Center for International Commercial
and Investment Arbitration
COLUMBIA LAW SCHOOL

THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION

2015/Vol. 26 No. 1

STATE IMMUNITY FROM EXECUTION IN THE COLLECTION OF AWARDS RENDERED IN INTERNATIONAL INVESTMENT ARBITRATION: THE ACHILLES' HEEL OF THE INVESTOR - STATE ARBITRATION SYSTEM?

*Olga Gerlich**

INTRODUCTION

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.[1] The compensation granted for expropriation of the investor's assets makes them the largest awards in the history of investment arbitration.[2] However, as indicated by commentators, the Russian Federation is unlikely to voluntarily comply with these awards.[3] The remedy available to the investors against Russia's non-compliance, namely the forcible execution of the compensation awarded in third states, will be barred in the case of most of the Russian assets by virtue of the principle of state immunity from execution.

Another case concerning Russia illustrates well the potential problems regarding state immunity pleas in the execution of investment awards. Sedelmeyer was the sole owner of a company dedicated to the 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 favor, ordering Russia to pay $2.35 million, plus interest.[4] It took Mr. Sedelmayer 12 years and over 30 domestic execution cases to

---

* Trainee attorney-at-law (*aplikantka radcowska*), Warsaw Regional Bar of Legal Advisors. The author wishes to thank professors Céline Lévesque and John Currie of the University of Ottawa for their helpful comments on the earlier drafts of this article. All errors remain the author's responsibility.

[1] Hulley Enterprises Limited v. Russian Federation, PCA Case No. AA 226, Award, July 18, 2014*;* Yukos Universal Limited v. Russian Federation, PCA Case No. AA 227, Award, July 18, 2014; Veteran Petroleum Limited v. Russian Federation, PCA Case No. AA 228, Award, July 18, 2014.

[2] Irina Reznik, Henry Meyer & Jessica Morris, *Yukos Owners Win $50 Billion in 10 Year Fight With Russia*, BLOOMBERG (July 28, 2014), http://www.bloomberg.com/news/2014-07-28/yukos-owners-win-50-billion-damage-award-vs-russia-gml-says.html.

[3] *Now Try Collecting*, THE ECONOMIST (Aug. 2, 2014), *available at* http://www.economist.com/news/business/21610284-business-disputes-taken-arbitration-winning-just-start-now-try-collecting; Cody Olson, *Enforcement of International Investment Arbitration Awards Against the Russian Federation*, 22 AM. REV. INT'L ARB. 711 (2011).

[4] Mr. Franz Sedelmayer v. Russian Federation, SCC, Award, July 7, 1998.

collect 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.[5]

At the international law level, the enforcement of international investment arbitration awards is governed by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention")[6] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[7] The first applies to awards rendered in accordance with the ICSID Arbitration Rules,[8] the latter to awards rendered under other arbitration rules, including the ICSID Additional Facility Rules and the UNCITRAL Arbitration Rules.[9] In the light of the rather successful history of compliance with investment awards,[10] the limitations to these collection mechanisms are yet to be fully explored in practice. Nonetheless, the examples of recalcitrant states like Russia and Argentina[11] reveal some serious deficiencies in the investor-state arbitration system which this article aims to analyze. Investors challenged by recalcitrant states are frequently forced to collect their compensation award in jurisdictions other than the respondent state. However, there they encounter a significant legal obstacle, namely state immunity from execution.[12]

---

[5] For a summary of the proceedings, see Andrea 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 302, 314-16 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009).

[6] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

[8] The New York Convention will be applicable to those ICSID awards that are sought to be enforced in a state that is not a party to the ICSID Convention.

[9] JAN PAULSSON, NIGEL RAWDING & LUCY REED, GUIDE TO ICSID ARBITRATION 180 (2d ed. 2010).

[10] A study conducted in 2008 demonstrates that nearly 90% of awards have been voluntarily complied with by the respondents. *See* Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT'L ARB. 319, 324 (2008).

[11] *See* Luke E. Peterson, *How Many States Are Not Paying Awards under Investment Treaties?*, INV. ARB. REP., http://www.iareporter.com/articles/20100507_3. Other less-known examples of recalcitrant states include Kazakhstan, Zimbabwe, Kyrgyzstan, and Thailand. *Id*.

[12] Some clarification regarding the terminology employed in this article is needed at this point. Here, the term "state immunity from execution" will be used to describe the immunity of state property from attachment by authorities of a state that exercises jurisdiction over the territory where the property is located. "State immunity from execution" is opposed to the term "state immunity from adjudication" which denotes the principle that bars domestic courts of a state from adjudicating disputes brought against a foreign state. The terms "measures of execution" and "measures of constraint" will be used interchangeably to describe measures following the issuance of the award, its recognition, and acknowledgement of its enforceability, which are aimed at satisfaction of

The application of the principle of state immunity in the execution of investment awards[13] can nullify the most attractive attributes of the investor-state arbitration system as a method of dispute settlement from the perspective of investors, namely independence from national legal systems, and the impartial and apolitical character of dispute settlement.[14] This article will answer the question of whether sovereign immunity from execution constitutes an "Achilles' heel" of the investor-state arbitration system as suggested by Professor Schreuer.[15]

The article is divided into three parts. Part I will introduce the terminology and provide an overview of the mechanisms of collection of investment awards under both Conventions. Part II will be devoted to the principles on state immunity from execution. It will examine the rules applicable under international law and in selected domestic jurisdictions (France, Germany, Switzerland, the United Kingdom, and the United States).[16] The last part will provide an analysis of the remedies to the defense of state immunity from execution in the collection of international investment awards. Firstly, it will examine the possible solutions that would directly address the problem of state immunity from execution. Secondly, it will explore the remedies against recalcitrant states that may be available directly to investors or to their home states. The effectiveness of these remedies in mitigating the problem of state immunity will be assessed.

I. COLLECTION OF INTERNATIONAL INVESTMENT ARBITRATION AWARDS

A. *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 states. Its primary objective was to facilitate the enforcement of awards rendered in disputes between private parties in commercial arbitration.[17]

---

the award debt. The attachment of the assets in the adjudicatory state, *i.e*., prejudgment or interlocutory measures, is beyond the scope of this article.

[13] This article uses the expression "collection of award" to refer to the mechanism leading to forcible recovery of the awarded compensation. This encompasses three distinct steps of the process leading to the ultimate recovery of the pecuniary compensation: recognition, enforcement, and execution of the award.

[14] Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV.-FOREIGN INVESTMENT L.J. 1 (1986).

[15] As stated with regard to the ICSID Convention. *See* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION. A COMMENTARY 1154 (2d ed. 2009).

[16] There are no available empirical data on the most popular fora for forcible execution of international investment awards. However, as demonstrated throughout the article, these jurisdictions were relevant in the known instances where the investment arbitration cases reached the execution stage.

[17] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 277-82 (1981).

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 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.[18] Thus, recognition and enforcement of non-ICSID awards will essentially be subject to 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, 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.[19] Setting aside of an award in the state of arbitration has an extra-territorial effect, as it may preclude enforcement in the other contracting states by virtue of Article V(1)(e) of the Convention.[20] This contrasts with the refusal of recognition and enforcement, which has legal effects only in the jurisdiction where recognition and enforcement are sought.[21]

---

[18] New York Convention, *supra* note 7, Art. IV(1).

[19] 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).

[20] 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).

[21] *Id*.

B. *Collection Mechanism under the ICSID Convention*

The ICSID Convention governs recognition, enforcement, and execution of awards in its Section 6 of Chapter IV, 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.[22] Their binding force requires the parties to a dispute to comply with the award. 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) is a restatement of the *pacta sunt servanda* principle of customary international law.[23] 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 award. 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 award cannot be subject to any external review.[24] 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.[25]

The collection mechanism under Article 54 can be used when a party fails to comply with the award in accordance with Article 53.[26] Article 54(1) of the ICSID Convention lays out the obligation of 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."[27] Some scholars have suggested that the

---

[22] *See* SCHREUER, *supra* note 15, at 1097. The first sentence of Article 53 reads, "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."

[23] 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).

[24] The only review available is for revision and annulment under Articles 51 and 52 of the Convention.

[25] Compañiá 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.

[26] Stanimir A. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, *supra* note 5, at 322, 328.

[27] Thus, 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

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.[28] 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.[29] Unlike the New York Convention,[30] 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, "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 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.[31] 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.[32] In several proceedings on the stay of

---

New York Convention, or subject to other applicable treaties or laws. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 237 (2d ed. 2012).

[28] *See, e.g.*, Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23(1) J. INT'L ARB. 1, 9-14 (2006).

[29] 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).

[30] New York Convention, Art. V.

[31] 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 (Oct. 7, 2008); Compañiá 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].

[32] As of August 6, 2014, s*ee* World Bank, List of ICSID Cases, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx.

enforcement, Argentina has argued that the obligation to comply with awards under Article 53 does not arise until the creditor has initiated enforcement proceedings under Article 54.[33] Argentina has claimed that the above relationship between Articles 53 and 54 resulted from the obligation to treat an ICSID award as if it were a final judgment of a domestic 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.[34]

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.[35] 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.[36] The committee analyzed in detail the relationship between these two obligations and provided reasons for which it held Argentina's interpretation untenable.[37] 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.[38] Secondly, in accordance with Article 54, parties are obliged to enforce only pecuniary awards. Following Argentina' reasoning, there would never be an obligation to comply with non-pecuniary obligations imposed by an ICSID award.[39] 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").[40] 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.[41] 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.[42]

---

[33] *Siemens*, *supra* note 31, ¶ 5; *Enron*, *supra* note 31, ¶ 57.
[34] *Enron*, *supra* note 31, ¶ 56.
[35] *Id.* ¶¶ 74-77.
[36] *Id*. ¶¶ 67-69
[37] *Id*. ¶¶ 54-78.
[38] *Id*. ¶ 62.
[39] *Id*. ¶ 66.
[40] Vienna Convention on the Law of Treaties, May 23, 1969, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.
[41] Enron, *supra* note 31, ¶ 70.
[42] Vivendi, Stay of Enforcement*, supra* note 25, ¶¶ 31-36.

As noted by some commentators, the interpretation proposed by Argentina would undermine fundamental principles of the enforcement regime under the ICSID Convention.[43] Argentina's interpretation of Articles 53 and 54 would imply a supervisory role for domestic courts in the enforcement of awards.[44] As explained 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.[45] 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 its enforcement procedure.[46] 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."[47] Such an interpretation would defeat the object and purpose of Article 53 in violation of the rules of interpretation under the VCLT.[48]

C. *Terminological Confusion: Recognition, Enforcement, and Execution*

Article 54 of the ICSID Convention, which prescribes the procedure for collection of the awards, uses the terms "recognition," "enforcement," and "execution."[49] The New York Convention uses only the terms "recognition" and "enforcement."[50] The notions of "recognition," "enforcement," and "execution" describe distinct steps in the process of collection of the award debt. As this distinction has caused some trouble in practice, these terms ought to be clarified.

Recognition is the formal certification that an award is final and binding.[51] Its primary function is to attribute a *res judicata* quality to an award in a given jurisdiction.[52] In most cases recognition will be a first step towards enforcement and execution of the award.

The notions of "enforcement" and "execution" have been the subject of significant confusion in legal doctrine. Similar confusion is present in the jurisprudence of domestic courts.[53] In the context of the ICSID Convention, some scholars draw a distinction between enforcement and execution, describing

---

[43] *See* Alexandrov, *supra* note 26, at 323.
[44] Vivendi, Respondent's Letter, *supra* note 31, ¶ 5.
[45] Vivendi, Stay of Enforcement*, supra* note 25, ¶ 36.
[46] *Id.* ¶ 35.
[47] *Id*. ¶ 36.
[48] *Id*.
[49] *See* ICSID Convention, *supra* note 6, Art. 53(2) and (3).
[50] *See* New York Convention, *supra* note 7, Arts. III -V.
[51] JAN PAULSSON, NIGEL RAWDING & LUCY REED, GUIDE TO ICSID ARBITRATION 179 (2010).
[52] *Id*.
[53] *See infra* notes 63-64; Liberian Eastern Timber Corp. (LETCO) v. Liberia, 650 F. Supp. 73 (S.D.N.Y. 1986).

enforcement as a distinct step of the process,[54] or a term encompassing recognition and execution of awards.[55] Others use these terms interchangeably.[56]

The distinction is crucial since Article 54(3) of the ICSID Convention subjects execution to domestic laws, whereas recognition and enforcement are subject to the automatic procedure under Article 54(2). The reason for the confusion is present in the very text of the ICSID Convention. The decision of the drafters to use different terms in Article 54 of the Convention would indicate that the words "execution" and "enforcement" should be assigned different meanings.[57] However, only the English version of Article 54 distinguishes between enforcement and execution, as the French or Spanish versions operate with only one term.[58] Pointing to Article 33(4) of the VCLT, Schreuer suggests that, in the absence of any indication to the contrary in the preparatory works to the Convention, the difference should be reconciled by giving the terms "execution" and "enforcement" the same meaning.[59]

The confusion is exacerbated by the use of terms "enforcement" and "execution" in domestic statutes. For example, the United States Federal Sovereign Immunities Act ("FSIA") refers to "immunity from attachment in aid of execution,"[60] whereas the United Kingdom's State Immunity Act ("SIA") describes sovereign immunity from execution as a principle according to which "the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award."[61] In the analysis below it will become evident that in this context "execution" and "enforcement" denote the same meaning. This distinction, which sometimes has no practical significance in domestic jurisdictions,[62] has serious repercussions for the collection of international investment awards, as will be demonstrated below.

