

ENFORCEMENT OF ICSID ARBITRATION AWARDS AND SOVEREIGN IMMUNITY

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LL.M. SHORT THESIS

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ABSTRACT

This thesis assesses the current practice regarding invocation of the sovereign immunity defense during enforcement of awards rendered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”). The thesis aims to answer the question of whether, and if yes, to what extent the issue of sovereign immunity impacts the efficiency of investment arbitration under the Convention.

Research revealed that, theoretical concerns notwithstanding, the rate of compliance of states with the awards rendered under the Convention has been rather high so far. This may create the impression that the sovereign immunity issue is not a topical concern for the ICSID arbitration regime. However, the thesis advances the view that, with the ICSID caseload rising, and states facing economic crises decreasing their payment ability, the probability that the issue will persist is rather high. This position is reinforced by the fact that, even in terms of those few ICSID award enforcement decisions available, the success rate of execution of awards in national courts is close to zero, precisely because of the reliance of the recalcitrant state on the sovereign immunity defense.

As a practical and efficient solution to the problem, the thesis proposes investors to negotiate waivers of sovereign immunity in contracts with states.

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List of Abbreviations

BIT	Bilateral Investment Treaty
etc.	etcetera (others)
i.e.	idest (that is)
ICSID	International Centre for the Settlement of Investment Disputes
p.	Page
para(s)	Paragraph(s)
US	United States
v.	Versus

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “Convention”) was adopted in 1965¹ to offer an efficient and depoliticized arbitration forum for investors versus states. Enforcement system under the Convention is praised by many as self-contained² and exhaustive,³ leaving no room for national courts to set aside the award. Whereas the Convention indeed provides for the automatic mechanism of recognition of the award by national courts,⁴ the Convention leaves it to the national courts to execute the award under applicable national laws. The possible problem lies in an unambiguous wording of Art.55 of the Convention: “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”.⁵ Thus, states, having lost in arbitration proceedings against investors, may presumably avoid execution of an unfavourable ICSID award in national courts by invoking the sovereign immunity defense. As a result, investors that have finally obtained ICSID awards in their favour, may face an equally challenging issue of procuring money from recalcitrant states under the award. If true, this seems

¹ International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules*, 5 (2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited April 8, 2016).

² Edward Baldwin, Mark Kantor and Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23(1) J. Int'l Arb.1 (2006), <https://www.milbank.com/images/content/5/6/5666/0106-Nolan-Journal-of-Intl-Arbitration.pdf> (last visited April 14, 2016).

³ International Centre for Settlement of Investment Disputes. *Process Overview*. <https://icsid.worldbank.org/apps/icsidweb/process/Pages/Overview.aspx> (last visited April 14, 2016); United Nations Conference on Trade and Development, Course on Dispute Settlement, 2.1 *Overview*, UNCTAD/EDM/Misc.232, 17 (2003), http://unctad.org/en/docs/edmmisc232overview_en.pdf (last visited April 14, 2016).

⁴ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1118 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016).

⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art.55, March 18, 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited April 8, 2016).

as a factor that may significantly undermine the purpose of creation of the said forum and reduce the attractiveness of investment arbitration as a whole.

The objective of the thesis is thus to evaluate the current practice with regards to the use of the sovereign immunity defense during enforcement of ICSID awards and whether, and if yes, to what extent this impacts the efficiency of investment arbitration under the Convention.

Chapter 1 aims to introduce the reader to the main concepts discussed in the thesis. **Chapter 1.1.** gives a brief overview of the unique mechanism of enforcement of the ICSID awards, and **Chapter 1.2.** reviews the current landscape of rules on sovereign immunity. **Chapter 2** examines theoretical aspects of the correlation between enforcement of ICSID arbitral awards and sovereign immunity under the Convention. **Chapter 3** proceeds with a practical perspective on the issue of the impact of sovereign immunity on the ICSID award enforcement proceedings. In particular, the chapter contains briefs of cases, in which the issue of sovereign immunity was of particular relevance in terms of enforcement proceedings, and analyses these cases with an eye to the efficiency of the ICSID mechanism. The chapter concludes with discussing a waiver of sovereign immunity as a practical solution for investors on dealing with the sovereign immunity problem in the ICSID arbitrations.

Before delving into this thesis, I would like to draw attention of the reader to its limitations. The first limitation lies in the general low accessibility of the enforcement decisions.⁶ The reason for this is that enforcement is usually handled by national courts, which adjudicate in their own language and do not always publish their decisions.⁷ This factor may slightly distort the findings

⁶ Giuliana Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 Am. Rev. Int'l Arb. 439, 439-440 (2004).

⁷ *Id.*



of this thesis. Secondly, the thesis does not consider the awards rendered under the ICSID Additional Facility Rules, enforcement of which takes place under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“New York Convention”).⁸

⁸ International Centre for Settlement of Investment Disputes, *Recognition and Enforcement - Additional Facility Arbitration*, [https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Recognition-and-Enforcement-\(AF-Arbitration\).aspx](https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Recognition-and-Enforcement-(AF-Arbitration).aspx) (last visited April 14, 2016).

Chapter 1 – Deciphering the Concepts of Enforcement and Sovereign Immunity

1.1. Mechanism of Enforcement of the Award under the Convention

The enforcement mechanism of the ICSID regime is contained in Section 6 of the Convention, entitled “Recognition and Enforcement of the Award”. Section 6 is comprised of Arts. 53-55.

Under Art.53, “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”.⁹ Art.54 obliges the state 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”.¹⁰ Art.54 also entrusts the matter of execution of the award to the respective national laws of the State in which execution is sought.¹¹ Art.55 states in unambiguous terms that: “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”¹² Below I will elaborate on each of these articles.

Before proceeding, I would like to explain briefly the use of the terms “recognition”, “enforcement” and “execution” in this thesis. This has been the source of some confusion in practice,¹³ since Section 6 of the Convention uses these terms to denote different stages of payment

⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art.53, March 18, 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, (last visited April 8, 2016).

¹⁰ *Id.*, art.54.

¹¹ *Id.*, art.54.

¹² *Id.*, art.55.

¹³ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1135-1136 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016); Olga

collection under the award without a clear delineation between them. As a result, understanding of the purpose of each stage of enforcement proceeding differs between scholars, which makes this terminological note necessary.

It appears that the Convention uses both the terms “recognition” and “enforcement” to denote one single procedure of verification of the award, the specifics of which is that it fully falls within the ambit of the Convention, rather than the national laws. This procedure under both the New York Convention and under many jurisdictions would be covered by one term - the “recognition” of the award, i.e. the formal confirmation by a state that an award is given the *res judicata* effect in its territory on par with other national judicial decisions.¹⁴ Secondly, the Convention clearly contrasts the stage of “enforcement” of the award with the stage of its “execution”, the latter stage placed by the Convention separately within the scope of regulation of the national laws. This contrasts with the New York Convention, which uses only two stages - “recognition” and “enforcement” of the award.¹⁵ The situation is made more complicated by the fact that, as Professor Schreuer notes in his Commentary, it is only the English version of the Convention that mentions both terms “execution” and “enforcement”.¹⁶ The Spanish and French texts, equally authoritative, use one and the same word for both concepts.¹⁷ Differentiation between, on the one hand, the stage of recognition and enforcement, and, on the other hand, the stage of execution, under the Convention

Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles’ Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int’l Arb. 47, 54 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016).

¹⁴ Jan Paulsson et al., *Guide to ICSID Arbitration* 179 (2011).

¹⁵ Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles’ Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int’l Arb. 47, 57 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016).

¹⁶ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1134 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016).

¹⁷ *Id.*

is important, since all three stages are assigned to the regulation of specific laws;¹⁸ conflating the stages may lead to the application of the incorrect set of rules to the case at hand.

To the best of my understanding, Professor Schreuer has used the term “recognition” independently (without coupling it with the term “enforcement”) to denote the stage of verification of the award.¹⁹ Furthermore, he interpreted the conundrum between the terms “execution” and “enforcement” in favour of both terms carrying the same meaning.²⁰ At the same time, he acknowledged that several authors (e.g. Broches²¹, Choi²²) utilized the term “enforcement” as a general term for denoting both the stages of recognition and execution. For the sake of convenience, this thesis will further combine the approaches of all the abovementioned scholars and will utilize the terms in the following way: the term “recognition” - for the stage of verification of the award, “execution” – for the stage of attachment of assets in satisfaction of the claim, and “enforcement” – for a combination of both stages. Having established this, I will proceed with elaborating on Arts.53-55 of the Convention.

According to Art.53 of the Convention, as soon as the award is issued, it becomes final and binding for the parties, and creates the obligation for the parties to comply with the award. Non-compliance with the award by the state by virtue of Art.53 becomes a violation of the obligations of the state under the international law.²³ Art.53 is an illustration of the *pacta sunt servanda* principle in the

¹⁸ Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles’ Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int’l Arb. 47, 55 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016)

¹⁹ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1136 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016).

²⁰ *Id.* at 1135.

²¹ Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev.-Foreign Invest. L. J. 318, 320/1 (1987).

²² Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 N.Y.U. J. Int’l L. & Pol. 179 (1995-1996).

²³ Schreuer, *supra* note 19, at 1179.

investor-state arbitration.²⁴ The finality of the award is achieved through the express wording of the Convention to this effect and no possibility of appeal of the award.²⁵ The award, once final, becomes *res judicata* for the parties in terms of the same claim,²⁶ and the same dispute can thus not be relitigated in a different forum.

Ideally, there would be no need for the drafters of the Convention to go farther than Art.53, since all the parties would voluntarily comply with the award. That not being the case, the architects of the Convention supported Art.53 of the Convention with Art.54, designed specifically with a purpose of dealing with the recalcitrant parties. Art.54 represents a unique²⁷ and a much-discussed enforcement machinery that was intended to take the Convention a step further than its counterparts (e.g. the New York Convention).²⁸ In particular, Art.54 presents to a successful investor a simplified and delocalized procedure of recognition of the award,²⁹ effectuated through simple handing-in of a certified copy of the ICSID award to the court of any state-signatory to the Convention.³⁰ Investor thereby receives the same right to enforcement of the award as if it were the final judgment of the same court in the enforcing state. The crucial feature of the enforcement mechanism is that the courts can neither refuse recognition, nor look into the merits of an award on the basis of public policy considerations, since the Convention does not provide for any grounds

²⁴ Ruqiyā B H Musa, Martina Polasek, *The Origins and Specificities of the ICSID Enforcement Mechanism* 14 <http://www.globelawandbusiness.com/EITA/sample.pdf> (last visited April 8, 2016); Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev-FILJ, 289 (1987).

