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***ENFORCEMENT OF ARBITRAL AWARDS IN ICSID  
ARBITRATION***

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## ENFORCEMENT OF ARBITRAL AWARDS IN ICSID ARBITRATION

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## ***Introductory remarks, scope of the work, methodology, structure and literature review***

This research project aims to analyse what in doctrine has been called the Achilles heel<sup>1</sup> of ICSID arbitrations, i.e. the obstacle posed by the theory of State immunity to the enforcement of arbitration awards rendered against sovereign States by arbitral tribunals constituted under the provisions of the Washington Convention of 1965, establishing, under the auspices of the World Bank, the International Centre for the Settlement of Investment Disputes (ICSID).

Indeed, in practice it sometimes happened that the State, condemned to pay damages to foreign investors, resorted to the plea of immunity in order to prevent the execution of the arbitral award on its assets. This is likely to whip the legitimate expectation of the individual who made the investment, even on the basis of the guarantee represented by the presence in the contract or in its BIT of the ICSID clause.

The absence of a balanced policy to the enforcement problem of ICSID arbitral awards, and the consequent need to recompose the range of remedies that from time to time have been adopted in practice, are witnessed by the recent decision of the US Second Circuit Court of Appeal decision in the Blue Ridge case,<sup>2</sup> which seems to have completely turned upside down the traditional approach of US courts to the issue of immunity from execution.<sup>3</sup>

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<sup>1</sup> Cfr. A. K. Bjorklund, State immunity and the enforcement of investor-state arbitral awards, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, (OUP 2009), 321.

<sup>2</sup> *Blue Ridge Invs., LLC v. Republic of Argentina*, United States Court of Appeals, Second Circuit, Docket No. 12-4139-cv (19 August 2013). Pursuant to a first arbitration award issued between the investor, CMS Gas Transmission Company (CMS), and the Argentine State, the latter was obliged to pay \$ 133.2 million. Subsequently, Argentina requested the annulment of the award, which was promptly rejected by the ICSID Tribunal. In 2008, Blue Ridge Investments LLC notified the Argentine State the transfer in its favour of the award in question by CMS. Argentina opposed its financial obligation under a number of arguments, including the lack of any legitimacy of Blue Ridge, given the mere transferee position. This argument was rejected by the Court of Appeal of the second US circuit in the light of two sets of arguments. First, by analysing the wording of the Washington Convention, the binding effect of an ICSID award is in no way restricted to the original parties of the arbitration. Secondly, pursuant to the New York's law, the transferee shall enjoy the same legitimacy of the transferor to request the execution of the award.

<sup>3</sup> The ruling marks a clear break with the general trend of US federal courts to accept too often immunity objections raised by States against the enforcement of arbitral awards on their assets. Cfr. J. Thomas, A. Bouhabib, *Confirming ICSID awards in US courts over sovereign objections: Duke and Blue Ridge*, in *International Litigation News*, 2013.

This outcome is part of the already fragmented picture of the possible remedies to an issue that is still unresolved, and which, constitutes, as evidenced by the most recent doctrine<sup>4</sup>, a necessary step for the improvement of the ICSID system both for the protection of foreign investors and for the compliance with the principle of legal certainty. Not rarely, indeed, domestic courts, in the enforcement of ICSID awards, have reached conclusions incompatible with the international obligations contained in the Washington Convention concerning enforceability of arbitration awards.<sup>5</sup>

### *Scope of the work and delimitation*

The issue of enforcement of investment arbitration awards has received little attention by the doctrine, in the ICSID systems as in other instances, because the drafters of most investment arbitration Conventions assumed that States would comply with enforcement based on the principle of *pacta sunt servanda*, and in light of the adverse effect that non-compliance would have on a State's standing in the international investment community. But the experience from nations like Argentina who was plagued by myriad of investment suits, shows that enforcement of awards can be resisted and therefore berates such assumption.

This research project aims to analyse the various solutions that have been proposed by the doctrine and practice to the problem of enforcement of ICSID awards and to propose a solution that will be a balance between the prerogatives of the State and the investor's rights. In the discussion several cases, even non ICSID ones, will be examined as their analysis is essential in order to illustrate common issues and draw common solutions. It is structured as follows: after a brief reconstruction of the regulatory framework, we will analyse the problems related to immunity from execution of the State in the context of the ICSID arbitral awards and finally we will address the different means of enforcing awards proposed and possible approaches to the issue.

### *Methodology and structure of the work*

The methodology that will be used draws on comparative law and international instruments.

The first part of the research will be devoted to an analysis of the existing Treaty obligations to honour arbitral awards in investment arbitration. Due attention will be given also to the related concept of the diplomatic protection.

The second part will focus on sovereign immunity in general including both immunity from jurisdiction and immunity from enforcement with particular reference to the execution of the ICSID arbitral awards and the legislation and practices adopted

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<sup>4</sup> *Infra multis* Y. BANIFATEMI, (2010) 97 *Enforcement of arbitral awards in investment arbitration: taking stock and way forward*.  
"<http://www.oecd.org/investment/internationalinvestmentagreements/49893996.pdf>".

<sup>5</sup> In the case *Siag v. The Arab Republic of Egypt*, the ruling would seem even give the floodgates for a possible review of the ICSID award by the national courts, prompting, in fact, the investor to sue another jurisdiction to comply with the ruling.

by the various national laws. The sovereign immunity issue is addressed through the ICSID Convention rules and the remedies adverse sovereign immunity and it argues how sovereign immunity affects compliance with ICSID awards. It will give also an overall review of the ICSID cases regarding sovereign immunity and how different countries deal with sovereign immunity question during the enforcement of ICSID awards.

The third part will deal with the means of enforcing an award and the possible solution to heal the Achille's heel. It will try to analyse few examples of the most significant national and international law framework relevant to attachment of and execution against Sovereign Commercial assets.

The investigation will be concluded, therefore, with a moment of synthesis of solutions on the basis of the spectrum of legal experiences considered and adopted by scholars' theories and practices.

Moreover, as to the methods used in this research project, necessary step of argumentative path will be in-depth analysis of decisions of ICSID arbitration courts in their role of precedents according to the so-called theory of the taking into account approach.

It will, therefore, try to identify a systematic solution to the issue of immunity from execution, able to reconcile the opposing interests of the parties, in the light of their equality in the execution phase of States-investor disputes and in respect of the legal certainty principle.

At the same time, the research should take into account the impact and scope that the United Nations Convention on Jurisdictional Immunities of States and Their Property (New York December 2, 2004), which aims to harmonize the regulations on of State immunity.

As we will see hereinafter, possible solutions proposed to date with respect to the issue of immunity from execution can be classified in three categories.

The first among these, is the possibility of including in the BIT clauses where the host State explicitly waives its immunity from execution, or, alternatively, the obligation to provide a list of possible assets that will be available for attachment, or lastly, the subscription of an insurance policy against the risk of giving rise to enforcement proceedings.

It was also proposed to expand the framework of sanctions against the convenient use of the exception of immunity from execution. This is achieved through the explicit recognition of sanctioning powers in the hands of the World Bank, or the conferring of higher rate of interest to the damage suffered by the investor for the delay in the execution.

Finally, in the light of the aforementioned judgment Blue Ridge, the chance to provide purchase agreements of the quantum obligation resulting from the arbitration award.

Correspondingly, we will also need to frame the procedural issues mentioned above. These include the possibility of adopting, by the same ICSID tribunal, of interim measures aimed at impeding an instrumental change of destination of the assets made by the State.

Although the execution phase of an ICSID award is only a potential one, as there is often a spontaneous enforcement of arbitral awards by the Member States, mostly due to sanctions that the World Bank has adopted in practice for the States failing to comply with the requirements of the arbitration decision; State immunity from execution still constitutes a bastion hardly scratched by the arrows of foreign investors. Therefore, the need to find a systematic solution is more necessary than ever in order to ensure the effectiveness and impartiality of ICSID system.

In conclusion, the ambition of this research project, therefore, is to make a valuable contribution to the improvement of an institution that seems more than ever vital for the promotion of the economic activity of companies now operating on a global scale.

### *Literature review*

The subject of enforcement of awards in investment arbitration, as of today, has not been widely discussed. There are, however, four monographs that – directly or indirectly – regard the subject, as well as many articles. The American Arbitration Association, due to the uncertainty related to this topic, dedicated its 28<sup>th</sup> chapter of the Handbook on international arbitration practice to *Sovereign Immunity and the enforcement of arbitral awards against State entities: Recent trends in practice*.<sup>6</sup> Moreover, the recent 26<sup>th</sup> 2014 Annual ITA Workshop in Dallas, focused on Enforcement of arbitral awards, and it was entitled Modern Enforcement Of Arbitral Awards: “Show Me The Money”. In 2016 Burford Capital research published the latest Enforcement Survey showing that in April 2016 58 percent of corporations have not been paid the full face value of judgments secured in the last five years and these unenforced judgments and arbitration awards cost 14 percent of companies over \$50 million. The starting point of a research aimed at studying the ICSID system was of course the Commentary of the ICSID Convention of Prof. C. Schreuer. This book has been very helpful in order to understand the legal framework of the topic.

The second main source for such a research is H. Fox, *The Law of State Immunity*, which analyses deeply the central issue of Sovereign immunity both from jurisdiction that from execution. On the same vein are P. Muchlinski, F. Ortino, C. Schreuer, *The Oxford Handbook of International Investment Law* and R. O’Keefe and C. Tams, *The Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*.

Finally, the main (and only) book directly regarding the subject is Mr. Doak Bishop’s book, entitled *Enforcement of arbitral awards against Sovereigns*, in which sovereign immunity, the enforcement against Sovereigns and the attachment and execution on commercial assets are largely debated<sup>7</sup>. However, this book largely differs

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<sup>6</sup> An updated version of A.F.M. Maniruzzaman, State Enterprise, Arbitration and Sovereign Immunity Issues: A Look at Recent Trends, *Dispute Resolution Journal* - Vol. 60, No. 3.

<sup>7</sup> Enforcement Of Arbitral Awards Against Sovereigns (R. Doak Bishop, Ed., 2009), in particular significant was chapter 6, Antonio R. Parra, The Enforcement of ICSID Arbitral Awards.



in its scope and goals from the present one. Definitely, helpful for its wide analysis of the subject and for its very extensive bibliography, does not propose systemic solutions to the problem of unenforced awards.

Only a small number of articles directly deal with the enforcement issue in investment arbitration from the perspective of possible solutions<sup>8</sup>. With regard to judicial and arbitral techniques for securing assets for enforcement, it is worth highlighting few articles.<sup>9</sup> Finally, some books and articles have dealt with the problem of enforcement in general terms<sup>10</sup> and in investment treaty arbitration.<sup>11</sup>

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<sup>8</sup> Jorge E. Viñuales & Dolores Bentolila, *The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards Against States*, in *DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT* (L. Boisson de Chazournes, Marcelo G. Kohen, and Jorge E. Viñuales, eds.) (BRILL) (2012); Inna Uchkunova & Oleg Temnikov, *Enforcement of Awards Under the ICSID Convention—What Solutions to the Problem of State Immunity?*, 29(1) *ICSID REV.* 187 (2014); Peter D. Fox & Charles B. Rosenberg, *The Hidden Tool in a Foreign Investor's Toolbox: The Trade Preference Program as a 'Carrot and Stick' to Secure Compliance with International Law Obligations*, 34 *NW. J. INT'L L. & BUS.* 53 (2013); Flávio Spaccaquerche Barbosa, *The Enforcement of International Investment Arbitral Awards: Is There A Better Way?* *TDM* 4 (2009), [www.transnational-disputemanagement.com/article.asp?key=1488](http://www.transnational-disputemanagement.com/article.asp?key=1488).

<sup>9</sup> Erin Collins, *Pre-Tribunal Emergency Relief in International Commercial Arbitration*, 10 *LOY. U. CHI. INT'L L. REV.* 105 (2012-2013); Elliot Friedman, *Enforcement of International Arbitration Awards in New York: If You Take Them There, You Can Collect from Anywhere*, 27(4) *ARB. INT'L* 575 (2011); Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment outside of Ecuador*, 1 *STAN. J. COMPLEX LITIG.* 429 (2013); Chan Leng Sun S. C. & Tan Weiyi, *Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief*, 6 *CONTEMP. ASIA ARB. J.* 349 (2013); Damien H. Weinstein, *New York: The Next Mecca for Judgment Creditors? An Analysis of Koehler v. Bank of Bermuda Ltd.* 78 *FORDHAM L. REV.* 3161 (2010); Stephan Wilske, *Collective Action in Investment Arbitration to Enforce Small Claims –Justice to the Deprived or Death Knell for the System of Investor-State Arbitration?*, 5(2) *CONTEMP. ASIA ARB. J.*, 165 (2012); Jeffrey L. Wilson, *Three if by Equity: Mareva Orders & the New British Invasion*, 19 *ST. JOHN'S J. LEGAL COMMENT.* 673 (2005).

<sup>10</sup> A. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Award*, in C. Binder et al, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009); A. Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, in 17 *The European Journal of International Law* (2006); I. Uchkunova, O. Temnikov, *Enforcement of Awards Under the ICSID Convention—What Solutions to the Problem of State Immunity?*, *ICSID Review*, (2013); J. Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 *American Journal of International Law* (1981); J. Thomas, A. Bouhabib, *Confirming ICSID awards in US courts over sovereign objections: Duke and Blue Ridge*, in *International Litigation News*, (2013); J. Paulsson, *ICSID's Achievements and Prospects*, in 6 *ICSID Review—Foreign Investment Law Journal* (1991); S. W. Schill, *Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights*, in 27 *ICSID Review* (2012); Tai-Heng Cheng, *The Role of Justice in Annuling Investor-State Arbitration Awards*, in 31 *Berkeley Journal of International Law* (2013)

<sup>11</sup> Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 *SANTA CLARA J. INT'L L.* 35 (2014); Flávio Spaccaquerche Barbosa, *The Enforcement of International Investment Arbitral Awards: Is There A Better Way?* *TDM* 4 (2009), [www.transnational-dispute-management.com/article.asp?key=1488](http://www.transnational-dispute-management.com/article.asp?key=1488); Piero Bernardini, *ICSID versus non-ICSID Investment Treaty Arbitration in LIBER AMICORUM BERNARDO CREMADES* (Miguel Ángel Fernández-Ballesteros and David Arias, eds.) (Kluwer) (2010); *ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS* (Doak Bishop, ed.) (JurisNet) (2009); Andrea K. Bjorklund, *Convergence or Complementarity?*, 12 *SANTA CLARA J. INT'L L.* 65 (2014); Andrea K. Bjorklund,

Collaterally, it has been necessary to make recourse, first of all, to books and articles related to general international law, secondly to works on international investment arbitration and, thirdly, to works related to municipal systems. All these sources have been of extreme utility in order to develop new approaches and solutions for investment arbitration.

In conclusion, as of today, the available literature on the subject is still *in fieri* and there is a lack of solutions for the enforcement problem in investment arbitration.

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I dedicate this thesis to the people I live for, the people who gave me unconditional love, a reason to live and always more than I deserved: my mother Silvana, my father Francesco, my uncle Eva, my sister Mariemilia, my brother Clemente, my loyal companion Enea and my fiancée Brunella.

These past three years have been one of the most valuable experiences of my life and have contributed to the person and the professional that I am today.

*Tutti i passi che ho fatto nella mia vita mi hanno portato qui, ora.  
Every step I have taken in my life has led me here, now.*

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## *Introduction*

### *The enforcement of Arbitral Awards against Sovereigns*

The past two decades have seen an unquestionable explosion and development of investment treaties and, at the same time, a veritable increase of arbitration claims brought against sovereigns.

Most of them have been filed before the International Centre for Settlement of Investment Claims (ICSID), pursuant to its constituent treaty, the Convention on the Settlement of investment Disputes between States and Nationals of Other States (the ICSID Convention). As of April 12, 2016, 161 countries had signed and ratified the ICSID Convention to become Contracting States.<sup>12</sup> The Convention provides for arbitration procedures of investment disputes they might have with individuals or companies (private investors) that qualify as national of other Contracting States. But, the most important aspect, for what concern our research, is that ICSID has its own self-contained rules for enforcement.

Given this significant proliferation in sovereign cases and the issues attendant to sovereign immunity, this thesis will address the various issues that arise in enforcing arbitral awards against sovereigns.

One of the most novel elements of the recent advent of International Investment Arbitration is its ability to effectively resolve investment disputes. Indeed, one of the first questions posed by clients to their counsel before starting an arbitration proceeding against a sovereign state is whether and how the resulting award can be enforced. If arbitral awards when rendered cannot be enforced against the debtor, then an essential-and I would say vital- aspect of investment arbitration is defeated. The reason of the client's question is usually based on the common knowledge that States possess sovereign immunity along with a concern about the difficulties of enforcement against a sovereign's assets. Last of all, to make matters worse, there is also uncertainty about the exceptions to such immunity. This uncertainty is sometimes fueled by the fact that often the decisions of national courts on the matter are confusing or even contradictory.

Ultimately, the value of international arbitration as a means of resolving disputes is dependent upon the extent to which awards are either honored or can be enforced. Few claimants will pursue a time consuming and often expensive process of

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<sup>12</sup> See ICSID, List of Contracting States and other signatories of the Convention, <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/List-of-Member-States.aspx>.

dispute resolution just for the principle of establishing a point. It is true that an award has firstly legal meaning and consequences but in the end it is generally pursued for practical ends. It is the enforceability and indeed the enforcement of the award that gives credence to the entire International Investment Arbitration process and justifies the cost and time that the parties to a dispute have invested in the resolution process.<sup>13</sup>

On the contrary, the problem with International Investment Arbitration is that; this desired justification is often compromised when States that enter into international agreements such as the International ICSID Convention and claim their sovereignty as a defence and therefore when it comes to the enforcement of awards they do not comply with the obligations set out in the agreements.<sup>14</sup>

Under ICSID, states reserve their immunity against enforcement of awards. However, states are reluctant to use this right as the damages from doing so outweigh its benefits. States choosing not to comply with awards issued by ICSID are risking a lot. The consequences of having a reputation of not respecting the law would be losing potential investments and the flow of foreign capitals. The damages to the economy may be severe as ICSID is a multilateral agreement that includes 161 signatory states. This creates significant pressure on members to comply with the rule of the convention as every state considers its image and reputation as priority. In addition, ICSID is an organization of the World Bank, and the Chairman's of ICSID Administrative Council is also the World Bank's President. This imposes serious concerns for states intending not to comply especially if they are not financially independent and rely on foreign aids and loans. Also, publication, whether officially or not, of arbitral awards and the media attention can lead to damages in states reputation which are known to have poor record of compliance. An example of a state with a reputation of refusing enforcement is Argentina. The US suspended commercial benefits to Argentina as a result of the pile-up of unenforced awards, including ICSID awards, in favor of American investors. Nonetheless, the outstanding number of awards against Argentina has led many to doubt the effectiveness of ICSID mechanism.

Although there are real legal obstacles to enforcing an award against a sovereign, those obstacles are limited to the means of obtaining enforcement and the types of assets against which enforcement may be sought. But those obstacles do not diminish the legal effect or the moral force of the award, with which the sovereign is

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<sup>13</sup> Loukas Mistelis, "Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement" (2013) ICSID Review, pp. 1–24.

<sup>14</sup> Alan Alexandroff, Ian Laird, 'Compliance and Enforcement; Recognition, Enforcement, and Execution of Investment Arbitration Awards'(2008) LLP, p.45.

legally obligated to comply. There is no right in international law of non-compliance with a final and binding award that has not been properly annulled or vacated.

It must be emphasized that enforcement is the ultimate ratio in investment arbitration especially on the premise that it serves as a final security for investment protection guaranteed by BITs. More than one- quarter of all international arbitrations settle before the tribunal issues a final award, and another 47% end in voluntary compliance with a final award. In fact, recent studies demonstrate that only 11% of international investment arbitrations culminate in enforcement proceedings.

In fact, generally speaking legal enforcement is not the norm but the exception. This is the customary practice, and even when litigation or arbitration is required to obtain recognition of a legal right or its breach, compliance with the decision is generally voluntary. And so it is with sovereigns as well. Relatively few people and far fewer sovereigns want to be publicly branded as refusing to comply with their legal obligations. In the case of a sovereign, the refusal to comply with its own legal obligation may undermine its integrity, and perhaps even its legitimacy, since it is a primary duty of the government itself to make and enforce laws.

A legitimate government that takes seriously its purposes of creation and enforcement of law cannot wish to be seen as an mechanism for violating the law, with a consequent loss of public confidence and trust. Thus, it should not be surprising that most arbitral awards against sovereigns are voluntarily honored. This thesis will focus on the legal tools and possible solutions to ensure that awards are either honored or enforced.

Several reasons abound why States may not want to comply with the enforcement of an award, these reasons include: the sovereign immunity of the State, an appeal or annulment of the award, dissipation of assets attached to the award and general social, economic or political influence. Specifically, these challenges in the course of enforcement of award raise the question as to what extent investment arbitral award can be regarded as a tool that guarantees investors legitimate expectations provided for in BITs, it probes the relevance of BITs and reveals the limitations in the adjudicatory powers of investment tribunals.

The ICSID Convention and many investment treaties expressly impose a duty upon sovereigns to honor arbitral awards issued against them that result from arbitrations under those treaties.<sup>15</sup> This duty requires more than a mere *pro forma* statement, but a solemn undertaking by a government to comply with an award, the breach of which constitutes a violation of the treaty, and thus, of international law.<sup>16</sup> It

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<sup>15</sup> See ICSID Convention Art. 53 and the 2004 U.S. Model BIT art. 34(5).

<sup>16</sup> See Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, Enron Corp. v. Republic of Argentina, ICSID Case No. ARB/01/3, Annulment Proceeding, October 7, 2008.

is certainly at least partially for this reason that most ICSID and investment treaty awards have been honored by respondent governments. A former Secretary General of ICSID was quoted in 2003 as saying of ICSID awards 'at ICSID there's never been a case in which a sovereign had failed to pay an award'.<sup>17</sup> At date, this statement is no longer true. There have been at least five ICSID awards in which enforcement actions were filled in courts in order to enforce the award.<sup>18</sup>

If a sovereign breaches its international law duty to pay an award, the government of the claimant can provide diplomatic protection to its national, using diplomatic means and perhaps even economic pressure to persuade the debtor government to pay the award. For ICSID cases, the ICSID Convention suspends the right of diplomatic protection during the arbitral process but resurrects that right if and when a state has 'failed to abide by and comply with' an award as it is obligated to do under Article 53 of the Convention.<sup>19</sup>

As we will see thereafter, the Claimant may also attempt to persuade its national government to initiate a state-to-state arbitration under the terms of an applicable investment treaty or to file a case before the International Court of Justice (ICJ) under Article 64 of the ICSID Convention, seeking a finding of a violation of international law and declaratory relief. With an ICSID award, it may also be possible for an investor to request another interested State to file an action before the ICJ.

An investor who has obtained an award under a contractual arbitration clause providing for arbitration under the arbitral rules of, for example, the International Chamber of Commerce (ICC), UNCITRAL, the Stockholm Chamber of Commerce (SCC), or the London Court of International Arbitration (LCIA) against a sovereign, or perhaps under certain circumstances against a state-owned company, may also be able to initiate an investment treaty arbitration against the sovereign to obtain declaratory relief that the sovereign is in breach of its international obligations either to honor the award or for a denial of justice if its courts improperly refuse to enforce the award. An analogous case is *Saipem v. Bangladesh*,<sup>20</sup> in which the courts of Bangladesh allegedly obstructed an ICC arbitration between the investor and a state-owned company, suggesting the investor to file an ICSID arbitration against the government.

An investor who has obtained an ICSID award may also request that ICSID remind the debtor government of its treaty obligation to honor the award, as the Secretary General of ICSID has done in the past. The eminent arbitration specialist Jan

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<sup>17</sup> Carolyn Kolker, *When Nations go Bust*, AM. LAW., Nov. 2003, at 90,92 quoting KoYung Tung, former ICSID Secretary General from 2000 to April 2003.

<sup>18</sup> Georges R. Dalaume, *Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies*, ICSID Rev. Foreign Inv. L. J., Vol. 8, No. 1, (1993).

<sup>19</sup> ICSID Convention Art. 27(1).

<sup>20</sup> *Saipem S.p.A. v. The People Republic's of Bangladesh*, ICSID Case No. ARB/05/07.

Paulsson has confirmed this by saying, ' the [ICSID] Secretary General has seen it as an appropriate part of his mission to communicate officially with recalcitrant parties after awards have been rendered, reminding them of their international obligation to respect the result of a process to which they have given their consent'.<sup>21</sup>

The investor may also request that the World Bank refuse to make any new loans or provide any further financial benefits to the debtor nation until it complies with its treaty obligations. The creditor may also request that other multilateral lending agencies and international financiers refrain from providing new loans as long as the debtor nation is not in compliance with its international duties. Cristoph Schreuer, one of the most famous expert in ICSID arbitration and author of *The ICSID Convention: A Commentary*, the definitive treatise on the ICSID Convention, has said that '[m]ost States will find it unwise to jeopardize their good standing with the Bank through non compliance with an ICSID Award.'<sup>22</sup>

Another possible option for the investor who has obtained a frustrated award is to publicize the refusal of the debtor government to honor an award either in the host country's newspapers or in the international press, or both. Some investors apparently believe this may be their best leverage in collecting an award. The significance of a government being tarnished with an image of a hostile investment climate should not be underestimated. Mr. Paulsson has noted that '[w]hen an ICSID award is rendered [...], it is clear that the investment climate would be adversely affected if it were not respected. Instances of post-award litigation before national courts are not only vexing to the party seeking to rely on the award, but also detrimental to the reputation of the non-complying loser'.<sup>23</sup> In addition, many nations, particularly developing countries, are reliant on a continuing flow of new investment funds not only to develop their infrastructure, but also to maintain economic growth. A sudden stoppage of investment flows may create problems for the government's economy. In the case of *Amco Asia v. Indonesia*,<sup>24</sup> the investor orchestrated a public relations campaign against Indonesia, and the government in turn sought provisional measures from an ICSID tribunal to restrain the investor from speaking to the press about the subject of the case on grounds of confidentiality. The Tribunal found that the ICSID Convention and Arbitration Rules do not impose an obligation on the parties to maintain the confidentiality of the arbitral proceeding, and it refused to restrain the investor from speaking to the press or issuing press releases concerning the proceedings.

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<sup>21</sup> Jan Paulsson, ICSID' Achievements and Prospects, 6 ICSID Rev.-Foreign Inv.L.J. 380, 386,1991.

<sup>22</sup> Cristoph H. Schreuer *The ICSID Convention: A Commentary*, 3 (2001).

<sup>23</sup> Jan Paulsson, ICSID' Achievements and Prospects, 6 ICSID Rev.-Foreign Inv.L.J. 380, 386,1991.

<sup>24</sup> *Amco Asia Corp. V. Indonesia*, ICSID Case No. ARB/81/8, 1 ICSID Reports 410, Decision on Interim Measures of 9 December 1983.

For ICSID proceedings, the host government may seek to annul the award before a newly-constituted ad hoc annulment Committee. In filing such a proceeding, the government typically requests a stay of enforcement of the award during the pendency of the annulment proceeding. In response to such a request, the investor may seek an order from the Committee that the government must post some form of security, such as bank guarantee, a bond, or an escrow fund, as a condition of the stay. Every *ad hoc* annulment committee to date has held that it possesses the authority to require security as a condition of a stay.<sup>25</sup> In determining whether to require security, recent committees have looked to whether the government will likely honor its Article 53 obligation to comply with the award voluntarily at the conclusion of the annulment proceeding<sup>26</sup>.

If a government refuses to honor its international obligations to comply with an award, and it becomes necessary to enforce it, it may in principle be enforced against the assets of the sovereign itself, against debts owed to the sovereign, or under certain circumstances against the assets of a state-owned company or debts owed to such company. As a general rule, only the commercial (not sovereign) assets of the government are subject to attachment to satisfy the award. In some jurisdictions, there must also be a nexus between the subject matter of the award and the assets attached. The rules in various countries are not uniform, and in any given country it can be difficult to predict the application of the rules to specific assets.

Enforcement takes place in two stages. The first stage is the enforcement phase, in which the award is accepted by the court for enforcement. At this stage, sovereign immunity is not relevant and may not prevent a court order of enforcement. In at least some countries, a stay of enforcement does not prevent the filing at this stage of conservatory measures to create a lien and establish a priority of rights.<sup>27</sup> The second stage deals with execution on specific assets. It is at this stage that sovereign immunity from enforcement becomes relevant and may prevent the attachment of specific assets. In at least some countries, a stay of enforcement only restrains the execution stage.

State immunity is a plea that can be used by a state against another state's municipal court proceedings and judgments, as both would undermine the state's

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<sup>25</sup> See, e.g., *Enron Corp. and Ponderosa Assets, L.P. (Enron) v. Argentine Rep.* (ICSID Case No. ARB/01/3)- Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, October 7, 2008.

<sup>26</sup> *CMS Gas Transmission Co v. Argentina* (ICSID Case No. ARB/01/8), Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, September 1, 2006; *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Annulment Proceeding, Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005.

<sup>27</sup> See, e.g., *Van den Bossche v. Hartford Accident and Indemnity Co.*, 125 B.R. 571, 573 (N.D. Cal. 1991); *Norbert Beyrard v. la Republique de Cote d'Ivoire*, published in *Revue de l'arbitrage* 133 (1994).



sovereignty.<sup>28</sup> In 1812, the state immunity principle was first used in the US in the case of *Schooner Exchange v MacFadden* in which the French government seized a vessel owned by a US citizen. The vessel was then remodelled and used as an armed ship. However, the court then dismissed the case filed by the owner on the grounds of state immunity.<sup>29</sup> In the UK, the principle was adopted by the court in the case of *Parlement Belge* in which the court had granted the same immunity to a mail packet which belonged to a Belgian monarch.<sup>30</sup> Subsequently, the doctrine of state immunity, which was described as “undisputed principle of customary international law” has evolved through the years.<sup>31</sup> In the 18<sup>th</sup> and 19<sup>th</sup> centuries, state immunity was an absolute right of each sovereign state against any court proceedings. This generally means that any judgment issued by a court in a specific state cannot bind another state. However, in the 20<sup>th</sup> century, states became significantly more involved in international trade which required a new approach to the principle of state immunity.<sup>32</sup> As a result, theories were developed that aimed to distinguish between the acts of a state of a governmental and sovereign nature with those which were made in a private capacity that mainly are concerned with commercial activities. The defence of state immunity of a state against court proceedings in another state is a complex area of law. It does not only fall under international law, but also the local laws of each state. Furthermore, each state decides the limit through local laws on how and when a claimant may file a case<sup>33</sup> against another state. However, states in recent years recognised the importance of foreign capitals and investments to their local economies. As a result, measures to attract foreign investors to invest became top priorities for many reasons such as seeking public prosperity or for local political advantages. It also became a challenge because rigid rules that prevent suing the state had to be compromised to insure foreign investors the guarantee of accessing the justice system against the state. Therefore, conventions, treaties and local laws have been enforced to reflect this new international approach to promote investment. In addition, many states have agreed to resort to arbitration, such as ICSID, through waiving their right to both refuse to litigate, on the grounds of immunity, and to resort to competent courts. However, in several cases,

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<sup>28</sup> Fox, H., *The Law of State Immunity* (2nd ed.) (Oxford: OUP, 2008).

<sup>29</sup> See *Schooner Exchange v MacFadden*, 7 Cranch 116 (1812)

<sup>30</sup> *The Parlement Belge* 5 P. D. 197 (1880)

<sup>31</sup> McNamara, T., *A Primer on Foreign Sovereign Immunity*, Union Internationale des Avocats Winter Seminar on International Civil Litigation and the United States of America, February/March 2006. (1)

<sup>32</sup> Caplan, L., *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 Am. J. Int'l L. at p.743 (2003)

<sup>33</sup> For example, the High Court in England and House of Lords have dismissed claims of torture and human rights violations against the Kuwaiti government on the basis that the Kuwaiti government was protected under a local law, UK State Immunity Act of 1978.

although governments have agreed to resort to arbitration, when the investor filed a claim, states often used the principle of state immunity to avoid either to appear in front of a tribunal or to enforce an award. This thesis will discuss the issues related to states when using immunity plea against ICSID arbitration as it has its unique stance and power in comparison to other arbitral institutions.

In determining the immunity of certain assets from attachment, it may be necessary to refer to treatise such as the ICSID Convention, the New York or Panama Conventions, the European Convention on State Immunity, the United Nations Convention on Jurisdictional Immunities of States and their Property, the Vienna Convention on Diplomatic Relations,<sup>34</sup> and the Vienna Convention on Consular Relations, along with any applicable bilateral treatise.

To attach a debt owed to a sovereign, in some jurisdiction it is necessary to show that the situs of the debt is located in the state in which attachment is sought and that the debt or funds obtained from its payment are used by the state whose debts are attached for commercial purposes in the enforcing's state's territory. Some states closely examine the purpose for which a sovereign debt or its resulting funds are used in determining whether it is commercial in nature. Taxes of various sorts owed to a government are generally considered as sovereign, not commercial, property.

The assets of a state-owned company may be attached to satisfy an award against the state that owns it if the company is so extensively controlled by the sovereign that a principal-agency relationship is created which would work a fraud or injustice.<sup>35</sup> This effectively applies the U.S. alter ego test for disregard of the corporate identity to a state-owned company. But other tests might also be applied, such as, for example, those used for attribution of state responsibility under Articles 4, 5 and 8 of the International Law Commission's Articles of State Responsibility. These tests include whether the company is considered an organ of the state under its own law, whether it exercises sovereign authority or whether it is directed or controlled by the sovereign. In addition, in certain circumstances the abuse of rights doctrine might also be applied.<sup>36</sup>

An alternative to collecting directly against a sovereign is to collect on political risk insurance (PRI) policy when a sovereign refuses to honor the award. There are many types of PRI coverage available. For example, Arbitral Award Default Coverage is available to cover a sovereign's dishonor of an award arising from the breach of a specified contract. Separate PRI coverage is available for a denial of justice, which typically applies when the wrongful action of a government, usually a local court

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<sup>34</sup> The two Vienna Conventions may be useful when enforcement is sought against the assets of an embassy or consulate.

<sup>35</sup> *First national City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983).

<sup>36</sup> Karl Heinz Bockstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* 45-56 (1984).

injunction, prevents arbitration from proceeding or renders the arbitration impossible. PRI coverage for refusal of a sovereign to honor an arbitral award arising from a treaty-based arbitration has not been generally available in the past, but is a product being considered by PRI insurers.

In sum, most arbitral awards against sovereigns are honored by the debtor government, in part because of contractual and treaty obligations of the government. Relatively few successful claimants have been forced to initiate enforcement proceedings in court. When governments do not honor their obligations, their investment climates may suffer a loss of reputation, perhaps slowing the flow of new investments into the country. Multilateral and other international lenders may also hesitate in committing funds to a nation that has not honored its international financial commitments. The claimant's government may exercise diplomatic protection, possibly including economic pressure, to persuade the debtor state to pay the award. If a sovereign persists in dishonoring an award against it, enforcement may be obtained against commercial assets or debts owed to it, or in certain circumstances, even against the assets or debts of a state-owned company.

This thesis aims to provide add to the transparency of this subject and further spur the consistent development of this area of law.

It will therefore try to give an answer to this problem, focusing in particular on the existing solutions and on the tools to be used in order to face the issue of enforcement in the network of international investment law and arbitration.

## **Chapter 1**

### ***Treaty obligations to honour arbitral awards: focus on the New York Convention and the ICSID Convention***

The World Bank's founders believed that the principal function of the institution would be to encourage international investment by private investors. According to Ibrahim Shihata, past Vice President and General Counsel of the World Bank and Secretary-General of the ICSID, the primary objective of the ICSID is to promote a climate of mutual confidence between investors and states so as to increase the flow of resources to developing countries under reasonable conditions. It is therefore expected that like the World Bank, the ICSID must be regarded as an instrument of international policy for promoting investment and economic development.

The key purpose in establishing ICSID was to assure foreign investors of protection under international law from unilateral actions of host countries that could jeopardize their investments. At the same time, host countries of foreign investments are assured a neutral dispute resolution mechanism that shields them from the economic manipulations of developed countries. The ICSID thus provides a level playing field for host countries and foreign investors alike. Both the ICSID Convention and the ICSID Rules of Arbitration create this balance. While the Convention gives private investors access to an international forum, the Rules assure them that the absence of a state party to the dispute or its refusal to participate in proceedings after it has consented to ICSID arbitration cannot frustrate the arbitral process.

Article 25(1) of the ICSID Convention provides for the jurisdiction of the ICSID. According to that article:

*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

Thus, for the ICSID to be vested with jurisdiction, a case must first involve a legal dispute arising out of an investment. Second, the dispute must be between a contracting state or its authorized constituent subdivision or agency, and a national of another contracting state. Third, the

parties must have consented in writing to bring their dispute to the ICSID, and such consent may not be unilaterally withdrawn.<sup>37</sup>

With the recent rapid increase of arbitrations commenced against States pursuant to investment treaties, it is useful to examine state's treaty obligation to honour final treaty-based awards. There are obligations to honour awards under specific treaties such as NAFTA, the Energy Charter Treaty (ECT) and some bilateral investment treaties (Bits), but we will focus only on obligations under the New York Convention and the ICSID Convention.

#### *1.1.1 New York Convention and Enforcement under the New York Convention*

Applicable rules to the enforcement of international arbitral awards in general and with special reference as to enforcement against states, are provided under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and under the 1965 (NY Convention) Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).

An obligation to honour a treaty-based arbitration award may be implied if the respondent state has ratified the New York Convention. Definitely, the New York Convention is not aimed specifically at treaty-based arbitration awards, as it generally requires the recognition and enforcement of arbitral awards not recognized as domestic awards in the State where their recognition and enforcement is being sought. Thus, the New York Convention is directed at state's obligations to enforce awards rendered elsewhere, rather than at state's obligation to honour an award rendered against it. However, the New York Convention does extend to investment treaty-based awards against sovereign states, and is expressly referenced in NAFTA Chapter 11<sup>38</sup> and the ECT<sup>39</sup>, and thus may be useful for grounding a treaty obligation to honour an award rendered against one of the 156 state parties to the New York Convention.<sup>40</sup> That said, the New York Convention will not apply to investment treaty awards rendered under the aegis of the ICSID Convention, which are subject to a special recognition, enforcement and annulment regime.

Article III of the New York Convention provides that: 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following

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<sup>37</sup> Some concepts in Article 25(1) require further clarification. For example, the term "investment" was not defined by the ICSID Convention. This was not an oversight, but a deliberate attempt by the drafters of the Convention to have a wider and more flexible interpretation covering major international business transactions rather than just trade in the traditional sense.

<sup>38</sup> NAFTA Article 1136(7), Finality and Enforcement of an Award, provides: A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the InterAmerican Convention.

<sup>39</sup> ECT Article 26(5), named Settlement of Disputes between an Investor and a Contracting Party provides an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention").

<sup>40</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)

articles.<sup>41</sup> The meaning of this provision is that enforcement of award depends on the laws of contracting States whereas the aim of investment arbitration is to take disputes out of the national court system and give investors the prime power to choose a neutral ground for the settlement of disputes. This is the basis of the problem in the enforcement mechanism under this institution because of the possibility that the awards may be reviewed or refused to be enforced in the courts of member states due to judicial, political and economic interference or based on the provisions of Article V which states the grounds to refuse the recognition and enforcement of award.

The New York Convention replaces between its contracting states the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, and purports to overcome the difficulties encountered by its application. The Convention strikes a balance two competing interests: one is to give full effect to the parties' choice of arbitration; the other is to allow a degree of supervision by the national court on arbitration. Its ultimate contribution lies in the favour granted to the parties' private freedom to choose arbitration.

Among others, the New York Convention aims at eliminating the need for judicial confirmation of the award preliminarily to the enforcement procedure (so-called "*double exequatur*"); at restricting the grounds for refusal of enforcement of awards; and at shifting to the resisting party the burden of proof of the validity of the award. With this respect the New York Convention is the principal standard for enforcement, replicated in other regional agreements, in the UNCITRAL Model Law and in domestic laws.

Articles III and IV lay down the general obligation for recognizing foreign awards<sup>42</sup> as binding and enforcing them in accordance with their rules of procedure, at the same conditions imposed on domestic awards. Article IV imposes to the party seeking enforcement to supply the court with (a) the arbitral award, and (b) the original arbitral agreement; thereby allowing the party a *prima facie* entitlement for enforcement.

The resisting party can oppose enforcement exclusively on the seven grounds set out in Article V; the court may *ex officio* raise two grounds.<sup>43</sup> These seven grounds for vacating the enforcement reveal the international common core for refusal of enforcement.<sup>44</sup>

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<sup>41</sup> Article III, New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>42</sup> The New York Convention applies to foreign arbitral awards. In the sense of Article I(1), foreign awards are those made in the territory of any other state, as well as those which are not considered domestic awards. If a state has ratified the New York Convention under the reservation set out in Art. I(3), it will only apply the Convention to arbitral awards made in another contracting state ("reciprocity reservation"); or to arbitral awards considered as commercial.

Article I(1) of the New York Convention: "1. This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

Article I(3) of the Convention: "3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

<sup>43</sup> Article V of the Convention: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) *The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

The first ground under Article V(2)(a) concerns the invalidity of the arbitration agreement. Grounds for refusal under letters (b),(c) and (d) concern procedural defects in arbitration such as: violation of due process, excess of authority by arbitrators, irregular composition of the arbitral tribunal, when they amount to serious procedural irregularities. Fifth ground is the setting aside of the award under the law the country where the arbitral tribunal legally seated, or under the laws governing the arbitral procedure – the so-called *lex arbitri*

Further two grounds for refusal of enforcement, which may be raised as well by the court, concern (a) arbitrability of the dispute; and (b) compatibility with public policy; both are grounds referring to the law of the court of enforcement.

In the system envisaged by the New York Convention, when recognition and enforcement is refused in one country, that refusal does not impair the initial award. A court in another country may take a different view and permit enforcement; this may take place simultaneously and is referred to as “multiple proceedings” in the same dispute. There may be a distinction where the challenge to the enforcement is made under the *lex arbitri*, which possibly nullifies the award and renders it unenforceable in all states, according to Article V(1)(e). Refusal of enforcement is still a mere faculty of the court, so the lack of a duty to abide by the annulment in the country of origin of the award prevents this system to operate properly<sup>45</sup>.

The New York Convention does not contain any express reference to recognition and enforcement of an arbitral award against a state, even if it is well established that the New York Convention applies also to awards involving states.

Unlike the ICSID Convention, the New York Convention was designed to permit the enforcement of arbitral awards between private parties as well as between private parties and foreign States. Though nothing in the Convention explicitly refers to States, there is no doubt that it permits enforcement as against sovereign States.<sup>37</sup>

State immunity is not one of the explicit grounds on which a court can rest a decision to refuse to enforce an arbitral award under the New York Convention. There are, how-ever, several avenues through which immunity might enter. State jurisdictional immunity could arise in defences

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(b) *The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*

(c) *The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

(d) *The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*

(e) *The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

2. *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*

(a) *The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*

(b) *The recognition or enforcement of the award would be contrary to the public policy of that country.”*

<sup>44</sup> Can be grouped in (a) excess of power by the arbitrators; (b) validity of the arbitration agreement; (c) annulment in the country of origin. See: Cordero Moss G., *International Commercial Arbitration*, Oslo 1999, p. 229.

<sup>45</sup> Paulsson J., *May or Must Under the New York Convention; an Exercise in Syntax and Linguistics*, 14 *International Arbitration* 227 (1998).

based on lack of capacity, arbitrability of the award, or the tribunal's treatment of matters beyond the scope of submission to arbitration.

State immunity from execution would likely arise in two ways. The first avenue is via the public policy exception in Article V(2)(b).<sup>46</sup> The argument in favour of extending the exception to encompass immunity is that the basic justifications for recognizing State immunity are effectively public policy concerns: 'Either for reasons of international comity or of internal constitutional structure, it is believed that the courts should not complicate potentially sensitive foreign policy issues by "interfering" to order execution against property vested in a foreign State'. The second avenue is via Article III of the New York Convention, which provides that contracting parties 'shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on [ . . . ]'. Accordingly, municipal immunity laws have been treated as preliminary matters of procedure which claimants seeking to execute awards must overcome.<sup>47</sup>

Claimants have argued, with a mixed degree of success, that the agreement of a State to arbitrate includes an implied waiver of a claim of immunity from the enforcement of any resulting award if that award is governed by the New York Convention.<sup>48</sup> Certainly there is no explicit reservation of waiver with respect to execution, such as exists in the ICSID Convention, which leaves open the possibility of an implied waiver argument in an enforcement action in municipal court. Again, though, the success of that argument depends on municipal State immunity law. Moreover, varied responses are possible. One possibility is that a respondent State's agreement to arbitrate in a State that is party to the New York Convention, such that any award is governed by the Convention, is an implied waiver of immunity in any subsequent enforcement action, regardless whether the respondent State is itself a party to the Convention. A second variation is that only if the respondent State itself is a party to the Convention would such a waiver be implied, regardless whether the award itself was rendered in a New York Convention State and was thus subject to enforcement under the Convention. Some States accept the implied waiver argument, but require that the subject matter of the dispute be tied to assets a successful claimant is seeking to attach. Even if a State's court asserts jurisdiction over the respondent State in the enforcement proceeding, however, most municipal immunity laws require a separate examination of the status of the property sought to be attached. If it is not commercial property, an explicit waiver of immunity with respect to that property will be required before attachment is permitted.

### 1.1.2 *Collection Mechanism under the New York Convention*

Unlike the ICSID Convention, the New York Convention was not designed specifically to permit the enforcement of arbitral awards rendered in disputes between private parties and foreign

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<sup>46</sup> S.J. Toope, *Mixed International Arbitration* (1990) 140–1; Fox, above n. 7, 837.

<sup>47</sup> Fox, above, 836–7.

<sup>48</sup> Toope, above n. 38, 146–8; A. Jan van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', 2 *ICSID Review–Foreign Investment Law Journal* (1987) 439, 450; V.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* (2001) 21, 35.



states. Its primary objective was to facilitate the enforcement of awards rendered in disputes between private parties in commercial arbitration.<sup>49</sup>

Article III contains an obligation to recognize as binding arbitral awards coming within the scope of application of the Convention and to enforce them in accordance with the procedures applicable under the domestic laws. As a result, state parties cannot impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of Convention awards than on the recognition and enforcement of domestic awards. The only specific requirement imposed by the Convention on the party seeking recognition and enforcement is that it must provide a court with the authenticated original award or a certified copy, and the original arbitration agreement or a certified copy. Thus, recognition and enforcement of non-ICSID awards will essentially be subject to the domestic laws. As the procedures for recognition and enforcement of the awards are governed by the domestic rules of practice, they will vary by jurisdiction. The New York Convention prescribes five grounds for refusing recognition and enforcement in its Article V(1), and two additional grounds in Article V(2). The five Article V(1) grounds must be established by a party resisting enforcement, which bears the burden of proof. Article V(1) lists the following grounds: (a) invalidity of the arbitration agreement; (b) violation of due process; (c) excess by arbitrator of his or her authority; (d) irregularity in the composition of the arbitral tribunal, or in the arbitral procedure; and (e) lack of binding force, suspension or setting aside of the award in the country of origin. The two additional grounds in Article V(2) can be examined by a court on its own initiative. Pursuant to this provision, a court can refuse recognition and enforcement of the award if its subject matter is incapable of settlement by arbitration under the enforcing country's laws or if recognition or enforcement of the award would violate the enforcing country's public policy.

Moreover, the awards enforced in accordance with the New York Convention are open to review by domestic courts of the state of arbitration, which can set the award aside. The grounds for setting aside are not regulated in the Convention.<sup>50</sup> Setting aside of an award in the state of arbitration has an extra-territorial effect as it precludes enforcement in the other contracting states by virtue of Article V(1)(e) of the Convention.<sup>51</sup> This contrasts with the refusal of recognition and enforcement which has legal effects only in the jurisdiction where recognition and enforcement are sought.

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<sup>49</sup> Albert Jan Van Den Berg, *The New York Arbitration Convention Of 1958: Towards A Uniform Judicial Interpretation* 277-82 (1981).

<sup>50</sup> If the state of enforcement has implemented the UNCITRAL Model Law on Commercial Arbitration, the grounds for setting aside the award will be identical to the grounds for refusal of recognition and enforcement under Article V of the New York Convention. *See*, Article 34 of the UNCITRAL Model Law on Commercial Arbitration, 24 I.L.M. 1302 (1985).

<sup>51</sup> Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29(2) ICSID REV.- FOREIGN INVESTMENT L.J. 263, 269 (2014).

### 1.1.3 ICSID Convention and Enforcement Framework

Besides the New York Convention, domestic enforcement of foreign arbitral awards can be based on the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).<sup>52</sup>

Although even more largely adhered to, being in force in 161 countries,<sup>53</sup> the scope of application of the ICSID Convention is limited to disputes arising from investments between contracting states and nationals of other contracting states which have been submitted to the International Centre for the Settlement of International Disputes (ICSID). The jurisdiction of the ICSID is defined under Article 25,<sup>54</sup> and extends *ratione materiae* to legal disputes arising directly out of an investment, provided the parties have consented in writing to it; *ratione personae* to disputes between private investors and states.

