International Investment Law and Investor-State Disputes in Central Asia

Emerging Issues

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CHAPTER 12

Immunity Defences and the Enforcement of Awards in Investor-State Disputes

Javier García Olmedo

This chapter critically examines the claim that investment treaty awards have a final and binding character. It finds that, despite providing different mechanisms of collection, the ICSID and New York Conventions provide states with a tool to avoid compliance with investment treaty awards based on sovereign immunity rules. These rules have been invoked by states in an increasing number of cases, creating a hurdle for investors to obtain payment of the award. This chapter concludes with some potential remedies to the immunity bar.

12.01 INTRODUCTION

It is a truism to say that the effectiveness of any dispute settlement system depends on whether the decision rendered against the losing party is timely enforced. In the field of investor-State arbitration, the most invoked instruments for enforcing awards are the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)[1] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[2] Unlike awards

1. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966). At the time of writing, there are 157 contracting states. *See* https://icsid.worldbank.org/about/member-states/database-of-member-states (last accessed 19 Oct. 2022).
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (done 10 June 1958, entered into force 7 June 1959). At the time of writing, there are 170 contracting states. *See* https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last accessed 19 Oct. 2022).

issued under the New York Convention, ICSID awards are, in principle, self-contained, meaning that they are not subject to any review by national courts. Notwithstanding this distinction, the enforcement mechanism set forth by both conventions is often portrayed and sold to investors as a 'powerful tool' that ensures that the state will voluntarily honour its pecuniary obligations.[3] In the context of ICSID awards, in particular, many authors have argued that there is no room for resistance to enforcement within the territory of contracting states.[4] Overall, the view is that 'there is no right in international [investment] law of non-compliance with a final and binding award that has not been properly annulled or vacated'.[5] On the surface, these claims appear reasonable, let alone desirable, but fail to fully reflect reality.

Perhaps as a corollary of the growing dissatisfaction with the existing investment arbitration regime,[6] the last decade has witnessed an increase in the number of states that have refused to satisfy ICSID and non-ICSID awards. These states have invoked sovereign immunity – particularly from execution – as a defence against the payment of these awards. Access to immunity defences undermines the functionality of investment treaty arbitration as an autonomous legal order designed to produce awards enjoying the broadest international enforceability.

This chapter reassesses the internationally praised final and binding character of awards rendered in investor-State disputes. In so doing, this chapter first provides a brief overview of the framework for the enforcement of awards under the ICSID and the New York Conventions. It finds that, despite providing different mechanisms of collection, both Conventions operate an express *renvoi* to the domestic legislation where enforcement is sought, including rules on sovereign immunity, thus providing states with a tool to avoid or delay compliance with ICSID and non-ICSID awards. This chapter then examines recent cases where states have created enforcement hurdles for investors by relying on sovereign immunity defences before concluding with practical remedies for investors in the event that the state refuses to comply with the award.

3. Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, 304 (in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer, OUP, New York 2009).
4. *See, e.g.*, B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, 3 MPILux Research Paper Series (2018); A. Jan van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York Convention and ICSID Conventions*, 2 ICSID Rev 439 (1987); George R. Delaume, *ICSID Arbitration and the Courts*, 77 AJIL 784,784-785 (1983).
5. D. Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns*, 3 (Jurisnet, New York 2009).
6. For a review of the current criticism against investor-state arbitration, *see*: G. Kaufmann-Kohler & M. Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*, CIDS Geneva Center for International Dispute Settlement (2016).

12.02 THE ICSID CONVENTION ENFORCEMENT (EXECUTION) MECHANISM

[A] The Promised 'Self-Contained' Nature of the ICSID Convention

Articles 53, 54 and 55 of the ICSID Convention establish a regime that intends to facilitate the recognition and enforcement of ICSID awards. The first sentence of Article 53(1) states that '[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention'. This provision then provides that parties to an arbitration 'shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention'.[7] The ICSID Convention therefore imposes an international obligation upon the host state to satisfy the outcome of ICSID arbitrations.[8] When discussing the content of Article 53, the 'father' of the ICSID Convention, Aron Broches, explained that this provision 'is a restatement of customary international law based on the concepts of *pacta sunt servanda* and res judicata'.[9]

Article 53(1) sets out a core idea of the ICSID Convention, namely, that ICSID awards are autonomous and self-contained.[10] Review by national courts is therefore excluded.[11] As will be further explained below, this is the crucial difference between enforcement under the ICSID Convention and the New York Convention. As the ad hoc Committee in *Vivendi v. Argentina* observed: 'one of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention'.[12] Accordingly, under the ICSID mechanism, investors expect enforcement to be voluntary and automatic,[13] leaving domestic courts with the role of simply verifying the authenticity of the award.[14] It is possible, however, that the

7. ICSID Convention, *supra* n. 1, Art. 53(1).
8. August Reinisch, 'Enforcement of Investment Awards' in Katia Yannaca-Small (ed.), Arbitration under International Investment Agreements: A Guide to the Key Issues (OUP 2010) 671, 690; A. Alexandrov, Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, in International Investment Law for the 21st Century, *supra* n. 3, at 322, 328.
9. 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). *See also* Chittharanjan F Amerasinghe, 'The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation' (1976) 9 VJTL 793, 812.
10. 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, 42 (2001).
11. C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001), 1097.
12. Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No ARB/97/3 (Second Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (4 November 2008) para 35.
13. A. Alexandrov, Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, in International Investment Law for the 21st Century, *supra* n. 3, at 322, 328.
14. Margaret L. Moses, The Principles and Practice of International Commercial Arbitration 237 (2d ed. 2012); Andrea K. Bjorklund, Sovereign Immunity as a Barrier to the Enforcement of

host state refuses to comply with an ICSID award. In those cases, Article 54 prescribes how enforceability must be invoked.

Article 54(1) obliges each contracting state, whether it is a party to the dispute or not, to recognize the award as binding and enforce its 'pecuniary obligations […] as if it were a final judgement of the courts in that State'. Contracting states are therefore bound to ensure compliance with Article 53 by recognizing and enforcing ICSID awards in their territories. Recognition is 'the formal certification [or confirmation] that an ICSID award is a final and binding disposition of contested claims' with res judicata effect.[15] Article 54(2) offers certain procedural directions for the recognition and enforcement of awards. Contracting states shall first designate a competent court or authority to that effect, and a party seeking recognition and enforcement shall submit a copy of an award (certified by the Secretary-General) to such court or authority. However, it is noteworthy that the ICSID Convention does not provide any supplementary information on how the actual process for recognizing and enforcing an ICSID award should work.

The above-mentioned provisions, when read together, have led to the conclusion that ratifying the ICSID Convention entails a waiver of any right to resist enforcement of an ICSID award. They also suggest that the ICSID Convention eliminates legal procedures, such as *exequatur*, which would otherwise be required to enforce foreign judgments.[16] It would, however, be unwise to reach this conclusion without considering the remaining provisions pertaining to the enforcement of ICSID Awards (i.e., Articles 54(3) and 55).

[B] Sovereign Immunity: A Ground for Non-compliance with ICSID Awards?

Under Article 54(3), '[e]xecution of the award shall be governed by the law concerning the execution of judgments in force in the State in whose territories such execution is sought'. For its part, Article 55 states that 'nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign state from execution'.

