, in practice those judgments have generally been complied with...Fourthly, I want to highlight what I regard as a particular success on the part of the Court, albeit one that has not always been free of controversy. Between the late 1960s and early 1980s the international law of the sea underwent dramatic changes... These factors created a potential for numerous conflicts. In practice, however, those conflicts have generally been avoided in large part due to a

⁵¹ Charter of the United Nations, Chapter XIV, Article 92.

⁵² See MOHAMMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 177-277 (Kluwer Law International, 2003).

⁵³ See MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA* 2375-2376 (Penguin Press, 2012); Edward Gordon, *The ICJ: On Its Own*, 40 *Denver Journal of International Law and Policy* 74, 77-80 (2011-2012).

series of rulings on maritime boundaries which have not only resolved the specific disputes to which they related but also articulated a body of principles for the determination of overlapping claims which have built up into a substantial body of law. While some of the decisions in question have emanated from arbitration tribunals, by far the largest contribution comes from the ten judgments of the International Court of Justice. Lastly, while no-one would argue that the International Court (or any of the other international institutions) has realized the dreams of some of those who, at the Hague Peace Conferences of 1899 and 1907 saw international adjudication as something that would abolish war, it is worth noting the record of the Court in resolving disputes which had led to outbreaks of fighting...⁵⁴

Given its historical importance and the generally high quality of its decisions,⁵⁵ it is remarkable that the International Court of Justice was edged out from direct adjudication of international investment disputes when the ICSID Convention was drafted. This is not entirely inexplicable. As previously discussed in the *Introduction*,⁵⁶ the Court's thin (and at times criticized) record in handling the few cases of diplomatic espousal involving foreign investment claims did not inspire much confidence. According to Professor Christoph Schreuer, the drafting history behind the ICSID Convention reveals a deliberate preference of the delegates not to permit interim or preliminary rulings by the Court in cases pending before a tribunal or commission, as well as not to permit the Court to review an arbitral award issued under the Convention:

“The relationship of what eventually became Art. 64 to cases pending before a tribunal or commission or decided by a tribunal was the subject of extensive discussions during the Convention's drafting...A ‘tentative amendment’ was tabled to allow arbitration proceedings to be suspended to seek a ruling of the ICJ on a matter concerning the Convention's interpretation or application...The reason put forward was a possible lack of familiarity of arbitrators with the technicalities of international law and the desire to attain uniformity in the Convention's application...The expectation was that either the host State or the State of the investor's nationality would initiate contentious proceedings before the ICJ...But the idea that the Centre or the tribunal itself might somehow seek an advisory opinion was also aired.

Objections to this planned amendment included the fear that recourse to the ICJ might be used as dilatory tactics and that it would be

⁵⁴ Judge Christopher Greenwood, *The Role of the International Court of Justice in the Global Community*, 17 U.C. Davis Journal of International Law and Policy 233, 241-252 (Spring 2011).

⁵⁵ LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 134-135 (, 2001) (“the decisions of the International Court of Justice are, on the whole, regarded by international lawyers as highly persuasive authority of existing international law”).

⁵⁶ Page 6 of this Article.

contrary to the Convention's objective to insulate ICSID proceedings from inter-State disputes...

The proposal was quietly dropped. But there was concern that Art. 64, even as eventually adopted, might lead to a frustration of arbitration proceedings through resort to the ICJ. A proposed amendment to rule out this possibility was withdrawn when it was agreed that the comments, attached to the Convention, would make it quite clear that Art. 64 would in no case enable a State party to an arbitration to frustrate the proceedings by a referral of the matter to the ICJ...⁵⁷

As discussed in the *Introduction*,⁵⁸ the Report of the Executive Directors to the Convention specifically carved out any review of decisions of arbitral tribunals or conciliation commissions from the jurisdiction of the Court under Article 64 of the ICSID Convention. The Report further interpreted Article 64 in relation to Article 27 to mean that no State could institute proceedings before the Court "in respect of a dispute" when the same has been submitted to arbitration.⁵⁹ Under no circumstances was the Court ever supposed to operate as an appellate court for international investment awards,⁶⁰ a position all the more emphasized by the fact that the ICSID Convention itself already provides for an internal system of interpretation, revision, and annulment of awards.⁶¹

What, then, is the subject-matter left to the compulsory jurisdiction of the Court under Article 64 of the ICSID Convention?

There is no question that one such subject-matter⁶² is the party's duty to comply with its obligation under Article 53(1) of the ICSID Convention to "abide by and comply with the terms of the award except to the extent that enforcement shall

⁵⁷ CHRISTOPH H. SCHREUER, WITH LORETTA MALINTOPPI, AUGUST REINISCH, ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* 1259-1260 (Cambridge University Press, 2011) [hereafter, "ICSID Commentary"].

⁵⁸ See *supra* note 24.

⁵⁹ *Id.*

⁶⁰ On the proposal for an Investment Arbitration Appellate Court, see Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 *Fordham Law Review* 1521-1625 (2005).

⁶¹ ICSID Convention, Articles 50 to 52. See LUCY REED, JAN PAULSSON, NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* 159-190 (Kluwer Law International, 2011); MARIEL DIMSEY, *THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS* 182-185 (Eleven International Publishing, 2008) (surveying proposals for a central appellate mechanism in international investment law, all of which do not involve the International Court of Justice).

⁶² See Christoph Schreuer, *Investment Protection and International Relations*, in *THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD* 345-358, 348 (August Reinisch and Ursula Kriebaum (Eds.), Eleven International Publishing, 2007).

have been stayed pursuant to the relevant provisions of this Convention”⁶³, as well as a Contracting State’s obligation under Article 54(1) of the ICSID Convention to “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.”⁶⁴ As explained by the ad hoc Committee in *Enron v. Argentina*,⁶⁵ these two obligations address different subjects:

“62. The Committee further notes that these two obligations are addressed to different subjects. It is clear from its context that the word “party” in the second sentence of Article 53(1) refers to a party to an award, who will be, on the one hand, a Contracting State or a constituent subdivision or agency of a Contracting State, and, on the other hand, a national of another Contracting State. That provision therefore expressly requires each party to an award to “comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention”. On the other hand, the first sentence of Article 54(1) is addressed to “each Contracting State” to the ICSID Convention, whether or not that Contracting State is a party to the award in question, and is not addressed to any party to an award other than a Contracting State. *The effect of the obligation imposed on Contracting States by this provision is to ensure that any ICSID award can be enforced by either party to the award in the territory of any ICSID Contracting State.* In other words, if an award is given against an investor in favour of a Contracting State or a constituent subdivision or agency of a Contracting State, Article 54(1) ensures that the Contracting State or constituent subdivision or agency can enforce the award in the territory of any Contracting State, including but not limited to its own territory or the territory of the investor's national State. Conversely, if an award is given against a Contracting State or a constituent subdivision or agency of a Contracting State in favour of an investor, Article 54(1) ensures that the investor can enforce the award in the territory of any Contracting State, including but not limited to the territory of the State that is, or the State of, the award debtor. *However, Article 54(1) does not state that a party to an award must use the enforcement machinery established pursuant to this provision as a condition of the award being complied with.* Nor does it state that a Contracting State or a constituent subdivision or agency that is an award debtor is entitled to decline to comply with the terms of the award until the enforcement machinery that exists under that Contracting State's own national law is used by the award creditor.”⁶⁶

⁶³ ICSID Convention, Article 53(1).

⁶⁴ ICSID Convention, Article 54(1).