The ICSID awards are binding on the parties and are not subject to appeal or any other remedy outside the Convention, i.e. interpretation,<sup>55</sup> revision,<sup>56</sup> and annulment by an *ad hoc* committee.<sup>57</sup> In this sense, the ICSID system is self-sufficient; once consent to ICSID arbitration has been given, the access to national courts is precluded and awards are subject to an internal review mechanism. Accordingly, ICSID awards are not subject to the New York Convention.

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<sup>52</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington 18 March 1965; 575 UNTS 159.

<sup>53</sup> As from the List of Contracting States and Other Signatories to the Convention (as of November 3, 2003) <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx>> (last visited 22 June 2016).

<sup>54</sup> Article 25 of the ICSID Convention: "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States."

<sup>55</sup> Article 50 of the ICSID Convention.

<sup>56</sup> Article 51 of the ICSID Convention.

<sup>57</sup> Article 52 of the ICSID Convention.

Enforcement of ICSID awards against a contracting state is quite simple and occurs according to Article 54. The party seeking enforcement needs to supply a copy of the award to the court. This entitles the party to enforcement, the award is automatically recognised. There is no ground for refusal of recognition and enforcement, not even a public policy defence.

Article 53(1) of the ICSID Convention provides as follows:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. *Each party shall abide by and 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.<sup>58</sup>

According to Professor Schreuer's commentary on Article 53(1), 'non-compliance by a party with an award would be a breach of a legal obligation', and violation of this obligation may lead to state responsibility.<sup>59</sup> This obligation may lead to state responsibility. As we will see, this obligation is independent of any argument regarding state immunity in the context of ICSID Article 55, and breach of this obligation may lead to diplomatic protection and an ICJ action pursuant to ICSID Articles 27 and 64 respectively.

Christoph Schreuer theorizes that enforcement of awards under the ICSID Convention is independent of the New York Convention and other international and domestic rules dealing with the enforcement of foreign arbitral awards. According to the author, this is why ICSID is believed to have its own 'self-contained' enforcement mechanism which means it does not need the assistance of any other institution to ascertain the binding force and enforcement of its awards, hence it is expected to have relative advantages.<sup>60</sup> Another scholar, Wang Dong, puts it more neatly when she argued that the Convention provides for an elaborate process designed to make arbitration independent of domestic courts. She emphasized that even in the face of an uncooperative party,

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<sup>58</sup> Article 54 of the ICSID Convention: "(1) 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. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) *A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

<sup>59</sup> Schreuer, *The ICSID Convention - A Commentary* by Christoph H. Schreuer (Cambridge University Press, 2001) pp. 1077, 1081; see also C. F. Amerasinghe, 'The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation Vanderbilt'. *Journal of Transnational Law* 9 (1976) p. 793

<sup>60</sup> Christoph Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention A Commentary on the Convention on the Settlement of Investment Dispute between States and Nationals of Other States* (2<sup>nd</sup> edn Cambridge University Press 2010).

ICSID arbitration is designed to proceed independently without the support of domestic courts.<sup>61</sup> This argument is correct to the extent that investor-state arbitration proceedings cannot be influenced by local courts. However, it is erroneous on the ground that the obligation to recognize and enforce an ICSID award depends absolutely upon all States parties to the ICSID Convention. The Convention leaves the choice of the appropriate court or authority charged with the enforcement of ICSID awards to each State party to the Convention. Art. 54(2) of the ICSID Convention provide that each State party must designate a court or authority for this purpose and notify the Secretary-General of ICSID. This certainly appears contrary to the aims of international investment arbitration and particularly to the 'self-contained' nature of the Convention because award creditors are invariably subject to the rules of enforcement in domestic courts including rules on sovereign immunity.

#### 1.1.4 Collection Mechanism under the ICSID Convention

The ICSID Convention governs recognition, enforcement, and execution of awards in its Section 6 of Chapter IV, in Articles 53 - 55. Article 53(1) in its first sentence stipulates the following features of ICSID awards: binding force, finality, and autonomous review within the ICSID system.<sup>62</sup> Their binding force requires the parties to a dispute to comply with awards. Non-compliance constitutes a violation of states' obligations under the Convention. The attribution of binding force to ICSID awards in the first sentence of Article 53(1) of the ICSID Convention is a restatement of the *pacta sunt servanda* principle of customary international law.<sup>63</sup> The obligation to comply is further reinforced by the second sentence of Article 53(1) which requires the parties to a dispute to "abide and comply with the terms of the award" with the exception of cases where the enforcement of the award has been stayed in accordance with the Convention. Finality refers to the *res judicata* effect of the awards. Once an award has been issued parties cannot seek a remedy in the same dispute in another forum. Autonomous review under the ICSID Convention is exhaustive and self-contained, meaning that the awards cannot be subject to any external review.<sup>64</sup> Autonomous review of ICSID awards is a fundamental difference from awards enforced in accordance with the New York Convention, which are open to review by national courts of the state of arbitration. The intention of the drafters of the ICSID Convention was to depart from a model which allows intervention of domestic courts offered by the New York Convention.<sup>65</sup>

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<sup>61</sup> Wang Dong, "Dispute Settlement in International Trade, Investment and Intellectual Property, binding force and enforcement" (2003) UN conference on trade and development ,pg 11  
[http://unctad.org/en/Docs/edmmisc232add8\\_en.pdf](http://unctad.org/en/Docs/edmmisc232add8_en.pdf) accessed 20/7/2014

<sup>62</sup> See SCHREUER, *supra* note 15, at 1097. The first sentence of Article 53 reads: "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention".

<sup>63</sup> Aron Broches, Awards rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Recognition, 2(2) ICSID REV.-FOREIGN INVESTMENT L.J. 287, 289(1987).

<sup>64</sup> The only reviews available are revision and annulment under Articles 51 and 52 of the Convention.

<sup>65</sup> Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ¶ 35 (Nov.4 2008) [hereinafter: Vivendi, Stay of Enforcement]. See SCHREUER, *supra* note 15, at 1118.

The collection mechanism under Article 54 can be used when a party's fails to comply with the award in accordance with Article 53.<sup>66</sup> Article 54(1) of the ICSID Convention lays out the obligation of the state parties 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".<sup>67</sup> Some scholars have suggested that the obligation under Article 54 to treat the awards "as if it were a final judgment of a court" allows for challenges available to final judgments in some jurisdictions.<sup>68</sup> However, Article 53 is clear on the point that awards "shall not be subject to any appeal or any other remedy except those provided for in this Convention". Opening the door to domestic review would manifestly contravene this provision.

Article 54(2) of the ICSID Convention prescribes a simplified procedure for recognition and enforcement of awards: "[a] party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General". Recognition and enforcement under Article 54 of the Convention is automatic meaning that the role of domestic authorities is limited to verification of the authenticity of the award.<sup>69</sup> Unlike the New York Convention, the ICSID Convention does not allow states to refuse recognition and enforcement on any grounds. Unlike recognition and enforcement, however, the execution of awards is governed by laws of the state where the enforcement is sought, in accordance with Article 54(3) of the Convention. Article 55 provides an interpretative guideline stating "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution".

The relationship between Articles 53 and 54 of the ICSID Convention was questioned when Argentina argued that its obligation to comply with ICSID awards under Article 53 is subject to the prevailing mechanism for enforcement of awards under Article 54.<sup>70</sup> Between 1998 and 2002 Argentina underwent a severe financial crisis. In order to stabilize the domestic economy the Argentinian government decided to dissolve the regulatory framework that was previously aimed at attracting foreign capital. This decision was followed by a flood of over 40 investment arbitration claims.<sup>71</sup> In several proceedings on stay of enforcement Argentina has argued that the obligation to

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<sup>66</sup> Stanimir A. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention* in INTERNATIONAL INVESTMENT LAW IN 21ST CENTURY, *supra* note 5, at 328.

<sup>67</sup> Thus, the non-monetary awards will be subject to the simplified recognition, but not to enforcement under the ICSID Convention. They will be enforced in accordance with the New York Convention, or subject to other applicable treaties or laws. See MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 237 (2 ed. 2012).

<sup>68</sup> Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23(1) J. INT'L ARB. 1, 9-14 (2006).

<sup>69</sup> Albert Jan van der Berg, Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions, 2(2) ICSID REV.-FOREIGN INVESTMENT L.J. 439,448 (1987).

<sup>70</sup> Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Argentina's Response to the Submission by the United States of America to the *ad hoc* Annulment Committee (June 2, 2008); Enron Corporation and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (October 7, 2008); Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Respondent's Letter Regarding Stay of Enforcement (Nov. 28, 2008) [hereinafter: Vivendi, Respondent's Letter].

<sup>71</sup> As of 6 August 2014, see World Bank, List of ICSID Cases, available at <https://icsid.worldbank.org/ICSID/FrontServlet>.

comply with awards under Article 53 does not arise until the creditor has initiated enforcement proceedings under Article 54.<sup>72</sup> Argentina has claimed that it was a result of its obligation to treat an ICSID award as if it was a final judgment of an Argentinian court in accordance with Article 54 of the Convention. According to Argentina, the award creditor has to comply with the same procedures that are applicable to the enforcement of final judgments in local courts in Argentina. Until then the obligation to pay the award under Article 53 does not arise.

In the *Enron* case, the ICSID *ad hoc* annulment committee rejected Argentina's interpretation of Articles 53 and 54 and confirmed that the obligations under these provisions are to be seen as separate and independent. The committee held that a state's obligation to comply is unconditional, meaning that it arises directly after the award is rendered and remains unaffected by any domestic procedure for collection. The committee analysed in detail the relationship between these two obligations and provided reasons for which it held Argentina's interpretation weak. Firstly, the obligations under Articles 53 and 54 are directed to different subjects: the obligation to comply under Article 53 is addressed to a party to a dispute, whereas the obligation to recognize and enforce is binding on all parties to the Convention.<sup>73</sup>

Secondly, in accordance with Article 54, parties are obliged to enforce only pecuniary awards. Following Argentina's reasoning, there would never be an obligation to comply with non-pecuniary obligations imposed by an ICSID award.<sup>74</sup> Moreover, it was found that Argentina's interpretation was not supported by the subsequent practice of states in terms of Article 31(3) (b) of the Vienna Convention on the Law of Treaties (VCLT).<sup>75</sup> In each of the four ICSID cases that reached the enforcement stage before local courts, the enforcement was sought before courts of a third state, rather than the courts of a state against which the award had been rendered.<sup>41</sup>

According to Argentina's interpretation, in those cases the obligation to pay the award could never arise because the claimants did not trigger the enforcement proceedings before the domestic courts of the respondent states. This construction of Articles 53 and 54 of the ICSID Convention was confirmed by the *Vivendi II* annulment committee in its decision on the stay of enforcement.<sup>76</sup>

As noted by some commentators, the interpretation proposed by Argentina would undermine fundamental principles of the enforcement regime under the ICSID Convention.<sup>77</sup> Argentina's interpretation of Articles 53 and 54 would imply a supervisory role for domestic courts in the enforcement of awards.<sup>44</sup> As noted by the Committee in *Vivendi*, this would open the possibility of local authorities reviewing awards and deciding whether or not they should be enforced based on domestic law.<sup>45</sup> This is contrary to the intention of the drafters of the Convention whose objective was to depart from the model offered by the New York Convention and to eliminate state intervention in the field of investment disputes by creating a self-contained review mechanism and

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<sup>72</sup> Siemens, *supra note*, para 5; Enron, *supra note*, para 57.

<sup>73</sup> Para 62.

<sup>74</sup> Para 66.

<sup>75</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

<sup>76</sup> Vivendi, Stay of Enforcement, *supra note* 25, paras 31-36.

<sup>77</sup> See Alexandrov, *supra note*, at 323.

its enforcement procedure.<sup>78</sup> Further, intervention by a judicial authority in the host state would render the award simply “a piece of paper deprived from any legal value and dependent on the will of state organs”.<sup>79</sup> Such an interpretation would defeat the object and purpose of Article 53 in violation of the rules of interpretation under the VCLT.<sup>80</sup>

#### 1.1.5 *Pros and Cons of ICSID vis-à-vis the NY Convention*

The ICSID Convention represents a self-contained regime and does not permit any external review, including at the recognition and enforcement stage. By contrast, Article 5 of the New York Convention contains grounds on which enforcement may be refused by domestic courts. The *Sempra v Argentina* stay decision explains that:

There is a fundamental difference between enforcement of awards under the New York Convention and the ICSID Convention, in that Article 5 of the New York Convention envisages certain grounds on which the award may be subject to judicial review at a national level and which may entitle a State to refuse enforcement.

The State where enforcement is sought cannot refuse execution on grounds such as *ordre public* or on any other ground. Consequently, the only reasons for a State to refuse execution are if the assets subject to execution are immune under the law of that State or if enforcement has been stayed pursuant to Article 52(5) of the ICSID Convention. As was stated in the *Vivendi v Argentina* stay decision:

Any possible intervention by a judicial authority in the host State is unacceptable under the ICSID Convention, as it would render the awards simply a piece of paper deprived from any legal value and dependent on the will of State organs.

Hazel Fox defines State immunity as ‘a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars municipal courts of one State from adjudicating the disputes of another’.<sup>81</sup> It must, therefore, be clarified that immunity from enforcement (which is available to the respondent State) is only a procedural limitation but it is not a ground for review. As a matter of procedure, it does not challenge on the substantive right to recover the amount owed under the award but serves as a limitation to proceed on State assets where no relevant exception would permit enforcement. The State where enforcement is sought cannot review compliance with international law either.

Anyway some authors, like Baldwin, Kantor and Nolan warn that given the equalization of ICSID awards to national judgments, the condemned States may still seek relief from a final judgment under national laws which provide exceptional remedies to final judgments. This question has not, however, been thus far scrutinized on the international level (eg in the practice of States or before an ICSID tribunal) and thus needs further clarification in the future especially with a view to what the *Vivendi v Argentina* stay decision mentions:

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<sup>78</sup> Vivendi, Respondent's Letter, *supra* note 31 para 5.

<sup>79</sup> Vivendi, Stay of Enforcement, *supra* note 25, ¶36.

<sup>80</sup> *Id.*

<sup>81</sup> Hazel Fox, *The Law of State Immunity* (OUP 2008) 1

Articles 54 and 55 were adopted for that precise purpose and were worded in a manner that excludes any possible court intervention in all States that adhered to the ICSID Convention, particularly the judicial organs of the State which was party to the dispute adjudicated under the ICSID rules.

States such as Brazil and India are not among the 150 contracting States to the ICSID Convention, and Bolivia has denounced the Convention. Additionally, the enforcement regime established by the ICSID Convention does not apply to awards rendered under the Additional Facility Rules; therefore, such awards will be enforceable under the New York Convention. It may thus be questioned whether an investor who has obtained an award in his favour may rely on the New York Convention to enforce it within the territory of such States. There is no clear answer to this question. Schreuer notes that:

*Since enforcement under the ICSID Convention is easier to obtain than under the New York Convention, the question of the applicability of the New York Convention to ICSID awards is not likely to arise. But this issue may become relevant in exceptional circumstances like the enforcement of an ICSID award in a State that is a party to the New York Convention but not to the ICSID Convention.*

Given that the regime established under the New York Convention requires recourse to local courts, it follows that enforcement under the ICSID Convention is, in principle, much faster. As explained in the *Vivendi v Argentina* stay decision:

To eliminate State intervention in the field of investment disputes, and as a necessary consequence of creating an international mechanism to adjudicate such investment disputes under the aegis of ICSID, all sort of recourse to domestic courts (in cases other than those provided by the Convention itself) was to be avoided in all States who are Members of the ICSID Convention, including the host State, in respect of the recognition or enforcement of a finally binding ICSID award rendered against a given State.

The second paragraph of Article 54 merely organizes the logistics of seeking the recognition and enforcement, through the identification of a given judicial or other authority whose function is merely administrative, in the sense of undertaking the operation of receiving the copy of the award 'certified by the ICSID Secretary-General' as required under Article 49, paragraph 1 of the ICSID Convention. This is the substitute for obtaining an 'exequatur' in international commercial arbitrations.

On the negative side, it should be mentioned that implied waiver of immunity from execution has been accepted under the New York Convention, but would not seem possible under the ICSID Convention because of Article 55,<sup>82</sup> although Schreuer supports the availability of the implied waiver argument even under the ICSID Convention enforcement regime.<sup>83</sup>

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<sup>82</sup> Spaccaquerche Barbosa, 'The Enforcement of International Investment Arbitral Awards: Is There a Better Way?' (2009) 6 Transnatl Dispute Management 1.

<sup>83</sup> Bjorklund 216. See also Schreuer et al, at 1128.



The ICSID Convention has not left room for its awards to be controlled by national authorities. It has withdrawn from national courts and national laws the competence to anyhow revise the award, including the set aside motions. The self-contained rules of the ICSID Convention avoid the possibility of any Contracting State's authority set aside, annul, reform, or change, in any way, the decision rendered by an ICSID Tribunal. One can say that this feature makes it the ICSID award truly international, for it is detached from any national law whatsoever. Ironically, however, the competent *ad hoc* Annulment Committees chosen to settle annulment requests under the scope of the ICSID Convention seemed to grant a similar role to a Court of Appeals, but with a more significant action for revising the awards. The ICSID practice shows that those Annulment Committees have been responsible for the review of a great deal of ICSID awards, rendering decisions nullifying the original award<sup>47</sup> and obliging the parties to wait for a new award. This practice results on the questioning of the real effectiveness of the ICSID procedure, as the annulment procedures may endanger the better features mentioned hereinabove and delay the supposedly faster enforcement procedure.

The reality of the non-ICSID awards which are submitted to the NYC is slightly different. The Article V(1)(e) gives the possibility to the national courts to neither recognize nor enforce arbitral awards that "have been set aside or suspended by a competent authority of the country in which or under the law of which, that award was made". Therefore, the competent authority of the place of arbitration is fully authorized to revise the awards rendered under its law or in its territory. In fact, set aside motions are a common practice in ordinary international arbitration in order to avoid, or at least postpone the compliance with the award. Hence, although the NYC does not provide for any rule to be followed by the competent authority of the place of arbitration, in international arbitration it is expected that "the courts of the seat of arbitration oversee the proper functioning of the procedural aspects of the arbitration and, at the end of the process, confirm or set aside the award"<sup>48</sup>.

As a result, the NYC allows the interference of the national courts of the seat of arbitration, even though set aside or annulment grounds are not the subject of this convention. It is true that international investment awards may be considered as detached from a specific national law or jurisdiction, avoiding the *lex loci arbitri*. Nonetheless, in jurisdictions where the award can still be attached from the seat of arbitration and there is not a "more-favourable right provision", the NYC can do nothing but make the competent authority of the place of enforcement respect the set aside decision rendered elsewhere. Luckily in this situation the UNCITRAL Model Law on International Commercial Arbitration can play an essential role.

#### 1.1.6 *Consequences of Enforcement and Non-Enforcement of Arbitral Awards*

In 2008, in an empirical survey conducted by the School of International Arbitration of the Queen Mary of London<sup>84</sup> the results about compliance and enforcement of arbitral awards are persuasive.

Awards are normally voluntarily complied with and only in a very small number of cases, enforcement proceedings will be instigated to ensure enforcement: '84% of respondents indicated that the opposing party had honoured the award in full in more than 76% of the cases. Only 3% reported that an award debtor had failed to comply with the award. During the interviews, corporate counsel often mentioned that more than 90%, typically 99% of the awards had been honoured by the non - prevailing party.'<sup>85</sup>

The same survey showed also that only in 11% of cases participants needed to proceed to courts or other enforcement agencies to enforce an award. Even in such cases, the majority of the corporations reported that they had not encountered major difficulties in doing so. only a very small proportion of the corporations faced problems when trying to recognize and enforce foreign arbitral awards. Out of the 11%, only 19% of the corporations had encountered difficulties when seeking to recognize and enforce foreign arbitral awards. This number appears to be, and actually is, quite small and encouraging as far as enforcement of awards is concerned.

As part of the same survey in-house lawyers reported that the 'difficulties in enforcing an award often arose because of the circumstances of the award-debtor rather than deficiencies in the arbitral or court proceedings.' The survey indicates that 70% of the problems related to the absence of assets or the inability to identify the debtor's assets. Against this background it is not surprising that asset-tracking or asset-tracing has become a profession nowadays. However, it is very encouraging that 'only 6% of the respondents encountered difficulties because the country of enforcement was not a signatory to the New York Convention. The small percentage in this last case is translated in the large number of countries parties to the New York Convention 1958. 17% of the corporate counsel indicated the hostility of the place of enforcement, which is understood as comprising, among others, an unstable and bureaucratic political and legal system with all consequences deriving from this, intimidation and threats or corruption.'

According to the abovementioned empirical survey, 44% of the participating corporations responded that they usually recovered 100% of the arbitral award when using recognition, enforcement and execution proceedings, while 40% recovered over 76% of the amount awarded. In other words, at least 84% of the participants reported that they have recovered 76 to 100% of the award sum. Corporate counsel also indicated in the interviews that the lack of assets of the non-prevailing party is the main reason for the failure to recover the full amount of an award. The fact that parties prevailing in arbitration are prepared to settle and satisfy their claim for a sum less than that 100% awarded by the arbitral tribunal should not be read as a defect of the arbitration system or an indication of a diminished value of the award. Quite to the contrary, one should not overlook the fact that most awards are complied with or are providing the basis for enforcement for a very substantial percentage. It is well possible that lawyers or damages experts may inflate claims in the

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<sup>84</sup> See <http://www.arbitrationonline.org/research/Corpattitempirical/2008.html>.

<sup>85</sup> Mistelis and Baltag, "Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices", 19(3-4) *American Review of Int'l Arbitration* 319-375 (2008), at 343.

request for arbitration while instructing parties are happy with a sum much lower than originally claimed for.

It is also worth mentioning that the award debt was typically collected in a rather short period of time (i.e. often less than six months or more commonly less than one year), but with some cases (about 5%) going for more than two years.

As alternative to voluntary compliance or enforcement via the national courts, other options have been developed such as post-award settlement; such alternatives to traditional enforcement seem to expand.<sup>86</sup> Similarly, it has been reported<sup>87</sup> that one award (*CMS v Argentina*) was assigned to a fund, Blue Ridge, which exercised significant diplomatic pressure in order to ensure enforcement. It was stated that CMS received from Blue Ridge a sum they felt fully compensated them but lower than the sum awarded as the result of the arbitration proceedings. Similarly, in a recent decision of the Thai Supreme Court, judgment no 9691/2554, it was confirmed that awards are transferable and may be enforced for the benefit of the transferee and ultimate recipient of the transferred award.

In this sense we share the conclusion of Professor Mistelis to draw that the “value” of an arbitral award lies not only on the fact that the legal framework for the recognition and enforcement of foreign arbitral awards is supportive of enforcement internationally (courtesy of the New York Convention), but also on the fact that the awards maintain economic value irrespective of whether the award is enforced or not. Awards may be used as a basis for renegotiation of contracts or for the exercise of pressure to achieve legitimate commercial objectives. For example, press releases may be issued and/or published on the financial or daily political press, awards may be assigned to collecting agencies, funds or banks, or an award may be used after it has been rendered to safeguard future business relationships. This may appear too rosy a picture but the fact remains that awards, whether enforced or not, do embody real economic and/or commercial value.

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<sup>86</sup> See, e.g., Loukas Mistelis, “The Settlement-Enforcement Dynamic in International Arbitration, 19(3- 4) *American Review of International Arbitration* 377-389 (2008), at 379 et seq. and most pertinently at 383-387.

<sup>87</sup> Viñuales, J. E. and D. Bentolila, ‘The use of alternative (non-judicial) means to enforce investment awards’, in: Boisson de Chazournes, L., M. Kohen and J. E. Viñuales (eds.), *Diplomatic and Judicial Means of Dispute Settlement: Assessing their Interactions* (The Hague: Brill, forthcoming in 2012), also in SSRN: SSRN-id2125051, at p 13.

## **Chapter 2**

### ***The ICSID Enforcement Procedure***

One area of the dispute resolution mechanism under the ICSID Convention that attracts academic comment is the enforcement of ICSID arbitral awards under article 54 of the Convention. The question is often raised whether the provisions of the Convention promote effective enforcement of ICSID arbitral awards. This is due to the place accorded domestic law in resolving questions of sovereign immunity in the enforcement of arbitral awards and other issues that seem to impinge on the effective enforcement of ICSID awards. In order to understand the problem, it is important to conduct a comparative analysis on the award and enforcement procedure of the ICSID Convention awards and clarify the concepts of recognition, enforcement and execution.

The World Bank principally aims to promote sustainable economic growth and to eradicate poverty in each part of the world.<sup>88</sup> Therefore, the Bank constituted Convention on the Settlement of Investment Disputes between States and Nationals of Other States (The Washington Convention) and then the Washington Convention ICSID in 1965 to provide "a favourable investment climate"<sup>89</sup>. The main intention of establishment of ICSID system was to "promote much-needed international investment by offering a neutral dispute resolution forum both to investors that are (rightly or wrongly) wary of nationalistic decisions by local courts and to host-states that are (rightly or wrongly) wary of self- interested actions by foreign investors"<sup>90</sup>. The ICSID Convention has brought unique enforcement rules for investor-state arbitration to transfer these purposes into practice. The underlying cause of this system is that success of an arbitral process is based on whether the award can be enforced and executed.<sup>91</sup>

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<sup>88</sup> Joseph M. Cardosi. "Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution." *Pepperdine Law Review* 41, no. 1 (2013). Accessed March 3, 2015. <http://digitalcommons.pepperdine.edu/plr/vol41/iss1/3/>.

<sup>89</sup> Yusuf Çalışkan. "Dispute Settlement in International Investment Law." In *Implementing International Economic Law Through Dispute Settlement Mechanism*, edited by Yusuf Aksar. Martinus Nijhoff Publisher, 2011, p. 130.

<sup>90</sup> Lucy Reed, Jan Paulsson, and Nigel Blackaby. "Recognition, Enforcement and Execution of ICSID Awards." In *Guide to ICSID Arbitration*. Kluwer Law International, 2004, p. 4-5.

<sup>91</sup> Mohamed Fahmi Ghazwi. "Recognition and Enforcement of International Arbitration Awards: A Case Study of Malaysia and Saudi Arabia." *International Journal of Accounting and Financial Reporting* 4, no. 2

In few words, just to give a brief overview of what we will see in deep further, according to the ICSID Convention, ICSID awards are recognised automatically by all signatory states and enforced by local laws including sovereign immunity laws. This brings forth the question how ICSID awards can be effective and executory in spite of sovereign immunity laws.

The enforcement of the arbitral award, when it is not voluntary, is the stage of the dispute where the parties have to resort to authority of the national courts. Effective enforceability before national courts is sometimes considered as the weakest ring chain of ICSID arbitration, the ultimate feature that makes arbitration a doubtful alternative to litigation.

The procedure for arbitration under ICSID has earned its various commendations from the observers of International investment arbitrations because it is believed to have established a mechanism for the resolution of disputes between foreign investors and host States through 'international methods of settlement designed to take special account of the characteristics' of such disputes which include recognition, execution and enforcement of the awards irrespective of the reserved sovereign powers of States.<sup>92</sup> One of such observer is Sir Elihu Lauterpacht who in his Foreword to Professor Christoph Schreuer's Commentary to the ICSID Convention stated that the most important features of the Convention represented 'significant new developments' in international law and the practice of States. According to him:

For the first time a system was instituted under which non-State entities, corporations or individuals, could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which the tribunal's award would be directly enforceable within the territories of the States parties.<sup>93</sup>

Therefore signatories to the ICSID Convention must ensure the enforcement of the award and particularly of its pecuniary obligations as if it were a definitive award of a national tribunal. Against this backdrop, in order to properly have an in-depth analysis of the procedure for the enforcement of award and its problems under this heading, it is important to take a look at the argument on the interpretation given to the procedure of enforcement under the sections which comprises of Articles 53, 54 and 55 as well as analyse the cases where the tribunal accepted or declined the various arguments on the interpretation or interrelationship of the Articles.

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

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(2014). Accessed March 3, 2015.  
[http://www.macrothink.org/journal/index.php/ijafr/article/download/6783/\\_59](http://www.macrothink.org/journal/index.php/ijafr/article/download/6783/_59)

<sup>92</sup> Stanimi Alexandrov "Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention" in Christina Binder(eds) International Investment Law for the 21st Century Essays in Honour of Christopher Schreuer, (Oxford University Press 2009)pg322-337

<sup>93</sup>Ibid n6p ix

Recognition of an award is the formal imprimatur that the awards are binding and final decision on the issues disputed by the parties.<sup>94</sup> In this respect, the award acquires *res judicata* effect through recognition. It means that the disputed issues cannot be subjected to any court or arbitration proceedings. Pursuant to Article 53 of the ICSID Convention, the ICSID awards are binding and final and cannot be subjected to any remedy except those provided by the Convention. Thus, the ICSID Convention brings automatic recognition and gives *res judicata* effect *ipso facto*. At this juncture, the ICSID mechanism discerned from other international arbitral mechanism with its unique procedure.

On the other hand, enforcement refers to declaring in an order that an arbitration awards is in fact enforceable.<sup>95</sup> However, in the context of ICSID arbitration, recognition and enforcement generally refers to same process, which is leading up to execution of an award. Article 54 says, "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". This article shows the greatest strength of the ICSID Convention that is even more favourable to recognition and enforcement than the New York Convention because the article nullifies the necessity of local court's decision for enforcement. Also, the Convention does not allow any refusal grounds for recognition and enforcement by clarifying that awards would be considered as a final judgment.

Pursuant to Article 54, all states parties to the ICSID Convention shall recognize and enforce an ICSID award as if it were a final judgment of a court in that state.<sup>96</sup> Highly unusual enforcement obligation is designed to ensure payment if the other party has failed to comply with an award.<sup>97</sup> In the case of non-compliance, the prevailing party can apply to courts of a Contracting State where the losing party has attachable assets because awards should be recognized and enforced by all Contracting States. Also, the party seeking recognition and enforcement of an award has the possibility to select most favourable forum for this purpose.<sup>98</sup>

Another matter about Article 54 is that there was a nuance between pecuniary and non-pecuniary obligations. The Article 54 clearly put down the fact that only monetary obligations can be subjected to automatic recognition and enforcement by all Contracting States. The Convention does not provide this mechanism for non-pecuniary obligations such as "restitution or an obligation to desist from a certain

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<sup>94</sup> Lucy Reed, Jan Paulsson, and Nigel Blackaby. Ibid. p. 95.

<sup>95</sup> Ibid. p. 95.

<sup>96</sup> "Course on Dispute Settlement International Centre for Investment Disputes." UNCTAD. March 3, 2003. Accessed March 3, 2015. [http://unctad.org/fr/Docs/edmmisc232overview\\_en.pdf](http://unctad.org/fr/Docs/edmmisc232overview_en.pdf).

<sup>97</sup> Tsai-yu Lin. "Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?" *Contemporary Asia Arbitration Journal* 5, no. 1 (2012): p. 5. Accessed March 3, 2015. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2115553](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115553)

<sup>98</sup> Course on Dispute Settlement International Centre for Investment Disputes." UNCTAD.

action”<sup>99</sup>. Indeed, it does not create a great difference because “ICSID tribunals have in all known cases only imposed pecuniary obligations”<sup>100</sup>. Therefore, ICSID keep the enforcement mechanism effective by means of implementing monetary obligations.

Yet, the ICSID Convention excludes external intervention of local courts or other authorities. Notwithstanding, the Convention establishes that execution of the award shall be governed by local laws. It conjures up whether the law of the country can prevent to abide by an award. Due to the fact that the ICSID Convention intended to provide more enforceable system, it eliminates the problem with strict compliance rules. Therefore, obstacles to the enforcement of an ICSID award under the law where execution is sought in no way affect the obligation of the party to the ICSID Arbitration to abide by and comply with the award in accordance with Article 53(1). In the same vein, it is a violation to avoid from compliance with an award because of state’s law. Also, the Convention brings certain remedies against such non-compliance cases as it will be seen below.

In addition to Article 54(3), Article 55 should be examined closely because it is a specification of Article 54(3). It states that sovereign immunity laws cannot be derogated from the law of the state where execution is sought. In other words, state immunity will apply to the execution of an ICSID award in the same way as it would apply to the execution of a judgment of a domestic court. For this reason, sovereign immunity must be examined closely to reveal its effect on enforcement and execution process.

#### 2.2.1 Articles 53 and 54 of ICSID Convention

Article 53(1) states:

*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and 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.*

Article 54 titled Recognition and Enforcement of the Award provides:

*(1) 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. A Contracting State with a federal constitution may enforce such an award in or through its federal*

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<sup>99</sup> ibid

<sup>100</sup> ibid

*courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.*

*(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*

*(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.*

The enforcement of the arbitration awards starts with its 'recognition' by the domestic courts of member States and this is followed by its execution which usually consists in the forcible realization of the respondent assets.<sup>101</sup> It has been observed that recognition, enforcement and execution appear in a sequential order under article 54: 'recognition' appears in Article 54(1) 'recognition and enforcement' appears in 54 (2) and 'execution' appears in 54(3) Consequently, it is argued that in order not to encounter problems in the course of enforcement, the procedure for enforcement under the ICSID Convention should follow this sequence. In other words it is important that recognition of the award should kick start the process while enforcement or execution will follow. Martin Hunter explained this procedure further when he stated that 'Recognition is a necessary and formal procedure whereby an award will be confirmed as authentic. It is a preliminary step to enforcement/execution. Once recognition has been obtained, enforcement or execution proceedings come into play. Prior to this stage, creditors possess only an executory title, meaning that the award is ready to be executed. There are two possible consequences of the recognition of an award. Firstly, it confirms that the award is binding or *res judicata*. Secondly, it is usually seen as a preliminary step leading to enforcement. In essence, in order to obtain the pecuniary obligations contained in the award, creditors have to obtain recognition from the competent court'.<sup>102</sup>

Article 54(2) offers certain procedural directions for recognition and enforcement of award. First, Contracting States shall designate the competent court or authority for the purpose of recognition and enforcement. A party seeking recognition and enforcement shall submit a copy of an award (certified by the Secretary-General) to such court or authority.<sup>103</sup> However, the problem with the enforcement of an ICSID award usually starts with the unwillingness of the designated authority to recognise an award.

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<sup>101</sup>Susan Choi, 'Judicial Enforcement of Arbitral Award under the ICSID and New York Convention', (1995) New York University Journal of International Law & Politics 28:1-2.

<sup>102</sup>M Hunter and J Garcia, "Enforcement/Execution' of ICSID Awards Against Reluctant States"(2011)12 J. World Investment & Trade pp. 307-330 at 310

<sup>103</sup>E Baldwin, M Kantor and M Nolan, "Limits to Enforcement of ICSID Awards", (2006)23(1) Journal of International Arbitration, pp. 1-24, at 5.



As Uchkunova and Temnikov observed, recognition of awards is distinct from and precedes execution.

Recognition is the verification of the authenticity of the ICSID award in order to accord it with *res judicata* force. It precedes enforcement.

Notably, as far as the second stage—that of enforcement—is concerned, there seems to be disagreement among scholars as to whether the terms enforcement and execution are the same for the purposes of Article 54 of the ICSID.

Schreuer is of the view that the interpretation that best reconciles the divergence between the three equally authentic English, French and Spanish texts would appear to be that the words 'enforcement' and 'execution' are identical in meaning. Broches, however, makes a distinction between the two, adding that 'enforceability [is] governed and decreed by the Convention and its implementation by execution [is] governed by domestic law'.<sup>104</sup>

The *Kardassopoulos & Fuchs v Georgia* stay decision seems to support such distinction. There the ad hoc Committee stated:

'The simplified and automatic enforcement system of Article 54(1) of the ICSID Convention should not be conflated with the measures of execution that follow the order granted by the court or authority designated in accordance with Article 54(2) for enforcement of the award and which are referred to in Article 54(3) providing that '[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought'.

Instead, recognition is the process by which the award is attributed with *res judicata* effect in the territory of the State where enforcement is sought, thereby serving as the basis for the subsequent execution. The party seeking leave for enforcement need only file with the competent local court (or another competent authority) a copy of the award certified by the Secretary-General of the ICSID.

While Article 54(3) subjects execution to the modalities of the law of the State of the enforcement forum, recognition, by contrast, is not subjected to local law but only to the requirements of the Convention. Therefore, domestic legislation should not impose additional requirements such as the summoning of the respondent State at the stage of recognition, under pain of violating Article 54. This is supported by Schreuer who has opined that ICSID awards 'must not be made subject to conditions for recognition not provided for by the Convention'.

For example, the order of *exequatur* issued by the Tribunal de grande instance de Paris in favour of the investor in *Benvenuti* contained a limitation requiring the prior authorization of the Court with regard to execution:

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<sup>104</sup> Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 ICSID Rev—FILJ 287, 304.

'no measures of execution, or even a conservatory measure shall be taken pursuant to the said award, on any assets located in France, without prior authorization of this Court'.

The Court of Appeal found that the judge had exceeded his powers as recognition and enforcement are two separate stages. At the stage of enforcement the court will inquire whether the assets concerned are immune or not. But there cannot be such a requirement or limitation at the stage of recognition.

The Court of Appeal stated [Benvenuti ]:

But considering that the order granting recognition and enforcement to an arbitral award does not constitute a measure of execution but only a decision preceding possible measures of execution the lower Judge could not, therefore, without exceeding his authority, deal with the second step, that of execution, to which relates the question of the immunity from execution of foreign states.

Once an award has been successfully recognised it becomes necessary to take steps to 'enforce' or 'execute' the award. The contextual meaning of the two words as used in the Article has been subject of academic debate and in his contribution to the debate; Edward Baldwin opined that they cannot be resolved by ordinary rules of interpretation thus it was necessary to resort to the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) for a clear interpretation.<sup>105</sup> This made him to conclude that the words are essentially identical in meaning and this is why the term 'enforcement' and 'execution' are used interchangeably in the Convention.<sup>106</sup> However the problems of award in IIAs go beyond the mere theoretical definition of these terms. It focuses more on the obstacles faced in an attempt to give practical approach to achieve the intent and purpose of the terms. At this point it will be necessary to take a look at the situations where enforcement /execution were faced with various problems.

#### 2.2.2 *Enforcement proceedings in national courts – four cases*

Rapidly summarizing the provisions, we have said that Article 54.1 of the ICSID Convention requires each Contracting State to recognize an award rendered pursuant to the Convention as binding and to enforce the pecuniary obligations imposed by the award as if it were a final judgment of the State's courts. Under 54.2 of the Convention, recognition and enforcement of the award may be obtained from the competent court of a Contracting State on simple presentation of a copy of the award certified by the Secretary-General of the Centre.

The regime of the Convention does not, however, extend to the execution of the award. Such execution is, in accordance with Article 54.3 of the Convention,

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<sup>105</sup> Vienna Convention on the Law of Treaties (1969) Article 1

<sup>106</sup> Ibid n 78 pg 5

governed by the law on the execution of judgements in force in the country where execution is sought. Article 55 of the Convention additionally makes it clear that Article 54 does not derogate from the law of the enforcement forum on sovereign immunity from execution of an award.

These provisions of the Convention have been tested in four cases.

In the first case, Benvenuti & Bonfant, an Italian company, obtained from the Tribunal de Grande Instance of Paris an order for the enforcement of a Convention award against the Republic of Congo's company.<sup>107</sup>

The court granted the recognition after ascertaining that the award did not conflict with French 'law and order', but under the condition that 'no measure of execution, or even conservatory measure, can be taken pursuant to that award on any assets located in France, without (the court's) prior authorization.'<sup>108</sup> Benvenuti appealed<sup>109</sup> the decision to the Paris Court de Cassation, which struck out the qualifying language on the grounds that it contradicted the ICSID Convention's simplified enforcement procedure, but did not address the public policy examination made by the lower Court.<sup>110</sup> Following the recognition, the claimant attempted execution, obtaining the attachment of funds held by a French bank on behalf of the Banque Commerciale Congolaise (BCC) a State-controlled bank. The attempt failed, as the Court de Cassation held that the claimant was a creditor of the State of Congo, but not to the BCC who, albeit dependent on the State, could not be regarded as an emanation of the State of Congo.<sup>111</sup>

One fundamental principle reintegrated in this case is that the recognition of an award does not guarantee its enforcement especially in view of the fact that the Convention concedes total discretion to Contracting States, under their national laws, to determine whether the award can be executed against particular assets. This gives room to different legal systems to invent policies with which they can deny enforcement or execution. For instance, in the instant case even though it may be right for the Court de Cassation to have denied enforcement on the ground of immunity but however since it did not address the issue of public policy as a ground for refusing enforcement it is assumed that it was comfortable with the introduction of public policy into the enforcement procedure under the ICSID. It is submitted that the role of enforcement or recognition delegated to courts of contracting States is a peculiar one

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<sup>107</sup> See S.A.R.L. Benvenuti & Bonfant v. Republic of the Congo, Decision of Jan. 13, 1981 of the Tribunal de Grande Instance, Paris, 108 Journal du droit international 365 (1981)

<sup>108</sup> Bonvenuti & Bonfant Srl. V The Government people's Republic of the Congo, Decision of Tribunal de Grande Instance, Paris, (1981)

<sup>109</sup> The Court of Appeal explained that Article 54 of the ICSID Convention provided for a 'simplified' enforcement procedure, that enforcement was a step preliminary to execution, and that courts in Contracting States therefore could not at the enforcement phase delve into the execution phase, the second phase being the one in which there might be a question of sovereign immunity.

<sup>110</sup> L Reed, J Paulsson and N. Blackaby, *Guide to ICSID Arbitration* (2004), 107

<sup>111</sup> Ibid n 76 pg 23

therefore they should not derogate from their rules of engagement by initiating policies not anticipated by the Convention.

Interestingly execution of award in *SOABI v Senegal*<sup>112</sup> which is another French case also suffered almost the same setback like the one above, in this case, the Tribunal Grande Instance of Paris granted SOABI an order for the enforcement of its ICSID award against Senegal. The Paris Court of Appeal<sup>113</sup> reversed the order and blocked execution of the award because it was not satisfied that SOABI would enforce the award only against assets specifically allocated by Senegal for economic and commercial activities. The Court of Cassation reversed the decision, on the grounds that the lower court's enforcement order in itself did not amount to an act of execution entitling Senegal to claim Sovereign immunity. The court held that the immunity of execution should not be considered until after the award is recognized and funds have been attached.<sup>114</sup> The major point that will be emphasized here is that since States are always quick to resist the attachment of their assets to offset an award and they often hide under the guise of immunity to do this, they should be made to give the court list of asserts as collateral when they want to apply for a stay of execution.

It must be highlighted that the Paris Court of Appeal confounded the two phases that the Court of Appeal has so clearly distinguished eight years earlier in the *Benvenuti & Bonfant* case. The French Court of Cassation corrected this, in a decision on June 1991 that quashed the decision of the Paris Court of Appeal.<sup>115</sup> In its decision, the Court of Cassation pointed out, in terms reminiscent of those used by the Paris Court of Appeal in the *Benvenuti & Bonfant* case, that the ICSID Convention provided a 'simplified' regime for the enforcement of awards and that enforcement did not in itself represent an act of execution in respect of which immunity from execution could be considered.

In exercising the powers of the court described above, the scenario that hindered the enforcement of award in above *LETSCO v Liberia*<sup>116</sup> raises the question of what the court will do when assets of States are used for both commercial and public purpose. This case was brought before the Federal District court of the Southern District of the New York. The district court granted an enforcement order, but declined to permit execution of the order against fees and taxes payable to Liberia on the grounds of sovereign immunity. A later effort in the District of Columbia to execute the order against certain bank accounts also failed for reasons of diplomatic and sovereign

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<sup>112</sup> See *Société Ouest Africaine des Bétons Industries v. Senegal*, Decision of December 5, 1989 of the Court of Appeal, Paris 117 *Journal du droit international* 141 (1990) para25

<sup>113</sup> The Paris Court of Appeal reversed that order on the grounds that it had not been demonstrated that the award would 'be enforced on assets assigned by Senegal to an economic and commercial activity, and that no objection could therefore be made for immunity from enforcement'.

<sup>114</sup> R. Lucy, J. Paulsson and N. Blackaby, *Guide to ICSID Arbitration* (1<sup>st</sup> edn Kluwer Law International, 2004) pg107

<sup>115</sup> See Decision of June 11 1991 of the Court of Cassation France 6 ICSID REV-FJIL 598.

<sup>116</sup> *LETSCO v Liberia*, Award( 1986), 2 ICSID Reports 349

immunity, on the ground that the accounts contained funds used both for public purposes and for commercial activities incidental to embassy operations.<sup>117</sup> It is submitted that if there is doubt about the use of any particular assets the award creditor should seek to enforce the award in other assets that do not have such encumbrance this is to prevent the States from invoking the doctrine of immunity.

The fourth and final case concerned an ICSID Convention award upholding claims brought against the Republic of Kazakhstan by AIG Capital Partners, a Delaware company, and a joint venture enterprise controlled by the Delaware company. An order of the High Court in London permitted the successful claimants to register the award as a judgement of the Court in accordance with the UK'S implementing legislation for the ICSID Convention. The Claimants then obtained interim third party debt and charging orders against cash and securities held by banks in London for the National Bank of Kazakhstan, the country central bank. In October 2005, the High Court discharged the interim orders. In doing so, it noted that the obligation of a contracting State to enforce an ICSID Convention award was made subject by Article 55 of the Convention to the State's law relating to sovereign immunity. The Court held in this respect that the assets in question were property of a central bank deemed, by the 1978 State Immunity Act of the UK, as non-commercial and hence immune from execution under the Act. As for the interim third party debt order, the Court held that such an order could only be made in respect of a debt owed to the judgment debtor, which in this case was the Republic of Kazakhstan, not its central bank.

These experiences suggest that securing sovereign compliance to international arbitral awards remains a challenging task, and that grounds to refuse enforcement can be found in the ICSID Convention itself, in international law, and domestic rules,<sup>118</sup> even the ICSID Convention, despite having gone a long way in limiting domestic review of arbitral awards, and providing for an international self-contained procedure investment disputes, suffers from an Achilles heel at the decisive moment of enforcing the award against a non-cooperative government .<sup>119</sup> It is submitted that since ICSID is a creation of World Bank every member of the Convention should be mandated to have a trust fund with the Bank, which they will forfeit to offset any award they deliberately refuse to comply with. This will enhance the enforcement of award on two grounds; first States may not want to lose their trust fund with the Bank because what may be used to offset an award will eventually be more than what they would have been able to negotiate with the award creditor. Secondly States makes all effort to keep a good reputation before the bank because they often resort to it to borrow money hence they will at all cost avoid the stigma they will get if they refuse the enforcement of award from ICSID Convention.

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<sup>117</sup>Ibid n78 pg 18

<sup>118</sup> Ibid n16Article 55

<sup>119</sup>Ibid n78 pg 18

### 2.2.3 *Enforcement/Execution of Award against the 'non-State' party*

Most of the problems discussed so far mostly entail the recognition, enforcement/execution against contracting States. Whereas the problem of enforcement of award is not particular to States alone it also extends to 'non-State' party to investment arbitration dispute. Even though the problem starts with States who may not want to initiate the enforcement process it is exacerbated when investors also take their turn to refuse recognition and enforcement of award. Regrettably, there is constraint of academic literature in this regard because of the high rate at which investors generally comply with the enforcement of award against them. This position seems to create a disparity in the attitude to enforce an award on the premise that State parties to investment arbitration do not record the same level of compliance to enforcement procedures.<sup>120</sup> Notwithstanding, opinions are divided on what will happen when investors also wish not to comply with enforcement. While some scholars believe that there are no clear cut measures to adopt under the ICSID Convention in such situation, others like Stanimi has postulated a standard model to adopt in such situation based on the interpretation of Art.54 of ICSID Convention. According to him: Article 54 gives States the means to compel compliance and enforce an award in its favour against an individual (investor) because host States (like investors) can also seek enforcement of the award in other contracting States under the provision of this Article.<sup>121</sup> On his part, Broches observed that, Article 54 'was inserted primarily with the needs of host States in mind'.<sup>122</sup> According to him:

If a host State obtains an award against an investor in arbitration proceedings before the Centre, and the investor does not comply with the award, the host State can seek forced execution in the territories of any Contracting State without running into the obstacles which frequently stand in the way of enforcement of foreign arbitral awards.<sup>123</sup>

It is submitted that in order not to allow the binding force of awards under Article 53 of the Convention to create a symmetrical obligation between States and investors, Article 54 was created to respond to this concern of parties who do not obey their obligation to accept an award under Art.53. Both investors and State parties should always accept liabilities arising from awards by performing their role under Art. 53 this is because the intention of the Convention and perhaps the investment protection from BITs is to secure immediate payment in the event that any party is in breach of their international obligations.<sup>124</sup>

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<sup>120</sup> Vincent Orlu Nmehielle 'Enforcing Arbitration Awards Under the International Convention for The Settlement of Investment Disputes (ICSID Convention)(2001) 7 Ann. Surv. Int'l & Comp. L. 21 2001 pg 31

<sup>121</sup> Ibid n64pg

<sup>122</sup> Aron Broches 'The Convention on the Settlement of Investment Dispute between States and Nationals of Other States'(1972) 136 Hague Recueil pg 331-349

<sup>123</sup> AJ Van Den Berg, 'Some Recent Problems in the Practice of Enforcement Under the New York and ICSID Conventions', (1987) 2 ICSID Review-Foreign Investment Law Journal, 439-441.