²⁵ Antonio R. Parra, *Enforcement of ICSID Arbitral Awards*, 24th Joint Colloquium on International Arbitration, 1, 2 (2007), http://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf (last visited April 8, 2016).

²⁶ Musa, Broches, *supra* note 24.

²⁷ Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev.-Foreign Invest. L. J. 287, 288 (1987).

²⁸ Schreuer, *supra* note 23, at 1140.

²⁹ Parra, *supra* note 25.

³⁰ Schreuer, *supra* note 23, at 1147.

for either refusal or review by national courts.³¹ Recognition of the ICSID awards is thus envisaged as an automatic procedure that is fully encompassed by the ambit of the Convention, and national courts' exercise of powers becomes limited to the simple confirmation of the authenticity of the award.³² National procedural laws may lay down a more detailed procedure for recognition,³³ but they cannot amend or supplement the general guidelines set out by the Convention. As to the finality of the awards, some may note that the phrase "as if it were a final judgment of a court"³⁴ does not secure the non-reviewability of the awards on the national level, but on the contrary, enables it, since final judgments in most national systems can be further challenged in exceptional circumstances.³⁵ However, this argument is be negated by reference to Art.53 of the Convention, which cements the will of the crafters of the Convention to make the award final and non-reviewable at the national level, once mechanisms of review under the Convention are exhausted.³⁶

The self-contained character attributed to the ICSID enforcement regime³⁷ ends at the brink of the stage of execution of the award. The Convention leaves this stage to the regulation of national laws, which invariably makes the ICSID enforcement regime that of a mixed,³⁸ rather than self-

³¹ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1139 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016).

³² Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles' Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int'l Arb. 47, 52 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016); 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 Invest. L. J. 439, 448 (1987).

³³ Julian Ku, *Enforcement of ICSID Awards in the People's Republic of China*, 6 Contemp. Asia Arb. J. 31, 37 (2013), http://scholarlycommons.law.hofstra.edu/faculty_scholarship/293 (last visited April 8, 2016).

³⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art.54, March 18, 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, (last visited April 8, 2016).

³⁵ Gerlich, *supra* note 32; Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23(1) J. INT'L ARB. 1, 9-14 (2006).

³⁶ Gerlich, *supra* note 32.

³⁷ Vincent O. Orlu Nmeihelle, *Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 Ann. Surv. Int'l & Comp. L. 21, 42 (2001).

³⁸ Giuliana Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 Am. Rev. Int'l Arb. 439, 442 (2004).



contained, character. Furthermore, Art.55 expressly preserves the sanctity of the concept of the state immunity from execution (“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”³⁹). Convention thus stops short of state immunity in revolutionizing the ICSID enforcement regime.

³⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art.55, March 18, 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited April 8, 2016).

1.2. Sovereign Immunity: Current State of Play

Having elaborated on the enforcement mechanism under the Convention, I would like to devote this Chapter to a general overview of the the current state of laws on sovereign immunity, in order to provide an insight into the kind of obstacles the investor may face during execution proceedings.

The doctrine of sovereign immunity is “one of the fundamental principles of the international legal order”.⁴⁰ This principle stems from the notion of the sovereign equality of states on the international arena,⁴¹ and presupposes that states, being equal in their sovereign powers, cannot subject another state to their territorially limited jurisdiction (without its express consent).⁴² This idea is reflected in the theory of absolute sovereign immunity, the concept that fully excludes any possibility of exercise of jurisdiction of one state over the other state.⁴³ Whereas initially absolute in most states, the concept of state immunity has considerably “shrunk” throughout the last decades.⁴⁴ Most countries nowadays have adopted the theory of restrictive sovereign immunity, thus recognizing immunity only of those assets of the state that are directly involved in the performance of sovereign functions (acts *iure imperii*), and casting off the immunity cover from the assets used in commercial matters (acts *iure gestionis*).⁴⁵

Whereas initially a product of international law, currently most states regulate state immunity and exceptions to it in their national laws or, alternatively, have accumulated immense caselaw on the

⁴⁰ Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgment, I.C.J. Reports 123, para.57 (2012), <http://www.icj-cij.org/docket/files/143/16883.pdf> (last visited April 8, 2016).

⁴¹ *Id.*

⁴² Mariia Puchyna, *The Impact of Arbitration on Sovereign Immunity*, slide 2, November 15, 2012, uba.ua/documents/doc/mariia_puchyna.pdf (last visited April 8, 2016).

⁴³ Burkhard Hess, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 EJIL 269 (1993), <http://www.ejil.org/pdfs/4/1/1203.pdf> (last visited April 8, 2016).

⁴⁴ August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17(4) EJIL 803 (2006), <http://www.ejil.org/pdfs/17/4/100.pdf> (last visited April 8, 2016).

⁴⁵ Hess, *supra* note 43.

subject.⁴⁶ This creates a disadvantage of the lack of legal certainty for an investor in that each state ultimately chooses to regulate the issue differently. This has also led to difficulties in international relations, in that states using the absolute immunity doctrine were expecting the same treatment abroad.⁴⁷ To minimize legal uncertainty, attempts have been made on the international level to codify the rules on state immunity.⁴⁸ Such attempts have so far been only moderately successful, resulting in two international instruments: the European Convention on Sovereign Immunities, adopted in 1972,⁴⁹ and United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted in 2004.⁵⁰

A more detailed insight into the sovereign immunity rules would require analysis of respective national laws (or caselaw) on the subject. However, sufficient attention to national laws or caselaw would be time-consuming and would require going outside the scope of this thesis. In light of this, I decided against reviewing respective national laws, and instead opted for elaborating on the key provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (“UNCSI”). In my opinion, the UNCSI may serve as a sufficient substitute for the the purposes of review of the state of play with respect to sovereign immunity. Although not yet in force (as of the date of this thesis 21 countries ratified the Convention out of the necessary 30),⁵¹

⁴⁶ Hazel Fox, *In Defence of State Immunity: Why the UN: Convention on State Immunity is Important*, 55 Int'l & Comp. L.Q. 399 (2006).

⁴⁷ Explanatory Report to the European Convention on State Immunity, European Treaty Series - No. 74, 1 (1972), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c96c3>, (last visited April 8, 2016).

⁴⁸ Burkhard Hess, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 EJIL 269, 270 (1993), <http://www.ejil.org/pdfs/4/1/1203.pdf> (last visited April 8, 2016).

⁴⁹ European Convention on State Immunity, May 16, 1972, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074> (last visited April 8, 2016).

⁵⁰ United Nations Convention on Jurisdictional Immunities of States and Their Property, December 2, 2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf (last visited April 8, 2016).

⁵¹ List of signatories of the United Nations Convention on Jurisdictional Immunities of States and Their Property as of April 8, 2016, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en (last visited April 8, 2016).

the Convention represents a consensus of states on the latest trends in the evolution of state immunity, and, even unratified, is said to “consolidate the customary status of its rules on immunity”.⁵² In fact, courts (France) have already relied on it as containing principles of customary international law on the subject.⁵³ As for the European Convention on Sovereign Immunities, it is a rather old document, and, even if it may have depicted the practices of the states-signatories at the time of its adoption, it does not present an accurate picture any more.⁵⁴ Moreover, only 8 European states are its signatories.⁵⁵

I will therefore proceed with elaborating on the main provisions of the UNCSI as a reliable sketch of the current state of play with respect to sovereign immunity rules.

1.2.1. The United Nations Convention on Jurisdictional Immunities of States and Their Property

The UNCSI⁵⁶ cements the basic rule that “A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State”,⁵⁷ though provides for certain exceptions to the rule.⁵⁸ One of such exceptions, relevant to the topic of this thesis, is an arbitration exception. Under this exception the state that has agreed to submit to arbitration disputes relating

⁵² Robert McCorquodale et al., *Cases and Materials on International Law*, n.p.: Oxford: Oxford University Press, 309 (2011).

⁵³ Leon Chung, *Recent Trends in State Immunity*, KLUWER ARBITR. BLOG (April 25, 2013), <http://kluwerarbitrationblog.com/2013/04/25/recent-trends-in-state-immunity/> (last visited April 8, 2016).

⁵⁴ August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 EUR. J. INT. LAW 803 (2006).

⁵⁵ List of signatures and ratifications of the European Convention on State Immunity as of April 8, 2016, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures?p_auth=RSOZJkbp (last visited April 8, 2016).

⁵⁶ United Nations Convention on Jurisdictional Immunities of States and Their Property, December 2, 2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf (last visited April 8, 2016).

⁵⁷ *Id.*, art.5.

⁵⁸ David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 (1) Am. J. Int'l L. 194, 197 (2005).

to a commercial transaction (including investment matters⁵⁹) cannot invoke immunity from jurisdiction before a competent court of another State with regards 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”,⁶⁰ unless stipulated differently in the arbitration agreement. In other words, by agreeing to submit matters to the arbitration, the state by extension agrees to waive its immunity with respect to supervisory powers of the competent courts, including at the stage of “confirmation or the setting aside of the award”.⁶¹ At the same time, the UNCSI emphasizes in Arts.19 and 20 that consent to arbitration does not entail waiver of immunity from execution measures (the UNCSI calls such measures “post-award measures of constraint”⁶²). State immunity from execution is regulated separately in Art.19, according to which the state assets may not generally be attached in connection with a proceeding before a court of another State. The UNCSI lists 3 exceptions to this rule. The rule does not apply, first, if the state has expressly consented to such measures, inter alia, in the international agreement, arbitration agreement or in a written contract; second, if the state has specifically allocated certain assets for satisfaction of the relevant court claim; and third, if it has been established that the relevant property is specifically in use or intended for use by the state for non-governmental purposes. The third condition is qualified: execution measures may be employed only against assets that have “a connection with the entity against which the proceeding was directed”.⁶³

⁵⁹ United Nations Convention on Jurisdictional Immunities of States and Their Property, Annex to the Convention “Understandings with respect to certain provisions of the Convention”, para. “With respect to article 17”, December 2, 2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf (last visited April 8, 2016).

⁶⁰ United Nations Convention on Jurisdictional Immunities of States and Their Property, art.17, December 2, 2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf (last visited April 8, 2016).

⁶¹ *Id.*

⁶² *Id.* arts.19, 20.

⁶³ *Id.* art.19.



The third condition (establishing that the sovereign immunity is waived with respect to property used for non-governmental purposes) should be read in conjunction with Art.21. Art.21 of the UNCSI lists specific categories of property that cannot be in any case considered as property used for non-governmental purposes (unless the state agrees otherwise). The list includes the following assets:

- (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.⁶⁴

The UNCSI also ascertains the privileges and immunities enjoyed by a State under international law with regard to its diplomatic missions and other similar missions, and persons associated with them (Art.3).