⁶⁵ *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Decision on Request for a Continued Stay of Enforcement of the Award, ICSID Case No. ARB/01/3, October 7, 2008.

⁶⁶ *Supra* note 58, para 62. Italics added.

Where a Contracting State fails to comply with an award issued under the Convention, the State of the nationality of the claimant-investor or a respondent State may invoke the Court's jurisdiction to compel that Contracting State to observe its international obligation under Article 54(1) of the ICSID Convention. When the non-complying State is a party to the dispute (either a claimant State or a respondent State), the infringement of the international obligation under Article 53(1) of the ICSID Convention entitles any other Contracting State to invoke the Court's jurisdiction through the Article 64 *clause compromissoire* in the ICSID Convention. Apart from issues of recognition and enforcement, few other potential disputes were also considered as within the ambit of Article 64 of the ICSID Convention, but have also never been tested at the Court:

“During the Convention's drafting, disputes concerning the States' general duty to cooperate with the Centre, the compliance with awards, the recognition and enforcement of awards, as well as the immunities of the Centre and of persons enjoying special privileges under the Convention, were considered suitable for submission to the ICJ (History, Vol. II, pp. 354, 403, 533, 906, 994, 1030). Other matters that may lead to disputes between States are the duty of domestic courts not to interfere in ICSID proceedings (see Art. 26, paras. 132-178) or the duty of States under Art. 27 not to give diplomatic protection in respect of disputes that are subject to ICSID arbitration. By January 2008 no case had ever been brought to the ICJ under Art. 64.”⁶⁷

The Report of the Executive Directors on the ICSID Convention clearly prohibited States from using Article 64 to institute proceedings before the Court “*in respect of a dispute* which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27...”⁶⁸ Article 27(1) of the ICSID Convention likewise prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, “*in respect of a dispute* which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention...”⁶⁹ The prohibition squarely applies *only* to a State that is a

⁶⁷ *ICSID Commentary*, *supra* note 57, at 1259.

⁶⁸ *Supra* note 24.

⁶⁹ ICSID Convention, Article 27(1).

Contracting Party to the ICSID Convention, and whose national has a pending arbitration with another State.⁷⁰ The limitation of the prohibition to matters “in respect of a dispute” is thus designed to preclude the submission of the same substantive issues pending before an arbitral proceeding to the Court. As the arbitral tribunal explained in *Enron Corporation and Ponderosa Assets LP v. Argentina*:⁷¹

“The purpose of Article 27(1) is explained in paragraph 33 of the Report of the Executive Directors of the Convention as follows:

When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, *the investor should not be in a position to espouse his case* and that State should not be permitted to do so...”⁷²

Clearly, the rationale for the prohibition against diplomatic protection under Article 27(1) of the ICSID Convention is to prevent the multiplicity of suits before an arbitral tribunal and international courts on identical issues and causes of action. As I show in the next section, this rationale would not be violated if the Court were to exercise jurisdiction under Article 64 only with respect to “gateway issues”,⁷³ such as issues involving State responsibility when a recalcitrant State refuses to comply with the exclusive chosen remedy of arbitration under Article 26 of the ICSID Convention, or acts in a manner intended to defeat, undermine, subvert, or thwart this chosen remedy. In this latter scenario, the breach alleged against the State before the Court (e.g. failure to abide by Article 26 of the ICSID Convention) is wholly separate and distinct from the breach alleged by the investor-claimant against the State in the actual investment dispute (e.g. breaches of a bilateral investment treaty or other sources of applicable law within Article 42 of the ICSID Convention). This

⁷⁰ See *Autopista Concesionada de Venezuela CA (Aucoven) v. Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/00/5, September 27, 2001, para. 74.

⁷¹ *Enron Corporation and Ponderosa Assets LP v. Argentina*, Decision on Request for a Continued Stay of Enforcement of the Award, ICSID Case No. ARB/01/3, October 7, 2008.

⁷² *Id.*, at para. 64.

⁷³ On the analogous “gateway” issues faced by national courts in international commercial arbitration, see George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 *Yale Journal of International Law* 1 (2012).

interpretation of Article 27(1) of the ICSID Convention would thus be consistent with that discussed by the arbitral tribunal in *Sempra Energy International v. Argentina*.⁷⁴

III. THE COURT'S JUDICIAL FUNCTION IN SUPPORT OF ICSID ARBITRATION

Throughout its jurisprudence, the Court has not hesitated to independently interpret the objective meaning of a *clause compromissoire* in a treaty, in order to ascertain the limits of States' consent to the Court's jurisdiction. In *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*,⁷⁵ the Court examined a *clause compromissoire* (Article 30, paragraph 1, of the Convention against Torture)⁷⁶ that is similarly worded to the *clause compromissoire* in Article 64 of the ICSID Convention. The Court emphasized that:

“...in order to establish whether a dispute exists, “[i]t must be shown that the claim of one party is positively opposed by the other” (*South West*

⁷⁴ *Sempra Energy International v. Argentina*, Decision on Argentina's Request for a Continued Stay of Enforcement of the Award, ICSID Case No. ARB/02/16, March 5, 2009, paras. 44, 46-47:

“44. This provision [Article 27(1) of the ICSID Convention] mirrors the undertaking expressed in Article 53 that parties to the arbitration are to abide by and comply with an ICSID award. This is also quite logical. It cannot possibly be correct that a State's failure to comply with its international obligation – constituted under Article 53 – must be submitted to a national court for ultimate resolution. The option of coercive enforcement is not available on the international plane, and an award creditor in the ICSID regime will therefore have no other choice than to seek diplomatic protection or to bring an international claim...”

46. Further, in the negotiating history of the ICSID Convention, it was generally believed that States would voluntarily comply with awards rendered by ICSID tribunals rendering any question of enforcement moot. The enforcement option provided for in Article 54 rather sought to allay any concern of a State party that recourse could not be had against investor parties. One may even question whether there was any expectation that enforcement against a State debtor would have to be undertaken within that State's own (or any other Contracting State's) enforcement apparatus.

47. In general, the Committee adopts the reasoning of the *Enron* ad hoc committee and considers that it has quite succinctly identified the error in the position advocated by Argentina in the following words: ‘The ICSID dispute settlement mechanism was intended to be an international method of settlement, and it would run counter to this intention for compliance with a final award to be subject, ultimately, to the provisions and mechanisms of national law.’...”

⁷⁵ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, July 20, 2012, at 18-19.

⁷⁶ *Id.*, at para. 42:

“42. To found the jurisdiction of the Court, Belgium relies on Article 30, paragraph 1, of the Convention against Torture and on the declarations made by the Parties under Article 36, paragraph 2, of the Court's Statute. Article 30, paragraph 1, of the Convention reads as follows:

“Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328). The Court has previously stated that “[w]hether there exists an international dispute is a matter for objective determination” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p.74) and that “[t]he Court’s determination must turn on an examination of the facts. The matter is one of substance, not of form.” (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011*, para. 30.) The Court has also noted that the “dispute must in principle exist at the time the Application is submitted to the Court” (*ibid.*, para. 30).⁷⁷

On its independent examination of the facts before it, the Court noted that Senegal had complied with its obligation under Article 5(2) of the Convention against Torture, and as such, the dispute with respect to the interpretation or application of the Convention against Torture had already ended by the time that Belgium filed its Application.⁷⁸ With respect to the international obligation under Article 6(2) and Article 7(1) of the Convention against Torture, the Court found that there was a dispute on the “interpretation or application” of the Convention that still existed between Belgium and Senegal, since both States had a difference “as to how the execution of an obligation arising from an international instrument to which both States are parties should be understood.”⁷⁹

Furthermore, the Court has been notably careful to determine the temporal limitations to its jurisdiction in relation to a treaty’s *clause compromissoire*,⁸⁰ as well as to strictly refer to the object of a State’s Application in relation to the *ratione materiae* scope of a treaty’s *clause compromissoire*.⁸¹ The Court considers it to be a “faithful discharging of its judicial function” to decide what is meant by the “interpretation or application” of a treaty in relation to the Court’s jurisdiction under a

⁷⁷ *Id.* at para. 46.