The practical consequences of this terminological confusion in the context of the ICSID Convention are illustrated by two enforcement cases before the French courts: *Benvenuti & Bonfant v. Democratic Republic of Congo*,[63] and *SOABI v.*

---

[54] Broches, *supra* note 23, at 318 (stating that the formulation "pecuniary obligations imposed by the award shall be enforceable" would be more appropriate).

[55] Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 178 (1995).

[56] SCHREUER, *supra* note 15, at 1135; Bjorklund, *supra* note 5, at 302 n.4.

[57] Broches, *supra* note 23, at 318.

[58] In its paragraphs 1, 2 and 3 of Article 54, the French text of the ICSID Convection consistently uses "l'exécution." The terminology in the Spanish version is also consistent in using "ejecutar" and "ejecuten" in Article 54(1), "ejecución" in Article 54(2), and "ejecutará" and "ejecución" in Article 54(3).

[59] SCHREUER, *supra* note 15, at 1134 -35.

[60] Foreign Sovereign Immunities Act, 28 U.S.C. § 1610 (1976).

[61] State Immunity Act 1978, c. 33, § 13(2)(b) (U.K.).

[62] *See* Michael E. Schneider & Joachim Knoll, *Enforcement of Foreign Arbitral Awards Against Sovereigns–Switzerland, in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 311, 345 (R. Doak Bishop ed., 2009).

[63] SARL Benvenuti & Bonfant v. Congo, Decision of Dec. 23, 1980, Trib. gr. inst. Paris, 1 ICSID REP. 370 (1993) (Fr.) (English translation) [hereinafter Benvenuti, Court of

Senegal.[64] Benvenuti & Bonfant was an Italian company which obtained an award in its favor against the Congo before an ICSID tribunal.[65] After the Congo refused to pay, Benvenuti located assets belonging to the Congo in France and sought enforcement before the local courts. The Court of First Instance of Paris declared the award enforceable with a limiting condition, stating that "[n]o measure of execution, or even a conservatory measure shall be taken pursuant to the said award, on any assets located in France, without the prior authorization of this Court."[66] Benvenuti successfully appealed this qualification before the Court of Appeal of Paris.[67] The company claimed that the lower judge conflated two stages of the collection mechanism, enforcement and execution of the award.[68]

The Court of Appeal decided in favor of the appellant and deleted the limiting condition. It correctly observed that a distinction must be made between recognition and enforcement under Article 54(1), and the measure of execution which involves the question of state immunity from execution dealt with in Articles 54(3) and 55 of the ICSID Convention. It acknowledged that the arbitral award did not itself constitute a measure of execution, but was only a decision preceding possible measures of execution. The "automatic" enforcement procedure in Article 54(2) restricts the function of a court to ascertaining the authenticity of the award certified by the Secretary-General of ICSID.[69] Thus, the lower court judge could not deal with the second step, the execution of the award, which raises issues of immunity from execution, without exceeding his authority.

The case of *SOABI* underwent a similar development. The ICSID award against Senegal[70] was declared enforceable in France by the Paris Court of First Instance.[71] On appeal by Senegal, the Paris Court of Appeal reversed the lower court decision on the grounds that SOABI did not demonstrate "that the award will be enforced on assets assigned by the state of Senegal to an economic and commercial activity, and that no objection could therefore be made for immunity

---

First Instance]; SARL Benvenuti & Bonfant v. Congo, Decision of Jun. 6, 1981, CA Paris, 20 I.L.M. 877(1981) (Fr.) (English translation) [hereinafter Benvenuti, Court of Appeal].

[64] Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal, Trib. gr. inst., not published (Fr.) [hereinafter: SOABI, Court of First Instance]; Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal, Decision of Dec. 5, 1989, CA Paris, 29 I.LM. 1341 (1990) (Fr.) (English translation) [hereinafter SOABI, Court of Appeal]; Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal, Decision of June 11, 1991, Cass civ 1re, 30 I.L.M. 1169 (1991) (Fr.) (English translation) [hereinafter SOABI, Court of Cassation].

[65] SARL Benvenuti & Bonfant v. Congo, ICSID Case No. ARB/77/2, Award, 1 ICSID REP. 330 (1993) (Aug. 8, 1980).

[66] *Benvenuti*, Court of First Instance, *supra* note 63.

[67] *Benvenuti*, Court of Appeal, *supra* note 63.

[68] *Id*. at 880

[69] MOSES, *supra* note 27, at 237.

[70] Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal, ICSID Case No. ARB/82/1, Award (Feb. 25, 1988), *reprinted in* 6 ICSID REV.-FOREIGN INVESTMENT L.J. 125 (1991).

[71] *SOABI*, Court of First Instance, *supra* note 64.

from enforcement."[72] In the Court of Appeal's opinion, recognition or enforcement of the award in France would violate the principle of state immunity, and was therefore contrary to international public order. The court considered itself obliged to refuse the grant of enforcement under Article 1502(5) of the New Code of Civil Procedure. This decision was itself reversed by the Court of Cassation which declared the award against Senegal enforceable holding that enforcement of awards under the ICSID Convention is independent from other types of enforcement applicable to foreign or international awards in domestic or international law.[73]

A clarification as to the meaning of the terms "enforcement" and "execution" in Article 54 was provided in the decision on the stay of enforcement in *Ioannis Kardassopoulos v. Georgia*.[74] In this case, the *ad hoc* annulment committee held that "[t]he 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 . . . governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."[75] Therefore, it is submitted that the order granting recognition and enforcement of an arbitral award under Article 54(2) cannot be considered a measure of execution, but merely constitutes a decision preceding possible measures of execution subject to domestic law pursuant to Article 54(3).

In some legal systems enforcement can generally refer to the judicial practice of issuing "exequatur," an order declaring that an arbitration award is in fact enforceable.[76] In other legal systems, "enforcement" loosely refers to an award creditor's legal right to execute its award.[77] Based on the decisions discussed above, the terms "enforcement" and "execution" can be defined as follows: "enforcement" refers to recognition by domestic courts that the award is enforceable. The term "execution" denotes the actual attachment of assets to satisfy the award. This is without prejudice to the meaning of terms adopted in national laws.

Unlike the ICSID Convention, the New York Convention does not explicitly refer to "execution." The obligation under Article III of the Convention requires states to "recognize arbitral awards as binding and enforce them." It is submitted that there are three possible interpretations of the term "enforce" as used in the text of the New York Convention. Firstly, it could be understood as the action of "rendering the awards enforceable in a domestic jurisdiction." Secondly, "enforcement" could be synonymous with the term "execution" used in Articles

---

[72] *SOABI*, Court of Appeal, *supra* note 64.

[73] *SOABI*, Court of Cassation, *supra* note 64.

[74] Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award (Nov. 12, 2010).

[75] *Id*. ¶ 30.

[76] PAULSSON, RAWDING & REED, *supra* note 51, at 179.

[77] *Id*.

54(3) and 55 of the ICSID Convention and denote actual attachment of the assets in order to collect the award. Lastly, it could be interpreted in a broad manner to encompass both steps of the process.

This article argues that the term "enforce" in the New York Convention should be understood in the same way as in the context of the ICSID Convention. The list of defects of awards which justify refusal of enforcement under Article V of the Convention pertains to the *enforceability* of the awards, rather than to their actual execution. The objective of the process of recognition and enforcement of the awards is to accord the award the same value as an enforceable domestic judgment,[78] provided that it is free of defects that would preclude it from giving rise to obligations under domestic law.

The question of the meaning of the term "enforce" is related to the issue of the stage of the awards collection mechanism at which the question of state immunity from execution should be considered. There are two options: the sovereign immunity defense could be placed either within the catalogue of reasons for refusal of enforcement under Article V of the Convention, or considered at the stage of execution under the domestic law of a state. If one were to agree that the Convention regulates only "enforcement" within the meaning adopted in this article, the actual execution of the award would not be governed by the Convention but would remain a matter of domestic law.

As exemplified by the decision of the German Federal Supreme Court in *Werner Schneider (liquidator of Walter Bau AG) v. Thailand*,[79] contracting parties to the New York Convention seem to recognize execution as a distinct stage of the process of collection of the award which follows recognition and enforcement of the award. In this case the German Federal Supreme Court had to place its consideration of sovereign immunity from execution at the correct stage of the collection procedure. The case was concerned with recognition and enforcement of an investment award rendered in accordance with the UNCITRAL Rules of Arbitration.[80] The court had to determine whether Article 10(2) of the Germany-Thailand BIT, which provided that "[t]he award shall be enforced in accordance with domestic law," constituted an implied waiver of immunity which would allow for execution under German domestic law.[81] The court found that the

---

[78] However, arbitral awards will be subject to a specific regime of legal remedies, different from domestic legal decisions, *i.e.*, the arbitral awards governed by the New York Convention will be subject to requests for setting aside of the award.

[79] Decision of Jan. 30, 2013, Federal Supreme Court, 30 III ZB 40/12 (Ger.) [hereinafter Werner Schneider, Federal Supreme Court]. For a commentary, see Roland Kläger, *Werner Schneider (liquidator of Walter Bau AG) v. Kingdom of Thailand. Sovereign Immunity in Recognition and Enforcement Proceedings under German Law*, 29(1) ICSID REV.-FOREIGN INVESTMENT L.J. 142 (2014).

[80] Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Thailand (formerly Walter Bau AG (in liquidation) v. Thailand), UNCITRAL, Award (July 1, 2009).

[81] Werner Schneider, Federal Supreme Court, *supra* note 79, ¶ 2(c)(aa) (translated by the author).

implied waiver in Article 10(2) of the BIT extended only to the adjudication stage, *i.e.*, recognition and enforcement of the award. The court characterized "recognition and enforcement proceedings" as a *sui generis* type of adjudication proceeding to which the principles of state immunity from jurisdiction applied.[82] In other words, it determined that enforcement constitutes a stage, to which sovereign immunity from adjudication applies, which precedes actual measures of execution.

Understanding the obligation to enforce under Article III of the New York Convention as a confirmation that an award is enforceable better corresponds with the reality of domestic procedures. The distinction, which may have less significance in the case of private parties, becomes relevant when state immunity from execution is concerned. After the award is declared enforceable, the limited availability of assets susceptible to execution may compel the award creditor to institute multiple execution proceedings until state property that is exempt from state immunity from execution is found. Such examples will be discussed in the next part of this article. Understanding "enforcement" as a synonym of "execution" or giving it a broad meaning encompassing both stages of the collection of awards would imply that a domestic court would be allowed to consider all of the reasons for refusal of the award under Article V(1) (and be required to examine the award with regard to the grounds in Article V(2)) every time a creditor seeks execution against a particular property. Such a solution would be impracticable because of the duplication of the procedures, and the potential for conflicting decisions.

D. *Assessment*

To conclude, "recognition," "enforcement," and "execution" are recognized as distinct steps of the process of collection of awards under the ICSID and New York Conventions. They differ in their functions, but more importantly for the purposes of this article they belong to different stages of the judicial process. Recognition and enforcement are a type of adjudicatory process. Post-judgment measures of execution follow them and belong to the execution stage. This has two important consequences. Firstly, state immunity from execution can be invoked only at the stage of the actual attachment of state assets. It cannot bar the proceedings pertaining to recognition and enforcement of international investment awards. Secondly, placing state immunity from execution in the executory stage limits the role of the domestic courts in recognition and enforcement of the awards. Under the ICSID Convention, until the execution phase, the role of domestic courts will be limited to verification of the authenticity of the award. Only the execution stage will engage the examination of whether the assets in question are protected by state immunity from execution. Similarly, state immunity from execution cannot interfere with the recognition and enforcement of the awards under the New York Convention. Although the role of domestic courts

---

[82] *Id*. ¶ 2(a). *Cf.* Yugoslavia v. Société Européenne d'Etudes et d'Entreprises (SEEE), Decision of July 6, 1970, Trib. gr. inst. Paris, 65 I.L.R. 46, 49 (Fr.) (English translation).

in the recognition and enforcement of non-ICSID awards is considerably more significant, state immunity from execution does not belong to the catalogue of the grounds for refusal of recognition and enforcement of awards under Article V of the New York Convention. Thus, the question of state immunity from execution will arise at the execution stage, which is governed by the domestic laws of the state in which recognition, enforcement, and execution take place.

II. STATE IMMUNITY FROM EXECUTION

A. *State Immunity from Execution under the ICSID and New York Conventions*

It is generally accepted that an agreement to arbitrate a dispute should be interpreted as a waiver of state immunity from adjudication in the supervisory proceedings before domestic courts relating to the arbitration.[83] It is acknowledged that state immunity from jurisdiction and state immunity from execution are to be treated separately.[84] It follows that a waiver of immunity from jurisdiction does not imply a waiver of immunity from execution.[85] Article 55 of the ICSID Convention makes clear that the collection procedure in Article 54 shall not "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." Article 55 constitutes a mere interpretative guide to Article 54, since equating an award to the final judgment of a domestic court already preserves State immunity from execution under domestic law.[86] The drafting technique employed in Article 55 constitutes a dynamic reference; the *renvoi* to domestic law in force leaves room for the law of immunity from execution to change over time.[87]

Unlike the ICSID Convention, the New York Convention does not explicitly mention state immunity from execution. Bjorklund contends that in the context of the New York Convention state immunity is likely to arise in one of two ways.[88]

---

[83] George R. Delaume, *Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration*, 2(2) ICSID REV.-FOREIGN INVESTMENT L.J. 403, 405-406 (1987). *Cf.* United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res 59/38, U.N.GAOR, 59th Sess, U.N. Doc A/RES/59/38 (2004), Art. 17; European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 181, Art. 12; SIA, *supra* note 61, § 9.