To conclude Chapter 1, the enforcement mechanism under the ICSID Convention is of a mixed nature. Regulation of different stages of enforcement of the award is dispersed between the Convention itself (stage of recognition of the award) and the national laws of the enforcing state (stage of execution). Although national courts are in charge of both recognition and enforcement of the award, their competence at both stages varies. Whereas they are obliged to recognize ICSID awards automatically, without any grounds for refusal, the Convention has preserved their right to honour the sovereign immunity from execution and to refuse execution of the award on this basis

⁶⁴ United Nations Convention on Jurisdictional Immunities of States and Their Property, art.21, December 2, 2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf (last visited April 8, 2016).



in accordance with their national laws. The landscape with respect to sovereign immunity rules, in particular at the stage of execution of the award, does not look very promising from the investor's viewpoint. The default position is still that the foreign state enjoys immunity against both jurisdiction and execution, though there are certain exceptions to this rule (e.g. consent of the state, state property for commercial purposes).

Having briefly introduced the main concepts associated with this thesis, I will now proceed to analyzing the correlation between these concepts in theory and in practice.

Chapter 2 - Correlation between Enforcement of the Award and Sovereign Immunity under the Convention: Theoretical Aspects

The aim of this thesis is to assess how the issue of sovereign immunity is addressed within the enforcement mechanism of the Convention, and whether it poses an obstacle to the efficiency of the mechanism in practice. I will first address the theoretical aspects of the interplay between the concept of sovereign immunity and the enforcement mechanism under the Convention, differentiating between two stages of enforcement.

2.1. Sovereign Immunity Defense at the Stage of Recognition of the Award

The conclusion on the basis of the literal reading of the Section 6 of the Convention is that at the stage of recognition of the ICSID award sovereign immunity should not come into play. This conclusion is based on two points. Firstly, by signing the Convention, the state has undertaken to submit to the ICSID in instances, provided for in the BITs or in other instruments, and thus, has waived its immunity from jurisdiction in this regard.⁶⁵ Consent to arbitration under the Convention is usually interpreted to include also a waiver of immunity at the stage of post-award proceedings

⁶⁵ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1153 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016); Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, in Julian D. M. Lew, *Contemporary Problems in International Arbitration*, 313, 316 (1987).

of verification of the award.⁶⁶ Secondly, as it was already emphasized upon in Chapter 1, recognition of the ICSID award is automatic⁶⁷ and cannot be refused by the competent courts.⁶⁸ Therefore, the State cannot prevent recognition of the award in national courts on the basis of the sovereign immunity defense. Even if the state attempts to do so, the courts should rely on the clear-cut enforcement provisions of the Convention and quash such attempts. The achievement of the crafters of the Convention is that they have managed to insulate the recognition mechanism of the ICSID awards, including against the sovereign immunity defense, and thereby achieving the finality of the ICSID awards. Investors trying to recognize ICSID awards are thus arguably in a better position than investors with the non-ICSID awards.⁶⁹

2.2. Sovereign Immunity Defense at the Stage of Execution of the Award

In light of Art.55 of the Convention, the rules on sovereign immunity may theoretically play a role only during the second stage of enforcement proceedings, i.e. the stage of execution of the award. The Convention is very explicit in allowing the State to use the sovereign immunity defense under national laws to avoid attachment of assets.⁷⁰ The state whose courts refuse the claim for attachment on the basis of sovereign immunity defense will thus not be in violation of the

⁶⁶ Georges R. Delaume, *Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration*, 2(2) ICSID Rev.-Foreign Invest. L. J. 403, 405-406 (1987); Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, in Julian D. M. Lew, *Contemporary Problems in International Arbitration* 313, 316 (1987).

⁶⁷ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1153 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016).

⁶⁸ *Id.* at 1129.

⁶⁹ R. Doak Bishop, *Enforcement of Arbitral Awards against Sovereigns* 22 (2009).

⁷⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art.55, March 18, 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, (last visited April 8, 2016).

Convention.⁷¹ However, even if the recalcitrant state is successful in raising its immunity defense, it will still be in violation of its duty to comply with the award under Art.53 of the Convention.⁷²

The ad hoc Committee in *MINE v. Guinea* ruled on this issue as follows:

It should be clearly understood, ..., that State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions. The Committee refers in this connection among other things to Article 27 and 64 of the Convention, and to the consequences which such a violation would have for such a State's reputation with private and public sources of international finance.⁷³

The preservation of the sanctity of sovereign immunity from execution within the enforcement mechanism of the Convention is a disputed move. One may criticize the Convention drafters for managing to achieve significant concessions from states in negotiations of the Convention (e.g. with respect to the finality of the ICSID awards), and in the end not using this chance to negotiate the waiver of sovereign immunity from execution. Although there was a proposition during the work on the draft of the Convention to include such waiver,⁷⁴ and such waiver was even seen as “technically possible”,⁷⁵ the relevant proposition did not make it to the Convention. There was apparently no doubt among the drafters of the Convention that states would solemnly respect and

⁷¹ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1154 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016).

⁷² *Id.* at 1125.

⁷³ *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 concerning Guinea's Application for Stay of Enforcement of the Award dated August 12, 1988, ICSID Reports: Volume 4: Reports of Cases Decided Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965, 115-116, para.25 (1997).

⁷⁴ Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev-FILJ, 289, 332 (1987).

⁷⁵ Schreuer, *supra* note 71.

comply with the ICSID rulings against them.⁷⁶ By the same token, Art.54 was contemplated as a tool in the hands of states in their action against the losing investors, and not vice versa.⁷⁷

From the wording of Art.55 of the Convention one may see that it does not regulate the issue of sovereign immunity from execution directly and simply points to the national laws on the subject. This invites the conclusion that there is no special treatment of the ICSID awards in terms of sovereign immunity at the execution stage in comparison with the non-ICSID awards. Therefore, with respect to sovereign immunity from execution, ICSID awards are to be executed on par with non-ICSID awards, and rules of international public law, as well as applicable national law on the subject, will apply equally to both. Also, the caselaw with regard to enforcement of non-ICSID awards against sovereigns in a particular jurisdiction will be equally instructive, in the absence of the caselaw on the execution of ICSID awards specifically. The extent of the sovereign immunity the state can rely on in a particular case will depend on the jurisdiction where execution of the award is sought and, naturally, will differ across jurisdictions.⁷⁸

2.2.1. State's Consent to Arbitration under the Convention as Automatic Waiver of Immunity from Execution

Before proceeding further, I would like to address here the pertinent issue of possible interpretation of a consent to arbitration by a state under the Convention as automatically leading to a waiver of immunity from execution. Logically, if the state consents to arbitration in any form, it cannot NOT

⁷⁶ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1119 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016).

⁷⁷ *Id.*

⁷⁸ 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*, by Binder, Christina, Ursula Kriebaum, August Reinisch, and Stephan Wittich, eds., Oxford: Oxford University Press, 302, 310 (2009), http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199571345.001.0001/acprof-9780199571345-chapter-17#ref_acprof-9780199571345-note-1536 (last visited April 8, 2016).

contemplate that it may need to pay up under the award, and, consequently, it cannot NOT contemplate that it may be coerced to comply with the award in case of non-compliance through attachment of its assets, as any other recalcitrant party.⁷⁹ As expressed by Albert Jan van den Berg, this interpretation is nothing more than the application of the *pacta sunt servanda* principle.⁸⁰ This logical conclusion is further supported by the principle of effectiveness of arbitral awards.⁸¹ One may ask themselves whether investor-state arbitration is not rendered meaningless if the state may choose to disregard the award against it by way of hiding behind the sovereign immunity shield. This is exactly the position undertaken recently by the French Court of cassation in its decision in *Creighton v. Qatar*⁸² in the context of the International Chamber of Commerce (“ICC”) arbitration. The court held that, by signing an ICC arbitration clause, Qatar made an implied waiver of its immunity from execution.⁸³ The court thus reversed a ruling of the lower court, which held that the consent to arbitration of the state did not amount to such a waiver.⁸⁴ In the holding the court relied on Art. 24(2) (Art. 34(6)) of the ICC Rules of Arbitration that provide for the binding force of the award and an obligation of the parties to comply with it.⁸⁵ In the subsequent *NOGA (I)* decision, the court further clarified, however, that it does not consider the general waiver of

⁷⁹ Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles’ Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int’l Arb. 47, 66 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016).

⁸⁰ Albert Jan van den Berg, *Recent Enforcement Problems under the New York and ICSID Conventions*, 5 Arb.Int’l 2, 13 (1989), <http://www.hvdb.com/wp-content/uploads/1989-AJvdb-Recent-Enforcement-Problems.pdf> (last visited April 8, 2016).

⁸¹ Emmanuel Gaillard, *Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles*, in E. Gaillard and J. Younan eds., *State Entities in International Arbitration*, IAI Series on International Arbitration No.4 (2008), 179, 181 (2008).

⁸² *Société Creighton v. Ministre des Finances de l’Etat du Qatar et autre*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 6, 2000, 127 J.D.I. 1054 (2000); Gerlich, *supra* note 79, at 68.

⁸³ *Id.* at 1054-1055; Gerlich, *supra* note 79, at 68.

⁸⁴ Gaillard, *supra* note 81, at 179; Gerlich, *supra* note 79, at 68.

⁸⁵ Arbitration Rules of the International Chamber of Commerce, art.34(6) (2012), www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_34 (last visited April 8, 2016).

immunity from jurisdiction as extending to diplomatic property.⁸⁶ This approach is arguably similar to the practice of Swiss courts. Swiss courts do not differentiate between sovereign immunity from jurisdiction and sovereign immunity from execution, and treat the latter as the extension of the former, at the same time preserving the state immunity of assets used for the sovereign purposes.⁸⁷ The *Creighton* decision evidences the pro-investor approach of the courts (at least in France), and can potentially hold significance in the context of enforcement of ICSID awards, since the Convention contains the provisions worded similarly to those of the ICC Rules of Arbitration.

In my opinion, the express mention of the sovereign immunity from execution in Art.55 of the Convention should not be an obstacle to courts adopting the “extended” version of the waiver of sovereign immunity in terms of enforcement of ICSID awards. First of all, Art.55 of the Convention is deliberately drafted to allow for a dynamic inclusion of the sovereign immunity concept;⁸⁸ secondly, it sends one to the respective national laws on the subject. Thus, nothing can preclude national courts from interpreting Art.55 of the Convention to include an “extended” version of the waiver of sovereign immunity, as the court did in the *Creighton* decision. Moreover, the extended interpretation can be achieved purely through the application of Art.53 of the Convention, on the basis of the obligation of the state to comply with the award issued against it,

⁸⁶ Embassy of the Russian Federation in France, et al. v. Compagnie NOGA d’Importation et d’Exportation, Cour d’appel [CA] [regional court of appeal] Paris, August 10, 2000, in Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles’ Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int’l Arb. 47, 65-66, 68 (2015).