⁷⁸ *Id.* at para. 48.

⁷⁹ *Id.* at 22, paras. 51 and 52.

⁸⁰ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of February 3, 2012, I.C.J. Reports, at 19-20, paras. 41-44.

⁸¹ *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment of December 5, 2011, I.C.J. Reports, at 14, para. 24 and at 18-19, paras. 41-43; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, at 40-42, paras. 48-52; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment*, I.C.J. Reports 2007, at 832, 835, 847-848, paras. 34-38.

clause compromissoire.⁸² In its Judgment on Preliminary Objections in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*,⁸³ the Court stressed the meaning of a “dispute” on the interpretation and application of a treaty, and the Court’s duty to objectively determine the existence of such a “dispute”:

“30. The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: “A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”(*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.*) Whether there is a dispute in a given case is a matter for “objective determination” by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.*) “It must be shown that the claim of one party is positively opposed by the other” (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328*) (and most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 40, para. 90*). The Court’s determination must turn on an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89*), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.

The dispute must in principle exist at the time the Application is submitted to the Court (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 42-44; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-44*); the Parties were in agreement with this proposition. Further, in terms of the subject-matter of the dispute, to return to the terms of Article 22 of CERD, the dispute must be “with respect to

⁸² *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment of December 5, 2011, I.C.J. Reports, at 22, para. 58.

⁸³ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment on Preliminary Objections, I.C.J. Reports, April 1, 2011.

the interpretation or application of [the] Convention”. While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984, pp. 428-429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State’s understanding of the subject-matter in issue and put the other on notice...”⁸⁴

As seen above, the Court in *Georgia v. Russia* required that the disputed exchanges between the States in regard to a treaty must refer to its subject-matter “with sufficient clarity”, to qualify a dispute as one that involves the “interpretation or application” of that treaty.⁸⁵ While it is not required that particular reference *eo nomine* be had to provisions of the treaty to identify a dispute as to its “interpretation or application”,⁸⁶ the Court will pay significantly close attention to the text of the treaty’s *clause compromissoire* to determine the scope and limits of its compulsory jurisdiction.⁸⁷ It will likewise examine if there are any State reservations or State declarations on limitations to its instrument of accession to the treaty that contains the *clause compromissoire*.⁸⁸ The scope of the court’s independent and objective determination of the existence of a dispute within the scope of a treaty’s *clause compromissoire* can extend to “other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to

⁸⁴ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment on Preliminary Objections, April 1, 2011, para. 30.

⁸⁵ See also the requirement that a dispute must “specifically concern the interpretation or application” of the treaty containing the clause *compromissoire* in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2006, at 41, para. 94 in relation to 43, paras. 99-101 and at 49, para. 118 and at 52, paras. 125-126.

⁸⁶ See *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2005, p. 6; *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment of December 2, 1963*, I.C.J. Reports 1963, at 15, 25, 27-28.

⁸⁷ See, e.g., *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, at 61, 70-71, paras. 20-22.

⁸⁸ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2006, at 6, 16-17, para. 15 and at 21-22, para. 28 and at 32, paras. 65-67 and at 33, para. 71 in relation to 34-35, paras. 74-79 and at 35-36, paras. 80-81, in relation to 39, paras. 87-88 and at 40, paras. 89-90 in relation to 40-41, paras. 91-92.

require examination of those matters.”⁸⁹ It can examine the conduct of the States concerned to infer the existence of a dispute, since “a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or attitude of a party can be established by inference, whatever the professed view of that party.”⁹⁰

Applying the foregoing principles, if the Court were to examine a future application by a State that invoked the Court’s compulsory jurisdiction through the *clause compromissoire* in Article 64 of the ICSID Convention, it is not easy to conclude that the Court would automatically yield the definition of its jurisdiction *ratione materiae* to the restrictive interpretation made by the Report of the Executive Directors on the ICSID Convention.⁹¹ While the Court could very likely accept the Report as part of the ICSID Convention’s context, it is not precluded from undertaking its own objective analysis of the meaning of Article 64 of the ICSID Convention and the existence of a legal dispute as contemplated in this provision.

Such being the case, I submit that Article 64 of the ICSID Convention need not be read exclusively according to the prohibitions and limitations set by the Report. While it is entirely understandable that the drafters of the ICSID Convention were desirous of preventing any disruptions to ICSID arbitration proceedings by States’ recourse to the International Court of Justice, I submit that it would not be contrary to the tenor, text, and intent of the drafters of the Convention to enable an interpretation of Article 64 of the ICSID Convention in a manner that permits resort to the Court *in support of* the arbitration, similar to the cooperative role played by national courts in international commercial arbitration. In international commercial arbitration, national courts provide support in various stages to arbitral proceedings

⁸⁹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, at 851, para. 49, citing (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, at 259, para. 22; and *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, at 463, para. 22; see also *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, at 29).

⁹⁰ *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, 275, at 315, para. 89.

⁹¹ *Supra* note 24.

and for recognition and enforcement of arbitration agreements and awards.⁹² Prior to the establishment of a tribunal, national courts act “to uphold the agreement to arbitrate”.⁹³ At the commencement of the arbitration, national courts “use [their] authority to give effect to the parties’ agreement by establishing an appropriate tribunal to take over and deal with the dispute between the parties where the prescribed appointment mechanism does not work”.⁹⁴ During the arbitration process, national courts can issue “procedural orders that cannot be ordered or enforced by arbitrators, or orders for maintaining the status quo...orders for protecting and taking evidence, or otherwise protecting the integrity of the arbitration.”⁹⁵ Finally, during the enforcement stage, national courts are crucial “(1) at the place of arbitration, i.e. when a party challenges and seeks to set aside the award, or lodges an appeal against the award under the applicable arbitral law or regime; or (2) at the place of enforcement, where the successful party seeks the recognition and enforcement of the award.”⁹⁶

I do not propose that the International Court of Justice assume all the foregoing functions of national courts in relation to international commercial arbitration, in order to provide strategic support to ICSID arbitration. After all, the self-contained dispute resolution system in the ICSID Convention already provides for a settled appointments and challenge procedure for arbitrators;⁹⁷ empowers arbitral tribunals to determine their own jurisdiction⁹⁸ (the principle of *competence-competence*⁹⁹), issue provisional measures to preserve the rights of parties,¹⁰⁰ order document or evidentiary production and other appropriate evidentiary inquiries;¹⁰¹ and further empowers parties to have arbitral awards internally interpreted, revised, or

⁹² See W. Michael Reisman and Heide Iravani, *Conflict and Cooperation: The Changing Relation of National Courts and International Commercial Arbitration*, 21 *American Review of International Arbitration* 5 (2010).

⁹³ Julian D.M. Lew, *Does National Court Involvement Undermine the International Arbitration Processes?*, 24(3) *American University International Law Review* 489, 496 (2009).