[84] XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 361 (2012); HAZEL FOX, THE LAW OF STATE IMMUNITY 602 (2d ed. 2008); Chester Brown & Robert O'Keefee, *State Immunity from Measures of Constraint in Connection with Proceedings before a Court, in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY. A COMMENTARY 287, 288 (Roger O'Keefe & Christian J. Tams eds., 2013).

[85] YANG, *supra* note 84, at 391-92.

[86] Broches, *supra* note 23, at 303.

[87] SCHREUER, *supra* note 15, at 1155.

[88] Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 218 (2010).

Firstly, it can be considered part of the public policy exception in Article V(2)(b). The second avenue is Article III, which subjects recognition and enforcement to "the rules of procedure of the territory where the award is relied on." This conclusion is correct, but it regards only sovereign immunity from jurisdiction. Both articles deal with recognition and enforcement, stages which precede the actual attachment of assets. As noted above, recognition and enforcement referred to in the New York Convention are to be treated as a special adjudicatory procedure to which sovereign immunity from jurisdiction applies. Just as in the case of the ICSID Convention, the execution phase remains subject to domestic laws of the contracting parties. Thus, municipal law, including any domestically applicable rules of international law, will govern whether particular assets of a foreign state can be seized.

It must be noted that the obligation to comply with awards is unaffected by an investor's ability to execute that obligation against any particular assets.[89] It constitutes an obstacle to the attachment of the assets, but it does not provide a valid defense to the actual obligation to comply with the award. Schreuer has called sovereign immunity the "Achilles' heel of the [ICSID] Convention."[90] The otherwise effective and self-contained machinery of arbitration fails when it comes to the actual execution against states of pecuniary obligations under awards, as it allows intervention by domestic courts at the stage of execution.[91]

B. *State Immunity from Execution under International Law: Rationale, Evolution, and Sources*

State immunity is a principle of customary international law protecting the state and its property from the jurisdiction of municipal courts of another state.[92] State immunity finds its origins in the principle of sovereign equality of states.[93] The implication of this principle is that no sovereign state can exercise its sovereign power over another equally sovereign state.[94] *A fortiori*, no measures of constraint can be exercised by the authorities of one state against another state and its property.[95] The once absolute doctrine of state immunity has been narrowed to

---

[89] Maritime International Nominees Establishment (MINE) v. Guinea, ICSID Case No. ARB/84/4, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award (Aug. 12, 1980), ¶ 25.

[90] SCHREUER, *supra* note 15, at 1154

[91] *Id*.

[92] Peter-Tobias Stoll, *State Immunity*, *in* RÜDRIGER WOLFRUM, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE at ¶ 1 (2011).

[93] Jurisdictional Immunities of the State (F.R.G. v. Italy), 2012 I.C.J. 99, 123 (Feb. 3).

[94] YANG, *supra* note 84, at 51-55.

[95] Draft Articles on Jurisdictional Immunities of States and Their Property with Commentaries, *in Report of the International Law Commission on the work of its forty-third session*, UN Doc. A/46/10, *reprinted in* [1991] 2(2) Y.B. INT'L L. COMM'N, 13, 56 U.N. Doc. A/CN.4/SER.A/1991/Add.l (Part 2).

sovereign immunity restricted by a number of exceptions. The restrictive doctrine of state immunity is now accepted in the majority of jurisdictions.[96]

Through the development of the restrictive doctrine of immunity, immunity from execution has evolved to be treated separately from immunity from jurisdiction.[97] This independence of the two immunities is evident in the considerable limitation on the scope of immunity from adjudication, which does not correspond to a similar development in the area of immunity from execution.[98] Compared to immunity from adjudication, states still enjoy a significantly wider immunity from execution. The rationale behind this development is that a seizure of state property is regarded as a greater intrusion into state sovereignty than submitting a state to foreign adjudicative jurisdiction. For this reason, the ILC Special Rapporteur on Jurisdictional Immunities of States and their Property, Sompong Sucharitkul, called immunity from execution "the last bastion of State immunity."[99]

The law relating to state immunity is placed on the borderline between international law and domestic law.[100] The international rules on state immunity have developed from the practice of domestic courts to look to customary international law.[101] The rules on state immunity applied by domestic courts are a mixture of customary international law, treaty law, and national laws. Common-law systems have adopted comprehensive legislation on state immunity, which is probably best exemplified by the American FSIA and British SIA.[102] Civil-law countries have not adopted comparable legislation. When necessary, they import principles of international law that they develop through their case law.[103]

Efforts have been made to reach an international consensus on the rules of state immunity. Special rules have been developed in particular contexts with regard to specific kinds of property.[104] Attempts to create universal treaty rules on state immunity have met with more limited success. To date, there are two conventions providing rules on state immunity: the European Convention on State

---

[96] *Id*. at 36-39; YANG, *supra* note 84, at 12-13; FOX, *supra* note 84, at 35.

[97] Draft Articles on Jurisdictional Immunities, *supra* note 95, at 56.

[98] YANG, *supra* note 84, at 438.

[99] Draft articles on Jurisdictional Immunities, *supra* note 95, at 56.

[100] SCHREUER, *supra* note 15, at 1155.

[101] YANG, *supra* note 84, at 26-27.

[102] State immunity legislation was also adopted in other common-law jurisdictions such as Australia, Canada, and Singapore. *See* Foreign States Immunities Act 1985 (Cth) (Austr); State Immunity Act 1985, RSC 1985, c S-18 (Can.); State Immunity Act 1978 (1985 Rev. Ed. Sing.).

[103] Jeremy Ostrander, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgements*, 22 BERKELEY J. INT'L L. 541, 551 (2004).

[104] *See, e.g.* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, Art. 22(3); International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Vessels, Apr. 10, 1926, 179 L.N.T.S. 1999 [hereinafter Brussels Convention], Arts. 1 and 3; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, Art. 32.

Immunity ("ECSI"),[105] and the United Nations Convention on Jurisdictional Immunities of States and Their Property ("UNCSI").[106] Apart from being the first comprehensive international convention on state immunity, the significance of the former is rather marginal. It was ratified by only eight parties out of 47 members of the Council of Europe.[107] Further, the ECSI never purported to constitute a codification of general rules of international law on state immunity.[108] It rather represents evidence of what an important group of western European countries regarded as the limits within which state immunity could be validly claimed under international law at the time of its conclusion.[109] The UNCSI, which has not yet entered into force, requires a more detailed discussion.

Among the other international works on state immunity,[110] the project undertaken by the International Law Commission ("ILC") and its ultimate result, the UNCSI, deserve special attention. State immunity was recommended as a topic for codification and progressive development by the ILC in 1977.[111] In the same year the General Assembly invited the Commission to commence work on this subject.[112] The interim result of the ILC's discussions was the adoption of the Draft Articles on Jurisdictional Immunities of States and Their Property in 1991.[113] The ILC work on the set of principles proposed in the Draft Articles continued until 2004 when the UNCSI was adopted by the General Assembly. In accordance with its Article 30, the Convention will enter into force once the 30th instrument of ratification, acceptance, approval or accession is deposited with the Secretary General.[114]

---

[105] *Supra* note 83.

[106] *Id*.

[107] *See* Council of Europe, European Convention on State Immunity, Chart of Signatures and Ratifications, *available at* http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=&DF=&CL=ENG.

[108] Ian M. Sinclair, *The European Convention on State Immunity*, 22 INT'L & COMP. L.Q. 254, 283 (1973).

[109] *Id*.

[110] Other projects on codification of international law on state immunity included: the Harvard Research project on state immunity, resolutions of the Institut de Droit International, and Draft Montreal Convention by the International Law Association. *See* FOX, *supra* note 84, at 194-200.

[111] Report of the International Law Commission on the work of its twenty-ninth session, UN Doc A/32/10, *reprinted in* [1977] 2(2) Y.B. INT'L L. COMM., U.N. Doc. A/CN.4/SER.A/1977/Add.l (Part 2)) 130, ¶ 110.

[112] Report of the International Law Commission, GA Res 32/151, U.N. GAOR, 32d Sess. (1977)..

[113] Draft articles on Jurisdictional Immunities, *supra* note 95.

[114] To date, there are 28 signatories, and 16 parties to the Convention. *See* United Nations Treaty Collection, Status of the United Nations Convention on Jurisdictional Immunities of States and Their Property, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en.

The UNCSI is aimed at providing a basis for substantial harmonization of state practice in the area of state immunity.[115] Once it enters into force it is likely to achieve this objective. However, pending its entry into force, state parties are not bound to observe the treaty provisions to the full extent, but only obliged not to defeat the object and purpose of the UNCSI.[116] The question remains whether the principles laid out in the Convention that has not yet entered into force can serve as a statement of the current state of customary international law, and as such serve as a source of binding norms of international law.

The text of the Draft Articles which served as the basis for the negotiations was prepared by the ILC, the mandate of which is both "codification and progressive development of international law."[117] The Preamble to the Convention expresses the belief that it will "contribute to the codification and development of international law."[118] This means that some provisions of the Convention codify the existing rules of customary international law, while others may rather reflect "progressive development." As observed by the ILC during its works on the Draft Articles, there is a "grey area in which opinions and existing case law and, indeed, legislation still vary."[119] In such grey areas, states may "take different positions without necessarily departing from what is required by general international law."[120] Probably the best evidence of the authoritative character of the UNSI is the fact that its provisions were applied by both international[121] and domestic[122] courts representing the current international consensus on the principles of state immunity from execution, and it will be treated as such in this article. This article will point to the "grey areas" in which the practices of selected jurisdictions (the United States, the United Kingdom, France, Germany, and Switzerland) differ. In fact, these "grey areas" pose a substantial challenge to investors seeking execution of investment arbitration awards, as they are required to possess intimate knowledge of the particularities of different jurisdictions. The provisions of the ECSI will also be analyzed as they are relevant to the analyzed domestic jurisdictions.[123]

---

[115] UNCSI, *supra* note 83, Preamble, ¶ 3.

[116] VCLT, *supra* note 40, Art. 18(b).

[117] *Establishment of the International Law Commission*, GA Res 174 (II), U.N. GAOR, 2d. Sess, U.N. Doc. A/RES/174(II) (1947).

[118] UNCSI, *supra* note 83, Preamble, ¶ 3.

[119] Draft articles on Jurisdictional Immunities, *supra* note 95, at 23.

[120] Jurisdictional Immunities of the State (F.R.G. v. Italy), 2012 I.C.J. 99, 318 (Feb. 3) (Dissenting Opinion of Judge ad hoc Gaja).

[121] Jurisdictional Immunities of the State (Germ. v. It.), 2012 I.C.J. 99, 123 (Feb. 3).

[122] AIG Capital Partners Inc. v. Republic of Kazakhstan, [2005] EWHC 2239 (Comm), ¶ 80; Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia), [2006] UKHL 26, ¶ 8; NML Capital v. Argentina, et al., Decision of Mar. 28, 2014, Cass civ 1re (Fr.), *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/394_28_25871.html.

[123] Germany, Switzerland, and the United Kingdom are parties to the ECSI.

C. *Scope of Sovereign Immunity from Execution*

1. *Consent to Execution*

a. *Waiver of immunity from execution*

Just like jurisdictional immunity, state immunity from execution is not absolute; a state is free to waive it. A valid waiver must be given by an authority competent to represent a state in the required form, which will differ depending on the applicable law. Article 18(a) of the UNCSI requires an express waiver of immunity from execution.[124] Section 1610(a)(1) of the FSIA permits execution against property used for commercial activity in the case of an express or implicit waiver of immunity.[125] The SIA and ECSI require the written consent of the state.[126]

With regard to the scope of the waiver, as observed by Reinisch, "[w]hen national courts have to interpret waivers of immunity from enforcement measures they tend to limit the scope of such waivers in order to avoid a possible conflict with immunities derived from consular or diplomatic law."[127] The relation between a waiver of immunity from execution and diplomatic immunities was at the center of the *NOGA (I)* dispute before the French courts.[128] NOGA, a French company, sought execution of a commercial arbitration award, in a dispute concerning a loan agreement, against bank accounts held by the Russian Federation Embassy, the Permanent Delegation of the Russian Federation at UNESCO, and the Commercial Bureau of the Russian Federation in France.[129] The Paris Court of Appeal held that a waiver of immunity contained in the contract between the company and the predecessor Soviet government could not extend to these bank accounts. The general terms of the waiver provided that "[the

---

[124] Article 18(a) of the UNCSI, *supra* note 83, reads: "No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that: (a) the State has expressly consented to the taking of such measures as indicated: (i) by international agreement; (ii) by an arbitration agreement or in a written contract; or (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen."