⁸⁷ Swiss caselaw also requires the connection to Switzerland for measures of execution against sovereigns and their assets in the territory of Switzerland. Matthias Scherer, *Swiss Federal Supreme Court provides guidance on rules of State immunity applicable to enforcement of ICSID awards*, December 13, 2011, <http://kluwerarbitrationblog.com/2011/12/13/swiss-federal-supreme-court-provides-guidance-on-rules-of-state-immunity-applicable-to-enforcement-of-icsid-awards/> (last visited April 8, 2016).

⁸⁸ Christoph H. Schreuer, *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1155 (2009), <http://dx.doi.org/10.1017/CBO9780511596896> (last visited April 8, 2016); Gerlich, *supra* note 79, at 69.

and thus without recourse to Art.55.⁸⁹ Therefore, it may be theoretically possible to interpret the consent to arbitrate under the Convention to implicitly include a waiver of immunity from execution against state assets.

To briefly conclude Chapter 2, at the stage of recognition of the award the issue of sovereign immunity should not arise, since the procedure is automatic and recognition cannot be refused by the courts. Sovereign immunity problem may pose a problem to the efficiency of the ICSID regime only at the stage of execution of the award, in light of the wording of Art.55 of the Convention.

⁸⁹ Société Creighton v. Ministre des Finances de l'Etat du Qatar et autre, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 6, 2000, 127 J.D.I. 1054 (2000); Gerlich, *supra* note 79, at 69.

Chapter 3 - Correlation between Enforcement of the Award and Sovereign Immunity under the Convention: Practical Aspects

Since I analyzed theoretical aspects of the correlation between enforcement and sovereign immunity under the Convention in Chapter 2, I will now proceed to analyzing current practices with respect to the impact of state immunity on the enforcement mechanism under the Convention. The purpose behind this Chapter is to attempt to understand whether the state immunity defense, which appears to be a valid obstacle to the enforcement of ICSID awards in theory, and which, in my initial opinion, can potentially make the ICSID mechanism close to meaningless, affects the efficiency of the ICSID enforcement mechanism in practice. For this, I will analyze both scholarly sources and statistical information, as well as cases in states-signatories of the Convention on the subject.

My research revealed that, surprisingly, most ICSID awards against states have been complied with up to this date voluntarily.⁹⁰ This is supported by the available statistical data. In 2008 PriceWaterhouseCoopers, in conjunction with Queen Mary School of International Arbitration, conducted a Survey on Corporate Attitudes and Practices on Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration (“Survey”).⁹¹ It should be noted that the Survey pertains to investor-state arbitration in general, not only to that conducted under the

⁹⁰ Antonio R. Parra, *Enforcement of ICSID Arbitral Awards*, 24th Joint Colloquium on International Arbitration 1, 9 (2007), http://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf (last visited April 8, 2016); Alan S. Alexandroff, Ian A. Laird, *Compliance and Enforcement*, 1172, 1185 (2012) http://alanalexandroff.com/wp-content/uploads/2010/11/asa_laird_ch29.pdf (last visited April 15, 2016).

⁹¹ Survey on Corporate Attitudes and Practices on Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration, by PriceWaterhouseCoopers, in conjunction with Queen Mary School of International Arbitration (2008), <http://www.arbitration.qmul.ac.uk/docs/123294.pdf> (last visited on April 14, 2016).

Convention, which, in my opinion, does not impact its relevance to the subject at hand. The Survey found that 81% of the participating corporations did not have to or did not seek to enforce arbitral awards against states.⁹² The key reason for that is apparently the high level of compliance by states with the awards rendered against them⁹³ (90%, according to interviews⁹⁴). Another reason appears to be that many investor-state proceedings end in the post-award settlement.⁹⁵ Interestingly, corporations have found enforcing arbitral awards against states or state enterprises generally less problematic than enforcing awards against private entities.⁹⁶ This is confirmed by the fact that there are barely a handful of cases on sovereign immunity problems in the context of ICSID award enforcement proceedings. Selected cases will be analyzed further in Chapter 3.2.

Such a satisfactory level of compliance of states with the ICSID awards may be viewed as a result of the effect of various “soft” mechanisms embedded in the ICSID arbitration mechanism. These factors are briefly discussed below.

3.1. Factors Ensuring High Level of Compliance of States with Awards Rendered against them

High level of compliance of states with the ICSID awards may be explained by, specifically, the reputational concerns (3.1.1.), the impact of the World Bank Affiliation of the ICSID (3.1.2.), and the influence of the sanctions laid down in the Convention (3.1.3.).

⁹² Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards Against States*, 19 Am. Rev. Int'l Arb. 391, 403 (2008).

⁹³ *Id.*

⁹⁴ Survey on Corporate Attitudes and Practices on Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration by PriceWaterhouseCoopers, in conjunction with Queen Mary School of International Arbitration, 13 (2008), <http://www.arbitration.qmul.ac.uk/docs/123294.pdf> (last visited on April 14, 2016).

⁹⁵ See Baltag, *supra* note 92, at 404.

⁹⁶ See Survey, *supra* note 94.

3.1.1. Reputational Risks

Compliance of states with awards rendered against them may be explained in part due to high reputational risks states face in case of non-compliance.⁹⁷ Today states are competing for investment, which necessitates a lot of attention and money to improving the investment climate. The interest of the State in signing up for the Convention lies in attracting investment, by, inter alia, creating a level-playing field for foreign investors in terms of rules of the game. The logical corollary of such a state policy is the voluntary compliance with the awards rendered against it. The positive effect of signing the Convention is nullified if the state chooses to disobey the award issued against it, thus giving off to the investors the signal that the Convention is viewed as nothing more than just a formal paper. Moreover, non-compliance may have the effect of “ostracizing”⁹⁸ the recalcitrant state on the international forum. Thus, compliance with the awards rendered against it “provides a state with credibility and reduces political risk associated with foreign investment”.⁹⁹ Non-compliance, at the same time, harms the very image the state tries to create on international arena by joining the Convention.¹⁰⁰

3.1.2. World Bank Affiliation of the ICSID

The additional strength of the ICSID awards may lie in the ICSID's connection to the World Bank.¹⁰¹ The Convention was drafted by the Executive Directors of the International Bank for

⁹⁷ Christoph Schreuer, *Investment Protection and International Relations*, in A. Reinisch & U. Kriebaum (EDS.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, 345, 348 (2007), http://www.univie.ac.at/intlaw/wordpress/pdf/87_investment_protect.pdf (last visited April 14, 2016).

⁹⁸ Joseph M. Cardosi, *Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution*, 41 Pepp. L. Rev. 109, 116 (2013), <http://www.lexisnexis.com/hottopics/lnacademic/?verb=sr&csi=270077&sr=cite%2841%20Pepp.%20L.%20Rev.%20109%29> (last visited April 14, 2016).

⁹⁹ *Id.* at 117.

¹⁰⁰ Jan Paulsson et al., *Guide to ICSID Arbitration*. The Hague: Kluwer Law International, 186 (2004).

¹⁰¹ Antonio R. Parra, *Enforcement of ICSID Arbitral Awards*, 24th Joint Colloquium on International Arbitration, 1, 11 (2007), <http://www.arbitration->

Reconstruction and Development (the World Bank),¹⁰² which creates the additional “institutional gravitas”¹⁰³ effect. The major activity of the World Bank lies in granting loans to developing countries.¹⁰⁴ Non-compliance with the ICSID award may allegedly affect this process.¹⁰⁵ According to the internal operational procedures of the Bank, the World Bank “takes an interest in disputes”¹⁰⁶ between a member state and nationals of other member states relating to international financial transactions.¹⁰⁷ Serious dissatisfaction of the Bank with the stance of the member state in such a dispute may prompt the Bank to stop disbursing new loans to the member state until the latter takes measures to resolve the situation.¹⁰⁸ Such situation may “give rise to concerns about the member country's creditworthiness for continued Bank lending”.¹⁰⁹ Finally, the Bank may also choose not to “appraise proposed projects/programs in a [defaulting] country unless it has good grounds for believing that the obstacles to lending will soon be removed”.¹¹⁰ Thus, affiliation of the ICSID with the World Bank may serve to create additional incentives for states

icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf (last visited April 8, 2016).

¹⁰² International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules*, 5 (2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited April 8, 2016).

¹⁰³ Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19(2) Pacific McGeorge Global Business & Development Law Journal 337, 372 (2007); Todd Allee, Clint Peinhardt, *Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment*, 8 (2008) <https://international-arbitration-attorney.com/wp-content/uploads/contingent-credibility-the-reputational-effects-of-investment-treaty-disputes-on-foreign-direct-in.pdf> (last visited April 8, 2016).

¹⁰⁴ World Bank, *What We Do*, <http://www.worldbank.org/en/about/what-we-do> (last visited April 8, 2016).

¹⁰⁵ Antonio R. Parra, *Enforcement of ICSID Arbitral Awards*, 24th Joint Colloquium on International Arbitration, 1, 11 (2007), http://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf (last visited April 8, 2016).

¹⁰⁶ World Bank, OP 7.40 - Disputes over Defaults on External Debt, Expropriation, and Breach of Contract, para.1, July, 2001, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064628~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (last visited April 8, 2016).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*, para.3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, para.5.

to comply with the award voluntarily. However, the World Bank has not yet utilized its leverage.¹¹¹

According to Parra, the only known involvement of the World Bank in encouraging enforcement has so far been to remind the debtor of its payment obligations.¹¹²

3.1.3. Sanctions under the Convention

Invoking the sovereign immunity defense, even if successful, still means a failure of a state to comply with the award, and consequently, a violation by the state of its international obligations under the Convention.¹¹³ Such violation triggers the possibility of the use of various sanctions provided for in the Convention. In particular, non-compliance with the award on the part of the losing state allows the home state of the winning investor to exert diplomatic protection over its national.¹¹⁴ Such right is suspended by the initiation of the ICSID proceedings and is extinguished by the act of compliance with the award.¹¹⁵ Non-compliance, however, renews the right under Art. 27(1) of the Convention. Additionally, under Art. 64 of the Convention, the state, if the failure to comply raises a question of interpretation or application of the Convention, may refer the dispute to adjudication by the International Court of Justice, unless the parties have agreed to a different method of dispute resolution.¹¹⁶ Therefore, diplomatic and political pressure may also play a role in ensuring compliance of the losing state with the ICSID award.