⁹⁴ *Supra* note 83, at 497.

⁹⁵ *Id.* at 497-498.

⁹⁶ *Id.* at 498.

⁹⁷ ICSID Convention, Articles 37 to 40.

⁹⁸ ICSID Convention, Article 41.

⁹⁹ GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 863 (Kluwer Law International, 2009): “The ICSID Convention also recognizes the competence-competence doctrine. Article 41(1) of the Convention provides that ‘the Tribunal shall be the judge of its own competence’. As noted above, this follows general principles of international law in both commercial and state-to-state arbitration. (At the same time, the ICSID Secretariat performs an unusually extensive review of Requests for Arbitration aimed at confirming the existence of a *prima facie* jurisdictional base before an arbitration may proceed under the ICSID Rules.)”

¹⁰⁰ ICSID Convention, Article 47.

¹⁰¹ ICSID Convention, Article 43.

annulled within the ICSID system under specific circumstances.¹⁰² The usual support functions of national courts in international commercial arbitrations are thus, to a great extent, already available within the dispute resolution system under the ICSID Convention.

However, I submit that there are three distinct areas in which the International Court of Justice can lend vital support to the ICSID arbitral process through its compulsory jurisdiction under Article 64 of the ICSID Convention. These areas were not only left unaddressed in the ICSID Convention, but more to the point, these areas involve international duties that cannot be readily enforced by national courts. I refer to: 1) urgent provisional measures *before* the constitution of the arbitral tribunal; 2) relief against recalcitrant States deliberately seeking to thwart, undermine, obstruct or resist ICSID arbitration proceedings through parallel domestic actions that involve identical causes of action with the arbitration, and which ultimately hamper and derail access to evidence and prejudice the subject-matter of the dispute in the ICSID arbitration; and 3) post-award conservatory measures to ensure recognition and enforcement of the arbitral award. I briefly discuss how each proposal in relation to Article 64 of the ICSID Convention, the practical obstacles that might exist for each proposed referral to the Court, and how the Court could be instrumental in supporting the good faith observance of the parties' exclusive choice of ICSID arbitration.

Beyond the question of whether the Court *may* take cognizance of these types of referrals pursuant to Article 64 of the ICSID Convention, is the more urgent question of whether States *should* pursue this route in rare exceptional cases that threaten the integrity and continued functioning of the arbitral process. States should also be aware of the institutional practice, history, and rules of procedure of the Court, in order to properly estimate the strategic advantages and disadvantages in seeking relief through the Court in these rare instances. While breaches of the ICSID Convention through State acts not involving issues “in respect of a [pending arbitral] dispute”¹⁰³ can be independently litigated at the Court, in practice apart from determining its jurisdiction (whether the Court *could* hear the case) the Court will also

¹⁰² ICSID Convention, Articles 50 to 52.

¹⁰³ *Supra* note 24.

examine the admissibility of an application (whether the Court *should* hear a case).¹⁰⁴ While I attempt to sketch the general contours of these policy considerations in this paper, I admit that tentative and abstract theorizing has its limits, and space constraints for this article result in barely scratching the surface of a State's decision-making calculus. Further research is necessary to fully characterize the legal nuances and policy gains behind any decision to initiate litigation before the International Court of Justice. Realistically, all that this article can achieve is to start the policy conversation for States' authoritative decision-makers on the possible uses of the *clause compromissoire* under Article 64 of the ICSID Convention.

A. Urgent Provisional Measures before the Constitution of the Arbitral Tribunal

Article 37(1) of the ICSID Convention mandates that the arbitral tribunal “shall be constituted as soon as possible after registration of a request pursuant to Article 36.”¹⁰⁵ There is no time period set by the Convention for the registration of the request, as in fact the ICSID Secretariat does conduct some preliminary review of the request for arbitration to determine if “the dispute is manifestly outside the jurisdiction of the Centre.”¹⁰⁶ After the ICSID Secretary-General notifies the parties of the registration of the request for arbitration, the arbitral tribunal will be constituted (either upon agreement by the parties or, if the parties cannot agree, by appointment of the World Bank President as Chairman of the Administrative Council), within a period not more than 90 days after such notification was issued.¹⁰⁷

Nothing in the ICSID Convention indicates whether the party filing the request (either State or investor) can apply for urgent provisional measures during the period from the notice of the registration of the request, to the period *before* the arbitral tribunal is constituted. An arbitral tribunal has the power to “recommend any

¹⁰⁴ See JOHN COLLIER AND VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 155-162 (Oxford University Press, 2005). [hereafter, “COLLIER AND LOWE”]

¹⁰⁵ ICSID Convention, Article 37(1).

¹⁰⁶ ICSID Convention, Article 36(3). See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 863 (Kluwer Law International, 2009): “...At the same time, the ICSID Secretariat performs an unusually extensive review of Requests for Arbitration aimed at confirming the existence of a *prima facie* jurisdictional base before an arbitration may proceed under the ICSID Rules.”

¹⁰⁷ ICSID Convention, Articles 37 and 38.

provisional measures which should be taken to preserve the respective rights of either party”,¹⁰⁸ but this power presupposes the existence of the tribunal. While Rule 39 of the ICSID Arbitration Rules enables a party to request for provisional measures “at any time after the institution of the proceeding”, the ICSID Secretary-General merely “fix[es] time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.”¹⁰⁹ Significantly, Rule 39(5) of the ICSID Arbitration Rules explicitly maintains that “[n]othing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.”¹¹⁰ While it has been observed that these provisions in Rule 39 “eliminate a significant practical roadblock for any party whose rights are in immediate jeopardy”, it has also been conceded that “even with these revisions, the process may still involve significant delays, so the parties may be well advised to consider seeking provisional measures in domestic courts as well, if they are available.”¹¹¹

Apart from domestic courts, would the International Court of Justice be a viable forum to apply for provisional measures during this intervening period between the filing of a request for arbitration and the constitution of the arbitral tribunal? It might not appear so, because Article 27(1) of the ICSID Convention specifically prohibits any Contracting State from “giv[ing] diplomatic protection, or bring[ing] an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”¹¹² This prohibition operates to bar bringing the *same* claim subject of the pending arbitral dispute to the Court. As

¹⁰⁸ ICSID Convention, Article 47.

¹⁰⁹ ICSID Arbitration Rules, Rule 39(1) and Rule 39(5).

¹¹⁰ ICSID Arbitration Rules, Rule 39(5).

¹¹¹ See Steven P. Finizio, Ethan G. Shenkman, and Julian Davis Mortenson, *Recent Developments in Investor-State Arbitration: Effective Use of Provisional Measures*, Global Arbitration Review (2007), available at http://www.wilmerhale.com/files/Publication/d76150c5-651f-4fb2-ae40-2334c60fe8ca/Presentation/PublicationAttachment/b8503dde-d3c8-4c8d-9cc9-2c180a7203d3/investor_state_arbitration.pdf (visited September 20, 2012); L. Yves Fortier, *Interim Measures: An Arbitrator's Provisional Views*, June 16, 2008, available at http://www.arbitration-icca.org/media/0/12232952989920/1115_001.pdf (visited September 20, 2012).