[125] However, under Section 1611(b)(1) an express waiver will be required for an attachment of property that is of a foreign central bank or monetary authority. FSIA, *supra* note 60, §1611(b)(1).

[126] SIA, *supra* note 61, §13(3); ECSI, *supra* note 83, Art. 23.

[127] August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17(4) EUR. J. INT'L L. 803, 818 (2006).

[128] Embassy of the Russian Federation in France, Permanent Delegation of the Russian Federation at UNESCO, Commercial Bureau of the Russian Federation in France v. Compagnie NOGA d'Importation et d'Exportation (NOGA), Decision of Aug. 10, 2000, CA Paris (Fr.), *excerpts reprinted in* XXVI Y.B. COM. ARB. 237 (2001) (English translation).

[129] It should be noted that the Delegation at UNESCO and the Commercial Bureau constitute an integral part of the Embassy of the Russian Federation and benefit from the Embassy's immunities under an agreement concluded between the French Government and the Government of the Soviet Union on September 3, 1951.

state] shall not rely, either directly or with respect to its assets or income, on any immunity from jurisdiction, from execution, from attachment or from any other judicial procedure in relation to its obligations under this contract."[130] The court observed that the respective bank accounts were protected under Articles 22(3) and 25 of the Vienna Convention on Diplomatic Relations ("VCDR").[131] It further held that the diplomatic immunity from execution constituted "a specific regime ... other than the regime that applies to the immunity from execution granted to States."[132] The waiver failed to encompass the immunity of diplomatic accounts as the Soviet government "showed no clear intention to waive diplomatic immunity from execution."[133]

This approach corresponds to Article 3(1) of the UNCSI which provides that the Convention is "without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of its diplomatic missions …."[134] It could be expected that the requirement of a specific waiver will also be applied to property protected under a *lex specialis* regime of immunity.[135] The ILC in its Commentary to the Draft Articles indicated that a general waiver of immunity without indication of any specific category of property will not be sufficient to permit execution against property protected under Article 21, which includes diplomatic property, property of central banks, military property, and property forming part of the cultural heritage of a state.[136]

One of the most important questions regarding waiver of immunity in the context of international arbitration is whether consent to arbitration constitutes a waiver of execution of the award. Intuitively, a conclusion in the affirmative would be supported by the principle of the effectiveness of international arbitral

---

[130] *NOGA*, *supra* note 128, at 273.

[131] Since the VCDR does not explicitly grant immunity to the embassy accounts, the court inferred the diplomatic protection of the embassy accounts from Article 25 of the VCDR which obligates the receiving state to "accord full facilities for the performance of the functions of the mission." VCDR, *supra* note 104, Art. 25.

[132] *NOGA, supra* note 128, at 274.

[133] *Id*. at 275. The French Cour de Cassation also ruled that a general waiver does not encompass immunity of property of diplomatic missions in *NML Capital Ltd. v. Argentina*, Decision of Sept. 28, 2011, Cass civ 1re, *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/867_28_21103.html.

[134] UNCSI, *supra* note 83, Art. 3(1).

[135] *E.g.:* Art. 3(3) of the UNCSI provides that the "Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State." UNCSI, *supra* note 83, Art. 3(3).

[136] Draft Articles on Jurisdictional Immunities, *supra* note 95, at 59. An argument that a specific waiver is necessary to exempt military property from immunity from execution was advanced by Argentina in the dispute before the International Tribunal for the Law of the Sea. *See* Case No. 20 ARA Liberdad (Argentina v. Ghana), Argentina's Request for Provisional Measures, at 42 (Nov. 9, 2012) *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf. Regrettably, the tribunal did not consider this argument.

awards.[137] Execution is the final stage of the arbitral process. Submission to arbitration implies a waiver of immunity from related judicial proceedings at the adjudicatory stage, *i.e.* supervisory proceedings,[138] as well as proceedings pertaining to recognition and enforcement of the award.[139] It might be reasonable to regard execution as a continuation of and a logical consequence of this adjudication stage. However, the general law on state immunity indicates the contrary. A waiver of immunity from adjudication does not extend to the execution stage.[140] This is a consequence of the separate nature of immunity from adjudication and immunity from execution. Expression of this principle is contained in Article 20 of the UNCSI, which clearly prohibits inference of a waiver of immunity from execution from a state's consent to the exercise of adjudicatory jurisdiction. What seems to be a general rule is the requirement for a separate waiver of immunity from execution.[141] Nonetheless, in state practice there seem to be two notable exceptions to what seems to be the general rule: the Swiss and French jurisdictions.

---

[137] 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, STATE ENTITIES IN INTERNATIONAL ARBITRATION 179 (Emmanuel Gaillard & Jennifer Younan eds., 2008).

[138] Article 17 of the UNCSI provides that "[i]f a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to: (a) the validity, interpretation or application of the arbitration agreement; (b) the arbitration procedure; or (c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides."

[139] During the works of the ILC a proposal was made to add "recognition and enforcement" to the list of proceedings related to arbitration in which state immunity from jurisdiction would be excluded. However, this proposal was not adopted in the final draft. *See* Third Report on Jurisdictional Immunities of States and their Property, by Mr. Motoo Ogiso, Special Rapporteur, UN Doc A/CN.4/431(1990), *in* Report of the International Law Commission on the work of its forty-second session (UN Doc A/CN.4/431), *reprinted in* [1990] 2(1) Y.B. INT'L L. COMM. 3, 17, ¶ 2, U.N. Doc. A/CN.4/SER.A/1990/Add.l (Part 1). As a consequence, Article 17(c) of the UNSCI mentions only "the confirmation or setting aside of the award." The rejection of the proposal was caused by the confusion as to the proper understanding of the term "enforcement" as either the actual attachment of state's assets, referred to in this article as "execution," or a preliminary order of obtaining an *exequatur*, constituting a declaration of enforceability of the award. *See* Second Report on Jurisdictional Immunities of States and their Property, by Mr. Motoo Ogiso, Special Rapporteur, UN Doc A/CN.4/422 and Add 1 (1989), *reprinted in* [1989] 2(1) Y.B. INT'L L. COMM. 59, 70-71, ¶ 38 U.N.DOC. A/CN.4/SER.A/1989/Add. 1 (Part 1). As demonstrated above, domestic courts distinguish between enforcement of awards, which is covered by a waiver of adjudicatory state immunity, and state immunity from execution which requires a separate waiver of immunity. *See, e.g.*, *Werner Schneider*, Federal Supreme Court, *supra* note 79, ¶ 2(a); SEEE, *supra* note 82, at 49.

[140] *See* UNCSI, *supra* note 83, Art. 20.

[141] *Id.*; ECSI *supra* note 83, Art. 23; SIA, *supra* note 61, §13(3).

Swiss courts traditionally treat immunity as a single concept and do not differentiate between immunity from adjudication and immunity from execution.[142] The Swiss Federal Tribunal sees immunity from execution as a consequence of adjudication immunity.[143] Therefore, a single waiver will be required to allow proceedings at both the adjudicatory and execution stages. However, this relaxed approach to immunity from measures of execution is restricted by the jurisdictional requirement of inner connection (*Binnenbeziehung*) which will be discussed below.[144]

The French *Cour de Cassation* has endorsed the concept of an implied waiver of immunity from execution through an arbitration clause in its decision in *Creighton v. Qatar*.[145] The court found the basis for an implied waiver of immunity from execution in Article 24 of the ICC Rules of Arbitration, which conferred binding force on awards and contains an obligation for the parties to comply with awards.[146] This interpretation diverges from the prior line of jurisprudence adopted by the French courts.[147] The decision attracted strong criticism.[148] In particular, commentators point to the weakness of the analysis employed by the court. Moreover, it has been pointed out that the decision left some questions unanswered, e.g., as to whether the measures of execution could be implemented against assets that are used for the state's sovereign functions.[149] This question was partly answered in the *NOGA I* decision, issued only a month later.[150] The decision clarified that a general waiver of immunity from jurisdiction does not extend to property protected under diplomatic immunity. However, as explained above, the exclusion from the scope of a general waiver of immunity from execution extends only to property which is protected under a special regime

---

[142] Jean-Flavien Lalive, *Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State*, 10 NETHERLANDS Y.B. INT'L L. 153, 162 (1979); Schneider & Knoll, *supra* note 62, at 329.

[143] Reinisch, *supra* note 127, at 809.

[144] *Infra* Section II.D.1.

[145] Creighton Limited v. Minister of Finance of Qatar and Minister of Municipal Affairs and Agriculture of Qatar, Decision of July 6, 2000, Cass., ILDC 772 (2000) (Fr.).

[146] In their former version, equivalent to Article 34(6) of the 2012 Rules. *See* ARBITRATION RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE 2012, *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration.

[147] Sociétés Eurodif et consorts v. République Islamique d'Iran, Decision of Mar. 14, 1984, Cass civ. 1re, 23 I.L.M. 1062 (1984) (Fr.) (English translation). However, a line of reasoning similar to *Creighton* was adopted by the Court of Appeal of Rouen in 1996. *See* Société Bec Frères v. Office des Céréales de Tunisie, Decision of June 10, 1996, Decision CA Rouen, 1997 REV. ARB. 263.

[148] 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) INT'L ARB. REP. 1 (2000).

[149] *Id.* at 4.

[150] *NOGA*, *supra* note 128.

of state immunity.[151] It is submitted that extending this rule to a general exclusion of all assets used for public purposes would undermine the significance of the distinct "commercial assets" exception to sovereign immunity from execution.[152] Exclusion of public assets from the scope of a waiver would render it purely declaratory.[153]

Although the decision concerned a commercial arbitration award rendered in accordance with the ICC Rules, it could potentially bear some significance for decisions related to the execution of investment arbitration awards. However, given the criticism and contrary practice of other jurisdictions, the impact of the *Creighton* approach on future decisions relating to investment arbitration awards is questionable.

In the context of the ICSID Convention, it has been argued that Article 55, which provides that "[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," excludes the possibility of inferring an implied waiver of immunity from execution from the obligation to comply with the award in Article 53.[154] This conclusion is not correct for two reasons. Firstly, Article 54(3) subjects execution to domestic laws of the forum state. Article 55 further clarifies that this *renvoi* includes a state's domestic laws regarding state immunity from execution. Thus, the interpretation of a waiver of immunity from execution is left to the domestic legal systems. Nothing in the ICSID Convention precludes domestic courts from applying an interpretation of its domestic law on state immunity according to which an arbitration clause would be considered equivalent to a waiver of immunity from execution. Secondly, the language of Article 55 provides that "[n]othing in Article 54 shall be construed as derogating …." However, the possible waiver of immunity from execution could be implied in the respondent state's obligation to comply with the award under Article 53, not only in the contracting state's obligation to recognize and enforce awards under Article 54.[155] Thus, theoretically, adopting the implied waiver approach would be possible under the ICSID Convention.

---

[151] *See supra* note 133.

[152] *See infra* Section II.C.2. State property used for public purposes and not protected under a special regime of state immunity from execution would include, for example, taxes and administrative fees due to a state.

[153] Section 1610(a)(1) of the FSIA allows for a waiver of immunity from execution only in relation to property "used for a commercial activity in the United States." However, in this case, the requirement of commercial purpose of the property does not diminish the significance of the commercial exception under Section 1610(a)(2). The exception of a property used for commercial activity is further qualified by a requirement of a connection between the commercial activity for which the property is used and the underlying claim. A waiver of immunity from execution eliminates the linkage requirement. FSIA, *supra* note 60, § 1610(a)(1).

[154] SCHREUER, *supra* note 15, at 1173.

[155] *Cf. Creighton*, *supra* note 145.

b. *Earmarked property*

State property can be subject to measures of constraint if it has been allocated or earmarked for the satisfaction of the claim which is the object of the proceeding. Earmarking or allocation means that a state has identified assets to pay its debt. This can be treated as a specific form of state consent (a waiver) to execution against assets demonstrated by acts rather than by statements.[156]

Article 19(b) of the UNCSI provides an exception from immunity for property that a state has allocated or earmarked for satisfaction of the claim which is the object of that proceeding. The FSIA and SIA do not include a similar provision. However, it could be argued that earmarking could be regarded as an implicit waiver of immunity from execution against specific property, provided that it is used for commercial activity under FSIA Section 1610(a)(1). The SIA does not contain an exception for property allocated for satisfaction of a claim; neither does it allow an implicit waiver. However, in a *dictum* in the judgment in the *Alcom* case, the House of Lords indicated that earmarking of assets for satisfaction of liabilities incurred in commercial transactions can indicate that the property is "in use or intended for use for commercial purposes" under the commercial exception of Section 13(4) of the SIA.[157] A similar approach can be observed in the *Cour de Cassation*'s reasoning in *Eurodif*.[158] This approach blurs the distinction between the exceptions for commercial assets and earmarked property, and should instead be considered in the context of the former exception discussed immediately below.

2. *Commercial Assets*

The exception for 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.

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 ECSI allows execution of a judgment 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 the forum.[159] Section 13(4) of the SIA allows execution against property which is "for the time being in use or intended for use for commercial purposes." The FSIA permits execution of arbitration awards against foreign state property "used for a

---

[156] FOX, *supra* note 84, at 631.

[157] Alcom Limited v. Colombia, [1984] 74 I.L.R. 170, 185 (HL Eng).

[158] *Eurodif*, *supra* note 147, at 1067.