<sup>124</sup> Ibid n77 p. 309.

## 2.2.4 *The Duty To 'Abide And Comply'*

In analysing the subject of the enforcement of awards rendered pursuant to the ICSID Convention, it is important also to recall the provisions of its article 53(1). Mention was made earlier of the provision of the first sentence of article 53(1) regarding the binding force and finality of such an award. The second sentence requires each party to 'abide by and comply with the terms of the award'. For the Contracting State party to the dispute, a failure to abide by and comply with the award is therefore a violation not only of its undertaking to arbitrate, but also of an international treaty obligation.

Article 27(1) of the Convention provides that a Contracting State may not give diplomatic protection, or bring an international claim, in respect of a dispute that one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention. Article 27(1) of the Convention also provides that the first Contracting State may nevertheless give diplomatic protection or bring an international claim if the second State fails to honor its obligation under Article 53 to abide by and comply with the award. In such circumstances, the first State could under Article 64 of the Convention institute proceedings against the second before the International Court of Justice. Article 64 of the Convention provides for the referral to the International Court of Justice of 'any dispute arising between Contracting States concerning the interpretation or application of this Convention'. To date, no such reference has been made to the Court under Article 64 of the Convention.

Indeed, for the drafters of the Convention, the main purpose of the enforcement provisions of Article 54 was to facilitate the enforcement of an award by a State as a successful claimant against an investor lacking assets in the host State.<sup>125</sup> This was seen as redressing the imbalance in the relative positions of the State party to the dispute, which would be bound directly under the Convention to comply with an award, and the investor. As Aron Broches, the principal drafter of the Convention, explained:

As regards enforcements against governments, as distinguished from that against private parties, what has become Article 53 of the Convention is the primary provision and...while Article 54 is important, concern with the possibilities offered by that provision should not be permitted to obscure or weaken the importance of Article 53. The obligation of governments to abide by awards remains unaffected by the limitations on their forcible execution.<sup>126</sup>

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<sup>125</sup> See ICSID, 2 Documents Concerning the origin and formulation of the Convention 892 (1970).

<sup>126</sup> A. Broches, Awards Rendered Pursuant to the ICSID Convention; Binding Force, Finality, Recognition, Enforcement, Execution, 2 ICSID REV. FILJ 287, 302 (1987).

### 2.2.5 *Voluntary Compliance And World Bank Influence*

Supporting perhaps Louis Henkin's aphorism about the observance by governments of their international law obligations, the record of compliance with awards rendered pursuant to the ICSID Convention has generally been good.

As of the date of writing (June 2016) the ICSID website listed almost four hundred concluded arbitration proceedings instituted against States under the Convention, while registered cases are almost six hundred. The scenario in various: in some of these, the parties had reached an amicable settlement of their dispute or decided otherwise to discontinue the proceeding before the rendition of the award. In others, the settlement agreement reached by the parties has been incorporated in the award. Sometimes the awards have been annulled in whole or in part pursuant to Article 52 of the Convention. In other instances, the outcomes vary. In some of them there were upholding claims and ordering the respondent governments to pay compensation to the claimant investors, in others awards had been rendered dismissing all claims on the merits or on jurisdictional grounds.

Information regarding payment of the awards is somewhat sketchy, settlements often being confidential. On the other hand, successful claimants, if not paid promptly, seldom hesitate to make that fact known.

From the information that can be garnered, it appears that in almost all the cases of awards upholding claims, the respondents ultimately discharged their payment obligations, either in accordance with the terms of the awards or in accordance with post-award settlement of the parties. It is worth noting that the cases of eventual voluntary compliance with the award include at least three of the four cases described in the previous paragraph in which there were enforcement proceedings in national courts. Often brought up in connection with the enforcement of ICSID arbitral awards is the possible role therein of the World Bank. Its executive Directors formulated the Convention and ICSID is a member of the World Bank Group of International organizations (made of the International Bank of Reconstruction and Development, The International Finance Corporation, the International Development Association, ICSID and the Multilateral Investment Guarantee Agency).

It is sometimes suggested that the leverage of the Bank with a borrowing member country might be applied to secure payment of an award. An operation policy of the Bank indicates that it may refrain from making new loans to a member country in certain extreme cases involving expropriation or external debt disputes. These are cases involving expropriation disputes that are substantially harming the country's international credit standing and that the country is not making reasonable efforts to settle or external debt disputes that have a significant effect on the country's creditworthiness or on its ability or on its ability to implement Bank-financed projects or service Bank loans. As indicated above, however, such situations have not arisen in connection with performance of an ICSID arbitral award. A role that has been played by the ICSID Secretariat, and occasionally also by the World Bank, when informed of a delay in paying an award, has been to remind the award debtor of the importance of



prompt payment, if only to avoid the accumulation of further interest on the amount outstanding. In addition, there has been an instance of the ICSID Secretariat agreeing, at the request of the parties concerned, to host post-award settlement discussions.

## Chapter 3

### *Issues Arising in ICSID Enforcement Procedure*

#### *3.1 Article 55 and the Obstacle Posed by the Doctrine of State Immunity to the Enforcement*

As already mentioned above, Article 55 is a specification of Article 54(3). It states that sovereign immunity laws cannot be derogated from the law of the state where execution is sought. In other words, state immunity will apply to the execution of an ICSID award in the same way as it would apply to the execution of a judgment of a domestic court. For this reason, sovereign immunity affects the enforcement and execution process.

Indeed, one of the main problems arisen in ICSID arbitration is the obstacle posed by the doctrine of State immunity to the enforcement<sup>4</sup> of arbitration awards rendered against sovereign States. As noted by Bjorklund the words recognition, enforcement, and execution are often used imprecisely. Recognition involves the process often called *exequatur*: confirmation by a municipal court that the award is authentic and thus has legal consequences, such as *res judicata* status. Execution usually refers to the mechanics of attaching assets to satisfy an award. 'Enforcement' is sometimes coupled with recognition, is sometimes coupled with execution, and is sometimes used as an umbrella phrase to encompass both recognition and execution. Professor Schreuer uses enforcement as synonymous with execution, unless otherwise specified.<sup>127</sup>

It has long been accepted that a waiver of State immunity from the jurisdiction of an international tribunal does not encompass any automatic waiver of immunity from the execution of a resulting award.<sup>128</sup> The distinction between waivers of immunity with respect to litigation or arbitration and waivers of immunity with respect to execution means that victorious investors may have difficulty collecting the monies owed them from States that do not wish to pay voluntarily.<sup>129</sup>

The rationale for maintaining immunity from execution is that certain State assets, such as central bank reserves and military and diplomatic property, are integral

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<sup>127</sup> In the United States there is strictly no such thing as execution of an award. A claimant moves to have an award confirmed under the ICSID, New York, or Panama Conventions. 22 USC s 1650a; 9 USC ss 201 *et seq*; 9 USC ss 301 *et seq*. The confirming court enters a judgment on the award, and that court judgment can then be executed against the assets of the defendant.

<sup>128</sup> H. Fox, *8e Law of State Immunity* (2nd edn, 2008) 599, 601–4.

<sup>129</sup> See eg G.R. Delaume, 'ICSID Arbitration and the Courts', 77 *American Journal of International Law* (1983) 784.

to the business of government and should not be subject to seizure.<sup>130</sup> Yet in concession contracts and in investment treaties States have acquiesced in the creation of international arbitral tribunals before which foreign investors can seek relief. Decoupling the waiver of immunity from jurisdiction from a waiver of immunity from execution seems inconsistent with the purpose of making a forum available to the foreign investor. As Professor Schreuer noted in his 1988 study of State immunity, long before the recent surge in the number of investors resorting to investor-State arbitration, 'The assumption of jurisdiction by domestic courts over foreign States without any prospect of having the resulting decisions made effective would not only be rather half-hearted but would also largely nullify the progress made in the protection of the private claimant'.<sup>131</sup>

Immunity from execution means that respondents who lose investor-State cases still retain the ability not to pay awards rendered against them, although by doing so they are in violation of their international obligations. Professor Sompong Sucharitkul, the Special Rapporteur for the International Law Commission's project on the codification of the law of State immunity, has described State immunity from execution as 'the last fortress, the last bastion of State immunity'.<sup>132</sup> Successful investors in investor-State arbitrations are increasingly finding themselves loosing arrows at that fortress. This impediment to an investor's recovery of assets is becoming more evident as recalcitrant States refuse to pay the awards rendered against them. Recent examples of those States include Russia and Argentina, though there have been other isolated instances over the years.

The more than 2,500 bilateral investment treaties (BITs) now extant are not identical. Many permit investors to choose either to submit a dispute to ICSID under the auspices of the ICSID Convention or to convene proceedings under other arbitral rules. Under the former election, enforcement of the award is governed by the ICSID Convention; under the latter, no matter which rules govern the arbitration, awards will nearly always be subject to enforcement under the New York Convention on the Recognition and Enforcement of Arbitral Awards.<sup>133</sup>

The enforcement provisions in both of these Conventions are usually heralded as a powerful tool in the hands of investors, who, if they win, will have in hand arbitral awards readily recognized around the world. The ICSID Convention requires that State parties to the Convention recognize and enforce ICSID awards as if they were final awards of their own courts (Article 54). Yet it also makes clear that waivers of

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<sup>130</sup> H. Fox, 'State Immunity and the New York Convention', in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: 8e New York Convention in Practice* (2008) 829, 858.

<sup>131</sup> Schreuer, above, 125.

<sup>132</sup> S. Sucharitkul, *Commentary to ILC Draft Articles*, Article 18, para 1, C/AN.4/L/452/Add 3.

<sup>133</sup> Convention on the Recognition and Enforcement of Arbitral Awards (1958), 21 *UST* 2517; 330 *UNTS* 3 [hereinafter New York Convention]. The Inter-American Convention on International Commercial Arbitration (the Panama Convention) is an OAS Convention with 17 State parties. 14 *ILM* (1975) 336; <<http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp>>. In the United States it takes precedence over the New York Convention, when it is applicable, unless the parties agree otherwise. 9 *USC* s 305 (2008). Its provisions, however, largely mirror those of the New York Convention.

immunity from jurisdiction do not encompass waivers of immunity from execution; actual execution of awards is subject to the laws, including those on State immunity, of the State in which execution is sought (Articles 54.3, 55). New York Convention awards are enforceable in 156 countries and are often more readily enforceable than municipal court judgments from other States. Yet they, too, are subject to the immunity laws of the place of enforcement. Because those immunity laws vary greatly, enforceability is much less certain than might be inferred from a cursory review of the enforcement provisions.

The insertion of municipal law into the execution process inevitably introduces a note of unpredictability, though it would be going too far to say there is no prospect of a decision resulting from an investment arbitration award being executable in local courts. State practice over the last several decades has shifted perceptibly, though not uniformly, towards a restrictive theory of immunity with respect to assets subject to execution, a reflection of the inroads made by the restrictive theory of immunity in the jurisdictional context.<sup>134</sup> Jus, a successful investor can very likely execute his arbitral award against commercial assets of a State, assuming he is able to locate those assets and surmount any immunity defence raised by the State that the assets are properly classified as used for government rather than for commercial purposes. This half-a-loaf approach, however, is unlikely to satisfy many foreign investors, and they may hesitate to bring claims if recovery should prove to be too difficult. As Professor Schreuer has noted:

[A]llowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution may put them into the doubly frustrating position of having been lured into expensive and seemingly successful lawsuits only to be left with an unenforceable judgment plus legal costs.<sup>135</sup>

Article 55 creates in this way a melting pot of State Immunity and domestic laws that can seriously undermine proper enforcement. It indeed qualifies the obligation to enforce and execute the award by expressly reserving the integrity and applicability of 'the law in force in any Contracting State' relating to the immunity of States from execution.

As noted by the MTD v Chile Decision on stay, 'immunity from execution is reserved (Article 55), but this simply leaves the issue of immunity to be dealt with under the applicable law: 'Immunity from execution of the host State in its own courts would depend entirely on its domestic law'.

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<sup>134</sup> A.F.M. Maniruzzaman, 'State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends', 60(3) *Dispute Resolution Journal* (August–October 1985) 1, 4; J. Crawford, 'Execution of Judgments and Foreign Sovereign Immunity', 75 *American Journal of International Law* (1981) 820, 854–5.

<sup>135</sup> Schreuer, above, 125.

Noticeably, Article 55 refers to 'a foreign state'. It may thus be arguable that the respondent State would not enjoy immunity when enforcement is sought in its own courts. However, this supposition has not been tested in practice, and in any event Article 54(3) refers to 'the laws concerning the execution of judgments in force in the State in whose territories such execution is sought', thus including the law of the respondent State in the event that enforcement is sought within its territory.

On the other hand, States enjoy immunity in the courts of other States based on the principle of sovereign equality. Thus, under customary law (and where applicable treaty law), States are obliged to respect the immunity of other States.

The State where enforcement is sought will not lift another State's enforcement immunity absent any applicable exception to immunity such as 'that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim.'

The question of forcible execution is left expressly subject to the law of the State of the execution forum, including in particular the immunity from execution which a foreign State might enjoy under that law. On the other hand, under Article 53 of the Convention the Respondent State is under a continuing obligation to comply with the award (subject only to stay of enforcement). Thus, the Convention imposes an obligation on the unsuccessful Respondent to abide by and comply with an award. Consequently, a Respondent State which raises the immunity plea breaches the ICSID convention because it is under the obligation to comply. As pointed out by Broches '[t]he obligation of governments [under Article 53] to abide by awards remains unaffected by the limitations on their forcible execution.'

Similarly and importantly, the MINE v Guinea stay decision records that:

It should be clearly understood [...] that State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligation and will attract its own sanctions. The Committee refers in this connection among other things to Article 27 and 64 of the Convention, and to the consequences which such a violation would have for such a State's reputation with private and public sources of international finance.

During the negotiations of the ICSID Convention, the main result which the drafters sought to achieve was removing any doubt as to the binding character of the agreement to arbitrate. Once this result was achieved in the Convention, it was thought

that States would not fail to comply with the award. In this sense, the ICSID convention has maintained the traditional distinction between immunity from enforcement and jurisdictional immunity.

Enforcement immunity, however, may cause serious prejudice to successful investors. They may only direct execution to property subject to one of the exceptions noted above such as property serving commercial purposes and in observance of all local law modalities.

Moreover, the burden of establishing that the property at hand is not serving non-commercial government purposes is on the party seeking enforcement based on the principle that the party relying on an exception bears the onus of proving it. This is a great burden given that such information is controlled by the debtor State and might not be susceptible to discovery. Under most national legislations, the head of a diplomatic mission may issue a certificate as to whether certain State property is immune or not. Such evidence is conclusive. Blane rightly recalls that the law of diplomatic immunity precludes cross-examination of the head of a diplomatic mission, and suggests that the burden of proof should be shifted in order better to protect investors.

The continuing availability of the State immunity plea has been criticized by scholars<sup>122</sup> as being contrary to the principle of effectiveness of awards. Schreuer has termed Article 55 'the Achilles' heel of the Convention'.<sup>136</sup>

Be that as it may, it must be emphasized that during the drafting of the ICSID Convention, it was assumed that States would comply voluntarily due to the threat of negative publicity and loss of future investment, as investors would be unwilling to deal with unreliable host States.

In actual fact, Article 54 was inserted to guarantee enforcement against noncompliant investors as they are not parties to the Convention per se and 'no direct sanction' was otherwise available to States, especially with a view to the additional guarantee which investors are entitled to pursuant to Article 27 of the Convention, namely, that if the respondent State refuses to comply voluntarily, there is a possibility of diplomatic protection by the investor's home State.

Compliance has prevailed since the ICSID Convention entered into force. Within the scope of the present article, only nine cases of enforcement against States have been identified. Of course, given that not all decisions of local courts or investor-State settlements are publicly available, there can be no absolute certainty as to State compliance.

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<sup>136</sup> Schreuer et al, 1154.

The instances in which investors have availed themselves of the ICSID Convention enforcement mechanism are:

- Benvenuti & Bonfant v The Congo;
- SOABI v Senegal;
- LETCO v Liberia;
- AIG Partners v Kazakhstan;
- Siag v The Arab Republic of Egypt;
- Sempra v Argentina;
- Enron v Argentina;
- Blue Ridge Investments, LLC as purchaser and assignee of the Award rendered in favour of CMS in the case CMS v Argentina;
- Ares International Srl and Metalgeo Srl v Georgia.

Domestic courts have been criticized for the way they have handled some of these cases. For example, in *SOABI v Senegal*, the French Court of Appeal 'erroneously treated the recognition and execution stages as interchangeable. It reasoned that since SOABI had not proven the commercial nature of the Senegalese assets subject to execution, recognition of the award would violate Senegal's immunity from execution.' The Cour de Cassation then corrected the error finding that '[t]here is no sovereign immunity with respect to the recognition of an award', since '[i]mmunity from execution under Article 55 only arises when actual measures of execution are taken'.

Broches has also noted that the French Tribunal de Grande instance was wrong in examining the conformity of the ICSID award with French law and ordre public in *Benvenuti & Bonfant v The Congo*.

The Order in the already cited case of *Siag v The Arab Republic of Egypt* states in one part that '[a] judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the supreme court of [New York] and may be satisfied in like manner.' Such language seems to imply that the option of review by a domestic court is open to the award debtor. This, most likely, is the reason why Siag chose a different forum to enforce the award.

Similar language, subject to much criticism, was also contained in the Order in *LETCO v Liberia* a few years earlier, implying that domestic courts have not learned a lesson from past mistakes. Additionally, in the LETCO Order, the judge mistakenly issued the Award with the same force as a final judgment of the court to which he belongs, rather than of a court of 'general jurisdiction of one of the several states' as required by Article 54(1), second sentence, in the case of federal States.

This thesis cannot present a comprehensive overview of all State laws and practices in the field of sovereign immunity. Suffice it to say that almost all national systems have

moved to the theory of restrictive immunity and permit enforcement against State property covered by the commercial exception. Reinisch has reported that only Russian courts accord absolute enforcement immunity, the only exception being an explicit waiver. In contrast, 'Turkish courts generally refuse to grant immunity from execution to foreign states'.

### 3.2 *Sovereign Immunity as the Achille's Heel*

Sovereign Immunity is, in essence, the principle that the sovereign (i.e.) the government) cannot be sued without its consent. Although rooted in English common law, the doctrine also derives from the practical consequence that the sovereign makes the laws, and so can restrict any legal right against it under the very laws that it makes. In federal states, like the United States, the concept extends to political subdivision and involves the immunity of both the federal courts and the courts of its constituent subdivisions. However, in this chapter, we will focus on 'foreign' sovereign immunity-i.e., the immunity of sovereign nation-states in the courts of other sovereign nation-states. This is an extension of the common law doctrine to the international plane, which emerged largely as a result of international comity.

Structurally, we will analyze firstly the evolution of the doctrine from its 'absolutist' origins to the significantly more 'restrictive' version in place in most states today. This evolution has made it substantially easier for a creditor holding an arbitration award against a sovereign to be able to maintain jurisdiction over that sovereign in a sovereign court. Importantly, however, we will try to demonstrate that creditors should be aware of the significant distinction between immunity from jurisdiction and immunity from execution. The latter protects many, perhaps even most, sovereign assets from being attached to collect an arbitration award, even when the relevant foreign court has otherwise obtained jurisdiction over the sovereign state. This portion of the thesis, therefore includes an overview of these concepts as applied in the most recent sovereign immunity precedents in several major jurisdiction in which enforcement of ICSID arbitration is likely to be sought, including the United States, the United Kingdom, France and Germany.

#### 3.2.1 *The Legal Issue with Sovereign Immunity*

So what is the legal issue behind the enforcement of an award between a state and a private party, when the state is unwilling to honour the award? The question invokes the rules, which were analysed in the previous chapters.

The New York Convention does not contain any express reference to recognition and enforcement of an arbitral award against a state, even if it is well



established that the New York Convention applies also to awards involving states. Neither does it address the subject of sovereign immunity, although it has been suggested that considerations of immunity may fall within the public policy exception under Article V(b)(2) of the Convention.<sup>137</sup> It should be said that no judicial authority could be cited so far supporting this proposition.<sup>138</sup> Such proposition may derive from, and it may lead to, confusion. It is the New York Convention to frame immunity rules, because it contains in itself a waiver to all exception not expressly mentioned, and not *vice versa* immunity rules to impact upon the Convention. All the same as an agreement to arbitrate operates, or should operate, as a waiver of immunity both with respect to enforcement of the agreement and the resulting award.

Under the ICSID Convention, where *ratione personae* arbitration necessarily involves a state, there are specific provisions to this effect. The Execution of an ICSID award shall be governed by the laws concerning the execution of judgements in force in the State in whose territories such execution is sought. Though Article 55 states that: "*Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.*" The Convention makes it clear that the issue of execution remains subject to the immunity rules prevailing in each contracting state. It is therefore possible that an ICSID award, like other award, may be susceptible of execution in certain countries and not in others.

### 3.2.2 *Sources of the State Immunity and Evolution From Absolute Immunity To Restrictive Immunity*

State immunity has either sources in international law that in local laws. One of the main sources of state immunity right under international law is the UN Convention on Jurisdictional Immunities of States and Their Property. This convention was signed in 2004, to allow signatory states to use this defence against foreign courts. It gave immunity to states in matters such as diplomatic properties and military assets, but at the same time excluded matter such as commercial transactions.<sup>139</sup> Similarly, with regards to arbitration, states may not use state immunity defence according to this convention against arbitration proceedings provided that the state has given its

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<sup>137</sup> Delaume G.R., *Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies*, 8 ICSID Review – Foreign Investment Law Journal 29 (1993), p. 49.

<sup>138</sup> See Stewart D.P., *National Enforcement of Arbitral Awards under Treaties and Conventions*, in: Lillich R. and Brower C. (eds.), *International Arbitration in the 21<sup>st</sup> Century: Towards "judicialization" and Uniformity?*, Twelfth Sokol Colloquium, Irvington New York 1993, at p. 196 and footnote 117. Reference is made to: generally Delaume, *Contractual Waivers of Sovereign Immunity: Some Practical Considerations*, 5 ICSID Review – FILJ 232 (1990); *M.B.L. Contractors, Inc. v. Republic of Trinidad and Tobago*, 725 F. Supp. 52 (D.D.C. 1989) (foreign government's agreement to arbitrate with non-U.S. entities outside of the United States under its own governing law held waiver of jurisdiction, subject matter and personnel, to U.S. enforcement action of resulting award).

<sup>139</sup> Article 10 of the UN Convention on Jurisdictional Immunities of States and Their Property.

consent in writing.<sup>140</sup> Nowadays, most BIT's contain arbitration clauses that refer disputes to ad hoc or institutional arbitration through which states waive implicitly their jurisdictional immunity.

Local laws play a role too. With the evolving role of states in different international activities including trade, many states such as the US and several European states have adopted a restrictive approach to state immunity and incorporated that into their local laws. One of the motives for such change was the pressure imposed by business owners through attacking the unfair status quo when conflict arises with foreign states. In 1978, the UK passed its State Immunity Act which eliminated the right for immunity against acts that have been committed by a state in its private capacity.<sup>141</sup> Also, agreeing in writing to submit to arbitration will not allow the state to use such defence at a later stage. Similarly, the Foreign Sovereign Immunities Act, FSIA hereunder, was passed in 1976 in the US. This Act excluded from state immunity the commercial disputes and obliges states to comply with arbitration agreements as long as the arbitration process is conducted in the US.<sup>142</sup> However, there is a significant difference between the two acts in relation to the definition of commercial property that can be enforced upon as the UK act has a narrower definition.<sup>143</sup>

Following the Treaty of Westphalia in 1648 the nation-state emerged, along with its corresponding theory of political sovereignty. In England, the notion that 'The King can do no wrong' became deep-rooted, so much that Blackstone described it as 'a necessary and fundamental principle of the English constitution'.<sup>144</sup>

Within the system of nation-states, it was widely accepted that this immunity of each sovereign state was a necessary corollary to respect for the state's overall sovereignty.<sup>145</sup> It therefore became a matter of international comity that, based on the respect for the sovereignty of fellow nation-states, the domestic courts of one sovereign state would refuse to entertain jurisdiction over cases lodged against another sovereign state in the absence of the latter's consent. Thus was the initially domestic doctrine of sovereign immunity internationalized, giving birth to 'foreign' sovereign immunity.

The international law of foreign immunity has evolved considerably over the past century. Prior to 1900, sovereign immunity could best be characterized in 'absolute' terms-sovereign immunity extended to the state and all of its avatars, including state-owned commercial operations and entities.<sup>146</sup>

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<sup>140</sup> Article 17 of the UN Convention on Jurisdictional Immunities of States and Their Property.

<sup>141</sup> Article 3 of the UK State Immunity Act of 1978.

<sup>142</sup> FSIA 28 USC sec. 1605 (A)6a

<sup>143</sup> Krishnan, A., Obstacles to the Enforcement of arbitral awards against states- an international perspective, Critical Twenties, (2011) <http://www.criticaltwenties.in/lawthejudiciary/obstacles-to-the-enforcement-of-arbitral-awards-against-states-an-international-perspective> (Last visited on January 2<sup>nd</sup>, 2013).

<sup>144</sup> William Blackstone, Commentaries on the laws of England (1769).

<sup>145</sup> David P. Vandenberg, In the Wake of Austria v. Altmann: The Current Status of Foreign Sovereign Immunity in the United States Courts, 77 U. Colo. L. Rev. 739-741 (2006).

<sup>146</sup> J M Sweeney, The international law of foreign immunity 20-22, (1963).

The first judicial expression of absolute sovereign immunity in the United States is found in the 1812 U.S. Supreme Court decision in *The Schooner Exchange v. M'Faddon*.<sup>147</sup> In that case, a French naval ship that entered Philadelphia under the stress of wretched conditions was claimed by M'Faddon and his partner as their own ship, which they claimed the French Navy had forcefully seized from them while at sea in 1810. M'Faddon and his partner libeled the ship in federal district court, which dismissed the libel, only to be overturned by the circuit court. The U.S. Attorney, appearing against M'Faddon, appealed to the U.S. Supreme Court, which in a decision by Chief Justice Marshall, began with the assertion that the jurisdiction of each sovereign is necessarily exclusive and absolute within its own territory:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself...One sovereign being in no respect amenable to another: and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse...have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.<sup>148</sup>

Accordingly, the Court held that France, the purported sovereign owner of the vessel, was protected by an implied grant of immunity from the jurisdiction of U.S. courts.

Importantly, however, Chief Justice Marshall also opined in *dicta* that certain exceptions to sovereign immunity should exist. Because his decision derived from the principle that each state had 'full and absolute territorial jurisdiction', Chief Justice Marshall left open the possibility that a territorial sovereign could condition or completely withdraw such immunity. In addition, observed that 'there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation'.<sup>149</sup>

In other words, when a sovereign acts as a private party, it may be considered to have waived its immunity as a sovereign and to have subjected itself to the laws governing private parties. Despite the *dicta*, which prefigured the 'restrictive' theory of sovereign immunity that would emerge later, *The Schooner Exchange* has been

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<sup>147</sup> See <http://courses.kvasaheim.com/ps376/briefs/tnkrumholzbrief2.pdf>.

<sup>148</sup> 135-137.

<sup>149</sup> *Id.* at 145.

repeatedly cited as an important precedent for the general principle of 'absolute' sovereign immunity.

The courts of numerous other jurisdiction subsequently announced support for the absolute theory. For example, in 1849, the Supreme Court of France in the case *Spanish Government v. Lambage et Puyol* described the sovereign immunity doctrine as follows:

The reciprocal independence of states is one of the most universally respected principles of international law, and it follows as a result therefrom that a government cannot be subjected to the jurisdiction of one another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations.

Similarly, the British courts expressed the concept of sovereign immunity in equally broad ad absolute terms. In 1880, the British courts stated in *The Parliament Belge* that:

As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign.

Acceptance of the 'absolute' doctrine of sovereign immunity began to decline at the turn of the twentieth century, eventually becoming an anachronism. This was largely due to the changing role of the nation-state. As governments increasingly participated in commercial activities through private entities, the number of disputes arising in connection with such transactions likewise increased. State claims of immunity in this context created an unfair result because aggrieved private parties were often denied a legal remedy for reasons wholly unrelated to the substance of their claims. To resolve such inequalities, judiciaries began to distinguish between public acts (*acta jure imperii*) and private acts (*acta jure gestionis*), excluding the latter from immunity.<sup>150</sup>

Belgium was the first civil law country to adapt its evolving domestic immunity concepts to litigation against foreign sovereign.<sup>151</sup> In the 1903 decision of *Societe' Anonyme des Chemins de Fer Liegeois Luxembourgeois v. The Netherlands*, the Supreme Court of Belgium described the distinction between public and private acts as follows:

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<sup>150</sup> In general on the immunity of States from jurisdiction and the distinction between , *acta jure imperii* and *acta jure gestionis*, see S. S. UCHATITKUL, *Immunities of Foreign States before National Authorities*, in *Recueil des cours*, n. 1/1976, pp. 87 e ss. ; I. PINGEL-LENUZZA, *Les immunités des Etas en droit international*, Bruxelles, 1997; M. COSNARD, *La soumission des Etas aux tribunaux internes*, Paris, 1996.

Cfr. also N. RONZITTI -G. VENTURINI, *Le immunità giurisdizionali degli stati e degli altri enti internazionali*, Padova, 2008.

<sup>151</sup> Joseph W Dellapenna, *Suing foreign Governments and their Corporations* 5 (2<sup>nd</sup> ed. 2003).

Sovereignty is involved only when political acts are accomplished by the state; However, the state is not bound to confine itself to a political role, and can, for the needs of the collectivity, buy, own, contract, become creditor or debtor, and engage in commerce...In the discharge of these functions, the state is not acting as public power, but does what private persons do, and as such, is acting in a civil and private capacity. When after bargaining on a footing of equality with a person or incurring a responsibility in no way connected with the political order, the state is drawn to litigation, the litigation concerns a civil right, within the sole jurisdiction of the courts...and the foreign state as civil person is like any other foreign person amenable to the Belgian courts.<sup>152</sup>

In this manner, the absolute theory of sovereign immunity began evolving into a new restrictive theory distinguishing between acts of a public and private nature.

In the United States, the weakness of the absolute theory was exposed in the 1926 case *Berizzi Brothers v. Steamship Pesaro*.<sup>153</sup>

In that case, the district court, in a preliminary ruling and upon recommendation of the U.S State Department, declined Italy's request for immunity in an admiralty case in which the Italian ship, in its usual course of commercial activities, failed to deliver cargo to New York. The State Department had recommended that the courts deny immunity on the basis that vessels conducting commerce were not entitled to the same deference as warships.<sup>154</sup> In a later proceeding, the district court reversed its earlier decision and dismissed the case for lack of jurisdiction. In upholding the dismissal, the Supreme Court concluded that even merchant ships of foreign sovereigns were entitled to immunity. The Court noted, however, that '[i]n the lower federal courts there has been some diversity of opinion on the question [of immunity in instances of commercial activity]'.<sup>155</sup>

In subsequent decisions, the U.S. Supreme Court shifted away from the absolute theory of deferring to the executive branch. For example, in the 1938 decision of *Compania Espanola de Navegacion Maritima, SA v. The Navemar*, the Court declared that sovereign immunity was no longer absolute. Rather, it was a prerogative extended by the executive branch and the judiciary would defer to decisions of the executive regarding whether a foreign sovereign should be entitled to immunity in any given case. Similarly, in the 1945 case of *Republic of Mexico v. Hoffman*, the Court reiterated that the judiciary would acquiesce to decisions of the executive concerning questions of foreign sovereign immunity. These cases, among others, marked the beginning of judicial deference to the U.S. State Department to define the scope of such immunity.<sup>156</sup>

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<sup>152</sup> Para 294,301 (1903) cited in Sweeney ut supra.

<sup>153</sup> Keith Sealing, *State Sponsors of Terrorism, Are Entitled to Due Process Too: The amended Foreign Sovereign Immunity Act is Unconstitutional*, 15 AM. U. INT'L L. REV. 395, 427 (2000).

<sup>154</sup> *The Pesaro*, 277 F. 473 (S.D.N.Y. 1921).

<sup>155</sup> 271 U.S 562,576 (1926).

<sup>156</sup> M. Scott Bucci, *Breaking Through The Immunity Wall? Implications of the Terrorism Exceptions to the Foreign Sovereign Immunities Act*, 3 J. INT'L LEGAL STUD. 293-298 (1997).

As the court shifted away from the absolute theory by deferring to the executive branch, a 1952 letter written to the acting U.S. Attorney General by Jack B. Tate, the Acting Legal Adviser to the U.S. Secretary of State, affirmed that the State Department would thereafter apply a restrictive form of sovereign immunity, which would be recognized 'with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)'.<sup>157</sup> The Tate letter explained that granting absolute immunity to foreign sovereign was no longer appropriate because foreign sovereigns were so often engaged in private commerce, and parties transacting business with those sovereigns deserved a dispute-resolution venue. The abovementioned letter further noted that it had become the prevailing practice around the globe for countries to employ the restrictive theory of immunity, pointing to Belgium, Italy, Egypt, Switzerland, France, Greece, Romania, Peru, Austria, Denmark, Sweden, Argentina, the Netherlands and Germany, concluding: 'It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity and there are evidences that British authorities are aware of its deficiencies and ready for a change.' For these reasons, the Tate letter concluded that 'it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity'.<sup>158</sup>

This conclusion was consistent with the evolving contemporaneous jurisprudence from other jurisdictions. For example, in 1950, the Supreme Court of Austria concluded in *Dralle v. Republic of Czechoslovakia*: 'This survey shows that today, it can no longer be said that jurisprudence...generally recognizes the principle of exemption of foreign states insofar as it concerns claims of a private character, because the majority of courts of different civilized countries deny the immunity'.<sup>159</sup>

One year later after the letter was issued, Professor Lalive surveyed jurisprudence in his course at the Hague Academy of international law on *L'immunité de Jurisdiction des Etats et des Organisations Internationales*: 'The theory of absolute immunity is today nearly universally condemned...; it is only followed with difficulty and not without hesitation by the courts of a few countries'.

Similarly, a 1963 Policy Research Study on the International law of Sovereign Immunity conducted by Joseph Sweeny on behalf of the U.S. State Department noted that international jurisprudence, scholarly writings and international agreements all provide evidence of the rejection of the absolute theory of sovereign immunity in favour of the restrictive theory. As Sweeny concluded, 'the sources of international law taken as a whole show a pronounced shift to the restrictive concept...the general rule of immunity from jurisdiction now is that a foreign state is entitled to immunity only with respect to its public acts'.<sup>160</sup>

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<sup>157</sup> Letter from Jack B. Tate, Acting Legal Adviser to the Secretary of State, to Acting Attorney General Philip B. Perlman (May 19, 1952, 26 DEP'T OF STATE BULL. 984.

<sup>158</sup> *Id.*

<sup>159</sup> INT'L L. REP. 155 (cited in Sweeny, *supra* note at 21).

<sup>160</sup> Sweeny, *supra* note, at 22.

It is this restrictive theory of sovereign immunity that forms the basis of the various modern domestic sovereign immunity regimes.

### 3.2.3 *Structuralist v. Functionalist Approach*

Another way to look at the Immunity Issue is, as Professor Maniruzzman pointed out, to notice that there are two main approaches to sovereign immunity: absolute sovereign immunity and restrictive sovereign immunity. It is not correct to say that the former has been completely eradicated, as Professor Brownlie noted that quite a few States, such as Brazil, Bulgaria, China, Ecuador, Hungary Japan, Poland, Portugal, Sudàn, Syria, Thailand and Tobago, Czechoslovakia and Venezuela still accept the principle of absolute immunity. Nevertheless, restrictive immunity has gained ground globally over the last few decades. The approach associated with absolute sovereign immunity is called 'structuralist' (*ratione personae*), while the approach associated with restrictive immunity is called 'functionalist' (*ratione materiae*). The former is concerned with the status of the party claiming sovereignty, while the latter is concerned with the subject matter (e.g. conduct) forming the bass for the claim of sovereign immunity.

The structuralist or status-oriented approach still finds favour in some jurisdiction ( i.e., those adhering to absolute sovereign immunity), but the recent trend seems to be towards the functionalist approach, which has little or no regard for the status of the State enterprise. The functionalist approach embodies the restrictive doctrine of sovereign immunity. According to the structuralist approach, the creation of a separate entity gives rise to a presumption that the entity is effectively separate from the State. Thus, the fact that a State entity has a distinct legal personality would defeat any claim to immunity. Communist and Socialist follow this principle. State corporations in these countries have rarely made claims to sovereign immunity because their character as separate legal entities was believed to exclude 'danger that the foreign trade corporations would claim for themselves the immunities which belong to the State and its property'.<sup>161</sup> Thus to determine whether a State enterprise is entitled to immunity from jurisdiction, the courts is structuralist States investigate such factors as : 1) whether the enterprise is a public entity or a company formed under private law; 2) the enterprise's capacity to sue or be sued; the extent of government control over the enterprise; and the enterprise's ability to incorporate and hold property. A strict structuralist approach will lead to absolute immunity if the entity is established as a public entity that is inseparable from the State. Then, everything the entity does will be entitled to immunity. Under the functionalist approach, when a State enterprise has a distinct legal personality, detached from the State itself, and it performs acts of a private or commercial nature, it cannot claim sovereign immunity. To functionalists, the status of the State enterprise is irrelevant, only the nature of its acts really matters for purposes of jurisdictional immunity.

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<sup>161</sup> V. Knapp, 'The function, organization and activities of foreign trade corporations in European socialist countries', in *Sources of the law of international Trade*, 61-63.

Some national courts have taken a mixed approach in which structuralist considerations were initially taken into account, but the nature of the act usually was decisive for the purpose of deciding the immunity issue. This suggests that mixed approaches would likely tilt in favour of the functionalist approach.

Under a functionalist approach to sovereign immunity, a State or a State enterprise can claim sovereign immunity only for *acta jure imperii* (government or sovereign acts) but not for *acta jure gestionis*. Because court decisions in different countries are inconsistent, it is not always easy, especially in marginal or borderline cases, to distinguish between them. Professor Ian Brownlie stated, '[O]n any view a satisfactory mode of application of the principle of restrictive immunity has yet to be developed'. For example, courts in Europe and the United States apparently are divided on whether the exploration and exploitation of natural gas or other natural resources are sovereign or commercial acts. Faced with conflicting positions on how to resolve the matter, the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) took a combined nature/purpose approach and offered the following guidelines:

*In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.*<sup>162</sup>

Thus, the distinction between *actus jure imperii* and *actus jure gestionis* is seen to resolve around the 'nature' and 'purpose or motive' of the act concerned. The nature test has been increasingly endorsed in both case law and recent legislation. The test seems to turn on whether the act is taken pursuant to a public law or private law contract. If the contract can be characterized as a public law one, immunity will be granted.

There is yet another test, that is whether the act 'is one that may be performed by anyone, or only by a sovereign'. In other words, the question is 'whether the act could be also performed by private persons'. This test, which may be circuitous, seems to derive from the combined nature/purpose tests.

Still, there are situations in which nature and purpose tests are not helpful. A recent ILC report noted as follows:

*Many of the cases examined took the approach that the purpose of the activity is not relevant to determining the character of a contract or transaction and that it is the nature of the activity itself which is the decisive factor. Nevertheless, some cases under different national legal orders have emphasized that it is not always possible to determine whether a State was entitled to sovereign immunity by assessing the nature of the relevant act. This is because, it is said, the nature of the act may not easily be separated from the purpose of the act. In such circumstances, it has sometimes been held to be necessary to*

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<sup>162</sup> Available at [https://treaties.un.org/doc/source/recenttexts/english\\_3\\_13.pdf](https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf).



*examine the motive of the act. Sometimes, even where motive and purpose are judged irrelevant to determining the commercial character of an activity, reference has been made to the context in which the activity took place.*<sup>163</sup>

This shows the complexity of the issue of sovereign immunity in certain circumstances. Where the nature and the purpose test are not helpful, other tests may be used to reach a satisfactory result. In this sense, courts need to be innovative and sensitive to all relevant elements at issue.

As Fox observed: 'the extent to which immunity should be enjoyed by agencies, connected to the State but not so closely as to constitute central organs of government, remains a perennial problem in the law of State Immunity'.<sup>164</sup>

### 3.2.4 *The Distinction Between Immunity From Jurisdiction And Immunity From Execution*

The restrictive theory of sovereign immunity does not necessarily imply that award creditors will have an easier time collecting on awards against sovereigns in the courts of a foreign state. In this respect, a clear distinction must be made between immunity from jurisdiction and immunity from execution. The former refers to whether a domestic court can even exercise jurisdiction over the foreign sovereign in the first place (sometimes called, in the arbitration context, 'recognition of an award'). The latter refers to whether and to what extent such a court, having obtained jurisdiction and recognized an award, can then attach and execute on specific property of the sovereign for purposes of enforcing a judgment or award against the sovereign.

This distinction is exactly recognized in Article 54 and 55 of the ICSID Convention. Article 54 sets forth that each Contracting State shall recognize and enforce within its territories the pecuniary obligations of ICSID awards (which often will constitute, under the law of the enforcing state, a waiver of immunity from jurisdiction by any Contracting State that has an ICSID award rendered against it). Article 55, however, goes expressly to state that 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of the State or of any foreign State from execution'. In other words, a foreign state retains the right to plead that certain sovereign assets remain immune from execution under the law of the enforcing state, even if the state has waived its immunity as to jurisdiction for purposes of having the award recognized in the enforcing state.

Indeed, ILC Special Rapporteur Suchartikul described immunity from enforcement as 'the last bastion of State immunity'.<sup>165</sup>

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<sup>163</sup> ILC Rep. Jurisdictional immunities of States and their property, 1999.

<sup>164</sup> Hazel Fox, *The Law of State Immunity*, OUP 2008, at 237.

Starting with sovereign immunity from jurisdiction, it means a plea against the jurisdiction of the court.<sup>166</sup> To be more precise, it is a protection given to a state from being sued in the courts of other states.<sup>167</sup> It arises from the notion of sovereign equality of states that a sovereign state cannot be compelled to submit jurisdiction of and be judged by another state.<sup>168</sup>

Waiver of immunity right has been a controversial topic. Surely, if the state had waived its right of sovereign immunity, that would be in the best interest of the investor. However, even in the case of express waiver, the courts, in the US, interpreted it in a significantly narrow way in favour of the state.

For the express waiver to be valid it must give a clear, complete, unambiguous and unmistakable manifestation of the sovereign's intent to waive immunity". In the early case of *Duff Development v Government of Kelantan*, the House of Lords ruled that an arbitration clause embedded in a mining contract did not establish the court jurisdiction. The arbitration clause was pursuant to the Arbitration Act of 1889, however, the House of Lords decided that it did not give any right for the court to interfere with regards to enforcement and the clause was *inter partes*. Since there is no explicit jurisdictional waiver by the state to allow the courts to intervene, the plea was accepted. With regards to implied waiver, the US courts have decided to widen the exceptions against using the immunity shield in relation to arbitration. After the ratification of the NYC, the courts have limited the use of immunity against arbitral proceedings in order to allow the convention to serve its intended purposes. The US courts will allow states to use immunity defence, unless stated in the FSIA, as an exception. One exception is when the parties agree for the arbitration process to be conducted in the US. Also, states may not use this defence if the arbitration agreement or award is governed by a treaty that is in force in the US. As a result, neither the arbitration agreements nor the process of enforcement will face difficulty before US courts if one of these conditions were met with regarding arbitration under NYC. With regards to ICSID, this also applies theoretically, but it should be mentioned that the wording of the ICSID Convention is independent and self-contained. In other words, the convention does not allow court interference in any form. Also, according to the ICSID Convention, the seat for arbitration is the US unless otherwise agreed between the parties. Therefore, it is not advisable to change the seat as this may risk this protection under FSIA if there is a special interest to sue in the US, or to insure that the seat has similar protection if the parties agreed on a different state to be the seat. However, a state of confusion and uncertainty was caused by the US Supreme Court in the ICSID

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<sup>165</sup> ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2(2) YBILC 56 (1991), UN-Doc. A/46/10.

<sup>166</sup> Muthucumaraswamy Sornarajah. "The Award and Its Enforcement." In *The Settlement of Foreign Investment Disputes*. Kluwer Law International, 2000, p. 291.

<sup>167</sup> Kiiza, Robert. "Recognition and Enforcement of International Arbitral Awards: A Comparative Analysis of UK and Ugandan Law and Practice." *LLM Dissertation*, 2015, p. 65. Accessed March 3, 2015. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2569014](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569014).

<sup>168</sup> Ibid.

case of *MINE v Republic of Guinea*. As mentioned above, ICSID seat is the US, and according to the FSIA, a state is considered to have waived its jurisdictional immunity if agreed to arbitrate in the US. However, the Supreme Court reversed a lower court ruling and asserted that an arbitration agreement which refer disputes to ICSID does not constitute an implicit waiver of jurisdiction to US courts under the FSIA. The court's reasoning was that the parties have not contemplated the role of the US courts explicitly in the arbitration process. This would cause uncertainty to investors who are seeking to initiate ICSID arbitration in the US, as this ruling, would give grounding for a state to claim state immunity against jurisdiction under the FSIA. It should be noted that the Supreme Court gave attention to the parties' intention as to their expectation of the US court role in the arbitration when it should not have done so as ICSID proceedings and award require no intervention from courts. Also, the Supreme Court view has been criticized as it ignored the parties' reasonable expectation when agreeing to arbitrate in the US, as the seat, according to ICSID rules. Although in ICSID arbitration the court role is only formal, but parties naturally and logically recognise that role because it is the competent court of the seat. Moreover, the Court of Appeal has violated the exclusivity rule of ICSID to which the US is bound to. In other case, the court had a different view. In *Liberia Eastern Timber Corp v Liberia*, Liberia jurisdictional immunity plea was refused by the court. The court stated that since member states have agreed to enforce ICSID awards, then Liberia has contemplated the role of courts of all contracting states including the US to enforce against Liberian assets. Furthermore, a state cannot plea jurisdictional immunity to an ICSID tribunal, but it could at the time of enforcement to be provided to the proper court.

Instead, sovereign immunity from execution aims to protect state's assets from execution. However, this doctrine has undergone significant changes in recent times when sovereign taking part in commercial activities.<sup>169</sup> Courts soon moved to recognise that once sovereigns had entered the market-place, they must be treated like the other merchants. To that end, courts began to make distinction between disputes involving purely governmental conduct for which they granted immunity and disputes arising from commercial transactions for which they did not grant immunity.

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

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<sup>169</sup> Muthucumaraswamy Sornarajah. "The Award and Its Enforcement." In *The Settlement of Foreign Investment Disputes*. Kluwer Law International, 2000, p. 290.