At the outset, it is worth noting that while Article 54(1) refers to 'enforcement', Articles 54(3) and 55 both refer to 'execution'. The French and Spanish texts use the same term in every provision: *ejecución* and *l'exécution*. The distinction between 'enforcement' and 'execution' in the English version has been a matter for discussion since the creation of the ICSID Convention. Professor Christoph Schreuer has suggested that the terms 'execution' and 'enforcement' are identical in meaning.[17] As I have

Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes, 21 Am. Rev. Int'l Arb. 211, 218 (2010).

15. Reed, Paulsson, et al., *Guide to ICSID Arbitration* (Kluwer Law International 2004), 179.
16. R.J. Coll, 'Comment: United States Enforcement of Arbitral Awards against Sovereign States: Implications of the ICSID Convention', 1976 17 Harv. Int. LL 401, 404.
17. Schreuer, *supra* n. 111121-1124. Books Online 1136 (2009).

argued elsewhere,[18] this interpretation is sound and consistent with the fact that the Spanish and French texts do not use different terms. Other authors, however, consider that the term enforcement refers to both the stage of recognition and execution.[19] Reed and Paulsson argue that 'recognition and enforcement … tend to be used in a single phrase that broadly refers to all steps leading up to, but stopping short of, actual execution of an award'.[20] Whichever interpretation may be preferred, one would agree that the terms 'enforcement' and 'execution' ultimately refer to the same procedure: attaching the assets of the debtor state in satisfaction of the claim. Both terms will therefore be used interchangeably for the purposes of this chapter.

With this important clarification in mind, Articles 54(3) and 55 mandate that an investor seeking enforcement in a contracting state be subject to the laws of that state, including any rules on sovereign immunity from execution. In other words, the ICSID Convention provides a defence against forcible execution in the event that the assets of a foreign sovereign are immune under the law of the enforcement forum.[21] This is a logical consequence of 'the equalization of ICSID awards to national judgments' as envisaged in Article 54(1).[22] This means that domestic courts are ultimately responsible for the investor's recovery of any pecuniary award issued against defaulting countries.[23] As Bjorklund puts it: '[although] the holder of an unpaid ICSID Convention award can seek enforcement in the courts of any ICSID Convention country […] its ability to recover will be limited by municipal laws on sovereign immunity'.[24] Broches used similar words when explaining the nature and effects of Article 55: '[sovereign immunity laws] might not provide the type of enforcement required in order to give full effect to an award'.[25] Consistently with this view, the executive directors' report that accompanied the final version of the ICSID Convention dryly stated that '[t]he doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought'.[26]

Based on the above considerations, it is safe to say that the self-contained regime of ICSID arbitration ends at the stage of enforcement, for the competent court may

18. J. Martin Hunter; J. Garcia Olmedo, Enforcement/Execution of ICSID Awards against Reluctant States, 12 J. World Investment & Trade 307 (2011).
19. Broches, *supra* n. 9, 320-321. *See also* 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).
20. Reed, Paulsson, et al., *supra* n. 15, 180.
21. Hazel Fox, 'State Immunity and the New York Convention', in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 829, 858. The motivation for these provisions was that state assets reserved for public, military or diplomatic use should not be subject to seizure.
22. Inna Uchkunova & Oleg Temnikov, 'Enforcement of Awards under the ICSID Convention – What Solutions to the Problem of State Immunity?', 29 ICSID Rev. 187, 191 (2014). *See* Article 54(1).
23. International Investment Arbitration: A Practical Handbook By Johan Billiet; Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23 J. Int'l. Arb. 1, 11.
24. Bjorklund, *supra* n, 14, 217.
25. Broches, *supra* n. 9,.
26. International Bank for Reconstruction and Development, *Report of the Executive Directors on the ICSID Convention*, para 43 (18 Mar. 1965), *reprinted in* History of ICSID, *supra* n. 3, at 1069, 1083.

intervene on the grounds of state immunity.[27] If anything, the permissibility of invoking sovereign immunity inherently undermines confidence in the promised automatic enforceability of ICSID awards.[28] As Professor Schreuer noted:

> [A]llowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution may put them into the doubly frustrating position of having been lured into expensive and seemingly successful lawsuits only to be left with an unenforceable judgment plus legal costs.[29]

In answer to this immunity loophole, Schreuer asserts that the obligation to comply with the terms of the award (Article 53) is absolute and not conditioned upon any invocation of the enforcement mechanisms under Articles 54 and 55.[30] The need to resort to enforcement measures constitutes, he concludes, a breach of Article 53.[31] There is also the argument that any contracting state, by refusing to satisfy the award, will likewise violate the obligation provided by Article 54(1).[32] In the same line of thought, some commentators have affirmed that ICSID awards are 'self-executing'[33] or 'immediately enforceable'.[34]

These views are attractive for foreign investors but difficult to reconcile with the fact that contracting states have preserved the right for judicial intervention at the stage of enforcement, the exercise of which may result in non-compliance with the award. Under Articles 53(3) and 55, not only are contracting states entitled to apply their national law on state immunity, but they are also required not to derogate from that law. The court seised of an enforcement action can accordingly release the non-prevailing party from its obligations under both Articles 53 and Article 54(1) by legitimately refusing execution of the award on sovereign immunity grounds. A more realistic approach is to accept that, presumably intentionally, the ICSID Convention has created a conflict between Articles 53 and 54(1) on the one hand and Articles 54(3) and 55 on the other. While Articles 53 and 54(1) require that the losing party abides by and enforces the award, its actual enforcement can be successfully resisted in domestic courts via the defences provided by Articles 54(3) and 55. It is therefore doubtful that, insofar as the investor's claim for attachment is contrary to the immunity laws of the

27. Giuliana Cane, The Enforcement of ICSID Awards: Revolutionary or Ineffective?, 15 Am. Rev. Int'l Arb. 439, 442 (2004).
28. Emmanuel Gaillard, 'Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles' in IAI Series on International Arbitration No. 4 (International Arbitration Institute 2008) 179, 181.
29. Schreuer, *supra* n. 11, 125.
30. *Ibid.*, 1087-1092.
31. *Ibid.*, 1106-1107. *See also*: V. J. Tejera Perez, Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards, 3 Journal of International Dispute Settlement; Maritime International Nominees Establishment (MINE) v. Republic of Guinea, ICSID Case No ARB/84/4, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, para. 25.
32. Tejera Perez, Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards, 454.
33. Stanimir A. Alexandrov, Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer.
34. Hess, *supra* n. 4.

forum, the recalcitrant state will be in violation of the ICSID Convention. To hold otherwise would invalidate the right and consent to execution immunity given by contracting states.

Finally, one could also argue that a state's agreement to arbitrate under the ICSID Convention is also a waiver of immunity from execution. This argument is not convincing. A state's consent should not be presumed to have thereby waived its sovereign immunity in respect of the enforcement of an award.[35] The explicit retention of immunity from execution in Article 55 supports this position. In fact, the drafters of the ICSID Convention were concerned that waiving immunity from execution would have 'run into the determined opposition of developing countries and have jeopardized the wide ratification of the Convention'.[36] To put it bluntly, the reality is that 'immunity from execution is the sole ground for non-enforcement permitted by the convention'.[37]

The question of immunity from execution (or sovereign immunity more generally) has been raised in various cases in which the investor was forced to seek enforcement through the courts of a contracting state. As shown in Section 3, this issue has proven to be an impediment for investors in collecting pecuniary compensations.