¹¹² ICSID Convention, Article 27(1).

aptly described by several scholars, a State's espousal of a claim means adopting the national's grievance 'as its own':

“Before an investor can rely upon the formal support of its home State, the government must ‘espouse’ his claim, adopting the grievance as its own and raising it to the international plane. Otherwise known as ‘diplomatic protection’, espousal is a completely discretionary right of the State – citizens may request that their claims be espoused, but it is impossible to compel the State to comply. Once a State has espoused a claim, it assumes all related rights and obligations, leaving the investor with little control over the dispute resolution process, and even over the remedy. In the formulation of the Permanent Court of International Justice,

‘by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, its right to ensure, in the person of its subjects, respect for the rules of international law’.”¹¹³

Short of the State's adoption of the investor's claim, therefore, it would be hard to trigger the prohibition against diplomatic protection under Article 27(1) of the ICSID Convention. In this regard, the arbitral tribunal's conclusions in *Pac Rim Cayman LLC v. El Salvador*¹¹⁴ are illuminating as to how the tribunal differentiated matters that did *not* amount to the exercise of diplomatic protection “in respect of a dispute” subject of a pending investment arbitration. In *Pac Rim*, the arbitral tribunal held that the extensive consultation procedures¹¹⁵ and provisions on notification and

¹¹³ N. STEPHAN KINSELLA AND NOAH D. RUBINS, INTERNATIONAL INVESTMENT, POLITICAL RISK, AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 406-407 (Oxford University Press, 2005), *citing Mavrommatis Palestine Concessions*, P.C.I.J. Series A, No. 2 (1924) at 12.

¹¹⁴ *Pac Rim Cayman LLC v. El Salvador*, Decision on the Respondent's Jurisdictional Objections, ICSID Case No. ARB/09/12, June 1, 2012.

¹¹⁵ Central American Free Trade Agreement, Article 20.4 (Consultations):

“1. Any Party may request in writing consultations with any other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.
2. The requesting Party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the actual or proposed measure or other matter at issue and an indication of the legal basis for the complaint.
3. A Party that considers it has a substantial trade interest in the matter may participate in the consultations on delivery of written notice to the other Parties within seven days of the date of delivery of the request for consultations. The Party shall include in its notice an explanation of its substantial trade interest in the matter.
4. Consultations on matters regarding perishable goods shall commence within 15 days of the date of delivery of the request.
5. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the consulting Parties shall:

provision of information¹¹⁶ under the Central American Free Trade Agreement (CAFTA), did not amount to the exercise of diplomatic protection by a CAFTA Party, even if both dealt with the precise subject-matter of a pending investment arbitration.¹¹⁷

Thus, if the submissions upon which an application is brought to the Court are *not* framed according to the claim subject of the pending arbitral dispute to the Court, it might be possible, in theory, that the prohibition in Article 27(1) of the ICSID Convention would not be triggered and resort may be had to the Court through Article 64 of the ICSID Convention. One example would be for a State to allege that the injurious acts of another State during the intervening period between the filing of a request for arbitration and constitution of the arbitral tribunal are of such an extraordinary nature, that they breach the general international law principle of good faith¹¹⁸ in the performance of treaty obligations (specifically the underlying obligation to comply with procedures contained in the ICSID Convention), by subverting, frustrating, or possibly mooted the object of the arbitration dispute altogether. It may be urgent and necessary to seek provisional measures against a recalcitrant respondent State, for example, which acts destructively against the subject-matter of a dispute,¹¹⁹

(a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation and application of this Agreement; and

(b) treat any confidential information exchanged in the course of consultations on the same basis as the Party providing the information.

6. In consultations under this Article, a consulting Party may request another consulting Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.”

¹¹⁶ Central American Free Trade Agreement, Article 18.3 (Notification and Provision of Information):

“1. To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party’s interests under this Agreement.

2. On request of another Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not that other Party has been previously notified of that measure.

3. Any notification or information provided under this Article shall be without prejudice as to whether the measure is consistent with this Agreement.”

¹¹⁷ *Pac Rim Cayman LLC v. El Salvador*, Decision on the Respondent’s Jurisdictional Objections, ICSID Case No. ARB/09/12, June 1, 2012, para. 4.87.

¹¹⁸ On the related uses of the good faith principle in the initiation of an arbitration, see Eric de Brabandere, ‘Good Faith’, ‘Abuse of Process’, and the Initiation of Investment Treaty Claims, *Journal of International Dispute Settlement* (2012).

¹¹⁹ The International Tribunal on the Law of the Sea (ITLOS) has specifically ordered provisional measures pending the constitution of an arbitral tribunal due to ongoing environmental harms to the subject-matter of the dispute in *The Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, 1999 ITLOS Case Nos. 3, 4, Provisional Measures (August 27, 1999) [hereinafter Southern Bluefin Tuna Cases], available at http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=3&lang=en (visited September 20, 2012); and *The MOX Plant Case (Ireland v. United Kingdom)*, 2001 ITLOS

or moves evidence material to the arbitration or assets subject of the arbitration request during this period when the arbitral tribunal has not yet been constituted.¹²⁰ In this narrow and extremely exceptional situation, there may be basis for a State to submit an application with a request for provisional measures to the Court, alleging the recalcitrant State's fundamental breach of its overriding obligation to abide by and comply with the consent to the exclusive remedy of arbitration prescribed under the Article 26 of the ICSID Convention.

The breach alleged against the recalcitrant State should be careful not to refer to, or involve, the merits of the dispute submitted to the arbitration, but rather, limit itself to the State's acts that extraordinarily undermine and thwart the exclusive remedy required under Article 26 of the ICSID Convention.¹²¹ Possible items of relief to be prayed for in this theoretical situation would be, first, a declaratory finding that a State is in breach of the good faith duty to submit to the dispute resolution process contained in the ICSID Convention (to which the State party consented without reservation or qualification);¹²² and second, injunctive relief to stop the State from committing further acts that jeopardize the arbitration during the period pending the constitution of the arbitral tribunal. Precisely for the reason that it would treat the breach as a matter of international responsibility, the Court might prove more

Case No. 10, Order (December 3, 2001) [hereinafter MOX Plant Case], available at http://www.itlos.org/case_documents/2001/document_en_197.pdf (visited September 20, 2012). See also Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 *American Journal of International Law* 277 (2001).

¹²⁰ See Doak Bishop, Craig Miles, and Roberto Aguirre Luzi, *Interim Measures Pending Arbitration*, 6 *Latin Lawyer* 4, available at <http://www.kslaw.com/library/publication/LatinLawyer-InterimMeasures.pdf> (visited September 20, 2012); Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 *Currents: International Trade Law Journal* 55 (2003).

¹²¹ See *Perenco Ecuador Ltd v. Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, Decision on Provisional Measures, ICSID Case No. ARB/08/6, May 8, 2009, para. 61 (where the tribunal found that “[t]he claims which the Respondents are invoking the legal process of the domestic courts to enforce are the claims which Perenco has brought this arbitration to challenge. It is, in the Tribunal’s opinion, inescapable that the Respondents’ resort to that process violates Article 26. It is also, in the Tribunal’s opinion, inescapable that Perenco would violate the Article if it were, in the domestic courts of Ecuador, to advance the arguments which it will rely on in this arbitration to challenge the recoverability of payments demanded under Law 42. Unless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration.”)

¹²² See *Ambatielos case (merits: obligation to arbitrate)*, *Judgment of May 19th, 1953*, I.C.J. Reports 1953, at 10, 19: “...[i]t is well-established in international law that no State can, *without its consent*, be compelled to submit its disputes... either to mediation or to arbitration, or to any other kind of pacific settlement.” (Italics added.)

effective than national courts of the recalcitrant State, in ordering that State from desisting from further acts that undermine, thwart, and frustrate the ICSID arbitration.