¹¹¹ Antonio R. Parra, *Enforcement of ICSID Arbitral Awards*, 24th Joint Colloquium on International Arbitration, 1, 12 (2007), http://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf (last visited April 8, 2016).

¹¹² *Id.*

¹¹³ Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 Ann. Surv. Int'l & Comp. L. 21, 40 (2001), <http://www.lexisnexis.com/lxacui2api/auth/checkbrowser.do?ipcounter=1&cookieState=0&rand=0.3255655967416241&bhcp=1> (last visited April 15, 2016).

¹¹⁴ *Id.* at 40, 41.

¹¹⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 27(1), March 18, 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited April 8, 2016).

¹¹⁶ *Id.*, art. 64.

To sum up this Chapter so far, most ICSID awards are complied with voluntarily, according to the information from available sources. The combination of such factors as the high reputational price of non-payment under the ICSID award, possibility of discontinuation of loan disbursement from the World Bank, as well as the right of the home state of the investor to exert diplomatic protection over its national, contributes to this phenomenon.

High level of compliance of states with the ICSID awards may invite the conclusion that the sovereign immunity defense, however challenging in theory, has so far not caused major problems in practice, and thus, deserves little to no consideration as the factor endangering the efficiency of the ICSID regime. However, one should not be too hasty in discarding the issue of sovereign immunity from the table. I will now proceed to analyzing the selected cases on the role of the sovereign immunity defense in the enforcement of ICSID awards. The listed cases will shed light on the the types of problems with respect to state immunity the investors may face during enforcement of the ICSID awards. Cases are grouped with respect to the stage of enforcement of the award (recognition or execution), at which the sovereign immunity defense was relevant.

3.2. Case study

3.2.1. Sovereign Immunity Defense at the Stage of the Recognition of the Award

This Chapter includes cases, in which the sovereign immunity defense was relevant at the stage of recognition of the award. In one of the cases (*Blue Ridge v. Argentina*), the state has tried to raise the sovereign immunity defense at the stage of recognition of the ICSID awards by itself. In the other two (*Benvenuti et Bonfant S.R.L. v. People's Republic of the Congo* and *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal*) the defense was allegedly raised by the court of lower instance at its own initiative and determined the outcome of the case at that stage. However, the relevant court decisions were quashed on appeal.

Case 1: *Blue Ridge v. Argentina* (US)¹¹⁷

Blue Ridge, a Delaware corporation, petitioned the district court to confirm an ICSID award against Argentina. Argentina moved for dismissal of the petition, arguing, inter alia, that it was immune from suit pursuant to the Foreign Sovereign Immunities Act (“FSIA”). Argentina claimed, in particular, that consent to an ICSID arbitration “hardly constitutes proof of a foreign state's intent to waive immunity to suit in United States courts”.¹¹⁸

¹¹⁷ *Blue Ridge Investments v. Republic of Argentina*, 902 F.Supp.2d 367 (S.D.N.Y. 2012), *aff'd* 735 F.3d 72 (2nd Cir. 2013).

¹¹⁸ Memorandum in Support of Motion by the Republic of Argentina to Dismiss the Petition, *Blue Ridge Investments, LLC v. Republic of Argentina*, 902 F.Supp.2d 367 (S.D.N.Y. 2012), *aff'd* 735 F.3d 72 (2nd Cir. 2013).



The Court dismissed the arguments of Argentina and held that Argentina waived its immunity from suit under two exceptions to the FSIA: the implied waiver exception and the arbitral award exception.

First, the Court found that Argentina made an implied waiver of its sovereign immunity in US courts with respect to “enforcement” (the term utilized in this case to denote “recognition”) proceedings by signing the Convention. In support of its position, the court cited, *inter alia*, the *LETCO v. Liberia* case, in which the court ruled that “Liberia, as a signatory to the [ICSID] Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered pursuant to the Convention.”¹¹⁹ The court particularly noted that “Liberia clearly contemplated the involvement of the courts of any of the Contracting States, including the United States as a signatory to the Convention, in enforcing the pecuniary obligations of the award.”¹²⁰

The Court in the present case similarly concluded that, in light of the enforcement mechanism provided by the ICSID Convention, Argentina “must have contemplated enforcement actions in other [Contracting] [S]tates,”¹²¹ including the US.

The Court did not stop there and proceeded to find that, in addition to the implied waiver exception, Argentina waived its sovereign immunity under the arbitral award exception. Under the FSIA arbitral award exception,

foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the action is brought ... to confirm an award made pursuant to ... an agreement to arbitrate, if ... the agreement or award is or may be governed by a treaty

¹¹⁹ *Blue Ridge Investments v. Republic of Argentina*, *supra* note 117, at 374.

¹²⁰ *Id.*

¹²¹ *Id.*



or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.¹²²

The Court held that, as long as the arbitral award was issued pursuant to the Convention, which falls within the definition of “a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,” and the US and Argentina are both signatories to the Convention, Argentina's agreement to submit its dispute to arbitration under the Convention constituted a waiver of immunity from suit pursuant to the arbitral award exception.

The order of the district court in the part on dismissing the sovereign immunity claims was affirmed on appeal.¹²³

Cases 2 and 3: Benvenuti et Bonfant S.R.L. v. People’s Republic of the Congo, Société Ouest Africaine des Bétons Industriels v. Republic of Senegal (France)¹²⁴

An Italian company, Benvenuti et Bonfant S.R.L. (“Benvenuti”), sought recognition of the ICSID award in France. It obtained an *exequatur* by the first-instance court, with the following reservation: “No measure of execution, or even conservatory measure, shall be taken pursuant to the said award, on any assets located in France without the prior authorization of this Court”.¹²⁵

Benvenuti appealed the decision in part of the reservation. It argued that the reservation part of the order made execution of the award impossible. According to the appellant, under Art.54(2) of the Convention the court could only confirm the authenticity of the award. The first-instance court

¹²² 28 U.S.C. § 1605(a)(6).

¹²³ Blue Ridge Investments v. Republic of Argentina, 735 F.3d 72 (2nd Cir. 2013).

¹²⁴ Benvenuti et Bonfant S.R.L. v. People’s Republic of the Congo, Cour d’Appel de Paris, June 26, 1981, in R. Doak Bishop, James Crawford, et al. (eds), *Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition)*, Kluwer Law International, 1180-1182 (2014).

¹²⁵ *Id.* at 1181.

conflated the stage of recognition and execution of the award. It should not have delved into the execution stage, at which the issue of state immunity from execution could be raised. Appellant asked the appeal court to delete the reservation.

The appeal court ruled that Art.54 “lays down a simplified procedure for obtaining an *exequatur* and restrict the function of the court designated for the purposes of the Convention by each Contracting State to ascertaining the authenticity of the award”.¹²⁶

The court at the same time noted that “the order granting an *exequatur* for an arbitral award does not, however, constitute a measure of execution but simply a preliminary measure prior to measures of execution”.¹²⁷ The court held that, pursuant to a request under Art.54 of the Convention, the court of first instance could not encroach upon the second stage, the stage of execution, at which the sovereign immunity becomes relevant, without acting outside of its competence. The appeal court thus ruled in favour of the appellants and deleted the contested reservation.

The similar confounding of the stages happened in one more French case *Societe Ouest Africaine des Betons Industriels v. Senegal*.¹²⁸ The mistake was corrected by the higher court with the reasoning similar to the one of the appeal court in the above *Benvenuti* case.¹²⁹

¹²⁶ *Id.* at 1182.

¹²⁷ *Id.*

¹²⁸ Georges R. Delaume, *Judicial and Similar Proceedings: France: Court of Cassation Decision in Soabi (Seutin) v. Senegal (Recognition and Enforcement of Award in the Context of the ICSID Convention): Introductory Note*, 30 I.L.M. 1167, 1169 (1991), http://heinonline.org/HOL/Page?handle=hein.journals/intlm30&g_sent=1&collection=journals#&id=1183 (last visited April 15, 2016).

¹²⁹ Alan S. Alexandroff, Ian A. Laird, *Compliance and Enforcement*, 1172, 1177-1179 (2012) http://alanalexandroff.com/wp-content/uploads/2010/11/asa_laird_ch29.pdf (last visited April 15, 2016).

3.2.2. Sovereign Immunity Defense at the Stage of the Execution of the Award

This Chapter includes cases, in which the sovereign immunity defense was relevant at the stage of execution of the award. In satisfaction of their claims under the awards investors have tried to attach: assets of the state-owned entity (*Benvenuti et Bonfant S.R.L. v. Banque Commerciale Congolaise and Others*), property of the central bank (*AIG Capital Partners v. Kazakhstan*), fees and taxes due to a losing state, and funds in the bank accounts of the embassy (*LETCO v. Liberia*). Investors were unsuccessful in all of the listed cases.

Case 4: Benvenuti and Bonfant S.R.L. v. Banque Commerciale Congolaise and Others (France)¹³⁰

After obtaining recognition of the award (Case 2 above), Benvenuti attempted to compel performance of the People's Republic of the Congo by attaching funds in ownership of Banque Commerciale Congolaise, a state-owned entity. The investor argued that, although state-owned entities have a distinct legal personality from the state itself, such entities should be regarded as a part of the state whenever the state exercises control over such entities. The court seized with the dispute, found, however, that control over a state-owned entity does not suffice to regard it as an emanation of the state. The court established that the Banque Commerciale Congolaise's capital was held by various foreign entities and individuals, and that its statutory activity is the performance of commercial operations on its behalf and on behalf of third parties. On the basis of this, the court held that Banque Commerciale Congolaise "should not be regarded as an emanation

¹³⁰ Benvenuti and Bonfant S.R.L. v. Banque Commerciale Congolaise and Others, France, Cour de cassation, Paris, July 21, 1987, in Rosemary Rayfuse, *ICSID Reports: Volume 1: Reports of Cases Decided Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965*, Cambridge University Press, 373-375 (1993).

of the State of the Congo, from which it is distinct”.¹³¹ Consequently, Banque Commerciale Congolaise could not be made responsible for payment obligations of the People’s Republic of the Congo¹³² under the ICSID award. The Court of Cassation thus upheld the ruling of the lower court and refused attachment of the assets of Banque Commerciale Congolaise.

Case 5: AIG Capital Partners Inc. v. Kazakhstan (UK)¹³³

AIG Capital Partners Inc. (“AIG”) attempted to enforce in the UK the ICSID award against Kazakhstan. AIG obtained permission to register the award in England and tried to attach cash and securities held in the UK by third parties (banks) in the name and for the benefit of the National Bank of Kazakhstan. The petitioners argued that these were the assets of Kazakhstan and could thus be seized for the purpose of execution of the award. Petitioners were granted interim orders in respect of the accounts. Kazakhstan and the National Bank of Kazakhstan (“NBK”) appealed raising the sovereign immunity defense with respect to the assets in question.