12.03 THE NEW YORK CONVENTION ENFORCEMENT MECHANISM

[A] Neither Automatic Nor-Self-Contained Collection Mechanism

Awards rendered by a non-ICSID tribunal (for example, the International Chamber of Commerce, the Arbitration Institute of the Stockholm Chamber of Commerce or the Permanent Court of Arbitration) are typically enforced under the provisions of the New York Convention. Unlike the ICSID Convention, the New York Convention was not primarily designed to enforce investor-State awards but awards rendered in disputes between private parties in commercial arbitration.[38] Despite this, it is widely accepted that the New York Convention allows for the enforcement of investment awards against sovereign states.[39]

35. Spaccaquerche Barbosa, 'The Enforcement of International Investment Arbitral Awards: Is There a Better Way?' (2009) 6 Transnatl Dispute Management 1; Dhisadee Chamlongrasdr, Foreign State Immunity and Arbitration (2007), 223; Vincent 0. Nmehielle, 'Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)', 7 Ann. Surv. Int'l & Comp. L. 21 (2001), 7.
36. Schreuer, *supra* n. 11 25, 1145 (citing Aron Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 RECUEIL DES COURS 331, 403 (1972); Georges R. Delaume, ICSID Arbitration and the Courts, 77 Am. J. Int'l L. 784 (1983), at 800 (noting that the solution 'is to be regretted' but was unavoidable due to the 'lack of consensus on the meaning and scope of immunity from execution').
37. D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cambridge University Press, 2007), at 223.
38. Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 277-282 (1981).
39. *Ibid*.

Like the ICSID Convention, the underlying aim of the New York Convention was to achieve 'greater enforceability of arbitral awards and greater uniformity of enforcement practice'.[40] To materialize this objective, the drafters of the New York Convention created an obligation for signatories to recognize and enforce arbitral awards. Under Article III, contracting states must 'recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'. Similarly to Article 54(2) of the ICSID Convention, the party seeking recognition and enforcement under the New York Convention must also provide a court with the authenticated original award or a certified copy of it and the original arbitration agreement or a certified copy of it.

Notwithstanding the mandate to enforce awards, the New York Convention expressly gives substantial leeway to national courts of the state of enforcement by allowing them to follow their domestic legislations. This differs significantly from the obligation imposed by Article 53 of the ICSID Convention, which intends (albeit seemingly unsuccessfully) to establish a mechanism for the automatic enforcement of awards.

Additionally, in departing from the principle of non-reviewability of ICSID awards, the New York Convention allows states to object to the enforcement of awards at the domestic level. Article V(1) lists grounds upon which the enforcement and recognition of arbitration awards may be refused by national courts:

- the incapacity of the parties to enter into the arbitration agreement or invalidity of the arbitration agreement;
- the lack of proper notice or incapacity of a party to present its case;
- that the decision goes beyond the terms of the arbitration agreement;
- the improper constitution of the tribunal or improper arbitral procedure; or
- that the award is not yet binding on the parties or has been set aside or suspended.

Article V(2) provides two additional grounds for challenging awards: (a) that the subject matter of the dispute is incapable of settlement by arbitration under the enforcing country's laws or (b) if recognition or enforcement of the award would violate the enforcing country's public policy. This provision provides 'protection against abusive arbitral procedures by allowing courts to decline to lend their power to support proceedings that lack the necessary integrity or violate the public interest'.[41]

However, there is a fundamental similarity between the enforcement regime provided by the ICSID and the New York Conventions in that both allow the non-prevailing party to refuse payment on the grounds of sovereign immunity.

40. Stephen T. Ostrowski & Yuval Shany, Chromalloy: United States Law and International Arbitration at the Crossroads, 73 N.Y.U.L. Rev. 1650, November, 1998, p. 1656.
41. S.I. Strong, Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns. 30(1) UPAJIL (Fall 2008), p. 56.

[B] Sovereign Immunity and Non-ICSID Awards

The New York Convention does not expressly include state immunity as a ground to resist enforcement. This however does not mean that the defence of state immunity is not also available before the courts of a contracting state where enforcement of a New York Convention award is sought. State immunity under the New York Convention can arise in one of two ways. Firstly, through the application of Article III, which provides that awards should be enforced pursuant to the 'rules of procedure' of the state of enforcement. The term 'rules or procedure' has been considered as embracing general principles of public international law that are part of the relevant domestic law, including sovereign immunity.[42] Indeed, as Bjorklund observes, 'municipal immunity laws have been treated as preliminary matters of procedure which claimants seeking to execute awards must overcome'.[43]

Secondly, state immunity law can be invoked via the public policy exception of Article V(2)(b). Sovereign immunity constitutes a public policy ground upon which a court may deny an award its enforcing status.[44] In practice, domestic courts have referred to the public policy exception in Article V(2)(b) when recognizing sovereign immunity with respect to foreign assets of the respondent state.[45] Leaving these two plausible interpretations aside, the New York Convention's silence on the issue of state immunity is by itself a strong indicator that domestic courts are permitted to apply their local law on sovereign immunity.[46]

As with the ICSID Convention, an argument can nonetheless be made that an agreement to arbitrate under the New York Convention constitutes a waiver of immunity. The New York Convention contains no explicit inclusion of immunity as that found in Article 55 of the ICSID; thus, it is easier to justify an implied waiver. The last word on this matter, however, belongs to the national court at the place of enforcement. As explained in the next section, domestic courts have generally found that a state's submission to arbitration is not sufficient in itself to imply a waiver of the sovereign immunity of the non-compliant state with respect to execution.

The above analysis has demonstrated that a claimant's success in executing an award under both the ICSID Convention and the New York Convention ultimately depends on domestic laws relating to immunity. More importantly, both conventions and the existing investment treaties do not contain a waiver of immunity from

42. A boner, 'Article III', in H kronke, P Nacimiento et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Kluwer Law International (2010), at 136. D Rivkin 'Attachment and Execution on Commercial Assets' in R Doak Bishop (Ed.), *Enforcement of Arbitral Awards against Sovereigns* (JurisNet, 2009), at 140. 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).
43. Bjorklund, *supra* n. 14,at 215.
44. Andreas, *supra* n. […], at 5. For an opposite view *see*: Chamlongrasdr.
45. Stephen J. Toope, Mixed International Arbitration 140-141 (1990).
46. Robert Volterra, Graham Coop and Álvaro Nistal, 'Sovereign immunities and investor-state awards: specificities of enforcing awards based on investment treaties' in Enforcement of Investment Treaty Arbitration Awards; van den Berg, *supra* n. 4, 277-282.

execution.[47] It follows that, in the event of resistance by the debtor state, the actual enforcement of ICSID and non-ICSID awards will necessitate a deep familiarisation with the peculiarities of the relevant national legislation.

12.04 STATE IMMUNITY LAWS AND (NEW) ENFORCEMENT HURDLES

The following section examines recent case law from jurisdictions where domestic courts have applied national legislation relating to immunity from execution and jurisdiction. Given the focus of this volume, it will particularly look at recent developments in the long-running enforcement saga of *Stati v. Kazakhstan*. The section highlights how immunity laws may create undesirable hurdles for investors seeking to enforce the pecuniary obligations owed by state debtors.