Naturally, the purpose of arbitral process is to reach an award that would end the dispute. The successful party then seeks to enforce the award to be able to collect what he was awarded. However, it is not that easy when the defeated party is a sovereign state. According to established international law, states cannot be compelled by foreign courts judgments. Under the New York Convention, it is easy for states to avoid enforcement as the grounds for refusal are several such as violating public policy. On the other hand, ICSID's main objective was to provide a reliable method of settling disputes. It is important to offer the guarantee of enforcing awards especially when awards are rendered against host states. Awards issued by ICSID tribunals are final and are not subjected to any appeals or annulment except on matters of procedural errors. Also, the awards are considered as if issued from highest judicial authority in the land and therefore they are final. However, there have been cases in which awards have been issued against state owned companies and states pleaded immunity to avoid execution. The ICSID Convention states clearly that it does not override or undermine states' laws which are related to sovereign immunity. This means that if the enforcement of award violates a local immunity law, this excuse the state from executing on its land. To illustrate the court's interpretation to waivers, in the case of *Noga v. the Soviet Union*, currently the Russian Federation, a loan agreement was signed which included an arbitration clause. The agreement also included terms such as waiver of "all right to immunity relative to execution of the arbitral award". Also, the government agreed to not rely on "any immunity from suit, from enforcement, from seizure", and upon enforcement, Paris Court of Appeal reversed an earlier ruling and refused enforcement on diplomatic funds and assets. This ruling has caused controversy as observers have agreed that the waiver wordings were clear, explicit and were general. Also, all states have the power to waive their immunity against enforcement, and the waiver clearly was general and included all types of assets not only commercial ones. In many cases states have attempted to evade enforcement of awards under the state immunity rights through re-categorising the assets. In the ICSID case of *LETSCO v Republic of Liberia*, the claimant was successful to freeze Liberian assets to recover the award value. However, a motion presented by the respondent was accepted to overturn the freeze order as these accounts were protected under the FSIA. The court had also rejected a request to execute on Liberia's Central Bank account as this would lead to a violation of the Vienna Convention on Diplomatic Relations. The court concluded that it does not have the right to freeze and execute on the bank accounts as they enjoy diplomatic immunity even if a portion of it is used in commercial activities. This, as a result, may encourage states with high risk of being sued to re-arrange their books and finances in a way to include all of them under diplomatic immunity. This can be achieved by not establishing accounts for the sole purpose of commercial activities separately. Although practically it would seem difficult, but theoretically, a state may evade execution of an ICSID award if it does not have commercial assets in an ICSID signatory state. Because, non ICSID state is not obliged by ICSID rules and no state, whether ICSID state or not, could enforce against diplomatic assets of a state for a commercial disputes under international law. The main reason behind this is that recognition and enforcement of awards are governed by different rules. Also, as it will be seen much better further in this dissertation, it is

important to distinguish between the recognition and enforcement of awards under ICSID. Recognition involves a formal procedure to confirm the award and grant it the seal of approval. On the other hand, enforcement involves actions such as asset seizure or confiscation of property. The recognition stage of the arbitral process is the ultimate step under ICSID Convention. However, with regards to execution, different rules apply. According to the ICSID Convention, the execution of ICSID award is governed by the law of the state in which the award is sought to be enforced. This will relocate the attention from ICSID convention to local laws on how they define the extent of immunity with regards to enforcement. Also, as mentioned before, the UK and US state immunity laws differs in the scope of commercial properties definition on which an award could be enforced. As a result, an investor may fail to enforce ICSID award issued in his favour because under the immunity law of that state, the defeated state has managed to rearrange its assets to be protected under the immunity law. After all, when defeated states do not want to comply with the awards, the successful party may always seek enforcement in another signatory state in which the defeated state has assets. For example, in ad hoc arbitration, the parties are constantly advised to choose a NYC signatory state to be the seat for enforcement purposes. Similarly, the successful party may seek enforcement in a state other than the respondent in which the respondent has assets. However, to avoid uncertainty, current practices illustrate the importance of inclusion of express waiver of immunity in international petroleum agreements as a key issue. Failure to reach an agreement on such waiver would cause the negotiation to reach an impasse in many cases.

Immunity definitely stands in the way of enforcement. The ICSID Convention expressly retains the defence of state immunity from execution in Articles 54(3) and 55. Immunity as used in this context simply means that certain assets of States are exempted from investment arbitration and the enforcement of investment arbitral award. The justification lies in the assumption that those assets which are reserved for public, military or diplomatic use should not be subject to seizure or use to offset the demands of an award. Thus, while many commentators mistakenly assume that final awards issued under ICSID are 'self-enforceable', the reality is that the Convention gives States the right to restrict enforcement of awards under the doctrine of immunity. This seems to be the motivation for the overwhelming acceptance of the Convention and it is doubtful if so many States would have ratified the Convention without Articles 54(3) and 55. When the principle of immunity is applied, legal action can only be brought against the State where its consent has been obtained. Claims of sovereign immunity remain available to States even before the court of other states where enforcement is sought.

Some commentators argue that immunity from jurisdiction should be treated separately from immunity from execution. Nevertheless, the decision of the tribunal in *Westland Helicopters Ltd v Arab Organization for Industrialization* seems to affirm that the waiver of immunity applies to both jurisdiction and execution. This is because once a tribunal has established it has jurisdiction over a sovereign State in a certain case and has consequently rendered an award against it, the property of that State should become

susceptible to attachment because execution is simply the act of enforcing the law by harmonizing the factual situation or the subject matter of the dispute with the award of the tribunal.

The question that may be asked under this heading is whether this applies to instances where some States do not appear in the arbitral tribunal throughout the proceedings and yet award is rendered in default against them? This generates the agitation as to whether or not they have submitted to the jurisdiction so as to consequently be affected by the award. It is submitted that it does apply because States do not need to be physically present for the tribunal to assume jurisdiction. In conclusion, it would be senseless for a party to investment arbitration over whom the tribunal has jurisdiction not to be liable to measures of enforcement. This seems to be the reality associated with the enforcement of awards hence most nations distinguish between immunity from jurisdiction and immunity from execution.<sup>170</sup>

As seen above, interestingly, the past decades have seen a shift in the doctrine of sovereign immunity from absolute to restrictive immunity<sup>171</sup>, contemporary enforcement procedures seems to show distinction from the nature of assets which are to be the object of enforcement on the premise that execution is permitted against commercial property but not against property serving official or governmental purposes. But the exact difference between the two types of property is not always clear.<sup>172</sup> For instance in *AIG Capital Partners Inc and Another v Republic of Kazakhstan (National Bank of Kazakhstan)*,<sup>173</sup> it was held that the property of a State's Central Bank or monetary authority was subject to State immunity under S.14 of the State Immunity Act 1978 and could not be used to satisfy an ICSID award, even if such property was being held by third parties on behalf of the Central Bank or monetary authority. However it must be noted that a State that successfully relies on the laws concerning State immunity from execution will still be in violation of its obligation under the Convention. The consequence may be a revival of the right of diplomatic protection under Art. 27(1) as noted above.<sup>174</sup>

In view of the far-reaching protection of State-owned property from execution, there seems to be a big problem to the enforcement of award hence an investor should have a strong interest in securing a waiver of immunity from execution. A waiver of immunity from execution is possible, in principle, but may be subject to specific conditions or limitations under the law of the country where execution is sought. The possibility to waive immunity is not necessarily unlimited.<sup>175</sup> Certain waivers may have to be explicit while others may be given implicitly. Certain forms of waiver of immunity may

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<sup>170</sup> Christoph Scheuer, *State Immunity: Some Recent Developments* (1988)84 Va. L. Rev. 47

<sup>171</sup> Ibid n1 p.

<sup>172</sup> Ibid n7 p. 19

<sup>173</sup> *AIG Capital Partners Inc and Another v Republic of Kazakhstan* (2005)EWHC 2239(Com),(2006)1 All ER 284(QBD)

<sup>174</sup> Ibid n7 p. 16.

<sup>175</sup> Peter Muchlinski, *Multinational Enterprises and the Law* (2<sup>nd</sup> edn Oxford International Law Library 2007) pg.743.

be invalid even if agreed upon by the parties but award creditors must strive to achieve their validity.

On this premise, it is suggested that an arbitration clause in BITs should be construed as a prior waiver of immunity such as in the 1970 Diminco Agreement between the Government of Sierra Leone and Sierra Leone Selection Trust Ltd which provide that:

The State and Dominco hereby expressly waive the right to avail themselves of any privilege or immunity of jurisdiction in respect of any arbitration pursuant to this Agreement of the execution or enforcement of any award or judgment as a result therefore.<sup>176</sup>

Also, Peter Wolfgang suggest the below sample:

The (name of contracting State) hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from jurisdiction of any court and immunity of any of its property from execution.<sup>177</sup>

The final submission on this is that arbitration clause indicates that enforcement should as of right be available to successful parties because the foreign state which decides to engage in international commercial business has by its own acts made itself equal to private persons who should neither have immunity from jurisdiction nor execution, therefore measures of execution can be taken against property which is used in activities that equate the position of the State with that of a private person.<sup>178</sup> They however must identify the asset they wish to use for commercial purpose and outline property that can be attached to offset the demands of an award execution. In 2008 for example, an empirical survey conducted by the School of International Arbitration<sup>179</sup> regarding compliance and enforcement of arbitral awards found compelling results that indicates that asset-tracking or asset-tracing is now a recognized profession. In view of this, such professionals can help identify the asset of the State used for commercial purpose such as bank accounts, investments in other countries, or seek concession and waiver of tax etc. to offset and award.

### 3.2.5 *The Role of the Courts of member States in Enforcement*

Historically, the relationship between investment arbitration and national courts in terms of enforcement of awards has been complex and subject to several debates. On the one hand, parties normally select IIAs for the resolution of their

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<sup>176</sup> George Dalaume, 'ICSID Arbitration and the Courts(1983) Vol. 77 AMJL, No 4

<sup>177</sup> Wolfgang Peters, *Arbitration and Renegotiation of International Investment Agreements*(2<sup>nd</sup> edn Kluwer Law International 1995)

<sup>178</sup> Ibid n17 p. 744

<sup>179</sup> See '2008 International Arbitration Study-Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards' (School of International Arbitration, Queen Mary University of London and Price water house Coopers LLP) <<http://www.arbitrationonline.org/research/Corpattitempirical/2008.html>> Accessed 10<sup>th</sup> September, 2014.

disputes precisely to reduce or eliminate the role of national courts. This is largely because of the mistrust that each side feels towards the municipal laws and their judges as well as to avoid giving either of them a home court advantage in the dispute resolution process. This kind of feeling was anticipated by the drafters of ICSID Convention, who wish to 'maintain a careful balance between the interests of investors and those of host States'.<sup>180</sup> In this regard, Aaron Broches rightly observed that in order to protect the balance of rights between investors and States, the drafters established 'a complete, exclusive and closed jurisdictional system, insulated from national law', with respect to the arbitration proceedings, awards, and review of awards.<sup>181</sup> Despite this however, recognition and enforcement of awards, 'required interaction of international and domestic law', this resulted in the creation of 'a mixed juridical structure'.<sup>182</sup> Numerous points of contact between the two structures remain since national courts hold the power of recognition and enforcement as well as establishing the court or authority designated for the purpose of enforcement.<sup>183</sup>

It suffices to say that the fate of an award at this point seems to rest on a given legal system of the State where enforcement is sought. For obvious reasons this is the stage at which investors or award creditors may experience difficulty in obtaining payment if Contracting States are reluctant to enforce or execute the award or there are rules that provide for immunity in a state where enforcement is sought.<sup>184</sup> It is important to point out that the consequence of this is that an over-zealous court is in clear danger of tampering with the intent and content of an award either by denying the enforcement of it as a whole or in part. This also exposes these courts to the possibility of reviewing an award.<sup>185</sup>

In view of all these, at the end of the day, national courts are an essential component of successful international arbitration this is because arbitrators, as private persons, lack the coercive police power of the state, which is reserved to government. At various stages in the arbitration process, effective adjudication may therefore become difficult to achieve without implementation of the threat of implementation by national court. It is submitted that, in as much as their execution role is acknowledged, excessive interference by state court can deprive arbitration of its usefulness, slows the process,

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<sup>180</sup> Leah Harhay, *The Argentine Annulment: The Uneasy Application of ICSID Article 52 in Parallel Claims* in Karl Sauvant (eds) *Yearbook on International Investment Law & Policy 2011-2012* (Oxford University Press 2013) pg 440-450

<sup>181</sup> Aaron Broches, *Award Rendered Pursuant to the ICSID Convention, Binding Force, Finality, Recognition, Enforcement and Execution*, (1987) *ICSID Review Foreign Investment Law Journal* (1987) 297-288

<sup>182</sup> *Ibid* n48 pg 354

<sup>183</sup> *Ibid* n14 Article 54 (2)

<sup>184</sup> David Caron, "The Nature of the Iran- United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", (1990) 84 *AM. J. INT. L.* 194, 118

<sup>185</sup> Muth Sornarajah, *The International law on Foreign Investment* (3<sup>rd</sup> edn Cambridge University Press 2010) P. 429-452



makes it more expensive, and can tilt the playing field if a party turns to its own national courts for intervention in an arbitrable dispute.<sup>186</sup>

This has resulted in the most extreme form of national court intervention in IIAs such as the issuance of restrictive injunctions. This position is informed by a practical example from the case of Jakarta court in *Himpurna California Energy Ltd (Bermuda) v Republic of Indonesia*.<sup>187</sup> In this case, the contract provided for ad hoc arbitration with the seat in Jakarta under the UNCITRAL Rules but with Indonesia law application to both substance and procedure. Shortly after the case began, Indonesia sought and obtained an injunction against the arbitral tribunal to stop them from rendering an award against an Indonesian state-owned corporation, ordered the arbitrators to cease all arbitration-related activities and failure to comply would result in a fine of US\$1 million per day.<sup>188</sup> After the first arbitral tribunal rendered an award against the Indonesian state-owned electricity corporation, an Indonesian court granted two injunctions: one ordering the suspension of the enforcement of the first award, and the second preventing the second arbitration from taking place. Consequently the adjudicatory powers of the tribunal were undermined.

For obvious reasons this is unacceptable especially in view of the role UNCITRAL and ICSID expects the courts of member states to play in arbitration particularly as regards enforcement of award.<sup>189</sup> Injunctions should not be allowed to prevent the smooth operation of investment arbitration process or enforcement of its award. Parties who lose their case in investment arbitration should learn to accept the outcome of the process. In *B L Harbert International v Hercules Steel*<sup>190</sup> the court criticized parties that are quick to seek other remedies when they are 'poor losers' in investment arbitration. The court stated that; 'If we permit parties who lose in arbitration to freely re-litigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less'<sup>191</sup> The court further suggested that sanctions are 'an idea worth considering' where a party 'decides to obey this caution and drag the dispute through the court system without objectively reasonable belief that it will prevail.'<sup>192</sup> In conclusion national courts should be constrained to providing 'reasonable support' in the recognition/enforcement and execution of award. Their powers should be limited if the problems of enforcement are to be curtailed. In view of this, investor should provide for execution clause in their BITs with member

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<sup>186</sup> Christopher F Dugan, Don Wallace, Noah D Rubins, *Borzu Dabahi Investor arbitration* (1<sup>st</sup> edn Oxford press 2008) p. 101.

<sup>187</sup> *Himpurna California Energy Ltd (Bermuda) v Republic of Indonesia*, (1999) 10 UNCITRAL Comm. Arb. 11

<sup>188</sup> C Dugan, and D Wallace, *Investor State Arbitration* (Oxford University Press 2008) pg 102

<sup>189</sup> *Ibid* pg 102

<sup>189</sup> New York Convention, Art. II, see D Julian M Lew, *Anti-Suit Injunction Issued by National Courts to Prevent Arbitration Proceedings*, in Gaillard (eds) *Anti-Suit Injunctions in International Arbitration* (Oxford University Press 2005) pg 31-32

<sup>190</sup> *B L Harbert International v Hercules Steel Co*, 441 F.3d 905 (11<sup>th</sup> Cir. 2006)

<sup>191</sup> *Ibid* n4 Pg 907

<sup>192</sup> *Ibid* n64 Pg 913

States to guide against any move by the States to frustrate enforcement of award through the mechanism of national courts.

### 3.2.6 *Conclusion*

The ICSID convention has provided a legal framework that is powerful for the purpose of settling disputes. Although the powerfulness of ICSID comes at a high price paid by member states, the upside to such convention is legal certainty. Investors are wishing to be on an equal footing with the host state when dispute arises which to a significant level ICSID provides. However, under international law, states enjoy immunities that cannot be violated unless there is a clear consent. State members of the ICSID Convention have waived jurisdictional immunity to ICSID but not the immunity against enforcement. Therefore, with regards to enforcement, although non-compliance is not common, it is important for the investor to know where the host state's assets are located, and whether these assets are protected under the local immunity laws. If that is the case, the investor may not be granted access to execute on these assets. However, there are other options that the investor might peruse. Seeking enforcement in another state in which the host state has assets. Also, without prejudice to ICSID, home state may be involved in imposing political or commercial pressure against the host state in case of non-compliance as happened with the US against Argentina in a form that is similar to the principle of diplomatic protection. Another solution, that has a preventative nature, is to include a clear and express waiver of enforcement immunity from the host state as ICSID, as mentioned earlier, cannot guarantee such right to the investor. However, states are reluctant to grant such a compromise to investors or private companies, but usually such compromises occur in a reciprocal basis with the home state. An effective solution to the problem may be solved through the current efforts to harmonise immunity laws. The definition of commercial activities, arbitration requirement and scope of immunity can all be enforced under one legal umbrella as the case of the UN convention on state immunity. However, the convention has significantly low number of signatories and it has not been enforced yet, therefore, unless this change, this area of law will remain to certain extent controversial and uncertain. Another option is to include in the agreement a clear express waiver of both, jurisdictional and enforcement, immunities as the case in the AIPN dispute resolution model of 2004, where AIPN stands for the Association of International Petroleum Negotiators is an independent not-for-profit professional membership association that supports international energy negotiators around the world. But, according to the wording of this clause, and depending on the country of enforcement, the local court would still have space to interpret it in accordance to the local law.

To conclude, the ICSID Convention provides the most effective dispute settlement for issues regarding investment even in the case of sovereign immunity. This system of remedies is exhaustive and self-contained. ICSID awards are binding on the parties and they have a legal obligation to comply. Thus, the awards are recognized automatically and they have *res judicata* effect. Thereof, awards cannot be subjected to

domestic courts' decisions. It represents a significant improvement over the enforceability of awards under the New York Convention.

On the other hand, the execution process must take into account the local laws and this can lead to face with sovereign immunity law. The Convention provides obligatory enforcement and other remedies in Article 27 and 64 to overcome sovereign immunity laws. By this way, the ICSID system carries built-in incentives for compliance as well as easily identifiable risks accompanying non-compliance. Thereby, while some scholars point out the that much could be done, other part of the doctrine sustains that the system supplies perfect compliance with the awards and accomplishes the purpose that providing comfortable investment environment by assuring effective remedies for both investors and states.

### 3.3 *Attachment and Execution on Commercial Assets*

Because most nations afford some form of immunity from attachment and execution to the assets of foreign sovereigns located in their jurisdictions, enforcing an arbitral award against a sovereign who refuses to pay can pose significant challenges, even when that award has been recognized as a judgment. In most nations, the concept of sovereign immunity generally protects most sovereign assets from execution and attachment. An exception to general principles of sovereign immunity, however, often exists with regard to sovereign assets that are used (or intended to be used) for commercial activity or for commercial purposes. Thus, although a party seeking to enforce an arbitral award against a recalcitrant sovereign may lack the execution and other options usually available to the victor in arbitration against a non- governmental party, under the "commercial activity" exception to sovereign immunity, the party seeking enforcement may be able to reach the sovereign's commercial assets in satisfaction of the award.

Thus we have to peruse the 'commercial activity' exception to sovereign immunity, which is codified in the statutes of some nations and recognized by reference to general principles of customary international law in others. Because the United States and the United Kingdom have sovereign immunity statutes explicitly recognizing the 'commercial activity' exception and well-developed case law setting forth the criteria for reaching sovereign assets under that exception, much of the following discussion will focus on those countries. Execution against sovereign assets in general is a relatively recent development, and most states have followed the lead of the United States and the United Kingdom in applying a sovereign immunity doctrine that permits execution in aid of arbitral awards against commercial assets.

### 3.4 Award and Enforcement: the Sedelmayer saga

The case called the Sedelmayer saga<sup>193</sup>, illustrates well the potential problems regarding state immunity pleas in the execution of investment awards and serves as a good example of the hardship involved in tracing attachable State assets.<sup>194</sup> Sedelmayer was the sole owner of a company dedicated to training of police and security personnel which entered into a joint venture with the Leningrad police department in 1991. Following expropriation of his capital contribution in the joint venture, Sedelmayer initiated arbitration under the Germany – Russia bilateral investment treaty (BIT) at the Stockholm Chamber of Commerce. In 1998 the tribunal rendered an award in his favour ordering Russia to pay \$ 2.35 million, plus interest.<sup>195</sup> It took Mr. Sedelmayer 12 years and over 30 domestic execution cases to collect a part of the award compensation. During that time Russia successfully evaded paying the awarded compensation by raising its state immunity from execution before national courts.<sup>196</sup>

The case called the Sedelmayer saga, illustrates well the potential problems regarding state immunity pleas in the execution of investment awards and serves as a good example of the hardship involved in tracing attachable State assets. The claimant in this dispute was one Franz Sedelmayer, a German citizen who owned a US corporation called the Sedelmayer Group of Companies International Inc. (SGC). The case arose following Sedelmayer's relocation to St Petersburg, Russia. There Sedelmayer through his company negotiated a 25-year lease on a villa previously used as a retreat by Soviet ministers. In August 1991, SGC and the Leningrad police entered into a joint venture called Kammenjj Ostrov (KO). After significant renovations, Sedelmayer opened the villa as a conference centre and training facility for security personnel. The joint stock company was, among other things, to produce police equipment and to provide for transportation and protection services for foreign and Russian citizens. Difficulties arose soon thereafter with a Russian court proceeding that determined that the joint venture's registration was null and void. In December 1994, a

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<sup>193</sup> See Alexandroff, Alan S., and Ian A. Laird. "Compliance and Enforcement." *The Oxford Handbook of International Investment Law*, Oxford (2008): 1171-1187.

<sup>194</sup> In July 2014 the Permanent Court of Arbitration in The Hague rendered three awards in the investment arbitration against the Russian government brought by the shareholders of Yukos, once Russia's largest oil and gas company, under the Energy Charter Treaty. The compensation granted for expropriation of the investor's assets makes them the largest awards in the history of investment arbitration. However, as indicated by commentators, the Russian Federation is unlikely to voluntarily comply with these awards. The remedy available to the investors against Russia's non-compliance, namely the forcible execution of the award compensation in third states, will be barred in case of most of the Russian assets by virtue of the principle of state immunity from execution.

<sup>195</sup> Mr. Franz Sedelmayer v. Russian Federation, SCC, Award, 7 July 1998.

<sup>196</sup> For a summary of the proceedings, see, Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor State Arbitral Awards*, in *INTERNATIONAL INVESTMENT LAW IN 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 303, 315 -317 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich, eds., 2009).

presidential decree directed that the assets of the joint venture were to be transferred to a 'Procurement Department'. In 1996 authorities barred Sedelmayer from the facility as well.

As a result of the Russian governmental action, Sedelmayer filed a claim under the 1989 German–Soviet BIT with the Arbitration Institute of the Stockholm Chamber of Commerce. Sedelmayer alleged expropriation. The tribunal ruled that the Russian Federation had expropriated the property and ordered a payment to Sedelmayer in the amount of US\$2,350,000, plus interest, in the July 1998 award. In turn, Sedelmayer had the 1998 award declared enforceable under the New York Convention by the German Superior Court of Justice (Kammergericht) in Berlin.

Though Mr Sedelmayer's case and award were not untypical of other claims by Western businessmen who had lost investments in Russia, his persistence in attempting to satisfy the award of the international tribunal was not.

As Mr Sedelmayer has described the Russian government efforts to block payment: 'They tried every trick to thwart me, but a building can't run away'. Mr Sedelmayer's first step to execute the award was to attempt to impound Lufthansa Airlines' payments to Russia for overflights of Russian airspace. To accomplish this, Mr Sedelmayer brought an action to execute against these assets in the municipal court (Amtsgericht Köln) of Cologne. The partial award granted was some €511,000.<sup>197</sup> In turn, the Russian Federation and the third-party debtor blocked appeals against the order and the municipal court overruled its earlier decision, annulling the order on the basis of public purpose. Although it had overruled its earlier order, the municipal court permitted Sedelmayer to appeal to the Federal Court of Justice on grounds of law. The case was then heard by Germany's highest court. The Federal Court of Justice determined that the German courts had no international jurisdiction in execution proceedings against the Russian Federation concerning these overflight rights. Overflight rights, including both the transit and entry fees, were deemed to be of a public character and not private law contract-type claims and were, therefore, not subject to internal execution. The German court stated that the determination of whether such assets as these fees were of a public character had to be determined according to German law. The fees, according to the court, arose out of the territorial sovereignty of a foreign state and were a benefit for a public function carried out by the Russian Federation and were, therefore, public in nature. An additional factor was that the assets were located in Russia and not Germany. The court concluded that the

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<sup>197</sup> Mr Sedelmayer was very unhappy with the behaviour of the local German bailiffs. In one instance—Sedelmayer suggests that he initiated over 30 different executions against the Russian Federation in Germany—Sedelmayer sought to execute against assets—in this instance, computers, cameras, and security equipment being displayed at the Russian government stand—at an industrial trade fair in Hannover in April 2005. What followed was a series of efforts to get a bailiff to act and refusals by several to do so. Though Mr Sedelmayer brought actions and complaints in several courts in Hanver and Lower Saxony, he finally launched an action against the Republic of Germany in the European Court of Human Rights for failure of Germany's judiciary to equally apply the law. See FJ Sedelmayer, 'Sedelmayer vs. Germany, European Court of Human Rights' 2(5) TDM (2005).

Russian Federation was not subject to German jurisdiction and that sovereign immunity applied.

Significantly, the court in its decision held that the arbitration clause implied no waiver of immunity for execution proceedings. The German court asserted that immunity in proceedings on the merits has to be treated in a different manner from immunity in execution proceedings. The BIT only regulates proceedings on the merits. For the Federal Court, the agreement pursuant to Article 10 of the German– Soviet BIT that the award was to be recognized and enforced in accordance with the New York Convention did not raise a waiver of immunity in execution proceedings such as those before the German courts. The BIT is designed to encourage investment activities and raises the prospect that an award will require execution against a state party. However, an execution against assets that are identified as being for public purpose is not necessary to achieve the purposes of the BIT.

Notwithstanding the refusal of German courts to order execution against these landing rights, Mr Sedelmayer has remained undeterred and continues to seek execution of his award. As a postscript, Mr Sedelmayer has traced Russian real estate assets in Germany. In Cologne, Mr Sedelmayer came across a former KGB compound near the downtown of the city. At first Sedelmayer was unable to act since the registered owner on title was the defunct Soviet Union. Sedelmayer continued to check the ownership every few months and was rewarded in late 2002 with a change in ownership to the Russian Federation. At that point, Mr Sedelmayer filed against the real property. While allegedly there have been threats against Sedelmayer and his family, Sedelmayer has begun to collect against the rent payments amounting to some \$29,000.00 per month<sup>198</sup> while he awaits sale and disposition of the revenues from the eventual sale of the property.<sup>199</sup>

The dispute was brought also before the European Court of Human Rights ("ECtHR"). Mr. Sedelmayer claimed that the conduct of the German authorities in the execution proceedings violated his rights under Article 1 of the Protocol No. 1 (protection of property), as well as Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the European Convention on Human Rights ("ECHR"). As seen

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<sup>198</sup> In an email to the OGEMID discussion group dated 3 December 2006, Mr Sedelmayer advised: 'Dear OGEMID members, This is to inform you that in the case Franz J. Sedelmayer vs. The Russian Federation, the Frankfurt City Court (Amtsgericht Frankfurt am Main) has issued an order to seize the business bank accounts of the Russian Federation held with the Dresdner Bank AG, the VTB Bank Deutschland AG (formerly called the Ost-West Handelsbank AG) and the Deutsche Bank AG. The registration number of the court order is 82 M 20481/06. A couple of days ago the Dresdner Bank AG and the Deutsche Bank AG have acknowledged the existence of bank accounts and declared their willingness to cooperate with the creditor . . . Cordially, Franz J. Sedelmayer.' See: OGEMID Archive, December 2006, 'Sedelmayer vs. Russian Federation: More Russian Federation Bank Accounts Seized—MinFin and Russian House in Berlin'.

<sup>199</sup> See E Baldwin, M Kantor, and M Nolan 'Limits to Enforcement of ICSID Awards' 23 J of Int Arb 1 (2006). The authors canvass the numerous means which disappointed state respondents may employ that may not have been contemplated by the drafters of the ICSID Convention to avoid enforcement of an arbitral award.

above, the execution was refused by the German authorities because the claims in question were protected by the principle of sovereign immunity from execution. The court qualified a claim to compensation under an award as a possession in terms of Article 1 of the Protocol No. 1. However, the ECtHR first observed that sovereign immunity was as a principle of customary international law in accordance with Article 31(3)(c) of the VCLT, and further that the principle of immunity of State property from execution is subject to "certain strictly delimited exceptions" and "[a] State cannot be required to override against its will the rule of State immunity". In the court's view, in this case "the German courts struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". Sedelmayer's claims were found manifestly ill founded and therefore declared inadmissible.

This case strongly suggests that there continue to be difficulties in achieving complete claimant satisfaction in the enforcement and execution of investment arbitration awards. All of the cases discussed above, and the Ultimately, as experience with the enforcement and execution of awards grows, it may be necessary to re-examine the application of sovereign immunity by domestic courts and ask the question as to whether the current system set in place, whether under the ICSID Convention or other arbitral settings, is satisfactory as an effective system of international justice for investors and their investments.

#### 3.4.1 *Defining The Property As "Commercial"*

The exception of commercial assets refers to the traditional distinction between two capacities in which the state acts: sovereign acts of a state (*acta iure imperii*) and acts of a state in its private capacity (*acta iure gestionis*). Following this division, state property can be classified as property serving either sovereign or commercial purposes.

Because of the "commercial activity" exception, the nature of the property becomes the central question in most published cases involving enforcement of arbitral awards against sovereigns: when is property sufficiently "commercial" subject to execution?

In most jurisdictions, the question of whether property subject to execution is being used for commercial activity is a separate determination from whether commercial activity gave rise to the claim in the first place. Thus, although a State may be engaged in commercial activity that led the parties to arbitration, the commercial activity underlying the claim does not mean that all the sovereign's property is subject to attachment and execution. In order to execute, the winning party must prove that

the property *itself* meets the requirement of "commercial activity" or "commercial purpose" under the applicable law. This can create challenges for winning parties, for while showing that a sovereign was engaged in commercial activity can be relatively easy, showing how property owned by the sovereign is being used, or is intended to be used, can be somewhat more difficult.

The commercial assets exception is generally accepted in treaty and domestic law. Article 19(c) of the UNCSI allows execution against property "in use or intended for use by the State for other than government non-commercial purposes" which "is in the territory of the State of the

The commercial assets exception is generally accepted in treaty and domestic law. Article 19(c) of the UNCSI allows execution against property "in use or intended for use by the State for other than government non-commercial purposes" which "is in the territory of the State of the forum". Article 26 of the European Convention on State Immunity allows execution of a judgement in proceedings relating to an industrial or commercial activity against property of the state against which judgment has been given, used exclusively in connection with such an activity in the state of forum. Section 13(4) of the State Immunity Act allows execution against property which is "for the time being in use or intended for use for commercial purposes". The Foreign Sovereign Immunities Act (FSIA) permits execution of arbitration awards against foreign state property "used for a commercial activity" in the territory of the United States.

The examples show that the current law on state immunity favours the "purpose test", as opposed to the "nature test" which focuses on the nature of the assets. The "purpose test" will require determination of two elements: whether the relevant activity is commercial and whether the assets in question are used or intended to be used for such an activity.

With regard to the first element, in 1977 the German Constitutional Court has observed that whether a state activity is sovereign or non-sovereign will in principle have to be determined according to the national law applicable in each case, since customary international law contains no criteria for establishing that distinction.<sup>200</sup> However, some context how to interpret the term "government non-commercial purposes" under Article 19(c) of the UNCSI is provided by the definition of a "commercial transaction" in Article 2(1)(c) of the Convention as "(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or

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<sup>200</sup> Philippine Embassy Bank Account Case, Judgment of Dec. 13, 1977, Constitutional Court, 65 I.L.R. 146, 155 (Germ) (English translation).



of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons".<sup>201</sup> Similar definitions have been adopted in domestic state immunity legislation.

As clarified in the context of the FSIA, "commercial activity" has been formulated as a state activity which is analogous to an activity conducted by private persons.<sup>202</sup> The commercial character of an act will be determined by its "nature" rather than its "purpose". This means that the question is not whether the foreign government is acting with a profit motive or with the aim of fulfilling uniquely sovereign objectives, but whether the particular actions that the foreign state performs are a type of "actions by which a private party engages in trade and traffic or commerce".

The second issue regarding the "commercial purpose" test is whether it is the past, present, or future use of the property that is relevant for determination of the purpose of the property. Using the phrase "used for commercial activity", the FSIA formulates the test as a past use, the SIA refers to the present or past use. The International Law Commission Commentary indicates that the property must be used or intended to be used for commercial purposes "at the time the proceeding for attachment or execution is instituted". Similarly, the German Constitutional Court held that it is the "actual use" that is decisive. French courts take into consideration "simultaneously the origin and use of the property". Determining the purpose of assets appears to be a challenging task. Without any specific earmarking, the use of funds will be a matter within the discretion of states.

There are several categories of commercial property that a sovereign might have available for execution in aid of an arbitral award. *First*, a winning arbitral party can attach obviously commercial property. Although executing against such property should be relatively straightforward, identifying sovereign-owned commercial property can be difficult. *Second*, "mixed use" property-in particular, embassy bank accounts - may be available to satisfy judgments. Although the Vienna Convention generally protects an embassy's property, bank accounts held in an embassy's name used for both diplomatic and commercial activities have been subject to attachment and execution proceedings (with varying results) in several jurisdictions. *Third*, central bank assets maintained in foreign jurisdictions present a particular difficulty in this context,

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<sup>202</sup> As held in by the United States Supreme Court in *Weltover v. Argentina*, foreign sovereign's actions are "commercial" within the meaning of the FSIA when it acts "not as a regulator of a market, but in the manner of a private player within it" see *Argentina et al. v. Weltover Inc. et al.*, 504 U.S. 607, 614 (1992).

because while they are obviously used for commercial activity, they are also regarded as critical to the operation of the international economy, and thus often held to be beyond the reach of judgment creditors.

### 3.4.2 The Problem of Assets of Separate Entities

States often conduct their private law activities through agencies or separate juridical entities owned or otherwise controlled by a state. Property owned by these entities is likely to be targeted by investors as there will be strong evidence that the property belonging to an entity engaged in commercial purposes will be used for commercial purposes.<sup>225</sup> However, such entities' distinct legal personality will often be an obstacle in the execution of an award against a state's property. If such entities were to be treated as separate from the foreign state, there would be a strong incentive for the sovereigns to direct commercial revenues to separate entity's organizational structure to avoid execution. Nonetheless, domestic legal systems have developed methods to "pierce the corporate veil" of entities controlled by a state to prevent such abuses

The FSIA incorporates state agencies and instrumentalities into the definition of a "foreign state" in Section 1603(a). In this way it extends the presumption of immunity to state agencies and instrumentalities. FSIA defines an "agency or instrumentality of a foreign state" as "any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States [...] nor created under the laws of any third country".

The SIA takes a position different from that of the FSIA and does not accord a presumption of immunity to separate entities. SIA Section 14(1) stipulates that state immunities do not extend to "any entity [...] which is distinct from the executive organs of the government of the State and capable of suing or being sued".<sup>231</sup> Section 14(2) provides that a separate entity can invoke immunity from jurisdiction before the courts of the United Kingdom only if the proceedings relate to an act by that entity "in the exercise of sovereign authority" and if its parent state in the same circumstances would be entitled to immunity. Thus, the assets of separate entities will not be entitled to immunity, unless the entities are engaged in sovereign activities and the assets are used for this activity. The UNCSI adopts a functionalist approach similar to that employed in the SIA. The presumption of immunity of the property of an entity will be dependent on the determination that the entity performs sovereign activities and that the property is used or intended to be used for such activities. The property will be protected only to the extent that it is used for the sovereign activities. The separate

entity bears the burden of proving that the entity is engaged in sovereign activities. As further clarified in the Annex to the Convention, "Article 19 does not prejudice the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues".

### 3.4.3 The Problem of Mixed Commercial/Sovereign Use

As noted above, in the *Sedelmayer* case, the Court of Appeals in Frankfurt allowed the attachment of a bank account held in the name of the Russian embassy in aid of the satisfaction of an arbitral award. The clear rule in Germany since 1977 has been that embassy accounts are exempt from attachment and execution. Although the Court of Appeals recognized this rule, the lower court had specifically asked Russia to elaborate on whether the funds in the account were earmarked for sovereign, as opposed to commercial, activities. The Russian government's response, a cursory statement to the effect that the account is sovereign in nature, did not satisfy the German courts. Thus, the attachment of the embassy bank account was upheld.

Despite the *Sedelmayer* decision, embassy accounts are generally considered immune from execution under the Vienna Convention, which immunizes embassies and their property. There are a number of cases, however, dealing with "mixed use" embassy accounts -that is, accounts used for both diplomatic and commercial activities-that have led to varying conclusions on whether mixed-use property should be subject to attachment. In *Liberian Eastern Timber Corp. v. Republic of Liberia*<sup>61</sup> for example, a mixed use account was found immune from attachment. The claimant, LETCO-who had been awarded over US\$9 million in arbitration -had its ICSID award reduced to judgment in the Southern District of New York. LETCO then attempted to execute against tax collection revenues in the Southern District of New York, but was rebuffed based on the court's finding that the collection of taxes is a sovereign activity.

LETCO, again like the claimant in *Sedelmayer*, then attempted to execute against bank accounts held in the name of the Liberian embassy.<sup>64</sup> In its execution order (which, in the United States, can be issued directly by a judgment creditor), LETCO specifically requested execution only against "any credits other than wages, salary, commissions or pensions of the defendant, The Government of the Republic of Liberia, The Republic of Liberia, or The Embassy of the Republic of Liberia or any of their agencies, that are used for commercial activities," thereby exempting from the execution any funds protected by the Vienna Convention.<sup>65</sup> The Court, acknowledging that the Liberian embassy accounts were mixed use accounts and included funds used for both diplomatic and commercial activities, nonetheless rejected the execution, but seemed to leave open the possibility that an account might be subject to attachment if a creditor can show that the account is used for enough commercial activity:

[F]ollowing the narrow definition of "commercial activity," funds used for commercial activities which are "incidental" or "auxiliary," not denoting the essential character of the use of the funds in question, would not cause the entire bank account to lose its mantle of sovereign immunity. . . . Indeed, a diplomatic mission would undergo a severe hardship if a civil judgment creditor were permitted to freeze bank accounts used for the purposes of a diplomatic mission for an indefinite period of time until exhaustive discovery had taken place to determine the precise portion of the bank account used for commercial activities. Such a scenario would practically gut one of the purposes behind immunity: to afford deference to the governmental affairs of foreign states.

Another U.S. federal court, however, arrived at the opposite conclusion on the exact same question of mixed-use bank accounts. In *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, the plaintiff had attempted to enforce an arbitral award rendered against Tanzania by serving a writ of garnishment on a Washington, D.C. bank at which the Tanzanian embassy maintained a bank account. The bank account in question was used to pay the Tanzanian embassy staff as well as for "incidental purchases and services necessary and incident to the operation of the Embassy." In denying Tanzania's motion to quash the writ of garnishment, the court first held that such "incidental purchases and services" were commercial activity under the FSIA, thereby rendering the bank account a mixed-use asset. The court then found that mixed-use bank accounts are subject to execution in order to enforce an arbitral award, because "a reading of the Act which exempted mixed accounts would create a loophole, for any property could be made immune by using it, at one time or another, for some minor public purpose."

Jurisdictions outside of the United States addressing the mixed-use problem, like the two U.S. courts discussed above, have arrived at divergent conclusions, although most grant immunity to mixed-use accounts.

#### 3.4.4 The exception of the exception: Central banks funds, military property, and property used by diplomatic missions

Regardless of its commercial or public character, certain categories of property will always be considered as serving a sovereign purpose, and thus immune to execution.<sup>203</sup> The most significant exceptions concern the assets of central banks, military property, and property used by diplomatic missions.<sup>204</sup>

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<sup>203</sup> UNCSI, Article 21(1). See Cedrik Ryngaert, *Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors*, 26(1) LEIDEN J. INT'L L. 73, 78 (2013) (holding against the view that the catalogue under Article 21 of the UNCSI represents customary international law).

<sup>204</sup> Article 21 of the UNCSI lists five categories of property: "(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to

Property of central banks is a fairly certain source of assets which makes it particularly attractive for attachment by award creditors. However, due to the peculiar character of these assets and their critical role in the functioning of a state, they enjoy special protection under the regime of sovereign immunity. The UNCSI as well as the domestic FSIA and SIA include non-rebuttable presumptions of immunity of the assets

After its first two failed attempts at execution, the claimant in the LETCO arbitration discussed above attempted to enforce its arbitral award against assets of the Liberian central bank. Under U.S. law, central bank assets are afforded special protection. Despite the obvious commercial nature of central banking activities, including investment and foreign exchange transactions (which, under the usual definition, any private person could undertake), the FSIA carves out special immunity for central bank reserves. The rationale behind this special protection is that central banking activity is critical to international relations and thus deserving of special protection. LETCO's attempt to execute against Liberia's central banking assets was rejected on this basis. Thus, despite the fact that the LETCO's arbitral award against Liberia was easily reduced to judgment in the United States, LETCO failed in three attempts to execute against Liberian assets in aid of that judgment.

The issue of central bank asset immunity in the context of enforcement of an arbitral award similarly arose in the United Kingdom in *AIG Capital Partners Inc. v. Republic of Kazakhstan*. The United Kingdom, like the United States, confers special immunity over central bank assets. There is one critical difference, however, in how the sovereign immunity statutes of the two countries classify central bank assets. Under the FSIA, central bank assets are considered commercial assets, but are nonetheless explicitly exempted from the execution provisions that would otherwise apply to the commercial assets. In the United Kingdom, however, the State Immunity Act specifically states that central bank assets are not commercial assets.

In *AJG v. Kazakhstan*, the claimant was attempting to enforce an ICSID award against funds held by English agents on behalf of Kazakhstan's central bank for the purpose of funding Kazakhstan's "National Fund." AIG argued not only that the funds were, in effect, actually held for the benefit of Kazakhstan and therefore not subject to the central bank exception, but also that the sovereign immunity requirements protecting central banks (and non-commercial property in general) should be read narrowly and in conjunction with Articles 1 and 6 of the European Convention of Human Rights, which protected AIG's right of access to the enforcement jurisdiction of the

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organs of international organizations or to international conferences; (b) property of a military character or used or intended for use in the performance of military functions; (c) property of the central bank or other monetary authority of the State; (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale". Only three first categories will be addressed in the present Article. It should be noted that the catalogue in Article 21(1) is not exhaustive as demonstrated by the use of the term "in particular" in the *chapeau* of the provision. UNCSI, Article 21(1).

court and AIG's general right to property, respectively. AIG further argued that the funds, being properly considered an asset of Kazakhstan, were "for the time being" used for commercial purposes, i.e. investment in the United Kingdom. The English High Court disagreed on all points, as it found first that the assets in question fell under the exception for central bank assets, and second that since the funds in question were intended to be used for Kazakhstan's National Fund, their present investment in the United Kingdom did not constitute commercial activity.

Like the United States and the United Kingdom, the statute governing state immunity in Canada protects central bank assets from attachment and execution. The Singapore statute contains no reference to central banks or their property. Australia's statute explicitly states that the exceptions to immunity from execution apply equally to States and their central banks.

### 3.4.5 Conclusion

In sum, most judicial systems accord a substantial degree of immunity from attachment and execution to sovereign assets. These same judicial systems, however, are also increasingly willing to permit the enforcement of arbitral awards against assets that are purely commercial in nature. This "commercial activity" exception to sovereign immunity can appropriately be viewed as balancing the need for governmental and diplomatic functions not to be interrupted by private commercial disputes with notions of fundamental fairness to litigants. Stated another way, when a sovereign engages in the same type of commercial behaviour as a private actor, it is fair to permit enforcement of a duly adjudicated arbitral award against the sovereign's commercial assets in the same manner that enforcement would be permitted against the assets of a private actor. To promote certainty, courts and other judicial bodies faced with future cases involving the "commercial activity" exception should develop and define with more precision the specific sovereign asset classes that are considered "commercial," and thus subject to attachment. Litigants would also be aided if judicial systems were to announce clear and specific criteria governing the circumstances under which so-called "mixed purpose" sovereign assets could be subject to enforcement.

### 3.5 *Limitations to Enforcement of Awards*

We have analysed the current problems investors can face after winning an ICSID case. We have showed how the immunity problem is clearly, as Professor Shereuer put it, the Achilles' heel of the whole ICSID system, which claims to be a self-contained system but at the same time shows its contradiction in entrusting to the domestic laws the enforcement stage.

As was stated in the *Vivendi v Argentina* stay of enforcement decision:

[O]ne of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention.<sup>205</sup>

While recognition and enforcement take place before the courts of the States parties to the Convention, the successful investor will have recourse to enforcement following the respondent State's refusal to comply voluntarily with the award.<sup>206</sup>

The award creditor is free to choose the place of enforcement<sup>207</sup> (he may even apply before the courts of the respondent State itself or can initiate executory measures in more than one State) depending on his ability to locate non-immune assets of the debtor State.<sup>208</sup>

This task is not an easy one. We have referred in this regard to the so-called Sedelmayer saga, which—although not an ICSID case—serves as a good example of the hardship involved in tracing attachable State assets. It took Mr Sedelmayer 12 years to enforce the award he obtained in his favour against Russia.<sup>209</sup>

### 3.5.1 *Annulment: the first problem that thwarts the enforcement of an arbitral award and other issues*

Under the ICSID framework, the lack of domestic review of the award's merits is compensated by establishing annulment proceedings before ICSID which aims to prevent the enforcement of awards affected by serious flaws. Annulment is the first problem that thwarts the enforcement of an arbitral award in the sense that it hinders execution by rendering the award a nullity. The annulment procedure can be used to set aside jurisdictional or merits awards rendered in all types of disputes submitted to the ICSID Convention, whether jurisdiction is bestowed by treaty or by contract. The reasons which authorize an ad hoc committee to annul an ICSID award are the five set forth in Article 52(1) of the Convention. They include:

- (1) The Tribunal was not properly constituted
- (2) The Tribunal "manifestly exceeded its powers,"

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<sup>205</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 (Second Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (4 November 2008) para 35.

<sup>206</sup> Stanimir A Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention' in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 324.

<sup>207</sup> Christoph Schreuer et al, *The ICSID Convention: A Commentary* (CUP 2009) 1124.

<sup>208</sup> See Joseph Profaizer, 'Emerging Issues in the Enforcement of Foreign Arbitral Awards' (2011) 2 *Transnatl Dispute Management* 168.

<sup>209</sup> Andrea Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-politicization of International Investment Disputes' (2010) 21 *Am Rev Intl Arb* 211.

- (3) One of the arbitrators was corrupt,
- (4) There was "a serious departure from a fundamental rule of procedure, and
- (5) The award has failed to state the reasons on which it is based

Hence there is a debate on whether or not annulment is relevant to the ICSID arbitration system. Jeswald Salacuse, sustains that the annulment system represents a great achievement because the Convention would have become a 'tame paper tiger', threatening but ineffectual, unable to offer a minimum amount of certainty to foreign investors, if the court where enforcement is sought is entrusted with the last say. Christopher Smith argues that this judicialization of arbitration under the ICSID Convention is responsible for several inconsistent decisions and this issue quashes the effect of awards. According to him, this position is a threat to the legitimacy of ICSID award when enforcement is sought immediately after the award is rendered, and therefore he concluded with a call for a reform or replacement of the annulment system. It is suggested that, against the backdrop of wrong reasoning of some annulment committees and tribunals, a reform of the ICSID annulment system is necessary especially in view of the fact that ICSID do not have any other form of appeal mechanism.

The anticipated reform has been subject of serious academic debate, scholars suggest an appeal system to replace or co-exist with annulment. Those who want an appellate tribunal argue it will help in harmonizing the different trends in interpreting the rules of foreign investment law and the divergent views of various investment tribunals. Michael Reisman argue that it should be replaced because of the time and cost incurred when an annulled dispute is resubmitted. He based his argument on the cases of *AMCO v Indonesia* - which lasted almost a decade because it went through two annulment decisions and *Klockner v Cameroon* which did not end until seven years after the registration of the original proceedings. Susan Frank cited the examples of two tribunals giving somewhat different ruling on similar questions of law as in the cases of *SGS v Pakistan* and *SGS v Philistines* and wrote that the inconsistent decisions occasion by annulment system is enough reason to justify its review because it takes away public confidence in the adjudicatory process.

While those who want the reform to co-exist argue that this approach is valuable because implementing the new appellate mechanism in this manner will not only present the parties with the advantage of choice, but also the appellate body will enable all parties to have the advantage of increased certainty that precedent provides. Therefore, parties that prefer the finality that the annulment process provides will be able to maintain the status quo by settling their disputes at the ICSID rather than seeking out an alternative forum. Parties valuing the accuracy of the legal reasoning of awards, however, will be permitted to appeal awards on legal grounds through the new ICSID appellate mechanism.

This school of thought believes that since the annulment mechanism will remain the default review procedure to affirm the parties' original expectations, a credible system of appeal which limits its review to legal issues should co- exist. Also, the appellate body will hear appeals only where all the factual issues and inferences



have already been determined, this is because if every issue of fact becomes subject to appeal, then awards by the original tribunal run the risk of becoming meaningless and superfluous. Smith added that: issues that are currently subject to annulment should be issues that can be later appealed to an appellate tribunal. According to him, the five grounds for annulment should be separate from grounds for appeal to the appellate tribunals apart from questions of law. In view of this, the ICSID secretariat initiated a discussion in 2004 into the possible creation of an appeal mechanism against the decisions of ICSID tribunals by issuing a discussion paper on 22 October 2004 and a working paper on 12 May 2005 containing a summary of the comments received on the discussion paper. But this process has suffered some set back because of the herculean task of amending the ICSID Convention thus it remains only a desire at present.