Alleging the recalcitrant State's breaches of fundamental duties to observe good faith in performing obligations under the ICSID Convention and respecting the dispute resolution system contained therein, an applicant State may, in theory, possibly submit a request to the Court for the indication of provisional measures pursuant to Article 41 of the Statute of the Court:

“Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”¹²³

It is important to emphasize the urgency of the requested provisional measures during the intervening period before the constitution of the arbitral tribunal. While the element of “urgency” does not specifically appear in the text of Article 41 above, the Court has long recognized this element:

“[t]he formal introduction of urgency into the law of provisional measures was made by the Judges of the International Court of Justice...They have always examined the circumstances in which the request was made to find whether the urgency of the matter justified the ordering of provisional measures. Urgency is also implicit in the requirement that in the circumstances immediate action is necessary to protect the rights being claimed (of both parties), something that cannot wait until the final decision in the case. The state of the proceedings when the request is made, and the estimated period likely to elapse before the decision of the court or tribunal on the principal claim, is thus also an element relevant to the determination of the urgency of the matter. In this connection, urgency has become linked to the gravity of the harm sought to be avoided by a provisional measure. Only if the Court finds that the potential damage will be irreparable, will urgency come to the forefront.”¹²⁴

¹²³ Statute of the International Court of Justice, Article 41.

¹²⁴ SHABTAI ROSENNE, *PROVISIONAL MEASURES IN INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 135 (Oxford University Press 2005). [hereafter, “ROSENNE 2005”] For the history of “urgency” as a procedural matter in the Rules of the Permanent Court of International Justice up to the present Articles 73, 74(2), and 54(2), of the Rules of Court of the International Court of Justice, *see* pp. 136-137.

Urgency must be deemed to appear “in two forms and with two meanings. Urgency is a matter of procedure, relevant to the convening of the Court or Tribunal if not in session when the request is made. Urgency is a matter of substance among the circumstances justifying provisional measures.”¹²⁵ The Court’s internal rules of procedure allow for considerable flexibility to accommodate and adjust to requests for provisional measures. Such requests are expressly given “priority over all other cases”,¹²⁶ and the Court can itself organize and expedite the time-limits for submission of written observations in consideration of the urgency of the dispute,¹²⁷ as well as to convene immediately for the purpose of proceeding to a decision on the request for provisional measures.¹²⁸ Under Article 75(1) of its Rules of Court, the Court “may *at any time* decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.”¹²⁹ After the Court issues an order indicating provisional measures, the same is communicated to the Secretary-General of the United Nations for transmission to the Security Council.¹³⁰

Thus, in the *Anglo-Iranian case*,¹³¹ a case involving sequestration and seizure of the assets of the Anglo-Iranian Oil Company, Limited, in Iran, the Court accepted the claim of diplomatic protection by the United Kingdom (the State of the nationality of the investor corporation) granted provisional measures despite the refusal of the Iran to participate in the proceedings. Specifically, the Court noted that there was a breach of the duty not to deny justice when Iran refused to submit to arbitration under its dispute settlement provisions in its concession agreement with the Anglo-Iranian

¹²⁵ *Id.*, at 136.

¹²⁶ Article 74(1) of the Rules of Court of the International Court of Justice.

¹²⁷ Articles 74(3) and 74(4) of the Rules of Court of the International Court of Justice:

“3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.

4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.”

¹²⁸ Article 74(2) of the Rules of Court of the International Court of Justice: “The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.”

¹²⁹ Article 75(1) of the Rules of Court of the International Court of Justice. Italics added.

¹³⁰ Article 77 of the Rules of Court of the International Court of Justice.

¹³¹ *Anglo-Iranian Oil Co. Case, Order of July 5th, 1951, I.C.J. Reports 1951*, at 89

Oil Company: “a violation of international law by breach of the agreement for a concession of April 29th, 1933, and by a denial of justice which, according to the Government of the United Kingdom, would follow from the refusal of the Iranian Government to accept arbitration in accordance with that agreement.”¹³² As such, the Court declared it was well within its powers to issue provisional measures *proprio motu* or without the participation of the respondent State where “the existing state of affairs”¹³³ justifies such issuance: “the object of interim measures of protection provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of Court, to indicate interim measures of protection *proprio motu*, it follows that the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent.”¹³⁴

The Court has also shown that it is capable of indicating provisional measures without need of making definitive findings of fact on the main dispute subject of a State’s Application.¹³⁵ In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*,¹³⁶ the Court granted provisional measures but stressed that while “the Court has available to it considerable information concerning the facts of the present case, including official statements of United States authorities...the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute *to consider the circumstances drawn to its attention as requiring the indication of provisional measures, but cannot make definitive findings of fact*, and the right of the respondent State to dispute the facts alleged and to submit arguments in respect of the merits remain unaffected by the Court’s decision.”¹³⁷ Furthermore, in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*

¹³² *Id.* at 92-93.

¹³³ *Id.* at 93.

¹³⁴ *Id.* at 93.

¹³⁵ See *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures*, Order of March 15, 1996, I.C.J. Reports 1996, at 13, paras. 45 and 48.

¹³⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Provisional Measures*, Order of May 10, 1984, I.C.J. Reports 1984, at 169.

¹³⁷ *Id.* at para. 31.

(*Georgia v. Russian Federation*),¹³⁸ the Court granted the request for provisional measures, despite the pendency of the question of jurisdiction.

Applying the foregoing, it is not entirely impossible to bring a request for provisional measures to the Court in the intervening period from the filing of the request before the constitution of the arbitral tribunal. Where the Application is framed in a manner that merely alleges the breach of the duty to respect the exclusive remedy and dispute resolution system contained in the ICSID Convention, it may be possible for a State to avoid triggering the prohibition under Article 27(1) of the ICSID Convention, and thus submit a request the indication of provisional measures under Article 41 of the Statute of the Court, limited only to enjoining a recalcitrant State's injurious acts designed to frustrate, thwart, undermine, or subvert the ICSID arbitration. Most importantly, the State acts that are subject of the request for indication of provisional measures must be of such an extraordinarily injurious nature that the Applicant-State *cannot* await interim relief to be conferred well after the requisite 90 days within which the arbitral tribunal ought to be constituted (and when the tribunal itself can thereafter order provisional measures). Otherwise, it may be more expedient and less costly for the claimant to simply file a request for provisional measures alongside its request for arbitration, and then wait until the arbitral tribunal's eventual action on the request for provisional measures.

B. Parallel Domestic Actions intended to thwart, frustrate, or undermine the ICSID Arbitration

When foreign investments are involved, there is always a risk of parallel proceedings being initiated in domestic courts and before arbitral tribunals.¹³⁹ As observed by two scholars:

“Investor-to-State arbitrations offer examples of Parallel Proceedings in which the responsibility of the State may be at stake with regard to the same facts, including the same state measures. The

¹³⁸ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of October 15, 2008*, I.C.J. Reports 2008, at 353, paras. 74-77.

¹³⁹ See Bernardo M. Cremades and Ignacio Madalena, *Parallel Proceedings in International Arbitration*, unpublished paper, 2, available at <http://www.luzmenu.com/cremades/Noticias/97/97.pdf> (visited September 20, 2012).

proliferation of bilateral investment treaties (“*BITs*” hereinafter)– has increased the complexity of the different methods of dispute resolution in the international arena, including the number of forums in which individuals and private corporations may claim the responsibility of host States...