[A] The United States

In 1976, the US Congress passed the Foreign Sovereign Immunities Act (the FSIA), which governs all claims brought in any courts in the United States, whether state or federal, against states. [48] As in many jurisdictions, the FSIA treats immunity from execution as a separate matter from immunity from jurisdiction. In 1988, Congress amended the FSIA to address the issue of jurisdictional immunity from recognition. Section 1605(a)(6) of the amended text provides that the state's agreement to arbitrate an investment dispute constitutes an implicit waiver of its immunity from proceedings concerning the confirmation of an award:

> A foreign State shall not be immune from the jurisdiction of courts of the United 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 or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.[49]

The treaty, or international agreement, referred to in this section includes the New York and ICSID Conventions, to which the United States is a party.[50] US courts have consistently held that consent to arbitration under the New York Convention constitutes a waiver of state immunity from jurisdiction in the United States.[51] The same holds true for the ICSID Convention.[52]

47. Bjorklund, *supra* n, 14, at 223-224.
48. Foreign Sovereign Immunities Act, 28 U.S.C., section 1610 (1976).
49. *Ibid*. Section 1605(a)(6).
50. H Fox and P Webb, *The Law of State Immunity* (3rd edition, Oxford University Press, 2016), 258.
51. S & R Davis International v. The Republic of Yemen, 218 F.3d 1292 at 1301-1302 (11th Cir. 2000), Creighton Limited v. Qatar 181 F.3d 118 at 123-124 (D.C. Cir. 1999), Cargill International S.A. v. M/T Pavel Dybenko 991 F.2d 1012 at 1018 (2nd Cir. 1993). See more recently Pao Tatneft v. Ukraine, a decision of 28 May 2019 from the United States Court of Appeals for the District of Columbia, discussed in JP Duffy and D Avila, 'Does Signing an International Treaty Impliedly Waive Sovereign Immunity in the U.S. under the FSIA?', Kluwer Arbitration Blog, 2 November 2019.
52. Blue Ridge Investments, LLC v. Argentina, 10 Civ. 153 (SDNY, 2012).

As a result, assuming an agreement to arbitrate exists, the FSIA does not shield a foreign sovereign from the jurisdiction of courts over a civil action to enforce ICSID awards. This 'arbitration exception' to immunity is also exhibited in what is known as the ICSID Enabling Statute, which was enacted ten years before the FSIA implemented the ICSID Convention.[53] This instrument states that '[t]he pecuniary obligations imposed by … an [ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states'.[54]

However, as one author observes, '[s]eeking to alleviate the "diplomatic pressures" that the U.S. government faced from foreign governments seeking immunity from suit in U.S. courts', the FSIA 'sought to provide certain requirements for obtaining in personam jurisdiction over a foreign state'.[55] One such requirement relates to the distinction between foreign governments and their agencies. Foreign governments are not considered "persons" entitled to US Constitutional protections. As such, the court may exercise jurisdiction and proceed with an enforcement action against a foreign government even if the government has no presence or property in the US. This is not the case with respect to an agency or instrumentality of a foreign government, which is considered to be separate from the government, and it is entitled to due process protection under the Fifth Amendment.

This means that unless the agent or instrumentality has sufficient minimum contact with the US, the court lacks personal jurisdiction over it. States-owned firms are, in other words, not generally liable for their government's actions. Accordingly, to enforce a foreign arbitral award against an agency or instrumentality of a foreign state, the investor should overcome the presumption of separateness for the purposes of substantive liability. And it can do so by showing that a foreign government 'so extensively controls [the entity] that a relationship of principal and agent is created' or that separate treatment of the entities 'would work fraud or injustice'.[56]

In *Tajik Air v. Skyroad*, the US District Court for the District of Columbia was faced with the question of whether Tajik Air, incorporated under the laws of Tajikistan and fully owned by the state, was sufficiently separate from the Tajik government to enjoy due process protection under the Fifth Amendment. This case concerns an arbitration before the Vilnius Court of Commercial Arbitration that led to an award in favour of Skyroad amounting to USD 20 million in damages, plus interest and legal costs. Upon refusal by Tajik Air to comply with the award, Skyroad initiated enforcement proceedings before the US District Court as an action against a foreign state or agency or instrumentality thereof. Tajik Air moved to dismiss the action on the grounds of lack of personal jurisdiction.

53. 22 US Code § 1650a – Arbitration awards under the Convention.
54. *Ibid*.
55. MD Slater et al., 'Jurisdictional and Forum Requirements for ICSID Award Recognition Against Foreign Sovereigns: Recent Developments and Debates', 32 MEALEY'S Int'l Arb Rep (11 November 2017), citing H.R. Rep. No. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6605.
56. First National City Bank, Petitioner v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 629.

The US District Court granted Tajik Air's motion to dismiss the award enforcement action on jurisdictional grounds. The Court found Tajik Air, as a wholly owned corporate instrumentality of a foreign state, to be separate from its state owner and therefore protected its right to due process protections since that presumption could not be rebutted. The Court thus ruled it lacked personal jurisdiction over Tajik Air, the State-owned entity, pursuant to the Due Process Clause of the Fifth Amendment. The decision illustrates the hurdles to enforcing an arbitral award against a foreign state-owned company, even when it carries out commercial activities.

The jurisdictional requirements of the FSIA also include service of process upon the state debtor and venue. Until very recently, the Southern District of New York had adopted a practice of ex parte recognition of ICSID awards without regard to the requirements of the FSIA, thereby allowing investors to avoid the 'expensive and time-consuming process of a plenary proceeding'.[57] The court has done so by relying on the ICSID Enabling Statute, which presumably permits this practice. An illustrative example includes the enforcement proceedings initiated in *Siag v. Egypt*.[58]

In that case, after Egypt refused to comply with the award, the investor filed an ex parte application with a proposed order and judgment of USD 133 million. In ruling on the application, the court noted that the ICSID Enabling Statute and Article 54(1) of the ICSID Convention allow courts to automatically convert ICSID awards into final judgments. In this view, the court considered that it was entitled to apply the New York Civil Practice Law and Rules (CPLR), which allow ex parte confirmation of the judgment (award) without the need for a separate plenary action.

In subsequent years, judges in the Southern District continued to grant *ex parte* applications. This, however, changed after the Court of Appeals for the Second Circuit issued a much-awaited decision in *Mobil v. Venezuela*, a decision that signalled a turning point for ICSID award creditors in the United States. In an award dated 10 October 2014, an ICSID tribunal ordered Venezuela to pay ExxonMobil over USD 1.6 billion plus interest.[59] Venezuela denied payment, and the investor filed an ex parte petition in the Southern District of New York for recognition of the award under New York's CPLR.[60] The court granted the requested relief the same day, and Venezuela moved to vacate the judgment.

The state argued that nothing in Article 54 or the ICSID Enabling Statute permitted the issuance of a judgment on an ICSID award on an ex parte basis. Venezuela contended that the FSIA took precedence over any other instrument, meaning that the state was entitled *inter alia* to service of (and response to) all pleadings.[61] Both arguments were rejected. In line with its previous practice, the court reasoned that 'Congress's use of 'full faith and credit' in the ICSID enabling statute'

57. Micula v. Government of Romania, No. 15 Misc. 107 (Part I), 2015 WL 4643180, 3 (S.D.N.Y. 5 August 2015).
58. Siag v. Arab Republic of Egypt, No. M-82, 2009 WL 1834562 (S.D.N.Y. 19 June 2009).
59. Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 9 October 2014.
60. Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela, 87 F. Supp. 3d 573 (S.D.N.Y. 13 Feb. 2015).
61. *Ibid*. 586.

reassured the automatic enforceability (hence recognition) of ICSID awards.[62] In this respect, the court feared that the FSIA's procedural and jurisdictional requirements might provide foreign respondents with an avenue for delay and non-compliance.[63]

The enforcement battle did not end there. Venezuela appealed the decision before the Second Circuit and argued that the lower court impermissibly treated the ICSID Enabling Statute as 'an alternative … basis to the FSIA for federal court subject matter jurisdiction'.[64] Venezuela insisted that the ICSID Convention does not purport to limit its sovereign immunity and thus the application of the FSIA's service and notice requirements.[65] Upon request to the Second Circuit, the United States government submitted an *amicus curiae*,[66] taking the position that the 'FSIA is the sole source of [personal] jurisdiction over an action to enforce an ICSID award against a foreign sovereign and its rules must be followed.' Interestingly, citing Article 55 of the ICSID Convention, the government opined that the 'the ICSID statute' mandated reliance on the immunity provisions of the FSIA because the ICSID Convention itself forbids derogation 'from the law in force in any Contracting State relating to immunity of … any foreign State from execution'. Thus, according to the government, since the FSIA does not permit 'a federal court to 'borrow' procedures from state law that permit an *ex parte* proceeding', the lower court erred in granting Mobil's petition.