Another issue that needs to be clarified is which awards are subject to enforcement under the ICSID Convention. As pointed out by Christoph Schreuer '[o]nly final awards under the Convention [. . .] are subject to recognition and enforcement.' An award rejecting jurisdiction may also be subject to recognition and enforcement as regards costs. This is confirmed by the *Libananco v Turkey* stay decision where the Committee found that, in principle, there is no distinction in the ICSID Convention between awards on jurisdiction and awards on the merits for purposes of enforcement. The key question is whether a part of the dispositive warrants execution.

Under Article 53(2) of the ICSID Convention, 'award' includes any decision interpreting, revising or annulling the award pursuant to Articles 50, 51 or 52 of the Convention. Schreuer adds that 'award' will necessarily include also 'any decision supplementing or rectifying the award pursuant to Article 49(2)'.

It follows that an annulment committee's decision on whether to make a stay of enforcement conditional on the posting of security by the respondent State under Article 52 of the ICSID Convention will not be subject to enforcement if the State refuses to comply with the requirement to provide security.

Under Article 54 of the Convention, an ICSID award is to be given the same effect as a final judgment of the courts of the State where the award is being enforced. Awards rendered under the ICSID Convention are 'directly enforceable, upon registration and without further jurisdictional control'.<sup>210</sup> The regime established under the ICSID Convention is characterized as delocalized, i.e. outside the control or interference of domestic courts. This is the main difference between enforcement under the ICSID Convention and under the New York Convention.

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<sup>210</sup> *MTD Equity Sdn Bhd & MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution (1 June 2005) para 31; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No RB/01/08, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (1 September 2006) para 40.

One more issue concerns the relevant part of Art. 54. While the obligation of recognition extends to the entire award, the obligation to enforce concerns only pecuniary obligations. Thus, States parties to the ICSID Convention are not required to enforce any other obligations imposed by the award such as restitution, an obligation to cease the wrongful act or other forms of specific performance (e.g. the award might require the host State to grant a visa or to restore a licence). Schreuer explains that this was due to the fact that such forms of relief may be unknown to the law of the State where enforcement is sought. Moreover, if the State where enforcement is sought is not the respondent State, the former State simply does not have the means under international law to compel another State to perform (or abstain from) certain acts.

In the same way, the ad hoc Committee in *Sempra v Argentina* recognized that:

[T]he enforcement mechanism, which a contracting party to the ICSID Convention undertakes to provide, concerns only the enforcement of 'pecuniary obligations imposed by that award'. This restriction is necessary because an ICSID award may well be of a declaratory character or impose obligations on a party to do or refrain from doing certain acts, something which would not lend itself to enforcement, in particular in a third State jurisdiction.

In this regard, Schreuer has suggested that '[t]ribunals imposing [...] non-pecuniary obligations should keep the impossibility of enforcing them in mind. Such awards should provide for a pecuniary alternative', that is, the payment of a sum of money in case the respondent State fails to fulfil voluntarily the obligation of specific performance.

### 3.5.2 *The Act of State Doctrine*

The Act of State doctrine is another obstacle to the enforcement of arbitral award because it probes the legitimacy of awards in courts where enforcement is sought. Simply put, the doctrine states that no domestic court of a State should pronounce upon the legality of a legislative or executive act performed by a foreign Government intended to take effect within the territory of that foreign State. This doctrine, according to some practitioners, derives its justification from the decision of the court in *First National Bank v Banco Nacional de Cuba*<sup>211</sup> where it was held that the conduct of foreign policy is not the matter for the courts but of the executive and the courts should not assume this role by speaking about the legality of the conduct of a foreign Government. This defense usually occurs when enforcement is sort in courts of member States other than courts of the State who is an award debtor.

Sornarajah is a major advocate of this doctrine and in his view: "in the situation of enforcement of arbitral awards in foreign investment disputes, the issue

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<sup>211</sup> *First National Bank v Banco Nacional de Cuba*(1972)402US 759,at 769

that arises is whether the award settling a dispute, which always arises from a governmental interference, is capable of enforcement as it involves a pronouncement on the validity of the governmental act".<sup>212</sup> He added that courts which surmount the impediment presented by the sovereign immunity plea use the act of State doctrine as the way out of the difficult task of enforcing an award made against a foreign sovereign. Thus in *Liamco v Libya*,<sup>213</sup> where enforcement of an arbitral award was sought under the New York Convention, the court rejected the sovereign immunity plea but held that the act of State doctrine precluded enforcement.

Anyway it has been pointed out that since the plea of the doctrine does not prevent a tribunal from assuming jurisdiction it should therefore not prevent execution. This is premised on the fact that the initial pronouncement on the validity of governmental act should have been made at the arbitral tribunal which would have felt constrained by such doctrines and consequently refuse to assume jurisdiction over the arbitration. If the doctrine did not prevent the tribunal from assuming jurisdiction, it is quiet illogical for courts of enforcement to deem it necessary to reopen the whole issue for examination irrespective of the time and effort that may have been spent deliberating on this doctrine at the tribunal. It is safe to conclude even though arbitral tribunals may consider the applicability of the doctrine as a defence to their jurisdiction, once a tribunal gives an affirmative decision on its jurisdiction, the doctrine should not affect the enforcement of award.

### *3.5.3 Local law and Limitations in Provisional Measures for the Enforcement of Investment Awards*

As mentioned above, the ICSID Convention has thus preserved the traditional distinction between immunity from jurisdiction and immunity from enforcement, indeed article 54(3) states that execution shall be governed by local law.<sup>214</sup>

This is already implicit in the equalization of ICSID awards to local final judgments and this is aimed to respect the variety of legal techniques followed in individual States. This means that actual enforcement will require intimate knowledge of the peculiarities of local laws, and consequently, the results obtained may also vary

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<sup>212</sup>Ibid n26 pg. 366.

<sup>213</sup>*Liamco v Libya* (1980) 20 ILM1

<sup>214</sup> Similarly, the *MINE v Guinea* stay decision records that: [W]hile the Convention imposes an obligation on parties to abide by and comply with an award and on Contracting States to enforce the pecuniary obligations imposed by an ICSID award, the question of forcible execution is left expressly subject to the law of the State of the execution forum, including in particular the immunity from execution which a foreign State might enjoy under that law. *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, ICSID Case No ARB/84/4, Interim Order No 1 on Guinea's Application for Stay of Enforcement of the Award, para 24 (12 August 1988) [attached to Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated 6 January 1988 (14 December 1989) as Annex II, (1990) 4 ICSID Rep 129].

from one jurisdiction to the other. Summoning the respondent State may be necessary at the stage of enforcement.

It should be noted that a list of pieces of State legislation implementing the Convention is available on the ICSID website. National legislation concerning State immunity is not registered there, however. For the sake of completeness, it should be noted that only nine States have enacted legislation concerning sovereign immunity, namely the United States<sup>215</sup>, Great Britain<sup>216</sup>, Canada<sup>217</sup>, South Africa,<sup>218</sup> Malaysia,<sup>219</sup> Pakistan,<sup>220</sup> Argentina,<sup>221</sup> Australia<sup>222</sup> and Singapore.<sup>223</sup>

A generalized standard mode of enforcement among member States of the ICSID and New York Convention is not readily available; hence the provisions of the Conventions with its attendant shortcomings remain the guiding principle for the enforcement of investment arbitral awards. A major weakness in the provisions of the Conventions as already stated is their inability to effect enforcement which makes them rely on the laws on enforcement of award of member states. For example, Art. 53(1) of ICSID Convention gives 'each party' the obligation to 'abide by and comply with the terms of the award'. This is often times addressed to the respondent party which in most cases is the host State. The problems with enforcement of award arise from this point especially if the content of an award contradict the policies of the State hence the argument generated in this regard is that the Articles should have made provision for necessary sanctions for parties that will not abide by or comply with the terms of the award. The semblance of solution in the case of default is that award creditors seek the enforcement of the award in more than one State at the same time bearing in mind the fact that the extent to which an award will be acceptable and enforced depends on the discretion of each State. As a result of this, the award creditor may have recourse to favorable jurisdiction to seek the enforcement of award. This has its own implications ranging from jurisdiction shopping, forum shopping, diplomatic rancor between States

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<sup>215</sup> United States Foreign Sovereign Immunities Act (1976) Pub L 94-583, 90 Stat 2891, 28 USC §1330, 1332(a), 1391(f) and 1601–1611.

<sup>216</sup> State Immunity Act 1978 (1978) <<http://www.legislation.gov.uk/ukpga/1978/33>> accessed 15 November 2017.

<sup>217</sup> State Immunity Act 1982 (1982) RSC, 1985, c S-18.

<sup>218</sup> Foreign States Immunities Amendment Act 5 of 1988 (1988).

<sup>219</sup> Immunities and Privileges Act No 16 of 1984 (1984).

<sup>220</sup> State Immunity Ordinance VI (1981).

<sup>221</sup> Ley de Inmunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos, Ley No 24488 (1995).

<sup>222</sup> Foreign State Immunities Act No 196 of 1985 (1985).

<sup>223</sup> State Immunity Act Revised Edition 1985 (1985).

and endless litigation arising out of attempt to enforce one award in different jurisdiction at the same time.<sup>224</sup>

Moreover, Article 54(3) of ICSID Convention provides that the execution of an award shall be governed by the laws concerning the execution of judgment in force in the State in whose territories such execution is sought. The overriding concern here as suggested by Loukas Mistelis is that the efficiency of the enforcement mechanism is often tangled with judicial efficiency, as well as judicial attitudes towards the arbitral process.<sup>225</sup> The argument among scholars is that this provision prorogates the jurisdiction of courts of member States as supreme against the intent and purpose of investment arbitration and most BITs provision. The point that must be emphasized is that there is a debate on how the courts of member states are likely to use such powers delegated to them to secure the efficacy of an award. In other words, in the exercise of this power to enforce an award the courts are burdened with a lot of judicial, social, and economic variables which may influence or change the content, intent and purpose of the award. The options usually available to the courts are either to adhere strictly to the anticipations of ICSID or entertain the concerns of the award debtor which in most cases are State agents.<sup>226</sup>

Opinions are divided on the position of the court in this regard but most likely, there are many reasons why courts will intervene on policy grounds or refuse to intervene in circumstances where a sovereign does not wish to abide by an arbitral award. It may intervene to help enforce the award so as to uphold the sanctity of the judicial system of the State and make it very attractive to both investors and award creditors. It may refuse to intervene due to jurisdictional and other problems or to 'protect' the investment within its jurisdiction.<sup>227</sup> However the situation is different if the enforcement of award is sought in the court of the State who is the award debtor, the court most times intervene to frustrate the enforcement of award because it wants to protect the assets of the State. There seems to be no straight forward provision on how the court will resolve such conflict of interest that hinders the enforcement of award.

However, to avoid such conflict and take the dilemma away from the courts, it is argued that several states reserve a role for the executive in the procedure to execute an award against a foreign state.<sup>228</sup> Art. 54(2) provides that 'a party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. This provision is interpreted to mean that the executive can be the alternative 'authority' designated for

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<sup>224</sup> Maxi Scherer, "Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' 'The Wrong Road?'" (2013) *Journal of International Dispute Settlement*, Vol. 4, No. 3, pp. 587–628.

<sup>225</sup> *Ibid* n15 p. 19.

<sup>226</sup> *Ibid* n8p. 346.

<sup>227</sup> *Ibid* p. 357.

<sup>228</sup> Lewis Mistelis and Krollis, *Comparative International Commercial Arbitration*. The Hague, London, New York, (Kluwer Law International, 2003), p. 744.

the purpose of enforcement to help the court to take such decisions. It must be noted that the relationship between the court and executive in this process is also not without problems. According to George Foster this relationship becomes practical in the seizure and attachment of respondent's assets including when the assets pursued are those of other sovereign. The challenge with this practice is that the executive may be unwilling to effect such powers against its own assets when it is the award debtor.

Against this backdrop the argument by Foster is that in such a situation the precedent to be followed is that of Brazil who provides specific rules that allow the courts upon the claimant's request, to register the debt into the government's budget, hence securing payment in the following budget.<sup>229</sup> This argument may be correct to the extent that some multinational corporations can have overwhelming 'undue influence' that can induce some weak States to compel the enforcement of the award. However, the reasoning is flawed in view of the fact that some powerful States will see this reasoning as challenge to their sovereignty and will not abide by it.

### 3.5.4 *Shortcomings related to Article 54*

Another shortcoming can be found in the provision of Art 54(1). An analysis of this provision shows that an ICSID award is 'res judicata'. This means that it is a final decision hence it cannot be reviewed in the court where enforcement is sought. It must be noted that this applies only to ICSID awards. UNCITRAL awards even though binding are not final because enforcement under UNCITRAL follows the New York Convention (under which an award can be reviewed and refused enforcement in courts where enforcement is sought under any of the grounds for refusing enforcement). This seems to fuel the argument that the New York Convention is not applicable to the ICSID.<sup>230</sup> On the contrary it is important to note that, the last part of Art.54(2) of ICSID Convention above has a peculiar problem because it emphasizes the fact that only 'pecuniary obligations' of award are to be enforced by contracting States. This is reasonably understandable in view of the fact that States cannot enforce award that carries obligations like injunctive reliefs because of territorial and jurisdictional inhibitions. However, bearing in mind the fact that awards may have obligations other than pecuniary measures, the questions that should be asked here is how does the ICSID Convention intend to enforce such awards? Against this backdrop, it is important to point out that the ICSID provision has a weakness in its provision. It is submitted that the New York Convention is applicable in this regard as well as in relevant exceptional circumstances like the enforcement of an ICSID award in a State that is not a party to the ICSID Convention but is a party to the New York Convention.

A major setback on the provisions of Art.54 is Article 55 of ICSID Convention which provides that; 'nothing in Article 54 shall be construed as derogating from the law in force in any Contracting States relating to the immunity of that State or any foreign

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<sup>229</sup>George Foster, 'Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Courts Judgements Against State and their Instrumentalities, and Some Proposals for its Reform' (2008) 25:3 Arizona Journal International & Comparative Law, p. 670.

<sup>230</sup>Ibid n6 p.1118

State from execution'.<sup>231</sup> Some scholars believe that Art. 55 of ICSID Convention take away with another hand what Art. 54 gave with one hand.<sup>232</sup> This is because sovereign immunity is invariably the single most important legal hurdle to the actual execution of a treaty award both within and outside the ICSID System.<sup>233</sup>

### 3.5.5 *Shortcomings related to Article 27*

Another notable limitation in the ICSID provision in relation to enforcement is the interpretation given to the relationship between the first and last part of Art. 27. The Article provides thus:

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 other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

The first part of this provision can be interpreted to mean that diplomatic protection is prohibited by the Convention. The reason for this is that the historical evolution of IIAs reveals diplomatic protection as one of the remedies for breach on investor's rights. The investors home States before the advent of treaty protection and investment tribunals often intervene in the case of expropriation to help investors recover their investment. The development of IIAs surpassed this practice hence this may explain why the above provision seems not to encourage it. However, the problem with this provision is the interpretation it has received among some practitioners. While some argue that the later part of the provision is interpreted to mean it is only an exception to the main provision in which case it is a necessary remedy when States fail to abide by and comply with the award rendered.<sup>234</sup>

Others believe that in practice it is a major procedure to enforce an award. This opinion is explained by Schreuer who suggests that it can be used concurrently with other enforcement mechanism. He argues that both remedies are available, in principle, to investors to secure compliance with awards. According to him 'there is no indication of any relationship of priority or mutual exclusivity between the two remedies. Enforcement and diplomatic protection may be used simultaneously but as soon as one of these remedies succeeds, the other must be discontinued'.<sup>235</sup> It is submitted that this reasoning is not totally correct in view of the provision of Art 26 of ICSID Convention which states that consent of parties to arbitration under the Convention shall, unless otherwise stated, be deemed consent to such arbitration to

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<sup>231</sup>Ibid n6 p.1121.

<sup>232</sup> Christopher Smith, "The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism can guide reform of ICSID procedure" (2003) Vol. 41 Georgia Journal of International and Comparative. p.567.

<sup>233</sup>Gaetan Verhoosel ' Annulment and enforcement Review of Treaty Awards: To ICSID or Not to ICSID' (2008) Vol.23 Num.1, ICSID Review Foreign Investment Law Journal, pp. 119-120.

<sup>234</sup> Ibid n14 p. 312.

<sup>235</sup>Ibid n6 p. 1120.

the exclusion of any other remedy. Therefore the remedy of diplomatic protection is excluded unless on the ground where enforcement is refused.

The very important point to note from Schreuer's argument is that even though the old rule of traditional diplomatic protection has been largely dispensed with in IIAs it keeps haunting us in other legal disguises.<sup>236</sup> Rudolf Dolzer also opined that diplomatic protection is an alternative and supplement to judicial enforcement of awards under Article 54 because the right of diplomatic protection will revive in the event of non-compliance.<sup>237</sup> This is correct in view of the fact that it allows award creditor to prevail upon its home State to intervene and take steps against the defaulting host State upon their failure 'to abide by and comply with' an award. In practice, the shortcoming with the provision is obvious in that it relies absolutely on the State of nationality of the aggrieved investor to secure compliance with an award.

The implication of this therefore is that the efficacy of this method depends largely on so many variable factors which include the relationship between the investor and its host State, the social economic relationship between the investor's State and any other State where enforcement is sought or general political will of the State to get involve in private arrangements. If these factors are not totally in favor of the investor the award may still not be enforced. It is safe to conclude that it is not a 'ready alternative' to the enforcement of award because it is not totally reliable.

### 3.5.6 *Another Limit : Stay of Enforcement*

The *Sempra v. Argentina* Committee rightly pointed out that '[a]n ICSID award is immediately payable by the award debtor, irrespective of whether annulment is sought or not.' Only where stay of enforcement has been granted under Article 52(5) would the award debtor be temporarily released from the obligation to pay. Having in mind Article and Article 54, under the terms of the ICSID Convention, therefore, stay of enforcement is the only exception to the obligation to comply promptly with an award.

The *MINE v Guinea* stay decision adds that:

Article 53(1) provides that the award is binding on the parties and that each party 'shall abide by and comply with the terms of the award except to the extent the enforcement shall have been stayed pursuant to the relevant provisions of this Convention'. Article 52(4) is one of those relevant provisions. Thus, if an ad hoc Committee grants a stay of enforcement, the obligation of the party against whom the award was rendered to abide by and comply with the terms of the award is *pro tanto* suspended.

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<sup>236</sup>Christopher Schreuer "Calvol's grand children: the return of local remedies in investment arbitration" (2005) the laws and practice of international courts and tribunals, 1pg file:///C:/Users/user1/Desktop/National%20%20court/cspubl\_75.pdf accessed 20/8/2014

<sup>237</sup>Ibid. p. 312.



In view of the above, except where stay is granted, the obligation under Article 54 is absolute. A decision on stay has suspensory effect over the award. As noted by the CDC v Seychelles Committee, 'under the ICSID Convention the stay automatically is effective for municipal enforcement purposes'. Schreuer points out in this regard that the 'competent court or authority to which a copy of the award certified by the Secretary-General is furnished will have to make sure that the award is not subject to any intervening stay of enforcement'.

It should also be noted that Article 52(2) of the ICSID Convention provides that parties seeking annulment shall commence proceedings within 120 days from the date of the award. This means that, during this period (pending stay), the victorious investor may initiate enforcement proceedings. By contrast, the North American Free Trade Agreement prohibits a party from enforcing an ICSID award until expiration of this period.

Stay of enforcement may also be granted in cases of interpretation and revision. It follows that the mere initiation of a procedure of interpretation, revision, supplementation, rectification or annulment, without obtaining stay of enforcement, does not create an obstacle to enforcement.<sup>238</sup>

### 3.5.7 *Argentina's Position and the Rosatti Doctrine*

The obligations under Articles 53 and 54 are separate and independent. As stated by the ad hoc Committee in *Kardassopoulos & Fuchs v Georgia*:

Once an award is made, completion of any further process is unnecessary for the acquisition of a binding character. Should the award debtor not carry out voluntarily the award, the award creditor is only invited by Article 54(2) of the ICSID Convention to furnish to a competent court or other authority of a Contracting State a copy of the award certified by the Secretary-General of ICSID. The party seeking recognition or enforcement of an ICSID award has no condition to prove other than the authenticity of the award, as Article 54(1) of the Convention obliges the Contracting States to recognize an ICSID award as binding and to enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State. Article 53(1) reinforces this obligation to recognize and enforce by specifying that an ICSID award is not subject to appeal or any other remedy except as otherwise provided in the Convention as regards interpretation, revision or annulment of the award.

Stanimir A Alexandrov has commented on Argentina's insistence that the obligation to comply with the award under Article 53 is subject to the successful investor's recourse to the enforcement mechanism of Article 54. He points out that 'Article 54 cannot be interpreted to weaken or diminish the obligation under Article 53'. Argentina's position has been fully described in the *Enron v Argentina* stay decision:

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<sup>238</sup> Schreuer et al (n 7) 1127–8; See also Víctor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No ARB/98/2, Decision on the Republic of Chile's Request for a Stay of Enforcement of the Unannulled Portion of the Award (16 May 2013) paras 31, 34–35.

Argentina on the other hand takes the position that Articles 53 and 54 of the ICSID Convention complement each other and have to be read in conjunction. According to Argentina, Article 53 of the ICSID Convention establishes the final and binding nature of ICSID Awards while Article 54 establishes the way in which ICSID Awards have to be complied with. Argentina submits that Article 53 of the ICSID Convention 'does not establish an obligation of voluntary payment by the State.' Rather, it is said that under Article 54, Argentina is required to treat an ICSID award as if it were a final judgment of a court in Argentina. This means that to receive payment, an award creditor has to comply with the same formalities applicable to final judgments of local courts.

Argentina also tried to avoid enforcement by contending (under what has become known as the 'Rosatti Doctrine') that, since only investors of foreign States have access to ICSID arbitration, this 'bestows an illegal privilege on foreign investors and discriminates against local Argentinean investors'.<sup>239</sup> Therefore, Argentina maintained that ICSID awards would be 'subject to local court review'.

Such arguments are, as many authors suggest, untenable. To accept Argentina's position would mean that enforcement must be first and foremost sought in the debtor State, which is contrary to the ordinary meaning to be given to Article 54. Next to this, Articles 53 and 54 address different subjects. What is more, under such a reading, there would never be an obligation to comply with non-pecuniary obligations in an award. Not the least, such an interpretation would provide a leeway for States to avoid (or at least to defer ad infinitum) enforcement. In the decision on continued stay of enforcement the Enron Committee stressed that:

[I]t would inherently undermine confidence in the ICSID system if a State against which an award has been given could make its own compliance with the award subject to the award creditor availing itself of the mechanisms under that State's national law for enforcement of final judgments of courts.

Argentina's interpretation renders Article 53 meaningless and has been discarded. The main reason for this is that the ICSID dispute settlement mechanism was intended to be an international method of dispute settlement. Hence, 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.

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<sup>239</sup> Anibal Sabater, 'The Weaknesses of the "Rosatti Doctrine": Ten Reasons Why ICSID's Standing Provisions Do not Discriminate against Local Investors' (2004) 15 Am Rev Intl Arb 465, 466.

### 3.5.8 *The linkage requirement*

Further, the so-called 'linkage requirement', according to which there must be a specific link between the underlying claim and the property that is subject to execution, has met with much criticism.

As noted by Reinisch:

One nexus requirement—which is clearly expressed in the US [Foreign Sovereign Immunities Act of 1976]—demands a connection between the property and the underlying claim. Similarly, the [International Law Association] Draft Convention requires that '[t]he property is in use for the purposes of commercial activity or was in use for the commercial activity upon which the claim is based'. The generally restrictive approach of the [European Convention on State Immunity] is also reflected in its Article 26 which permits enforcement measures only against property 'used exclusively in connection with [an industrial or commercial] activity'.

The nexus requirement would constitute a serious limitation on execution as it is highly unlikely that a Respondent State will keep commercial assets in another State that can be said to have a direct connection to an investment in the territory of the Respondent State.

Article 19(c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (not yet in force) attempts to overcome this hurdle by permitting execution in respect of 'property that has a connection with the entity against which the proceeding was directed' as is stated in Article 19(c) of the UN Convention itself. This provision, however, does not currently reflect customary international law and was rather an attempt at 'harmonization of practice in this area'.<sup>151</sup> State practice on this question is still unsettled. Schreuer has thus pointed out that the ICSID Convention will evolve hand in hand with the evolution of the practice of States in the field of immunity.

There are certain types of property, such as property used for military purposes, property of the State's central bank etc, which cannot be attached in enforcement without explicit waiver on the part of the State concerned. The rationale for maintaining immunity from execution against such property is that certain State assets, such as central bank reserves or military and diplomatic property, are integral to the functioning of a State and should not be subject to seizure without explicit waiver on the part of the State.<sup>240</sup> Diplomatic property is additionally protected under

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<sup>240</sup> Andrea Bjorklund, 'State Immunity and the Enforcement of Investor-State Arbitral Awards' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 303.

customary international law and under the 1961 Vienna Convention on Diplomatic Relations.

### 3.5.9 *Defenses To Enforcement Found Within The ICSID Convention*

The growth of ICSID's caseload will give rise to many new opportunities for disappointed parties to explore possible defences to enforcement of an ICSID award. The traditionally light ICSID docket has undergone a dramatic change in recent years as a result of the explosion in bilateral investment treaties containing consents by the signatory states to ICSID arbitration. Disputing parties can be expected to look closely at the language of the ICSID Convention regarding enforcement of ICSID awards in national courts. Significantly, defences to enforcement of ICSID awards may arise out of the "final judgment" language of Article 54(1) of the ICSID Convention itself.

Article 54(1), as noted above, requires enforcement of the monetary obligations of an ICSID award "as if it were a final judgment of a court" in the forum where enforcement is sought. Although the phrase "final judgment" suggests true finality, in fact many jurisdictions permit final judgments to be challenged in a number of circumstances. The practice in the United States, France, Colombia and Chile is illustrative.

In the United States, Rule 60(b) of the Federal Rules of Civil Procedure (FRCP) sets out the bases upon which a U.S. federal court may refuse to enforce a final judgment:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial ... ; (3) fraud (whether heretofore denominated as intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Thus, Rule 60(b) offers U.S. federal courts a number of grounds for refusing to enforce a final judgment. Out of the thousands of cases in U.S. courts asserting Rule 60(b) as a basis for overturning a final judgment, however, only a very small proportion have been successful. Still, a careful attorney may pick and choose among the successes for cases that offer parallels to common arguments for challenging awards in investment treaty arbitrations. In *Tsakonites v Transpacific Carriers Corp.*, for example, the court vacated a judgment dismissing plaintiff's claim for failure to state a cause of action because the U.S. Supreme Court had subsequently ruled in another proceeding

that a similar claim could be brought. And in *Pioneer Investment Services Co. v Brunswick Associates Ltd. Partnership*, the U.S. Supreme Court held that, in circumstances constituting “excusable neglect,” a creditor would not be subject to a final judgment disallowing its claim in bankruptcy proceedings even though the claim was submitted late.<sup>28</sup> Analogous fact patterns may arise in investor-state arbitration.

In addition, allegations of unequal knowledge and bargaining power, often raised in investment treaty arbitration, have played a role in Rule 60(b) cases. In *United States v Williams*, for example, the court voided an order for the sale of a farm by a tax authority to recover back taxes. In reaching that conclusion, the court held that, while “persons with more experience, education, and general knowledge would have taken effective steps to preserve and protect their interest in the land,” in the particular circumstances of the case the failure of the petitioner to raise certain defenses in the earlier tax litigation was “excusable neglect” under Rule 60(b)(1) of the FRCP even though the petitioner had been represented by counsel in that litigation.

### 3.5.10 *Defenses To Enforcement Found Outside The ICSID Convention*

Apart from the defenses to enforcement of an ICSID award arising out of the “final judgment” language of the ICSID Convention itself, disappointed Contracting States may also use methods outside the ICSID Convention to resist the enforcement of awards. These methods might include using the national courts to invalidate ICSID awards for reasons arguably not allowed under the ICSID Convention. Disappointed Contracting States may also employ international law in their efforts to avoid their treaty obligations under the ICSID Convention.

For what concerns the invalidation of the Award by the Home State, disappointed parties may seek invalidation of an ICSID award in the courts of their home state. Although, to the authors’ knowledge, no party to ICSID proceeding has yet sought to invalidate an ICSID award in its home state, it is possible that home state courts may be sympathetic to losing parties in an ICSID proceeding regardless of the terms of the ICSID Convention. Although the annulment of an ICSID award in the home state may not render that award unenforceable in other states, such a decision could affect the practical opportunities for a prevailing party to enforce the award.

Article 53(1) of the ICSID Convention states that ICSID awards “shall not be subject to any appeal.” But, in other contexts, courts have not always upheld agreements to limit appeals of arbitration awards. In the recent Argentine case of *Jose Cartellone Construcciones Civiles, S.A. v Hidroelectrica Norpatagonica S.A.*, for example, the losing party sought to modify an arbitration award rendered under procedures that disallowed an appeal of the award. The Argentine High Court, the National Supreme Court of Justice, nevertheless accepted the respondent’s argument that the arbitration award should be modified in the interests of *ordre public*.

The claimant had successfully obtained an award against the respondent for damages plus interest. When the claimant sought to enforce the award in Argentina,

the respondent challenged various aspects of the award, including the dates upon which interest was calculated. In response, the claimant argued that the parties had agreed the award was not subject to appeal. Although the lower court accepted the claimant's argument, the National Supreme Court of Justice reversed the lower court. The Supreme Court of Justice found that certain portions of the award relating to interest accrual contravened the terms of the arbitration agreement. The Supreme Court therefore modified the award to reduce the interest amount.

More significant than the result, the Supreme Court held that agreements to restrict review of arbitration awards in the courts do not prevent the court from determining whether such awards contradict *ordre public*. The Supreme Court reasoned that parties cannot restrict appellate review by agreement, because the public's interests override the parties' intentions. In this case, the Supreme Court found that the award did not comport with what it regarded as the realities of the situation and therefore produced a disproportionate and irrational result in contravention of *ordre public*.

Although the Argentine Supreme Court's decision in the *Jose Cartellone* case to examine the award in light of the *ordre public* did not occur pursuant to Treaty arbitration, recent actions by the Argentine government indicate that Argentina might use this and other reasoning to seek the invalidation of awards rendered pursuant to ICSID arbitration. In an ICSID hearing related to *CMS Gas Transmission Co. v Argentine Republic*, Argentina argued that national public services such as gas transportation and distribution must take into account particular needs of social importance. In such circumstances, Argentina argued, necessity and emergency allowed the government to change public policy without violating its Treaty obligations.

The CMS tribunal rejected Argentina's arguments regarding necessity and national emergency as a defense to Treaty violations and awarded CMS U.S.\$ 133 million. Before and after the tribunal's award to CMS, Argentinean officials have made statements that ICSID awards should be subject to domestic court review based on the arguments stated above, as well as other possible bases. For example, Argentina's former Attorney General, Horacio Rosatti, made public arguments that ICSID did not have jurisdiction over Argentina if the Argentine Supreme Court found an award incompatible with the Argentine Constitution. Notwithstanding this and other statements regarding the review of ICSID awards, Argentina, proceeding under the ICSID rules, has brought an annulment challenge to the CMS award rather than use its domestic courts to resist enforcement of the award. Argentinean officials have also been meeting with foreign government officials and some ICSID complainants in an attempt to amicably resolve the outstanding ICSID cases. Although Argentina, of course, may ultimately decide to use the domestic courts to resist enforcement of ICSID awards, there does not appear to be such a review in the immediate future.

Recent actions show that a trend for states to resist the enforcement of arbitral awards may be gaining force. After losing an UNCITRAL arbitration to Occidental Petroleum based on violations of a bilateral investment treaty, the Republic

of Ecuador sought to avoid enforcement of the award. Initially, Ecuador brought a jurisdictional challenge to the award in the English courts, as London was the seat of the arbitration. The court held that English courts could entertain the challenge to the jurisdiction of the tribunal even though the right of arbitration was derived from public international law.<sup>71</sup> Although the result may have been different had the *Occidental Petroleum* arbitration been conducted pursuant to the ICSID Convention, this case shows that disappointed states cannot always be relied upon to pay awards arising out of investment treaty arbitration without a fight. Incidentally, Ecuador has continued the fight by bringing an action against Occidental Petroleum in local Ecuadorian courts for contract violations based on actions taken by Occidental related to a production sharing contract.

The *Karaha Bodas* arbitration presents another example. In April 1998, Karaha Bodas Corp. (KBC) instituted arbitration proceedings against Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), an Indonesian state-owned company, pursuant to an agreement containing an arbitration provision. That agreement provided for UNCTRAL ad hoc arbitration and limited the rights of the parties to challenge any resulting award.<sup>74</sup> Despite this limitation, Pertamina sought to vacate the award in Switzerland and Indonesia.<sup>75</sup> The Swiss court rejected Pertamina's action on procedural grounds.<sup>76</sup> The Indonesian district court, however, annulled the award, finding in part that the award was contrary to Indonesian law and that Indonesian courts had authority to determine the validity of the award. Recently, though, the Indonesian Supreme Court overturned that lower court decision, finding that the district court had no "authority to examine and adjudicate" the award to KBC.

### 3.5.11 *The International Law of Treaties for refusing to enforce an ICSID award*

According to Edward Baldwin, Mark Kantor and Michael Nolan, the international law of treaties may also create grounds for refusing to enforce an ICSID award. Professor Schreuer, as noted above, has remarked that the "finality of [ICSID] awards would also exclude any examination of their compliance with international public policy or international law in general." Here too, commentators may have too quickly dismissed the prospect that national courts will not review an ICSID award on the basis of international public policy, as illustrated by the reference to international ordre public found in *SOABI v Senegal*. Moreover, international law respecting Treaty obligations applies to both the interpretation of obligations of Contracting States under the ICSID Convention and to the circumstances in which those obligations may be suspended. Therefore, the international law of treaties may also come into play. Let us turn first to the interpretation of a Contracting State's obligation under Article 54(1) to recognize and enforce an ICSID award.

The core instrument for interpreting treaties is the Vienna Convention on the Law of Treaties, to which virtually all countries are adherents. Article 31(3)(c) of the Vienna Convention tells us that treaties should be interpreted in light of "any relevant rules of international law applicable in the relations between the parties." Sympathetic

domestic courts might employ, among other arguments, the international law doctrines of “abuse of right,” “denial of justice,” “unfair and inequitable treatment” or “good faith” as bases to interpret the recognition and enforcement obligations established by ICSID Article 54(1).

The doctrine of “abuse of right” arguably obligates parties to exercise a right reasonably and in good faith. An abuse of right may arise, for example, where a party “adopts a position contrary to one it has previously taken [and] the other party has relied on the initial position to its detriment.” This international precept is codified in the domestic law of many countries as well. Article 2 of the Swiss Civil Code states that “[e]very person shall exercise his rights and perform his obligations in accordance with the rules of good faith. A manifest abuse of right is not protected by law.” Article 281 of the Greek Civil Code states that “[t]here is an abuse of a right under this article, if the party exercising that right goes well beyond the limits of accepted principles of good faith and morality. The exercise of a right becomes ‘abusive,’ if a reasonable person would say its exercise exceeded its financial or social objective.” Although admittedly in a different context, the concept of “abuse of right” was employed by the arbitrators in recent ad hoc investor-state arbitrations involving geothermal power projects in Indonesia to limit the damages awarded against the Indonesian side.<sup>241</sup>

“Fair and equitable treatment” and “denial of justice” may provide another set of bases for a court to narrowly construe its enforcement obligations under ICSID Article 54(1). The revised 2004 Model U.S. Bilateral Investment Treaty states in Article 5.2(a) that the customary international law obligation of “fair and equitable treatment” includes the obligation of a state “not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” According to the ICSID “Additional Facility” tribunal in *Robert Azinian and others v United Mexican States*, a finding of denial of justice may be based upon: (i) a court decision clearly incompatible with international law; (ii) lack of procedural and substantive due process, including the relevant court’s refusal to entertain a suit, creation of undue delay, administration of justice in a seriously inadequate way, or adoption of a “clear and malicious misapplication of the law”; or (iii) in some circumstances, a judicial decision contrary to municipal law. Arguably, proceedings held before an ICSID tribunal may fall below international standards of justice if there are instances of corruption, threats, unwarranted delay, flagrant abuse of judicial procedure, or a judgment so manifestly unjust that no competent and honest court could have issued it. While “denial of justice” has developed as a customary international law standard applicable to states, not private parties, there is no assurance that a court in an enforcing jurisdiction would reject the application of that standard to investor-state arbitration proceedings conducted pursuant to an international treaty and administered by an international organization.

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<sup>241</sup> See *Himpurna California Energy Ltd. (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award, 14 Mealey’s Int. Arb. Rep. A-1 (1999) and *Patuha Power Ltd. (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award, 14 Mealey’s Int. Arb. Rep. B-1 (1999)



Similarly, based on early international decisions such as the 1926 decision in *Neer v United Mexican States*, the minimum standard of “fair and equitable treatment” under customary international law has traditionally been understood to prohibit acts by states amounting to “bad faith, wilful neglect, clear instances of unreasonableness or lack of due diligence.” For instance, the international standard of fair and equitable treatment may be invoked where “national law does not provide ... for adequate guarantees of fair treatment in accordance with generally shared values of substantial and procedural fairness and justice in respect of the enjoyment of property and the normal conduct of business operations.” An ICSID tribunal is not, of course, an organ of a particular state. Nevertheless, it is certainly possible that counsel for a disappointed respondent state may seek to extend the principle of fair and equitable treatment to public sector activities such as investor-state arbitration under the auspices of an arm of the World Bank Group, ICSID. Accordingly, a respondent state might argue in the enforcement forum that the obligation to enforce the ICSID award under Article 54(1) is subject to interpretation taking account of unfair or inequitable treatment by the tribunal.

Customary international law principles of “good faith” might affect the claimant’s rights in local enforcement proceedings as well. In a dispute between a foreign investor and a host state, the host state may assert that the foreign investor has made material misrepresentations or engaged in corrupt practices or similar misconduct. Such allegations may be renewed when the ICSID award is being enforced to support an argument that the enforcement obligations of an ICSID Contracting Party are to be interpreted in light of international law principles of good faith. If lack of good faith by the foreign investor in the underlying transaction is proven, those principles might buttress an argument that a Contracting State need not enforce an ICSID award in its national courts.

## **Chapter 4**

### ***Possible solutions to the ICSID Achilles' heel***

Few authors have attempted to offer and propose solutions to the ICSID Achilles' heel even if non-compliance by States with ICSID awards is the exception, and voluntary compliance remains the rule.<sup>242</sup> Hereinafter we have tried to give an overview of all the possible solutions that could be adopted to heal the Achilles' heel.

#### **4.1 *Waiver of immunity and provision of a list of attachable assets***

Waiver remains one of the most reliable ways of avoiding the immunity bar. As part of the doctrine has noted, it is the 'only one hope'.<sup>243</sup> However, waiver will be applicable only where there is a direct investment agreement between the investor and the host State, and it will depend on the negotiating strength of the former.

There are instances in which a waiver is contained in a bilateral investment treaty (BIT); however, these instances are rare as they require reciprocity, meaning that the home State must waive its immunity as well. Therefore, States are unwilling to include such clauses in BITs.

It should also be noted that, under domestic law, a waiver of immunity in respect of diplomatic or military property may not be possible. For example, the US Court of Appeals, Ninth Circuit, in *Af-Cap, Inc v Chevron Overseas (Congo) Ltd*, held that a waiver whereby a State waives its immunity with respect to all of its property held in the United States, is invalid. The Court required the creditor to prove that the property is commercial.

Schreuer cautions that 'the reference of Article 55 of ICSID to the law of the respective country means that any limitation in that law to the validity of a waiver would have to be respected . . . [Thus], a waiver that goes beyond that provision [may not] be effective.'

The Commentary to the ILC's Draft Articles on Immunity of States (which represent the preparatory work to the United Nations Convention on Jurisdictional Immunities of States and Their Property), however, is explicit in that a State may validly waive its immunity even with regard to specially protected property. Moreover, in view of the fact that most States already permit enforcement on commercial property, it would be

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<sup>242</sup> Among them we can for sure find Uchkunova and Temnikov who offered a clear picture of possible remedies available.

<sup>243</sup> See for this part Uchkunova and Temnikov. Few authors have tried to propose solutions to the enforcement issue.

illogical additionally to require a waiver with regard to property which does not enjoy immunity anyway.

Schreuer, however, makes the important observation that under the European Convention on State Immunity, because of its far-reaching protection even of commercial property, a waiver that covers such property would make sense.

A weak point of this solution is that it does not solve the problem of unavailability of assets or their (possible) subsequent conversion from commercial to non-commercial.

Another possible solution is found in *Mitchell v Congo* where Mr Mitchell agreed to indicate his address in South Africa and the United States and to provide the Respondent State with a list of assets that could be attached should the Democratic Republic of Congo (DRC) be successful in the annulment proceedings, on condition that the DRC proceeds alike. This could well serve as an example for subsequent cases, but would depend on the good will of the host State.

#### *4.1.1 Making Stay of Enforcement Conditional on the Posting of a Financial Guarantee: 'Comfort Letters' as Implied Waiver—Attachment of Escrowed Funds by Third Creditors*

A stay of enforcement may be requested in accordance with Article 52(2) of the ICSID Convention pending a decision on annulment. Neither the granting of a stay, nor the imposition of conditions such as posting a financial guarantee, however, represents an automatic entitlement of the award creditor. This is due to the fact that the ad hoc committee may grant the request for a stay only if the circumstances so require.

The posting of a guarantee aims at preventing the risk of non-enforcement in the future. The guarantee may be defined as a form of 'conditional payment in advance' in that it converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids any issue of sovereign immunity from execution, which is expressly reserved by Article 55 of the Convention. In the event that the annulment fails, the successful investor may enforce on the security imposed.

Absent such a security, enforcement proceedings would at all times depend on the successful investor's ability to overcome the defence of sovereign immunity.

Likewise, the *Mitchell v Congo* Committee stated that:

[B]y virtue of the Convention a State has the obligation to comply with the award, while annulment of an ICSID award is 'unusual'. It thus seems reasonable to order the posting of a guarantee when a State requests the stay of enforcement of the award, except if this entails significant costs for said State, or the freezing of the amount due with serious consequences on this State's budget.

Thus, while the presumption of the good faith of States remains valid, one may wonder whether in future stay-of-enforcement proceedings it would not be preferable

that the Committees demand security as a matter of course, subject only to the exception that the State is able to prove that it will suffer severe economic hardship as a result.

A weak point of this solution is that, in the event that the State refuses to honour the condition thus imposed, there is no way for the award creditor to enforce it since it does not qualify as a final award, as above noted. The only sanction would be termination of the stay.

In a number of cases, annulment Committees have imposed as a condition of stay that the Respondent State provides a 'comfort letter'.

Thus, in *CMS v Argentine Argentina* provided such a letter stating that in the event that annulment is not granted, it would 'recognize the award . . . as binding and . . . enforce the pecuniary obligations imposed by that award within its territories'. This can well raise the question as to whether such a 'comfort letter' could be read as an implied waiver of enforcement immunity. This proposition has not been tested in practice, however.

Another solution may be found the attachment of escrowed funds by third creditors. This solution can be found in cases such as the *Second Enron stay Decision* where the Committee stated:

[O]ther claimants, including those with unsatisfied ICSID awards for payment of monetary amounts, could actively seek to execute against the funds that would be held by the escrow agent or Ponderosa in the event that the Award is annulled.

#### *4.1.2 Awarding Post-award Interest at a Higher Rate*

ICSID tribunals have consistently awarded interest on compensation or damages in investment disputes. Interest compensates the Claimant for the time-value of money since the compensation has been due to him at a certain date preceding the date of the award (most often the date of the violation).

The Tribunal in *Vivendi* made it clear that '[t]he object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive'.

Post-award interest, specifically, is intended to compensate for any additional loss incurred from the date of the award to the date of final payment and to protect the value of the award against inflation. Thus, post-award interest has a bearing on the efficacy of the award in that it is intended to discourage the respondent from delaying enforcement.

Therefore, post-award interest must be awarded at a sufficiently high rate in order to achieve this result. Otherwise, if the rate of interest is less than the rate at which

the State is able to gain on the withheld award amount it will not be encouraged to pay promptly.

As observed by Penelope Nevill, tribunals 'do not always make a distinction between the award of pre-award interest and post-award interest', i.e. they award them at the same rate. This question seems unnoticed, but awarding post-award interest at a higher rate may serve as a good incentive for the respondent State to comply promptly with the award. Ensuring the effectiveness of the award after all is the main function of post-award interest.

One very interesting point, in this regard, is that in *Enron v Argentina*, Argentina opposed the enforcement of the Award and demanded stay due to the fact that the Claimant had allegedly sought to amend the Award in a national court (in the United States) by claiming post-award interest, despite the fact that post-award interest had not been awarded in the Award itself. The Claimant countered that, consistent with Article 54 of the ICSID Convention, an ICSID award is enforced in the United States as if it were a final judgment, and that when an ICSID award is converted into a United States judgment, it accrues post-judgment interest like any other United States judgment. The Committee noted that it has not been referred to any authority suggesting that there is anything inconsistent with the ICSID Convention, or with the Award in this case, for a party enforcing an award under Article 54 of the Convention to avail itself of provisions under the relevant national law for post-judgment interest, even if the award debtor would not be liable to pay interest if it complied with an award under Article 53 without enforcement proceedings under Article 54. This should also serve as an incentive for the State to comply voluntarily and speedily with the award.

#### 4.1.3 *Possible Sanctions by the World Bank*

Commentators have pointed out that the Secretary General of ICSID can remind non-paying States of 'their international obligation to respect the result of a process to which they have given their consent'. Additionally, under its Operational Policy 7.40 concerning Disputes over Defaults on External Debt, Expropriation, and Breach of Contract, the World Bank can refuse new loans in the event that the Bank 'receives notice that a member country is unwilling to take steps to resolve a dispute over its failure to service external debt'.<sup>244</sup>

This is not a remedy open to the investor, technically speaking, since it is outside its control.

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<sup>244</sup> World Bank Operation Policy Statement 7.40—Disputes over Defaults on External Debt, Expropriation, and Breach of Contract ('OP 7.40') (March 2012) <[http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064628\\_menuPK:64701763\\_pagePK:64709096\\_piPK:64709108\\_theSitePK:502184,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064628_menuPK:64701763_pagePK:64709096_piPK:64709108_theSitePK:502184,00.html)> accessed 15 November 2017.

#### 4.1.4 *Assignment (Blue Ridge case)*

CMS assigned its Award against Argentina to Blue Ridge Investments, LLC. Yas Banifatemi has observed that this is yet another possible solution to the problem of immunity.

Argentina, however, objected to the assignment arguing that 'CMS has—improperly—transferred its rights to the award, which requires prior analysis of the legality under international law'. Schreuer also speaks of the 'requirement that only one of the original parties may initiate a proceeding for the recognition and enforcement', and states that this can present problems even in cases of corporate succession.

Despite arguments as to the impropriety of such assignment, the Committee in the *Sempra v Argentina* Stay Decision ruled that it was unable to accept that CMS's transfer of rights under the Award served as a justification of Argentina's failure to abide by and comply with the Award.<sup>200</sup> Similarly, and importantly, in its recent Decision regarding enforcement of the CMS award the US District Court for the Southern District of New York held that, given that the enforcement of awards is subject to local law, 'nothing in the . . . New York law prevents an assignee from seeking recognition and enforcement of an ICSID Convention award'.<sup>245</sup>

#### 4.1.5 *Piercing the Corporate Veil*

Under Article 25(1) read together with Article 25(3) of the ICSID Convention a State may designate a constituent subdivision or agency to become a party to the proceedings before the Centre. This is not to say that attribution is affected and, where such designation is lacking, the Tribunal will not uphold jurisdiction against the State. However, as remarked by Schreuer, '[i]n some instances the State entity may be the only potential respondent under the rules of State responsibility'. This happened for example in the cases of *Repsol v Petroecuador* and *Tanzania Electric v IPTL*.

As the UNCTAD Course points out, '[i]n such a case, the obligation to abide by and comply with an award would be incumbent upon the constituent subdivision or agency rather than upon the host State.' Consequently, an award rendered against the State may not be enforced against such a constituent subdivision or agency and vice versa.

Therefore, it would seem wise for investors—when instituting proceedings before the ICSID—to be cautious to ensure the participation of such State entities as

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<sup>245</sup> US District Court for the Southern District of New York, Order of 30 September 2012, 10 Civ 153 (PGG) 20 <<http://www.italaw.com/sites/default/files/case-documents/italaw1102.pdf>>

parties to the proceedings (or the State, as the case may be) with a view to optimizing the chances of enforcement.

Similarly, in the case of *Benvenuti & Bonfant v Congo*, the Award creditors sought enforcement in France of an award rendered against The Congo by seizing assets of Banque Commerciale Congolaise (BCC). The Cour de cassation held, however, that *Benvenuti & Bonfant* was the creditor of the State of the Congo but not of BCC, and it therefore rejected the award creditors' claim.