The court ruled that, in light of a specific section in the applicable statute on the position of the property of a central bank, all property of a central bank of the foreign state is covered by the sovereign immunity defense. The court concluded that “in all cases the central bank's property shall not be regarded as in use or intended for use for commercial purposes”.¹³⁴ Thus, the property

¹³¹ *Id.* at 374.

¹³² Chiara Giorgetti, *Litigating international investment disputes: a practitioner's guide*, 495 (2014).

¹³³ AIG Capital Partners Inc. and Another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), Queen’s Bench Division of the High Court of England and Wales, October 20, 2005, [2005] E.W.H.C. Comm. 2239, 129 I.L.R. 589, 589-628 (2007), www.italaw.com/sites/default/files/case-documents/ita0022.pdf (last visited April 15, 2016); R. Doak Bishop, James Crawford, et al. (eds), *Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition)*, Kluwer Law International, 1264-1271 (2014).

¹³⁴ AIG Capital Partners Inc. and Another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), Queen’s Bench Division of the High Court of England and Wales, October 20, 2005, [2005] E.W.H.C. Comm. 2239, 129 I.L.R. 589, 589-628, para.57(2) (2007), www.italaw.com/sites/default/files/case-documents/ita0022.pdf (last visited April 15, 2016) (citations and internal quotation marks omitted).



of the central bank is protected by full immunity from execution in the UK courts, whether the property in question is used or is intended for use for commercial purposes or not.

The court speculated that the applicable statute contained separate provisions on the position of property of central banks and other monetary authorities with regard to the execution process in the UK courts, because the drafters of the statute acknowledged the difficulty, if not impossibility, “to determine whether a particular asset of a central bank or monetary authority was, at a relevant time, being used or intended for use for sovereign purposes or for commercial purposes”.¹³⁵ The court considered the assets of a state's central bank “an obvious target for the enforcement process in relation to judgments against the state or its central bank (etc.)”,¹³⁶ which might result in “unwelcome and perhaps embarrassing litigation in UK courts”.¹³⁷ The Court hazarded a guess that the drafters of the statute wanted to avoid such instances by granting central bank property full immunity under a specific section of the statute.

The court established that the third parties to which the order for attachment was addressed held relevant cash and securities in the name of NBK, and that NBK possessed contractual rights to the debt constituted by the cash accounts. This made the relevant assets the property of NBK, and thus, the property that could not be attached because of the sovereign immunity defense.

In the alternative, the judge held that the relevant assets at all times were the property of Kazakhstan, utilized by it in the exercise of sovereign authority, which still left these assets

¹³⁵ *Id.*, para.58.

¹³⁶ *Id.*

¹³⁷ *Id.*

immune from attachment in the UK courts under a general section of the statute on sovereign immunity. The court discharged the attachment orders.

Case 6: LETCO v. Liberia (US)¹³⁸

After having recognized the award (as briefly mentioned in Case 1), LETCO started proceedings for attachment of the assets of Liberia in satisfaction of its claim. A writ of execution was issued on the registration fees and taxes accrued for the benefit of Liberia. Liberia appealed the writ on the basis of the sovereign immunity defense in the FSIA to the same court that previously issued the writ in favour of LETCO, and was successful. The court ruled that the assets concerned were used by Liberia for governmental purposes and thus, were immune from attachment. The court, however, made it clear that “LETCO is not enjoined from issuing executions with respect to any properties which are used for commercial activities and that day fall within one of the [commercial] exceptions.”¹³⁹ LETCO made one more attempt at attachment: it obtained execution writs against the bank accounts of the Embassy of Liberia in Washington, D.C. LETCO’s second attempt was equally unsuccessful. The court cancelled the writ on two grounds. First, the court ruled that the property of the Embassy was protected by diplomatic immunity under the Vienna Convention on Diplomatic Relations, to which the US was a party. In the alternative, the court found that the assets concerned enjoyed immunity from attachment as assets used for governmental, rather than commercial, activities. Interestingly, the court expressly noted that “The concept of “commercial activity” should be defined narrowly because sovereign immunity remains the rule rather than the exception, ... and because courts should be cautious when addressing areas that affect the affairs

¹³⁸ Jan Paulsson et al., *Guide to ICSID Arbitration* 188 (2011).

¹³⁹ *Cases, Introductory Note*, ICSID Rev.-Foreign Invest. L. J. 159, 161
<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC662&caseId=C126> (last visited April 15, 2016).



of foreign governments”.¹⁴⁰ The court acknowledged that a portion of funds on respective bank accounts could be used for commercial purposes (e.g. for purchase of various goods or services for the daily running of the Embassy). Regardless, it “decline[d] to order that if any portion of a bank account is used for a commercial activity then the entire account loses its immunity”,¹⁴¹ in line with the narrow interpretation of the concept of sovereign immunity.

Thus, LETCO failed in both of its attempts to attach assets of the Republic of Liberia in the US courts since, according to the relevant court decisions, these assets were protected by sovereign immunity.

¹⁴⁰ *Id.* at 164-165.

¹⁴¹ *Id.* at 165.

3.2.3. Case analysis

The positive aspect about the listed cases is that they are few and far in between, which corresponds to the conclusion about the high level of compliance of states with the ICSID awards, made earlier. On the other hand, the listed cases prove that the incentives listed in Chapter 3.1. do not guarantee the desired effect in all cases. If the state chooses to evade payment under the award, sovereign immunity may potentially become a major headache for the investor. The available case-law, meagre as it is, illustrates that successful investors may encounter problems with sovereign immunity at all stages of the enforcement of the award: both at the stage of recognition and at the stage of execution. Invoking sovereign immunity defense at the stage of recognition, in light of express provisions on automatic recognition of awards in the Convention, seems like a token resistance on the part of the state and, as evidenced by the above cases, is usually quashed by the courts quite quickly. On the other hand, as the listed cases clearly demonstrate, invoking sovereign immunity at the stage of execution has proven to be a successful non-compliance tactics for the states so far. This conclusion is in line with the findings of the Survey. In the Survey several corporations noted that they did not attempt to enforce awards against recalcitrant states, since they did not consider their chances promising.¹⁴² Out of the remaining 19% of the corporations that had to resort to enforcement of awards against states, 46% indicated encountering difficulties at the stage of enforcement, 15% - serious difficulties.¹⁴³ Such difficulties included, namely, inability to identify and/or access the assets of the state (as encountered by 68% of those that indicated facing

¹⁴² Survey on Corporate Attitudes and Practices on Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration, by PriceWaterhouseCoopers, in conjunction with Queen Mary School of International Arbitration 13 (2008), <http://www.arbitration.qmul.ac.uk/docs/123294.pdf> (last visited on April 14, 2016).

¹⁴³ Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards Against States*, 19 Am. Rev. Int'l Arb. 391, 405 (2008).

difficulties), and immunity from execution (13%, respectively).¹⁴⁴ On the face of it, the former problem appears to be just a separate facet of the latter problem, i.e. the state's immunity from execution.¹⁴⁵ Based on this, one can conclude that, high level of compliance with the awards notwithstanding, the main problem at the stage of enforcement investors face remains to be the problem of state immunity from execution (as encountered by 81% of those that indicated facing difficulties).¹⁴⁶

The situation is worsened by the fact that investors and states are in an obviously unequal position at this stage. Although the state is the losing party that violates its international obligations by not complying voluntarily with the award, it is usually the winning investor that bears the burden of locating the state assets, suitable for attachment, and further proving their suitability for attachment under applicable laws.¹⁴⁷ The most obvious assets, i.e. property of embassies, central banks, etc., are off-limits,¹⁴⁸ necessitating half-detective research work on available attachable state property, which is both money- and time-consuming. Since the issue of sovereign immunity is the national law domain and thus, is not uniformly regulated across jurisdictions, investors, in order to succeed, have to be intimately acquainted with the peculiarities of the state immunity laws in each jurisdiction where attachment is sought.¹⁴⁹ Moreover, states may take advantage of their stronger bargaining position and may take deliberate steps to shield their attachable assets from coercive

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Joseph M. Cardosi, *Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution*, 41 Pepp. L. Rev. 109, 130 (2013), <http://www.lexisnexis.com/hottopics/lnacademic/?verb=sr&csi=270077&sr=cite%2841%20Pepp.%20L.%20Rev.%20109%29> (last visited April 14, 2016).

¹⁴⁸ Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles' Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int'l Arb. 47, 81-82 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016).

¹⁴⁹ *Id.* at 81.

measures, like, e.g. Argentina, that has moved its hard currency assets to the Bank for International Settlements in Basel, Switzerland, ensuring their immunity from attachment.¹⁵⁰ The investor's burden is increased exponentially by the courts' natural reluctance to encroach upon sovereignty of foreign states. Courts, having demonstrated a pro-investor stance at the stage of recognition of the award, have exercised extreme caution about interfering with the affairs of foreign states at the stage of execution. On the one hand, this is understandable, since coercive measures against state assets may result in significant obstacles to its functional capacity.¹⁵¹ Granted, as the main participants of the international legal order and the actors in charge of the public interest in their territory, states have a legitimate right to "demand a significant measure of deference in any substantive evaluation of their public acts".¹⁵² However, the results of the cautious approach of the courts are telling: in neither of the above-mentioned execution cases have the investors managed to succeed in attaching the state assets, despite holding valid and recognized ICSID awards in their favour.

This should also be viewed against the increasing popularity of ICSID as the dispute resolution forum.¹⁵³ The number of the disputes administered by the ICSID has significantly risen in the recent years, and the trend perseveres.¹⁵⁴ Logically, this considerably increases the probability of

¹⁵⁰ Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles' Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int'l Arb. 47, 82 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016).

¹⁵¹ Burkhard Hess, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 EJIL 269, 277 (1993), <http://www.ejil.org/pdfs/4/1/1203.pdf> (last visited April 15, 2016).

¹⁵² Charles H. Brower II, *Mitsubishi, Investor-State Arbitration, and the Law of State Immunity*, 20 (5) Am. Univ. Int'l L.R. 907, 920 (2005), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1148&context=auilr> (last visited April 8, 2016).

¹⁵³ *ICSID Publishes Annual Report for FY 2015 and Latest Caseload Statistics*, HERBERT SMITH FREEHILLS. - ARBITR. NOTES (October 16, 2015), <http://hsfnotes.com/arbitration/2015/10/16/icsid-publishes-annual-report-for-fy-2015-and-latest-caseload-statistics/>.