[159] It must be noted that Article 26 is part of the optional provisions of the ECSI.

commercial activity" in the territory of the United States.[160] The commercial assets exception is also generally accepted in the practice of states that do not have immunity legislation,[161] including the jurisdictions discussed in this article, namely Germany,[162] France,[163] and Switzerland.[164]

The above examples show that the current law on state immunity favors the "purpose test," as opposed to the "nature test" which focuses on the nature of the assets.[165] The key concern is what is to be understood as coming within the term "commercial activity" or "commercial purpose." As will be demonstrated below, 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 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.[166] However, some context as to 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 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."[167] Similar definitions have been adopted in domestic state immunity legislation. The FSIA, in Section 1603(d), defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act." It further provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[168] SIA Section 17 defines "commercial purpose" by reference to its Section 3(3), which describes "commercial transaction" as "any contract for the supply of goods or services; any

---

[160] FSIA, *supra* note 60, § 1610(a)(6).

[161] YANG, *supra* note 84, at 369.

[162] Philippine Embassy Bank Account Case, Judgment of Dec. 13, 1977, Constitutional Court, 65 I.L.R. 146, 155 (Ger.) (English translation).

[163] *Eurodif*, *supra* note 147, at 1065; Société Sonatrach v. Migeon, Decision of Oct. 1, 1985, Cass civ 1re, 77 I.L.R. 525, 527 (English translation).

[164] United Arab Republic v. Mrs X, Judgment of Feb. 10, 1960, Federal Tribunal, 65 I.L.R. 385, 391-92 (Switzerland) (English Translation).

[165] YANG, *supra* note 84, at 393. The "nature test" which focuses on the nature of the transaction is employed in the commercial exception from immunity from jurisdiction. *See id*. at 86. *Cf*. FSIA, *supra* note 60, § 1603(d).

[166] *Philippine Embassy*, *supra* note 162, at 185.

[167] UNCSI, *supra* note 83, Art. 2(1)(c).

[168] FSIA, *supra* note 60, § 1603(d).

loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority."[169]

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.[170] 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 types of "actions by which a private party engages in trade and traffic or commerce."[171]

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 in the past use.[172] The SIA refers to present or past use. The ILC 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."[173] Similarly, the German Constitutional Court held that it is the "actual use" that is decisive.[174] French courts take into consideration "simultaneously the origin and use of the property."[175]

Determining the purpose of the assets appears to be a challenging task. Without any specific earmarking, the use of funds will be a matter within the discretion of states. Domestic courts tend to be deferential to foreign states in this regard. The property will be regarded as serving public purposes unless the creditor can prove the contrary. This allocation of the burden of proof follows from the general rule of immunity of state property in Sections 1609 of the FSIA[176] and 13(2)(b) of the SIA.[177] French courts also apply a general

---

[169] SIA, *supra* note 61, § 3(3).

[170] As held by the United States Supreme Court in *Argentina v. Weltover*, a 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 v. Weltover Inc., 504 U.S. 607, 614 (1992).

[171] *Id.*

[172] FOX, *supra* note 84, at 627.

[173] *Draft Articles on Jurisdictional Immunities*, *supra* note 95, at 58.

[174] *Philippine Embassy*, *supra* note 162, at 184.

[175] *Eurodif*, *supra* note 147, at 1066.

[176] The Section reads, "[A] foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and1611 of this chapter." FSIA, *supra* note 60, § 1609.

[177] "(2) Subject to subsections (3) and (4) … (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award…" SIA, *supra* note 61.

presumption that state property serves a sovereign purpose.[178] Swiss courts, however, have adopted a different approach. They will allow execution against property which was not assigned for a sovereign purpose.[179] The burden of proving the sovereign purpose of the assets will be borne by the state.

Regardless of their commercial or public character, certain categories of property will always be considered as serving a sovereign purpose, and thus be immune to execution.[180] The most significant exceptions concern the assets of central banks, military property, and property used by diplomatic missions.[181]

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.[182] Attachment of central bank assets was attempted in an ICSID case where the English court denied execution against accounts held on behalf of the National Bank of Kazakhstan in order to satisfy an ICSID award against Kazakhstan.[183] There is, however, some state practice against the presumption of immunity of central bank assets. In French courts, central banks are treated no differently than other separate state entities addressed in the following section.[184] If a central bank has a legal personality distinct from that of a

---

[178] *Sonatrach*, *supra* note 163, at 527.

[179] FOX, *supra* note 84, at 628; Dana F. Freyer, *Attachment of Debts Owed to Sovereigns, in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS, *supra* note 62, at 159, 175.

[180] UNCSI, *supra* note 83, Art. 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).

[181] 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 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 the first three categories will be addressed here. 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. UNSCI, *supra* note 83, Art. 21(1).

[182] UNCSI, *supra* note 83, Art. 21(c); FSIA, *supra* note 60, § 1611(b)(1); SIA, *supra* note 61, § 14(4).

[183] *AIG Capital Partners*, *supra* note 122.

[184] George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements Against States and their*

state, its assets will be denied immunity, but they can be attached only by its own creditors, and not those of the state.[185] The presumption of immunity will also not arise in Switzerland. In *Actimon,* the Swiss Federal Tribunal refused to accept the presumption that all funds held by the Central Bank of Libya were destined for sovereign purposes.[186] It held that immunity could only be claimed where the assets at issue were allocated in an identifiable manner for the performance of sovereign functions, and allowed attachment of the assets in question.[187]

The assets of diplomatic missions have proven to be another popular target of award creditors.[188] However, there is a well-established practice of domestic courts to hold such assets immune as property serving sovereign purposes. They are included in the catalogue of sovereign assets in Article 21(1) of the UNCSI. The underlying idea is to protect the uninterrupted functioning of state missions.[189] However, the assets listed in Article 21(1)(a) are limited to the property which is in use or intended for use for the "purposes" of a state's diplomatic functions.[190] This excludes property, such as for example, bank accounts maintained by embassies for commercial purposes.[191]

A controversy has arisen with regard to so called "mixed funds." "Mixed funds" are accounts maintained on behalf of a diplomatic mission but occasionally used for payments for the supply of goods and services to the mission itself, and are thus used simultaneously for public and commercial purposes.[192] State practice with regard to "mixed accounts" is deferential to foreign states.[193] The current law on state immunity tends to regard embassy accounts as one, indivisible sovereign asset and to grant it immunity from execution.[194] Indeed, a denial of immunity could undermine the very rationale of immunity, which is to preserve the

---

Instrumentalities, and Some Proposals for its Reform, 25 ARIZ. J. INT'L & COMP. L. 665, 687 (2008).

[185] *Id*.

[186] Libyan Arab Socialist People's Jamahiriya v. Actimon SA, Judgment of Apr. 24, 1985, Federal Tribunal, 82 I.L.R. 30, 31 (English translation).

[187] *Id*.

[188] *E.g.* Liberian Eastern Timber Corporation v. Liberia, 659 F. Supp. 606 (D.C. Cir. 1987) [hereinafter LETCO]; Decision of Oct. 4, 2005, Federal Supreme Court, VII ZB 8/05 (Ger.), *available at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=34537&pos=0&anz=1 [hereinafter Sedelmayer, German Federal Supreme Court].

[189] Reinisch, *supra* note 127, at 827.

[190] *Draft Articles on Jurisdictional Immunities*, *supra* note 95, at 59.

[191] *Id*.

[192] *Id*.

[193] Based on state practice, the ILC supported the view on the inadmissibility of attachment of the mixed accounts: "[T]he recent case law seems to suggest the trend that the balance of such a bank account to the credit of the foreign State should not be subject to an attachment order issued by the court of the forum State because of the non-commercial character of the account in general." *Id*.

[194] YANG, *supra* note 84, at 420; Ryngaert, *supra* note 180, at 74-75.

performance of a state's diplomatic functions.[195] In the United Kingdom, this general presumption is created by a peculiar requirement under SIA Section 13(5). A certificate by the head of a foreign diplomatic mission that property is not used or intended to be used for commercial purposes will be sufficient evidence to establish the sovereign purpose of the assets, unless the creditor can prove the contrary.[196] The award creditor is thus charged with a difficult, nearly impossible task of proving that the embassy's assets are intended exclusively for commercial uses. Such an inquiry could itself be considered inadmissible under the VCDR. Article 24 stipulates that "[t]he archives and documents of the mission shall be inviolable at any time." Article 31(2) of the VCDR further provides that "[a] diplomatic agent is not obliged to give evidence as a witness."

Moreover, an additional difficulty in the execution of international arbitral awards rendered against a foreign state lies in the overlap between state immunity from execution and the immunity of diplomatic missions under the *lex specialis* regime of diplomatic law. Article 3(1) of the UNCSI clarifies that the principles laid down in the Convention are without prejudice to the "immunities enjoyed by a State under international law in relation to the exercise of the functions of…diplomatic missions." Article 25 of the VCDR obligates the receiving state to "accord full facilities for the performance of the functions of the mission."[197] Unless the sending state waives the immunity of the property of the diplomatic mission, the execution of an award against an embassy of the respondent state will be prevented under the VCDR.[198] As stated by the Paris Court of Appeal in *NOGA I*, with regard to the general waiver of state immunity from execution, establishing an exception under the regime of state immunity of execution does not affect the immunity afforded to the property under diplomatic law.[199]

In the case of military property, the sovereign purpose of the assets is evident. Nonetheless, the UNCSI explicitly prescribes a presumption of sovereign purpose.[200] The FSIA renders military property absolutely immune from execution and attachment.[201] The property must be of a military character or be used or

---

[195] *LETCO*, *supra* note 188, at 609. However, upholding the immunity from execution of embassy accounts on the basis of diplomatic law has a shaky basis as these accounts are not explicitly protected by the VCDR. *See* Ryngaert, *supra* note 180, at 76; *cf.* VCDR, *supra* note 104, Art. 22(3). Nonetheless, in the *NOGA* case, as the VCDR does not explicitly grant immunity to embassy accounts, the French court inferred the diplomatic protection of the embassy accounts from Article 25 of the VCDR. *See NOGA*, *supra* note 128.

[196] *See Alcom*, *supra* note 157. Likewise, the Supreme Court held that a statement of use of the assets of a diplomatic mission exclusively for diplomatic purposes by the counselor of the German embassy establishes *prima facie* evidence of the sovereign purpose of the assets. *Sedelmayer*, *supra* note 188, at 4.

[197] VCDR, *supra* note 104, Art. 25.

[198] *Sedelmayer*, *supra* note 188, at 4.

[199] *NOGA*, *supra* note 128, ¶¶ 5-6.

[200] UNCSI, *supra* note 83, Art. 21(1).

[201] FSIA, *supra* note 60, § 1611(b)(2).

intended for use in the performance of military functions.[202] However, such special status does not stop some creditors from attempting forced execution against military assets. This can be illustrated in the attempted execution of a judgment of the U.S. District Court for the Southern District of New York[203] against an Argentinian warship, the ARA Libertad, by Argentina's creditor, NML Capital Investment, in 2012. The ship entered the port of Tema in Ghana and was detained by the Ghanaian authorities after a local Ghanaian court granted NML's application for an injunction. At Argentina's request, the International Tribunal for the Law of the Sea issued a provisional measures order which upheld the immunity of the ship and commanded its release pending constitution of an arbitral tribunal.[204]

As demonstrated, due to presumptions and allocation of the burden of proof, identifying commercial assets amenable to execution might be a very difficult task. The difficulties that award creditors can face are well illustrated by the decisions issued in the *Sedelmayer* saga. Sedelmayer's failed attempts to collect the award compensation granted by the tribunal at the Stockholm Chamber of Commerce included unsuccessful applications to attach value added tax refunds owed to Russia and paid into the accounts of the Russian Embassy in Berlin,[205] payments owed by Lufthansa for overflight of Russian airspace,[206] and property of the Russian House of Science and Culture in Berlin.[207] Nevertheless, Sedelmayer achieved some prominent victories in his campaign. The first came in 2008, 12 years after the investment award was rendered, when the Cologne Court of Appeals permitted execution against a Kremlin-owned apartment complex which had formerly been used as an office of the Soviet trade mission.[208] Sedelmayer also obtained attachment of Russian assets in Sweden. The Swedish Supreme

---

[202] *Id.*; UNCSI, *supra* note 83, Art. 21(1). The Brussels Convention clearly distinguishes between state-owned ships in commercial service which are subject to execution measures and military vessels enjoying immunity from execution. Brussels Convention, *supra* note 104, Arts. 1 and 3.

[203] NML Capital Ltd. v. Argentina, Dec. 18, 2006, not published (S.D.N.Y. 2006), *cited in* ARA Libertad (Argentina v. Ghana), Case No. 2, Written statement of the Repuiblic of Ghana (Nov. 18, 2012), *available at* https:/www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/WRITTEN_STATEMENT_OF_THE_REPUBLIC_OF_GHANA_-28_NOVEMBER_2012_2.pdf.

[204] ARA Libertad (Argentina v. Ghana), Case No. 2, Order for prescription of provisional measures, (Dec. 15, 2012), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf. The matter was subsequently settled and the arbitral proceedings were terminated.

[205] *Sedelmayer*, *supra* note 188.

[206] Decision of Oct. 4, 2005, Federal Supreme Court, VII ZB 9/05 (Ger.) *available at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=6517d7e9cfb605db8841cd158bbcb8c2&nr=34320&pos=0&anz=1.