In a decision of 11 July 2017, the Second Circuit sided with the opinion of the United States government that the FSIA should not be averted. The Second District concluded that 'the FSIA provides the sole source of jurisdiction – subject matter and personal – for federal courts over actions brought to enforce ICSID awards against foreign sovereigns'. Consequently, the judgment of the Southern District of New York was vacated. A few months later, on 23 October 2017, a different Second Circuit panel followed the Mobil holding in *Micula v. Romania*.

These decisions seem to have put an end to the Southern District's longstanding tradition of granting ex parte enforcement of ICSID awards. In fact, on 13 November 2017, that very same court vacated an order for the ex parte recognition of a EUR 128 million award[67] rendered against Spain in one of the above-mentioned ECT arbitrations.[68] The order was initially issued in favour of Eiser Infrastructure and its subsidiary. The Southern District's reversal followed a letter from Spain on 24 October 2017 addressed to Lewis A. Kaplan, the judge that had previously granted the ex parte petition. In the letter, Spain averred that '[i]n light of the Second Circuit's controlling decisions in *Mobil* and *Micula*, the ex parte judgment entered against the Kingdom of Spain should be vacated and this proceeding should be dismissed'.

62. *Ibid*. 597.
63. *Ibid*. 600.
64. Br. for Resp't-Appellant at 1, Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela, No. 15-707 (2d Cir. 2017), ECF No. 31.
65. *Ibid*.
66. Br. of United States of America as Amicus Curiae at 1, Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela, No. 15-707 (2d Cir. 2017), ECF No. 87.
67. Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à.r.l v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017.
68. EISER Infrastructure Ltd. and Energía Solar Luxembourg S.à.r.l v. Kingdom of Spain, No. 17 Civ. 3808 (LAK) (S.D.N.Y. 2017), ECF No. 2.

The legal and practical consequences of this jurisprudence are straightforward: the specific preservation of immunity from jurisdiction in the FSIA does not disable debtor states from relying on the FSIA's jurisdictional requirements. Put another way, establishing jurisdiction over foreign sovereigns is now an additional hurdle for investors that seek to enforce investor-State awards.

[1] Immunity from Execution: The Final Burden

Once an award has been successfully converted into a local judgment, the investor creditor will hold an enforcement title. This represents the end of the confirmation process but the start of another: execution, or the attachment of sovereign assets, to satisfy the judgment. To that end, the investor needs to obtain an attachment order, also known as a writ of execution, from a US Court.

As previously explained, the FSIA's reforms aimed at ensuring that jurisdictional immunity rules were more closely adapted to execution immunity rules. Slater explains that '[w]ithout these reforms':

> Congress feared that 'disparate treatment of cases involving foreign governments may have adverse foreign relations consequences'. This was particularly true in the case of execution immunity because Congress was concerned about how other countries would treat execution attempts against the U.S. government's assets abroad. The FSIA thus mandates that a foreign sovereign's claim to immunity 'should ... be decided ... in conformity with the principles set forth in [the FSIA]'.[69]

The FSIA begins with the presumption that the property of foreign sovereigns in the United States is immune from execution.[70] This presumption follows the doctrine of restrictive immunity, according to which the implicit waiver to state immunity from jurisdiction provided by an arbitration agreement does not extend to execution. A waiver of state immunity from execution of an award will only exist if the debtor state has expressly consented to such a waiver.[71] Under section 1610(a)(1) of the FSIA, if a waiver is not expressly provided, execution against a state's assets to satisfy the debt imposed by an award may proceed only if such assets are 'used for a commercial activity in the United States'. The exception of a property used for commercial purposes is further qualified by a requirement of a connection between that activity and the underlying claim.[72] Accordingly, in the event of a default in payment by the losing state, an investor must locate the sovereign's assets and establish that they are commercial in nature.

69. Slater, *supra* n. 55.
70. Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention, July 2012.
71. Birch Shipping Corporation v. The Embassy of the United Republic of Tanzania, Judgment of the United States District Court for the District of Columbia, 18 November 1980, 507 F. Supp. 311 (1980) at 312; Creighton Ltd. v. Government of the State of Qatar, 181 F. 3d 118 (DC Cir. 1999).
72. Section, 1610(a)(2).

Execution immunity was invoked against the enforcement of the ICSID award in *LETCO v. Liberia*.[73] The Southern District of New York recognized the award and entered judgment expeditiously. It also issued a writ of execution on Liberia's property. Liberia moved to vacate the confirmation judgment or, in the alternative, the execution of that judgment on its property. The second motion was successful. Liberia argued that the assets against which LETCO had levied execution (tonnage fees, registration fees and other taxes due to the government) were sovereign and not commercial assets.[74] Liberia relied on section 1610 of the FSIA, which, as just explained, protects sovereign assets from attachment. The court agreed and appropriately preserved Liberia's rights under the FSIA by vacating the writ of execution.[75] The Second Circuit affirmed the decision on appeal.[76] This finding, which was consistent with Article 55 of the ICSID Convention, has been upheld in subsequent cases.[77]

We should expect states like Venezuela, Romania and Spain to rely on the FSIA's rule on immunity from execution to continue to avoid payment of the awards. Should they do so, the Miculas and the other investors seeking enforcement in the United States investors would thus be compelled to start the long and costly process of identifying state assets that are used for commercial activities. The enforcement battle is not over yet.

[B] France

Until recently, French law on the immunity of sovereign states was developed by the practice of French courts. French case law generally protects state immunity from the execution of foreign assets, setting a high threshold for the waiver of such immunity. Since June 2017, sovereign immunity has been governed by a new legislation on Transparency, Anti-corruption Measures and the Modernisation of Economy: the Sapin II Law. By including new requirements for the enforcement of awards, the Sapin II Law establishes a framework that departs from, and sometimes confirms, previous jurisprudence on state immunity. It also aims at implementing customary international rules on state immunity as reflected in the UN Convention, but with a more restrictive approach towards the issue of waiver of immunity from execution.