¹⁵⁴ *Id.*; International Centre for Settlement of Investment Disputes, *Background Information on the International Centre for Settlement of Investment Disputes (ICSID)* 4, <https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf> (last visited April 15, 2016).

instances of states not complying with the awards, including through reliance on the sovereign immunity defense. Financial crises necessitate serious measures by states, which go contrary to their obligations to investors under BITs and contracts. As a result, such states, e.g. Argentina, face an array of investment claims worth exorbitant amounts of money.¹⁵⁵ Argentina in particular is “the most heavily litigated country under investment treaty arbitrations”.¹⁵⁶ It is thus not surprising that such states adopt a tactics of evading compliance with the awards rendered against them by any means.¹⁵⁷ Utilizing state immunity defense during execution phase may be part of this tactics.

Therefore, the issue of state immunity during ICSID award enforcement proceedings has been accorded little attention to date since, as of now, most states have complied with the ICSID awards voluntarily. At the same time, it is submitted that the issue still deserves careful consideration on the part of investors due to such factors as, inter alia, the increasing ICSID caseload and increasing incentives for states not to comply with awards rendered against them (crises, etc.). Investors should thus carefully weigh the possible ramifications of the non-compliance by the state with the award in respect of sovereign immunity before agreeing on and proceeding with the ICSID arbitration.

¹⁵⁵ Tsai-Yu Lin, *Systemic Reflections on Argentina’s Non-Compliance with ICSID Arbitral Awards: a New Role of the Annulment Committee at Enforcement?*, 5(1) Contemp. ASIA ARB. J. 1, 2 (2012), <http://ssrn.com/abstract=2115553>, (last visited April 14, 2016).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

3.3. Practical Solution: Contractual Waiver of Sovereign Immunity

Since sovereign immunity has the potential of becoming a major problem in the investor-state arbitration, investors should think of effective ways to insulate themselves against it.

As of nowadays, it is highly unlikely that the sovereign immunity rules will be harmonized on the international level (the international conventions on sovereign immunity notwithstanding).¹⁵⁸ Diplomatic protection and reference to the International Court of Justice look good on paper, but, in my opinion, would be hardly useful for investors in practice for various reasons. Firstly, investors cannot exert control over these actions (their initiation is at the full discretion of the respective state); and secondly, states would most probably be highly reluctant to take these actions in light of significant political ramifications their initiation may entail.¹⁵⁹ This thesis does not aim to cover the structural (general) solutions to the sovereign immunity problem on either international or national level, which has been comprehensively done elsewhere.¹⁶⁰ I will rather concentrate on practical solutions available to investors.

The most effective practical solution for the investor is to insist on including the provision on waiver of sovereign immunity in the contracts with states.¹⁶¹ The inclusion of such a waiver is possible if the investor has a strong bargaining power vis-à-vis the state.¹⁶² Waivers of immunity

¹⁵⁸ Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 A.J.I.L. 319, 346 (1985), <http://www.jstor.org/stable/2201705>, (last visited April 15, 2016).

¹⁵⁹ Giuliana Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 Am. Rev. Int'l Arb. 439, 458; 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, 518 (2013).

¹⁶⁰ See, e.g. Giuliana Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 Am. Rev. Int'l Arb. 439, 459-462.

¹⁶¹ *Id.* at 457-458.

¹⁶² *Id.*

can be usually found in transnational loan documents.¹⁶³ The ICSID recommends the following model clause for that purpose: “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.”¹⁶⁴

Naturally, it would be best to tailor the wording of the waiver to the particular circumstances of each case.¹⁶⁵ The following considerations may be useful. The waiver clause should include an express and unequivocal waiver of both immunity from jurisdiction and immunity from execution.¹⁶⁶ It is advisable to check whether the waiver is effective under the laws of both the jurisdiction where enforcement may be pursued and under the domestic national laws of the state-counterparty.¹⁶⁷ It is also preferable to include the waiver into texts of all transaction documents with state counterparties.¹⁶⁸ Moreover, the waiver should be agreed upon by all state entites that may participate in the transaction or, in the alternative, possess assets relevant to it.¹⁶⁹ If the contract is with the state entity, the waiver should expressly state that the entity does not perform any sovereign functions by entering into the said contract.¹⁷⁰ Ideally, the waiver should encompass all assets, but, if not feasible, specific types of property to which the waiver clause will be applicable should be stated.¹⁷¹ It should be noted that courts will most probably not allow attachment of assets protected by specific laws (e.g. diplomatic and consular assets, property of

¹⁶³ Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 Ann. Surv. Int'l & Comp. L. 21, 39 (2001).

¹⁶⁴ ICSID – Model Clauses, *Waiver of Immunity from Execution of the Award*, <https://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/15.htm> (last visited April 15, 2016).

¹⁶⁵ Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 A.J.I.L. 319, 338 (1985).

¹⁶⁶ Ashurst, *State Immunity: an Overview*, 4, https://www.ashurst.com/doc.aspx?id_Resource=7655 (last visited April 15, 2016).

¹⁶⁷ Leon Chung, *Recent Trends in State Immunity*, KLUWER ARBITR. BLOG (April 25, 2013), <http://kluwerarbitrationblog.com/2013/04/25/recent-trends-in-state-immunity/> (last visited April 15, 2016).

¹⁶⁸ Ashurst, *supra* note 166, at 4.

¹⁶⁹ *Id.*

¹⁷⁰ Ashurst, *supra* note 166, at 5.

¹⁷¹ *Id.*

the central bank, etc.) without a very specifically drafted waiver to this effect. The *NOGA (I)* decision may be instructive in this regard. Despite a general waiver of immunity from execution in the contract (“[the 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”¹⁷²), the French court ruled that NOGA, a French legal entity, could not attach the bank accounts of Embassy of Russian Federation, the Permanent Delegation of the Russian Federation at UNESCO, and the Commercial Bureau of the Russian Federation in France, since they were protected by the provisions of the Vienna Convention on Diplomatic Relations, and in the waiver the Soviet Union “showed no clear intention to waive diplomatic immunity from execution”.¹⁷³

¹⁷² Embassy of the Russian Federation in France, et al. v. Compagnie NOGA d’Importation et d’Exportation, Cour d’Appel, Paris, August 10, 2000, Yearbook XXVI 273 (2001) in Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles’ Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int’l Arb. 47, 65-66 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016).

¹⁷³ Embassy of the Russian Federation in France, et al. v. Compagnie NOGA d’Importation et d’Exportation, Cour d’Appel, Paris, August 10, 2000, Yearbook XXVI 273, 275 (2001) in Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles’ Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int’l Arb. 47, 66 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich.pdf> (last visited April 8, 2016).

The enforcement regime under the Convention, praised as self-contained and an overall improvement in comparison to that of the New York Convention, is not that self-contained, after all. Its self-contained nature encapsulates the stage of recognition of the award, but leaves out the execution stage from the coverage of the Convention. This stage, as the most crucial one to the enforcing investor, shall fall within the domain of national laws of the enforcing state, which opens the system up to uncertainty, born out of different interpretations under national laws of different jurisdictions. The extent to which the Convention regulates the stage of execution is the express preservation of the sovereign immunity from execution at this stage. The system is as efficient as its weakest link. The issue of sovereign immunity, though not the weakest link in the regime, has the potential of making the ICSID system meaningless, or at the very least, significantly challenge its efficiency. The core of the problem is that compliance with the award is fully at the discretion of the losing states. If the state does not want to comply with the award, it has, *inter alia*, the concept of sovereign immunity to shield itself with. Whereas the sovereign immunity should not ideally be an issue at the stage of recognition (in light of consent of the losing state to the ICSID arbitration), as the caselaw proves, sovereign immunity from execution is a reliable shield in any recalcitrant state's armour. International law and respective domestic laws on sovereign immunity allow exceptions from sovereign immunity, but, as practice demonstrates, courts are very reluctant to enforce these exceptions. Thus, there is currently no clear-cut solution to this loophole on either international or national level.

Research has revealed that the compliance rate of states with the ICSID awards is rather high, which may make the sovereign immunity issue seem unimportant. This explains the fact that only

a few enforcement decisions are available to the legal community. However, the importance of the topic is reinforced when one sees that even in terms of those few decisions the success rate of execution of the award is close to zero (in fact, I have not found any execution case in favour of the investor), precisely because of the reliance of the recalcitrant state on the sovereign immunity defense. With the ICSID caseload rising, and states facing economic crises decreasing their payment ability, the probability that the issue will persist is, in my opinion, very high.

In light of this, investors should clearly realize the shortcomings of the ICSID system before embarking on the costly and time-consuming way of investment arbitration. Securing a waiver of sovereign immunity from jurisdiction and execution in the contract with the state, though significantly dependent on the bargaining power of the investor vis-à-vis the state, seems like the most practical solution to the problem. At the same time, one should keep in mind that waiver may also hardly be the panacea to all the investment arbitration problems. Interpretation and application of the waiver is fully dependent on the courts of the enforcing state, which rely on their own laws and/or caselaw on sovereign immunity in this and thus, may arrive at different conclusions as to the same issue. This once more demonstrates the unclear terrain that the sovereign immunity is for the ICSID arbitration, and invites structural changes on the international and national level to eliminate this hazard to the success and effectiveness of the ICSID system.

Articles

Allee, Todd, & Peinhardt, Clint, *Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment*, 1 (2008) <https://international-arbitration-attorney.com/wp-content/uploads/contingent-credibility-the-reputational-effects-of-investment-treaty-disputes-on-foreign-direct-in.pdf>.

Baldwin, Edward, Kantor, Mark and Nolan, Michael, *Limits to Enforcement of ICSID Awards*, 23(1) J. Int'l Arb. 1 (2006), <https://www.milbank.com/images/content/5/6/5666/0106-Nolan-Journal-of-Intl-Arbitration.pdf>.

Baltag, Crina, *Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards Against States*, 19 Am. Rev. Int'l Arb. 391 (2008).

Berg, Albert Jan van den, *Recent Enforcement Problems under the New York and ICSID Conventions*, 5 Arb.Int'l 2 (1989), <http://www.hvdb.com/wp-content/uploads/1989-AJvdB-Recent-Enforcement-Problems.pdf>.

Berg, Albert Jan van den, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2(2) ICSID Rev.-Foreign Invest. L. J. 439 (1987).

Bjorklund, Andrea K., *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, by Binder, Christina, Ursula Kriebaum, August Reinisch, and Stephan Wittich, eds., Oxford: Oxford University Press, 302 (2009), http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199571345.001.0001/acprof-9780199571345-chapter-17#ref_acprof-9780199571345-note-1536.