Still, there have been cases in practice where assets of State entities have been seized for debts of the State itself. For example, in *First National City Bank v Banco Para el Comercio Exterior de Cuba*, the US Supreme Court pierced the corporate veil of Bancec (a State-owned bank). In a similar vein and as reported by Emmanuel Gaillard, the Paris Court of Appeals has allowed enforcement of awards against a State through assets belonging to a national company tightly controlled by that State in four decisions.<sup>246</sup>

This exception is relatively limited in that it will only apply 'when a State-controlled company exhibits a near total lack of autonomy' (and is dependent on the peculiarities of the domestic law), but this is better than nothing.

This issue touches also on the important question of asset stripping. Thus, in the *Enron v Argentina* stay decision the Committee was unable to attribute asset stripping to Argentina since it was carried out by an Argentinean province:

As regards Argentina's alleged diversion of assets away from New York to prevent their attachment in satisfaction of the CMS award, the Committee further notes that the assets in question belonged to a province of Argentina which was not alleged to be involved in the events to which the claim in the CMS case related. The Committee is unable to conclude on the basis of the material before it that the diversion of these assets away from New York, if this occurred, is demonstrative of any intention on the part of Argentina, if the stay is continued, to take steps that would frustrate or impede the future execution of the award in the event that it is not annulled.

Consequently, there is a good policy argument supporting the proposition of piercing the corporate veil since, otherwise, States would take an incentive to create separate entities in order to avoid enforcement or to freely strip of their assets.

Likewise, the International Court of Justice has recognized in the *Barcelona Traction* case the principle of lifting the corporate veil:

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<sup>246</sup> Emmanuel Gaillard, 'Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles' in IAI Series on International Arbitration No. 4 (International Arbitration Institute 2008) 179, 181.

[The] veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

#### 4.1.6 *Regional Human Rights Courts: The Stran Case*

A second public international law option potentially available to a party whose arbitral award has been wrongfully annulled or left unenforced is to seek redress before one of the regional human rights courts. The three major institutions established by international human rights treaties are: the European Court of Human Rights (ECtHR), whose jurisdiction extends to all 47 States of the Council of Europe (COE); the Inter-American Court of Human Rights (IACtHR), with competence in respect of the 20 States within the Organization of American States that have adhered to its jurisdiction (out of 35); and the nascent African Court of Human and Peoples' Rights (ACtHPR), covering the 26 member States of the African Union to accept its jurisdiction (out of 54). Any claim before these tribunals must be brought under their discreet constituent treaties – respectively the European Convention on Human Rights (ECHR), the American Convention on Human Rights (*ACHR*),<sup>247</sup> and the African Charter on Human and Peoples' Rights (*ACHPR*).<sup>248</sup>

In addressing the human rights courts in greater detail, we first discuss the threshold matter of who can bring claims before them (Subsection 1). Next, we consider the relevant human rights that can be invoked in cases involving the non-enforcement or annulment of arbitral awards, in particular interference with property (Subsection 2), and the right to a fair trial (Subsection 3). Finally, we discuss the remedies available (Subsection 4). Annex C provides a summary of the relevant human rights cases decided to date.

The three regional human rights bodies differ materially in their jurisdictional structures. The ECtHR affords the greatest degree of access. There, both natural and legal persons may bring direct complaints before the Court on their own initiative, provided that the offending State is a party to the ECHR. By contrast, under the IACHR, a claimant must petition the Inter-American Commission on Human Rights to begin an investigation on his or her behalf, and can reach the IACtHR only on the latter's recommendation. The Convention applies uniquely to natural persons, thus depriving corporations of any access to the IACtHR – although the Court has extended the Convention's protection to injured shareholders in their personal capacities.<sup>145</sup>

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<sup>247</sup> Organization of American States, American Convention on Human Rights, "*Pact of San José*," *Costa Rica*, 22 Nov. 1969, available at <http://www.unhcr.org/refworld/docid/3ae6b36510.html>.

<sup>248</sup> Organization of African Unity, *African Charter on Human and Peoples' Rights* ("*Banjul Charter*"), 27 Jun. 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www.unhcr.org/refworld/docid/3ae6b3630.html>; and Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, 9 Jun. 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III) (establishing the Court).



The ECtHR first articulated the principles by which it would afford protection to award creditors in its 1994 decision in *Stran Greek Refineries & Stratis Andreadis v. Greece (Stran)*. The *Stran* case concerned the validity and enforcement of a purely domestic arbitral award – although the Court would extend the same principles to international arbitral awards in its subsequent jurisprudence.

*Stran* originated in an application against Greece lodged by two Greek nationals – a private limited company and its sole shareholder. The underlying dispute arose out of a construction contract concluded in 1972 between Stran and the then-existing Greek military regime, which the State unilaterally terminated in 1977 after the restoration of democracy. Stran commenced a domestic contractual arbitration against the State and received a multi-million dollar final award in 1984. In subsequent challenge proceedings, the Greek courts upheld the validity of the award at first instance and in the court of appeals. Then in May 1977, after the judge-rapporteur of the Court of Cassation had circulated a draft opinion ruling in favor of Stran, the Greek legislature passed a law retroactively voiding the contract and its arbitration clause, as well as any arbitration awards resulting from the contract.<sup>152</sup> The Court of Cassation ultimately upheld the constitutionality of that law and, accordingly, annulled Stran's award.<sup>153</sup>

Before the ECtHR, Stran claimed that by annulling the award, the Greek legislature and judiciary had violated its right to property under Article 1, Protocol 1 of the ECHR (P1-1), as well as its right to a fair trial under the Convention's Article 6 (as to which more will be said below). P1-1 provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>154</sup>

In assessing Stran's claim that Greece wrongfully interfered with its property, the ECtHR divided its analysis into three questions: (i) whether the arbitral award was a "possession" within the meaning of P1-1; (ii) whether the State interfered with Stran's rights in the award; and (iii) whether any such interference was justifiable under the "fair balance" test typically applied by the Court in P1-1 cases.

As to the first question, the Court held that an arbitral award constitutes a "possession" for purposes of P1-1, so long as it has "given rise to a debt in [the applicant's] favor that was *sufficiently established to be enforceable*." The ECtHR looked to domestic law in answering that question, determining that that "[u]nder Greek legislation arbitration awards have the force of final decisions and are deemed to be

enforceable,” and are not subject to appeal on the merits. The Court further noted that in *Stran’s* case, “the ordinary courts had . . . already twice held – at first instance and on appeal – that there was no ground for . . . annulment.” Accordingly, and despite the contrary ruling by the Court of Cassation, the Court held the award to be sufficiently enforceable to constitute a “possession” within the meaning of P1-1.

The Court had no difficulty finding governmental interference with *Stran’s* property, carried out by both the Greek legislature and the judiciary. Through those organs, the underlying contract, the arbitration clause and the subsequent award had all been voided.

The ECtHR then turned to the third prong, assessing whether in acting as it did, the Greek State had struck “a fair balance . . . between the demands of the general interest to the community and the requirements of the protection of the individual’s fundamental rights.”<sup>160</sup> Greece attempted to justify its actions as being “part of a body of measures designed to cleanse public life of the disrepute attaching to the military regime.”<sup>161</sup> In assessing this submission, the Court acknowledged the State’s sovereign prerogative to amend or terminate contracts concluded with private individuals, but determined that the exercise of that right entails an obligation to pay compensation. Further, and similar to the reasoning of the investment tribunal in *ATA*, the Court found that Greece had acted improperly by voiding the underlying contract’s arbitration clause. In the Court’s words, “to alter the machinery set up by enacting an authoritative amendment to such a clause would make it possible for one of the parties to evade jurisdiction in a dispute with respect to which specific provision was made for arbitration.” Taking all of these factors into consideration, and while recognizing Greece’s legitimate interest in expunging vestiges of the dictatorship period, the Court determined that Greece’s actions had upset the balance between protection of the right to property and the requirements of the public interest, resulting in a violation of P1-1. As explained further below, the Court also found Greece’s actions to be in violation of the right to a fair trial under Article 6(1). The Court proceeded to award *Stran* full compensation, ordering Greece to pay the entire value of the award, plus 6% interest as provided for in the award itself.<sup>167</sup>

The ECtHR has expounded upon the principles articulated in *Stran* in a series of cases decided in the period 2008 to 2010. The result has been the extension of the coverage of P1-1 to the recognition and enforcement of international arbitral awards, and expansion of the scope of protections due.

*First*, as regards the threshold question of when an arbitral award constitutes a “possession,” the Court has confirmed that the protections of P1-1 extend to arbitral awards rendered in international cases, irrespective of the nationality of the parties to the underlying arbitration, or how the applicant came into possession of the award. *Regent Company v. Ukraine*, decided in 2008, involved an arbitral award rendered under the auspices of the Ukrainian Chamber of Commerce in favor of a Czech company and against a State-owned corporation. After seeking to enforce the award in the Ukraine for four years, during which period the State-owned respondent entered bankruptcy, the Czech company sold its award to

Regent Company. The latter, incorporated in the Seychelles and thus outside the CoE region, continued enforcement efforts in the Ukraine, but was stymied by recalcitrant bailiffs and a law staying the enforcement of debts against State-owned entities. Regent Company then turned to the ECtHR, which found the award to be sufficiently enforceable to constitute a “possession” for P1-1 purposes. The Court applied a similar analysis two years later in *Kin-Stib & Majkić v. Serbia*, and went further still in *Sedelmayer v. Germany*.

In sum, the ECtHR’s jurisprudence establishes that a Member State may violate P1-1 where its courts fail to recognize or enforce a commercial arbitration award, provided three conditions are met. *First*, to be protected under P1-1, an award must be “a possession” – meaning that it must be “sufficiently established to be enforceable.”<sup>181</sup> *Second*, the State must have interfered with this possession. Interference is a relatively broad concept that includes not only a State’s outright refusal to enforce an award, but also a failure to enforce fully and within a reasonable time. *Third*, the Court must determine whether any such interference is proportional – in the sense of pursuing a legitimate aim and fairly balancing that objective against the individual’s right to property. This will necessarily be a fact-specific inquiry, as to which the Court has reached divergent results in the cases decided thus far.<sup>182</sup>

Going forward, the chief open question relates to the first prong of the P1-1 test. In all of the cases so far adjudicated, the underlying arbitral awards have either been upheld by the national courts against challenge (in *Stran* and *Sedelmayer*) or not challenged there (in *Regent Company* and *Kin-Stib*). It remains to be seen how the ECtHR would view a case in which an arbitral award had been set aside in the country of origin, or denied enforcement in another forum, on arguably proper grounds. If the investment treaty cases are any guide, one might surmise that the Court would require evidence of court malfeasance – or at least misfeasance – before finding a violation of P1-1 in such circumstances.

In addition to finding a violation under P1-1, *Stran* opened a second avenue through which a State may incur liability for preventing or impeding the enforcement of an arbitral award. That avenue is the right to a fair and reasonably timely trial, as enshrined in Article 6(1) of the ECHR.<sup>249</sup> Article 6(1) provides: “In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .”

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<sup>249</sup> See IACHR, art. 21 (“(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interest of society; (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law”); ACHPR, art. 14 (“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”).

As a threshold matter, the Court confirmed in *Stran* that the right to recover the proceeds of an arbitral award constitutes a “civil right” within the meaning of Article 6(1). That civil right, the Court clarified, exists on the international plane under the ECHR, such that its content may not be assessed “solely by reference to the respondent State’s domestic law.”<sup>250</sup> And as *Regent Company* makes clear, that civil right extends to any subsequent purchaser of the arbitral award, enabling the latter to pursue claims before the ECHR.

Article 6(1), as interpreted by the ECtHR in *Stran* and the subsequent cases cited above, imposes two obligations on ECHR Member States in respect of their treatment of arbitral awards: (a) a prohibition on unfair treatment of the award creditor in the courts, and (b) a requirement of reasonably prompt enforcement action.

With respect to the first obligation, the ECtHR has held that the principle of equality of arms lies at the heart of the fair trial right. “In litigation involving opposing . . . interests, that equality implies that each party must be afforded a reasonable opportunity to present his case – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.” In *Stran*, the Court thus found fault with both the timing and manner of Greece’s legislative intervention into the applicant’s enforcement proceedings in the Greek courts. As explained above, after the Court of Cassation had indicated to the parties that it would rule in favor of *Stran*, the legislature passed a law retroactively nullifying *Stran*’s claim and the underlying arbitration agreement. The ECtHR ruled that Article 6(1) precludes “any interference by the legislature with the administration of justice designed to influence the judicial determination of the [particular] dispute.” Applying that standard to the facts, the Court held the Greek State in violation of Article 6(1) for “intervening in a manner which was decisive to ensure that the – imminent – outcome of proceedings in which it was a party was favourable to it.”

The second standard imposed by Article 6(1) relates to reasonableness of the duration of enforcement proceedings. As noted earlier, *Regent Company* concerned an arbitration award originally rendered in favor of a Czech company against a Ukrainian State-owned company (Oriana), which later became insolvent. The original award creditor and its successor-in-interest pursued enforcement of the award in the Ukrainian courts beginning in 1999, but to no avail. By 2005, the responsible State entities had ceased any effort to enforce the award against Oriana’s assets. Ruling in 2008, the Court determined that ten years was an unreasonably long delay for the enforcement of an arbitral award, especially given that no recent steps had been taken by Ukrainian authorities to remedy the situation. In the Court’s view, neither the insolvency of the State-owned company, nor the delays inherent in appropriations for the payment of State debts, could excuse such a long delay. As a result, the Court held the Ukraine in violation of Article 6(1).

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<sup>250</sup> *Stran*, para 39.

#### 4.1.7 *Conclusion on the Human Rights Courts*

The regional human rights courts – and in particular the ECtHR – provide a potential avenue of public law redress to award creditors frustrated by a State's interference with the arbitral process or an arbitral award. While there are substantial gateway issues limiting access to the three human rights courts surveyed above, the jurisprudence of the ECtHR has developed in a reasonably protective manner. A State's wrongful annulment of an arbitral award or agreement, or its failure to enforce a binding award in full and within a reasonable (if expansive) timeframe, can result in liability under either P1-1 or Article 6 of the ECHR. The chief open question concerns when an arbitral award will be sufficiently enforceable to constitute "property" for purposes of the P1-1 (or Article 6) analysis, and in particular the level of scrutiny the Court would be willing to apply in cases of arguably justified setting-aside or non-enforcement.

#### 4.2 *Mitigating the Problem of Sovereign Immunity against Execution of Investment Awards: A Systemic Solution by Olga Gerlich*<sup>251</sup>

Absent the respondent state's voluntary compliance with the award, investors are likely to be left with no effective remedy to execute the award due to the principle of state immunity from execution. Proposals for a systemic solution to the problem of state immunity from execution in collection of international investment awards can be divided into three groups: those pertaining to a change of general international law on sovereign immunity, solutions incorporated into the investment law regime, and proposals related to a more efficient use of the existing framework

##### 4.2.1 *A change in international law*

The ideal solution to the problem would require a change in general international law on the issue. States would need to adopt uniform restrictive rules on state immunity from execution. This could be achieved, to some extent, once the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIS) enters into force. However, it is unlikely that it would reach a ratification rate similar to that of the New York or ICSID Conventions.<sup>242</sup> Moreover, the rules contained in the UNCIS lack specificity and leave a substantial "grey area" which allows for diverging interpretations by states in relation to the commercial purpose of the use of

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<sup>251</sup> See State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?, *American Review of International Arbitration*, Vol. 26(1) 2015

state property in Article 18(1)(c).<sup>243</sup> Therefore, a creation of a uniform regime on sovereign immunity from execution in collection of international investment awards, even though adoption of the UNCSI by parties to the ICSID and New York Conventions, is very unlikely.

#### 4.2.2 *General Reform of investment law regime*

With regard to potential reform of investment law, it is argued that creating a *lex specialis* regime within international investment law is more realistic than adopting an overarching set of rules on state immunity by the international community. This could be achieved by adopting amendments to the existing investment law treaties or creating of a specialized treaty or soft law instrument on state immunity. The former solution is unfeasible given the number of existing international investment treaties. It would be unfeasible for states to review over 3000 treaties existing at the moment to introduce amendments relating to execution of international investment awards.<sup>252</sup> With regard to harmonization of domestic regimes through a soft law instrument, Fox proposed the adoption of minimal international standards on state immunity from execution in collection of arbitral awards through an UNCITRAL Model Law on attachment of state property and collection of international arbitration awards.<sup>245</sup> Individual states could adopt the Model Law by incorporating it into their domestic law. The plausibility of this solution is informed by the large success of the UNCITRAL Model Law on International Commercial Arbitration which was incorporated in more than 60 jurisdictions. The rules should also address special regimes of immunity from execution, such as these applicable to property of embassies and central banks. These rules should adopt a creditor-friendly approach expressed in balanced principles on burden of proof. Moreover, such rules could provide for a uniform procedure on recognition, enforcement, and execution of the awards and eliminate the problems related to the application of collection mechanisms under the ICSID Convention.

#### 4.2.3 *Specific solutions of investment regime*

According to Olga Gerlich rather than creating a comprehensive set of *lex specialis* principles on state immunity, some more specific solutions could be adopted. An example of such a solution could be to establish waivers of state immunity from execution. The wording of such waivers was proposed by the ICSID in Model Clause 15. It reads: "the Host State hereby waives any right of sovereign immunity as to it and its

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<sup>252</sup> The most comprehensive database for international investment agreements by the UNCTAD covers more than 3400 treaties see UNCTAD, IIA Database, available at [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Tools.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx).

property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement".<sup>253</sup>

Until now, states have been reluctant and hesitant to include waivers of immunity in their investment treaties. Generally, investment treaties do not include any provisions relating to enforcement and execution of international investment awards in the investment treaties. Changing the investment law regime through wide adoption of waivers of state immunity from execution is unfeasible due to the large number of investment agreements. Moreover, general waivers, such as that proposed by the ICSID Model clause, could create some interpretational difficulties.

Another alternative, but in my opinion a weak solution, would be a mechanism established by international convention whereby a fund would pay amounts due to creditors under awards against participating states. Such a fund could be administered by the ICSID and established through contributions from contracting states to the Convention, from which eligible debts would be paid. Such a solution is unlikely to raise controversies related to the existing rules on state immunity. Among the exceptions from the principle of state immunity from execution, only earmarking is not subject to differential treatment in domestic jurisdictions or creates interpretational problems. However, there are some practical difficulties concerning such a solution. States that were challenged in investment arbitration disputes will consider themselves likely to benefit from such a solution, whereas states that do not have similar experience may find the incentive to join such a fund insufficient.

*a. transparency of domestic laws*

The least invasive solutions, which, however, do not provide a systemic solution to the problem, would include increased transparency of domestic laws. For example, the relevant laws on execution and state immunity in state parties to the ICSID Convention could be published by the ICSID Secretariat.

*b. insurance coverage*

Another solution, as seen above, would be extending the protection under award arbitration default insurance coverage available in contract-based arbitrations to investment arbitrations.

#### *4.3 Post-Award remedies available directly to investors : Post-award settlement*

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<sup>253</sup> ICSID Model Clauses, available at <https://icsid.worldbank.org/ICSID/FrontServlet?actionVal=ModelClauses&requestType=ICSIDDocRH>.

A post-award settlement can be an alternative to voluntary compliance with an award and to the use of the collection mechanism involving action on the part of domestic courts. Post-arbitral award settlement refers to an agreement concluded between the parties to the original award, after the award has been rendered by the arbitral tribunal, which modifies the rights and obligations arising from the award by changing the terms of its performance.<sup>254</sup> In exchange for a guarantee of prompt payment, an investor may agree to a lower amount of compensation, a different time frame, or payment in instalments.<sup>255</sup> The quantitative data gathered in a survey conducted by Mistelis and Baltag in 2008 reveal that 54% of the participating corporations negotiated a post-award settlement amounting to over 50% of the award, whereas 35% of the corporations settled for an amount in excess of 75% of the award.<sup>256</sup>

Investors may be likely to accept post-award settlement in order to avoid a potentially lengthy and costly process of recognition and enforcement of the award. The difficulty of locating assets of a recalcitrant state susceptible of attachment in a third state can be another reason why investors are inclined to settle in a particular case. Post-award settlement might also be regarded as an alternative to enforcement when the investor wishes to maintain reasonably good business relations with the host state or a third state linked to it.<sup>257</sup> Although such settlements are rarely made public, there are reported cases of investors having negotiated post-award settlements.<sup>258</sup> For example, in 2013 Argentina reached a post-award settlement with award creditors in the CMS, Azurix, Vivendi, Contintetal Casualty, and National Grid cases.<sup>259</sup> The investors agreed to a lower amount of compensation, paid in the form of Argentinian sovereign bonds.

#### 4.3.1 *Claim the failure to Enforce as a violation of investor's rights under a BIT*

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<sup>254</sup> See, Loukas Mistelis & Crina Baltag, Recognition and Enforcement of Arbitral Awards and Settlement and International Arbitration: Corporate Attitudes and Practices, 19 AM. REV. INT'L ARB. 319, 324 (2008).

<sup>255</sup> Ibidem.

<sup>256</sup> Ibidem.

<sup>257</sup> Jorge E. Viñuales & Dolores Bentolila, *The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States*, in DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 247, 257 (Laurence Boisson de Chazournes, et al eds., 2012).

<sup>258</sup> For instance, the terms of the post-award settlement in *Cargill v. Mexico* remain undisclosed. See Nate Raymond, REUTERS, *Cargill settles NAFTA dispute with Mexico* (Feb. 21, 2013), at <http://www.reuters.com/article/2013/02/22/cargill-mexico-idUSL1NoBLEIU20130222>.

<sup>259</sup> Allen & Overy Publications, Argentina settles five investment treaty awards, available at <http://www.allenoverly.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx>.



Hypothetically, a failure to recognize, enforce, or execute an award could be considered a violation of investor's rights under a BIT, i.e., an expropriation or a denial of justice. Such suggestion relies on a determination of whether claims related to an award can be regarded as an investment enabling an investment tribunal to exercise jurisdiction. The application of such a proposition in practice is conceivable taking into consideration some more recent arbitral jurisprudence.

State responsibility for non-enforcement of an arbitral award was first confirmed in *Saipem v. Bangladesh*.<sup>260</sup> The claimant instituted proceedings at the ICSID in connection with the alleged violation of the expropriation provision of the Italy - Bangladesh BIT through interference of Bangladeshi courts with an ICC award. The dispute before the ICC concerned a contract for construction of a pipeline concluded between Saipem, an Italian company, and Petrobangla, a Bangladeshi State-owned company. The ICC tribunal rendered an award in favour of Saipem. On the subsequent application by Petrobangla to set aside the award, the Supreme Court of Bangladesh held that the award "is a nullity in the eye of the law and ... cannot be treated as an Award in the eye of the law as it is clearly illegal and without jurisdiction".

Consequently, it found the award non-existent. As such it could neither be set aside nor enforced. Saipem argued that the lack of enforcement deprived it of the compensation award which thus constituted an unlawful expropriation. The ICSID tribunal found jurisdiction and held that the unlawful interference of the court amounted to expropriation and decided in favour of the investor. For the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, the tribunal considered the entire operation and decided that the dispute arose out of the overall investment. According to the tribunal, the award only crystallized the rights and obligations under the original contract.

The above analysis of the jurisprudence shows that a failure to execute an investment arbitration award can indeed be considered a violation of the expropriation provisions of an investment treaty. The condition for a tribunal to make such a determination is that the overall operation which gave rise to the claims adjudicated in the award must qualify as an "investment".

#### 4.4 *Remedies Involving Action by the State of Nationality of the Investor*

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<sup>260</sup> *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (Mar. 21, 2007) [hereinafter: *Saipem*, Jurisdiction].

#### 4.4.1 *Interstate proceedings: Diplomatic protection according to Art. 27 ICSID Convention*

Diplomatic protection is an alternative and supplement to the mechanism for collection of awards in Articles 53 - 55 of the ICSID Convention. The possibility of recourse to diplomatic protection as a remedy available in case of non-compliance with awards, recognized in Article 27 of the ICSID Convention, was designed to counterbalance state immunity against execution preserved by Article 55. According to Article 27, the parties to the Convention renounce their right to grant diplomatic protection to their nationals or to bring an international claim in relation to a dispute that they have consented to submit to arbitration, unless another contracting state "has failed to abide by and comply with the award rendered in such dispute". Article 27 allows for two types of international recourse related to breach of the obligation to comply with awards. Firstly, the state of the investor's nationality can espouse the claim of the investor and exercise diplomatic protection. Secondly, the state of the investor's nationality can initiate interstate proceedings without resorting to diplomatic protection.

Diplomatic protection is a concept of customary international law whereby a state espouses the claim of its national based on an injury caused by an internationally wrongful act by another state and pursues it in its own name.<sup>261</sup> Despite of the lack of provisions explicitly allowing for diplomatic protection, an investor's claim can be espoused by a state in cases of non-compliance with non-ICSID awards. Violation of the obligation to comply with the investment award under international law should provide a sufficient basis for a state to espouse the claims of its nationals in accordance with customary international law.

Customary international law sets forth three conditions for exercising diplomatic protection by a state in relation to an injured person: a violation of international law, exhaustion of local remedies, and a link of nationality between the person and the state exercising protection. Article 17 of the ILC Draft Articles on Diplomatic Protection provides that the rules codified therein "do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments".

This can modify the requirements in relation to diplomatic protection exception in non-compliance with investment awards.

For what concerns the test of nationality of corporations for purposes of diplomatic protection exercised in accordance with Article 27 of the ICSID Convention,

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<sup>261</sup> Draft Articles on Diplomatic Protection, Article 1. Draft Articles on Diplomatic Protection with commentaries, in *Report of the International Law Commission to the General Assembly on the works of its fifty-eighth Session*, U.N. GAOR, 51<sup>st</sup> Sess, Supp No. 10, UN Doc A/61/10 (2006), 22, 24-25, paras 2-3.

the International Court of Justice (ICJ) has traditionally adhered to a test focused on the locus of the corporation's registered seat and/or of its incorporation. A similar test has been formulated in Article 9 of the ILC Draft Articles on Diplomatic protection. Article 25(2)(b) of the ICSID Convention offers a more flexible model in which the parties may determine the nationality of the foreign investor by agreement under certain circumstances. For purposes of non-compliance claims under the ICSID Convention, the nationality test under Article 25 should be respected.

The exclusion of the requirement of exhaustion of local remedies in ICSID Article 26 should

also apply to cases of diplomatic protection for non-compliance. It seems, however, that the investor should first use the mechanism for collection of the award under Article 54 of the ICSID Convention. Moreover, during negotiation of the ICSID Convention, the possibility of a resort to diplomatic protection was regarded as an *extrema ratio* and a necessary check on the shield provided to host states by immunity from execution. This would imply that diplomatic protection can be exercised only when the investor is not able to recover his award under the ordinary action under the ICSID collection mechanism in Article 54.

#### 4.4.2 *Countermeasures and Inducement*

In the same way, the home State may have recourse to countermeasures subject to the observance of all the customary international law requirements. For example, in *Archer Daniels v Mexico*, the Respondent State relied on countermeasures allegedly taken in response to the United States' prior wrongful act in order to justify its imposition of a 20 percent excise tax on soft drinks and syrups.<sup>262</sup>

Thirdly, As suggested by Bjorklund, '[i]ndividual states may also attempt to influence a foreign government's actions. For example, in the United States, the 1961 Foreign Aid Act (modified by the 1994 Helms Amendment), limits foreign aid to any country that has "nationalized or expropriated the property of any United States person" and has not "provided adequate and effective compensation . . . , as required by international law."<sup>191</sup> Thus, with regard to the Santa Elena dispute, the United States government pressured the government of Costa Rica (so that the latter consents to ICSID Jurisdiction) by threatening to invoke the Helms Amendment.

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<sup>262</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/05, Award (21 November 2007) paras 89, 180. See however Inna Uchkunova and Oleg Temnikov, 'In Someone Else's Shoes: Are the Investor's Rights His Own or Those of the Home State?'

Moreover, as stated in *Mitchell v Congo*, '[a] State's refusal to enforce an ICSID award may have a negative effect on the State's position in the international community with respect to the continuation of international financing or the inflow of other investments.'

#### 4.4.3 *Recourse to the ICJ according to Art. 64 of ICSID Convention*

With reference to the second type of non-compliance claims, Article 64 of the ICSID Convention provides that disputes between contracting parties concerning the interpretation or application of the Convention are to be referred to the ICJ. The scope of this provision is broader than that of Article 27 and, arguably, allows for submission of a dispute relating to compliance with the Convention to the ICJ by every state party to the Convention in its own right, without the necessity to prove a connection of nationality to an aggrieved investor. Moreover, resort to the ICJ would also be possible against a state party to the ICSID Convention that was not a party to the original ICSID proceedings if it fails to recognize and enforce an award in violation of Article 54. Many bilateral investment agreements contain similar provisions on state-to-state dispute settlement relating to interpretation and application of those agreements.<sup>263</sup> Some investment treaties also expressly provide for state-to-state arbitration in case of non-compliance with awards, such as under Article 1136(5) of North American Free Trade Agreement (NAFTA).

In case of a failure to comply with an award by the state of nationality, the investor may request the Free Trade Commission to establish a panel in accordance with NAFTA Article 1136(5). The panel can declare the failure to abide by the award inconsistent with the obligations under the Agreement and recommend that the recalcitrant state party comply with the award.<sup>309</sup> To date the establishment of a panel under Article 1136(5) of NAFTA has not been requested. A compliance mechanism is

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<sup>263</sup> *E.g.* Agreement between the Republic of India and the Kingdom of the Netherlands for the Promotion and Protection of Investments, Nov. 6, 1995, Article 10, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1584>; Agreement Between the Government of the Republic of Turkey and the Government of the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments, May 22, 2012 (not yet in force). Article 12, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2134>; Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Sept. 9, 2012 (not yet into force), Article 1, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/600> North American Free Trade Agreement, Dec., 171992, 32 I.L.M. 289. NAFTA, *supra* note, Article 1136(5). 2012 United States Model Bilateral Investment Treaty, available at <http://www.state.gov/documents/organization/188371.pdf>. 2004 Model Canada Foreign Investment Promotion and Protection Agreement, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

also provided in Article 34(8) of the 2012 United States Model BIT.<sup>310</sup> It allows for state-to-state proceedings before an arbitration tribunal which can make determinations as to whether the non-compliance of the respondent state is consistent with its obligations under the Convention and recommend that the respondent abide by or comply with the award. A similar mechanism is prescribed by Article 45(5) of the 2004 Canadian model BIT.<sup>311</sup>

#### 4.4.4 *Diplomatic Pressure: retorsion and reprisals*

The unilateral measures of retaliation that can be taken by a state to compel another state to comply with obligations under international law can be divided into two categories. The first describes measures which do not interfere with countries' rights and obligations under international law (retorsion); whereas the second refers to measures which would otherwise be inconsistent with international law as breaching the rights of the target state under international law (reprisals).<sup>264</sup> Within the first category, a state could suspend trade benefits granted to host states in case of non-compliance with arbitration awards rendered in favour of the first state's nationals. The Generalized System of Preferences ("GSP") established by the Enabling Clause allows members of the World Trade Organization to reduce or eliminate tariffs on imports from developing states without necessitating the lowering of tariffs on imports from developed states without violating the Most Favoured Nation obligation. This regime is optional for developing countries in the sense that they have a right to include programs in their national laws, but they do not have an obligation to do so. Currently, only select countries maintain GPS programs. Suspension of trade benefits applied as a form of retorsion for failure to comply with investment awards already has a precedent. In May 2012 the United States suspended Argentina's preferential status under its GSP. The suspension was a response to Argentina's failure to comply with the ICSID awards rendered in favour of United States investors in CMS, Azurix, and Continental Casualty. The United States' Trade Act of 1974 explicitly provides that the President shall not designate a developing country as a beneficiary of the GSP if that country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or corporations.<sup>265</sup>

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<sup>264</sup> Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, in *Report of the International Law Commission on the work of its fifty-third session*, U.N. Doc A/56/10, reprinted in [2001] 2(2)Y.B. INT'L L. COMM'N, (UNDOC A/CN.4/SER.A/2001/Add.1 (Part 2) 30, 128, ¶3.

<sup>265</sup> Trade Act, 19 U.S.C., c12, § 2462(b)(2)(E) (1974) ("[t]he President shall not designate any country a beneficiary developing country under this subchapter if ... . Such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favour of United States citizens or a corporation, partnership, or association which is 50 per cent or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute").

Moreover, the state of investor's nationality can lobby in international financial institutions, such as the World Bank and International Monetary Fund, to withhold loans to host states which fail to comply with investment arbitration awards. Operational Policy 7.40 of the World Bank specifically addresses such a situation and provides that the World Bank takes an interest in disputes over a failure to service external debt. As a consequence, the World Bank can decide not to make new loans when the country is unwilling to take steps to resolve such a dispute.<sup>266</sup> A state of origin can also vote against granting loans to the state which is in breach of its obligation to comply with the award in these institutions. With regard to measures inconsistent with international rights of a state that fails to comply with an award, possible measures include withholding payments due to a state or freezing assets of the host state that are located in the state which takes reprisals. To be legal, these actions must comply with the requirements for lawful countermeasures under customary international law. These conditions have been codified in Articles 49 – 54 of the ILC's Articles on Responsibility of States. These requirements include proportionality of countermeasures, prohibition of breaching certain obligations under international law, and notification to the targeted state of intent to take countermeasures.

It has been argued that attaching property within the territory of a state of origin could be regarded as a legitimate countermeasure. As suggested by Prof. Schlachter "it seems logical that ... if the successful state is free under international law unilaterally to apply coercive measures against the recalcitrant state [...], it should be free to seize assets of the debtor state within its control for the purpose of satisfying an award of damages".<sup>267</sup> Yet, such a measure would be subject to further conditions under Article 50(2)(a) and (b) of the Articles on Responsibility

of States which provide that a state taking countermeasures is not relieved from fulfilling its obligations under any dispute settlement procedure applicable between it and the responsible state and that it must respect the inviolability of diplomatic or consular agents, premises, archives and documents. It might be debatable whether the mechanism for collection of the award under Article 54 qualifies as an "obligation under any dispute settlement procedure". Article 50(2)(b) of the Articles on Responsibility of States clarifies that execution in the framework of countermeasures cannot affect the immunity of state property under diplomatic law.

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<sup>266</sup> World Bank, Operational Manual, Operational Policy 7.40 - Disputes over Defaults on External Debt, Expropriation, and Breach of Contract, available at [http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:2\\_0064628~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:2_0064628~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html).

<sup>267</sup> Oscar Schlachter, The Enforcement of International Judicial and Arbitral Decisions, 54 AM.J.INT'L L. 1, 7 (1960).

#### 4.4.5 Conclusion of Olga Gerlich

According to the above proposed solutions the opinion of Olga Gerlich is that currently, there are no remedies that directly address the problem of state immunity from execution in the collection of international investment arbitration awards under the ICSID Convention. Sovereign immunity does constitute the Achilles' heel of investor-state arbitration. The drafters of the ICSID Convention considered it highly unlikely that state parties to the Convention would fail to carry out their obligation to comply with awards, but the instances where investors have sought to collect awards against recalcitrant states show that the drafters' assumption of absolute compliance proved to be naïve, or short-sighted. The *reference* to laws on execution in the state of execution creates a systemic problem as it undermines some fundamental principles of investor-state arbitration. It re-politicizes the disputes, and exposes execution to national bias and deficiencies of domestic judicial systems. The rules on state immunity applied by domestic courts are a mixture of customary international law, treaty law, and national laws. An investor seeking collection of his award must have knowledge of the particularities of domestic legal systems. Furthermore, the availability of assets amenable to execution is affected by the overlap between general and special regimes of state immunity under international law. Existing legal remedies that could mitigate the lack of a systemic solution to the problem of state immunity from execution are lacking on the investor's side and the ones involving action by the state of investor's nationality are not likely to provide an effective remedy for non-compliance with investment arbitration awards by recalcitrant states. When exercising diplomatic protection, a state pursues its own right to ensure, in the person of its subjects, respect for the rules of international law.<sup>268</sup> The exercise of diplomatic protection lies, therefore, entirely within the discretion of the state. The state of origin might not be interested in espousing the claim of its national since such diplomatic protection indeed re-politicizes investment disputes. It exposes the state of origin to deterioration of relations with the host state. This is illustrated by the *Sedelmayer* case. The German government refused to espouse Sedelmayer's claim and even pressured him not to "create a diplomatic incident" by seizing Russian assets exhibited at the aviation show in Germany. Diplomatic protection also deprives investment arbitration of their most attractive attributes from the investor's perspective, *i.e.* direct compensation and control over the course of proceedings. The situation is not particularly different in the case of individual remedies available to investors. Post-award settlements do not always present an attractive alternative. They require concessions on the part of the investor and put the investor in a less advantageous position than if the award were properly executed. Reduction of the value of the arbitral award undermines the compensatory function of the remedy under international law. Post-award settlements can hardly represent a satisfactory systematic solution to the problem. They rather demonstrate that investors recognize the deficiencies of the system and are aware of the difficulties they may face when seeking collection of their awards.

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<sup>268</sup> See Conforti.

Among the many suggested improvements, creating a *lex specialis* regime within the international investment law system through a soft law instrument seems to be the most feasible solution. Such an instrument governing recognition, enforcement, and execution of investment awards against state property could be adopted under the auspices of the UNCITRAL. Indeed, a soft law instrument under the auspices of UNCITRAL that would address the issues of recognition, enforcement, and execution of investment awards could provide for a uniform approach to the problem of state immunity from execution.

#### 4.5 *The back door solution proposed by B.Rice*

At the turn of the twentieth century, sovereign states enjoyed nearly unfettered immunity from suit in foreign jurisdictions thanks to the then-ubiquitous theory of absolute immunity. By the second half of the 1900s, however, the balance between sovereign states' rights and their obligations abroad had changed significantly. The plethora of post-WWII conventions and newly created international institutions all chipped away at a sovereign's freedom to act at home and abroad. And as concerns sovereign immunity, the default view went from absolute to restrictive, with many jurisdictions adopting rules that stripped immunity from states' "commercial" activities and assets. It was in this spirit that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") was drafted and first signed in 1965. By signing onto the ICSID Convention developing states (at least to some extent) sought to signal to foreign investors that they were "open for business" and offered reasonable investment protection through the Convention's binding arbitration mechanisms. However, the ICSID Convention was more than just a general arbitration agreement and applicable rules/protocols.<sup>269</sup>

The procedures and rules established in the ICSID Convention were intended to create an entirely self-contained adjudication and remedial process for aggrieved investors. As per Article 53, there is no recourse to appeal a final ICSID decision in a national court or in set-aside proceedings. Moreover, Article 54 obligates Contracting parties to recognize and enforce ICSID awards as if they were domestic judgments. As a result, the ICSID Convention has long been assumed to produce final and self-executing awards,<sup>270</sup> and the drafters of the ICSID Convention themselves used the term

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<sup>269</sup> Brandon Rice, ICSID Article 53: A Back Door to Thwarting Sovereign Immunity from Execution?, TDM, Vol. 14, issue 1, January 2017

<sup>270</sup> Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23(1) J. OF INT'L ARB. 1, 1 (2006).



"[s]ystem of 'automatic' enforceability of awards."<sup>271</sup> That design may hold true for the recognition and enforcement of ICSID awards, but as any practitioner can attest, recognition and enforcement are not the same as actual execution. Seemingly counter to the rest of the ICSID Convention's post-award provisions, Article 55 provides that the sovereign immunity laws of the state where execution is sought affirmatively apply, effectively throwing a spanner in the works of the agreement's otherwise efficiency-focused award- satisfaction aims. Christoph H. Schreuer has called Article 55's presumed capitulation to national sovereign immunity laws "the Achilles' heel of the Convention."<sup>272</sup> He goes further and argues that "[t]he otherwise effective machinery of arbitration has its weak point when it comes to the actual execution against States of pecuniary obligations under awards."<sup>273</sup> Similarly, a working group created during the negotiation process argued that by granting state property sovereign immunity, the ICSID Convention would "place the State party to the dispute in an unduly privileged position" vis-à-vis the investors when it came to collecting an award in a third- party state.<sup>6</sup> Irrespective of such concerns and despite the conscious creation of a "system of automatic enforceability of awards," in the executive directors' report that accompanied the final version of the ICSID Convention, the authors dryly noted that "[t]he doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought."<sup>274</sup>

In the decades since the ICSID Convention's signing, this tension has played out across the globe. In the United States ("US"), the United Kingdom ("UK") and France, courts developed robust case law that effectively shielded sovereign assets from execution if a losing state refused to voluntarily comply with the ICSID award. However, in *Société Creighton v. Ministère des Finances de l'Etat du Qatar*, the French *Cour de cassation* demonstrated that it might be possible to circumvent some of the strictures of sovereign immunity by interpreting certain arbitration convention provisions as a waiver of immunity from execution.<sup>275</sup> Admittedly, that French decision pertained to a provision in the ICC Rules of Arbitration (which is extremely similar but not identical to that in ICSID) and has not led to progeny of cases following its logic.

Unlike other conventions and sets of rules on international commercial arbitration, ICSID Convention Articles 53 and 54 were intended to ensure a "self-

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<sup>271</sup> World Bank Legal Committee on the Settlement of Investment Disputes, *Working Group VI Report on Article 57*, Doc. No. SID/LC/50, at 2 (Dec. 8, 1964), *reprinted in* ICSID, 2 HISTORY OF THE ICSID CONVENTION 892,

893 (1968) [hereinafter HISTORY OF ICSID].

<sup>272</sup> CHRISTOPH H. SCHREUER ET AL., ICSID CONVENTION: A COMMENTARY 1154 (2009).

<sup>273</sup> *Id.*

<sup>274</sup> International Bank for Reconstruction and Development, *Report of the Executive Directors on the ICSID Convention*, para 43 (Mar. 18, 1965), *reprinted in* HISTORY OF ICSID, *supra* note 3, at 1069, 1083.

<sup>275</sup> Civ. 1ère, 6 juil. 2000, Bull civil I, n°207

contained system for limited review”<sup>276</sup> and “created an autonomous and simplified regime for recognition and execution.”<sup>277</sup> At the same time, however, Article 55 was included in the ICSID Convention to preserve state immunity from execution. Because Article 55 can thus be used to “prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought,”<sup>278</sup> it has the ability to upset the entire simplified regime and “may be seen as the Achilles’ heel of the Convention.”<sup>279</sup>

Articles 53 and 54 make up two-thirds of ICSID Convention’s Section 6, pertaining to the “Recognition and Enforcement of the Award.”

While perhaps not evident on the face of the text, Christoph Schreuer has argued:

The Convention’s drafting history shows that domestic authorities charged with recognition and enforcement have no discretion to review the award once its authenticity has been established. Not even the *ordre public* (public policy) of the forum may furnish a ground for refusal. The finality of awards would also exclude any examination of their compliance with international public policy or international law in general.<sup>280</sup>

Therefore, taken together Articles 53 and 54 “created an autonomous and simplified regime for recognition and execution which excluded the otherwise applicable provisions of the [local civil procedure law] and the remedies provided therein.”<sup>281</sup>

Unfortunately for ICSID arbitral award winners, collecting from a recalcitrant sovereign debtor is complicated by Articles 54(3) and 55. Article 54(3) of the ICSID Convention provides that “[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.”<sup>282</sup> Meanwhile Article 55 clarifies that such laws concerning the execution of judgments includes laws on sovereign immunity: “Nothing in Article 54

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<sup>276</sup> Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23(1) J. OF INT’L ARB. 1, 4 (2006).

<sup>277</sup> SCHREUER ET AL., *supra* note 4, at 1132 (paraphrasing *SOABI v Senegal*, Cour de cassation, June 11, 1991, 2 ICSID Rep. 341 (1991)).

<sup>278</sup> INT’L BANK FOR THE RECONSTRUCTION AND DEV., REPORT OF THE EXECUTIVE DIRECTORS ON THE ICSID CONVENTION, ¶ 43 (Mar. 18, 1965).

<sup>279</sup> SCHREUER ET AL., *supra* note , at 1154.

<sup>280</sup> SCHREUER ET AL., *supra* note , at 1140–41

<sup>281</sup> SCHREUER ET AL., *supra* note 4, at 1132 (paraphrasing *SOABI v Senegal*, Cour de cassation, June 11, 1991, 2 ICSID Rep. 341 (1991)).

<sup>282</sup> SCHREUER ET AL., *supra* note 4, at 1154 (citing Broches, A., *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Recueil des Cours 331, 403 (1972-II); Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2(2) ICSID REV. 287, 333, 334 (1987).

shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign state from execution.”

While the decision to leave the law on sovereign immunity untouched was a conscious one, it was done with the assumption that the issue would never arise because states would always comply voluntarily.<sup>283</sup> The “father of ICSID,” Aron Broches,<sup>284</sup> remarked, “Since any State against which an award was granted would have undertaken in advance a solemn international obligation to comply with the award, the question of enforcement against a State was somewhat academic.”<sup>285</sup> Thus, because “the host State would have undertaken to abide by the award[,] the problem of enforcement in a third State was not likely to arise.”<sup>286</sup>

Professor Schreuer also notes that the history of the Convention demonstrates that State compliance was not a major concern:

During the Convention’s drafting there was a general expectation that compliance by the host State with ICSID awards would not be a practical problem and that voluntary compliance would be a natural consequence of the treaty obligation expressed in Art. 53. Any other course of conduct was likely to lead to adverse reactions by other States and would affect the standing of the State concerned with the international business community. This view is supported by a cost/benefit analysis of non-compliance and by most of the practice following ICSID awards.

Thus, the drafters of the Convention were not concerned that a State would seek to avoid compliance with its obligations. In fact, early in the negotiations Chairman Broches stated that:

[B]y definition the host State would have undertaken to abide by the award and the problem of enforcement in a third State was not likely to arise.

In later discussions, Chairman Broches explained that in his view:

[I]t was not necessary to provide for forced execution against States under this Convention since the Convention imposed a direct obligation on States to carry out the award.

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<sup>283</sup> Alexandrov, *supra* note 16, at 5–6 (“State compliance was never a concern for the drafters. It was assumed that all State parties, with due respect for the solemn and binding nature of their commitments as Contracting States to the ICSID Convention, would abide by and comply with awards automatically. Article 53 creates a public international law obligation on a losing State. The drafters assumed that States would comply based on the international law maxim *pacta sunt servanda*, and in light of the effect that non-compliance would have on a State’s standing in the international community.”).

<sup>284</sup> Aron Broches, 1914–1997, 14(2) NEWS FROM ICSID 3, 3 (1997).

<sup>285</sup> World Bank Legal Committee on the Settlement of Investment Disputes, *Summary Record of Proceedings of Consultative Meeting of Legal Experts*, at 5 (June 12, 1964), reprinted in HISTORY OF ICSID, *supra* note 3, at 298, 304.

<sup>286</sup> *Id.*

Chairman Broches also alluded to the option of Articles 27 and 64 as recourse in the event that the State failed to comply:

In the unlikely event that a losing State failed to comply with an award it would be in clear violation of the Convention itself, and the investor's national State could take up his case.<sup>9</sup>

Later in life, Chairman Broches observed:

I felt then, and I do now, that as regards enforcement against governments, as distinguished from that against private parties, what has become Article 53 of the Convention is the primary provision and that while Article 54 is important, concern with the possibilities offered by that provision should not be permitted to obscure or weaken the importance of Article 53. The obligation of governments to abide by awards remains unaffected by the limitations on their forcible execution.

Given this trust in States' compliance as a result of the international legal obligation imposed by Article 53, one might ask which is the meaning for the existence of Article 54. The answer, according to Alexandrov,<sup>287</sup> lies in the fact that the drafters perceived an imbalance between States, who were bound as signatories to the Convention to comply with its terms (including Article 53), and investors, who faced no such obligation. The Convention is constructed to entertain not only treaty claims, but also cases based on contractual claims and counterclaims, in which either party (State or investor) might face an award ordering payment. Investment treaty awards may also impose obligations on investors, such as payment of costs. Chairman Broches noted that "[w]hile the investor was also under an obligation to comply with the award, there was no direct sanction under the Convention for his failure to do so."<sup>11</sup> Thus the drafters were concerned that:

The State itself, having undertaken to accept an award as final and binding, could not evade the obligation. On the other hand, refusal by private investor to comply with an award would have to be taken before a national court and the New York Convention did provide some grounds for attacking the award.<sup>288</sup>

Article 54 responds to this concern that the binding force of awards under Article 53 of the Convention would not be symmetrical between States and investors. It was agreed that:

[F]or the purposes of ensuring compliance with an arbitral award between States, Section 14 [Article 53] would have been sufficient but, since one of the parties to

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<sup>287</sup> S.A. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*, TDM, VOL. 6 Issue 1.

<sup>288</sup> ICSID, *DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION* VOL. II, at 304 (1968) [hereinafter ICSID, *DOCUMENTS* VOL. II].

a dispute brought before the Center would be a private individual, Section 15 [Article 54] was necessary to give a State the means of enforcing an award in its favor against an individual.