[207] Decision of June 14, 2010, Court of Appeals, Berlin, 1 W 276/09 (Ger.) *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1524.pdf.

[208] Decision of Mar. 18, 2008, Court of Appeals, Cologne, 22 U 98/07 (Ger.) *available at* http://www.italaw.com/sites/default/files/case-documents/ita0764.pdf.

Court allowed execution against real estate constituting the former premises of the Russian trade delegation.[209]

D. *Particular Limitations to Execution of Awards Related to State Immunity from Execution*

1. *Nexus Requirement*

In some jurisdictions the courts will not allow execution against commercial-purpose property unless the property is used for the activity upon which the claim is based (subject-matter nexus), has a connection with the entity against which the proceedings were instituted (entity nexus), or has a connection to the territory of the state of enforcement and execution of the award (jurisdictional link).[210]

With regard to the first type of nexus requirement, a subject-matter connection is prescribed by the FSIA. Section 1610(2) of the FSIA allows for execution against property located in the United States and used for commercial purposes provided that it is used for commercial activity upon which the claim was based. In relation to arbitration awards, this limitation was removed through the 1988 amendment to the FSIA which included an exception to the FSIA which was designed to facilitate collection of arbitration awards in the United States.[211] No link between the property and the claim will be required when the judgment is based on an order confirming an arbitral award rendered against a foreign state.[212]

Article 18(c) of the ILC Draft Articles on Jurisdictional Immunities of States and Their Property required the property to have "a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed." This requirement proved to be controversial and was dropped in the later work of the ILC.[213] The UNCSI in its Article 19 contains a modified linkage requirement which prescribes that the property must have "a connection with the entity against which the proceeding was directed." French courts traditionally adhered to the subject-matter nexus requirement.[214] However, this requirement seems to have been abandoned in the more recent jurisprudence.[215]

Thus, the subject-matter connection requirement has lost much of its significance. There is, however, one exception. Subject-matter nexus is required by the ECSI. Article 26 of the ECSI provides that a judgment "may be enforced in

---

[209] Russian Federation v. Franz J. Sedelmayer, Decision of July 1, 2011, Supreme Court, Ö 170-10 (Sweden) (English translation), *available at* http://www.sccinstitute.com/filearchive/4/41226/Case170_10ENG.pdf.

[210] Generally on the nexus requirement, *see* Sun Jin, *The Linkage Requirement in Enforcement Immunity*, 9 CH. J. INT'L L. 699 (2010).

[211] Bjorklund, *supra* note 88, at 221.

[212] FSIA, *supra* note 60, § 1610(a)(6).

[213] Reinisch, *supra* note 127, at 822.

[214] *Id*. In *Sonatrach* the Cour de Cassation held that "[t]he assets of a foreign State were not subject to attachment unless they had been allocated for a commercial activity under private law upon which the claim was based." *Sonatrach*, *supra* note 163, at 526.

[215] Reinisch, *supra* note 127, at 822 (referring to the *Creighton* decision).

the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity."[216]

Creditors seeking collection of their awards in Switzerland may encounter an additional difficulty, namely a requirement of a jurisdictional link of the underlying dispute to Switzerland. The Swiss Federal Tribunal has developed in its jurisprudence a specific requirement that must be met for enforcement of an award in Switzerland. Namely, in order to initiate proceedings against state property, a sufficient jurisdictional connexion with Switzerland must be demonstrated.[217] This is described by the German term "*Binnenbeziehung*."[218] The Swiss Federal Tribunal has clarified when the connection to Swiss territory is sufficient: "When the underlying claim arose in Switzerland, when it has been performed there, or when the foreign State has performed in Switzerland acts through which a place of performance has been created there."[219]

It will not suffice that the debtor's assets are located in Switzerland or that the claim was confirmed by an arbitral tribunal having a seat in Switzerland.[220] *Binnenbeziehung* qualifies the relaxed approach to state immunity in Switzerland. In the context of investment arbitration, it will prevent execution of an award in a very attractive jurisdiction. This was shown in the vacatur by the Swiss Federal Tribunal of the attachment order rendered to satisfy an award arising from Libyan nationalization in *LIAMCO*.[221]

Schneider and Knoll argue that *Binnenbeziehung* cannot be invoked in relation to awards collected under the New York Convention because the nexus requirement is not listed among the grounds to refuse enforcement under Article V.[222] They state that the situation is different in the context of the ICSID Convention, which in Article 54(3) subjects execution of the awards to domestic law.[223] I do not agree with this contention. *Binnenbeziehung* pertains to the enforceability of awards, not their actual execution. Therefore, it should not be invoked in relation to ICSID awards as the ICSID Convention contains an unqualified obligation to enforce the awards.[224] The autonomous ICSID enforcement regime was created specifically to shield awards from this kind of interference on behalf of the domestic courts. The case of the New York Convention is different as it lists permissible exceptions to recognition and

---

[216] However, the actual impact of the ECSI with only eight parties and the optional execution mechanism is questionable.

[217] LIAMCO v Libya, Judgment of June 19, 1980, Federal Tribunal, 62 I.L.R. 228 (English translation) (Switz.).

[218] German "*Binnenbeziehung*" stands for "inner connection."

[219] Moscow Center for Automated Traffic Control v. Geneva Supervisory Commission of the Debt Collection Office, Judgment of Aug. 15, 2007, Federal Tribunal (Switz.), *cited in* Schneider & Knoll, *supra* note 62, at 340-41.

[220] *Id.*

[221] *LIAMCO*, *supra* note 217.

[222] Schneider & Knoll, *supra* note 62, at 344.

[223] *Id*.

[224] ICSID Convention, *supra* note 6, Article 54.

enforcement of the awards. It is submitted that *Binnenbeziehung* could fit into the public policy exception under Article V(2)(b).

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 the 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.[225] 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 the 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.[226] Analysis of the problem requires answering the questions of whether the presumption of immunity applies to property of separate entities and whether execution of arbitral awards can be directed against their property once that presumption is rebutted.

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."[227] The United States applies a presumption of "separateness" to government instrumentalities.[228] As clarified by the Supreme Court in *Bancec*, this presumption can be rebutted when the entity is "so extensively controlled by its owner that a relationship of principal and agent is created" or where recognizing its separate status would "work fraud or injustice."[229] The criteria taken into consideration in an "alter ego" inquiry include: the level of economic control over the property by the government of the foreign state; whether the profits of the property go to that government; the degree to which officials of that government control the daily affairs of the property; whether that government is the sole beneficiary in interest of the property; and whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligation.[230]

---

[225] YANG, *supra* note 84, at 394.
[226] *Id*. at 287.
[227] FSIA, *supra* note 60, § 1603(b).
[228] FNC Bank v. Banco Para el Comercio, 462 U.S. 611, 626-27 (1983).
[229] *Id.* at 629.
[230] *Cf.* FSIA, *supra* note 60, § 1610 (g)(1).

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."[231] 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 general rule is that the British courts must respect the separate legal personality of the entities.[232] Nonetheless, the courts will treat the assets of separate entities as assets of a state under some circumstances. This will be the case when the separate entity was created by a "sham" to avoid liability by the state.[233] Disregarding the entity's separate personality might also find its basis in the principal-agent relationship when the parent state controls and directs a subsidiary so closely that the subsidiary has effectively functioned as the agent of the state.[234]

French courts will permit attachment of the assets of a separate state agency or instrumentality by an award creditor if it can be established that the entity can be regarded as an emanation of the state. This will usually require dependence of the entity's "patrimony" upon the state, *i.e*., a determination that its budget relies on contributions from the state, or that the state manages the entity's finances.[235] In an ICSID case, *Benvenuti & Bonfant*, the Court of Cassation denied execution against the funds held by Banque Commerciale Congolaise in a French bank as it did not find sufficient control by the Congo to consider Banque Commerciale Congolaise an emanation of the state. The control that the State of Congo exercised over the bank was not enough to regard it as an emanation of the State.[236] It should be recalled that French courts treat central banks no differently than other state entities.[237]

The UNCSI adopts a functionalist approach similar to that employed in the SIA. It includes "agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State" in its definition of a "state" under Article 3(1)(b)(iii). 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

---

[231] SIA, *supra* note 61, § 14(2).

[232] Foster, *supra* note 184, at 685.

[233] *Id*.

[234] *Id*.

[235] *Id*. at 686.

[236] Benvenuti & Bonfant v. Banque Commerciale Congolaise, Decision of July 21, 1987, Cass, 82 I.L.R. 91, 92 (Fr.).

[237] *Supra* at II.B.1.

property will be protected only to the extent that it is used for sovereign activities. The separate entity bears the burden of proving that the entity is engaged in sovereign activities.

This presumption can be rebutted by establishing that the "commercial assets" exception under Article 19(c) of the UNCSI applies. It should be recalled that this provision requires the property to have "a connection with the entity against which the proceeding was directed" for the execution against it to take place. The term "connection" is to be understood as broader than "ownership" or "possession."[238] As further clarified in the Annex to the Convention, "Article 19 does not prejudge 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."[239]

E. *Assessment*

The development of the restrictive doctrine of state immunity has hardly affected the scope of sovereign immunity from execution. In the light of the recognition of the private sphere of activities of a state under the restrictive doctrine, the nearly absolute state immunity from execution seems to be reminiscent of the age of absolute state sovereignty.

One of the biggest challenges in analyzing international law on state immunity is its structure. The current customary international law includes a "grey area" in which states can adopt different legal solutions without departing from what is required by general international law.[240] This makes it difficult to identify the common denominator under customary international law. Part II of this article demonstrated that the approaches adopted in various jurisdictions differ in their treatment of waivers of immunity from execution, the special role of central banks, the allocation of burdens of proof with regard to separate entities, and nexus requirements. This compels investors seeking execution to have intimate knowledge of the peculiarities of the laws of different jurisdictions. A further obstacle to execution of investment arbitration awards is posed by the fragmentation of international immunity regimes, which complicates the situation even further.

Part II identified two general exceptions to state immunity from execution: waivers and state assets used exclusively for commercial purposes. As exemplified by the *NOGA I* decision, a seemingly effective solution to the executory state immunity problem such as a waiver of immunity from execution by a state has limitations when it comes to attachment of property protected under diplomatic law. The existing international law regime makes it extremely difficult to identify state assets used for commercial purposes. Moreover, the most obvious

---

[238] UNCSI, *supra* note 83, Annex.

[239] *Id*.

[240] As stated by Judge Gaja in his dissenting opinion in relation to the tort exception under Article 12 of the UNCSI concerning military activities. Gaja, Dissenting Opinion, *supra* note 120, at 318.

sources of assets, namely property of diplomatic missions, central banks, and separate entities affiliated with a state are protected by presumptions of immunity, which, as demonstrated, are often nearly impossible to rebut. Absent specific earmarking for purposes of satisfaction of an award, award creditors will struggle to identify the assets susceptible to execution and their initial victory in the investment arbitration proceedings can prove illusory.

States are aware of their advantage. They can allocate their assets to entities enjoying a non-rebuttable presumption of immunity. Commentators invoke the example of Argentina, which has transferred its hard currency assets held by its central bank to the Bank for International Settlements in Basel, the "central banks' central Bank," where they are exempt from execution due to the immunities granted in Switzerland and other jurisdictions.[241] States can also benefit from challenges posed to investors by the allocation of the burden of proof in relation to separate entities, which may permit recalcitrant states to bury their commercial assets in the organizational structures of such entities.

III. MITIGATING THE PROBLEM OF SOVEREIGN IMMUNITY AGAINST EXECUTION OF INVESTMENT AWARDS

A. *Systemic Solution*

Parts I and II identified a systemic problem in the mechanisms for collection of international investment arbitration awards under the ICSID and New York Conventions. 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 the collection of international investment awards can be divided into three groups: those pertaining to a change in the 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.

The ideal solution to the problem would require a change in the 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 UNCSI enters into force. However, it is unlikely that it would reach a ratification rate similar to that of the New York or ICSID Conventions.[242]

---

[241] David W. Rivkin & Christopher K. Tahbaz, *Attachment and Execution on Commercial Assets, in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS, *supra* note 62, at 148.

[242] Currently there are 150 parties to the New York Convention (as of Sept. 22, 2014), *see* Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, and 150 parties to the ICSID Convention, *see* List of Contracting States and Other signatories of the Convention, *available at* https://icsid.worldbank.org/ICSID/

Moreover, it is not clear whether a wide adoption of the UNCSI would provide for a unified regime of execution of international investment awards. The rules contained in the UNCSI lack specificity and leave a substantial "grey area" which allows for diverging interpretations by states, for instance in relation to the commercial purpose of the use of state property in Article 18(1)(c).[243] Therefore, the creation of a uniform regime on sovereign immunity from execution in the collection of international investment awards, even with the adoption of the UNCSI by parties to the ICSID and New York Conventions, is very unlikely.