Broches, Aron, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev-FILJ 287(1987).

Brower, Charles H. II, *Mitsubishi, Investor-State Arbitration, and the Law of State Immunity*, 20 (5) Am. Univ. Int'l L.R. 907 (2005), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1148&context=auilr>.

Cane, Giuliana, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 Am. Rev. Int'l Arb. 439 (2004).

Cardosi, Joseph M., *Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution*, 41 Pepp. L. Rev. 109 (2013),



<http://www.lexisnexis.com/hottopics/lnacademic/?verb=sr&csi=270077&sr=cite%2841%20Pepp.%20L.%20Rev.%20109%29>.

Cases, *Introductory Note*, ICSID Rev.-Foreign Invest. L. J. 159,
<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC662&caseId=C126>.

Choi, Susan, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Pol., 175 (1995-1996).

Delaume, Georges R., *Economic Development and Sovereign Immunity*, 79 A.J.I.L. 319 (1985),
<http://www.jstor.org/stable/2201705>.

Delaume, Georges R., *Judicial and Similar Proceedings: France: Court of Cassation Decision in Soabi (Seutin) v. Senegal (Recognition and Enforcement of Award in the Context of the ICSID Convention): Introductory Note*, 30 I.L.M. 1167 (1991),
http://heinonline.org/HOL/Page?handle=hein.journals/intlm30&g_sent=1&collection=journals#&id=1183.

Delaume, Georges R., *Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration*, 2(2) ICSID Rev.-Foreign Invest. L. J. 403 (1987).

Delaume, Georges R., *Sovereign Immunity and Transnational Arbitration*, in Julian D. M. Lew, *Contemporary Problems in International Arbitration*, 313 (1987).

Fox, Hazel, *In Defence of State Immunity: Why the UN Convention on State Immunity is Important*, 55 Int'l & Comp. L.Q. 399 (2006),
<http://journals.cambridge.org/action/displayAbstract?jsessionid=15998B8646518E89FE91A869938550E9.journals?fromPage=online&aid=1532576>.

Franck, Susan D., *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19(2) Pacific Mc George Global Business & Development Law Journal 337(2007).

Gaillard, Emmanuel, *Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles*, in E. Gaillard and J. Younan eds., *State Entities in International Arbitration*, IAI Series on International Arbitration No.4 (2008), 179 (2008),
http://www.shearman.com/~media/Files/NewsInsights/Publications/2008/07/Effectiveness-of-Arbitral-Awards-State-Immunity-/Files/View-Full-Text/FileAttachment/IA_070208_02.pdf.

Gerlich, Olga, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles' Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int'l Arb. 47 (2015), <http://kocurpartners.com/wp-content/uploads/2015/10/ARIA-V26-No1-Olga-Gerlich>.

Hess, Burkhard, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 EJIL 269 (1993),
<http://www.ejil.org/pdfs/4/1/1203.pdf>.



Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, 345-358 (2007), http://www.univie.ac.at/intlaw/wordpress/pdf/87_investment_protect.pdf.

Ku, Julian, *Enforcement of ICSID Awards in the People's Republic of China*, 6 *Contemp. Asia Arb. J.* 31 (2013), http://scholarlycommons.law.hofstra.edu/faculty_scholarship/293.

Musa, Ruqiya B H, Polasek, Martina, *The Origins and Specificities of the ICSID Enforcement Mechanism*, 13, <http://www.globelawandbusiness.com/EITA/sample.pdf>.

Nmehielle, Vincent O. Orlu, *Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 *Ann. Surv. Int'l & Comp. L.*, 21 (2001).

Parra, Antonio R., *Enforcement of ICSID Arbitral Awards*, 24th Joint Colloquium on International Arbitration, 1 (2007), http://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf.

Reinisch, August, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17(4) *EJIL* 803–836 (2006), <http://www.ejil.org/pdfs/17/4/100.pdf>.

Rosenberg, Charles B., *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.* 503-530 (2013), http://www.lexisnexis.com/lncui2api/results/docview/docview.do?docLinkInd=true&risb=21_T23754877959&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T23754877963&cisb=22_T23754877962&treeMax=true&treeWidth=0&csi=294116&docNo=7.

Stewart, David P., *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 (1) *Am. J. Int'l L.* p.194-211 (2005).

Schreuer, Christoph, *Investment Protection and International Relations*, in A. Reinisch & U.

Tsai-Yu Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: a New Role of the Annulment Committee at Enforcement?*, 5(1) *Contemp. ASIA ARB. J.* 1-22 (2012), <http://ssrn.com/abstract=2115553>.

Books

Alexandroff, Alan S., Laird, Ian A., *Compliance and Enforcement*, 1172-1187 (2012) http://alanalexandroff.com/wp-content/uploads/2010/11/asa_laird_ch29.pdf.

Bishop, R. Doak, *Enforcement of Arbitral Awards against Sovereigns*, 502 p. (2009).

Giorgetti, Chiara, *Litigating international investment disputes: a practitioner's guide*, 537 p. (2014).



McCorquodale, Robert et al., *Cases and Materials on International Law*, n.p.: Oxford: Oxford University Press, 768 p. (2011).

Paulsson, Jan et al., *Guide to ICSID Arbitration* 468 p. (2011).

Schreuer, Christoph H., *The ICSID Convention*, 2nd ed. Cambridge: Cambridge University Press, Cambridge Books Online 1596 p. (2009), <http://dx.doi.org/10.1017/CBO9780511596896>.

United Nations Conference on Trade and Development, *Course on Dispute Settlement, 2.1 Overview*, UNCTAD/EDM/Misc.232, 28 p. (2003), http://unctad.org/en/docs/edmmisc232overview_en.pdf.

Cases

AIG Capital Partners Inc. and Another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), Queen's Bench Division of the High Court of England and Wales, October 20, 2005, [2005] E.W.H.C. Comm. 2239, 129 I.L.R. 589 (2007); also in R. Doak Bishop et al. (eds.), *Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition)*, Kluwer Law International, 1264-1271 (2014).

Benvenuti and Bonfant S.R.L. v. Banque Commerciale Congolaise and Others, France, Cour de cassation [Cass.] [supreme court for judicial matters], July 21, 1987, in Rosemary Rayfuse, *ICSID Reports: Volume 1: Reports of Cases Decided Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965*, Cambridge University Press, 373-375 (1993).

Benvenuti et Bonfant S.R.L. v. People's Republic of the Congo, Cour d'appel [CA] [regional court of appeal] Paris, June 26, 1981, in R. Doak Bishop et al. (eds.), *Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition)*, Kluwer Law International, 1180-1182 (2014).

Blue Ridge Investments v. Republic of Argentina, 735 F.3d 72 (2nd Cir. 2013).

Blue Ridge Investments v. Republic of Argentina, 902 F.Supp.2d 367 (S.D.N.Y. 2012), *aff'd* 735 F.3d 72 (2nd Cir. 2013).

Embassy of the Russian Federation in France, et al. v. Compagnie NOGA d'Importation et d'Exportation, Cour d'appel [CA] [regional court of appeal] Paris, August 10, 2000, in Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: the Achilles' Heel of the Investor – State Arbitration System?*, 26 (1) Am. Rev. Int'l Arb. 47, 65-66, 68 (2015).

Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgment, I.C.J. Reports 99 (2012).



Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Interim Order No. 1 concerning Guinea's Application for Stay of Enforcement of the Award dated August 12, 1988, ICSID Reports: Volume 4: Reports of Cases Decided Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965, (1997).

Société Creighton v. Ministre des Finances de l'Etat du Qatar et autre, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 6, 2000, 127 J.D.I. 1054 (2000).

Treaties

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

European Convention on State Immunity, May 16, 1972, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074>.

United Nations Convention on Jurisdictional Immunities of States and Their Property, December 2, 2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf.

Other Sources

Arbitration Rules of the International Chamber of Commerce (2012), www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_34.

Explanatory Report to the European Convention on State Immunity, European Treaty Series - No. 74, 1-25 (1972), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016800c96c3>.

List of signatures and ratifications of the European Convention on State Immunity as of April 8, 2016, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures?p_auth=RSOZJkbp.

List of signatories of the United Nations Convention on Jurisdictional Immunities of States and Their Property as of April 8, 2016, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en



International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* (2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

International Centre for Settlement of Investment Disputes, *Background Information on the International Centre for Settlement of Investment Disputes (ICSID)*, <https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>.

ICSID – Model Clauses, *Waiver of Immunity from Execution of the Award*, <https://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/15.htm>.

International Centre for Settlement of Investment Disputes. *Process Overview*. <https://icsid.worldbank.org/apps/icsidweb/process/Pages/Overview.aspx>;

International Centre for Settlement of Investment Disputes, *Recognition and Enforcement - Additional Facility Arbitration*, [https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Recognition-and-Enforcement-\(AF-Arbitration\).aspx](https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Recognition-and-Enforcement-(AF-Arbitration).aspx).

ICSID Publishes Annual Report for FY 2015 and Latest Caseload Statistics, HERBERT SMITH FREEHILLS. - ARBITR. NOTES (October 16, 2015), <http://hsfnotes.com/arbitration/2015/10/16/icsid-publishes-annual-report-for-fy-2015-and-latest-caseload-statistics/>.

Ashurst, *State Immunity: an Overview*, https://www.ashurst.com/doc.aspx?id_Resource=7655.

Chung, Leon, *Recent Trends in State Immunity*, KLUWER ARBITR. BLOG (April 25, 2013), <http://kluwarbitrationblog.com/2013/04/25/recent-trends-in-state-immunity/>.

Puchyna, Mariia, *The Impact of Arbitration on Sovereign Immunity*, November 15, 2012, uba.ua/documents/doc/mariia_puchyna.pdf.

Scherer, Matthias, *Swiss Federal Supreme Court provides guidance on rules of State immunity applicable to enforcement of ICSID awards*, December 13, 2011, <http://kluwarbitrationblog.com/2011/12/13/swiss-federal-supreme-court-provides-guidance-on-rules-of-state-immunity-applicable-to-enforcement-of-icsid-awards/>.

Survey on Corporate Attitudes and Practices on Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration, by PriceWaterhouseCoopers, in conjunction with Queen Mary School of International Arbitration (2008), <http://www.arbitration.qmul.ac.uk/docs/123294.pdf>.

World Bank, OP 7.40 - Disputes over Defaults on External Debt, Expropriation, and Breach of Contract, July, 2001, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064628~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.



World Bank, *What We Do*, <http://www.worldbank.org/en/about/what-we-do>.

28 U.S. Code § 1605 - General exceptions to the jurisdictional immunity of a foreign state.