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Pakistan Enacts A Statute To Implement The ICSID Convention

Laurence Burger (Perréard de Boccard) · Thursday, June 16th, 2011

The Islamic Republic of Pakistan is not foreign to defending investment claims. In order to restore investors' confidence in its country, the Pakistani government has enacted on April 28, 2011 a law to secure foreign investment. The International Investment Disputes Act (the "Act") has been qualified by the Pakistani president, Mr. Asif Ali Zardari, as "a giant leap forward" to create confidence amongst foreign investors.

The Act is Pakistan's answer to the Supreme Court of Pakistan's 2002 decision in the *SGS v. Pakistan* proceedings that the ICSID Convention, although ratified by Pakistan, having not been incorporated into the laws of Pakistan by implementing legislation, the domestic courts had no power to enforce the provisions of the Convention while ignoring the existing national statutes relating to arbitration. This case saw parallel arbitration proceedings in Pakistan and before ICSID, and the Supreme Court upheld the lower courts' decision not to stay the arbitration proceedings under the Pakistani Arbitration Act following the commencement of the ICSID arbitration.

However, the *SGS v. Pakistan* case had highlighted the need for national legislation in order to give full force and effect to the ICSID Convention. The enactment of this legislation, however, was not exempt of obstacles. The legislation was first promulgated by presidential ordinance in November 2006, but lapsed. Under the Constitution of Pakistan, presidential ordinances have a limited life of four months unless earlier repealed or enacted into a statute. A new presidential ordinance was promulgated in March 2007 followed by another in July 2007, but the state of emergency was thereafter declared in Pakistan, which gave it permanent life. The permanent life however was cut short by a judgment of the Supreme Court which declared the emergency as illegal. This resulted in promulgation of another presidential ordinance in November 2009 followed by another in April 2010. The current Act is the result of a government sponsored bill introduced in Parliament in 2010.

The purpose of the Act is to implement the International Convention on the Settlement of Investment Disputes between States and Nationals of other States, with an aim to bringing transparency in the settlement of investment disputes. The Act attaches the ICSID Convention as a schedule.

Under the ICSID Convention, awards are insulated from review by national courts at the recognition and enforcement stage, but no such guarantees are offered when specific assets are targeted in execution of the award. Article 54(1) of the ICSID Convention provides that each

contracting state shall “recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”. Article 54(3) of the ICSID Convention provides that the execution of the award is governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought, and Article 55 emphasizes that “nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any State from execution”.

The Act leaves a great discretion to the Pakistan courts for the enforcement of ICSID awards. Article 4 provides that an award registered in Pakistan must “be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court” and, if the award “relates to pecuniary obligations”, “proceedings may be taken on the award” and “the High Court shall have the same control over the execution of the award, as if the award had been a judgment of the High Court”. High Courts in Pakistan are generally courts of appeal, which are to be found in each province. The purpose of giving jurisdiction to a High Court is to ensure the quality of judicial expertise. With respect to its binding effect on the government itself, the Act provides that the principles set forth in Article 4 bind the government but “not so as to make an award enforceable against the Government in a manner in which a judgment would not be enforceable against the Government”. Moreover, the Act provides that these principles do not apply if the government is not a party to the award (Article 5).

In effect, therefore, the Act does not provide for a foolproof execution of ICSID awards in Pakistan. Execution of awards is subject to the review of the High Court and, if the award has been rendered against the Government, it can only be enforced if it were enforceable in the same circumstances if it were a judgment. In practice, the High Court will have the power to attach and sell assets, as long as such assets are not related to defense and national security. High Court decisions can be appealed. However, in execution matters, the grounds of appeal are very limited.

The Act, however, removes a lacuna and one can hope that it will render the enforcement of ICSID awards in Pakistan easier. It has also the advantage of providing an effective reference for the execution of awards in Pakistan. In contrast, in many a state, the execution of ICSID awards is left to the civil procedure provisions applicable to the execution of judgments, which can lead to confusion and unsatisfactory decisions.

In addition to this Act, Pakistan is also preparing the enactment of two statutes relating to international arbitration. First, a law to enforce the New York Convention has been passed by the National Assembly and is currently pending consideration before the Senate. Second, a new Arbitration Act, based on the UNCITRAL Model Law, is pending before the National Assembly.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

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