With regard to the 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 a specialized treaty or soft law instrument on state immunity. The former solution is not feasible given the number of existing international investment treaties. It would not be feasible for states to review over 3000 treaties currently existing, to introduce amendments relating to the execution of international investment awards.[244] 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 the collection of arbitral awards through an UNCITRAL Model Law on attachment of state property and collection of international arbitration awards.[245] 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 has been incorporated in more than 60 jurisdictions.[246] Such rules should not depart from the general solutions adopted in the UNCSI to avoid possible conflicts once the Convention enters into force. However, they should avoid the biggest deficiency of the Convention, namely its over-generality, and should precisely regulate the exemptions from state immunity from execution which are subject to diverging practice in different jurisdictions. In particular, they should lay down a test for commercial purpose of the assets, conditions for waiver of state immunity from execution, and formulate an "*alter ego*" test for separate state entities. The

---

FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English. This is compared to 16 parties to the UNCSI. *See supra* note 114.

[243] Hazel Fox, *State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law for Execution Against State Property?,* 12 ARB. INT'L 89, 91 (1996).

[244] 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.

[245] Fox, *supra* note 243, at 93.

[246] Stravos L. Brekoulakis & Laurence Shore, *UNCITRAL Model Law. Introductory Remarks, in* CONCISE INTERNATIONAL ARBITRATION 581, 581 (Loukas A. Mistelis ed., 2010).

rules should also address special regimes of immunity from execution, such as these applicable to property of embassies and central banks. It is submitted that these rules should adopt a creditor-friendly approach. This would be expressed in balanced principles on burden of proof. Moreover, such rules could provide for a uniform procedure on recognition, enforcement, and execution of awards and eliminate the problems related to the application of collection mechanisms under the ICSID and New York Conventions as presented in Part I of this article.

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 represented by 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 property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement."[247] So far, states have been reluctant 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. Changing the investment law regime through wide adoption of waivers of state immunity from execution is infeasible due to the large number of investment agreements. Moreover, as presented in Part II, general waivers, such as that proposed by the ICSID Model clause, create some interpretational difficulties. Following the interpretation of general waivers of immunity by the French courts, supported by the work of the ILC, such waivers would not extend to property protected under the special regimes as indicated in Article 21 of the UNCSI. This could undermine their practical significance.

Another alternative would be a mechanism established by international convention whereby a fund would pay amounts due to creditors under awards against participating states.[248] 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 controversy 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 have been challenged in investment arbitration disputes will consider themselves likely to benefit from such a solution, whereas states that have not had a similar experience may find the incentive to join such a fund insufficient.

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

---

[247] ICSID Model Clauses, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?actionVal=ModelClauses&requestType=ICSIDDocRH.

[248] Foster, *supra* note 184, at 726.

ICSID Convention could be published by the ICSID Secretariat. Another solution would be extending the protection under award arbitration default insurance coverage available in contract-based arbitrations to investment arbitrations.

B. *Remedies Available Directly to Investors*

1. *Post-Award Settlement*

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.[249] In exchange for a guarantee of prompt payment, an investor may relinquish its rights under the original award and agree to a lower amount of compensation, a different time frame, or payment in installments.[250] The quantitative data gathered in a survey conducted 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.[251]

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.[252] The difficulty of locating assets of a recalcitrant state susceptible of attachment in a third state can be another reason why investors would be 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.[253] Although such settlements are rarely made public, there are reported cases of investors having negotiated post-award settlements.[254] For example, in 2013 Argentina reached a post-award settlement with award creditors in the *CMS*, *Azurix*, *Vivendi*, *Continetal Casualty*, and *National Grid* cases.[255] The investors agreed to a lower amount of compensation, paid in the form of Argentinian sovereign bonds.

---

[249] Mistelis & Baltag, *supra* note 10, at 339.

[250] *Id*.

[251] *Id.* at 342.

[252] *Id*. at 339.

[253] 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).

[254] 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), *available at* http://www.reuters.com/article/2013/02/22/cargill-mexico-idUSL1N0BLEIU20130222.

[255] Allen & Overy Publications, *Argentina settles five investment treaty awards*, *available at* http://www.allenovery.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx.

2. *Human Rights Claims*

In the *Sedelmayer* saga, the leading case on compliance with and execution of international investment awards, a dispute related to non-execution of the award rendered by a Stockholm Chamber of Commerce tribunal was brought before the European Court of Human Rights ("ECtHR").[256] Mr. Sedelmayer claimed that the conduct of the German authorities in the execution proceedings violated his rights under Article 1 of 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").[257] The case concerned two joined applications regarding non-execution of the award against value added tax reimbursements owed to the Russian Federation and Russia's claims to air traffic fees against the German airline, Lufthansa. In both cases, the execution was refused by the German authorities because the claims in question were protected by the principle of sovereign immunity from execution.[258] The Court qualified a claim to compensation under an award as a possession in terms of Article 1 of Protocol No. 1.[259] However, the interpretation of the individual right guaranteed under Article 1 required taking into account sovereign immunity as a principle of customary international law in accordance with Article 31(3)(c) of the VCLT.[260] The ECtHR observed 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."[261] 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."[262] Sedelmayer's claims were found manifestly ill-founded and therefore declared inadmissible.[263]

Sedelmayer v. Germany was not the only case concerning execution of an international arbitration award before the ECtHR. In *Regent v. Ukraine*, the Court

---

[256] Franz J. Sedelmayer v. Germany, Decision on Admissibility, App. Nos. 30190/06 and 30216/06 (Nov. 10, 2009) [hereinafter *Sedelmayer*, Admissibility].

[257] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Apr. 11, 1950, 213 U.N.T.S. 221.

[258] *Sedelmayer*, Admissibility, *supra* note 256, at 2.

[259] *Id*. at 7. Article 1 of Protocol No. 1 to the ECHR reads:

> 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."

Protocol No. 1 to the ECHR, *supra* note 257, Article 1.

[260] *Sedelmayer*, Admissibility, *supra* note 256, at 8.

[261] *Id*. at 9.

[262] *Id*. at 10.

[263] *Id*.

held that Ukraine's continued non-execution of the award rendered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine amounted to a violation of Article 1 of Protocol No. 1.[264] Similarly, in *Kin-Stib and Majkić v. Serbia*, the Court found a violation of this provision in the failure to execute the award of the Foreign Trade Arbitration Court of the Yugoslav Chamber of Commerce by the Serbian courts.[265] However, the issue of sovereign immunity from execution arose in neither of these cases.

A human rights claim can serve as a remedy directed at a member state of the Convention where the proceedings pertaining to enforcement and execution of the award take place. Both cases where a violation of the Convention right to peaceful enjoyment of possessions was found involved manifest failures to execute the award by the domestic judiciary systems. The arbitral award in *Regent* was granted enforcement in 1999. It had not been executed when the ECtHR's judgment was rendered in April 2008. In *Kin-Stib and Majkić* the award was granted enforcement in 1996.[266] The proceedings related to its execution were still pending at the time when the judgment was rendered by the ECtHR in 2005.[267]

A human rights claim before the ECtHR could be a remedy against non-enforcement and non-execution of an investment arbitral award caused by deficiencies of the judicial systems of the member states of the Convention, or bias of the national authorities against the award creditors. Ironically, investor-state arbitration was created specifically to minimize the risk of bias of the host states' authorities towards investors and to avoid the deficiencies of under-developed judicial systems. However, as demonstrated in *Sedelmayer v. Germany*, a human rights claim in the ECtHR will not provide a remedy when execution is denied because the property against which the award creditor seeks execution enjoys immunity under international law.

3. *Failure to Enforce and Execute an Arbitral Award as an Investment Claim*

Theoretically, a failure to recognize, enforce, or execute an award could be considered a violation of investors' rights under a BIT, *i.e*., an expropriation or a denial of justice.[268] Such proposition 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 more recent arbitral jurisprudence.

State responsibility for non-enforcement of an arbitral award was first confirmed in *Saipem v. Bangladesh*.[269] The claimant instituted proceedings at

---

[264] Regent Company v. Ukraine, App. No. 773/03 (Apr. 3, 2008).

[265] Kin-Stib and Majkić v. Serbia, App. No. 12312/05 (Apr. 20, 2010).

[266] *Id*. at 3.

[267] *Id*. at 5.

[268] *See generally* Loukas A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement*, 28(1) ICSID REV.-FOREIGN INVESTMENT L.J. 6 (2013).

[269] 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].

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 favor of Saipem.[270] 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."[271] Consequently, it found the award non-existent.[272] As such it could neither be set aside nor enforced.[273] 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 favor of the investor.[274] 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.[275] The rights embodied in the ICC award were not created by the award, but arose out of the construction contract.[276] According to the tribunal, the award only crystallized the rights and obligations under the original contract.[277]

In *Romak v. Uzbekistan* an investment arbitration tribunal considered whether the Uzbek courts' failure to recognize and enforce a GAFTA arbitration award amounted to a breach of the Switzerland-Uzbekistan BIT.[278] Following reasoning similar to that employed in *Saipem,* the tribunal held that the award represented "a mere embodiment or crystallization of rights" arising from the transaction, and as such could not "transform it into an investment."[279] It decided, on the facts in that case, that the underlying transaction was a sales contract which did not meet the requirements for an "investment."[280] Conversely, the tribunal in *GEA v. Ukraine* found the *Saipem* approach unconvincing.[281] The tribunal decided that the award rendered by the International Commercial Arbitration Court at the Chamber of

---

[270] *Id*. ¶ 34.
[271] *Id*. ¶ 36.
[272] *Id*.
[273] *Id*.
[274] Saipem SpA v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (June 30, 2009).
[275] *Saipem*, Jurisdiction, *supra* note 269, ¶¶ 110, 114.
[276] *Id*. ¶ 127.
[277] *Id*.
[278] Romak S.A. v. Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, Award (Nov.26, 2009).
[279] *Id*. ¶ 211.
[280] *Id*. ¶ 241.
[281] GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (Mar. 31, 2011). Interestingly, the dispute arose from the same set of facts as *Regent v. Ukraine* before the ECtHR. *See supra* note 264.

Commerce and Industry of Ukraine could not amount to an "investment" in terms of Article 1(1) of the Germany-Ukraine BIT or Article 25 of the ICSID Convention.[282] The *White Industries v. India* award rendered the same year heavily criticized the approach applied in *GEA v. Ukraine*.[283] The UNCITRAL tribunal agreed with the reasoning employed by the *Saipem* tribunal and found that the award was a part of White Industries' original investment[284] and the failure to enforce an ICC award by the Indian courts amounted to a violation of the Australia- India BIT.[285]

The above analysis of the jurisprudence shows that a failure to execute an investment arbitration award can 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." It is difficult to accept that a claim submitted to an arbitral tribunal can offer an effective remedy to investors struggling with a sovereign immunity bar to collection of their awards. At the merits phase of the case a tribunal would need to determine whether there was a violation of investment treaty provisions. The principle of sovereign immunity would be taken into consideration by the tribunal either under Article 31(1)(c) of the VCLT[286] or Article 42(1) of the ICSID Convention.[287] An investment tribunal would likely arrive at a conclusion similar to that reached by the ECtHR in the *Sedelmayer* case and hold that state authorities did not violate the rights granted to an investor under international investment law when the non-execution of the award is caused by the application of the principle of sovereign immunity from execution.[288]

---

[282] *Id.* ¶¶ 158-164.

[283] White Industries Australia Limited v. The Republic of India, UNCITRAL, Award (Nov. 30, 2011) ("the conclusion expressed by the *GEA* Tribunal represents an incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning transformation of the original investment." *Id.* at ¶ 7.6.8).

[284] *Id.* ¶ 7.6.10.

[285] *Id.* ¶ 16.1.1.

[286] The general rule of interpretation under Article 31(1)(c) of the VCLT provides that "[t]here shall be taken into account, together with the context: (c) [a]ny relevant rules of international law applicable in the relations between the parties." VCLT, *supra* note 40, Art. 31(1)(c).

[287] ICSID Convention, *supra* note 6, Art. 42(1) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable").

[288] *Sedelmayer*, Admissibility, *supra* note 256, at 9-10.

C. *Remedies Involving Action by the State of Nationality of the Investor*

1. *Interstate Dispute Settlement*

Diplomatic protection is an alternative and supplement to the mechanism for collection of awards in Articles 53-55 of the ICSID Convention.[289] The possibility of recourse to diplomatic protection as a remedy available in the 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.[290] According to Article 27, the parties to the Convention relinquish 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 "shall have failed to abide by and comply with the award rendered in such dispute."[291] 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.[292] 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.[293] 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."[294] This can modify the requirements in relation to the diplomatic protection exception in non-compliance with investment awards.[295]

The question that arises is what test of nationality of corporations should be applicable for purposes of diplomatic protection exercised in accordance with Article 27 of the ICSID Convention. The International Court of Justice ("ICJ") has traditionally adhered to a test focused on the locus of the corporation's

---

[289] SCHREUER, *supra* note 15, at 426.

[290] *Id*. at 427.

[291] ICSID Convention, *supra* note 6, Art. 27.

[292] Draft Articles on Diplomatic Protection, Art. 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, 58st Sess. Supp. No. 10, UN Doc A/61/10 (2006), 22, 24-25, ¶¶ 2-3.

[293] *Id.* Arts. 3, 14

[294] *Id.* Art. 17.