[1] Case Law Before Sapin II: Execution Immunity Guaranteed

French courts have consistently viewed consent by a state to arbitration as an implied waiver of immunity from suit with respect to the recognition of investor-State

73. Liberian Eastern Timber Corporation v. Republic of Liberia, ICSID Case No. ARB/83/2, Award, 30 March 1986.
74. Liber. E. Timber Corp. v. Liberia (*LETCO*), 650 F. Supp. 73, 7 (S.D.N.Y. 1986).
75. *Ibid*.
76. Liber. E. Timber Corp. v. Liberia, 854 F.2d 1314 (2d Cir. 1987).
77. *See*, *e.g.*, Trans Commodities, Inc. v. Kazakhstan Trading House, S.A. Capital. S.A., 96 Civ. 9782 (SDNY 1997).

awards.[78] This approach applies to awards rendered under the aegis of both the ICSID and New York Conventions. French case law also supports the principle that a state's waiver of jurisdictional immunity does not entail a waiver of immunity from execution.[79] In what seems to be an exception to this general rule, the French Supreme Court (the *Cour de cassation*) held in *Creighton v. Qatar* (2000) that an agreement to arbitration subject to the rules of the International Chamber of Commerce (ICC Rules) constituted a waiver of immunity from execution for purposes of enforcement under the New York Convention.[80]

What was then Article 24 of the ICC Rules provided that 'the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal in so far as such waiver can validly be made'.[81] Pursuant to this provision, the *Cour de cassation* reasoned, Qatar agreed to refrain from invoking *any* defences against the enforcement of the award, including immunity from execution. The Court so decided, despite the fact that Article 24 includes no explicit reference to immunity from execution as a right a state party may be willing to revoke. To read implied intentions between the lines of soft norms is a far-fetched interpretation that may work in the case of an ICC arbitration[82] but would not be helpful in disputes arbitrated under rules that contain different language. Article 55 of the ICSID Convention is of particular interest in this context, for it safeguards compliance with state laws pertaining to immunity from execution.

That said, the method used in *Creighton* to circumvent immunity by means of an implied waiver does not reflect the prevailing view in France. The standard acceptance in France is that immunity from execution must be preserved unless the state unequivocally consented to the contrary. In 2013, the *Cour de cassation* confirmed the need for an express waiver and even applied a stricter version of this requirement. In *NML v. Argentina*, it decided that:

> according to customary international law, as reflected by the United Nations Convention of 2 December 2004 on the Jurisdictional Immunities of State and their Property, while States can waive, by written contract, their immunity from execution against assets or categories of assets used or destined to be used for

78. *See, e.g.*, Arab Republic of Egypt v. S.P.P L.t.d, 23 I.L.M. 1048 (1984) (Fr. Cour d'appel, 12 July 1984); SOABI v Senegal, Cour de cassation, Decision (11 June 1991) 2 ICSID Rep 341; Societe Bec Freres v Office des Céréales de Tunisie, Cour of Appeal of Rouen, 20 June 1996, Rev Arb. 263 (1997), at 267.
79. Société Eurodif v République Islamique d'Iran, Judgment of 14 March 1984, Cour de Cassation, France, 1984, R.CDIP 1984; Embassy of the Russian Federation et. al v. Compagnie NOGA d'importation et d'exportation (NOGA), Paris Court of Appeal (1st Ch. A), 10 August 2000, Case no. 2000/14157; NML Capital Limited v Republic of Argentina, Cass civ 1, March 28 2013, No. 11-10-450.
80. Creighton v. Ministère des Finances de l'Etat du Qatar, Cass. 1e civ, 6 July 2000, 127 J.D.I. 1054, 1055 (2000).
81. This provision is now Article 35(6), which contains substantially similar wording.
82. N. Mayer-Fabre, 'Enforcement of Arbitral Awards Against Sovereign States, A New Milestones: Signing ICC Arbitration Clause Entails Waiver of Immunity From Execution Held French Court of Cassation In Creighton v. Qatar, 6 July 2000, 15(9) Mealey's International Arbitration Report 1 (September 2000).

> public purposes, they can only do so in an express and specific manner, mentioning the assets or the category of the assets over which the waiver is granted.[83]

With that reasoning, the *Cour de cassation* set forth a test whereby, in addition to being express, a waiver must specify the assets or category of assets against which execution may occur. This test goes beyond the terms of the UN Convention that do not require that a waiver be specific. Indeed, under Article 19(a) of the UN Convention, an express agreement to waive immunity is sufficient to grant post-award measures of constraint (*saisie-arrêt*) against a state.

The decision in *NML* followed a previous ruling by the Versailles Court of Appeal in *Commisimpex v. République du Congo*. In October 2011, Commisimpex, a Congolese company, successfully attached assets of the Republic of Congo kept in diplomatic bank accounts in an attempt to enforce a EUR 167 million ICC award. The state had previously renounced its immunity from enforcement by a written commitment to satisfy the award, but without clarifying to which assets that waiver ought to apply. By judgment of 12 April 2012, the Versailles Court of Appeal held that diplomatic assets enjoyed an autonomous immunity from execution. These assets, according to the court, required both an express and specific waiver. Accordingly, since the original waiver failed to mention funds for diplomatic missions, the Versailles Court of Appeal lifted the attachments. Notably, however, on 13 May 2015, the *Cour de cassation* quashed the Versailles Court of Appeal's ruling, holding that customary international law only requires an express waiver of immunity, even with respect to bank accounts of diplomatic missions of the state.

Leaving aside the issue of waiver, French case law adheres to the doctrine of restrictive immunity. Hence, in the high likelihood that the instrument containing the arbitration agreement was silent on the issue of immunity from execution, the investor must show that the property against which the award will be enforced is used for non-governmental purposes. As early as 1987, the *Cour de cassation* observed in *Eurodif v. Islamic Republic* that 'immunity from execution, which, as a matter of principle, benefits foreign States, may only be set aside if the property seized was used or intended for the economic or commercial private law activity which gave rise to the claim'. This notion of immunity from execution has been applied in the context of enforcement actions under the ICSID and New York Conventions.

In *SOABI v. Senegal*, for instance, the *Tribunal de grande instance de Paris* granted an *exequatur* (enforceability title) for the enforcement of an ICSID award rendered against the Republic of Senegal.[84] The Paris Court of Appeal vacated the order on the ground that SOABI had not proved 'that the award will be enforced on assets assigned by the state of Senegal to an economic and commercial activity'. In the court's opinion, satisfying an award in France with sovereign assets would violate the principle of state immunity and thus international public policy.

83. NML Capital Limited v. Republic of Argentina, Cass civ 1, March 28 2013, No. 11-10-450.
84. Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal, Trib. gr. inst., not published (Fr.)

The *Yukos* enforcement proceedings underwent a similar development. Yukos shareholders attempted to enforce the PCA award in France with multiple attachments on property belonging to the Russian Federation, including an orthodox cathedral and cultural centre that the latter had built in the heart of Paris. On 28 April 2016, the *Tribunal de grande instance de Paris* refused to seize those assets on the ground that they were protected by sovereign immunity. The Paris Court of Appeal rejected the remaining attachment orders in a number of decisions, forcing the beneficiaries of the USD 50 billion award to abandon enforcement in France.

[2] The Sapin II Law

The Sapin II Law, which entered into force in June 2017, seeks to clarify the solutions of French case law on state immunity from execution by introducing three new provisions in the Code of Civil Enforcement Procedures (Article L. 111-1-1, Article L. 111-1-2, and Article L. 111-1-3). These provisions apply only to enforcement measures performed after their entry into force.

Article L. 111-1-1 incorporates a 'procedural' requirement that an investor must fulfil prior to the taking of forced measures of execution. It provides that 'provisional or enforcement measures cannot be applied to the property of a foreign State unless there is prior authorisation by a judge in an order issued upon request'. Requesting an authorization by a judge is necessary irrespective of whether the investor holds an enforceable title. This requirement does not conform to the previous practice of French courts, which in principle, enable award creditors to proceed directly with the seizure of state property through a court bailiff. The decision of the Paris Court of Appeal in *Benvenuti v. Senegal* is illustrative in this context. In that case, the Italian company Benvenuti sought recognition and enforcement of an ICSID award in France.[85] The *Tribunal de grande instance de Paris* issued an *exequatur,* but with the following reservation: 'no measures of execution, or even a conservatory measure shall be taken pursuant to the said award, on any assets located in France, without prior authorization of this Court'.[86] On appeal by Benvenuti, the Paris Court of Appeal deleted this reservation, holding that Article 54(2) of the ICSID Convention 'lays down a simplified procedure for obtaining *exequatur* and restrict[s] the function of the court designated for the purposes of the Convention by each Contracting State to ascertaining the authenticity of the award'.[87] In other words, while execution against a foreign sovereign cannot evade the law of the enforcement forum, recognition is only subject to the requirements of the ICSID Convention.