Although originally drafted with enforcement against investors in mind, the drafters recognized that Article 54 could also serve as a backup mechanism for collecting from defaulting States. There was no reason to limit the provision to enforcement actions against investors. Professor Schreuer explains in his Commentary:

[T]he *travaux préparatoires* to the Convention show clearly that the original motive for the inclusion of a provision on enforcement was to give recourse against a defaulting investor. It was considered highly unlikely that a State party to the Convention would not carry out its treaty obligation under the Convention to comply with an award. . . . A provision on enforcement was seen as necessary to balance the situation in favour of the host state, should the investor not comply with an award. But all the drafts leading to the Convention refer to recognition and enforcement against the parties in equal terms, without distinguishing between investors and host States, and it is clear that this was also the intention of the drafters.<sup>289</sup>

As Alexandrov concluded in his work: 'any other interpretation of the relationship between Articles 53 and 54 of the ICSID Convention would essentially render Article 53 meaningless and without useful effect. If a prevailing claimant is in fact required to seek enforcement under Article 54 as a condition of the respondent State's compliance with an ICSID award, or if a respondent State's affirmative obligation to comply with an ICSID award arises only upon a claimant's exhaustion of the State's domestic enforcement mechanisms, then Article 53 would be read out of the ICSID Convention altogether'.

Article 53's obligation to abide by and comply with an award must be independent of the enforcement mechanisms provided for in Article 54.

The consequence in the opposite scenario is clear: 'if an award is only complied with through the enforcement mechanism of Article 54, and if Article 54 only provides for the enforcement of pecuniary provisions of an award, then a State would be under no obligation to comply with any non-pecuniary terms of any ICSID award against it. This would be an untenable outcome for the ICSID system: the ICSID Convention clearly contemplates that awards may include such non-pecuniary terms.'<sup>290</sup>

#### 4.5.1 *A choice between sovereign immunity and effective arbitral awards*

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<sup>289</sup> Schreuer, ICSID CONVENTION, *supra* note, at 1102-03 (citations omitted).

<sup>290</sup> Alexandrov, *ut supra*.

In the practice in the vast majority of cases, claimants never need to resort to collection mechanisms in Article 54. Rather, States simply make payment consistent with the terms of the award.

In large part, that good faith belief in voluntary compliance has borne itself out in reality.<sup>291</sup> However, with the massive growth in investor-state disputes in the 21st century<sup>292</sup> (and no shortage of contentious decisions), there has also been an increase in losing states' attempts to resist paying up, often hiding behind the dual veils of sovereign immunity and separate legal personhood of state-owned entities.<sup>293</sup> In the non-ICSID realm, the most notable recent example of a state refusing to pay its arbitration judgment debts is Russia's heretofore fight to avoid paying a \$50 billion award in favor of Yukos shareholders.<sup>294</sup> As frustrating as it may be whenever a sovereign state effectively deploys sovereign immunity to skirt its liabilities, a recalcitrant state's refusal to satisfy an award rendered by an ICSID tribunal seems especially unpleasant considering the ICSID Convention's aim to create "an autonomous and simplified regime for recognition and execution."

In recent memory there have been a handful of ICSID awards that the misbehaving state managed to avoid satisfying in court. In *Benvenuti & Bonfant v. Congo*, for example, after obtaining an ICSID award in its favor<sup>295</sup> and recognition in Paris courts, the investor sought to execute against funds owned by *Banque Commerciale Congolaise*.<sup>296</sup> Because the bank was a legally separate entity and could not be considered an emanation of the state, the French *Cour de cassation* held that the assets were not amenable to execution. Similarly, in *AIG v. Kazakhstan*, investors in

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<sup>291</sup> Alexandrov, *supra* note 16, at 10. As regards compliance with arbitral awards generally (*i.e.*, not just those rendered by ICSID), a joint report by the School of International Arbitration at Queen Mary (University of London) and PricewaterhouseCoopers found that "84% of respondents indicated that the opposing party had honoured the award in full in more than 76% of cases" and that "in only 11% of cases did participants need to proceed to enforce an award." INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 8, 10 (2008). Beyond the aforementioned figures, it appears that "[n]o official statistics exist regarding the compliance rates with ICSID and non-ICSID awards." S. Tonova, *Compliance and Enforcement of Awards: Is There a Practical Difference Between ICSID and Non-ICSID Awards*, in 5 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 229, 235 (I.A. Laird & T.J. Weiler eds. 2012).

<sup>292</sup> UNCTAD, RECENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) 2 (2014),

[http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf).

<sup>293</sup> See generally Emmanuel Gaillard, Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles, in STATE ENTITIES IN INTERNATIONAL ARBITRATION, IAI SERIES ON INTERNATIONAL ARBITRATION NO. 4, at 179 (E. Gaillard & J. Younan eds., 2008) (arguing that sovereign immunity, legal autonomy of state entities and the effectiveness of arbitral awards are ultimately incompatible, which at present means one of them must be sacrificed (usually effectiveness of arbitral awards)).

<sup>294</sup> Brandon Rice, *States Behaving Badly: Sovereign Veil Piercing in the Yukos Affair* (Oct. 12, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2673335](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673335).

<sup>295</sup> *Benvenuti & Bonfant v. Congo*, Award, Aug. 15, 1980.

<sup>296</sup> SCHREUER ET AL., *supra* note 4, at 1134.

possession of an ICSID award<sup>297</sup> attempted to enforce its winnings in the UK by way of a third-party debt and charging order against assets of the National Bank of Kazakhstan held by another (private) bank. The High Court prevented execution on grounds that the assets in question were held by the Kazakh central bank, not the state itself.<sup>298</sup>

Furthermore, the court noted that the property of foreign states' central banks or monetary authorities are completely immune from execution. Lastly, in *Liberian Eastern Timber Corp. v. Liberia*, the US District Court for the Southern District of New York found that regardless of any waiver of immunity from execution, the plaintiff's attempts to attach fees and taxes owed to the Liberian government must fail because the assets in question were not "commercial" as required by relevant US sovereign immunity laws.<sup>299</sup>

As the foregoing examples demonstrate, when a sovereign debtor does not want to, it is rather easily able to escape its international responsibilities.

#### 4.6 *Bypassing Sovereign Immunity*

As the ICSID *ad hoc* committee in *MINE v. Guinea* noted,

State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions.<sup>300</sup>

Simply because a state is able to avoid execution on sovereign immunity grounds (and perhaps through the legal fiction of separate legal personality of state entities as well) does not mean that it has not violated its Article 53 obligations. As Professor Schereur commentated :

*"The impossibility to enforce an ICSID award as a consequence of the law concerning the execution of judgments in one or several States in no way affects the obligation of the party to the ICSID arbitration to abide by and comply with the award in*

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<sup>297</sup> *AIG v. Kazakhstan*, Award, Oct. 7, 2003.

<sup>298</sup> *AIG Capital Partners Inc. and another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening)*, High Court, Queen's Bench Division (Commercial Court), Oct. 20, 2005, [2005] EWHC 2239 (Comm), 11 ICSID Reports 118, 134/5

<sup>299</sup> *In re Liberian E. Timber Corp. v. Gov't of Republic of Liberia*, 650 F. Supp. 73, 77–78 (S.D.N.Y. 1986) *aff'd sub nom. Liberian E. Tymbor v. Rep. Liberia*, 854 F.2d 1314 (2d Cir. 1987).

<sup>300</sup> *MINE v. Guinea*, Interim Order No. 1 on Guinea's application for Stay of Enforcement of the Award, 12 August 1988, 4 ICSID Rep. 111, ¶125

*accordance with Art. 53(1). In particular, a State that successfully relies on the laws concerning State immunity from execution will be in violation of its obligation under the Convention."*

In fact, in such instances ICSID Convention's Article 27(1) revives the right of diplomatic protection and includes the possibility of bringing the issue before the International Court of Justice as per Article 64. Despite the fact that such recourse remains on the table, B.W. Rice argued that it is possible for arbitral award holders to avoid that additional step by circumventing some of the limits of sovereign immunity altogether if they can successfully argue that ICSID Convention's Article 53 amounts to a waiver of immunity from execution. That is precisely what France's *Cour de cassation* did with a similar provision in the ICC Rules of Arbitration in *Société Creighton v. Ministère des Finances de l'Etat du Qatar*.

#### 4.6.1 *Société Creighton v. Ministère des Finances de l'Etat du Qatar*

The case *Société Creighton v. Ministère des Finances de l'Etat du Qatar* an ICC arbitration arose in connection with the performance of a contract for the construction of a hospital in Doha between the Government of Qatar (specifically, the Ministry of Municipal Affairs and Agriculture) and Creighton, a private US company.<sup>301</sup> Two final arbitration awards on October 18, 1993, were rendered in favor of Creighton, according to which the Government of Qatar was ordered to pay approximately 12 million QAR, plus interest.<sup>46</sup> Creighton took to French courts to collect its arbitral spoils, seizing money and shareholder rights held in the name of the Qatari Ministry of Municipal Affairs and Agriculture at the *Banque de France* and Qatar National Bank.<sup>47</sup> Although Qatar failed to have the award set aside outright, it successfully invoked sovereign immunity in the court of first instance and on appeal. The French *Cour de cassation*, however, ultimately held that the seized assets were amenable to execution in satisfaction of the arbitration award. Crucially, the court determined that there was an implied waiver of immunity from execution because Qatar had expressly consented to arbitrate pursuant to the ICC Rules of Arbitration, which in Article 24 (now Article 34(6)) provided:

The arbitral award shall be final. By submitting the dispute to arbitration by the International Chamber of Commerce the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.<sup>302</sup>

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<sup>301</sup> Nathalie Meyer-Fabre, *Enforcement of Arbitral Awards Against Sovereign States, A New Milestone: Signing ICC Arbitration Clause Entails Waiver of Immunity from Execution Held French Court of Cassation in Creighton v. Qatar*, July 6, 2000, 15(9) MEALEY'S INT'L ARB. REP. 1, 1 (Sept. 2000).

<sup>302</sup> C. Annacker & R. Greig, *State Immunity and Arbitration*, 15(2) ICC INT'L CT. OF ARB. BULL. 70, 74 (Fall 2004).



Interestingly, however, the *Creighton* decision goes against a leading line of cases that concluded that a state's agreement to arbitrate does not, by itself, waive its immunity from execution. Instead, such cases held that a separate and unequivocal manifestation of intent to waive execution immunity was required to trigger the consent-based exception to immunity from execution. It is also worth noting that *Creighton v. Qatar* has not led to a seismic shift in French courts' view that a consent to arbitration is insufficient to prove a waiver of sovereign immunity from execution. Despite that, Rice sought to explore whether, based on the logic of *Creighton*, a court could similarly find ICSID Convention Article<sup>303</sup> to amount to a waiver of sovereign immunity from execution and, if so, how that would be applied in various legal regimes around the globe.

#### 4.6.2 Applying *Creighton* to ICSID disputes

Looking at the text of the relevant provisions in the ICC Rules of Arbitration and the ICSID Convention, their similarities are striking. The old Article 24 of the ICC Rules provided that "[t]he arbitral award shall be final" and that "[b]y submitting the dispute to arbitration by the International Chamber of Commerce the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made." Correspondingly, ICSID Convention Article 53(1) states that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." In other words, the award is final and the parties have no recourse to appeal in domestic courts. What is more is more, the ICSID Convention language goes further than the ICC Rules of Arbitration in that the availability of appeal in set-aside proceedings is not conditioned upon the ability to waive one's right to such appeals. Considering the ICSID's underlying goal for creating an autonomous and self-executing regime, Rice is convinced that if a court were to follow the logic of *Creighton*, there is an even stronger argument for ICSID Article 53(1) to be construed as a waiver of immunity from execution than the old Article 24 (now Article 34(6)) of the ICC Rules of Arbitration.

Interpreting Article 53(1) as a waiver of immunity from execution is only the first step, however. Importantly, domestic laws governing sovereign immunity still apply. Whether a waiver of immunity from execution has any marked impact on an investor's ability to forcibly collect on its arbitral award depends on the specifics of the immunity laws in force in the country where it seeks enforcement. For example,

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<sup>303</sup> International Chamber of Commerce (ICC), Rules of Conciliation and Arbitration, in force from Jan. 1, 1988 until Dec. 31, 1997.

whether a waiver from executorial immunity needs to be explicit or whether a state can only waive immunity as regards “commercial” assets will ultimately determine if the *Creighton v. Qatar* approach would change the status quo.

#### 4.6.3 *How that might work in other legal systems*

Simply treating Articles 53 as an implied waiver is not to say that all of a sovereign’s assets abroad become automatically amenable to execution. Far from displacing domestic sovereign immunity laws, accepting the ICSID Convention as including a waiver merely improves an arbitration winner’s ability to satisfy one of the exceptions to immunity from execution. Each state’s specific rules governing immunity will ultimately determine (1) whether an implicit waiver is sufficient to pierce the veil of sovereignty and (2) if so, what property becomes a fair target for execution. Given nations’ existing rules on immunity from execution, viewing ICSID Articles 53 as an implicit waiver will not, as some commentators have seemed to suggest, inappropriately upset the careful balance struck between respecting sovereign privileges abroad and offering aggrieved investors a remedy for their infringed rights. In fact, in US courts, treating the ICSID Convention as containing a waiver of executorial immunity will not change anything.

In the United States, the restrictive view of sovereign immunity was codified in federal law by the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>304</sup> The FSIA provides the sole basis for obtaining jurisdiction over foreign governments and their agencies and instrumentalities. Under the FSIA, there is a statutory presumption in favor of immunity and plaintiffs must identify one of the specific exceptions to avoid dismissal.<sup>305</sup> Section 1610(a) provides seven specific exceptions to the presumed immunity from attachment or execution provided in § 1609, including when the sovereign waives immunity (either explicitly or implicitly). However, in addition to the waiver of immunity from execution, the court must also find that the property is (1) used for commercial activity in the U.S. and (2) located in the US. The absence of any point is fatal to any executorial immunity exception inquiry. Therefore, if a US court were to construe the ICSID Convention to include a waiver (even if only implicit), the sovereign defendant would lack the protection of sovereign immunity as regards “commercial” assets in the US.

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<sup>304</sup> Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602–11 (2013)) [hereinafter FSIA].

<sup>305</sup> § 1604 (“[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”); § 1609 (“[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.”); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010) (citing *Phaneuf v. Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997)); *accord* *Walters v. Indus. & Commer. Bank of China, Ltd.*, 651 F.3d 280, 290 (2d Cir. 2011).

Unfortunately for arbitral award holders, however, this does not change much from the status quo. Ever since the adoption of the Federal Arbitration Act of 1988,<sup>306</sup> US sovereign immunity law has included an exception to executorial immunity when “the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.” This, too, is also limited to execution against commercial assets located in the US. Thus, in US courts, the *Creighton* approach would do nothing to make it easier for an ICSID award holder to collect its arbitral spoils.

In the UK whether a state or related entity can claim sovereign immunity is governed by the State Immunity Act 1978 (“SIA”).<sup>307</sup> Similar to the FSIA, under § 1 of the SIA a foreign state is presumptively immune from jurisdiction unless one of the exceptions in the SIA applies. As regards the SIA’s relevant waiver exception, it permits execution against a state’s assets only when the state has expressly consented to such an action. While that waiver exception to immunity must be explicit (whereas under the US FSIA it can also be implied),<sup>308</sup> it applies to non-commercial property as well as commercial property (whereas under the FSIA, that the property is “used for commercial activities” is a prerequisite).<sup>309</sup>

Therefore, if a UK court considered ICSID Article 53 to be an *implicit* waiver, it would not have any significant impact on an award holder’s ability to forcibly execute against sovereign property. However, if a court took *Creighton* one step further and interpreted it as an *explicit* waiver of execution immunity, that would appear to open up a whole number of possibilities, given the lack of limitation to commercial property. Of course, Rice goes on, given the generality of the language of Article 53 (and considering the fact that many observers think it is a stretch to find it to be an implied waiver), it is very unlikely that a court would deem it to be an explicit consent to execution against sovereign assets. Thus, a court applying the *Creighton* approach to UK sovereign immunity law would only affect the status quo insofar as it viewed the waiver as an express one.

Most civil law courts have adopted the restrictive approach to sovereign immunity not through domestic legislation, but instead through customary international law (CIL).

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<sup>306</sup> Pub. L. No. 100-669, 102 Stat. 3969 (1988) (codified as amended at 9 U.S.C. § 9, 28 U.S.C §§ 1605(a) & 1610(a)).

<sup>307</sup> State Immunity Act 1978 c. 33 (Butterworth's 2003) [hereinafter SIA].

<sup>308</sup> George K. Foster, Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for its Reform, 25(3) ARIZ. J. OF INT’L & COMP. L. 666, 684 (2008). Compare FSIA, § 1610(a)(1) with SIA, § 13(3).

<sup>309</sup> Burkhard Heff, The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property, 4 EUR. J. INT’L L. 269, 271 (1993).

The ILC's Draft Articles on Jurisdictional Immunities of States and their Property<sup>310</sup> was tasked with codifying international law on sovereign immunity, and the Draft Articles were the result of more than a decade of work, with discussions, meetings and revisions going on from 1978 to 1991.<sup>311</sup>

Article 18 addresses the primary issues of immunity from execution. Crucially, Article 18(1)(a)(i) provides that a sovereign is immune from measures of constraint (including execution) against state property unless the state has expressly consented to such measures, including by an arbitration agreement. Much like the relevant UK SIA provision, such waiver needs to be explicit, but its reach is not limited to commercial property (as is true under the US FSIA). Therefore, just as was the case under the SIA, if a court guided by the ILC Draft Articles considered ICSID Article 53 to be an implicit waiver, it would not have any significant impact on an award holder's ability to forcibly execute against sovereign property. On the other hand, (unlikely as it may be) if a court interpreted the provision as an express waiver of execution immunity, commercial and traditionally "sovereign" property may be deemed ready for the taking.

#### 4.6.4 Conclusion

Recent experience with recalcitrant sovereign debtors has shown that sovereign immunity may be the Achilles' heel of any enforcement regime, even one designed to offer simplified and straightforward procedures like the ICSID Convention. One way to get around this problem is to view certain provisions whereby a sovereign government expressly consents to final, binding, unreviewable arbitration and affirmatively agrees to fulfill its obligations arising thereunder as a waiver of sovereign immunity from execution. That is what the French *Cour de cassation* did in *Société Creighton v. Ministère des Finances de l'Etat du Qatar* as regards Article 24 of the old ICC Rules of Arbitration. Rice has explored whether ICSID Convention Article 53 could be similarly construed as a waiver of executory immunity. Determining that it is possible, Rice further concluded that doing so would only have a tangible effect on an investor's ability to forcibly execute against sovereign assets where Article 53 was viewed as an explicit waiver and where non-commercial property was amenable to execution.

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<sup>310</sup> United Nations, Draft Articles of Jurisdictional Immunities of States and Their Property, with Commentaries, YEARBOOK ILC 1991 II(2) [hereinafter ILC Draft Articles].

<sup>311</sup> Thomas Geigerich, The Holy See, a Former Somalian Prime Minister and a Confiscated Pissarro Painting: Recent US Case Law on Foreign Sovereign Immunity, in IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM 51 (eds. Anne Peters et al.) (2014).

#### 4.7 *The Better Way proposed by Barbosa*

According to Barbosa, a consequence of the boost of international investment treaties (specially the so-called BITs – Bilateral Investment Treaties), the number of arbitration cases and consequently the number of awards to be enforced have increased significantly. As a result, the whole ICSID system started to be more questioned in practice, including its recognition and enforcement formula.

As a result, although ICSID arbitration is still the one mostly chosen for settling investor-State's disputes, investors have been more and more taking into account not only the rules of recognition and enforcement when making their choice of arbitration, but also the effectiveness of the arbitral award execution, since satisfaction of the award is the common goal in any kind of arbitration.

##### 4.7.1 *The solution proposed: The waiver of the immunity from execution*

Once immunity from execution is considered an independent issue from immunity from jurisdiction in almost every national law and national case law, questions about the State's waiver of such immunities started also to be faced. If immunity from jurisdiction can be easily waived only by the State decision to settle a dispute by arbitration, what should happen to the immunity from execution? As case law has shown, immunity from execution is more likely to face more limited and strict conditions in order to be considered as been waived by the State.

National courts' decisions and scholars' opinions have substantially divided the waiver of the immunity from execution in two positions: the first one considers that such waiver may only be effected expressly and unequivocally by the State, independent and detached from the waiver of the immunity from jurisdiction. The second position understands that the waiver of the immunity from execution can be effective without the express and clear statement of the State, directly resulting from the waiver of immunity from jurisdiction. Anyhow, each and every State will have full authority to provide for its own rules on this subject.

As for the first position, Carias-Borjas is of the opinion that "[i]mmunity from execution is a principle of public international law that cannot be set aside unless expressly waived or abolished in a particular State by statute or case law". Under this position, investors have failed to convince national courts in the US, in Germany and in France, that a reference to the NYC in the arbitral agreement (Libancell and Sedelmayer) or a reference to an arbitration clause (Iran v. EUODIF) should be considered as a waiver of immunity from execution.

However, “in some countries, acceptance of arbitration is taken to imply waiver of immunity from execution”<sup>312</sup>. In France, the *Cour d’appel de Rouen*, in *Société Bec Frères*, has innovated the French position when it decides that the arbitration clause shows that the parties have chosen to submit their dispute under international commercial law, waiving the immunity from jurisdiction and, as a consequence, when making an interpretation of the arbitration agreements in good faith, it should be considered that the parties have also waived the immunity from execution. Moreover, in *Creighton v. Qatar*, this position was emphasized by a decision of the *Cour de Cassation*. After the Court, Qatar has waived its immunity from execution because of the Article 24 of the ICC Arbitration Rule then in force. At the time, the parties had submitted their dispute to an ICC tribunal and the applicable Article 24 of the ICC Arbitration Rules provided for that “[b]y submitting the dispute to arbitration by International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made”<sup>313</sup>. It was considered that immunity from execution was one of the “forms of appeal insofar as such waiver could validly be made”. However, this decision was not very well accepted by scholars.

French case law shows that only post-judgment attachments have an open wide application. Pre-judgment attachments do not allow the French courts to use the same position taken in *EURODIF* and *Creighton*. In the famous *NOGA v. Russia* case, even though Russia had expressly waived its immunity from execution by a contract signed up by *NOGA*, the *Cour d’appel de Paris* stated that pre-judgment attachments were not authorized against those who benefited from immunity from execution, regardless its waiver.

As we can see, since the ICSID Convention adopts the independence of the immunity from execution from immunity from jurisdiction, waiver of the immunity from jurisdiction will never authorize a broader interpretation to consider it as a waiver of immunity from execution as well, due to the mere fact that the Article 55 sets forth that recognition and enforcement rules shall not be construed as derogating the immunity from execution law in force in any Contracting State. However, the non-ICSID practice shows the possibility to have an implied waiver of the immunity from execution, as national laws are free to consider the possibility of having implied waiver of immunity from execution, giving a more favourable treatment if compared to ICSID awards.

#### 4.8 The solution of *Baldwin, Kantor and Nolan*

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<sup>312</sup> PAULSSON (J.), “Review and enforcement of state-investor awards”, §2.

<sup>313</sup> The Article 24 was replaced by the current Article 28(6) of the ICC Arbitration Rules, in force since January 1<sup>st</sup>, 2008

It is commonly said by proponents of the ICSID investor-state arbitration system that the ICJ is available to be enlisted in its defense. Article 27 of the ICSID Convention forbids Contracting States from bringing an international claim on behalf of an investor related to an ICSID dispute unless another "Contracting State shall have failed to abide by and comply with the award rendered in such dispute." Consistent with this provision, Article 64 of the ICSID Convention states that any dispute arising from the "interpretation or application" of the ICSID Convention shall be referred to the ICJ, therefore allowing Contracting States to bring an action against another Contracting State for failing to honor its treaty obligations under the ICSID Convention. This possible counter-action to the resistance of an ICSID award, however, presents its own difficulties. First, the investor would have to convince its home Contracting State to bring the claim on its behalf. The decision by a state to bring an ICJ action against another state will undoubtedly involve a balancing of political, economic and security issues outside the control of that investor. In the case of some states at least, this course of action may be complicated by a lack of confidence in the ICJ, as was recently addressed by Professor Eric Posner in a New York Times opinion piece.<sup>314</sup> Professor Posner noted that, in "the last 30 years, the countries with the ten largest economies have brought only two contentious cases" before the ICJ.<sup>92</sup> Moreover, a case before the ICJ would likely take a substantial length of time to prosecute. And, finally, there is no guarantee that a disappointed state would pay an ICJ award if ordered to do so.

Difficult issues also exist as to the remedies available for an investor in connection with an Article 64 ICJ proceeding brought by that investor's state.<sup>315</sup> The ICJ's Statute does not authorize the orders of specific performance, only "recommendations." It is therefore unclear whether the ICJ could compel the respondent state to comply with the ICSID award. Moreover, ICSID Convention Article 64 does not necessarily give the ICJ juris-diction over the investor's claims as espoused by the investor's state. Instead, Article 64 addresses only disputes between the two states about "interpretation or application" of the ICSID Convention. It is therefore also unclear how the investor's state can bring a damage claim on behalf of the investor to the ICJ without a separate ICJ jurisdictional consent from the respondent state with respect to that claim.

Some observers suggest that the World Bank could withhold certain benefits to Contracting States if those states take actions to avoid the enforcement of awards. The Operational Procedures of the World Bank allow Regional Vice Presidents of the Bank to withhold loans from states that do not comply with their obligations to the World Bank.<sup>94</sup> ICSID itself is undeniably a part of the World Bank Group. In contrast, an ICSID tribunal is clearly not an arm of the World Bank Group. Moreover, an award of an ICSID tribunal is not an obligation owing to the World Bank Group. Accordingly, the

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<sup>314</sup> Eric A. Posner, *All Justice, too, is Local*, N.Y. TIMES, December 30, 2004.

<sup>315</sup> Art. 64 of the I.C.J. arguably allows any interested Contracting State, not just the investor's home state, to bring a claim against another Contracting State before the I.C.J.

World Bank's Operational Procedures (and the Bank's Articles of Agreement) do not directly address the situation where a member country refuses to honor an ICSID arbitration award. Additionally, the World Bank has not, to the authors' knowledge, spoken publicly about the consequences (if any) for new loans to a Contracting State if that state refused to honor its obligations under the award and the ICSID Convention.

The IMF recently did threaten to withhold loans from Argentina in order to remedy Argentina's failure to reach agreements with its bondholders following the failure to honor the bonds. The IMF has stated that it would require Argentina to reach agreements with its bondholders before restructuring Argentina's existing loans with the IMF. Possibly as a result of the pressure from the IMF, Argentina reached agreements with many of its bondholders on a controversial exchange offer for sovereign Argentine debt. Ultimately, however, the IMF agreed to restructure Argentina's loans despite Argentina's failure to reach agreements with all of its bondholders. Moreover, the terms of the exchange offer were seen by the international financial community to be favourable to Argentina. Thus, it is unclear to what extent IMF pressure influenced the conduct of Argentina. Although the efficacy of possible pressure from the World Bank to cause the enforcement of ICSID awards is far from clear, the commitment of the World Bank itself may well be the most important factor in the ultimate success of the ICSID's investor-state arbitration regime.

#### 4.9 *The Solution of Vincent O. Orlu Nmehielle*

In Nmehielle's opinion it appears to be two possible ways to remedy this situation. The first one is the waiver of immunity.

From the time of entering into an investment contract, an investor should properly address the possibility of waiving immunity from execution. At present, unfortunately, the attorney of a private investor has no choice but to insist on including a clause explicitly waiving immunity from execution in a contract with a state. Waiver of immunity is controversial, and thus will depend on who has greater bargaining power. Where the private party is in a stronger position, it is likely that the state party will succumb to the pressure of waiving immunity from execution. Whether the private party is in a stronger position depends upon the kind of investment contemplated.<sup>74</sup> Experience has shown that though waivers of immunity in economic development agreements vary from case to case, waivers of immunity are commonplace in transnational loan agreements. Lenders almost never fail to see that borrowing states or other public entities waive immunities from jurisdiction and enforcement, whether before or after recovery of judgment. <sup>75</sup> It can be expected that as long as the relevant provision is clearly worded and does not lend itself to restrictive interpretation, or border on other considerations impacting the act of state doctrine, there is reason to have confidence in the merits of such waivers.<sup>76</sup> Recognizing the Convention's



shortcomings regarding execution of its awards, the ICSID recommends the following model clause for the purpose of waiving immunity: The *[Name of Contracting State]* hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this agreement, including immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.

There is no doubt that waiver of immunity will be a difficult issue in the negotiation of any investment agreement with state parties to the contract, one which most states will vehemently oppose. The real issue boils down to the bargaining power of the investor, which depends on the attendant need of the state party with regard to the investment contemplated. It has been suggested that waivers of immunity outside the financial field are relatively rare. While private parties engaged in giving loans to states may be in a better bargaining position to demand a waiver of immunity, other aspects of investments may require such waivers, especially if the parties proceed under the ICSID Convention. It is not uncommon to see certain economic development agreements contain a waiver of immunity clause.

Apart from being in a strong bargaining position, the interest of the investor may also influence the decision whether to negotiate for a waiver of immunity clause. The investor may very well take a business risk, hoping for the best. This kind of action will depend upon the existing business relationship between the investor and the state party to the agreement.

#### 4.9.1 *A New Era: The Solution of Duke and Blue Ridge*

Some years ago, Argentina announced its intention to withdraw from the International Centre for Settlement of Investment Disputes (ICSID), making it the fourth Latin American country to do so and signaling a growing resistance to the obligations imposed by the international arbitration regime - namely, treating ICSID awards as binding and immediately enforceable in any signatory state. Alongside the public denunciations, certain signatory states have directly challenged ICSID's authority by raising various and novel defenses to the confirmation and enforcement of ICSID awards in other signatory states, particularly in the US. Despite this trend, recent federal court decisions illustrate the US judiciary's resolve to uphold ICSID awards and resist sovereign attempts to evade pecuniary obligations imposed by ICSID awards.

Resort to the ICSID system is voluntary and requires consent by both investors and signatory states to the ICSID Convention (the 'Convention') but once consent is given, the obligations under the Convention become mandatory and the outcomes of the arbitration binding. It is this feature that is perhaps the most defining of the ICSID system: national courts may not intervene in an ICSID proceeding and awards are binding and enforceable in all signatory states. Indeed, when drafting the Convention, its authors repeatedly emphasized the binding nature of the arbitral award, believing it to be essential in instilling party confidence in the neutrality and efficacy of the process. As Aaron Broches, the 'father' of the ICSID Convention,

explained, drafters of the Convention sought to create “a complete, exclusive and closed jurisdictional system, insulated from national law” with respect to the arbitration proceedings, awards, and review of award.<sup>316</sup>

The Convention's provisions concerning the binding force and finality of ICSID awards appear in Chapter IV, section 6 of the Convention, Articles 53 and 54.

The remedies referenced in Article 53(1) are limited to annulment, revision or interpretation of an award and can be obtained only through ICSID.<sup>317</sup> That is, only an ICSID tribunal may review or interpret the award, and only a specially constituted annulment committee may annul the award. No setting aside or other review of ICSID awards is permitted by national courts.

As noted, signatory states are obligated, under Article 54(1), to codify their obligations under the Convention through national

legislation. In the US, the federal implementing statute is located in 22 USC section 1650a(a) (the 'implementing statute'), which provides:

'The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration

Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.'

The latter caveat that the Federal Arbitration Act (FAA) does not apply to ICSID awards serves to further strengthen the enforceability of ICSID awards as it means that defenses available under the FAA are not available to parties seeking to challenge enforcement of an ICSID award.

Together with the Convention's binding force and enforcement provisions, the implementing statute should render an ICSID award nearly impervious to challenge in US courts. This, after all, was the idea behind the Convention in the first place: to create a comprehensive, self-sufficient system of international arbitration in the area of investment disputes free from national interference and in which the 'tribunal's award would be directly enforceable within the territories of the States parties.<sup>318</sup>

Notwithstanding the former, in recent years, certain states have nonetheless attempted, albeit unsuccessfully, to raise defenses to the confirmation or enforcement of ICSID awards. Two recent opinions, issued within two weeks of each other, illustrate the federal courts' unwillingness to allow states to circumvent the mandatory enforcement provisions of the Convention and the implementing statute:

- in *Duke Energy Int'l v Republic of Peru*, No 1: 11-cv-01602 (JEB) 2012 WL 5839206 (DDC 19 November 2012), the DC District Court rebuffed Peru's attempt to avoid payment of interest applicable under an ICSID award; and
- in *Blue Ridge Investments, LLC v Republic of Argentina*, No 10 CIV. 153 PGG, 2012 WL 4714819 (SDNY 30 September 2012), the Southern District of New York

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<sup>316</sup> Christina Binder et al. *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer* (2009) at 323.

<sup>317</sup> Convention, Articles 50-52.

<sup>318</sup> E. Lauterpacht. 'Foreword' to C. Schreuer, *The ICSID Convention: A Convention* (2001) p xi.

likewise rejected Argentina's asserted defenses to confirmation of an ICSID award.

In *Duke*, Duke Energy International ('Duke'), an investor in Peru, petitioned the DC District Court to confirm an underlying ICSID Award ('Award') that had been granted in its favor. The petition to confirm related to the amount of interest Peru owed Duke under the Award. Having lost the ICSID arbitration, Peru paid Duke the principal amount it owed and a certain sum of interest. However, prior to issuance of the ICSID award, but after the closing of arguments, the Peruvian Tax Authority amended the Peruvian tax code, changing the applicable interest rate. Peru claimed it need only pay Duke the interest rate as it existed before the amendment; Duke argued in its petition to confirm that it was owed an additional US\$2m under the adjusted interest rate. Peru moved to dismiss.

At issue in the *Duke* case was a phrase in the Award requiring Peru to pay Duke a principal amount plus 'simple interest calculated thereon ... using the actual interest rate(s) stipulated for that period by [the Peruvian Tax Authority] for refunds to tax payers'. In its motion to dismiss, Peru argued first that Duke had failed to state a claim, based on Peru's contention that it had fully paid its obligation.

In the alternative, Peru argued that the Award was ambiguous and should be remanded to the Tribunal for clarification. Finally, Peru fought the petition on grounds of *forum non conveniens*, arguing that the Peruvian courts were better suited to determine which interest rate applied: the new rate under the amended tax code, or the previous rate. On 14 September 2012, DC District Judge Boasberg denied Peru's motion. The Court easily rejected Peru's first defense, failure to state a claim, finding that a claim for unpaid interest was valid and that Duke had 'giv[en] [Peru] fair notice of what the claim is and the grounds upon which it rests.'<sup>319</sup>

The Court also rejected Peru's request for remand, concluding that Peru had not met the threshold for the 'exceptional' remedy of remand, 'a procedure to avoid if possible, given the interest in prompt and final arbitration'.<sup>320</sup> In rejecting Peru's request for remand, the Court noted that the DC Circuit 'has strongly cautioned against remanding arbitral awards, finding that in the "balance between ... rooting out possible error and ... assuring that judgment be swift and economical" ... the latter must generally prevail.'<sup>321</sup>

Substantively, the Court held that the Award was 'clear on its face' and thus required no interpretation by the Court or by a tribunal. Furthermore, embracing the judiciary's general deference to arbitration, the Court warned that a remand based on ambiguity 'requires something more substantial than a disagreement between the parties ... Rather, the award must be so ambiguous that a court is unable to discern how to enforce it, with the arbitrator's intent hopelessly difficult to determine.'<sup>322</sup> Finally, in view of its determination that the Award was unambiguous and required neither

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<sup>319</sup> *Duke Energy Int'l Peru Investments No 1 Ltd v Republic of Peru*, CIV A. 11-1602 JEB, 2012 WL 4045191 \*3 (DDC 14 September 2012) (citing *Bell Atlantic Corp v Twombly*, 550 US 544, 555 (2007)).

<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.* (citing *Sargent v Paine Webber Jackson & Curtis, Inc*, 882 F 2d 529, 533 (DC Cir 1989)).

<sup>322</sup> *Ibid.*, (internal citations omitted).

judicial nor arbitral clarification, the Court declined to consider Peru's argument under the doctrine of *forum non conveniens*.

Having rejected Peru's motion to dismiss, the Court found itself in somewhat uncharted territory. Judge Boasberg held a status conference in which it invited the parties to propose how next to proceed. Duke argued that the Court should simply confirm the award, while Peru requested a final chance to brief Peruvian law. Judge Boasberg opted to permit Peru a 'limited opportunity' to present any other arguments against confirmation.<sup>323</sup>

Peru filed a 'Motion to Deny Confirmation' in response to which Duke cross-moved for confirmation. Again, the Court denied Peru's motion, finding that 'Peru now seeks what amounts to a second bite at the apple and meets the same fate.'<sup>324</sup> Indeed, Peru offered no new arguments and largely reiterated those it had brought under its motion to dismiss, namely that the amended tax code did not apply to the Award. In its opinion, the Court repeated that the 'question presented is a narrow one: whether the ICSID Award is sufficiently clear for this Court to determine the applicable interest rate.' It continued:

'If so, this Court is required by statute to give the Award full faith and credit and confirm it accordingly. (See 22 U.S.C. §1650a). The legal standards governing judicial review of arbitration awards are not complicated. As the Court previously noted, such review 'is limited by design.' Remand is the only relief available, and it is 'an exceptional remedy ... 'to avoid if possible, given the interest in prompt and final arbitration.'" Remand is only warranted where the award is "so ambiguous that a court is unable to discern how to enforce it." Although styled as a Motion to Deny Confirmation, then, Peru's Motion is really just a second motion for remand. Once again, Peru would only be entitled to such remand if this Court were at a loss to determine the arbitrator's meaning.'<sup>325</sup>

Once again, the Court determined that the Award was unambiguous. It thus deemed the ICSID tribunal's ruling binding and conclusive, denied Peru's motion and granted Duke's petition to confirm.

Not two weeks after the DC District Court's denial of Peru's motion to dismiss, judge Gardephe of the Southern District of New York ruled against Argentina on its motion to dismiss a petition for confirmation. In *Blue Ridge*, the investor, CMS Gas Transmission Company (CMS), prevailed against Argentina, winning an award of US\$133.2m. Argentina filed an application with the ICSID to annul the Award but was rebuffed. The ICSID Annulment Committee 'confirmed Argentina's obligation to pay CMS \$133.2 million plus interest in compensation, holding that 'payment by Argentina of the sum awarded is ... obligatory.'<sup>326</sup> Unlike Peru, Argentina did not pay any portion of the Award.

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<sup>323</sup> *Duke Energy Int'l Peru Investments No 1 Ltd v Republic of Peru*, CIV A. II-1602 JEB, 2012 WL 5839206 at 1 (DDC 19 November 2012)

<sup>324</sup> *Ibid*.

<sup>325</sup> *Ibid* (emphasis original) (international citation omitted).

<sup>326</sup> 2012 WL 471489 at \*1 (citing Petitioner's brief)

In 2008, Blue Ridge Investments, LLC ('Blue Ridge'), a Delaware company wholly-owned by Bank of America Corp, notified Argentina of its purchase and assignment of the Award from CMS. Blue Ridge thereafter filed a petition to confirm. Argentina moved to dismiss.

Argentina moved to dismiss based on several grounds, including:

- i. Argentina was immune pursuant to the Foreign Sovereign Immunities Act (FSIA);
- ii. Blue Ridge, as an assignee of the Award, lacked standing to bring the petition; and
- iii. the petition was time-barred under New York's one-year statute of limitations for the enforcement of arbitral awards.

Judge Gardephe ruled against Argentina on each of its arguments. First, the court agreed with Blue Ridge that Argentina had waived immunity under two exceptions to the FSIA: 28 USC section 1605(a)(6), the exception for the confirmation of arbitral awards; and 28 USC section 1605(a)(1), the exception for explicit or implicit waivers of immunity. Citing Article 54(1) of the Convention, the Court rejected Argentina's contention that '[c]onsenting to arbitrate before an ICSID tribunal hardly constitutes proof of a foreign state's intent to waive immunity to suit in United States courts under Section 1605(a)(1).'<sup>327</sup> To the contrary, the Court found that consenting to arbitrate before the ICSID did just that:

'[W]here, as here, a foreign state has chosen to become a Contracting State for purposes of the TCSID Convention — which provides for the automatic recognition and enforcement of awards in Contracting States — that foreign state clearly anticipates the availability of a cause of action in the United States, at least with respect to the recognition and enforcement of an award.'<sup>328</sup>

For similar reasons, noting that the Award was governed by the ICSID Convention and was therefore entitled to 'full faith and credit' under the federal implementing statute, the Court found that Argentina's agreement to submit its dispute to ICSID arbitration constituted a waiver to immunity under section 1605(a)(6).

The Court likewise rejected Argentina's claim that Blue Ridge lacked standing to bring the petition. Argentina's argument turned on the meaning of the word 'party' used in Article 54(2) of the Convention:

'A *party* seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General..'

Argentina argued that the term party as used in Article 54(2) was restricted to a 'party to the arbitration' and that therefore an assignee could not seek confirmation. The Court rejected this assertion, noting in particular that the Convention did not define the term and in fact used it differently throughout the Convention depending on the context. The Court noted that, in most cases, the Convention applies descriptive

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<sup>327</sup> Ibid

<sup>328</sup> Ibid at *Duke Energy Int'l Peru Investments No 1 Ltd v Republic of Peru*, CIV A. II-1602 JEB, 2012 WL 4045191 (international citations omitted).

terms to limit the scope of the term party, such as 'party to the arbitration' or 'party to the dispute'. It thus could not conclude that the term 'party', without a further descriptive, was restricted to a 'party to the arbitration'.<sup>329</sup> Finally, the Court agreed with Blue Ridge that, given the implementing statute's imperative that the Award be entitled to 'the same full faith and credit as a final judgment of a state court', New York law on assignments was relevant. Under New York law, an assignee 'has the same standing to enforce an arbitration award in this Court as its assignor would have.' The Court thus concluded Blue Ridge had standing.<sup>330</sup>

Likewise, it rejected Argentina's argument that a one-year statute of limitations should apply to the claim, noting that so holding could produce 'absurd results' because Argentina had asked for - and obtained - a stay of enforcement for more than one year while it sought to annul the Award.<sup>331</sup> Instead, noting that the Award was to be treated as a 'final judgment [] of a state court', and not as an arbitral award, the Court borrowed the most analogous state statute of limitations, CPLR section 211, which governs money judgments.<sup>332</sup> Under CPLR section 211, a party may enforce money judgments within 20 years<sup>333</sup>. Thus, Blue Ridge's petition was not time-barred.

But the fight continues. Like the DC District Court, the SDNY did not immediately confirm the petition when it denied Argentina's motion, meaning confirmation is currently pending. Argentina promptly filed an interlocutory appeal based on FSIA immunity grounds and concurrently moved in the SDNY to certify its remaining claims to the Second Circuit. Blue Ridge has cross-moved in the district court for confirmation and for certification of the appeal as frivolous.

*Duke* and *Blue Ridge* exemplify US deference to foreign arbitral awards even in the face of varied challenges to their recognition and enforcement. With their strong language and probing analysis on issues such as interpretation, foreign immunity and remand, they stand as important precedents in upholding the binding force of ICSID awards.

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<sup>329</sup> Ibid

<sup>330</sup> Ibid

<sup>331</sup> Ibid

<sup>332</sup> Ibid

<sup>333</sup> Ibid.

#### 4.10 Towards Non-Judicial Means To Enforce Investment Awards

Having a legal right does not mean much in practice, if such right cannot be enforced. In other words, in order for a rule of law to successfully give effect to the important values set out in the substantive law, attention should also be paid to actual compliance, either voluntary or coerced via enforcement mechanisms.<sup>334</sup>

In a 2008 survey on "Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards", 61% of the 80 corporations surveyed declared to have encountered difficulties in enforcing arbitral awards and, out of this 61%, 68% indicated that they had been unable to identify and access the assets of the State.<sup>335</sup> In addition, there are risks of a procedural and economic nature.

According to Vinuales and Bentolilla, there are two kind of hurdles. The first difficulties arise from the host State's immunity from execution and the autonomy of State entities. In addition there are procedural and economic difficulties.

The specific scope of the rules on sovereign immunity significantly depends on the domestic law of the State of enforcement and it would be pointless to provide, in this contribution, a catalogue of the different legal regimes. The basic rule is that assets serving governmental purposes (*iure imperii*) benefit from immunity of enforcement, whereas assets serving commercial purposes (*iure gestionis*) do not. Overall, a rather restrictive view of the assets covered by sovereign immunity seems to prevail in practice, but this is not to say that awards against sovereigns are easily enforceable. Diplomatic, military, central bank, and cultural assets are, as a rule, excluded. In addition, as seen above, States often conduct their *iure gestionis* activities through separate legal entities. Commercial assets will often be property of these entities, such as national companies or central banks. This makes it difficult for the investor to find assets that can be subject to attachment because the assets belong to a separate legal entity and not to the State itself. As noted by one commentator:

'[t]he end result is that the State will be effectively shielded from its creditors: when creditors try to enforce a decision against a State through assets allocated to *jure imperii* activities, the State will raise its immunity from execution; when creditors try to

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<sup>334</sup> For this part see the work see Viñuales, J. E. and D. Bentolilla, 'The use of alternative (non-judicial) means to enforce investment awards', in Boisson de Chazournes, L., M. Kohen and J. E. Viñuales (eds.), *Diplomatic and Judicial Means of Dispute Settlement : Assessing their Interactions* (The Hague: Brill, forthcoming in 2012).

<sup>335</sup> C. Baltag, "Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards against States", *Am. Rev. Int'l Arb.* 19 (2008), 404-05.

seize assets allocated to *jure gestioni* activities, they will be told that they are not pursuing the right debtor.<sup>336</sup>

When these entities lack independence or are the *alter ego* of the State, the principle of autonomy of these entities may be tempered. This said, domestic courts are reluctant to find these entities as a mere façade and pierce the veil.<sup>337</sup> Moreover, in some cases, a link between the dispute and the assets to be attached was considered as a necessary requirement.

Enforcing awards before the courts of the host State has its own specific problems. The potential hostility of the local authorities, including domestic courts, makes investors reluctant to pursue this avenue. In *Azurix v Argentina* and *CMS v Argentina* (subsequently acquired by Blue Ridge), the investors explored several avenues to enforce two ICSID awards but they paid little attention to the possibility of seeking enforcement before Argentine courts as Argentina has adopted a policy of challenging each award in the annulment proceedings as a matter of routine dilatory practice to resist compliance. Furthermore the Attorney General of Argentina stated to the press that if an ICSID tribunal were to render an award considered by Argentina unconstitutional, Argentine courts would be empowered to decide on its constitutionality (Rosatti doctrine).

Plus, there are procedural and economic difficulties. Aside from the risk that the court seized may refuse recognition or enforcement, some other procedural difficulties include excessive delays, high expenses and the potential disclosure of confidential information. In some cases, investors may have to initiate several proceedings in different countries where they find assets of the host State.

In addition, the enforcement of investment awards may also be constrained by business- related difficulties. The enforcement of investment awards may also be constrained by business- related difficulties. Investors may wish to preserve a reasonably good business relationship with either the host State or a third State linked to this latter. In this context, enforcement proceedings may be prejudicial to the business relationship. In some cases, investors may go as far as to avoid recourse to arbitration altogether. This was the case of many oil companies exploiting heavy oil

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<sup>336</sup> E. Gaillard, "Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities. Three Incompatible Principles", *State Entities in International Arbitration. Iai Series*, in eds. E. Gaillard and J. Younan (Juris publishing, 2008), 183.

<sup>337</sup> Enforcement was refused against these entities assets in *First National City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983); *Benvenuti & Bonfant Srl v. Banque Commercial Congolaise*, Cour de cassation Paris, 21 July 1987, 1 ICSID Reports 373, 374; *AIG Capital Partners Inc. and Another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening)*, High Court, Queen's Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2239 (Comm), 11 ICSID Reports 118; Cass. 1e civ., 4 January 1995, *Office des cereals de Tunisie v. Bec frères*, 122, JDI 649 (1995); Cass. 1e civ., May 12, 2004, *Compagnie Noga d'importation et d'exportation v. EADS France*, 2004 Bull. Civ. I, No. 135; Gaz. Pal., Somm. 3405 (2004).



in the Orinoco belt in Venezuela after the forced conversion of oil production sharing contracts into mixed companies controlled by the State in 2009.<sup>338</sup> Or, if the investor has pursued arbitration proceedings, it may prefer to negotiate a post-award settlement in order to maintain the business relationship.<sup>339</sup>

In this regard I fully share the view of *Jorge Viñuales and Dolores Bentolila* who proposed a variety of “alternative” or “non-judicial” means that can be used either as a supplement to the judicial framework for enforcement or on a stand-alone basis, when judicial enforcement has been pursued unsuccessfully.

The alternative means in the light of current practice can be divided in three categories. The first ones are the means available to the investor (or the assignee of an award); then we have those requiring the intervention of the investor’s home State or other third States, and in the end those requiring the intervention of an international organization or a private institution.