[295] *See* Victorino J. Tejera Pérez, *Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards*, 3(2) J. INT'L DISP. SETTLEMENT 445, 461 (2012).

registered seat and/or of its incorporation.[296] A similar test has been formulated in Article 9 of the ILC Draft Articles on Diplomatic protection.[297] 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.[298] This is supported by the use of the expression "for the purposes of this Convention" instead of "for purposes of the ICSID jurisdiction" in Article 25(2)(b) of the ICSID Convention.[299]

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.[300] It seems, however, that the investor should first use the mechanism for collection of the award under Article 54 of the ICSID Convention.[301] Moreover, during negotiation of the ICSID Convention, the possibility of resorting to diplomatic protection was regarded as an *ultima ratio* and a necessary check on the shield provided to host states by immunity from execution.[302] This would imply that diplomatic protection can be exercised only when the investor is not able to recover his award through ordinary action under the ICSID collection mechanism in Article 54.

Despite 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.[303]

With regard to the second type of non-compliance claims, Article 64 of the ICSID Convention provides that disputes between contracting parties concerning

---

[296] Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5).

[297] However, Article 9 of the Draft Articles on Diplomatic Protection in its second sentence provides for an exception to this general rule: "[W]hen the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality."

[298] SCHREUER, *supra* note 15, at 424.

[299] *Id*.

[300] Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 BRIT.Y.B. INT'L L. 264, 312 (2008).

[301] *See* Pérez, *supra* note 395, at 464 (who comes to this conclusion through a different reasoning. He asserts that the exhaustion of local remedies applies to diplomatic protection in cases of non-compliance with the awards. In such cases, "the available domestic remedy to be exhausted is requesting recognition and enforcement of the award before the courts of the losing State.").

[302] Viñuales & Bentolila, *supra* note 253, at 269.

[303] Pérez, *supra* note 295, at 474.

the interpretation or application of the Convention are to be referred to the ICJ.[304] 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 bond of nationality to an aggrieved investor.[305] 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.[306] Many bilateral investment agreements contain similar provisions on state-to-state dispute settlement relating to interpretation and application of those agreements.[307]

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 the North American Free Trade Agreement ("NAFTA").[308] In the 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.[309] To date the establishment of a panel under Article 1136(5) of NAFTA has not been requested. A compliance mechanism is also provided in Article 34(8) of the 2012 United States Model BIT.[310] 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

---

[304] ICSID Convention, *supra* note 6, Art. 64.

[305] *See* SCHREUER, *supra* note 15, at 423 (holding that a claim would be based on the argument that every Contracting Party has an enforceable interest in the observance of the Convention). However, it is not clear whether a failure to comply would be a sufficient basis to give standing to parties to the Convention other than the state of nationality of the investor. *See* Article 42 of the Articles on Responsibility of States for Internationally Wrongful Acts, *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 26, U.N.Doc A/CN.4/SER.A/2001/Add.1 (Part 2).

[306] SCHREUER, *supra* note 15, at 1261

[307] *See, e.g.,* Agreement between the Republic of India and the Kingdom of the Netherlands for the Promotion and Protection of Investments, Nov. 6, 1995, Art. 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). Art. 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 (entry into force Oct. 1, 2014), Art. 1, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/600.

[308] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993).

[309] *Id.* Art. 1136(5).

[310] 2012 United States Model BIT, *available at* http://www.state.gov/documents/organization/188371.pdf.

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.[311]

2. *Diplomatic Pressure*

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 that do not interfere with countries' rights and obligations under international law (retorsion); 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).[312] Within the first category, a state could suspend trade benefits granted to host states in the case of non-compliance with arbitration awards rendered in favor of the first state's nationals. The Generalized System of Preferences ("GSP") established by the Enabling Clause[313] 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 in accordance with the Most Favoured Nation obligation.[314] 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.[315] Currently, only select countries maintain GSP programs.[316] 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.[317] The suspension was a response to Argentina's failure to comply with the ICSID awards rendered in favor of United States investors in *CMS*, *Azurix*, and *Continental Casualty*.[318] The United States' Trade Act of 1974

---

[311] 2004 Model Canada Foreign Investment Promotion and Protection Agreement, *available at* http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

[312] 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) at 128, ¶ 3.

[313] *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT CP Decision of Nov. 28, 1979, GATT Doc. L/4903, GATT, 26th Supp. BISD (1980) 203, Arts. 1 and 2.

[314] *Id*. Arts. 1 and 2.

[315] INTERNATIONAL TRADE LAW 682 (Andrew T. Guzman & Joost H. B. Pauwellyn eds., 2012).

[316] These countries include Australia, Canada, Japan, New Zealand, Switzerland, the United States, and the European Union. *See* Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT'L L. 503, 520 (2013).

[317] The text of President Obama's announcement, *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-03-29/html/X12-10329.htm.

[318] *Id*.

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.[319] It should be noted that the condition for eligibility for the GSP addresses a state's failure to recognize and enforce arbitral awards. It does not refer to a state which fails to comply with the award, but to one that fails to recognize and enforce the award on application of the award creditor. Thus, an actual suspension of the trade benefits to the recalcitrant state will be dependent on whether the award creditor has applied for recognition and enforcement before that state's authorities. Currently, the United States is the only country which has formulated a requirement relating to enforcement of international arbitration awards in its GSP.[320] There is no obstacle for other states to adopt similar criteria in their GSP programs to secure compliance with investment arbitration awards.[321] The preferable formulation of the condition would refer to compliance with the awards, instead of recognition and enforcement.

Moreover, the state of an investor's nationality can lobby 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.[322] 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.[323] A state of origin can also vote against granting loans to the state

---

[319] 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 favor of United States citizens or a corporation, partnership, or association which is 50 percent 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").

[320] Theodore R. Posner, *Good Faith Recognition and Enforcement of Arbitral Awards as a Criterion for Eligibility under the United States Generalized System of Preferences*, 106 AM. SOC'Y INT'L L. PROC. 125, 127 (2012).

[321] For example, in response to Argentina's government decision to validate the expropriation of the shares of a corporation owned by a European company, the European Parliament adopted a resolution which urged "the European Commission and the Council to explore and adopt any measures required to safeguard European interests in order to avoid such situations arising again, including the possible partial suspension of the unilateral tariff preferences under the GSP scheme." European Parliament Resolution of April 20, 2012 on the legal security of European investments outside the European Union (2012/2619(RSP)), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0143+0+DOC+XML+V0//EN.

[322] Rosenberg, *supra* note 316, at 516.

[323] World Bank, Operational Manual, Operational Policy 7.40, July 2001 – Disputes over Defaults on External Debt, Expropriation, and Breach of Contract, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMAN

which is in breach of its obligation to comply with the award in these institutions.[324]

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 ("ARS").[325] These requirements include proportionality of countermeasures,[326] prohibition of breaching certain obligations under international law,[327] and notification to the targeted state of intent to take countermeasures.[328]

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 Professor Schachter, "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."[329] Yet such a measure would be subject to further conditions under Article 50(2)(a) and (b) of the ARS, 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.[330] It might be debatable whether the mechanism for collection of the award under Article 54 qualifies as an "obligation under any dispute settlement procedure."[331] Nonetheless, it seems that an investor should resort to the collection mechanism under the ICSID Convention before its state of origin takes any countermeasures.[332] Article 50(2)(b) of the ARS clarifies

---

UAL/0,,contentMDK:20064628~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html.

[324] As a response to Argentina's failure to comply with *CMS* and *Azurix* awards, the United States voted against extending certain loans to Argentina in the World Bank and in the Inter-American Development Bank. *See* Rosenberg, *supra* note 316, at 517.

[325] *Supra* note 305.

[326] ARS, *supra* note 305, Art. 51.

[327] Article 50(1) of the ARS lists the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, and other obligations under peremptory norms of general international law. *See* ARS, *supra* note 305, Art. 51(1).

[328] *Id.* Art. 52(1).

[329] Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 7 (1960).

[330] ARS, *supra* note 305, Art. 50(2)(a)(b).

[331] Pérez, *supra* note 295, at 453.

[332] *Id*.

that execution in the framework of countermeasures cannot affect the immunity of state property under diplomatic law.[333]

D. *Assessment*

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 and New York Conventions. This article has identified a number of possible improvements to the existing system. However, it was established that adoption of any of these solution in the near future is highly unlikely. Creating a *lex specialis* regime within the international investment law system through a soft law instrument constitutes 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. It should be complementary to the principles provided in the UNCSI, further developing and specifying the rules contained therein.

The article also examined whether there are existing legal remedies that could mitigate the lack of a systemic solution to the problem of state immunity from execution. In the light of the analysis of the remedies directly available to the investors and those involving action on the part of the investor's state of nationality, this question must be answered in the negative.

The remedies involving action by the state of an 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."[334] Thus, the remedies available under diplomatic protection are remedies in favor of the investor's state of nationality, not the investor.[335] 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.[336] Diplomatic protection also deprives investment arbitration of its most attractive attributes from the investor's perspective, *i.e.* direct compensation and control over the course of the 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

---

[333] ARS, *supra* note 305, Art. 50(2)(b).

[334] Mavrommatis Palestine Concessions (U. K. v. Greece), 1924 P.C.I.J. (Ser. A) No. 2, at 12 (Aug. 30).

[335] Viñuales & Bentolila, *supra* note 253, at 259.

[336] Rosenberg, *supra* note 316, at 519.

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.

An investor may pursue a claim against a state where execution and enforcement takes place before the ECtHR or an international investment arbitration tribunal. Contrary to diplomatic protection, these claims do not aim at securing compliance with the original award, but rather provide redress in cases of a state's failure to execute it. An execution claim is unlikely to succeed in relation to execution of an award barred by the principle of state immunity. Responsibility under international law requires an act attributable to a state that is in violation of that state's obligation under international law.[337] In the scenario where an investor seeks collection of an award in a jurisdiction other than the respondent state, refusal of such a claim because of sovereign immunity from execution is unlikely to result in a determination of responsibility under international law. There is a manifest conflict between the principles of state immunity and non-expropriation under human rights and investment law. A conflict of norms in international law is defined as a situation where "two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them."[338] The only case in which an international court has been faced with resolution of such a conflict was *Sedelmayer v. Germany* before the ECtHR. In that case, the court observed that the concept of possession in the Convention was qualified by international law in two ways. Firstly, the interpretation of the right to peaceful enjoyment of possession under the Convention required consideration of sovereign immunity in accordance with Article 31(3) of the VCLT.[339] The second limitation arose from the language of the Convention, which in Article 1 of Protocol No. 1 provides that the concept of possessions is "subject to the conditions provided for . . . by the general principles of international law."[340] State immunity from execution, applied in accordance with Article 31(1) of the VCLT, is likely to put a limitation on the individual right to non-expropriation under the principles of international investment law.

Nonetheless, individual human rights and investment claims could provide a remedy for another problem, namely the non-execution of awards in recalcitrant respondent states. As the court and tribunals have refrained from making general statements, and the relevant investment and human rights cases have dealt with

---

[337] ARS, *supra* note 305, Art. 3.

[338] Fragmentation of International Law: Difficulties Arising for the Diversification and Expansion of International Law*, in Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi*, ILC, 58th Sess, UN Doc. A/CN.4/L/682 (2006), ¶ 2.

[339] *Sedelmayer*, Admissibility, *supra* note 256, at 8.

[340] *Id*.

extreme deficiencies of domestic courts, it is difficult to indicate a required threshold of misconduct.

CONCLUSIONS

In light of the above analysis, this article argues that sovereign immunity does constitute the Achilles' heel of investor-state arbitration. The same conclusion could be extended to the whole mechanism of collection of international investment arbitration awards in Articles 53-55 of the ICSID Convention and the New York Convention. The system of international investment arbitration therefore relies on voluntary compliance with the awards. This fact is evident in the drafting history to the ICSID Convention. 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.[341] The collection mechanism in Article 54 was included rather to secure compliance with the obligations imposed by awards on the investors than states.[342] 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 *renvoi* 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. Investors seeking execution of the award compensation in a non-respondent country are challenged by the complex structure of the rules applicable to execution of assets of a foreign state. 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 will be affected by the overlap between general and special regimes of state immunity under international law. As demonstrated in Part III, currently international investment law provides no effective remedy to the challenges posed by recalcitrant respondents that rely on their state immunity from execution.

A systemic solution to the problem of state immunity from execution in the collection of international investment arbitration awards is needed. This article presented some possible improvements to the existing regime. Implementation of any of these solutions meets numerous difficulties: the quantity of investment treaties, fragmentation of the regimes of state immunity, and states' reluctance to address the problem of execution of investment arbitration awards in international investment agreements. The preferred solution is adoption of a soft law instrument under the auspices of UNICITRAL that would address the issues of recognition, enforcement, and execution of investment awards and would provide for a uniform approach to the problem of state immunity from execution. Such a

---

[341] Broches, *supra* note 23, at 303.
[342] Alexandrov, *supra* note 26, at 327.

solution is not only most feasible, but it could also most comprehensively address the systemic problem of state immunity in the collection of international arbitration awards.

The mythical demigod Achilles had only one weakness that could compromise his overall strength. The metaphorical comparison between international investment arbitration and Greek mythology ends here since Achilles' weakness, his heel, ultimately brought him to his downfall. It is unlikely that problems related to sovereign immunity from execution will result in the abandonment of investor-state arbitration as a method of dispute settlement by investors. This does not mean that the problem can be understated. State immunity from execution is a flaw in the otherwise efficient mechanism of dispute settlement of international investment disputes. State immunity from execution is likely to be a more significant problem given the increase in the number of disputes. These probable future developments should encourage a discussion on a systemic reform of the collection mechanisms under the ICSID and New York Conventions in the international community.