It is unclear whether the requirement provided by Article L. 111-1-1 for judicial authorization applies to the recognition or execution stages of arbitral awards issued

85. SARL Benvenuti & Bonfant v. Congo, ICSID Case No. ARB/77/2, Award, 1 ICSID REP. 330 (1993) (8 August 1980).
86. SARL Benvenuti & Bonfant v. Congo, Decision of 23 December 1980, Trib. gr. inst. Paris, 1 ICSID REP. 370 (1993) (Fr.),
87. S A R L Benvenuti & Bonfant v. People's Republic of the Congo, Cour d'appel, Paris, Decision (26 June 1981) has.

against sovereign states. One would presume that it does. It is nonetheless interesting to note that a version of the contested, and much criticized, condition established by the lower court in *Benvenuti* now forms part of the French law on state immunity. If anything, Article L. 111-1-1 surely adds a new obstacle to the forced execution in France of ICSID and non-ICSID awards issued against states, an obstacle that is not included in the UN Convention.

Article L. 111-1-2 sets forth the conditions under which the aforementioned authorization will become effective: 'provisional or enforcement measures concerning a property belonging to a foreign State cannot be authorised by a judge unless one of the following conditions is satisfied:

(a) The State concerned has expressly consented to the application of such measure;
(b) The State concerned has reserved or affected this property to the satisfaction of the claim which is the purpose of the proceedings;
(c) When a judgement or an arbitral award has been rendered against the State concerned and the property at issue is specifically in use or intended to be used by the State concerned for other than government non-commercial purposes and is linked to the entity against which the proceedings are initiated'.

This disposition is an attempt to emulate Article 19(c) of the UN Convention and to restate the restrictive doctrine of sovereign immunity. Article L. 111-1-2 seems, in this respect, to draw from previous case law by requiring an express waiver of immunity from execution or, in the alternative, the identification of property used or intended to be used for commercial purposes (*see NML*, *Eurodif* and *SOABI*). With the aim of facilitating the location of state property, Article L. 111-1-2 contains a list of assets that are immune from enforcement, such as military assets and cultural heritage. Importantly, this list appears to relate to the 'commercial activity' exception and not to the exception of 'express consent'. This means that, in contrast with the position adopted by the *Cour de cassation* in *NML*, an express waiver under Article L. 111-1-2 will apply to state property reserved for both governmental and non-governmental purposes. In principle, therefore, when consenting to waive its immunity from execution, the state need not specify the assets or category of assets against which execution may occur. Nevertheless, if an express waiver in favour of enforcement measures is lacking, the investor will still need to locate the state's commercial assets to obtain payment of the award.

The issue of 'specific waiver' becomes relevant in cases where the targeted property involves diplomatic, consular or special missions of foreign states. Pursuant Article L. 111-1-3:

> Provisional or enforcement measures cannot be taken on the property, including bank accounts, used or intended to be used for the exercise of functions of diplomatic missions of the foreign States or their consular posts, special missions,

> or their missions to international organizations unless there is an express and specific waiver [of immunity] by the States concerned.

The content of this provision strikingly departs from the *Cour de cassation*'s ruling in *Commisimpex*. As previously noted, in quashing the Versailles Court of Appeal's decision, in that case, the *Cour de cassation* ruled that diplomatic missions of foreign states do not fall within an autonomous category of immunity from execution and can therefore be the subject of an express waiver. However, in a last-anticipated reversal, it overturned its own precedent on 10 January 2018. It did so by retroactively applying Article L. 111-1-3, which, as the court noted, 'subject[s] the waiver of its immunity from enforcement […] to the double condition that such waiver be express and specific' with respect to diplomatic assets. Despite acknowledging the inapplicability of this provision to enforcement measures taken before the entry into force of the Sapin II Law, the Court considered that: 'as regards […] the preservation of States' diplomatic representations […] the purpose of consistency and legal certainty mandates applying prior case law as comforted by the new legislation'. The result was the resurgence of an immunity defence that the *Cour de cassation* had abrogated in 2015.

The examined jurisprudence and the enactment of the Sapin II Law indicate that France has adopted a state-friendly approach towards sovereign immunity, an approach designed to reinforce the protection of foreign property. Reluctance of a state to abide by the pecuniary obligations imposed by ICSID and non-ICSID awards will compel investors to consider that:

(a) a waiver of jurisdictional immunity through the state's submission to arbitration does not entail a waiver of its immunity from execution, which must be express to be effective;
(b) diplomatic assets enjoy independent immunity; thus, an express waiver must also specify the state's consent to seize those assets in satisfaction of the award;
(c) in the likely scenario that a waiver is not present, execution of the award will be limited to assets that served commercial purposes; and
(d) compliance with the above requirements will be in vain if the investor has not previously requested the prior authorisation of a French judge.

It remains to be seen how French courts will continue to implement these requirements in future cases. For now, it suffices to say that the latest decision by the *Cour de cassation* in *Commisimpex* does not offer a promising state of affairs for award creditors.

[C] The *Stati* Enforcement Saga

In 1999, father and son investors Anatolie and Gabriel Stati invested in petroleum operations in Kazakhstan, which they alleged the state subsequently expropriated. The investors had invested more than USD 1 billion since 1999, and their businesses had become profitable by late 2008. At this point, the Kazakh government undertook a

range of measures that ultimately led to the seizure and nationalization of the investments in July 2010. The Stati investors initiated an arbitration under the Stockholm Chamber of Commerce rules against Kazakhstan pursuant to the Energy Charter Treaty (ECT). In 2013, the tribunal rendered an award, finding that Kazakhstan had breached the ECT's fair and equitable treatment standard, and the majority awarded the investors USD 500 million plus interest in compensation.[88]

Over the past eight years, the Stati investors have attempted to enforce the award in different jurisdictions, including Sweden, the US, the UK, Italy, Belgium, the Netherlands and Luxembourg. Courts in these jurisdictions have reached differing findings. In March 2014, after an unsuccessful attempt by Kazakhstan to annul the award at the seat, Sweden, the investors applied to the District Court for a freezing order in respect of property belonging to Kazakhstan. The District Court accepted the application, upon which the investors applied to the Swedish Enforcement Agency (EA) to attach government property in the form of securities accounts held in a Swedish bank.

Kazakhstan objected to the EA's decision before the District Court on the grounds of state immunity. The District Court rejected Kazakhstan's objection, holding that, as per Articles 19(c) and 21.1(c) of the UN Convention on Jurisdictional Immunities, to benefit from sovereign immunity, it is not enough for the property in question to be held for a non-commercial purpose. The District Court found the property was not reported in the National Bank's accounting and, as such, the National Bank should not be considered as the owner of the property. The District Court concluded that the property attached by the EA was not protected by state immunity.