In addition, foreign investment often entails contracts between investors and State entities, which may adopt the form of a concession agreement or a public works contract. These contracts establish rights and obligations for the parties, in addition to the treaty-based rights addressed in the applicable BIT; and may further provide a dispute resolution clause allowing the parties to submit any contract claim to court adjudication or to arbitration. Therefore, the ultimate forum in which the dispute with the State will be resolved may depend on the investor’s choice.

The investor may either exercise the rights derived from the contract and start arbitration proceedings in accordance with the contract’s arbitration clause, or may activate the procedural right that the applicable BIT confers upon the investor against the host State. In the former situation, the contract-related dispute will be decided in accordance with the contractual rights and obligations of the parties. In the latter case, the investment dispute will be decided in accordance with the substantive standards of the applicable BIT. The difference between treaty claims and pure contract claims can be problematic, as evidenced by the recent case law of the International Centre for the Settlement of Investment Disputes (ICSID). As contract and treaty rights can easily be intertwined, investors may attempt to exercise both simultaneously, giving rise to an unquestionable risk of duplicate proceedings..”

Under Article 26 of the ICSID Convention, Contracting States are obligated to observe and respect the exclusive remedy of ICSID arbitration. While the principle of exhaustion of local remedies is not required in this provision,¹⁴⁰ “a Contracting State *may* require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”¹⁴¹ The risk of parallel domestic proceedings alongside a pending ICSID arbitration is not merely theoretical,¹⁴² as several ICSID arbitral tribunals have already had to issue provisional measures against respondent States to discontinue actions in domestic courts.¹⁴³

¹⁴⁰ See Christoph Schreuer, *Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4, *The Law and Practice of International Courts and Tribunals* 1, 16 (2005).

¹⁴¹ ICSID Convention, Article 26, second sentence.

¹⁴² See Robin F. Hansen, *Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty Drafters, Arbitrators, and Parties*, 73(4) *Modern Law Review* 523-550 (July 2010).

¹⁴³ See ICSID Commentary, at 786-793, referring to *CSOB v. Slovakia*, Procedural Order No. 4, January 11, 1999; *SGS v. Pakistan*, Procedural Order No. 2, October 16, 2008, at 394-396; *Zhinvali v.*

When a State deliberately initiates, continues, and refuses to suspend a domestic action directly involving a dispute already subject of a pending ICSID arbitration (despite an order from an arbitral tribunal to that effect), there is basis to allege its breach of the good faith duty of a Contracting State to observe exclusivity of remedies under Article 26 of the ICSID Convention.¹⁴⁴ This breach engages the international responsibility of the State, and may be brought to the International Court of Justice under Article 64 of the ICSID Convention. In this situation, the Court does not adjudicate on the merits of the dispute already pending before the ICSID arbitral tribunal, but rather examines the international responsibility of a recalcitrant State that acts in bad faith to use parallel domestic proceedings to avoid complying with the exclusive arbitral remedy mandated under the ICSID Convention. Where a State deliberately uses domestic actions to allegedly justify obstructions to, non-compliance with, or defiance of, the ICSID arbitral proceedings and the orders, the State of the claimant should be permitted to seek recourse to the Court through Article 64 of the ICSID Convention. The dispute that is referred to the Court is the recalcitrant State's breach of its duties to perform its obligations under the ICSID Convention (specifically Article 26 therein) and to act in good faith to abide by the orders of the arbitral tribunal seised of the dispute. This duty to act in good faith is read into the ICSID Convention, as acknowledged by the arbitral tribunal in *Phoenix Action Ltd. v. Czech Republic*.¹⁴⁵

“107. The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties ‘to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair

Georgia, Award, January 24, 2003, para. 45; *Tokios Tokeles v. Ukraine*, Order No. 1, July 1, 2003, para. 1; *MINE v. Guinea*, Decision on Provisional Measures of 4 December 1985, unreported but cited in ICSID Commentary, at 786:

“(1) The Tribunal recommends that MINE immediately withdraw and permanently discontinue all pending litigation in national courts, and commence no new action, arising out of the dispute. Litigation based upon the award of the American Arbitration Association is considered to arise out of this dispute for purposes of this Provisional Measure.

(2) The Tribunal further recommends that MINE dissolve every existing provisional measure in litigation in national courts (including attachment, garnishment, sequestration, or seizure of the property of Guinea, by whatever term designated and by whatever means performed) and seek no new provisional remedy in a national court.”

Note as well that in *Roussalis v. Romania*, Award, ICSID Case No. ARB/06/1, December 7, 2011, para. 255, the arbitral tribunal accepted that the suspension of pending parallel litigation in Romanian courts was sufficient to moot the alleged breach of Article 26 of the ICSID Convention.

¹⁴⁴ See *Perenco Ecuador Ltd v. Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, Decision on Provisional Measures, ICSID Case No. ARB/08/6, May 8, 2009, para. 61.

¹⁴⁵ *Phoenix Action Ltd. v. Czech Republic*, Award, ICSID Case No. ARB/06/5, April 9, 2009.

advantage...’ This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused...

108. The idea that the international conventions granting protection to foreign investors through arbitration have to be applied in good faith was also underscored by the tribunal in *Amco Asia Corporation et al. v. Indonesia*:

‘... like any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. ... and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.’

109. The Washington Convention as well as the BIT have to be construed with due regard to the international principle of good faith...¹⁴⁶

The actual subject-matter of the dispute pending before the arbitral tribunal will thus not form part of the dispute referred to the Court under Article 64 of the ICSID Convention. What would be at issue before the Court is the recalcitrant State’s refusal to follow the dispute resolution system under the ICSID Convention by interposing domestic litigation before its national courts. As such, this proposal should not run afoul of the prohibition on diplomatic protection under Article 27(1) of the ICSID Convention, since the dispute brought to the Court is not, *stricto sensu*, “an international claim in respect of a dispute” submitted to the arbitral tribunal. The Court’s jurisdiction would only be invoked in support of the arbitration, and mainly to ensure that the recalcitrant State applies and complies with, its obligations under the ICSID Convention.

C. Post-award Conservatory Measures to ensure Recognition and Enforcement of the Arbitral Award

While Article 54(1) of the ICSID Convention makes it obligatory for each Contracting State to “recognize an award rendered pursuant to this Convention as

¹⁴⁶ *Id.* at paras 107-109.

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”,¹⁴⁷ the Convention is silent on how this obligation will be practically implemented. An arbitral tribunal that has already issued its award is no longer in a position to issue provisional measures, and for all intents and purposes, the enforcement of the award would devolve upon the Contracting States themselves pursuant to their obligations under Article 54(1) of the ICSID Convention. While Article 64 of the ICSID Convention is widely understood to enable referrals to the Court on matters involving the recognition and enforcement of ICSID arbitral awards, the scope of the Court’s compulsory jurisdiction over such matters has not been fully fleshed out.

I submit that the Court’s jurisdiction *ratione materiae* under Article 64 of the ICSID Convention would adequately support its authority to issue post-award conservatory measures, which are intended to ensure that State obligations to recognize and enforce Convention awards would not be breached. This power to grant post-award conservatory measures would be analogous to the authority of national courts to issue post-award conservatory measures.