The most frequent means pursued by investors and debt-collection funds include: the negotiation of a post-award settlement (i); public relations campaigns targeting the creditworthiness of the host State (ii); and, in some cases, the initiation of new arbitration proceedings to put pressure on the host State to comply with a previous award (iii).

#### *4.10.1 Means Available To The Investor (Or The Assignee Of An Award): Post-Award Settlements*

According to the aforementioned survey on “Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards” post-award settlements are not uncommon. Some 40% of the corporations surveyed have negotiated post-award settlements.<sup>340</sup> Although these numbers are applicable to international arbitration in general, not only mixed arbitrations,<sup>341</sup> a settlement of an award rendered against a sovereign has advantages for both the investor and the host State. Whereas the investor will avoid spending time and money in enforcing the

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<sup>338</sup> La migración de los contratos de servicios en la industria petrolera venezolana" "Entorno-Empresarial.Com".Nov.2006,[www.entorno-empresarial.com/?ed=70&pag=articulos&aid=596](http://www.entorno-empresarial.com/?ed=70&pag=articulos&aid=596) (last accessed December 2011).

<sup>339</sup> L. Mistelis and C. Baltag, "Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards. Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices ", 339-40.

<sup>340</sup> L. Mistelis and C. Baltag, "Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards. Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices ", 339.

<sup>341</sup> 5% against States and 21% against State legal entities of the total number of arbitrations in which the corporations surveyed participate in. Baltag, C., "Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards against States," *Am. Rev. Int'l Arb.* 19 (2008), 398.

award, the host State will comply with its obligation at a discount or in installments.<sup>342</sup> The risks associated with the enforcement of an award against States together with the relative bargaining power of the parties have an impact on the value of the award and represents the value at which the creditor would be willing to settle or sell.<sup>343</sup> When an investor anticipates that it will be difficult and/or expensive to find attachable assets, a post-award settlement may offer a suitable alternative. In the abovementioned survey, 54% of the corporations interviewed said that they had negotiated a settlement at an amount between 50% and 75% of the value of the award whereas only 35% of them settled for an amount above 75% of the value the award.

Settlements can be achieved by direct negotiations between the parties or assisted by other means through the intervention of conciliators or mediators.<sup>344</sup> Technically, a settlement is an agreement whereby the parties relinquish their rights in favour of a compromise on the amount and modalities of payment of the award. A settlement does not necessarily involve direct cash payments. It may instead involve creative solutions with forward-looking terms, such as declaratory relief and future benefits, such as tax benefits or regulatory dispensations. The agreement may also include other terms, such as the release of guarantees and obligations regarding the investment (e.g. the release of certain machinery or the completion of certain works).<sup>345</sup>

At the treaty level, it has been considered that economic and physical coercion exercised by the host State over the investor to conclude an unfair post-award settlement is null and void and a violation of the fair and equitable standard (FET) of a BIT. In *Desert Line Projects LLP v. Republic of Yemen*, the investor had failed to enforce a previous award against Yemen. In a context characterized by

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<sup>342</sup> L. Mistelis and C. Baltag, "Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards. Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices", 340.

<sup>343</sup> Arbitral awards have a market value depending on the risks to enforce it, and can be sold to third parties. Such is the case of CMS who basically sold the dishonoured award to Blue Ridge. As an investment strategy, these vulture funds will buy awards for less and develop an aggressive tactic of diplomatic and economic pressure over the host State to induce compliance.

<sup>344</sup> D. Bishop, "Introduction: The Enforcement of Arbitral Awards against Sovereigns", *Enforcement of Arbitral Awards against Sovereigns*, in ed. Doak Bishop (JurisNet, 2009), 4.

<sup>345</sup> In the case *Desert Line Projects LLP v. Republic of Yemen*, the tribunal disclosed the content of a post-award settlement. Although the settlement was reached under duress, it remains useful as an illustration of the contents of this type of settlements. The agreement contained the following main obligations: a) waiver of the claims and rights arising out of the award; b) the obligation to pay the settled sum according to the agreed modalities, c) the obligation of the investor to release the bank guarantees provided by the host State; d) the obligation of the investor to receive, complete and maintain all works in addition to provisional facilities established by the Company; e) the obligation of the host State to release all machinery, equipment and vehicles belonging to the investor; and f) formalities regarding endorsement. *Desert Line Projects LLC v Yemen*, Award (ICSID Case No ARB05/17) 16 February 2008, § 144.

bankruptcy proceedings and a variety of threats and attacks, the investor agreed to sign a post-award settlement in which the claimant relinquished over 50% of the value of the award. Yemen did not pay and the investor initiated a treaty-based arbitration against Yemen for the violation of the BIT, arguing that the settlement was null and void due to economic and physical duress and that the measures adopted by Yemen were contrary to the BIT. The tribunal found that although financial pressure *per se* does not render a settlement null, some element of abuse by the other contracting party does. The measures challenged had been abusive depriving the post-award settlement of any 'international effect' and breaching the fair and equitable treatment standard of the BIT. Yemen was ordered to pay the initial award. It is noteworthy that the tribunal considered that the relinquishment of 50% of the value of the award in a post-award settlement is unfair. In this connection, it held that a settlement is a standard of contractual practice where each party waives its rights and claims arising out of a dispute on a *quid pro quo* basis, and given that the domestic arbitration had already decided the dispute there was no longer a dispute. Thus "to accept that the amount awarded be amputated by half, falls well short of minimum standards of international law and cannot be the result of an authentic, fair and equitable negotiation." This said, the amount at which the parties settled was not the only element considered by the tribunal in reaching its conclusion.

#### 4.10.2 *Reputational damage*

Another option is a public relations campaign targeting the refusal of the State to honor the arbitral award. According to one commentator "some investors apparently believe this may be their best leverage in collecting an award".<sup>346</sup> Bad publicity might affect the reputation of the host State, its investment climate, and its credit worthiness.

Non-compliance with awards may have an impact on the country's credit risk ratings. Credit-rating agencies, such as Moody's, Standard & Poor's and Fitch, regularly carry out sovereign risk rating exercises in which the capacity and willingness of States to service their debt in accordance with the conditions agreed with the creditors are taken into account.<sup>347</sup> The determinants for payment capacity and willingness to repay the debt are of a different nature, reflecting macroeconomic variables, such as stock of foreign currency reserves and balance of payments flows, economic growth prospects and capacity to generate tax receipts, a variety of political factors, etc. Raising the awareness of the public and of credit-rating agencies about unpaid awards may influence the assessment of the unwillingness of the sovereign to pay its private debt. Countries with risky sovereign ratings may experience difficulties in accessing private capital markets.<sup>348</sup> And even if the country does not borrow

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<sup>346</sup> D. Bishop, "Introduction: The Enforcement of Arbitral Awards against Sovereigns", 7.

<sup>347</sup> "What is Sovereign Risk and How to Measure it? Fixed Interest and Credit Research" (May, 2010), available at [www.cfsgam.com.au](http://www.cfsgam.com.au) (last accessed December 2011).

<sup>348</sup> Bank for International Settlements, Committee on the Global Financial System - CGFS Papers No 43, "The impact of sovereign credit risk on bank funding conditions" *Report submitted by a*

money internationally, sovereign ratings are used by analysts to impute a country risk premium to be included in the cost of capital computations. Such costs are then used for foreign direct investment evaluation.<sup>71</sup> For these reasons, information on non-compliance is a significant instrument to induce a State to comply with an award. An illustration is provided by the post-award settlement concluded between Azurix and Argentina (further discussed below) where the investor undertook to assist Argentina in communicating to credit-rating agencies and banks Argentina's compliance with its credit obligations.<sup>349</sup>

Such public relations campaigns could, however, violate confidentiality undertakings. This issue arose in *Amco v. Indonesia*, where the investor conducted a campaign against Indonesia while the arbitration was pending.<sup>350</sup> The host State requested provisional measures from the tribunal to restrain the investor from making the dispute public based on confidentiality grounds. However, the tribunal found that neither the ICSID Convention nor the arbitration rules impose an obligation on the parties to maintain confidentiality of the arbitral proceedings.

#### 4.10.3 *A new arbitration as bargaining strategy*

Another alternative is to initiate a new arbitration arguing that the non-enforcement of (or non-compliance with) an award amounts, as such, to a breach of investment disciplines.<sup>351</sup> The investor could pursue this as a strategy to pressurise the host State to comply with the award or to conclude a post-award settlement while the new arbitration is pending. If the State pays the award, the arbitral proceedings would be discontinued; if a settlement is achieved, it could be incorporated into the new award.

As a rule, award creditors are unwilling to initiate a new arbitration against the very same respondent for rather obvious reasons.<sup>352</sup> However, such a strategy may be useful when the new arbitration benefits from a more favorable regime of enforcement than the one applicable to the unpaid award. By way of illustration, this would be the case of a domestic award (by contrast to an international award) or of one where the losing party is a State entity (by contrast to the State itself).<sup>353</sup> These

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*Study Group established by the Committee on the Global Financial System* (2011). Available at: [www.bis.org](http://www.bis.org) (last accessed 22 July 2011).

<sup>349</sup> Generalized System of Preferences: 2009 Annual GSP Country Practices Review; Case No. 001-CP-09; Azurix Pre-Hearing Brief, 9.

<sup>350</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, Decision on Request for Provisional Measures (ICSID Case No. ARB/81/1) 9 December 1983, 1 *ICSID Reports* 377 (1993).

<sup>351</sup> D. Bishop, "Introduction: The Enforcement of Arbitral Awards against Sovereigns," 7.

<sup>352</sup> L. Reed and I. Martinez, "Treaty Obligations to Honour Arbitral Awards and Diplomatic Protection", *Enforcement of Arbitral Awards against Sovereigns*, in ed. Doak Bishop (JurisNet, 2009), 23

<sup>353</sup> As to awards against bankrupts' states entities these include: *GEA Group Aktiengesellschaft v Ukraine*, Award, (ICSID Case No ARB/08/16) 31 March 2011 [*GEA v. Ukraine*] (ICC award against Oriana which was bankrupt); *Petrobart Ltd v Kyrgyzstan*, Award, (SCC Case No 126/2003), 29 March 2005 [*Petrobart v. Kyrgyzstan*] (award of the Kyrgyz court of arbitration against RSM, the government obtained a suspension of enforcement proceedings 3 months before it was declared bankrupt). As

cases are generally triggered in situations where the investor holds an award against a bankrupt State entity or a State entity that only has assets in the host State where local courts make particularly difficult the enforcement of the award.<sup>354</sup> Although the investor could try to enforce the award against the State and claim that the legal entity is an instrumentality of the State, the investor may also sue the State based on a breach of a BIT. The availability of this latter option will depend on (a) whether the award or the rights it declares qualify as protected investments under a treaty as well as on (b) whether non-compliance may amount to a violation of the treaty standards.

Regarding (a), tribunals tend to consider that arbitral awards are not *per se* investments. Yet, the underlying rights enforced through such awards may qualify as investments. In *Saipem v. Bangladesh*, the protected investments were the contractual rights which were *crystallized* or declared by the award.<sup>355</sup> According to this tribunal an arbitral award and the arbitration clause (as a contractual remedy) are part of the investment as an overall operation and, as such, may be protected by the investment treaty. In *FPS v. Czech Republic*, the investments were the contractual rights *transformed* into new rights in the award whose investment character was maintained by virtue of Article 1(a) of the applicable BIT. The tribunal in *GEA v. Ukraine* took a more restrictive stance and rejected the argument that an ICC award was an investment because the rights it declared resulted from a settlement which was not itself an investment. The tribunal further noted *in arguendo* that, even if the settlement were to be seen as an investment, ‘the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal’s view, the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall—*itself*—within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention.’<sup>356</sup>

The rights arising out of an award relating to an investment are first and foremost pecuniary obligations. They are a remedy against damage suffered in the

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for non-bankruptcy situations but where assets exist only in the host State is *Saipem SpA v Bangladesh*, Award (ICSID Case No ARB/05/7) 20 June 2009. [*Saipem v. Bangladesh*] (ICC award against Petobanga but domestic courts of Bangladesh revoked arbitrators powers and annulled the award).

<sup>354</sup> As to awards against bankrupts’ states entities these include: *GEA Group Aktiengesellschaft v Ukraine*, Award, (ICSID Case No ARB/08/16) 31 March 2011 [*GEA v. Ukraine*] (ICC award against Oriana which was bankrupt); *Petrobart Ltd v Kyrgyzstan*, Award (SCC Case No 126/2003), 29 March 2005 [*Petrobart v. Kyrgyzstan*] (award of the Kyrgyz court of arbitration against RSM, the government obtained a suspension of enforcement proceedings 3 months before it was declared bankrupt). As to non-bankruptcy situations but where assets exist only in the host State is *Saipem SpA v Bangladesh*, Award (ICSID Case No ARB/05/7) 20 June 2009 [*Saipem v. Bangladesh*] (ICC award against Petrobanga but domestic courts of Bangladesh revoked arbitrators powers and annulled the award).

<sup>355</sup> The tribunal said “the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties’ rights and obligations under the original contract.” The tribunal did not consider necessary to determine whether the award constituted an investment as such, *Saipem SpA v Bangladesh*, Decision on jurisdiction and recommendation on provisional measures (ICSID Case No ARB/05/07) 21 March 2007, § 127.

<sup>356</sup> *GEA v Ukraine*, § 162.

investment rights, be these contractual or not. This obligation is ancillary to and separate from the investment *per se*. It is ancillary because as a remedy, its existence depends on the existence of a contractual or property right (the investment) and its violation will affect the effectiveness of such right. It is separate from the investment because the pecuniary debt can, as such, be waived or assigned to third parties independently from the investment. The assignment of the rights arising out from an award relating to an investment to third parties does not make these parties the new owner of the investment. Therefore, a debt-collection fund who acquires the rights arising from an award could not launch a new arbitration as an enforcement strategy because it does not have an investment. Arguably a distinction should be made between situations where the investment continues to exist and situations where the investment no longer exists. In the former case, the investment and the award-related rights would be more easily distinguished than in the latter case, where the award-related rights embody the value of the initial investment. In those cases where the award transforms the rights the parties, e.g. by changing their contractual rights into a settlement, the award itself would arguably embody the investment. By way of illustration, in *FPS v Czech Republic* the original contractual rights (i.e. payments made to MA and Davidová) were transformed in the arbitral award into an entitlement to a first secured charge.

With respect to (b), for this strategy to be pursued the non-enforcement of an award would have to amount (*prima facie* and after the assessment of the merits) to a breach of a BIT. In *Saipem v. Bangladesh*, the tribunal concluded—quite debatably—that the non-enforcement of an ICC award by Bangladeshi courts amounted to an expropriation of the rights declared by the award. But this case is exceptional and, as a rule, a refusal of enforcement or a challenge before domestic courts would not amount to a violation of investment disciplines. Such was the conclusion of the tribunals in *FPS v. Czech Republic* and *GEA v. Ukraine*, where a refusal by domestic courts to enforce an award was considered to be in conformity with the BIT because no 'egregious'<sup>87</sup> mistreatment nor any arbitrariness, discrimination or bad faith could be discerned in the conduct of the local courts.<sup>357</sup> For these reasons, this strategy should be limited to situations where non-compliance and non-enforcement of the award are blatantly unfair.

One important consideration in deciding whether to initiate new arbitration proceedings as a tool to facilitate the enforcement of an unpaid award lies in the nature of the arbitration. Specifically, when the new arbitration is formally conducted under the ICSID Convention, rather than helping this approach may delay collection of the amounts claimed. Article 26 of the ICSID Convention provided indeed that ICSID

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<sup>357</sup> In *SPS v. Czech Republic* the tribunal considered that the refusal to enforce an arbitral award on the grounds of public policy is not a violation of the BIT. "As far as the alleged violation of the fair and equitable treatment standard ... this Tribunal concludes that there is no indication that the courts determining Claimant's requests for the recognition and enforcement of the Final Award acted arbitrarily, discriminatorily, or in bad faith. Claimant's requests were entertained by four levels of courts and Claimant had several opportunities to submit legal arguments on the proper interpretation and application of the exceptions to the recognition and enforcement of the Final Award established under Article V of the *New York Convention*.", § 529.

arbitration is an exclusive remedy, which may have the effect of freezing other parallel enforcement proceedings. This can be illustrated by reference to *MINE v. Guinea*, where the investor pursued ICSID proceedings against Guinea in parallel with other proceedings in Belgium and Switzerland seeking enforcement of an unpaid AAA award. The courts of both countries considered that enforcement proceedings are a remedy and as such prohibited under Article 26 of the ICSID Convention, a position which was also taken by the ICSID tribunal.

#### 4.11 *Means available to international organizations or private institutions*

A number of alternative means of enforcement can be pursued by international organizations or private institutions. Among these, two are particularly noteworthy. First, arbitration institutions, either inter-governmental (e.g. ICSID) or private (e.g. the International Chamber of Commerce) may play a role in the enforcement of arbitral awards by reminding the debtor of its obligation to comply with the arbitral award or by facilitating the negotiation of a settlement (a). Second, international development banks, such as the World Bank or other regional banks, may play a significant role in the enforcement of arbitral awards through a variety of channels (b).

##### 4.11.1 *Arbitral institutions*

Arbitration institutions may play a role in the enforcement of investment awards in several ways. They may, for instance, host post-award settlement discussions<sup>358</sup> or, more frequently, remind the debtor of its obligation to comply with the award. According to some commentators, despite the absence of a clear legal basis in the ICSID Convention, the ICSID Secretariat sometimes reminds recalcitrant award debtors of the importance of payment, if only to avoid the accrual of further interest on the outstanding amount of the debt.<sup>359</sup>

Another possibility is to make non-compliance public. The reasons why making an award public may incite the debtor to comply have already been discussed in connection with the question of reputational damage. Suffice it to add here that arbitral institutions benefit from a legitimacy that the creditor cannot claim. Although an arbitral institution may not go as far as pursuing an awareness campaign on unpaid awards, their mere posting of the information on unpaid awards significantly facilitates the efforts of creditors and may add a measure of objectivity to their claims.

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<sup>358</sup> According to reports, ICSID has hosted such negotiations at least once. See A. R. Parra, "The Enforcement of ICSID Awards", *Enforcement of Arbitral Awards against States*, in ed. Doak Bishop (JurisNet, 2009), 138.

<sup>359</sup> D. Bishop, "Introduction: The Enforcement of Arbitral Awards against Sovereigns," 7.

#### 4.11.2 The World Bank

The World Bank is an important source of financial assistance to developing countries. The access of these countries to international financial markets is often difficult or very expensive (in terms of the interest rates they have to pay to borrow in international markets). This situation places the World Bank in a key position as a provider of financial and technical assistance as a result of which the Bank may exercise substantial leverage over its clients.<sup>360</sup> For present purposes, the question is to what extent the World Bank may use this leverage to incite borrowers to comply with unpaid arbitral awards.

According to the World Bank's Operational Manual there are three types of disputes between a member country and the nationals of other member countries in which the Bank takes an interest:<sup>361</sup> (a) disputes over a failure to service external debt; (b) disputes over compensation to aliens when their property has been expropriated; and (c) disputes over the breach of governmental contracts. When a borrower country is unwilling to take steps or make necessary efforts to resolve or settle these disputes, the World Bank may be led to withhold or suspend lending to the country until such disputes have been solved.<sup>137</sup> The decision of the Bank must be based on an assessment that the conduct of the borrower country is 'substantially harming' its credit worthiness.<sup>138</sup> Under such circumstances, the Bank "may not appraise proposed projects in such a country unless it has good grounds for believing that the obstacles to lending will soon be removed." The Bank may also call on the parties to find a settlement or otherwise seek to promote a prompt and adequate settlement.<sup>140</sup> When the dispute concerns a project financed by World Bank, the Bank may even assist in the negotiation of a settlement.

Although non-compliance with arbitral awards is not specifically listed as a motive to withhold loans or to urge the parties to settle the dispute, it could arguably be seen as failure to take the necessary steps or make appropriate efforts to reach a fair settlement between the parties. Given the institutional links between ICSID and IBRD and IDA, which are all part of the World Bank's Group, Schereur has suggested that this connection could play a significant role in fostering compliance with ICSID awards. Although the World Bank has used this leverage in the post-war nationalisations of the 1960s or in the Suez Canal dispute in the early 1950s, there is little practice in connection with unpaid ICSID awards. In *Azurix v Argentina* and *CMS v Argentina*, the lobby efforts of Azurix and Blue Ridge led the US government to sanction Argentina for the unpaid arbitral awards by voting in the World Bank and the Inter-American Development Bank to withdraw or suspend loans to Argentina. This strategy could potentially affect certain applications for credit made by Argentina amounting to some USD millions.

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<sup>360</sup> H. Shams, "The World Bank and Investment Protection: A Question of Accountability," *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects*, in eds. Norbert Horn and Stefan Michael Kröll (Kluwer Law International, 2004), 111-1142.

<sup>361</sup> Bank Operational Manual, *Operational Policies*, (WB OP 7.40) and as to the procedure see: The World Bank Operational Manual, *Bank Procedures*, (WB BP 7.40).



#### 4.12 *Political Risk Insurance For Collection Of Arbitral Awards*

Another strategy that seems though still *in fieri* is a type of international investment insurance known as political risk insurance.

Arbitration is a long process. The outcome may be unpredictable and enforcement can be difficult at best. Not only is an arbitral award inevitably subject to considerable collection risk, but host government actions or conditions in the host country can thwart or frustrate the arbitration process, resulting in no arbitral award at all.

A type of international investment insurance known as political risk insurance has long existed to compensate foreign investors for expropriations and similar actions of a host government. A wide variety of political risk insurance can be purchased to protect assets or other forms of investment, whether located in a single country or a portfolio of countries, from various specified risks, including expropriation, political violence and currency inconvertibility.

Among them, arbitral award default coverage and denial of justice coverage are specifically designed to facilitate collection of arbitral awards arising from contracts with a host government. Arbitral award default coverage is designed to compensate an investor if the host government breaches its contractual obligations, the parties go to arbitration, and the investor obtains an arbitral award that the government cannot or will not pay. Denial of justice coverage, often provided in tandem with arbitral award default coverage, is designed to compensate an investor if it cannot obtain an arbitral award in the first place because the government has thwarted or frustrated the arbitration process. In recent cases, host governments have obtained injunctions in local courts against arbitration proceedings, had fines charged against parties involved in arbitrations, and even detained arbitrators in an effort to derail the arbitration process.

Together these two specialized coverages provide strong protection for investors relying on arbitration as a dispute resolution mechanism in their contracts with the host government.

In theory, or at least generally, BIT's or multilateral treaties cannot be covered. But if we want to look for solutions, and take a perspective to address any possible chance to recover what is due for a victorious award, we must follow another idea and as pointed out by Frederik E. Jenney, expanding arbitral award default coverage to cover awards resulting from international arbitrations arising from treaties, rather than only from direct agreements with the host government.

##### 4.12.1 *Collection Risk Following An Arbitral Award For Breach of Contract*

Managing political risk has always been an important element of international project financings and other complex international business transactions. One of the

biggest risks faced by investors in large international projects is that the host government will breach or attempt to unilaterally revise the terms of a key contract, such as an investment agreement, concession contract, or offtake agreement<sup>362</sup>.

For many international investors, the most important assets in an overseas project are not the physical assets, such as property, plant and equipment, but rather rights to payment by the host government under a long-term contract to supply goods or services to the government.

Investors rightly perceive that the strength of those contract rights depends on the availability of

- i. a meaningful remedy for breach by the government of its payment obligations,
- ii. a workable forum and dispute resolution mechanism for the inevitable disputes with the host government regarding non-payment, and
- iii. a reliable mechanism for collecting an awarded amount from the government.

#### 4.12.2 *Contractual Remedy of Breach*

The first element—a meaningful remedy for a breach—is typically the subject of much negotiation between the investor and the government, but there are certain general approaches. Most off-take agreements provide for a stream of payments from the government for the product or service provided by the investor.

Given the impracticality of pursuing a government for a series of unpaid periodic payments, investors typically negotiate a right to terminate the contract upon repeated material breach and receive a large termination payment from the government. The termination payment amount is typically sized to compensate the investor fully for its investment, and often an anticipated return on investment, so as to in essence preserve the benefit of the investor's bargain in entering into the contract with the government. Given the size of the periodic payments and the long term of many offtake contracts, it is not unusual for the required termination payment to be in the hundreds of millions of dollars.

The second element for protecting an international investor's contract rights is finding a workable forum and mechanism for resolving disputes regarding non-payment of these large termination amounts. Unlike the first element, this is more the province of lawyers than of business people.

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<sup>362</sup> An offtake agreement is an agreement between a producer of a resource and a buyer of a resource to purchase or sell portions of the producer's future production. An offtake agreement is normally negotiated prior to the construction of a facility such as a mine, in order to secure a market for the future output of the facility. If lenders can see the company has a purchaser of its production, it makes it easier to obtain financing to construct a facility.

Many investors are fundamentally dissatisfied with local dispute resolution procedures typically available with respect to international investment, indeed investors are appropriately wary of resolving a dispute under a contract with a host government party by resorting to local courts that are agencies of the same host government.

For this reason, foreign investors often refuse to submit to the jurisdiction of local courts in countries where the judicial system is not seen as sufficiently independent from the executive branch of the host government that is party to the contract. Similarly, host governments often for various reasons refuse to submit to the jurisdiction of the investor's home country. This creates a stand-off as to the dispute resolution procedure. Therefore, the dispute resolution mechanism of choice for contracts with off takers and other government parties is international arbitration at an administered forum (such as ICSID) or on an ad hoc basis under the rules of one of many arbitration regimes (such as the AAA or UNCITRAL). In any case, the arbitration is usually specified to be at a neutral site before disinterested arbitrators selected by some method perceived as being free from bias. Today virtually all international contracts of any type requiring significant payments by a host government contain international arbitration as the stipulated dispute resolution procedure.

This leaves only the third element finding a dependable mechanism for collecting from the government an amount awarded in an international arbitration.

#### *4.12.3 Arbitral Award Default Coverage: Overview of Arbitral Award Default Coverage*

Even if a carefully negotiated off-take contract and a well-drafted arbitration clause lead to an arbitral award, an investor is faced with a significant collection risk. It can be a difficult process to collect any amount from a government-much less the very large lump-sum termination payments typically involved in off-take contracts. This is where political risk insurance of an arbitral award default can be a solution. The coverage provides compensation if the investor is unable to obtain timely enforcement of an international arbitral award arising from a contract dispute with a sovereign government, and thus effectively protects the investor against the risk that an arbitral award in its favor cannot be collected.

The basic requirements for an investor to make a claim for payment under arbitral award default coverage are as follows:

- i. A dispute between the host government and the investor (or the project company from which the investor derives its interest) must be submitted to the international arbitration procedure contained in the insured contract.
- ii. The arbitral procedure must yield a final and binding monetary award, not subject to appeal, against the sovereign and in favor of the investor (or the project company);

- iii. The investor must make reasonable efforts to enforce the arbitral award in a court of competent jurisdiction. This is typically a local court in the host country, but depending on the circumstances the investor may be required to seek enforcement elsewhere.
- iv. The host government must fail to pay the amount of the arbitral award within a short waiting period (usually 60 to 90 days) of the date of such attempted enforcement.

If these four conditions are satisfied, the political risk insurer will pay to the investor the full amount of the arbitral award, in exchange for assignment to the insurer of the investor's interest in the award. If there are multiple investors in a project, compensation is limited to the insured investor's share (based on ownership percentage) of the award.

#### *4.12.4 Requirements for Arbitral Award Default Coverage*

As with all political risk insurance, however, there are a few requirements for investors to consider with respect to the types of contractual arrangements eligible for arbitral award default coverage.

Insurers generally require that the contractual dispute resolution mechanism be international arbitration. Generally, to be "international", the location of the arbitration must be outside the host country or the home country of one of the parties.

By virtue of the "New York Convention" and other similar international treaties such as ICSID, international arbitral awards have the force of law and are enforceable without judicial review both in the countries that are now party to the New York Convention, so an international arbitral award is recognized around the world as being a binding obligation of the host government.

Another reason for the requirement that an arbitration be international is the allowance under the New York Convention for local court annulment of an award. The New York Convention entitles an enforcing court to refuse enforcement of an arbitration award that "has been set aside or suspended by a competent authority of the country in which . . . that award was made." Therefore, annulment of an award by a court at the seat of the arbitration (i.e., the host country in the case of local arbitration) is one of the few defenses to enforcement of an arbitral award specifically contemplated under the New York Convention. Because the choice of the host country as the place of arbitration can impair the practical enforceability of an eventual award, most political risk insurers insist on arbitration outside the host country.

Note also that mediation and conciliation procedures and other less formal dispute resolution mechanisms, such as resort to a special master or other expert, are not enforceable under international treaties and therefore are not insurable under arbitral award default coverage.

All this generally means that any dispute resolution mechanism other than binding international arbitration is not insurable.

Plus, insurers also generally require that the insured contract obligations (and the resulting arbitral award) be binding on the central government of the host country, rather than on a provincial, municipal or local government, or on an agency, company, or other parastatal entity controlled by the host government. This is because the international treaties that make arbitral award obligations binding under international law do not clearly apply to obligations of host government agencies, parastatals and other subsidiary entities. In some cases a sub-sovereign entity may be acceptable to the political risk insurer, but usually only if its obligations are expressly backed by the central sovereign government.

Yet, only contract-based arbitration mechanisms are insurable. International arbitration under Bilateral Investment Treaties (BITs) or multilateral treaties such as NAFTA, for example, generally cannot be covered. Also insurers can cover only contract disputes that would result in a monetary award to the investor. This means that actions to compel performance and other non-monetary remedies are not insurable. The arbitral award must be final and binding under the rules of the arbitral regime, which generally means that it must not be subject to further review by the arbitral panel that properly rendered it. The award also must be non-appealable. Most arbitration rules provide for only limited rights of appeal — even if those rights are frequently invoked. Normally, an arbitral award can be treated as being final and non-appealable by a political risk insurer, notwithstanding that it is subject to challenge or contest by the host government in the courts of the host country or otherwise outside the dispute resolution procedure.

The arbitral award must meet the customary standard for enforceability of legal obligations. It must be valid, binding and legally enforceable against the host government. Note that this does not require that the award be practically enforceable, in the sense that there is a likelihood of being able to successfully enforce it in order to get paid, but instead only that the award is in proper legal form for enforcement. In this sense the political risk insurer is taking the collection risk on the arbitral award.

#### 4.12.5 *Concerns about Host Government Interference*

One concern that investors have about arbitration as a dispute resolution mechanism, even with arbitral award default coverage, is the potential for the host government to thwart the international arbitration process altogether. Despite its advantages over litigation, international arbitration in most instances remains a long process.

Insured investors are concerned that host government actions might bring an already slow arbitration process to a complete halt, and thereby prevent an arbitral award from being issued. Actions of concern may include host government refusal to participate in agreed-upon arbitration procedures, frustration of arbitration procedures, and other actions rendering arbitration impossible or impracticable. This is critical because, as noted above, arbitral award default coverage requires that there be a final and binding arbitral award against the host government.

These risks are not just theoretical. An excellent article by professor and international arbitrator Mark Kantor reviews three recent investment disputes regarding power projects in Indonesia, as well as power projects in Pakistan and India. Kantor notes that in each of these disputes, courts in the host country enjoined international arbitration proceedings or took jurisdiction over project disputes despite mandatory arbitration clauses in the project documents.

Kantor describes a case in which an Indonesian court, at the request of an Indonesian parastatal entity that was involved in an arbitration, issued an injunction against the arbitration proceeding, with fines of \$1 million per day if the order was violated. An arbitral tribunal in a parallel action against the government of Indonesia reacted by relocating its hearings from Indonesia to The Hague. In response to the relocation of arbitral proceedings, the Indonesian government in quick succession

- i. filed an application with the appointing authority seeking removal of the tribunal chairman for bias,
- ii. requested a Dutch court to enjoin the hearings in The Hague, and
- iii. forcibly prevented the Indonesian arbitrator appointed by the government from participating in the proceedings.

In the last action, Kantor notes "Officers from the Indonesian embassy in The Netherlands intercepted the arbitrator at the Amsterdam airport and escorted him to Jakarta in a scene described by one witness as very 'frightening'."

These types of extreme actions may well amount to a denial of justice that constitutes a violation of international law. However, although the instances just mentioned are certainly clear-cut cases, denial of justice concepts can be murky in general and can lead to confusion if an investor attempts to fit them within standard expropriation coverage.

Hence, if the question is what can be done to address denial of justice risk, again, the answer is that there is a political risk insurance solution.

#### *4.12.6 Denial Of Justice Coverage : Overview of Denial of Justice Coverage*

Political risk insurers provide "denial of justice" coverage to cover events - such as those mentioned above- that signal unambiguously that the dispute resolution procedure has gone seriously awry and will not yield a meaningful determination. Insurers offer denial of justice coverage on a stand-alone basis, and more often in conjunction with arbitral award default coverage, but only in a specific set of circumstances.

The typical requirements for denial of justice coverage are as follows:

- i. **Dispute Submitted to Arbitration.** The investor must have submitted the dispute to arbitration or another approved dispute resolution procedure. Note that "submitting the dispute" is broader than "initiating the dispute resolution procedure" because host government acts that result in the arbitral panel not being named can be said to have prevented the initiation of the arbitration.

- ii. **Timely Submission and Diligence.** The initiation of the dispute resolution mechanism must be timely. Some insurers may prefer to add a stated time period (e.g., “no later than 180 days after the disputed payment was originally due”) to avoid stale claims. The investor must diligently pursue the specified dispute resolution procedure. This requirement may be subject to varying standards (e.g., “use its best efforts” or “use all reasonable efforts”).
- iii. **Wrongful Action of Host Government.** There must be wrongful failure or refusal by the host government to submit to or participate in the dispute resolution procedure. Note that this is described as action or inaction by the host government. Indeed, many of the actions that a host government might take to thwart an arbitration fall more into the category of inaction.
- iv. **Arbitration Rendered Impossible.** That wrongful failure or refusal by the host government must principally and directly cause the invocation, operation or formal conclusion of dispute resolution procedure to be either (a) rendered impossible or (b) prevented from proceeding as provided by the rules of the dispute resolution procedure and the terms of the covered agreement.
- v. **Required Duration.** Generally, this failure or refusal by the host government must last for a continuous period, typically 365 consecutive days.

#### 4.12.7 *Requirements for Denial of Justice Coverage*

As with arbitral award default coverage, there are also a few special requirements for investors to consider with respect to eligibility for denial of justice coverage.

First, as with arbitral award default coverage, frustration of international arbitration under bilateral investment treaties or the GATT is not covered.

Second, denial of justice is usually limited to actions of the host government itself, although some insurers may be willing to include action (or even inaction) by any agency, authority, ministry, company, or other entity controlled by the host government. (Uncertainty whether courts could be added to this list, which would cover situations where there is no independent judiciary.)

Third, the host government action must be wrongful, in the sense that it is not a legitimate legal defense or procedural requirement under applicable law. This can involve a subjective judgment, and is not a bright line.

Finally, and perhaps most importantly, note that the “rendered impossible or prevented from proceeding” requirement sets a high standard, but provides a clear test: the dispute resolution procedure must be completely halted, not merely interfered with.

In fact, some political risk insurers have experimented recently with lower standards with respect to the required consequences to the arbitration process of the wrongful host government action. For example, some insurers offer coverage in the following circumstances:

a) The process has been rendered futile. This is not as high a standard as impossibility. The dispute resolution procedure may not be completely halted, but going forward becomes pointless. (Exactly when a process becomes pointless is admittedly a bit vague.)

b) The process has been obstructed, frustrated or thwarted. This is a significantly lower standard than impossibility. The dispute resolution procedure must be interfered with, but perhaps not completely halted.

c) The process has been rendered impracticable or ineffective. This is low standard, and so is rarely used. This requires only that the dispute resolution procedure be rendered less practical or effective than some unspecified standard.

Note that denial of justice coverage does not typically address inability to arbitrate due to deterioration in conditions in the host country (e.g., due to political violence or other unspecified problems not directly caused by the host government).

Some insurers, however, do offer denial of justice coverage if the arbitration process has been rendered exceptionally hazardous to the physical safety of representatives of any required party. This is special coverage to address threats to the investor's representatives. In some cases this concept can even be broadened to include "witnesses on behalf of any required party." This broadens the coverage substantially, since one credible threat to one witness would allow a claim.

Some investors might question whether the combination of arbitral award default and denial of justice coverages really works. In his article regarding investment disputes in Indonesia, Kantor notes that in one dispute the investors had obtained OPIC (Overseas Private Investment Corporation-known as OPIC) political risk insurance. He adds that "The terms of the insurance policies were somewhat unusual, as they explicitly treated the improper refusal to recognize an international arbitration award as a recoverable event." In fact, OPIC's policy included both arbitral award default and denial of justice coverages, under which OPIC paid the insured investors over \$200 million in December 1999.

#### *4.12.8 Political Risk Insurance In General*

Insurance represents another option, though at an additional cost for the investor. Bjorklund points out that '[i]nsurance possibilities fall into two categories: political risk insurance and BIT award insurance'.<sup>184</sup> As to political risk insurance—which covers the risk of loss of property due to actions of the host State—she notes that it covers only the book value of the investment (which is lower than for example the actual or going concern value) in the event of an expropriation and coverage is not provided in cases of indirect or creeping expropriation. As to BIT award insurance, Bjorklund observes that it is costly; and moreover, it is difficult to obtain coverage.



Political risk insurance is typically available for up to 100% of the value of an investor's interest in specified assets or investments. Premium rates are fixed for the term of the insurance and unless otherwise agreed the policy is non-cancelable, so that insurers cannot remove cover if the political circumstances in a country change. Standard political risk insurance coverages offer protection against political violence, currency inconvertibility, and other host government actions. Perhaps the best known of these coverages is expropriation coverage, which protects an investor against confiscation, expropriation, nationalization of assets, and other acts by the host government that impair fundamental investor rights in the insured investment.

Generally, political risk insurance is available from governmental and multilateral organizations as well as from the private sector.

Governmental organizations offering political risk insurance include the Overseas Private Investment Corporation (known as OPIC), the investment insurance agency of the U.S. government, as well as export credit agencies of the major investor nations, such as U.S. Eximbank, Export Development Canada, ECGD (for the UK), MITI (Japan), COFACE (France), and HERMES (Germany). Governmental organizations offering political risk insurance include the Multilateral Investment Guarantee Agency (known as MIGA), a part of the World Bank, Inter-American Development Bank (for Latin America), and Asian Development Bank.

Private political risk insurers include the American International Group (known as AIG), based in New York, Zurich Emerging Markets Solutions, which is based in Washington, but part of the larger Zurich group of insurance companies, Sovereign Risk Insurance Ltd., based in Bermuda, and various syndicates in the Lloyd's London market.

Virtually all of these public and private insurers offer arbitral award default coverage and most also offer denial of justice coverage.

#### *4.12.9 Expanding the Political Risk Insurance Theory*

As the name suggests, political risk insurance is designed to cover political risks only. Therefore, political risk insurers — as distinct from all-risk guarantors, for example — seek to draw the line between commercial and political risks.

Most political risk insurance coverages apply to investments that have no host government involvement. A government may expropriate a purely private project in which it (previously) had no interest. However, where the project involves a contract with the host government, the line between commercial and political actions can be blurred. Just because a dispute arises under a contract with the host government does not make it a political dispute. In other words, governmental disputes may be commercial or political or (more often) a mix of both.

Investors often mistakenly assume that the breach by a governmental party of its payment obligations under an offtake contract is (or should be) an expropriation

covered by political risk insurance. That is, many investors assume that political risk insurance coverage for expropriation covers all wrongful acts of the host government which of course leads to the question of what government acts are "wrongful." Investors often assert that, especially if a breach of contract by a host government is blatant and deliberate, it is a wrongful governmental act that should be covered by the general concept of expropriation.

Most political risk insurance policies, however, distinguish actions by the host government as a government, which may be covered if they otherwise meet the tests for expropriation, and actions by the host government as a commercial party, which generally are not covered. In fact, most expropriation policies expressly exclude from the scope of coverage any failure of the host government (or its relevant agency) to honor its obligations under any contract in favor of the project company.

Moreover, most political risk insurance policies require that to be expropriatory (and thus be compensable under the policy) an action must be a violation of international law. Generally, a host government's breach of contract with a foreign investor is not a violation of international law.

The prevailing international law standard makes a clear distinction between (a) abrogation or repudiation of a contract-in essence the host government tearing up the contract-which could constitute an expropriation, and (b) lesser non-performance that is a mere breach of a contract, which is not an expropriation.

Recent international law cases confirm this distinction. An ICSID tribunal convened under a North American Free Trade Agreement proceeding recently issued a unanimous award holding that a significant breach of an investment agreement was not "tantamount to expropriation" for purposes of NAFTA, Article 1110. The tribunal noted:

The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless it is accompanied by other elements) is it tantamount to expropriation ... [I]t is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation.

Of course, excluding a risk from coverage does not solve the problem for investors. Because investors recognize breach of contract as a risk they cannot adequately manage or mitigate, there is a healthy demand for a political risk insurance product that addresses it. However, true breach of contract coverage, which would pay immediately upon a breach (or better yet, upon an alleged breach) by the host government of its contractual obligations, is not generally available in the political risk insurance market.

Instead, arbitral award default coverage is available, and it fits within the overall theory of political risk insurance. Arbitral Award Default and Denial of Justice Are Specialized Coverages.

Arbitral award default coverage is not new: it has been available for years in various forms from most public and private political risk insurers. As noted above, it is separate from other standard coverages offered by political risk insurers, such as

expropriation coverage, which are designed specifically to address confiscatory acts by the government.

The key requirement is that commercial disputes between the parties must go through arbitration first. The dispute resolution mechanism, not a political risk insurer, is best able to distinguish between (i) a commercial dispute, where the host government has a legitimate reason for not making a payment, and (ii) a political action by the host government, where the host government is just making excuses. The implicit principle is that when a host government is in a commercial dispute, its actions are not necessarily political.

Particularly in off-take contracts where there might be legitimate issues of non-performance by the project company, it would be imprudent for a political risk insurer to agree to pay an amount before it has been finally determined to be due. However, when a host government refuses to honor an international arbitral award resulting from a dispute resolution procedure to which it has expressly agreed, its actions are more akin to the high-handedness normally associated with an expropriation without compensation.

Lastly, it must be taken into account the recent feeling of dissatisfaction with arbitration as dispute resolution mechanism.

Some investors are dissatisfied with political risk insurance coverage that requires completion of an international arbitration, which often can take years. But political risk insurers note that arbitral award default coverage puts an insured investor in exactly the position it bargained for with respect to commercial disputes with the host government: the dispute should be resolved through arbitration, and if the host government is the losing party, then it should pay. Insurers point out that a political risk insurance policy that pays sooner (e.g., when the dispute arises) than could be reasonably expected under the contract would improve the investor's bargained-for position, rather than maintain it. Political risk insurance policies are not letters of credit. If investors want a clearer and faster right to payment without resort to arbitration, they should bargain for it with the host government.

Indeed, this is exactly the principle behind OPIC's recent introduction of "Non-Honoring of Government Guaranty" coverage. If a host government is willing to issue a standard unconditional financial guaranty, under which payment is not subject to any realistic possibility of defenses or commercial disputes, OPIC is willing to insure payments on that host government guaranty without resort to a dispute resolution mechanism such as arbitration.

#### *4.12.10 A New Idea For Arbitral Award Default Coverage: Coverage of Treaty-based Arbitration*

As recent events in Argentina and elsewhere demonstrate, an investor can find itself in a dispute regarding a host government action, such as a wrongful regulatory change or even classic expropriation, that does not arise out of a contractual

relationship. A possibility that some political risk insurers are exploring is to use arbitral award default coverage more broadly to cover awards resulting from international arbitrations arising from treaties, rather than only from direct agreements with the host government.

In theory at least, treaty-based rights should be insurable. Investors often have standing and rights to compensation under international agreements such as BITs or multilateral treaties such as NAFTA. The responsibilities of a state under international agreements to which it is party are in addition to, and therefore may be broader than, its obligations under general principles of international law. International arbitral awards, including those arising from treaty-based disputes, have the force of law under the New York Convention and otherwise, and so are enforceable without judicial review.

One practical issue for offering this sort of political risk insurance coverage is the timing of its availability for purchase. Although some investors would want to purchase coverage against non-contractual risk when they make their initial investment, certainly more investors would be interested in purchasing coverage later, if concerns about those risks arise. This creates problems of what is referred to in the insurance industry "adverse selection", which is purchasing insurance coverage against a risk when that risk arises, or at least when it has a greater than normal probability of arising.

Some practical issues remain to be resolved. Insurers clearly will need to set sensible limits to avoid adverse selection problems, and will need to make underwriting determinations regarding their prospective recovery rights under the relevant international treaties. Investors will need to determine whether buying coverage against government action is of value for investments where there is no direct relationship with the host government.

Subject to resolution of these issues, this form of coverage could significantly broaden the pool of investors able to take advantage of political risk insurance.

## CONCLUSION

The previous analysis suggests that the enforcement of investment awards can be pursued through a variety of avenues in addition to (or aside from) the basic legal regime for the recognition and enforcement of arbitral awards. This may be good news for an aggrieved investor seeking to recover, as they would be able to avail themselves of a wider range of means. Yet, from a policy perspective this contribution leads to a more nuanced conclusion.

The investment arbitration regime was specifically developed to limit the incidence of inter-State politics on the resolution of investment disputes, but it left open the possibility to resort to diplomatic protection to overcome the difficulties on the enforcement of arbitral awards due to immunity of execution. Yet, diplomatic protection has proved to be a difficult option in practice because: (i) as a general matter States seem increasingly reluctant to exercise diplomatic protection; (ii) such exercise is, in all events, subject to rather demanding conditions; and (iii) the remedies available—including potential compensation—are entirely in the hands of the home State, not the investor. The alternative means are perhaps a better option to collect a debt arising from an award. They mobilize a variety of actors (States, IOs, private institutions) and measures (affecting creditworthiness, influencing the operation of certain IOs or the availability of a GSP) and, thereby, they rely on different pressure strategies. In practice, these means have achieved a reasonable level of effectiveness. This effectiveness is perhaps due to the involvement of debt collecting funds, which can mobilize (i) specific know-how in the enforcement of arbitral awards, (ii) an institutional structure facilitating the adoption of enforcement measures and (iii) effective lobbying strategies. Investors with limited resources or coming from States with fewer means of political persuasion may sell their awards to these entities, as did CMS. The market has thus created an alternative fall back mechanism to enforce arbitral awards where the bargaining power of the investor is unnecessary to collect the value of the award. The investor will certainly have to pay a price for it, but it will dispose of an alternative mechanism to the volatile institution of diplomatic protection.

Of course, the use of these alternative means to enforce awards is sometimes problematic. An excessively intrusive strategy may be very disruptive to the economy of the country and to wider social interests. An example would be the triggering of a lower sovereign credit rating due to disproportional reputational damage.<sup>363</sup> In addition, in cases of defaulting States, such as Argentina in 2005, sovereign debt creditors compete with award creditors. While default often requires complex restructuring of sovereign debt, award creditors, in particular vulture funds, will pursue

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<sup>363</sup> “U.S. Credit Downgraded: S&P Reduces Rating To AA+”, *Huff Post Business*, available at [www.huffingtonpost.com/2011/08/05/downgrade-us-standard-and-poors\\_n\\_919867.html](http://www.huffingtonpost.com/2011/08/05/downgrade-us-standard-and-poors_n_919867.html), last accessed (1 March 2012)

the full value of the debt through independent channels. This might be disruptive to the restructuring of the sovereign debt of the host State, in particular after the *Abaclat* decision on jurisdiction, where an arbitral tribunal asserted jurisdiction over the claims of 60,000 Argentine sovereign bondholders.<sup>364</sup> While some concerns have been raised in connection with litigation to collect sovereign debts against Zambia and Liberia, which led to the Highly Indebted Poor Countries initiative (HIPC) limiting the collection of debts by vulture funds,<sup>365</sup> enforcement of investment arbitral awards remains an area where further regulation is needed. The best avenue remains the negotiation of post-award settlements, which despite their many intricacies, offer an option adapted to the parties circumstances and needs. Post-award settlements will normally entail a reduction of the value of the award, but the adoption of intrusive stances and measures affecting wider social interests will be more easily avoided.

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<sup>364</sup> *Abaclat and ors v Argentina*, Decision on Jurisdiction and Admissibility (ICSID Case No ARB/07/5) 4 August 2011, available at <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf> (last accessed 1 March 2012); and Dissenting opinion of Georges Abi Saab of 28 October 2011, available at [http://italaw.com/documents/Abaclat\\_Dissenting\\_Opinion.pdf](http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf) (last accessed 1 March 2012).

<sup>365</sup> The effects of vulture funds' litigation raised concerns after certain litigation to collect sovereign debts against Zambia and Liberia. These concerns however are focused on the hurdles of highly indebted poor countries to restructure their public external debt. As a result of these concerns the World Bank adopted an initiative to reduce the amount commercial creditors may recover against Highly Indebted Poor Countries (HIPC). This initiative has been implemented by some countries through national laws, such as the UK by the UK Debt Relief 2010 Act.

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