Kazakhstan appealed the decision before the Svea Court of Appeal, which is a decision of June 2020, found in favour of Kazakhstan, refusing to enforce the award against assets of the National Bank of Kazakhstan.[89] The Court considered that based on the evidence of the case, the National Bank was the owner of the relevant property subject to attachment. It then referred to Article 21.1(c) of the Convention, which exempts the property of a central bank from the exemption of sovereign immunity. The Court of Appeal resorted to a "categorical" application of the provision and found that as the property was owned by the National Bank, it was automatically protected from enforcement measures.

The investors appealed the Court of Appeal's decision to the Supreme Court of Sweden. On 18 November 2021, the Supreme Court overturned the Court of Appeal's decision and referred the case back there.[90] The Supreme Court, *inter alia*, found that 'the main purpose of the property holding of the property holding at the time of seizure must be seen as having been more of a long-term plan to contribute to the preservation

88. Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, SCC Case No. V 116/2010, Award, 19 December 2013.
89. Decision of Svea Court of Appeal (Svea Hovrätt) II (English), 17 June 2020.
90. Decision of the Supreme Court of Sweden (English), 18 November 2021. Available at: https://jusmundi.com/en/document/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-i-decision-of-the-supreme-court-of-sweden-thursday-18th-november-2021#decision_18310. Last accessed: 24 October 2022.

and increase of the Kazakhstan State's wealth for future use'.[91] According to the Supreme Court, such purpose could not be 'adequately qualified to be considered to constitute an expression of Kazakhstan's act by right of dominion or similar activity'[92] and, therefore, the immunity from enforcement did not apply to the property in dispute. As another example of the attempts by the Stati investors to enforce the award, on 18 December 2020, the Dutch Supreme Court set aside the judgment of the Amsterdam Court of Appeal in which permission had been given to attach the shares of KMG Kashagan B.V. (KMGK) to obtain payment of the award. The shares in KMGK do not belong to Kazakhstan but to Samruk-Kazyna JSC (Samruk), one of Kazakhstan's sovereign wealth funds. The Stati investors argued that they were entitled to attach Samruk's property, for it is, in fact, a part of the state of Kazakhstan. In response, Samruk argued that the attachment should be lifted by application of state immunity from execution. The Supreme Court noted that immunity from execution applies if it can be shown that the foreign state is using or intending to use the property in question for public purposes. The Court of Appeal found that Samruk's shares have a purpose other than a public one. The Supreme Court disagreed, holding that since the proceeds of the shares were meant to increase Kazakhstan's national welfare, the shares have a public purpose. The Court has thus referred the case back to the Hague Court of Justice.[93] Finding, *inter alia*, that the investors 'did not provide sufficient data… to establish that the shares in KMGK held by Samruk were intended for purposes other than public purposes', the Court of Appeal yet again concluded that Samruk enjoyed immunity from execution.[94]

The investors were more successful before the Brussels Court of Appeal that rejected Kazakhstan's claim of sovereign immunity.[95] In these proceedings, the Stati investors obtained a freezing order for USD 22 billion belonging to the National Fund of Kazakhstan in its accounts at the Bank of New York Mellon NV, or BNYM, in Belgium. Kazakhstan subsequently succeeded at lifting the attachment from the overwhelming majority of these funds, although USD 542 million remained seized in relation to the award. Kazakhstan appealed before the Brussels Court of Appeal against the attachment of the funds from the National Fund of Kazakhstan worth USD 542 million. In a decision on 29 June 2021, the Court rejected the appeal. Unlike the Svea

91. *Ibid.* para. 47.
92. *Ibid.*
93. Judgment of the High Council of the Netherlands, 18 December 2020. Available at: https://jusmundi.com/en/document/decision/nl-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-arrest-van-de-hoge-raad-der-nederlanden-friday-18th-december-2020#decision_14458. Last accessed: 24 October 2022.
94. Judgment of the Hague Court of Justice, 14 June 2022. Available at: https://jusmundi.com/en/document/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-i-judgment-of-the-hague-court-of-appeal-tuesday-14th-june-2022#decision_24870. Last accessed: 24 October 2022.
95. Judgment of the Brussels Court of Appeal, 29 June 2021. Available at: https://jusmundi.com/en/document/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-judgment-of-the-brussels-court-of-appeal-tuesday-29th-june-2021#decision_17019. Last accessed: 24 October 2022.

Court of Appeal, the Brussels Court rejected Kazakhstan's claim of sovereign immunity, holding that the National Fund assets were invested for a commercial purpose, so they are not exempted from the protections of sovereign immunity. Although this decision may seem favourable for the enforcement actions of the Stati investors, it nonetheless highlights the enforcement hurdles that investors may face when enforcing an arbitral award against a state.

[D] Conclusions and Possible Remedies to the Immunity Bar

The ICSID and New York Conventions do not shelter awards from the scrutiny of national courts at the execution stage of enforcement. In the event that the losing state fails to enforce an award, the investor must seek forced execution before the competent national court of another state party. This court may then prevent the investor from collecting payment of the award on the grounds of sovereign immunity. The immunity laws of the state where enforcement is sought ultimately determine the significance and finality of the award. As we have seen, most jurisdictions extend immunity to the property of states even when they are deemed to have consented to jurisdiction for the recognition and enforcement of an arbitral award.[96] In the US, France and the Netherlands, courts have developed robust case law that effectively shielded sovereign assets from execution if a losing state refused to voluntarily comply with ICSID and non-ICSID awards. In this respect, investors have the challenge of proving that the foreign state's targeted assets are used or intended to be used for non-governmental (i.e. commercial) purposes. The conclusion seems to be that immunity from execution is an international right that may be exercised as another ground to refuse enforcement of investor-State awards, as it allows respondents states to avoid paying compensation to investors. What can investors do in response?

It is not easy to see any realistic solutions. Ideally, investors could attempt to incorporate a waiver of state immunity from execution in investment treaties or investment contracts, at least in respect of 'commercial' assets. By including such an additional clause in the contract, a state would, in principle, be precluded from relying on state immunity as a ground to resist enforcement. ICSID recommends the following model:

> 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.[97]

However, it seems rather improbable that states would be willing to renounce their immunity from execution by incorporating such a clause in their treaties or investment agreements. With respect to ICSID awards, by resorting to Article 27 of the ICSID Convention, investors could also persuade their national home state to bring a

96. Georgios Petrochilos, Procedural Law in International Arbitration 291–92 (2004); Bjorklund, *supra* n, 14, at 221-222.
97. ICSID website, clause 15, *see* http://icsid.worldbank.org/ICSID/StaticFles/model-clauses-en/main-eng.htm.

diplomatic protection claim against the recalcitrant host state for it to comply with its investment treaty commitment. Article 64 of the Convention allows the investor's home state to bring an international claim before the ICJ if the host state has failed to comply with the award. Although this solution appears to be practical, it may present difficulties. First, this procedure requires the active cooperation of the investor's home government, which may have international policy considerations at stake which may override its duty to its citizens by taking hostile action against a friendly government. Second, it remains unclear whether Article 64 of the ICSID Convention gives the ICJ jurisdiction over the investor's claim as espoused by the investor's state.

Finally, international investment law has advantages in influencing international organizations, such as the World Bank, IMF, and the UN, to put pressure on disobedient countries. This is precisely what the US did in response to Argentina's failure to pay the ICSID awards in favour of the US investors in *Azurix*, *CMS* and *Continental Casualty*. The US voted against Argentina continuing to receive loans from the Inter-American Development Bank and suspended Argentina's preferential trade status because of its non-payment of these awards. As of today, no Contracting State has invoked the right granted by Article 64.