It may be recalled that the 1958 New York Convention and the 1971 Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters both appear silent on the issue of post-award conservatory measures. However, a commentator has observed that no municipal court in any state party to the [New York] Convention “has [ever] doubted that an attachment in connection with the enforcement of an arbitral award, in order to secure payment under the award, is compatible with the Convention.”¹⁴⁸ The ICC Rules provide for conservatory and interim measures in Article 23, which indicates the authority of the ICC arbitral tribunal to issue provisional orders for *pre-award* attachments. The classic rationale for Article 23 is to preserve the rights of a party pending final resolution of a dispute.¹⁴⁹ The issue of interim relief pending recognition

¹⁴⁷ ICSID Convention, Article 54(1).

¹⁴⁸ ALBERT JAN VAN DEN BERG, COMMENTARY VOLUME IX, 9 Y.B. COM. ARB. 364 (1984). See also Andrew S. Holmes (Student Note), *Pre-Award Attachment under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 Va. J. Int’l L. 785, 801 (1981), which argued that pre-award attachment was unnecessary because the New York Convention already allows for post-award attachment to satisfy arbitral awards.

¹⁴⁹ See Neil Kaplan, *Interim Measures – A Practical Experience*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 768-775 (Albert Jan Van Den Berg (ed.), Kluwer Law

proceedings thus appears to be a matter governed by domestic procedures, and entrusted to the competence of national courts.¹⁵⁰ Quite similar to Article 54(1) of the ICSID Convention, the Article 28(6) of the ICC Rules stipulates: “the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”

Applying the foregoing, where a State alleges breaches of duties by another Contracting State under Article 54(1) to the ICSID Convention, and is further able to show that the ability of said Contracting State to recognize and enforce a Convention award is diminished due to acts taken to isolate the assets of such Contracting State from enforcement, the State may refer these separate breaches to the International Court of Justice as a legal dispute covered by Article 64 of the ICSID Convention. The State may likewise apply for provisional measures pursuant to Article 41 of the Statute of the Court, in order to ensure that recognition and enforcement of the Convention award will not be rendered nugatory by the acts of the recalcitrant State. In this instance, there is clearly no violation of the prohibition against diplomatic protection under Article 27(1) of the ICSID Convention, since the dispute falls under the carve-out exception or proviso on matters that involve a State’s refusal to comply or abide with awards issued under the Convention.

IV. Conclusion: Cooperation Between Court and Arbitral Tribunal

The creation of the dispute resolution system under the ICSID Convention was not intended to antagonize or undermine the established and authoritative system of adjudication under the International Court of Justice. By providing for a *clause compromissoire* under Article 64 of the ICSID Convention, the drafters of the Convention ultimately foresaw the need for the Court’s jurisdiction in certain areas that could not be addressed even within the “self-contained” arbitration system. Even

International, 2007). *For a copious survey of country and institution practices on interim measures, see* AXEL BÖSCH (ED.), *PROVISIONAL REMEDIES IN INTERNATIONAL COMMERCIAL ARBITRATION* (Walter de Gruyter & Co., 1994).

¹⁵⁰ MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION LAW AND PRACTICE* 917-942 (Kluwer Law International, -2001). *See* DENNIS CAMPBELL (ed.), *INTERNATIONAL JUDICIAL ASSISTANCE IN CIVIL MATTERS* (Transnational Publishers, Inc. 1999).

if Contracting States to the Convention are uniformly bound to recognize and enforce arbitral awards, the mode and manner of enforcement was not institutionally prescribed in the ICSID Convention.

Why, then, would the Court be any more suitable to exercise its jurisdiction ultimately to aid the uninterrupted conduct of the arbitral process and bring Contracting States in line with their obligations to recognize and enforce awards under the ICSID Convention? The Court does not have its own enforcement machinery, and certainly does not possess its own police force capable of exacting compliance with its decisions.¹⁵¹ National courts at least have the benefit of direct vertical linkage with executive branches that can enforce judicial writs, orders, and judgments. The Court, on the other hand, depends more on a horizontal relationship with the United Nations Security Council for the enforcement of its decisions. Article 94(1) of the United Nations Charter provides that “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice to which it is a party”, while Article 94(2) of the same Charter states the consequences of non-compliance with the decisions of the Court: “[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”¹⁵² And if the Security Council does not muster the required votes to make such decisions, then a State seeking to enforce a judgment of the Court “could take non-forcible measures such as reprisals, for example, by seizing the assets of the defaulting State within its jurisdiction. It could try to gain the co-operation of a third State by asking it to use its own power to deprive the defaulting State of certain rights...”¹⁵³ Clearly, enforcement of international decisions remains a matter for both law and politics.

However, the same may be said of the entire international investment dispute settlement system altogether, which, as shown in the *Introduction*, had its early and rather uneasy beginnings in the Court itself. The difficulties of enforcement do not

¹⁵¹ See CONSTANZE SCHULTE, *COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE* 36-38 (Oxford University Press, 2004).

¹⁵² United Nations Charter Articles 94(1) and 94(2).

¹⁵³ Collier and Lowe, p. 178.

easily translate into clear empirical disincentives against compliance with international decisions.¹⁵⁴ Despite perceived difficulties of enforcement of international decisions, States continue to avail of ICSID arbitration procedures, and States likewise continue to refer international disputes involving issues of State responsibility to the International Court of Justice. Clearly, there is value in the legal settlement of a dispute in and of itself, independently of the question of its coercive enforceability in the political sphere of international relations.

My narrow purpose to this article was to explore theoretical possibilities behind the underutilized Article 64 of the ICSID Convention, particularly in regard to recalcitrant States that seek to undermine the Convention and thwart the “self-contained” dispute resolution system therein. As this article has shown, the *clause compromissoire* of Article 64 in the ICSID Convention can function as a pragmatic tool for cooperation between the Court and ICSID arbitral tribunals, perhaps more than we would ordinarily realize from the caution expressed in the Report of the Executive Directors on the ICSID Convention against possible disruptions to the arbitral proceedings. Much as the drafters of the ICSID Convention desired to anticipate every possible contingency and make the system as “self-contained” as possible within the ICSID arbitration procedure, as I showed in *Part II*, there are lacunae for which the judicious exercise of the Court’s judicial function may well be more appropriate and strategically beneficial to invoke. If national courts are harnessed to lend support to international arbitrations, it defies comprehension that the Court’s compulsory jurisdiction provided for in the specific *clause compromissoire* in the ICSID Convention was meant to rule out the Court’s support for ICSID arbitration. In an era where recalcitrant States are lately emerging to disavow their obligations to comply with the ICSID Convention,¹⁵⁵ it strains credulity that the Court would be deprived of the jurisdiction to determine international responsibility for material breaches of, and serious non-compliance with, the provisions of the ICSID Convention. Not only would it be to the advantage of parties as well as ICSID arbitral tribunals to have the additional force of the Court’s compulsory jurisdiction over questions of international responsibility arising

¹⁵⁴ As Aloysius Llamzon rightly observes, almost all of the Court’s decisions have achieved “substantial, albeit imperfect, compliance.” Aloysius Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18(5) *European Journal of International Law*, 815-852 (2008).

¹⁵⁵ *Supra* notes 40 and 50.

from non-compliance with the ICSID Convention, but it is to the advantage of the international investment dispute settlement system as a whole to give real meaning to Article 64 of the ICSID Convention as the mechanism that bridges institutionally managed cooperation between tribunals and the Court. By purposely re-examining and appropriately including the Court in matters appropriate to support the chosen remedy of ICSID arbitration and to ensure overall compliance with the ICSID Convention, one can indeed say that the international investment dispute settlement system under the ICSID Convention was genuinely designed to be “self-contained”.

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